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3	DAVID A. FURLOW, ESQ.
4	On behalf of the Petitioners
5	LEONDRA R. KRUGER, ESQ.
6	On behalf of the United States, as amicus
7	curiae
8	MARK I. LEVY, ESQ.
9	On behalf of the Respondents
10	REBUTTAL ARGUMENT OF
11	DAVID A. FURLOW, ESQ.
12	On behalf of the Petitioners
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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-636, Kennedy v. The Plan Administrator for DuPont Savings and Investment Plan.

Mr. Furlow.

ORAL ARGUMENT OF DAVID A. FURLOW

ON BEHALF OF THE PETITIONERS

MR. FURLOW: Mr. Chief Justice, and may it please the Court:

As this Court has confined consideration of the matters before the Court to certiorari issue number 5 concerning qualified domestic relations orders, or QDROs as they are called, I will confine my argument to arguing that the Fifth Circuit erred in holding that the only way a divorcing spouse can waive the right to pension benefits is by executing a QDRO. I have four basic arguments to present today. I'll give them in thumbnail sketch form first.

JUSTICE GINSBURG: You did in your reply brief address the plan question?

MR. FURLOW: Yes, Your Honor. I did so after stating that we believe that the matter was properly confined to the certiorari issue number three, but out of an abundance of caution and subject to

1 objection I did respond to the argument leveled against  
2 us by I think it is five amici and by DuPont itself. We  
3 nevertheless, I prepared my original briefing on the  
4 merits to address the QDRO issue and that's where you  
5 see it focused. We have four basic issues.

6 JUSTICE GINSBURG: The problem is that is  
7 that if you, even if we hold for you on that issue, you  
8 could still lose on the plan documents rule, right.

9 MR. FURLOW: Well, Your Honor, I think that  
10 instead this Court might choose well to follow what the  
11 concurrence said in the recent LaRue v. DeWolff, Boberg  
12 case, emphasizing that where the court of appeals below  
13 has not passed on the central issue of a case and where  
14 most of the fire that the one party is responding to  
15 comes from amici, that it is appropriate to remand the  
16 case to that court so that that court may pass on the  
17 central issue, especially in the situation where, as  
18 here, the Fifth Circuit did not even mention the plan  
19 document's role, but based its decision solely on a  
20 misinterpretation of the QDRO language.

21 Of course, here, in the interest of candor,  
22 Dupont did in fact address in brief format -- a page or  
23 to, several pages -- in its motion for summary judgment  
24 the plan document's role and raised that matter again in  
25 the Fifth Circuit. It's just the Fifth Circuit did not

1 consider or pass on that because it relied solely on  
2 Dupont's argument that the Fifth Circuit should adhere  
3 to what it believed to be the Department of Treasury's  
4 interpretation of the anti-alienation statute. The  
5 Department of the Treasury and the Department of Labor,  
6 now in a harmonized stance, have come forth and in their  
7 amicus for the government supports our position that the  
8 Fifth Circuit erred in its interpretation of the QDRO  
9 statute, and that's the position we take.

10 JUSTICE BREYER: At the end of your  
11 argument, could you just spend a minute because my state  
12 of mind is I'm sorry we limited it. You've sort of  
13 briefed this question pretty fully.

14 MR. FURLOW: Yes, Your Honor.

15 JUSTICE BREYER: And I'm tempted to try to  
16 decide it. I know you want to make your four points.  
17 Go right ahead. But at the end, could you possibly say,  
18 why shouldn't we just go ahead and decide the substance,  
19 not as a technical matter. Are we really going to get  
20 something out of remanding it that we don't already  
21 know? But don't do that now, but whenever you want.

22 JUSTICE SCALIA: We know what's going to  
23 happen on remand, though, don't we? Doesn't the Fifth  
24 Circuit already have case law on -- on that question?

25 MR. FURLOW: The Fifth Circuit already has

1 case law. They have stated that, but they consider some  
2 of the other cases and they might consider this Court's  
3 ruling addressing the interpretation of the QDRO  
4 provision; that might provide them additional  
5 enlightenment as to how they should address the  
6 other issue.

7 JUSTICE KENNEDY: But again as a preliminary  
8 matter, am I on the same page with Justice Ginsburg? Or  
9 would it be a different question? I'm curious to know  
10 why the beneficiary designation and change provisions at  
11 page 48, number 29c, beneficiaries, couldn't have been  
12 invoked here. Is that the same question Justice  
13 Ginsburg was asking?

14 MR. FURLOW: I do not believe so, Justice  
15 Kennedy.

16 JUSTICE KENNEDY: Because the plan does  
17 contain a procedure for designating some other  
18 beneficiary, including the spouse. I just don't  
19 understand why anybody doesn't talk about that.

20 MR. FURLOW: Well, Your Honor, there was  
21 that provision for invoking another beneficiary and we  
22 only pointed out that indeed three days after the  
23 divorce, and consistent with his ex-wife's waiver of any  
24 right, title, claim and interest in this 401(k) plan in  
25 specific, and that was the very first item of the things

1 that he retained as the plan participant in that divorce  
2 decree, he did in fact designate his sole daughter Kari  
3 Kennedy as his sole beneficiary in a change of form plan  
4 for one part of this very complex series of multiple  
5 plans -- of plan retirement benefits where he said that  
6 he would give -- that she would be his sole beneficiary;  
7 and the form there that DuPont drafted for him said that  
8 it invoked and superseded any and all prior  
9 designations, and was not limited to that one particular  
10 part 6 pension and retirements plan. And so we submit  
11 it is a reasonable explanation, if he did not believe  
12 that his wife had waived any right, title and interest  
13 to invoke that beneficiary clause, pursuant to the Fifth  
14 Circuit's decision just six weeks beforehand in the  
15 Brandon v Travelers International case that said that a  
16 waiver of ERISA benefits, welfare benefits mainly -- but  
17 ERISA waiver of benefits, a voluntary waiver was  
18 enforceable, was valid and could be enforced at summary  
19 judgment.

20 We believe his counsel, you know, were aware  
21 of that in formulating, you know, this waiver of  
22 benefits. Even if that didn't take care of Liv  
23 Kennedy's knowing, voluntary, attorney-negotiated,  
24 court-approved, signed-by-her waiver of any right,  
25 title, claim and interest in his pension benefits, then

1 we believe he may have believed as a layman that by  
2 signing that beneficiary designation form prepared by  
3 DuPont, that he had indeed superseded and revoked all  
4 prior designations.

5 JUSTICE GINSBURG: Or he might have -- he  
6 might have decided that he didn't want to revoke that  
7 one. We -- we just have no way of knowing. It's odd  
8 that he revoked as to one plan but not the 501(k) plan,  
9 as I understand.

10 MR. FURLOW: Your Honor, I might -- I might,  
11 if I would, just offer an explanation. He almost  
12 certainly saw no reason to revoke that which his wife  
13 had just four days before voluntarily waived any right,  
14 title, claim and interest to in terms of the divorce.  
15 He certainly would have expected that her word would be  
16 her bond and that it wouldn't turn out to be a junk bond  
17 as it turned out to be when years later she repudiated  
18 her own voluntary waiver; and that's just one of the  
19 issues that we address.

20 JUSTICE GINSBURG: Well, because he could --  
21 he could have -- despite her waiver, he could have named  
22 her as the beneficiary of that plan and that would have  
23 controlled.

24 MR. FURLOW: Well, Your Honor, the way I see  
25 it is that his attorneys who were advising him and



1 guiding him through this process, they were acting, we  
2 must assume, in complete awareness of Texas and Fifth  
3 Circuit law; and the Fifth Circuit had just ruled some  
4 six weeks before in a case involving voluntary divorce  
5 decree waivers that such a waiver was enforceable. Now  
6 you don't have to --

7 CHIEF JUSTICE ROBERTS: I'm sorry; six weeks  
8 before what?

9 MR. FURLOW: Before the divorce decree in  
10 the Brandon v. Travelers International case. We believe  
11 that there was no sense there in bombing the rubble. If  
12 it was already taken care of, it didn't have to be taken  
13 care of the second time. Now, I and you might want a  
14 belt-and-suspenders approach to be absolutely, doubly,  
15 positively sure. But the fundamental thing is if under  
16 Federal common law, as a majority of courts and almost  
17 all of the State courts have ruled, a voluntary waiver  
18 is enforceable, then that was already taken care of.

