IN THE SUPREME COURT OF THE UNITED STATES

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DONNA RAE EGELHOFF, :

Petitioner :

v. : No. 99-1529

SAMANTHA EGELHOFF, A MINOR, BY :

AND THROUGH HER NATURAL :

PARENT KATE BREINER, AND DAVID :

EGELHOFF :

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Washington, D.C.

Wednesday, November 8, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

WILLIAM J. KILBERG, ESQ., Washington, D.C.; on behalf of the Petitioner.

BARBARA J. McDOWELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1529, Donna Rae Egelhoff v. Samantha Egelhoff.

Mr. Kilberg.

ORAL ARGUMENT OF WILLIAM J. KILBERG

ON BEHALF OF THE PETITIONER

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

Washington State's divorce revocation law strikes at the very heart of ERISA's comprehensive regulatory scheme for employee benefit plans. It does so by purporting to revoke ERISA plan beneficiary designations upon divorce.

We submit that the Washington statute is preempted by ERISA on two independent grounds. First, because it relates to an ERISA plan within the meaning of ERISA's express preemption provision, section 514(a) and second, because it conflicts with ERISA's other provisions.

Turning first to section 514, this Court has made clear that a State law relates to an employee benefit plan if it mandates employee benefit structures or their administration or binds plan administrators to particular

choices. Washington's divorce revocation statute has precisely that forbidden effect.

As applied by the courts below, the statute invalidates the beneficiary determination and benefit payment scheme provided for by the terms of the ERISA plans here and instead mandates payment according to a different State-imposed scheme. Moreover, the determination of beneficiary status, and the payment of plan benefits, lie at the very heart of ERISA's concerns.

Indeed, the determination whether particular alleged beneficiaries are entitled to obtain plan benefits is so crucial to the entire Federal scheme created by ERISA that such benefits claims are deemed to arise under Federal law under this Court's decision in Metropolitan Life v. Taylor even if they purport to raise only State law claims.

QUESTION: Of course, what you say applies exactly similarly, I take it, to a State statute that would say, if A murders B, A shall be treated as having predeceased B for purposes of inheriting from B, or in a word, A can't inherit from B. All that you've said would apply to that similarly, so what's the difference?

MR. KILBERG: If that were a State law, then it would be preempted.

QUESTION: In other words, you're saying that

basically this ERISA preempts all of what you call the slayer statutes, I guess, that traditionally have said you can't inherit from a person you murder.

MR. KILBERG: It preempts the slayer statutes. However, the slayer rule may very well be incorporated into ERISA, because the slayer rule was extant at the time of ERISA's passage in 1974, was a common law rule, and had been applied in numerous cases, Federal cases with regard to a death benefit statute, so it was a gloss on the law.

QUESTION: All right. So does it also incorporate statutes where people die simultaneously? There are a complicated set of State rules as to how you treat what assets for purposes of inheritance.

MR. KILBERG: It may encompass simultaneous death, a simultaneous death rule.

QUESTION: All right, so if it -- now we have it interpreting a considerable area of State probate law. Is there any reason why Congress would have wanted ERISA to preempt a traditionally State-regulated subject like probate and -- you know, at least where it doesn't interfere with some important policy, or -- I don't know. I mean, you see the -- that's what I want you to address.

MR. KILBERG: I can imagine where you're headed, Justice Breyer. Yes, the answer, of course it preempts those laws. There's no reason to believe that it doesn't.

We're talking about employee benefit plans. There's nothing more central to an employee benefit plan than benefits, how it pays them, to whom it pays them, and ERISA has specific provisions with regard to the exception for State law with -- in the context of the payment employee benefit plans in a divorce situation.

QUESTION: I'm not sure about you -- how you distinguish the slayer statute. You say it's been around, it's part of the common law, it's part of the background. Why -- suppose the case we have here has been around a long time.

MR. KILBERG: Well, the difference, Justice Kennedy, is that the slayer -- the slayer rule was part of the common law, was part of the common law of trust at the time that ERISA was enacted, and it may be presumed that the Congress, seeing that as a backdrop, incorporated, impliedly incorporated the slayer rule into ERISA.

QUESTION: But not simultaneous death statutes, because they vary from State to State, or --

MR. KILBERG: Well, I'm not sure about simultaneous death statutes, quite frankly. They may, too, have been incorporated, but with regard to a divorce revocation rule, that was not the state of the common law in 1974. Indeed, it's not the state of the law now. Very few States, fewer than a third of the States have any sort

of divorce revocation rule. Only 10 States have developed --

QUESTION: May I just -- is your point that it was the law before ERISA was passed, or that it's part of the common law.

