ORAL ARGUMENT – 10/09/02
01-0447
KEENE V. WEAVER

BRESENHAN: This case presents a complex question dealing with federal law and state law in the question of ERISA, and preemption.

Factually, what is this case about? We believe it is about the guaranteed right of Mr. Weaver, who is now deceased, to designate a beneficiary to annuity contracts that are both concededly controlled in their entirety by ERISA The two plans, one by TIA and one by CREF are pension plans. And, thus, are subject to the anti-alienation provisions of ERISA.

Legally, we believe that this court must recognize that there is no gap, gore(?) or void in ERISA that would permit the creation of any type of common law or allow any type of a common law rule to have any effect on this particular case.

HANKINSON: If I understand the Sec. of Labor's brief, the sec. of labor takes the position that Egelhoff does not control the disposition of this case. Is that your position as well?

BRESENHAN: No.

HANKINSON: So what is your position with respect to Egelhoff?

BRESENHAN: Is that Egelhoff does control the disposition of this case, because of the rules that are established in Egelhoff for analyzing when preemption attaches. I think it is clear beyond any question, and this court recognized that clarity in the Barnett decision, that...

HANKINSON: Leaving us with Egelhoff, the CA here did indicate that the redesignation statute in Texas was preempted and that's not as I understand it the basis for the respondent's claims at this point in time.

BRESENHAN: As I understand it now there is a claim that is based on a waiver theory.

HANKINSON: Exactly. And Egelhoff did not specifically address that issue.

BRESENHAN: If you want to say is the word "waiver" used and we say that, I would have to agree with you. That is exactly correct. But that is far too simplistic, I believe, in the analysis of Egelhoff, Barnett, Boggs and the others. You simply cannot ignore the analytical matrix as established in those cases.

HANKINSON: You would agree though that there is a body of law out of the circuits that acknowledges waiver as an issue in the case, and that the US SC denied cert in one of those cases

five days after it decided Egelhoff? Is that a correct reading of where the cases stand?

BRESENHAN: I believe that is a correct listing of what exists right now.

HANKINSON: I'm just trying to understand the relationship between the multiple decisions out of the federal circuits that apparently the SC decided not to deal with at the same time it decided Egelhoff. So where do we stand vis a vis that body of case law in Egelhoff?

BRESENHAN: I believe that body of case law really has no utility whatsoever in the analysis of this particular case. Let's talk about the case you talked about, the one that was denied cert 5 days after Egelhoff. That is the Manning v. Hayes case, which I was the attorney on that particular case at all particular levels. Manning is of course cited in Egelhoff. But I think it is cited for a very limited purpose. That is to establish that there is a problem here that we are going to try to resolve. And I think that has a more utility than that. As a matter of fact, I believe that what you saw in Manning was simply a situation where the US SC much like this court does from time to time agreed with the result, but simply did not adopt the reasoning whatsoever. In fact, if you take a look at the footnotes there is no indication that the SC recognized or agreed with that reasoning.

HECHT: Did Manning involve pension benefits?

BRESENHAN: It was a welfare benefit case. It was an insurance policy that accrued as part of the employment of the decedent. It is a welfare benefit plan.

HECHT: Do you think that makes a difference?

BRESENHAN: Ultimately, no. I do not think it makes a difference because I don't think we have to reach the anti-alienation question at all in this case. In this particular case, I think we are talking about a classical analysis of preemption with a well established framework at this point in time that says that the attempt to create some type of common law to deal with a perceived problem simply doesn't exist.

ENOCH: Let me ask you about this problem. I didn't understand the cases that I was reading to be talking about a problem or even a gap. What I understood the cases to be saying is what happens if the beneficiary doesn't want the benefits. What happens if the beneficiary says that I don't want to accept these benefits. Don't they have the right to do that? And you talk about alienation, but I guess one of the issues was, we have this whole body of law where the parties give up the right to receive something in exchange for something else. It seems to me these cases all went to can a beneficiary waive their rights to a benefit under ERISA. and they all seem to say certainly. Now how do you deal with that?

BRESENHAN: In this particular case, you did not have any waiver whatsoever in the divorce decree. All you had was a partitioning of property. You had Mr. Weaver receiving this body of property over here. You had Ms. Weaver, now Ms. Keen, receiving this body of property over here.

Mr. Weaver waived nothing. He still had the unfettered right guaranteed by ERISA to do with that property as he saw fit. And that is what has happened here.