19 CHIEF JUSTICE ROBERTS: Well, but how does  
20 the plan know that?

21 MR. FURLOW: The plan knows that, as here,  
22 when the court-appointed fiduciary, the executrix Kari  
23 Kennedy makes the plan aware of that on April 26, 2001,  
24 via fax and delivery, which is acknowledged by their  
25 plan administrator, Mary Deneen that's coming in, and

1 there you have a copy of the divorce decree served on  
2 DuPont months before they make a payout.

3 And it is critical here, Your Honor, that  
4 when they chose to make this -- you know, when they  
5 chose to pay the beneficiary, they were working on a  
6 test case right there from the very beginning. And if  
7 you look at their paralegal's letter, who actually  
8 notifies the estate that they are going to disregard the  
9 voluntary test case, they refer to DuPont's success in  
10 raising this issue before. And then the paralegal  
11 actually quotes a Fifth Circuit case that holds for  
12 voluntary waivers, obviously not understanding the, you  
13 know, crucial import here; and we note --

14 CHIEF JUSTICE ROBERTS: But the plan terms  
15 say that if you want to change the beneficiary, here's  
16 how you've got to change the beneficiary; and we are  
17 going to pay the beneficiary until it's changed.

18 MR. FURLOW: Well, Your Honor, I would also  
19 say that the plan forms here at page 48 of your joint  
20 appendix, and 49 -- I ask this Court to scrutinize these  
21 two provisions because they are critical to the outcome  
22 of the case. At page 48 you hear the following  
23 mandatory language in DuPont's own SIP. And it says:  
24 "If no surviving spouse exists and no beneficiary  
25 designation is in effect, distribution shall" --

1 mandatory term -- "shall be made to or in accordance  
2 with the directions of the executor or administrator of  
3 the decedent's estate." And so we say that --

4 CHIEF JUSTICE ROBERTS: I would have thought  
5 your friend on the other side would be quoting that  
6 language.

7 MR. FURLOW: Well, Your Honor, I like to  
8 bring a fresh insight to the -- to the -- to the  
9 Petitioner's argument here because I see that language  
10 and we say it is not in effect. This Court has ruled in  
11 several cases what the term "in effect" means, and in  
12 ERISA cases saying this version of ERISA was in effect,  
13 meaning valid and operational. Well, the voluntary  
14 waiver was in effect and that made the beneficiary  
15 designation some 10 years before during the course of  
16 the marriage ineffectual, invalid. And so --

17 CHIEF JUSTICE ROBERTS: But that's -- that's  
18 a bit of a stretch, isn't it? It says no beneficiary  
19 designation is in effect. If you look at the plan, he's  
20 got a beneficiary designation.

21 MR. FURLOW: But it's not in effect at the  
22 time that it comes to be decided because their plan  
23 administrator Mary Deneen has a copy of the divorce  
24 decree with the knowing voluntary waiver. And although,  
25 Your Honor, although they take the position that plan

1 administrators can't understand knowing and voluntary  
2 waivers, that that's a law sort of thing, they have got  
3 one in-house counsel there who was never called upon to  
4 actually pass on this matter and it wouldn't have cost  
5 them a dime to go outside of that in-house counsel.

6 JUSTICE KENNEDY: Well, of course, that was  
7 the point of my earlier point. I focused on -- on this  
8 whole paragraph.

9 MR. FURLOW: Yes.

10 JUSTICE KENNEDY: That just indicates that  
11 this would have been a different case if the provision  
12 of the plan that said there shall be no assignment,  
13 which is quoted in the Fifth Circuit thing, was the only  
14 provision in the plan; but when you look through this in  
15 retrospect, there are means for participants and  
16 beneficiaries to make a change, and they weren't  
17 followed here.

18 MR. FURLOW: Well --

19 JUSTICE KENNEDY: And I understand that you  
20 say in effect they were. I understand that argument but  
21 it's not as if the plan didn't contain an adequate  
22 vehicle if the -- the parties had followed strictly the  
23 terms of the plan.

24 MR. FURLOW: Your Honor, we submit that  
25 people all the time in situations like this may believe

1 that a knowing voluntary waiver which has received the  
2 approval of the majority of the Federal appellate courts  
3 and the State courts is good enough. In some other  
4 instances, they forget. They forget to do this or to  
5 make those changes, or believe that one of a series of  
6 multiple and overlapping beneficiary designations has --  
7 as the June 7th one did, we submit -- revoked and  
8 superseded any and all prior designations, and they are  
9 lay people not lawyers.

10 Now, I would submit that the critical thing  
11 is also on page 49 the very portion of the joint  
12 appendix that you're looking at, because that language  
13 says, in the DuPont SIP plan, quote, "if in the opinion  
14 of the company there is a question as to the legal right  
15 of any beneficiary to receive a distribution under the  
16 plan, the amount in question may be paid to the  
17 decedent's estate in which event the trustee and the  
18 company shall have no further liability to anyone in  
19 respect to such amounts." Consider that when you've  
20 heard all of the fear mongering that's come in, in the  
21 amici briefs with respect to -- to interpleader actions.  
22 And we submit that interpleader actions are a perfectly  
23 good means of disposing of this, but if you --

24 CHIEF JUSTICE ROBERTS: It's in the opinion  
25 of the company. That sounds -- and this is a plan -- as

1 we've said often in ERISA cases, we want to enforce  
2 these according to the terms of the plan because the  
3 companies don't have to set these up at all. So it  
4 makes perfect sense for the company to say, well, if we  
5 think this, then we can do this. So, in other words,  
6 there's a doubt and we don't want to give it to somebody  
7 who might not end up being the person, but if we don't  
8 think there's a doubt, that's it.

9 MR. FURLLOW: And that's the first step in  
10 the analysis, Your Honor, because the second step is all  
11 of this Supreme Court case and all of the substantial  
12 expenses that this estate out of Jasper, Texas, has had  
13 to pay from the very beginning could have been avoided  
14 had they paid over to Kari Kennedy, a court-appointed  
15 executrix who would have taken that money in and would  
16 have been bound by the rules of the probate court to  
17 handle it as a fiduciary to consider Liv's claim that  
18 her voluntary waiver was not voluntary, to pay the  
19 creditors first, rather than get stuck with the past  
20 liabilities, which happened here.

21 The important thing is DuPont could have  
22 avoided all of this litigation, would not have had to  
23 file an interpleader, would not have had to incur a  
24 dime's worth of attorney's fees, would not have had to  
25 put its own interest ahead of that of the participants

1 and beneficiaries, had they simply invoked this clause  
2 as they had the power to do. They chose this case.

3 JUSTICE SOUTER: We can't decide this case  
4 based on sympathy to DuPont. I would understand the  
5 point of your argument. But if -- in theory the problem  
6 would be exactly the same, whether DuPont had expressed  
7 a doubt and paid it into the estate or hadn't.

8 MR. FURLOW: The problem --

9 JUSTICE SOUTER: We have the same question  
10 before us.

11 MR. FURLOW: The QDRO question, Your Honor?

12 JUSTICE SOUTER: Yes.

13 MR. FURLOW: Yes, and that's why we say that  
14 if you look carefully at -- excuse me, but it's 29  
15 U.S.C. section 1056(b) through (k) -- you look at the  
16 specific language, and I am asking this Court to adhere  
17 to the specific written terms of the ERISA statute  
18 because those require a transfer to an alternate payee.  
19 That is our fundamental argument: A transfer to an  
20 alternate payee which is defined in 1056(d)(3)(K) as  
21 being someone --

22 JUSTICE SCALIA: Sorry. Does this appear  
23 somewhere in the materials? It's always helpful.

24 MR. FURLOW: Respondents' brief, Your Honor,  
25 and you will find it specifically on pages 14A and 15A,

1 in the appendix in the back. And if you actually go to  
2 the language, we stand on a plain-meaning interpretation  
3 of the ERISA statute, this reticulated and complicated  
4 statute. We say every word has its meaning.