MR. KILBERG: That's correct.

QUESTION: I mean, which is true? In other words, supposing this statute had been passed before ERISA. Would that make a difference?

MR. KILBERG: No, not the statute. If -- if the divorce revocation rule had been commonly accepted in the common law at the time ERISA was passed and had been used as a gloss --

QUESTION: So your point is that --

MR. KILBERG: -- on similar Federal statutes --

QUESTION: Your point is, the other was a common law rule, not the timing. The timing is --

MR. KILBERG: That's correct. Well, it's really both, Justice Stevens. It is that it is a common law rule and it was a common law rule at the time of ERISA's passage in 1974.

QUESTION: Yes, but you've said that if there had been a statute which is in effect that wouldn't have done the trick.

MR. KILBERG: That's correct.

QUESTION: Well, when you say a common law rule, we're dealing with a country with 50 different States. I mean, don't you think the law might have been different in some of those States?

MR. KILBERG: Not with regard to the slayer rule, in fact, and indeed what is important here is that the slayer rule had been applied in Federal cases as a gloss to death benefit statutes, and so one can assume that the Congress, or one can rule that the Congress had impliedly incorporated that common law rule into ERISA.

QUESTION: Even in the face of a provision in ERISA that says benefits have to be paid to the named beneficiary?

MR. KILBERG: With regard to the slayer rule, if it had been incorporated into ERISA, then it would be incorporated as an implied exception.

QUESTION: What is the mechanics of the working of a plan? Supposing that you have a designated beneficiary, and the insurance company or whoever goes and pays -- goes on and pays out to the beneficiary. In fact, the beneficiary killed someone and he's disqualified from inheriting. If he's still the named beneficiary, is the insurance company responsible for that sort of an error?

MR. KILBERG: Yes, they would be responsible under those circumstances. The plan administrator has to

make a decision as to whether a benefit is to be paid out. The plan administrator does so by looking both to ERISA and to the terms of the plan.

QUESTION: Well, does he have to look into a whole bunch of factual matters like, you know, whether this beneficiary might be disqualified by some State, State statute like the slayer's --

MR. KILBERG: No. No. He would not look at State law. He would not have to look at State rules unless, not finding the answer in his plan, and not finding the answer in ERISA he may choose to look to State law, but --

QUESTION: It seems to me that would be a much narrower ground for ruling in your favor here, rather than these general assertions about the incorporation in the common law, that perhaps if a State statute actually directly affects the designation of a beneficiary, the way the Washington statute does, it may be different than the slayer statute.

MR. KILBERG: But we believe that State law, Mr. Chief Justice, that a State law like this, which is essentially a rule of decision for employee benefit plan, is preempted both as a matter of express preemption and as a matter of conflict preemption under ERISA.

QUESTION: But you agree that your argument is

stronger -- let's assume that the statute does not incorporate slayer statutes, or simultaneous death statutes --

MR. KILBERG: Yes.

QUESTION: -- or simultaneous death rules. Would you agree that your argument is much stronger than if you rely on conflict preemption than if you rely on statutory relating-to preemption?

MR. KILBERG: I believe it's equally strong.

QUESTION: Well, if it's a flat conflict preemption, it seems to me relatively easy for us to say, look, the statute says, beneficiaries or plans designate the --

MR. KILBERG: Participants.

QUESTION: -- participants or plans designate beneficiaries. This says they don't. Clear conflict.

But if you get to relating-to preemption, which we do not find it easy to understand, then it seems to me the force of the argument for anomalous results which my colleagues were making is simply a stronger argument, because the concept of preemption is a comparatively weaker concept.

MR. KILBERG: Well, obviously, we believe that there is both conflict preemption and express preemption here, and the Court can certainly, as it did in Boggs, not

reach the question of express preemption and go off on conflict preemption, but --

QUESTION: Well, except your -- I think the point being made is that your preemption is stronger if you're willing to swallow the bitter pill of not including the slayer statutes, but once you say the slayer statutes don't pose any conflict, it's hard to see why they pose any more of a conflict than -- or, excuse me, any less of a conflict than the statute here.

MR. KILBERG: In Ridgeway v. Ridgeway, which was a decision of this Court involving the Servicemen's Group Life Insurance Act, the Court noted the slayer rule and determined that it did not have to deal with it in the context of that case and that it was an extreme example. The Court certainly is free to do the same in this context and that, I believe, was also an express preemption.