HANKINSON: Are you taking the position that this is what he intended to have happen? Does the record reflect that he intended, or was this an oversight on his part that he never changed the beneficiary, or do we know?

BRESENHAN: The man is deceased, so we can never know.

HANKINSON: But you're not here telling the court that he intended to leave that beneficiary designation as it was and intended for his ex-wife to have those benefits despite the fact the property had been partitioned otherwise?

BRESENHAN: I can make a better argument for that...

HANKINSON: I don't want an argument. I'm just trying to understand factually where you stand.

BRESENHAN: I will address that factually. For thirteen years after the divorce occurred, he allowed that beneficiary designation to remain.

HANKINSON: I understand. But you keep saying that he intended this to be the beneficiary. My question to you is, is there any evidence that that's what he intended or could this have been an oversight on his part that he never got around to changing the beneficiary?

BRESENHAN: Objectively, we have what he put on paper. Objectively, we have him receiving over a period of 13 years notices from TIA and CREF of the existence of the plan, the fact that this is covered by ERISA, the changes in the REA. We have all of those objective manifestations...

HANKINSON: But we also have the objective manifestation that he had a new wife and three children.

BRESENHAN: That came along sometime after Ms. _____.

HANKINSON: Going back to J. Enoch's question in terms of looking at your client's position in terms of being the beneficiary that was designated. She did sign documents that indicated that she was giving up her right to claim those benefits by acknowledging the partition that gave him sole ownership.

BRESENHAN: She gave up any right to compel him to do anything as far as those benefits were concerned. That's correct.

HANKINSON: Well she gave up any ownership interest she may have had in them because he became the sole owner of them.

BRESENHAN: That's exactly right.

HANKINSON: She gave up her right to claim any ownership interest, and now she's claiming an ownership interest.

BRESENHAN: As a result of his objective acts. yes.

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HOPKINS: I'm here on behalf of the Sec. of Labor, the US Dept of Labor as amicus curiae in this case in support of petitioner.

ENOCH: Could you address the question that I thought was raised that if we conclude that a beneficiary cannot waive their interest in these pension plans it has tax consequences, it interferes with the beneficiary's ability to affect their tax consequences here?

HOPKINS: We don't disagree that at the time of receiving benefits a beneficiary can decline to take those benefits. And that's what that revenue ruling is about.

ENOCH: But before the benefit comes in you argue they could not waive those benefits?

HOPKINS: That's correct, and we think that this is exactly what the anti-alienation provision is directed at. And that's why in cases where there is, for instance, a garnishment under court order or a settlement amounting to a garnishment under a court order, that can't be enforced to defeat a participant's or beneficiary's interest in a pension plan. It doesn't apply in the context of a welfare plan. For instance an insurance policy. So we would say that those cases are somewhat different. Part of our argument is applicable whether it's an insurance plan or other kind of welfare plan...

ENOCH: To you it makes a difference on whether it's a benefits plan or a welfare plan. If it's a benefit plan you can't alienate your interest. If it is an insurance policy you can if you're a beneficiary.

HOPKINS: If it's a pension plan you can't alienate your interest. That is correct. And the SC in Boggs v. Boggs in 1997 specifically held that the anti-alienation or spendthrift provision is applicable to a beneficiary's benefits under an ERISA pension plan. So that argument that it somehow doesn't apply to a beneficiary's interest is not correct. It was decided long ago. I believe the cases that the respondent cites to that effect pre-date the Boggs decision in 1997, but that clearly is not the case.

HANKINSON: Did I understand your brief correctly that you believe that this question that's presented in this case has not been answered by the SC yet?

HOPKINS: Technically it was not answered. I agree with that in Egelhoff. Egelhoff is about preemption. And certainly the court below in this case said that the state's redesignation law was preempted under Egelhoff. And that is correct.

I would say though that the issue was raised in Egelhoff. The Sec. of Labor briefed the issue of waiver. Factually Egelhoff is pretty much indistinguishable in that case. The contingent beneficiaries claimed that under a divorce decree, the designated beneficiary waived her benefits and we argued...

HANKINSON: They didn't address the issue.