5 JUSTICE KENNEDY: What do you want me to  
6 read here?

7 MR. FURLOW: Specifically, Your Honors,  
8 pages 14A and 15A of the Respondents' appendix, where he  
9 has actually given us all of the QDRO statute at 1056.

10 And we say that has meaning, and that means  
11 we prevail because, if you look at that language, every  
12 subpart is talking about payments to alternate payees.  
13 "Alternate payees" are defined at 1056(d)(3)(K), and you  
14 will find that, Your Honors, specifically at page, at  
15 page 22A to 23A in the appendix.

16 The alternate payees there that we are  
17 talking about are spouse, ex-spouse, child, or other  
18 dependent. It does not refer to the plan participant  
19 Mr. Kennedy; and, therefore, there was no -- his mere  
20 retention of his pension benefits and his wife's waiver  
21 of her contingent beneficiary payments, which would only  
22 come to her upon the death of William Kennedy, meant  
23 there was no transfer, not a dime's worth of money, not  
24 a bit of pension benefits transferred on the date that  
25 she signed that waiver. There was thus no --



1 JUSTICE ALITO: I'm not sure I'm getting  
2 this argument. There's not -- the argument isn't that  
3 there was a QDRO; the argument was that he could have  
4 disposed of this through a QDRO. And he could have done  
5 that, and he could have named an alternate payee in the  
6 QDRO. He could have named his daughter, for example.

7 MR. FURLOW: Your Honor, the way pension  
8 planners understand it is that you use a QDRO for a  
9 transfer of benefits, not for a bare waiver. And that's  
10 where the U.S. Solicitor General supports our position  
11 and reads this and says that's consistent with  
12 Treasury's own, now harmonized with Labor's,  
13 interpretation of the anti-alienation clause. It does  
14 not apply to bare waivers of benefits, and, therefore,  
15 the Fifth Circuit erred in putting within a QDRO context  
16 his wife's --

17 JUSTICE ALITO: All you're saying is that  
18 you couldn't effect a bare waiver through a QDRO, but  
19 why does that prove your case? I don't understand that.

20 MR. FURLOW: We think that --

21 JUSTICE ALITO: A QDRO could have been used  
22 to direct the payment to someone else other than the  
23 ex-spouse.

24 MR. FURLOW: With respect to her waiver that  
25 would have required him in advance to decide who he

1 would have transferred what alternate payee he would  
2 transfer way back at the time of his divorce in 1994.  
3 He cannot. He did not transfer anything to his wife.  
4 She didn't receive anything at that time. She simply  
5 waived her contingent right to receive something upon  
6 her death, something that would occur in the future.  
7 She thoroughly waived that.

8 JUSTICE SCALIA: That's not your point. It  
9 would seem to me your point is that the QDRO is an  
10 exception to the assignment or alienation.

11 MR. FURLOW: I believe --

12 JUSTICE SCALIA: And your point is this has  
13 been no assignment or agency, so we don't need the QDRO  
14 exception. There is nothing in here that violates  
15 anything in the statute.

16 MR. FURLOW: I completely agree with that  
17 analysis.

18 JUSTICE SCALIA: So whether he could have  
19 done a QDRO is in your view irrelevant. Your basic case  
20 is the QDRO is an exception from the prohibition on  
21 assignment or alienation, that provision has no  
22 application here, there has been no assignment or  
23 alienation, and therefore the waiver is effective.

24 MR. FURLOW: That's exactly our position  
25 Your Honor, yes. So we find support in that and we find

1 support in not only Treasury's interpretation of its own  
2 regulation, which deserves great deference under this  
3 Court's opinion, especially when DuPont in the Fifth  
4 Circuit asserted that it was Department of Treasury that  
5 had all of the expertise pursuant to congressional  
6 mandate in determining how QDROs should apply and told  
7 the Fifth Circuit to follow their outdated  
8 interpretation of the QDRO statute. They certainly are  
9 not in a position to say that the expertise that they  
10 touted in the Fifth Circuit should be disregarded now,  
11 and we submit that the Attorney General and the  
12 Solicitor General are correct in saying that the  
13 regulation does not mean what DuPont says it does, but  
14 means what Kennedy says it does.

15 CHIEF JUSTICE ROBERTS: Well, of course you  
16 only think the Solicitor General is right so far to a  
17 certain extent.

18 MR. FURLOW: To a certain extent.

19 CHIEF JUSTICE ROBERTS: Then you throw them  
20 under the train because you don't -- you certainly don't  
21 think they are correct by saying, look, the only way you  
22 can do this is by modifying the plan. I still don't  
23 know how the plan administrator is supposed to know that  
24 the person whose name appears on the plan documents,  
25 which the plan participant can change at any time, isn't

1 the person that they are supposed to send the benefits  
2 to. Now, you tell me here they knew about the divorce  
3 and all that stuff. Maybe, maybe not. But we are  
4 trying to develop a rule for all cases and it seems to  
5 me the easiest, most administrable rule is to say  
6 whoever's name appears there gets the money, and if they  
7 are not supposed to because of some collateral dispute,  
8 well, they can sort that out in litigation. Maybe Kari  
9 has a suit against Mrs. Kennedy or her estate, but  
10 that's not a matter for the plan to worry about.

11 MR. FURLOW: Well, Your Honor, let me  
12 address that. First, we don't throw the Solicitor  
13 General under the tracks. We simply point out the fact  
14 that they have gone off track in terms of their plan  
15 documents. And specifically, Your Honor, I would say I  
16 agree with the Manning versus, the Manning decision of  
17 the Texas, of the Fifth Circuit, which we cited. In  
18 there that says that sections 1102 and 1104 of ERISA are  
19 a very thin reed indeed to on which to cobble together a  
20 plan document's rule. And specifically DuPont then goes  
21 one bridge too far going way beyond that to say that  
22 these ever meetable ever changeable beneficiary changes  
23 thousands of them constitute documents where the Ninth  
24 Circuit conity substitutes of what constitutes plan  
25 documents in the salaried employees of Hughes versus

1 Hughes administrator case and said that a list of the  
2 participants and their addresses could not be considered  
3 a plan document because it did not correspond with that  
4 detailed listing of the plan document under Section 1024  
5 and 102 a. Indeed under Section 1025, Your Honors, if  
6 these are plan documents then the administrator has a  
7 duty to disclose them to any person participant or  
8 beneficiary who asked and as the Ninth Circuit pointed  
9 out there is substantial dangers there of going way  
10 beyond what Congress, a very liberal Watergate Congress  
11 in 1974, intended ERISA to be, which is a protection for  
12 participants and beneficiaries, not for plan  
13 administrators. And it exposes those participants and  
14 beneficiaries to loss of privacy, telemarketing, and  
15 other things because one person could get such a list  
16 and sell it to others.

17 CHIEF JUSTICE ROBERTS: I must have missed  
18 -- where did Watergate come from.

19 (Laughter.)

20 MR. FURLOW: Just putting in context the  
21 intentions of the 1974 Congress, which was concerned  
22 about participants and beneficiaries. Those were the  
23 sole purposes for which section 1102 was designed to  
24 protect, not the convenience of plan administrators as  
25 DuPont would lead this Court to believe.

1 I see that I'm into rebuttal time. I would  
2 like to save some for that. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4 Ms. Kruger.

5 ORAL ARGUMENT BY LEONDR A. KRUGER

6 ON BEHALF OF AMICUS CURIAE

7 MS. KRUGER: Mr. Chief Justice, and may it  
8 please the Court:

9 The Fifth Circuit decided this case on the  
10 grounds that ERISA's anti-alienation provision forbids a  
11 divorcing spouse from relinquishing an interest in his  
12 or her ex-spouse's pension plan benefits unless the  
13 waiver takes the form of a qualified domestic relations  
14 order.