QUESTION: Mr. Kilberg --

QUESTION: But is -- is the answer that you gave in talking about the administrative burden -- my understanding, and correct me if I'm not right, that this statute says that if a trustee of a plan doesn't know about this problem, he doesn't have to pay, and if he does know about the problem, he doesn't have to pay until the State courts resolve it, and if that isn't good enough, he can opt out of the whole thing just by putting a sentence

in the plan that says, I opt out, in effect.

So where is the administrative burden, and is it the same -- they also say there are 47 other States that have similar statutes, and so I'm trying to get an idea for what this administrative burden is.

MR. KILBERG: Oh, indeed, as we point out in our brief, I believe it's at footnote 8 on page 20 of petitioner's brief.

QUESTION: Yes.

MR. KILBERG: It's also described in amicus briefs for the National Coordinating Committee and in the Western Conference of Teamsters. In fact, the State rules vary dramatically. Most States do not have a divorce revocation rule at all.

Most States, more than two-thirds of the States, the rule is simply that you go with the main beneficiary. It is in a handful of States that you have divorce revocation rules, and they vary among themselves, so there is that burden that plaintiffs would have to deal with.

Moreover, the opt-out provision that you're referring to in this State law merely adds another layer of complexity. Now, in order to opt out you have to meet yet another State standard, so at the end of the day --

QUESTION: Which is?

MR. KILBERG: Well, which is that you have to

specifically opt out, and you have to opt out in the manner in which the State tells you you have to opt out.

QUESTION: And you may not know which State is the State that will govern.

MR. KILBERG: That's correct, Justice Ginsburg.

QUESTION: But before we get into that, I'm still a little confused on the nature of the common law that we're talking about. As I understand you, Mr. Kilberg, you are not talking about the common law of California or Massachusetts or anything.

MR. KILBERG: That's correct.

QUESTION: You're talking -- and you're not talking about the pre-Erie general common law, either. You're talking about what Judge Friendly called, in praise of Erie and the new Federal common law. That is, Federal common law that fills in the interstices of Federal statute, so you would not be incorporating any particular State's slayer rule.

MR. KILBERG: That's correct.

QUESTION: But it would be a Federal, a true Federal common law rule.

MR. KILBERG: That's correct.

QUESTION: And that with all Federal statutes, or most Federal statutes, there will be a penumbral area, and what would fill that in would not be the law of any

particular -- common law of any particular State, but Federal common law.

MR. KILBERG: That's correct. I'm talking about the common law of trusts, Federal common law, which in prior decisions of this Court has been understood to apply to ERISA but, more importantly, or as importantly --

QUESTION: I mean, if there is such a Federal common law I suppose we could invent a -- you know, the same spousal substitution rule that the State has done by statute here. I mean, if there is -- if we have that common law power to say, fill in the interstices in statutes --

MR. KILBERG: I'm afraid not, Justice Scalia.

QUESTION: No?

MR. KILBERG: I was moving on from Justice Ginsburg's question to distinguish between Federal common law which is incorporated into a statute, because it is the common law against which the Congress legislates, which is what I would be referring to with regard to the slayer rule, and that would be the common law in extant in 1974 that had been applied in other Federal cases to other Federal death benefit statutes.

There is also a notion that if a statute does not answer a question, if there are interstices that the Court -- a court may apply a Federal common law rule, but

that's not the case here. Here, ERISA speaks specifically to the issue at hand, and I believe --

QUESTION: Well, of course, that's the question in the case, whether it does.

But suppose there's an ambiguity in the designation, that there's a State rule of law that would resolve, would the trust look to the State rule of law or would it look to some Federal common law rule about ambiguities. For example, say the beneficiary named my son Joseph, and it turns out that the -- that he has -- he gave the middle name Joseph to four different sons, and how would you go about resolving that? Would you look to a State rule or a Federal rule?

MR. KILBERG: It looked -- it would be the plan administrator's choice. It would not be a decision under State law, and the plan administrator would look to see if there were any guidance in the plan, in Federal common law, and then the plan --

QUESTION: He would confine his inquiry entirely to the terms of the plan itself?

MR. KILBERG: He -- no. He may -- in making a decision he may, of course, look to State law if he chooses.

QUESTION: Mr. Kilberg, the Washington supreme court seems to have analyzed the decedent's life insurance

policy separately from the pension plan in doing the preemption analysis. Do we have to consider those two plans separately, or do we apply the same analysis to both of them?

MR. KILBERG: I believe we can apply -- the Court can apply the same analysis for both of them with one exception. One of our arguments is that there is a conflict with ERISA's antialienation provision. That provision, which is found in section 206 of the statute, applies only to pension plans, but all of our other arguments would apply to both welfare and pension plans.