HOPKINS: The SC did not. The SC reversed and remanded. The Washington SC, however, where the case originated had that issue briefed to them and dismissed the case anyway on the basis of Egelhoff. So it's true, I agree, that Egelhoff did not directly address this issue. I would say though that the reasoning of the court that ERISA's explicit provisions defining a beneficiary to be the person designated by the plan participant, the provision that says the plan administrator is to follow and has to follow the written plan documents, and the provision that requires that a plan provide that pension benefits cannot be assigned or alienated, all three of those provisions conflict with the idea that you can create a QDRO.

HANKINSON: Did I understand you correctly. As you paint the interpretation of the statute, if I'm the beneficiary I have to take the benefits, and there's no tax consequences to me when I take them and then give them to someone else even though they pass through my ownership at some point?

HOPKINS: No. At the time that the benefits are being offered you have the right to refuse them. And then the IRS has ruled, and we don't disagree with this ruling, that the tax consequences do not fall on you of taking those benefits.

ENOCH: But you have said that I, as a beneficiary, can't refuse to take them. You said once I get them, then I can do something with them. But you have indicated that I can't refuse to take them.

HOPKINS: I'm sorry. I misspoke. You can refuse at the time of their being offered. But you can't waive ahead of time through another proceeding. One of the great goals here of ERISA is to make sure that the plan administrators can ascertain who the participant is, who the beneficiary is and can pay benefits promptly.

HANKINSON: But they have to review QDROs all the time to be able to determine that. There are factual determinations that have to be made by plan administrators in determining who to

pay. It isn't that clean in the real world.

HOPKINS: Well that's correct, although the way that QDROs are intended to work at the time that someone gets a domestic relations order they are supposed to file it with the plan administrator, who then gets notice, determines whether it meets the qualifications for a qualified domestic relations order. Basically does it make it clear who is to get the benefits? Are the same type of benefits? Does it give the names and addresses? There are certain technical requirements. And then qualifies it so that when it comes time to pay the benefits, benefits can be paid promptly.

ENOCH: One of the other issues that was raised is there is nothing apparently under the statute that indicates how you designate beneficiaries. I mean there doesn't seem to be a particular form that you are required to file or something. At least that's one of the arguments. Do you agree?

HOPKINS: The statute says that the beneficiary is the person designated by the plan participant or as provided in the plan. So the plan can certainly control what the documents look like.

ENOCH: We have this document where the respective rights of the parties are spelled out with particularity to this plan. Could I have just sent that document to the plan administrator before he died, and would that have been a designation of the beneficiary? I get it. She doesn't. Does that satisfy the designation?

HOPKINS: In the first instance, that's a question for the plan administrator. And this is one of the problems actually in this case, and many cases of this kind. This case was actually brought not as a claim for benefits under ERISA as it should have been, but as a breach of contract claim. The way that this is supposed to work is that the question is supposed to go to the plan administrator. And then the court assuming that there is a discretion involved is supposed to defer it to the plan administrator on review. And that didn't happen in this case. Really this case is sort of exemplary of the problems that are raised both in terms of delay, in terms of defeating the whole structure in the way that this is supposed to work.

HANKINSON: Does the Sec. of Labor think that the result is somewhat perverse, that a beneficiary can in fact have given up all ownership or right to claim in the benefits, and yet, turn around at a period of time later and act inconsistent with that? Does the secretary not see any problem perverse?

HOPKINS: Well actually under the facts of this case, the participant at anytime could have divested her of those interests by filing a new designation.

HANKINSON: I understand that, but I'm not focusing on him at this point in time. I'm talking about her.

HOPKINS: I think in any particular case you can speculate. I don't know the facts of this

case really, and I'm not sure anybody knows what the intent of the parties were at this point. But there can be injustices with any rule. This rule draws a bright line and I'm sure there are cases that come close to either side of the line where there is an injustice. But any rule is going to amount to injustice in a particular case.

ENOCH: Had this document been sent to the plan administrator, the plan administrator would have the obligation to determine whether or not this document is a redesignation?

HOPKINS: Well I'm not sure he could have, because this didn't...

ENOCH: There's no magic to this designation. So he would just be deciding, is this a designation or isn't it a designation.

HOPKINS: Right. It certainly was not a QDRO. I mean it did not...

HANKINSON: Well this predated the time when QDROs were part of the statute.

ENOCH: I mean I can understand there's an argument about what a QDRO is. Maybe that's the limit of discretion. But your position would be had this gone up there - I think you may be correct as I understand it, that there's no magic to the designation. It just has to be clear. I die. I write out a designation. I'm redesignating my beneficiary and I put it in the mail, and I die that day, and the designation was received by the plan administrator three days later. I'm already dead. Would that work?