15 We agree with Petitioner that the Fifth  
16 Circuit misinterpreted both the anti-alienation  
17 provision and the QDRO exception to that provision. But  
18 we disagree with Petitioner's further submission that  
19 merely because ERISA does not forbid waivers in the  
20 divorce context or otherwise, that a plan administrator  
21 may be required as a matter of Federal common law to  
22 recognize such waivers even when those waivers conflict  
23 with the beneficiary designation the plan administrator  
24 has on file.

25 JUSTICE KENNEDY: Well, are the provisions

1 of page 49 of the appendix consistent with the statute?

2 MS. KRUGER: Indeed, Your Honor, we think  
3 that they are. The statute directs plan administrators  
4 to administer the plan in accordance with the plan  
5 documents and further requires administrators to pay  
6 benefits to persons who are either participants under  
7 the plan or who are beneficiaries within the meaning of  
8 the statute.

9 JUSTICE KENNEDY: Did the Court of Appeals  
10 give short shrift or overlook that point?

11 MS. KRUGER: Well, the Court of Appeals  
12 determined that it need not reach this point because it  
13 decided the case on different grounds; namely, the  
14 anti-alienation grounds. But, again, we think that if  
15 the Fifth Circuit was incorrect in its reasoning but  
16 reached the correct overall conclusion, then its  
17 judgment should be affirmed.

18 JUSTICE SCALIA: Well, we -- I mean, we  
19 could have -- you know, we should have thought of that  
20 when we limited our -- our grant of certiorari to the --  
21 to the one question on which you agree with the  
22 Petitioner. But we did do that, didn't we, even though  
23 the other one was -- was explicitly put under our nose,  
24 and we said we -- we are not going to get into that? We  
25 just want to decide this question, which is an important

1 question all by itself.

2 MS. KRUGER: Well, for several reasons, Your  
3 Honor, we think it would be appropriate for the Court to  
4 answer both the plan documents question as well as the  
5 anti-alienation question.

6 One is that it is an alternative ground for  
7 affirmance.

8 The other is that it was properly raised in  
9 the Court of Appeals. It was raised in the cert  
10 petition as well as in the brief in opposition.

11 JUSTICE SCALIA: Do you know any other case  
12 in which we have explicitly declined to accept a  
13 question and then have used one of these other back  
14 doorways of -- of answering it anyway?

15 MS. KRUGER: I --

16 JUSTICE SCALIA: I don't know of any. I  
17 mean maybe -- maybe we have but --

18 MS. KRUGER: I'm -- I'm not sure that I know  
19 of any either, Your Honor.

20 JUSTICE BREYER: Well, could we do this? I  
21 mean, what's bothering me about this is -- is you have a  
22 very strong argument following the plan documents. They  
23 have had some chance to reply to it, but not a full  
24 chance. It seems a little unfair, and the Fifth Circuit  
25 had -- would probably know what they say. Okay. Can



1 we, say, grant the question now and ask that people file  
2 an additional brief if they want to say something?

3 It just seems to me an awful waste of money  
4 and everybody's time to send it back and have it make  
5 another trip. So what's your suggestion as to how we  
6 proceed?

7 MS. KRUGER: Well, Your Honor, I think it  
8 would be possible to -- to either order for the briefing  
9 on the issue or to grant the question now at this  
10 juncture. I think it would also be conceivable to read  
11 the question that the Court did grant on as encompassing  
12 the Federal common law --

13 JUSTICE BREYER: You see, I want to be fair  
14 to them. I mean, we want -- you want to be fair to the  
15 other side to be sure they have a chance to say  
16 everything they have to say. That's what's worrying me.

17 MS. KRUGER: Well, Your Honor, that is an  
18 important consideration. I do think that in the opening  
19 brief the Petitioners did brief the question of what  
20 effect is to be given to a waiver if indeed a waiver is  
21 not prohibited by the anti-alienation clause. And that  
22 Federal common law rule that Petitioners suggest is one  
23 that does, I think, naturally invite some consideration  
24 of the conflicting statutory directive in the form of  
25 the plan documents principle that this Court has

1 recognized in its earlier cases. And certainly in its  
2 reply brief Petitioners did address this issue in full.

3 JUSTICE SCALIA: Did -- did we recognize in  
4 earlier cases that beneficiary designations are plan  
5 documents?

6 MS. KRUGER: Well, Your Honor, I think the  
7 question of whether beneficiary designation forms,  
8 counsel plan documents, is a little bit beside the  
9 point. The -- the plan documents in this case do  
10 specify a procedure for determining who is to receive  
11 benefits. It says that benefits will be paid to the  
12 designated beneficiary, the person who is designated by  
13 the participant. And it says that changes to those  
14 beneficiary designations shall be made in the manner  
15 that's prescribed by the plan.

16 And so, because the plan sets out a  
17 procedure for changing beneficiary designations, we  
18 think that it would be inappropriate to look beyond that  
19 to require plan administrators to look to extrinsic  
20 documents in order to determine whether one of them  
21 overrides that designation.

22 JUSTICE SCALIA: Again, assuming there has  
23 been a change of beneficiary designation, and, of  
24 course, the argument you're confronted with is: I  
25 haven't changed anything. The prior beneficiary simply

1 -- simply refused to accept it, waived it. I haven't  
2 changed the designation at all.

3 MS. KRUGER: Well, in this case there is a  
4 conflict then between the wishes of the participant, who  
5 by all accounts would have chosen not to change the  
6 beneficiary designation, and that of the beneficiary.

7 And in that case in order to effectuate the  
8 -- the interests of all parties involved in order to  
9 provide certainty to all parties in ascertaining what  
10 their rights are with respect to the plan, then it is  
11 incumbent on the plan administrator to abide by the  
12 designated beneficiary.

13 JUSTICE SCALIA: Well, I think it's a harder  
14 question than you make it; and I, for one, have not gone  
15 into it as deeply as I would like to, principally  
16 because we rejected that -- that question.

17 MS. KRUGER: Well, again, Your Honor, we  
18 think it would be appropriate for the Court to go on to  
19 address that question because the issues have been fully  
20 aired both in the Fifth Circuit and in the briefing in  
21 this Court. But if the Court were inclined to -- to  
22 reserve that question for a later time, I think that  
23 would be fine as well. And --

24 CHIEF JUSTICE ROBERTS: Am I right in  
25 understanding that there is a fairly sharp circuit split

1 on that question, even that majority of the circuits are  
2 contrary to the Government's position?

3 MS. KRUGER: That is correct. There is a  
4 circuit split on the question as was raised in the  
5 petition for certiorari, and the Second and Sixth  
6 Circuits are the circuits that have to date agreed with  
7 the position that we are espousing here: That the plan  
8 documents control and preclude formulation of a Federal  
9 common law rule of the sort that Petitioner proposes.

10 CHIEF JUSTICE ROBERTS: And which circuits  
11 are on the other side?

12 MS. KRUGER: There are a number of them  
13 including the Fifth, the Seventh, the Third.

14 The reason why the plan documents rule is so  
15 important in this case is because it serves important  
16 statutory interests in certainty, certainty of the  
17 parties as well as certainty of the administrators.

18 And it is clear; it is easy to apply; it  
19 makes it possible for administrators to do their jobs  
20 without fear of further litigation in case they happen  
21 to make what a court may later in the proceedings  
22 determine is the wrong choice.

23 For that reason, we think that ERISA is  
24 clear, and that it doesn't permit the kind of Federal  
25 common law rule that Petitioner proposes, which is one

1 that would essentially revise the statute to override  
2 the plan documents rule and would require substantial  
3 burdens on the plan and would yield uncertainty for the  
4 parties.

5 For that reason we would ask the Court to  
6 affirm the judgment of the Court of Appeals on  
7 alternative grounds or, alternatively, it should remand  
8 for further proceedings.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 Mr. Levy.