If the Court has no further questions, I would like to reserve the remainder --

QUESTION: Very well, Mr. Kilberg.

Ms. McDowell, we'll hear from you.

ORAL ARGUMENT OF BARBARA B. McDOWELL

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. McDOWELL: Mr. Chief Justice, and may it please the Court:

The Washington statute relates to employee benefit plans within the meaning of ERISA's express preemption provision and also conflicts with several specific provisions with ERISA. Accordingly, whether viewed as a matter of express preemption, conflict

preemption, or appeal preemption, the Washington statute in its application to ERISA plans is preempted.

QUESTION: Suppose, Ms. McDowell, you have a trustee under an ERISA plan who has a designated beneficiary and so forth and perhaps, you know, ambiguity as suggested by Justice -- something else -- and then you have simply a trust company that has exactly the same provisions but it's not an ERISA plan. Are -- does -- are their duties different? Say when you come to an ambiguity -- you're both sitting in Seattle.

MS. McDOWELL: As a practical matter, they may do essentially the same thing interpreting the terms of the plan, or whatever instrument governs it. The key question is what happens after the plan makes the decision in the ERISA context. That decision is subject to review and an action under ERISA section 502(a). In that sort of action the Federal court would apply common law.

QUESTION: So -- but would the Federal common law likely be different from the State of Washington's law, or is it just up for grabs, kind of?

MS. McDOWELL: In many instances the appropriate rule would presumably be for the plan administrator of the ERISA plan to look to State law for guidance, for example, in determining who was a spouse, who was a child, et cetera. It would only make sense for the ERISA plan to

essentially require looking to the relevant State law that creates the relationship. That's not so, however, where the State law is one that conflicts with the provisions of an ERISA plan such as the one here, which --

QUESTION: May I ask two questions? First, do you agree that the State law here is a law of general applicability?

MS. McDOWELL: Yes, it is. It refers to insurance, but it's more general.

QUESTION: My second question is, in weighing the various interests at stake here, should we give any weight at all to the interests in carrying out the wishes of the former employee who -- whose assets are being distributed?

MS. McDOWELL: No, we shouldn't

QUESTION: We shouldn't.

MS. McDOWELL: In the first place, we don't know his wishes. In the second place --

QUESTION: Well, we know he presumably was advised by a lawyer, who was a State lawyer who told him what the State rule of law was, and presumably he was told he could rely on the fact that he didn't have to change his designation for his sons to get the property. Isn't that the normal thing you would expect a divorce lawyer in that State to tell him?

MS. McDOWELL: This individual in fact was not represented. It was a pro se divorce. One would assume that a participant in an ERISA plan would look at a variety of sources, most specifically including his summary plan description, which in this case made quite clear that the only way to change a beneficiary is to file the required form, that such documents as divorce decrees would not --

QUESTION: Of course, unless as a matter of law, there is a rule of law that automatically changed the -- such as the slayer rule. Don't you think there's a reasonable probability here that the plan participant thought the money would not go to his divorced wife?

MS. McDOWELL: I don't think there's any way to say what the plan participant intended at this point.

QUESTION: Because normally in the divorce settlement -- they did have a divorce settlement -- don't they provide otherwise? If there's a specific intent to save that particular asset for the divorced wife, isn't that normally set forth in the agreement providing for the property settlement?

MS. McDOWELL: Well, certainly there is the possibility under ERISA to obtain a qualified domestic relations order. In this case the children's interests could have been protected if such an order had been

obtained at any point in the process since the first wife's divorce. That wasn't done.

QUESTION: Your basic -- you think he really wanted the money to go to his divorced wife. That's your suggestion.

MS. McDOWELL: My point is, we don't know, and an ERISA plan --

QUESTION: What about ordinary common sense, that a person who just divorces his wife, gives her half the property, might prefer that the other half of the property go to his children, rather than this wife, who's now going to get more than her fair share, and whom he's just divorced?

I mean, suppose I thought the common sense of it in my knowledge of human nature is that people would prefer their half share to go to their children rather than the just-divorced wife.

MS. McDOWELL: Well, that's a sensible approach, and ERISA plans could adopt that approach --

QUESTION: And is there some reason -- all right, is there any -- so then is there any reason to think that Congress wouldn't have wanted State statutes that don't interfere that much with anything and in fact embody that common sense notion, like you wouldn't like your property to go to the guy who kills you. You know,

that's another common sense notion.

QUESTION: Ms. McDowell, that common sense approach is disagreed with by two-thirds of the States, as I understand it, right? Two-thirds of the States don't think that that's common sense and don't provide for automatic substitution in the event of a divorce.