HOPKINS: It depends on what the plan term says. Actually the plan here said that as long as the plan administrator got it, it could date back to the time that it was signed. Some plans are very express and very explicit about what's required. And it's our position that ERISA provides that the written plan documents control, and provides for written designations for the clarity and convenience that it provides essentially to plans, which is ultimately a cost saving feature for plans and for their participants and beneficiaries.

OWEN: Going back to Egelhoff. It was my recollection that before the case got to the US SC, that the federal common law issues had been briefed in the Washington State courts. Is that your recollection as well?

HOPKINS: That's correct.

OWEN: In your brief you say a couple of times that the Washington SC dismissed this. Is that a reported action anywhere? How do we find that?

HOPKINS: I can't remember now if it's reported. If it's not, I can send you the order of dismissal. We were involved when it was remanded to the Washington SC.

OWEN: Following up on J. Enoch's question. Let's suppose that this divorce decree and the agreement had been sent to the plan administrator, would this have been clear enough in your view to change the designation of the beneficiary? Under the statute, as I understand it, ERISA says that you can treat a pre-1985 divorce decree as a QDRO. Could the plan administrator have said this is a redesignation?

HOPKINS: It certainly is not a QDRO. A QDRO is designed not to divest a spouse or a child or a dependent of an interest, but to allow a spouse or a child or dependent who was not designated, but who is supposed to receive benefits under a divorce decree to get that qualified.

OWEN: How would this have been treated is my question? Had this been given to the plan administrator, how should it have been treated? Would this have been adequate?

HOPKINS: I think the plan administrator - I wouldn't want to say. I'm not sure what - you know I think it would be a determination for the plan administrator in the first instance. But it certainly doesn't meet the definition of a QDRO. And really the way that ERISA intends for these things to happen is that the participant can redesignate. And that's why during the amendments ERISA gave a way for an ex-spouse who is supposed to get benefits to get her domestic relations order in front of the plan administrator, and get those benefits. But it didn't see a problem with divesting an ex-spouse of the interest, because a participant can do that at anytime. And there really was not a gap there to fill. There wasn't a question.

It depends on you know if the participant sent the letter saying I intend to divest Patsy Keen, my ex-wife, for benefits. Send me any papers if I need to fill out anything else. And they did. It depends on the facts. And it's a question again for the plan administrator in the first instance who was entitled to deference as long as it's a question where a discretion was involved.

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RESPONDENT

SLOAN: The issue here really is the enforceability under ERISA of an assignment of benefits by a beneficiary. There is a provision of the ERISA that addresses that sort of question. That is the anti-alienation provision of ERISA, §2.6b.

OWEN: Do you agree these are pension plan benefits as opposed to welfare?

SLOAN: Yes, I do. And, therefore, the anti-alienation of provisions of ERISA apply only to pension benefits. So they conceivably come into play.

The important point here though is that the anti-alienation provisions do not apply to the interest of a beneficiary, which is what is at issue here.

The SC case that's controlling here is the Mackey v. Lanier Collection Agency

case, which is cited in our brief. That case decided a preemption issue, but it examined the question of whether ERISA preempts - actually the Georgia garnishment statute as applied to employee welfare benefits. And the court's reasoning went something like this...

OWEN: But my recollection is they made a distinction. They said can't touch pension plan benefits. Welfare benefits are a different animal.

LAWYER: What the question is, is whether the assignment in question or the alienation in question is subject to the anti-alienation provision rather than whether it's a pension plan or a welfare plan. I think you have to look more closely.

In the Mackey decision, the court said, Look, congress in enacting ERISA had before it a scheme where employee benefits were alienated, assigned, garnished. That was the reality. Congress decided to mention only pension benefits. In doing so, congress implicitly said, that it's okay to garnish your welfare benefits, therefore, that's okay under ERISA. No preemption.

The same reasoning applies here because we have a pension plan, but we have a beneficiary's interest not a participant's interest. So that Ms. Keen's alleged waiver of her right just simply is not subject to the anti-alienation rule. And you can see that in a number of respects. We talk about that in our brief. You can look at the statutory language. It talks about the interest with respect to a participant. It's silent as to beneficiaries. In fact, the point Ms. Hopkins made about the QDRO provisions, which are an exception to the anti-alienation rule, qualified domestic relations order, do not provide. You cannot have a QDRO in a case such as ours, because the QDRO is not a QDRO if it provides for the participant retaining his own interest. Which is what essentially what happened here in the divorce decree. Mr. Weaver kept his benefits so there was no alienation, so you couldn't have a QDRO.