11 ORAL ARGUMENT BY MARK I. LEVY  
12 ON BEHALF OF THE RESPONDENTS

13 MR. LEVY: Mr. Chief Justice, and may it  
14 please the Court:

15 In light of the Court's questions, I want to  
16 begin with the plan documents argument and first the  
17 procedural question of whether it's properly before the  
18 Court. We think that it is.

19 It's well within the settled doctrine of an  
20 alternative ground for affirmance. It was raised below,  
21 and the Fifth Circuit has decided the issue in other  
22 cases. We don't dispute that. So we know what the  
23 Fifth Circuit thinks about this issue, and, therefore,  
24 there is no point in a remand.

25 JUSTICE SCALIA: Do you know of any case in

1 which we've done this --

2 MR. LEVY: I do.

3 JUSTICE SCALIA: -- rejected the question  
4 and then decided it?

5 MR. LEVY: I apologize if it's not in the  
6 brief, but a case I could find was called Piper Aircraft  
7 versus Rayno 454 U.S. 235. And in that case the court  
8 limited its grant of certiorari, but then went ahead and  
9 decided a question that wasn't subsumed within that  
10 question because they found it appropriate to the proper  
11 disposition of the case.

12 CHIEF JUSTICE ROBERTS: No, no. But is that  
13 a case in which the question the court decided was  
14 presented in the petition, the court said we are not  
15 going to take that question then they decided it on that  
16 ground anyway.

17 JUSTICE SCALIA: That's what I'm asking.  
18 Yes.

19 MR. LEVY: I'm not sure of the answer to  
20 that.

21 JUSTICE SCALIA: You are sure of the answer.  
22 You don't know of any case.

23 MR. LEVY: I think Piper is at least a first  
24 cousin if not a direct sibling of the issue that we've  
25 got here. I don't disagree that it is in the Court's

1 discretion. The Court has discretion, I think, one --  
2 either way whether it wants to decide this or wants  
3 remand, but we think it would be appropriate --

4 CHIEF JUSTICE ROBERTS: I guess you agree  
5 that it's a question of which the circuits have split,  
6 so presumably there are good arguments on both sides,  
7 and it's one that your friend hasn't had a full  
8 opportunity to brief here. So we'd have to be pretty  
9 confident of the answer, I think, to go ahead and decide  
10 it.

11 MR. LEVY: Well, actually I think the Court  
12 will be confident if it looks into it. But beyond that  
13 this is the classic case of an alternative ground for  
14 affirmance of the judgment. When that arises, the  
15 topside party always has to deal with that issue in its  
16 reply brief and only in its reply brief. So there is  
17 nothing unfair about the --

18 JUSTICE SCALIA: It would be the classic  
19 case but for the fact that we had rejected that  
20 question. Had we not been asked to decide it and said  
21 no, it would be the classic case, I agree.

22 MR. LEVY: And I agree. That makes it  
23 within the Court's discretion. It doesn't have to  
24 decide it, but we think there are good reasons here.  
25 It's been fully briefed, including by the Petitioner for

1 the reason I just said. Four amici have addressed it;  
2 we have addressed it. So it's properly before the  
3 Court, and there is nothing unfair about deciding it.  
4 In addition --

5 JUSTICE SCALIA: Can we expect that to  
6 happen in future cases when we turn down a question and  
7 amici and people come in and brief the question anyway  
8 and then ask us to decide it?

9 MR. LEVY: I wouldn't think so. The fact  
10 that we can't find another case, either, I think makes  
11 this one unique. And I think there are good reasons --

12 JUSTICE GINSBURG: I think there is a  
13 question of the way it was phrased. And perhaps the  
14 court just didn't get it, what that question on which we  
15 didn't grant cert was driving at.

16 MR. LEVY: I would be loathe to make that  
17 suggestion, Justice Ginsburg.

18 (Laughter.)

19 MR. LEVY: But it may well -- it's possible  
20 that that could be the explanation or the Court with  
21 fuller consideration -- I mean, the issue has been fully  
22 briefed. The Court knows more about the issues than it  
23 did at the time it granted cert, and we think it is for  
24 a -- to decide this.

25 And I do want to point out that there is a



1 relationship between the questions. Both the question  
2 granted and the question that wasn't granted -- wasn't  
3 denied, but it wasn't granted -- raise similar  
4 considerations. They both get into the same statutory  
5 scheme. They both get into the same considerations of  
6 plan administrability. We think it would be most  
7 efficient for the Court to resolve the conflict now and  
8 not leave the uncertainty to continue any further.

9 JUSTICE SCALIA: Undoubtedly we should have  
10 granted it.

11 MR. LEVY: Well, in the fullness of time,  
12 the Court can now revisit that. But again, I think it  
13 has been fully briefed and there is nothing unfair to  
14 the Petitioners. The Court in its discretion --

15 JUSTICE KENNEDY: Would you like to argue  
16 the question that is here?

17 MR. LEVY: Yes --

18 (Laughter.)

19 MR. LEVY: -- I would. I take it the Court  
20 doesn't need argument on the merits of the plan  
21 documents issues, since that's already been discussed,  
22 so let me turn to the QDRO question. That is the  
23 question that was -- that was granted and was discussed  
24 fully in the briefs.

25 Now, as to the QDRO part of the case, the

1 rule of law that governs this case is that pension plan  
2 administrators must pay benefits in accordance with a  
3 qualified domestic relations order, and they may not pay  
4 benefits in accordance with a nonqualified order.

5 That rule follows from two separate and  
6 different analyses. One is the anti-alienation  
7 provision, and the other is the QDRO provision in  
8 subparagraph (H) of section 1056. They are both  
9 discussed in our brief.

10 JUSTICE SCALIA: Where would I find the  
11 latter? If I wanted to read it? Which I do.

12 (Laughter.)

13 MR. LEVY: I don't find this all that  
14 pleasant reading, but it's on page 21A of the statutory  
15 appendix to the red brief.

16 JUSTICE SCALIA: 21A?

17 MR. LEVY: 21A. And it's (H)(ii) and (iii).  
18 And I want to start with this because it is really is  
19 the more straightforward analysis and avoids a lot of  
20 questions under the anti-alienation provision. This  
21 argument would prevail whether or not the purported  
22 waiver is deemed to be an assignment or alienation under  
23 1056(d)(1) and (d)(3).

24 Now, we think it is and I'll come back to  
25 that under the IRS regulation, but let me start with

1 this alternative argument that's also made in the brief.

2 Under ERISA, a domestic relations order is  
3 either a qualified order or a nonqualified order. And  
4 ERISA expressly provides that if it's a nonqualified  
5 order, as it is here, the plan administrator may not pay  
6 benefits pursuant to that order.

7 Justice Scalia, since you're on page 21A,  
8 let's look at subparagraph (H)(iii). This is 21A of the  
9 red brief. It provides that: If an order is not  
10 qualified, the plan administrator shall pay the benefits  
11 to the person or persons who would be entitled to such  
12 benefits if there had been no order. If there had been  
13 no order. In other words, the administrator disregards  
14 it and pays it to the person -- this is in (iii),  
15 Justice Scalia.

16 Contrast that with subparagraph (H)(ii)  
17 right above it, where the order is qualified: The  
18 administrator shall pay the benefits to the person  
19 entitled thereto under the order.

20 So, it gives you two choices. If it's a  
21 qualified order, the plan must pay. If it's not a  
22 qualified order, the plan --

23 JUSTICE BREYER: Well, that doesn't make too  
24 much sense, does it, where all that happens is it's just  
25 waived. The wife waived the amount because when she

1 waived the amount, she doesn't give it to anybody. She  
2 just doesn't take it. So it goes to the beneficiary --  
3 it goes to the person who made up the plan. It's a  
4 little hard to pay to him, because he is dead.

5           So I mean if you read it literally, it  
6 doesn't seem to apply, these (ii) and (iii), to the case  
7 before us, which is a case of waiver. And of course the  
8 argument, yes, she makes is that throughout the law,  
9 waiver is treated differently. And if it weren't, you'd  
10 have to pay gift tax, for example, when you waive a  
11 benefit that's given to you by someone else.