MS. McDOWELL: That's correct, and in many instances --

QUESTION: So it's not that much common sense, and I --

(Laughter.)

QUESTION: And I assume that any -- that once you have a statute like ERISA, which avowedly supersedes State law, if you're dealing with a lawyer who doesn't consult ERISA and knows nothing about ERISA and gives you your advice only on the basis of State law, you're going to get a lot of bad advice.

MS. McDOWELL: And you might in fact have a malpractice action.

QUESTION: Mine was actually a question. Mine was actually a question. I wasn't just making a comment.

(Laughter.)

QUESTION: I wanted you to respond to the notion that State statutes, probate -- you know, that traditional State area that embody that kind of a notion, what I'd

call a notion of trying to carry out the wishes of the testator, or whoever, that those are not preempted unless they impose a real burden upon the ERISA plan.

MS. McDOWELL: Well, you began your question with a reference to what Congress would have intended here, and we do know that Congress intended to permit the nationally uniform administration of ERISA plans. That's why it included an express preemption provision.

QUESTION: Ms. McDowell, I would like to go back to your prior concession, or maybe I shouldn't use the word concession, but is it not within the realm of the possible that a man who has just divorced a woman, he's tired of her, he's used her up, he's thrown her over, he's off with a young thing but not married, and he's feeling tremendous remorse, so he says, I'm going to leave that pension plan alone.

(Laughter.)

MS. McDOWELL: Well, that's true, and perhaps the more common situation is where the divorced spouse has custody of the couple's children. In that case, it would probably be a matter of relative indifference to the plan participant whether the money went to the spouse directly or the children, or --

QUESTION: Isn't it even more likely, instead of this tender-hearted --

(Laughter.)

QUESTION: -- divorced husband, isn't it more likely that the wife, in striking her deal for the divorce settlement, having an ERISA plan, knowing there's an ERISA plan which names her as the beneficiary, assumes that that's her money?

MS. McDOWELL: She may well do so, although she would know that at the time of their divorce the -- her spouse would be free to --

QUESTION: And knowing that ERISA supersedes State law, as well --

(Laughter.)

MS. McDOWELL: With respect to express conflict preemption there are several provisions of ERISA that we submit conflict with the Washington statute. One is the provision that requires that plans be administered in accordance with plan documents. The plan documents, in this case, require payment to the beneficiary designated by the plan participant, rather than by somebody designated under State law.

It also conflicts with ERISA's definition of beneficiary as the person designated by the participant or under the terms of the plan. If one looks to the participant's designation and the terms of the plan, petitioner here is the proper beneficiary, not respondent.

With respect to the pension plan, the Washington statute also conflicts with ERISA's antialienation provision, which prohibits the assignment or alienation of plan benefits. This statute affects an assignment or alienation of benefits by transferring a right to benefits from the petitioner's former spouse.

QUESTION: So your view of the murder situation statutes are all preempted, too.

MS. McDOWELL: Well, we would submit that the slayer statutes and the underlying slayer rule and the Federal common law reflect a public policy limitation that ERISA plans would not be free to --

QUESTION: Despite the express preemption provisions on which you rely here.

MS. McDOWELL: That's correct.

If there are no further --

QUESTION: What is your position if in a divorce decree the decree sets forth that the wife agrees to relinquish her interest in the pension plan and that the husband will name the children as beneficiary, and they both agree to that?

MS. McDOWELL: And the husband doesn't do it?

QUESTION: Right, and then you have this -- then you have this --

MS. McDOWELL: Our position is that under ERISA

one would continue to enforce the terms of the plan, just as in this case.

QUESTION: And the children could not bring a suit, because that would be preempted? The suit would be preempted as well, I take it.

MS. McDOWELL: There may be a separate sort of action in that situation under State law.

QUESTION: Why couldn't that --

QUESTION: Well, I thought the preemption of the plan --

QUESTION: -- be a QDRO, though? In the example Justice --

MS. McDOWELL: Yes, you're correct. It might be recognized as a QDRO --

QUESTION: -- Kennedy gave you, why isn't that covered by the QDRO section --

QUESTION: Can --

QUESTION: -- if it comes up in a divorce matter?

MS. McDOWELL: That's correct, it could constitute a QDRO, depending on whether it meets the procedural requirements.

QUESTION: But the QDRO has to be forwarded to the plan administrator, I take it?

MS. McDOWELL: That's correct, and presumably

the children with an interest in the benefits would do that.

Thank you.

QUESTION: Thank you, Ms. McDowell.