OWEN: What would happen in a case where a husband and wife were married and she was named as the beneficiary under the pension plan benefits. And the husband said, honey, I can't alienate these. I've got gambling debts and I want you to assign these over to somebody, your future interests in them. Is that okay under ERISA?

LAWYER: This is another point I guess I was going to make. With certain exceptions that don't apply here, as Ms. Hopkins said, Mr. Weaver could have done it at anytime. He can change the beneficiary designation at anytime. Pension plan or not. He can say, Ms. Keen, I'm sorry, you are out. I'm going to scratch your name off. I'm not going to tell you about it. I'm not going to ask for your consent.

ENOCH: And so if an anti-alienation provision applies to a beneficiary, you would have some difficulty in whether or not a participant could redesignate the beneficiary?

LAWYER: It would be absolutely in conflict with the basic statutory scheme, which is

that a participant can designate his own beneficiary and can change his beneficiary anytime.

HANKINSON: Then how do we square the fact that he did not change the beneficiary?

LAWYER: In think in truth, I think we all know what happened. The divorce decree took care of that. The divorce decree specifically mentioned his TIAA account. I think most people think that if you have a judgment and you agree that that beneficiary is not going to make a claim to those benefits, then you've taken care of it. I think that's what happened.

HECHT: There's no evidence on this one way or the other?

LAWYER: There is this. Ms. Keen has never claimed in this case at trial, on appeal, before this court, that there was anything to the contrary. That there was anything vague or unclear about that divorce decree. That she never got up and testified. She didn't even get up and testify, I didn't intend to give up those benefits. Those no testimony to that effect. Obviously, Mr. Weaver couldn't testify. But I think the paper is clear on its face as to what Ms. Keen intended.

OWEN: But it's his separate property so he can do with it as he wishes. He could leave her the beneficiary, he could change it. Why aren't we bound by what he did?

LAWYER: That's the scheme with one exception. That's not applicable to this case, but that's where you have a qualified joint and survivor annuity. Where the law says the exception to the rule is the beneficiary presumptively as a matter of law is the spouse or the participant. And it's interesting in that case, that's the one case where congress said, and by the way, the participant can't unilaterally change who the beneficiary is...

OWEN: But that doesn't apply here. I'm saying the decree said it's his sole, separate property, he can do with it as he wishes. So he could have left it to his former wife had he chosen, and that's the way he left it. Why should we go beyond that designation?

LAWYER: Because I think what we have here, and I guess that really goes into Egelhoff and whether Egelhoff controls. If Egelhoff means what Ms. Keen, and apparently not the dept. of labor, but Ms. Keen means then you never look beyond the beneficiary designation. That's the end of the debate. If the beneficiary designation is Patsy Keen, that's all we have to look at. We never look at anything else.

ENOCH: That's Bogg's interpretation isn't it?

LAWYER: No.

ENOCH: Don't they really tell you look at what the plan administrator has and that's it?

LAWYER: That's their interpretation of Egelhoff. And that can't be.

OWEN: Why do you think the Washington SC dismissed the federal common law claims in Egelhoff after the Egelhoff decision?

LAWYER: I was not a party to that.

OWEN: But you agree that it was briefed in the state courts before it went to the US SC?

LAWYER: I do not know that. The reason I was saying that Egelhoff can't mean what Ms. Keen says it does and the secretary suggests that it does is it would render the anti-alienation provision of ERISA mere surplusage. It would be there for no reason at all. If all you had to look to is the beneficiary designation or the participant, there would be no reason to have an anti-alienation rule because you couldn't by definition alienate any benefits. That would mean also that the court's decision in Mathew, which I just talked to you about, was overruled by Egelhoff. Because it held as the dept. of labor concedes, that garnishment of employee welfare benefits is okay.

OWEN: But it also held that you can't garnish pension plan benefits .

LAWYER: Egelhoff is reasoning, The sections of ERISA they are talking about cannot being limited to pension benefits.

OWEN: One of those cases squarely said that. They drew a distinction between garnishing pension plan benefits and garnishing welfare benefits. The US SC held you cannot garnish pension plans.

LAWYER: Yes, the Guidry decision. The SC held that.