12           And so let's interpret this and make sense  
13 of the language you quoted, and consistent with the rest  
14 of the law to say a waiver is waived. It's not giving  
15 something to somebody else.

16           MR. LEVY: You've covered a lot of ground,  
17 Justice Breyer. I want to give you several responses --

18           JUSTICE BREYER: The argument is against you  
19 and I would like to hear what you have to say.

20           MR. LEVY: And I appreciate that.

21           First of all, on this part of the argument  
22 under the QDRO provision under subparagraph (H), it  
23 doesn't matter whether this is a waiver or not. That  
24 goes to the alienation question, and I will get to that  
25 in a little while. This applies --

1 JUSTICE SCALIA: No, it also goes to the  
2 question of who is the person or persons who would have  
3 been entitled to such amounts if there had been no  
4 order.

5 MR. LEVY: If there were no --

6 JUSTICE SCALIA: If there was a waiver and  
7 there had been no order, your friend's contention is by  
8 traditional common law, the person who would have been  
9 entitled to it would have been his client.

10 MR. LEVY: On the contrary, Justice --

11 JUSTICE SCALIA: I mean, I don't see how  
12 this language helps you. It sort of restates the  
13 question, but --

14 MR. LEVY: I don't believe so. I think it  
15 is not only helpful but dispositive. The order that is  
16 referred to is the divorce decree, the qualified  
17 domestic -- I'm sorry -- the domestic relations order.

18 JUSTICE SCALIA: Right.

19 MR. LEVY: If there had been no order --

20 JUSTICE SCALIA: If there had been no  
21 order --

22 MR. LEVY: -- then there wouldn't have been  
23 any waiver by Liv. I mean, excuse me -- yes, by Liv.  
24 There wouldn't have been any waiver if there weren't any  
25 divorce decree because the waiver is contained --

1 JUSTICE SCALIA: Oh, I see. I see.

2 MR. LEVY: -- in the decree. So, if there  
3 were no --

4 JUSTICE SCALIA: I see your point. Does he  
5 agree with that, that apart from the divorce decree,  
6 there is no waiver?

7 MR. LEVY: I'd hesitate to speak for him,  
8 but I think the language is --

9 JUSTICE SCALIA: I got you.

10 MR. LEVY: -- quite clear, and that's why  
11 this is a more straightforward analysis than the waiver  
12 under anti-alienation. I do hope to get to that.

13 JUSTICE SCALIA: I see.

14 MR. LEVY: But this is really very  
15 straightforward and dispositive.

16 And the legislative history confirms this.  
17 The plain text is clear, but the legislative history  
18 confirms it. Congress took a specific look at this  
19 specific issue in a specific context of marital  
20 dissolution, and it enacted this QDRO provision. And  
21 the provision is comprehensive and complete.

22 JUSTICE BREYER: I'm -- I didn't follow, I'd  
23 have to admit. I think -- and you perhaps can explain  
24 it to me -- but, I thought the things that you are  
25 quoting are QDRO is about an effort to alienate some

1 property that would otherwise go to the person who was  
2 setting up a QDRO, in other words, the wife here, in  
3 other words Liv here; is that right?

4 MR. LEVY: No. It has to go to an alternate  
5 payee. It doesn't have to be the wife.

6 JUSTICE BREYER: Okay. The one person who  
7 couldn't be an alternate payee is the payor. And so, in  
8 fact, when you waive something, it isn't that it  
9 necessarily goes back to some alternate payee, as it  
10 didn't here. It simply went back to the payor. And so  
11 the language of this provision you're quoting just  
12 doesn't deal with this case.

13 MR. LEVY: Well, I think it does, Justice  
14 Breyer.

15 JUSTICE BREYER: I know you do, and that's  
16 what I need to ask.

17 MR. LEVY: It doesn't say anything about  
18 where it goes. It just says if it's a QDRO, you pay it,  
19 and if it's not a QDRO, you don't pay it.

20 JUSTICE BREYER: I'm sorry. It says, if  
21 it's not, the issue to wit is not resolved, then the  
22 plan administrator shall pay the segregated amounts to  
23 the person or persons who would have been entitled to  
24 such amounts if there had been no order.

25 MR. LEVY: Yes.

1 JUSTICE BREYER: Now, you think that  
2 includes the giver, the payor?

3 MR. LEVY: No.

4 JUSTICE BREYER: Well, that's where this  
5 goes if you waive it.

6 MR. LEVY: I don't believe so, because the  
7 "if there had no order" clause refers to the domestic  
8 relations order, a divorce decree.

9 JUSTICE SCALIA: You say the waiver is in  
10 the order?

11 MR. LEVY: Yes.

12 JUSTICE SCALIA: And without the order,  
13 there has been no waiver.

14 MR. LEVY: That's correct. And the statute  
15 says --

16 JUSTICE SCALIA: We'll have to see whether  
17 your friend agrees with that. I'll bet he doesn't.

18 (Laughter.)

19 MR. LEVY: That's what made horse races.  
20 Let me just say a further word about the legislative  
21 history of this and then come back to the  
22 anti-alienation provision, Justice Breyer, if I -- if I  
23 might.

24 Congress made it clear that benefits are to  
25 be paid pursuant to an order "if and only if" -- and



1 that's a quote from the legislative history -- the order  
2 is a QDRO; in other words, the order be a QDRO in order  
3 to be paid. Congress was mindful of the burdens that  
4 nonqualified orders put on plan administrators and it  
5 purposely sought to avoid that by requiring that an  
6 order be a QDRO, a qualified order, in order for there  
7 -- for there to be payment. The QDRO provision is an  
8 objective checklist that is easy for -- for plan  
9 administrators to follow.

10 JUSTICE SCALIA: What if they had agreed to  
11 the waiver apart from -- apart from the -- from the  
12 domestic relations order? Just apart from that, they  
13 have a separate signed waiver. We'd be in the same suit  
14 that you're -- that you say we have to avoid, wouldn't  
15 we?

16 MR. LEVY: I don't think so. I mean I think  
17 that would be an alienation.

18 JUSTICE SCALIA: Well, if it's an  
19 alienation, but his point is that a waiver is not an  
20 alienation.

21 MR. LEVY: Right. And I will come to that,  
22 but the point here is that this arises and can only  
23 arise in a domestic relations context. That's where  
24 QDRO applies, and the Fifth Circuit's holding was that  
25 that was the sole mechanism for the --

1 JUSTICE SCALIA: What about some other  
2 waiver that's -- that's not in connection with a -- with  
3 a domestic relations thing? You know -- "I've made my  
4 -- my eldest son a beneficiary." It turns out, you  
5 know, he is fat and happy; he doesn't need the money and  
6 he agrees to waive it, so -- so I can give it to an  
7 impecunious daughter. Okay? What -- what happens with  
8 that?

9 MR. LEVY: Well, first of all, that would  
10 run squarely into the plan document's argument.

11 JUSTICE SCALIA: Ah. Oh, oh, oh. You're  
12 jumping over to the other argument. Let's leave that  
13 argument out.

14 MR. LEVY: If it's not a marital dissolution  
15 context, then QDRO wouldn't apply one way or the other.  
16 Now, in that context, I think what you're suggesting,  
17 Justice Scalia --

18 JUSTICE SCALIA: Yes, but you would still --  
19 the plan would still have to make some inquiries,  
20 wouldn't it?

21 MR. LEVY: Not -- well, just on -- not  
22 getting to the plan documents.

23 JUSTICE SCALIA: Yes. Not getting in the  
24 plan documents.

25 MR. LEVY: It would be a different case. I

1 mean, this case involves what Congress specifically  
2 looked at and specifically did in the context of marital  
3 dissolution, and the reason for that is a marital  
4 dissolution comes up all the time.