Mr. Goldstein, we'll hear from you.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE RESPONDENTS

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

I will turn quickly to the mistaken notion that the Washington statute at issue in this case conflicts with ERISA, but I want to explain from the outset exactly what this statute does and why it does it.

Washington, like a number of States, as a number of the questions have reflected, recognizes the unsurprising proposition and, Justice Scalia, it is recognized by an increasing number of States very rapidly, that when two people divorce they try to give each other less money, not more.

Particularly relevant here, the designation of one spouse as a death beneficiary, whether in a will, and there are will statutes in 49 out of the 50 States, or in some other asset, is premised on the idea that at the time of death the couple will still be married.

Applied to this case, and I think it very

important that we talk about the facts of this case, the statute rests on the idea that when petitioner sought and received a divorce from David Egelhoff, and after they entered a very detailed divorce decree, to the level of, he got the tan area rug and she got the Exercycle, that he did not walk out of the courthouse thinking, oh, and I want her to get the pension and the life insurance, too.

QUESTION: Maybe she thought she got it.

MR. GOLDSTEIN: That is --

QUESTION: Maybe she had a good lawyer who read ERISA --

(Laughter.)

QUESTION: -- and said that, you know, there is this statute, but it ain't going to affect whether you get your ERISA payment. You have that one. Now, maybe he doesn't know that, but boy, we're walking away with a good settlement here.

MR. GOLDSTEIN: Fortunately --

QUESTION: You really can't predict what the expectations were. It's hard to do.

MR. GOLDSTEIN: With respect, we can here for two reasons. First, the divorce decree itself explicitly says that he gets the pension. It says so, and there's no doubt that that was the parties' intent.

And second, there is a declaration

uncontradicted in the record that she basically went around telling people that David would roll over in his grave at the notion that she was going to get this money.

QUESTION: Well, just addressing the first, the fact that the husband has the property interest means that he simply has the power to designate the beneficiary. That's quite consistent with his wanting to let her remain the beneficiary.

MR. GOLDSTEIN: With respect, in terms of just what the parties understood would happen to the money, and in particular, Justice Scalia, what Donna's expectation was, he got the pension benefits. The death benefit is the entirety of the pension benefit, and she could not have an expectation that she would ever get the money, because she knows that he could change it the next day.

Moreover, this is a community property State. They had to divide up the marital property, which included the value of the pension at the time of divorce, and she had to get equivalent assets at the time of divorce. This is nothing more than a double recovery in the purest sense.

QUESTION: Well, maybe it is, but I guess the point that I don't seem to grasp is why it makes a dime's worth of difference.

We've got a statute. If the statute means what

they say it does, you lose. If it doesn't, maybe you win, but the particular expectations of the parties in a particular divorce, even if there's an evidentiary basis for it, seems to me irrelevant.

MR. GOLDSTEIN: It is relevant in the sense -- in two senses, Justice Souter. The first is that I'm trying to explain to you the rationale and why it is so rational that Washington did what it did, and second, it goes to the question now speaking to the statute, what the standard is for finding a conflict and finding preemption, and that is that in this area, from cases like Hisquidero on, there must be a clear and manifest conflict.

And now let me turn directly to the notion of whether or not there is a conflict.

QUESTION: Before you do that, can you just clarify -- you said that this is a galloping thing in the States. How many States have these statutes now?

MR. GOLDSTEIN: There are 20 States that have the statute now -- the number has been growing rapidly -- with respect to nonprobate assets. It was --

QUESTION: So the majority of States still do not.

MR. GOLDSTEIN: They do not.

QUESTION: Is this the case: 47 States had divorce revocation when the instrument is a will --

MR. GOLDSTEIN: Exactly.

QUESTION: -- and about 20 have it when divorce revocation is a nonprobate asset, and it's not nonuniform -- that is, the States that have it are copying the Uniform Probate Code, which has such a provision in it? Is that right?

MR. GOLDSTEIN: Yes.

QUESTION: All right. If that is right, do these 20 States all say, or most of them say, like Washington, that if you expressly deny the applicability of a divorce revocation statute, you're home free? Do they all say that?

MR. GOLDSTEIN: They do not --

QUESTION: Some of them? They all say that?

MR. GOLDSTEIN: They do not all say that, but almost all do, because that's in the UPC.

QUESTION: All right. Do almost all of them provide, as Washington does, that if a trustee doesn't know about a conflict among beneficiaries, he needn't pay?

MR. GOLDSTEIN: The majority do.

QUESTION: All right. Do the majority also provide that if the trustee does find out about it he also need not pay until the State courts resolve the matter?

MR. GOLDSTEIN: Yes.