HECHT: Your position is that if Egelhoff had been a little better argued it would have come out the other way?

LAWYER: No. I think Egelhoff is right.

HECHT: But if the other issue had been argued it would have come out the other way.

LAWYER: Egelhoff is a question of ERISA preemption. It did not address what the rule under ERISA is.

HECHT: You agree that 9.302 is preempted?

LAWYER: Yes.

HECHT: But it's going to apply anyway. Why wouldn't that have been the case in Egelhoff?

LAWYER: Technically state law may coincide with what the federal rule decisions...

HECHT: Has it ever not? Well we've got 6-8 cases and they all follow state law.

LAWYER: That's where you might look. I think the easier analysis is to say, look under Mathew, the SC said, Congress address the issue of assignments. We say congress said, if an assignment does not run contrary to ERISA's anti-alienation rule it's okay under ERISA.

OWEN: But we're not talking about assignment. Here there's no question that the court could "assign" these rights solely to the husband. Now the question is, the husband left a designation and what do we do with that designation? It's not an assignment.

LAWYER: I guess my point again, if you stop with the designation you wouldn't need to look at the anti-alienation rule. If a designation always controlled you couldn't garnish employee welfare benefits. You couldn't assign any sort of benefit at all. And that's not the rule. The rule is that some assignment, some waiver, or some alienation, some garnishments are okay.

OWEN: Who did the beneficiary assign these benefits to?

LAWYER: She assigned them or waived them, however you want to use the term to her husband.

OWEN: And then he kept her as the designation, so doesn't it bounce back to her? It seems we're circular. You keep talking about assignment.

LAWYER: Well the designation and assignment - the assignment I believe or a waiver presupposes that a person has some right to benefits under the plan or some claim to benefits under the plan. And that would be either by virtue of being a participant or being a designated beneficiary. Assignment would be her garnishment would be after the fact.

OWEN: Back to J. Hecht's question about Egelhoff. There was briefing in that case on the federal common law. An argument was made that even if the statute was preempted that common law should give the benefits to the second wife. And if that were the case why didn't Egelhoff come out the other way?

LAWYER: I think that if Egelhoff addressed that issue the court wouldn't have denied cert in Manning, which held precisely to the contrary. It went along the lines of the majority of the CA's which say that knowing and voluntary waivers of benefit are in fact enforceable.

ENOCH: In this case you have the expression in the decree by Ms. Keene that she gives

up her interest in this pension plan. In the preemption where a state can't do that automatically by statute to require this under Egelhoff, is there anything in Egelhoff that prohibits Ms. Keene from agreeing to do that?

LAWYER: Nothing whatsoever.

ENOCH: So her agreement could coincide with the state law, but if it does do you have some authority that says that if the state law is preempted, then her agreement isn't binding or she can't make that agreement under federal preemption?

LAWYER: Again, federal preemption is a different question. I think a federal rule decision in most cases, if I understand your question is, that yes in fact, a knowing and involuntary waiver of benefits is entirely consistent with ERISA and can be enforceable. And that's probably consistent with most state laws.

RODRIGUEZ: If we wind up having to look at decrees and interpret those rather than look at the express designations or redesignations, isn't it going to put the courts in an intolerable position?

LAWYER: Well they already have to do that. They also have to look at any divorce decree to see whether it qualifies for a QDRO. I think it's disingenuous for anybody to say that there is something wrong with the divorce decree because it doesn't meet the qualifications of a QDRO, because those are requirements that didn't exist. And the legislation itself says that pre-1985 divorce decrees can be considered enforceable because before that time the courts weren't even sure if they were preempted or not. And that wasn't clear until 1985. But arguably they were not.

RODRIGUEZ: Even today we're having to guess at what his intent was. And it's not clear. You want us to infer that, but it certainly could be the other way. We just don't know.

LAWYER: I respectfully disagree. Having read the divorce decree, I don't think it could be even clearer especially given the terms of the decree and Ms. Keen's of testimony on the subject. I just don't think there is a question about what was intended here.

HECHT: Well it was virtually identical to the decree in the Lyman Lumber case, and they said that wasn't clear to them at all.

LAWYER: There's only one TIA CERF account and this specifically refers to that. It doesn't just refer to all pension benefits or all welfare benefits. I don't remember exactly what the Lyman Lumber case was. But this specifically mentions the account. I don't know how much more specific it could be except for copying and attaching the _____ to the divorce decree.