5 JUSTICE SCALIA: Sure.

6 MR. LEVY: It's a commonplace in these  
7 benefits issues, and these are high-volumes operations.  
8 The plan administrators aren't lawyers. Congress wanted  
9 bright-line rules that could be easily applied here, not  
10 general principles to be applied for the facts and  
11 circumstances of each particular case, highly  
12 fact-intensive, highly subjective inquiries. Congress  
13 didn't want any of that. It didn't want the plan  
14 administrator to have to look behind the face of the  
15 order to the circumstances of the --

16 JUSTICE BREYER: I'm five minutes behind. I  
17 just got your point on the (iii)(1). I see it.

18 MR. LEVY: Okay.

19 JUSTICE BREYER: Okay? I get it.

20 MR. LEVY: It didn't want the plan  
21 administrators to have to try and divine the intention  
22 of the parties, didn't want the plan administrators to  
23 have to hold a factfinding hearing before it could pay  
24 plan benefits. That is completely foreign to the  
25 efficient and simple operation that Congress had in

1 mind.

2 Now let me turn to the anti-alienation issue  
3 about which there have been several questions.

4 JUSTICE GINSBURG: Before you do, leaving  
5 the plan -- the beneficiary designation, you say that  
6 the plan administrator is not required to give effect to  
7 a waiver that conflicts with the beneficiary  
8 designation. Is it just not required? Does the  
9 administrator have discretion to give effect to the  
10 waiver, or it -- must it disregard the waiver and  
11 strictly follow the beneficiary designation?

12 MR. LEVY: I believe it must follow the  
13 beneficiary designation. Indeed, my understanding is it  
14 has a fiduciary duty and a legal requirement to follow  
15 the plan designation. Now, the plan might specify  
16 alternatives. Here, for example, the plan said, here's  
17 a form that you fill out. And William Kennedy filled it  
18 out with respect to a different plan, the pension and  
19 retirement plan. But where the plan says, "we will pay  
20 the designated beneficiary" -- and that's what this plan  
21 says -- then the plan administrator is required, as I  
22 understand it, to pay that designated beneficiary.

23 Now let me say a word since this came up,  
24 although it's not really central to the change of  
25 beneficiary designation that William filed for this

1 other plan that's not now before the Court, the pension  
2 and retirement plan. And I would say only two things  
3 about that: One is at JA 62, and if you look at it, it  
4 says in the title and it says in the body of the  
5 document that this applies to the pension and retirement  
6 plan. We don't think anyone could have thought that it  
7 applied to other plans and that William therefore was  
8 changing the beneficiary as to those other plans. In  
9 fact, at JA 28 in paragraph 10, there was a stipulation  
10 of fact in the district court that William never changed  
11 the designation as to the savings and investment plan,  
12 the SIP that is before the Court today. So it was not  
13 only not raised below, it was stipulated away and I  
14 think that was --

15 JUSTICE BREYER: Let me go back for a second  
16 because, while I got it five minutes late, if I have it  
17 right, I still don't see why Congress would have done it  
18 literally.

19 I think what you're saying is: "Read the  
20 full four pages. What those four pages say are, Judge,  
21 you have an order, a divorce decree. It's defined as an  
22 order. Look at it. It's qualified or it isn't. If  
23 it's qualified, pay the money to the person it names.  
24 If it's not qualified, pay the money to the person,  
25 namely Liv, who would have been entitled to the amount

1 if there had been no order."

2           Okay. You read that literally as you want  
3 and what it says is: "Liv, you're being divorced. You  
4 want a divorce; your husband wants a divorce; you're  
5 going to be divorced. You cannot waive the benefit  
6 under the plan." Now, why would Congress not want her  
7 to be able to waive it? Why?

8           MR. LEVY: I don't think the issue -- I  
9 mean, a lot depends on the wording.

10           JUSTICE BREYER: I can understand an anti-  
11 alienation provision. That's some guy who is going to  
12 come along and grab this money when you want to take  
13 care of a widow, and you want to take care -- but -- but  
14 this isn't that. It's just -- she just wants to waive  
15 it; she doesn't want it. That's the widow herself.  
16 Okay, so why would Congress --

17           MR. LEVY: Two things: One, we think that  
18 purpose does apply here. I mean, the point of  
19 anti-alienation provision is to guard against the  
20 temptation to trade off future pension benefits in  
21 exchange for immediate economic gain or advantage.  
22 That's exactly what Liv did in the divorce. She got the  
23 Mercedes, she got other things. She traded off her  
24 pension benefits, and we think that falls squarely  
25 within the purpose of the anti-alienation provision.

1 JUSTICE BREYER: I see.

2 MR. LEVY: That's the first and, I think,  
3 most important answer.

4 The other thing is that we are not saying --  
5 our position today does not mean that divorcing parties  
6 can -- can be foreclosed from eliminating the death  
7 benefits -- the death benefits for the designated  
8 beneficiary; but they have to follow procedures that  
9 comply with ERISA. The most -- the most direct and  
10 simplest one is the change of beneficiary form. William  
11 didn't do that here. That's undisputed. They could  
12 have entered into a QDRO, and that would have gone --  
13 the money would have gone to Liv as an alternate payee.  
14 That would have taken the benefits, consistent with  
15 ERISA, away from Liv and given them to Kari. They could  
16 have done that.

17 CHIEF JUSTICE ROBERTS: Well, why -- why do  
18 they have to worry about that? The simplest thing is  
19 for the participant to change the designation, and if  
20 there's a divorce, the divorcee is no longer a spouse  
21 under the terms of the plan, so he is free to do that.  
22 It seems odd to me that they have this elaborate QDRO  
23 provision when it shouldn't be necessary.

24 MR. LEVY: It's not necessary. It's simply  
25 another alternative, but I agree with you, Mr. Chief

1 Justice, that the most direct and straightforward --

2 CHIEF JUSTICE ROBERTS: But another  
3 alternative is that all you can -- you can cross out  
4 this name and put in another, or you can go to court,  
5 get this, qualify it as a QDRO, file it with the plan.  
6 I mean, why would anybody do that?

7 MR. LEVY: They wouldn't have to.

8 Now, let me turn to this issue about what is  
9 an assignment or alienation when we disagree with our  
10 friends from the Solicitor General's Office. We think  
11 Liv's purported waiver here was an assignment or  
12 alienation within the IRS definition. The IRS  
13 regulation is reprinted at page 15 of the body of the  
14 red brief, and it provides that assignment or alienation  
15 is defined to include any direct or indirect arrangement  
16 whereby a party acquires an interest from the  
17 beneficiary. And I've left out the not -- the  
18 not-critical language for present purposes. So it talks  
19 about an indirect arrangement whereby a party acquires  
20 an interest from the beneficiary.

21 Now, the government argues that that  
22 definition requires that the beneficiary, first, must  
23 direct the transfer and, second, it must direct it to a  
24 third party. The government's argument rests not on the  
25 language of the regulation that I just read but on a



1 legal argument that this is what terms meant at common  
2 law. But that position simply can't be squared with the  
3 language of the regulation. As I just said, the  
4 regulation includes an indirect arrangement within the  
5 definition of "assignment or alienation."

6 JUSTICE SOUTER: But isn't -- isn't the  
7 problem that it must be an indirect arrangement, and  
8 what you are arguing for here is an indirect effect.  
9 And it has that indirect effect on your reasoning  
10 because of the -- of the waiver and because of probate  
11 law. And it seems to me, as I read the -- the IRS reg,  
12 the "arrangement" that it's referring to is an  
13 arrangement which in and of itself would -- would effect  
14 the transfer. And that is not the case here.

15 MR. LEVY: Well, we think it is. The  
16 arrangement here effected transfer to the estate under  
17 the plan default rule. The estate was next in line. So  
18 if this is a relinquishment -- I don't want to use the  
19 word "waiver." But if this is a relinquishment of her  
20 interest, then it went to the estate.

21 That's what the plan provides, but it's not  
22 just the phrase "indirect arrangement" that we rely on,  
23 Justice Souter. It's also the phrase "a party  
24 acquirer." It doesn't say a party acquirer at or by the  
25 direction of the beneficiary. -

1 JUSTICE SCALIA: Well, that's -- that's the  
2 point that troubles me. It's -- it's the "acquirer's"  
3 language.

4 Does -- does the person who -- who receives  
5 the -- the refused benefit acquire it from the other  
6 person? He certainly doesn't do so for Federal tax  
7 purposes.