QUESTION: All right.

MR. GOLDSTEIN: Justice Breyer has helpfully just identified three different opt-out provisions that go directly to the question of whether or not there's an actual burden on the plan.

Chief Justice Rehnquist --

QUESTION: Now, is it the case that -- does the preemption provision at issue here say that preemption only occurs when there's an administrative burden on the plan?

MR. GOLDSTEIN: The courts --

QUESTION: Is that the criterion? I mean --

MR. GOLDSTEIN: It is a principal criterion. Whether or not there's an --

QUESTION: Oh, I have no doubt that if there is an administrative burden you will be much more likely to find preemption, but if, on the face of it, there is preemption, does there need to be an administrative burden?

MR. GOLDSTEIN: We do not believe so, and Boggs is an example, that the Court did not reach the question. Four justices of the Court in Justice Breyer's opinion explained that there really wasn't a burden and there wasn't field preemption. The majority said there is conflict preemption here, but it is worth noting that Justice Kennedy's opinion in that case did explain why

there would be real administrative trouble if you recognized nonparticipant interest.

Chief Justice Rehnquist -- so if I could continue for the moment to focus on the practicalities of what happens to an ERISA plan, turn to the specific alleged conflicts with the statute in just a moment.

Chief Justice Rehnquist, you asked how this worked in operation, and I'd like to refer to you -- refer you to the respondent's lodging for a moment. Respondent's lodging at tab 3 has the designation form for the life insurance plan, and it explains that David Egelhoff designated Donna R. Egelhoff, wife -- I apologize. There may be some confusion. This is an 8-1/2 X 11 lodging that may not have come upstairs.

QUESTION: What is the tab that you --

MR. GOLDSTEIN: I'm starting at tab 3, Justice Kennedy.

QUESTION: On this so-called lodging --

MR. GOLDSTEIN: Yes.

QUESTION: -- this isn't part of the joint appendix, apparently.

MR. GOLDSTEIN: That is correct, Justice O'Connor.

QUESTION: And it's not a brief of yours, and by what authority did you file it, if I may ask?

MR. GOLDSTEIN: We conferred with the Clerk's Office and received permission to file a lodging.

Let me explain also that these are materials -- it's particularly important, because this is not something that translates at all well into --

QUESTION: Well, normally things that the parties intend to refer to are incorporated in a joint appendix, and I did not know that we accepted these independently submitted supplemental documents. I couldn't believe it when it came in.

QUESTION: The fact that the Clerk's Office gives you leave to file it doesn't mean that it's a desirable or even a permissible thing to do so far as the Court is concerned.

MR. GOLDSTEIN: That point is well-taken, Mr. Chief Justice. Let me just specify for the benefit of the Court that the documents that I am about to refer to are part of the record.

I understand the point is well-taken that counsel are much preferred at the beginning of the case within the joint appendix to have one consolidated document. It is the case, however, that as the case moves along, for example, after we received the petitioner's brief, other documents become relevant that we want to bring to the Court's attention.

QUESTION: And these are part of the record?

MR. GOLDSTEIN: Yes, Mr. Chief Justice, and so let me just be absolutely clear these are not pedagogical devices, anything outside the record. The two documents I'm going to take you now are in the record of the case. Tab 3 is the designation form, and it says that David designated Donna R. Egelhoff, wife.

The reason I point to it is that when the administrator receives a claim for death benefits it's common ground that he or she pulls out the designation form. Before paying the benefits, he or she must get the death certificate. We have to be sure that the person is dead. That's common sense.

On the death certificate it explains that David Egelhoff died, and on line 14 -- or, excuse me, in cell 14, three lines down, it explains that he was divorced, and that is the sum total of the administrative burden that is put on ERISA plan administrators. They look at the exact same documents.

QUESTION: Death certificates always say whether you're divorced or not?

MR. GOLDSTEIN: So far -- I will not represent to the Court that I have been able to identify every State, but I have not been able to find one that hasn't. There was no easy way of identifying every State's death

certificate, but yes, because they have to notify next-of-kin, and remember as well, Justice Scalia, that when you try to pay on death the survivor annuity required by ERISA you must make the same inquiry. You have to know if the participant was married at the time of death, and so --

QUESTION: But it's not married. I mean, do they put down never married so you know that? You said they must put down divorced.

MR. GOLDSTEIN: The question for the survivor annuity, Justice Ginsburg, is, at the time of death was the person married. That -- and if so, there must be a mandatory --

QUESTION: So it will say -- it will say either married or divorced.