HANKINSON: You keep say this is not a preemption case. What do you mean by that?

LAWYER: I mean that there's no question in my mind and under Egelhoff that the Texas Family Code doesn't control who the appropriate recipient of the benefits here is.

HECHT: But it ends up doing that.

LAWYER: Well it ends up with the same result.

HECHT: Preemption law is pretty strange. But it seems to me very odd that ERISA preempts state law, doesn't supply another rule, says look to the federal common law. The federal common law says well we're going to look to the state statute that's just been preempted, and here we are home again. That's a kind of a long way around.

LAWYER: Well it is strange. The difficulty lies, and I understand what you're saying, that conflict preemption is a typical form of federal preemption. Federal law preempts the state law if there's a conflict. ERISA goes beyond that.

PHILLIPS: Has there ever been any cases that look to a federal common law of a gap filler for ERISA and devise that contrary to what the preemptive state law was? In other words some state that didn't have a statute like this would say well, 45 other states do and we need uniformity so that's _____ ERISA?

LAWYER: Ideally that's what courts would do. I'm not familiar with any cases actually doing that in the preemption context. I will tell you that courts do manufacture it sort of speak, or apply the rules of principles under ERISA where ERISA doesn't expressly dictate the result. For example, when an employee pension plan can be a amended or terminated, the courts look for example to the _____ trust. And the SC specifically told the courts to do that because that was sort of the foundation of ERISA itself. And that by the way in this case also would allow the beneficiary to waive her claim to benefits. That would be a law under the statement of trust.

It's strange indeed that the anti-assignment rule prohibits a beneficiary from waiving her right to benefits before she actually becomes entitled to it but allows her to waive it after she actually vest in it. In other words, it becomes her property. Especially since before that time, before the death of the participant who can write her off the list at anytime. So I think the position in the general counsel memorandum, the revenue ruling that even after a participant dies so that a beneficiary vests, so it's really her interest and nobody elses that she's allowed to disclaim that benefit strongly suggests that again I think it reinforces that the anti-alienation rule doesn't apply to beneficiary's interest. I would suggest that it doesn't apply to beneficiary's interests where they are waiving their interest in favor of the participant whose benefit it is to begin with.

In very many ways this is not an assignment case if you look at the divorce decree. It is simply Frank Weaver as participant retaining his right to benefits. Again there is no

alienation under those circumstances. And the anti-alienation rule really has the underlying purpose of it has no...

OWEN: But then you get back to the question. It's his benefits. He can do whatever he wants to with them. And he designated his former wife. He didn't change the designation.

LAWYER: There was the intervening fact of the divorce in the divorce decree.

HECHT: What if he redesignated her after the divorce?

LAWYER: Well I don't think we have any question here. I don't think we have the question of whether the beneficiary designation controls even absent a waiver. That's the issue we have before the court. If he redesignated then we wouldn't have this issue. There would be no claim by Ms. Keene to the benefits.

HECHT: If the decedent following the divorce had said, no, I really do want you to have them. Notwithstanding the divorce decree where would be?

LAWYER: I would have a much poorer argument.

HECHT: But as J. Jefferson points out, we don't really know one way or the other, and so why should we argue about this, something that we really don't know and can't decide as opposed to having a bright line rule?

LAWYER: Again, the bright line rule is just irreconcilable with other provisions of ERISA. It would write the anti-alienation provision out and make it totally redundant.

OWEN: I don't follow that. Because if he can do with them what he chooses, and he chooses to leave it to his former spouse, how does that write the anti-alienation provisions out of ERISA?

LAWYER: Because there was an alienation or an assignment later on in the divorce decree by Ms. Keene. So we have that additional fact. You have an assignment or an alienation arguably...

OWEN: I don't understand what that has to do with ERISA. How does that violate the ERISA alienation provisions or write it out of the statute?

LAWYER: Well the SC has said that if an assignment that does not violate the anti-alienation provisions of ERISA it is enforceable under ERISA. Here we have an assignment or a waiver, however you want to look at it, that does not violate the anti-alienation rule.

OWEN: He chooses to give it back to her let's say. How does that violate the anti-

alienation provisions of ERISA?

LAWYER: If he chose to redesignate her as a beneficiary it would not.

OWEN: Or just decides to leave her. He says, well I'm not going to change it. How does that violate the anti-alienation provision? How does his subjective mind set have anything to do with the alienation provision of ERISA?

LAWYER: His designation of a beneficiary does not.