8 MR. LEVY: Well, that's back to the  
9 disclaimer, Justice Scalia.

10 JUSTICE SOUTER: The only person who  
11 acquires it -- the only entity that acquires it is the  
12 estate.

13 MR. LEVY: Yes, that's right under the  
14 default rule. And if the default rule had a -- if the  
15 plan had a different default rule, under the default  
16 rule maybe it goes to the children.

17 JUSTICE SCALIA: Does he acquire it from a  
18 participant or beneficiary?

19 MR. LEVY: He acquires it from the  
20 beneficiary list.

21 JUSTICE SCALIA: I thought the -- the notion  
22 is it's as though the -- it's as though the devise to  
23 the person refusing it had never occurred. I mean,  
24 there is -- there is no gift tax payable or anything  
25 else.

1                   MR. LEVY: Well, there is no gift tax  
2 payable if it's a qualified disclaimer, and it won't be  
3 in a divorce case because there will be consideration  
4 and that prevents a qualified disclaimer. So that's a  
5 different situation, but the word "acquired" doesn't  
6 mean --

7                   JUSTICE GINSBURG: You made the contention  
8 now -- and I think you have it in your brief -- that if  
9 you get something in return for a disclaimer, then the  
10 disclaimer is not effected. That it's effected only if  
11 you receive nothing in return. And what -- what is the  
12 source of that contention that you can't disclaim if you  
13 get something in return?

14                   MR. LEVY: The -- it's -- under the Gift Tax  
15 Code Justice Ginsburg, section 2518 defines a qualified  
16 disclaimer, which means you don't pay gift tax on it.  
17 It's as if the interest had never been transferred. And  
18 one of the conditions of that qualified disclaimer is  
19 that the disclaimant not accept any interest or any of  
20 its benefits. So if there is consideration, if the  
21 person is in a better position than they would have been  
22 because they received consideration, then it won't be a  
23 qualified disclaimer for gift tax purposes.

24                   But there won't ever be a disqualified  
25 disclaimer for that reason in a -- in the divorce

1 context. It simply --

2 JUSTICE BREYER: Is the -- is the wife --  
3 I'm thinking of the Chief Justice's question, too. If  
4 your -- the woman is Wife X, and her ex has a pension.  
5 Doesn't something vest there? She is in California.  
6 Doesn't she have some vested right to some of that  
7 pension?

8 MR. LEVY: In her own pension?

9 JUSTICE BREYER: Suppose she's married for  
10 40 years to Joe Smith, Joe Smith earns a pension and  
11 then he wants a divorce. Doesn't she have some right to  
12 some of that money.

13 MR. LEVY: Well, I think under section 1055  
14 there's a right to different annuities. That that was a  
15 new provision in the Retirement Equity Act in 1984.

16 JUSTICE BREYER: Does she get some of the  
17 money he saved?

18 MR. LEVY: Yes, she's entitled to it.

19 JUSTICE BREYER: So it's not exactly that  
20 you could have just changed the beneficiary. If you  
21 just changed the beneficiary, you'd have to give her  
22 something else.

23 MR. LEVY: After the divorce she is not  
24 entitled. It's only a spouse who is entitled to the  
25 benefits .

1 JUSTICE BREYER: But in the divorce  
2 proceeding she's going to get some of the money, which  
3 is now just the inverse point, to which she is entitled.  
4 So obviously she will get something, but she's entitled  
5 to it.

6 MR. LEVY: Right, I think that's right.

7 CHIEF JUSTICE ROBERTS: Not, not obviously.  
8 I mean it depends what the divorce is. She got the  
9 Mercedes, right? I mean, she can get -- it depends on  
10 the divorce arrangement, not anything under ERISA, once  
11 she is a nonspouse.

12 MR. LEVY: Once she is a nonspouse she is no  
13 longer entitled to those benefits under ERISA section  
14 1055.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
16 Mr. Furlow, you have three minutes  
17 remaining.

18 REBUTTAL ARGUMENT BY DAVID A. FURLOW  
19 ON BEHALF OF THE PETITIONERS

20 MR. FURLOW: Thank you, Your Honor. Chief  
21 Justice Roberts, you were asking about the evidence  
22 earlier with respect to the possession in DuPont office  
23 own files of the divorce decree and of the notice that  
24 was given saying: Please don't pay leave; she's already  
25 waived all of her benefits. You will find that on page

1 76 of the joint appendix in the sworn amended affidavit  
2 of Mary Dineen, the plan's administrator, specifically  
3 at paragraph 20, page 76, where she says in bold: "Upon  
4 its receipt" -- meaning the April 26, 2001, letter from  
5 Kari Kennedy Duckworth -- "Exhibit No. 1 was maintained  
6 as a record of DuPont with regard to the SIP account of  
7 William Patrick Kennedy." That's joint appendix 76,  
8 paragraph 20. It was within the regular course of  
9 business of DuPont to maintain a copy of this letter  
10 with other DuPont letters relating to Mr. Kennedy's SIP  
11 account at the time the letter was received from its  
12 sender. The letter is then attached as the next exhibit  
13 that follows on. That would be about pages 78 to 79.  
14 And there it says the divorce decree was attached.

15 Make no mistake: DuPont had that divorce  
16 decree and could see the knowing, voluntary waiver and  
17 had it well in advance of making its decision to pay  
18 money to a woman who went off to Norway and paid her  
19 when she was over there, where there was no prospect of  
20 grabbing it back and turning it over to the executor.

21 CHIEF JUSTICE ROBERTS: They look at it and  
22 say, is this a QDRO? And if no, then they go back to  
23 the other provision, I guess on page 21a in the red  
24 brief, and say: If it's not a QDRO, ignore it.

25 MR. FURLOW: Well, Your Honor, it's more

1 interesting than that, actually, in that if you look to  
2 page 68 of the joint appendix you'll see Mary Dineen,  
3 the administrator, was saying, quote: "Had Liv Kennedy  
4 disclaimed her designation of the beneficiary of  
5 Mr. Kennedy's SIP, that declination or disclaimer or a  
6 copy would have been included in the beneficiary  
7 designation file." So they're taking disclaimers or  
8 waivers. They're taking declinations, which is a fancy  
9 Latin way of saying waiver. They've got them in their  
10 files. They're acting on it. But here they decided to  
11 pay the money to the person who has voluntarily waived,  
12 knowing the issue, not asking their in-house counsel at  
13 no cost to make an examination here. And why? So that  
14 they can later take this plan documents rule and take it  
15 all the way to this court. But --

16 JUSTICE SCALIA: Was this waiver only part  
17 of the divorce degree? Do you agree with your friend on  
18 that point?

19 MR. FURLOW: Well, this waiver was the part  
20 in which Liv Kennedy waived all right so that he  
21 retained all of his --

22 JUSTICE SCALIA: That's not separate and  
23 apart from the divorce decree.

24 MR. FURLOW: It was not separate and apart.  
25 In fact, when they were transferring benefits they knew

1 what to do and they used the waiver to transfer part of  
2 the benefits.

3           It is interesting, Your Honors, that they  
4 talked about the plan documents rule, but their own  
5 documentation says, their own plan says, that the only  
6 plan documents -- and I quoted it here on page 25 of our  
7 reply brief -- "The official plan documents are the E.I.  
8 DuPont de Nemours & Company savings and investment plan  
9 and the trust agreement," not beneficiary designations.  
10 So they give no notice.

11           CHIEF JUSTICE ROBERTS: Do you have anything  
12 more to say on the plan document, the plan document  
13 issue than what you've said here.

14           MR. FURLOW: Oh, I could come up with lots  
15 of things. That's a bad idea.

16           CHIEF JUSTICE ROBERTS: Okay. Thank you,  
17 counsel. The case is submitted.

18           (Whereupon, at 1:56 p.m., the case in the  
19 above-entitled matter was submitted.)

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