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REBUTTAL

PIAZZA: First of all, J. Hankinson, this is a preemption case. The 10th CA recognized that because the issue in this case is the distribution of benefits under the plan. And all the courts have universally, including this court in Barnett, said that is the sole problems of ERISA. This is a preemption case.

ENOCH: If they had sent this decree to the plan administrator would the plan administrator have to make a determination whether this was a redesignation of a beneficiary?

PIAZZA: The plan administrator would have to determine under the terms of the plan whether that was a proper predesignation of what beneficiary is. I think one of the important thing is, J. Hankinson you make a comment about well doesn't plan administrators make factual determinations all the time? I think a QDRO is something very different. ERISA specifically talks about QDRO and sets out the requirements of a QDRO. And as Ms. Hopkins said, actually QDROs are qualified before they even get signed by the court.

HANKINSON: No. I understand that. We get this picture painted that it's go to one place and look at one blank and that's the end of the inquiry. Plan administrators do a whole lot more than that.

PIAZZA: They do, but at the same time I think this court in Barnett and the US SC in Egelhoff have said, the idea is uniformity. Plan administrators should make fact finding such as what we're struggling with today.

HANKINSON: As I understand J. Enoch's question is, you're talking about QDROs. We are talking about before the change in the law that provided for QDROs. And so the question, I think is, had this divorce decree been given to the plan administrator with her giving up her interest, could the plan administrator have looked at it and given it legal significance?

PIAZZA: Yes, the plan administrator would have given it legal significance. And I believe _____ would have been is that Ms. Keene gave up her community property right

as part of the division of the community estate. Mr. Weaver retained his right to designate, which even during the period of the coverture in community, he had that right under the plan. She had a community interest in the retirement benefit. But he had the right to designate, which was designated prior to the divorce, and he had the right afterwards. I personally think that his...

HANKINSON: He did not redesignate her after the divorce?

PIAZZA: He did not predesignate.

HANKINSON: His designation predates the divorce?

PIAZZA: That's correct. But he also received every year from the plan administrator notice of the plan, the necessary forms to change the beneficiary if he wanted to change the beneficiary.

RODRIGUEZ: Did those forms have her listed as beneficiary?

PIAZZA: I believe the form is a blank form that says if you want to change here is the change.

RODRIGUEZ: But was there continuing notice annually of who he had designated as beneficiary?

PIAZZA: No. One of the problems I think we have here is if the rule applies in this case what you are going to force plan administrators to do is not only look at what Ms. Keene did, but what Mr. Weaver did, and whether did Mr. Weaver waive the waiver if there was a waiver in the first place. Did the divorce decree under Texas law divest her in concert to the waiver? I think one of the things here and what y'all admonished us not to do in Barnett is that if you have to look to Texas law for the source of the law, and in this case I would argue that in order to determine whether that divorce decree constitutes a waiver, you have to look at how Texas law construes that divorce decree as to whether it's a waiver or whether it's merely an adjudication of the rights of the community.

ENOCH: How do you explain the SC's denial of cert in Manning that was pretty adamant about the fact that a beneficiary could waive their interest in the proceeds and that was not a conflict with ERISA? How do you square that? The 5th circuit seems very strong about - in fact they went after a trial judge who didn't pay attention to them. How do you square that?

PIAZZA: I think there are two ways to square that. The first way is the conceptual way and that is a denial of certiorari is not precedent and is not a determination of the substance of the case. For whatever reason they chose not to accept certiorari in the Manning case.

ENOCH: But there's a split in the circuits on that point that Manning was arguing about. Between like the 6th circuit and the 5th.

PIAZZA: Yes there was a split in the circuits. But the US SC as has this court can decide even when there is a established recognized split in the circuits whether they want to take it up in that case or not. I believe that Mr. Bresenhan correctly, if we are going to surmise what the SC said, is that the result in Manning was correct. In that case there was no waiver. They agreed with the result. They don't believe that the Manning case was the proper vehicle to resolve the dispute. And I think that you can't read anything more than denial of certiorari than the fact that they denied cert.

HANKINSON: Which means we have an open question. The issue that's presented in this case is an open question?

PIAZZA: All they said is that they decided not to resolve that conflict. I agree as Mr. Bresenhan and Ms. Hopkins said, conceptually this court and the SC has already set up a matrix which requires that you can't establish this federal law of waiver. Is there a split in the circuits? Yes there is.