MR. GOLDSTEIN: Exactly. There are two lines in the death certificate. One is married or divorced and the second is, there is, in fact, a surviving spouse, so --

Now, a number of the questions have focused on whether or not there is a conflict with the terms of ERISA. Justice Scalia, you pointed out that it may well be that there would be preemption even if there was no additional burden. This is -- Congress said, this is how it's going to work. Washington can't say anything different.

Justice Souter, earlier you inquired similarly whether or not there might not be conflict preemption, because the statute mandates that you have to pay the benefits to the named beneficiary. The difficulty is that the statute does not say that. The only claimed conflict here is with the term, beneficiary, and with the --

QUESTION: I think I was referring to the definition of beneficiary as being the individual designated by the participant or by the plan, and I thought there was an apparent conflict between that and any statute which in effect superseded that.

MR. GOLDSTEIN: That occurs, with all due respect to my colleagues, because in their briefs there is an ellipsis of an important phrase, and the definition of a beneficiary is -- and I'm going to now refer to 29 U.S.C. 1002 sub (8).

QUESTION: Where do we find it?

MR. GOLDSTEIN: Mr. Chief Justice, it is at the appendix to the petitioner's brief at page 2, and I -- when I refer to statutory section, from henceforth it will always be in that brief.

QUESTION: Page 2a?

MR. GOLDSTEIN: Yes, Justice Scalia. This is 1002, sub (8). The term, beneficiary, means a person designated by a participant or by the terms of an employee

benefit plan who is or may become entitled to a benefit thereunder, and let me explain how Washington law operates here.

Washington law at the time of divorce does not say, if you divorce you are no longer a beneficiary, the money instead goes to the children. It instead says that the designation is ineffective and it is up to the terms of the plan to determine who gets the money, and that's exactly what the children were here. They were persons who may become entitled to a benefit thereunder. They have always been, because the plan specified.

QUESTION: Two things -- excuse me. Two things occur to me. One is, doesn't -- first I guess is, just as a matter of Washington law, the children don't become entitled under the plan. They end up becoming entitled, if they are entitled at all, under the Washington -- under the State law of Washington.

And number 2, would you comment on what I speculated when I read that last phrase, who are or may become entitled. I assumed that that last phrase was referring to, in effect, a contingent designation. You know, to B or a C if B dies first, something like that. C would be, may become entitled. --

MR. GOLDSTEIN: I --

QUESTION: And I thought that was all it was

referring to.

MR. GOLDSTEIN: I understand. I have both points firmly in mind. The first, Washington law does not say that the children become entitled because of the statute. All that Washington law says is that the designation -- it reflects, again, the common-sense understanding that the meaning of the designation -- I mean, it's fairly obvious here, when it says Donna R. Egelhoff, wife, but --

QUESTION: Well, the form is, first becomes disentitled --

MR. GOLDSTEIN: Becomes disentitled, and then --

QUESTION: We agree with that, and isn't that enough for the conflict?

MR. GOLDSTEIN: No, Justice Souter.

QUESTION: Because the participant, or the plan -- I guess the participant in this case -- is designated and the statute says no, that designation is not operative. Isn't that a conflict?

MR. GOLDSTEIN: No. The actual conflict, to make it even more specific, the conflict would have to go, if petitioner's position were accepted, ERISA says, pay the beneficiary, which is correct, absent this special --

QUESTION: Well, ERISA says, sure, but ERISA says, by means of the definition section, pay the

beneficiary, who is the designee either of the participant or of the plan.

MR. GOLDSTEIN: Well, then we come to your second point, because we have, or may become, because it doesn't say the person who is entitled to receive by that -- under the designation or under the plan. It's, who may become.

I agree with you that that is intended to trigger contingent beneficiaries. Our point is that the children are as much contingent beneficiaries in the meaning of that term as is the participant, because --

QUESTION: They are if you first assume there is no conflict and therefore the statute prevails.

MR. GOLDSTEIN: Well, we are looking --

QUESTION: That's -- I mean, that seems to me a circularity in your position.

MR. GOLDSTEIN: I will give you an interpretive aid in trying to decide what it means to be, or may become, and that is that it can't be the case that the children -- let me take you to Boggs.

Justice Kennedy's opinion for the Court in Boggs explained that there are a class of people that ERISA is intended to protect, participants and beneficiaries. Our position is, is that before the death of David, and before the administrator looked at the alternate beneficiary

provisions, the children were protected by ERISA.

They were in the class of people who could bring an action and say, look, you're misadministering plan assets, just as much as Donna could. They are within the class of people that ERISA intended to protect, and so if you are going to call them not beneficiaries, they are excluded from the rest of the statute entirely and they receive none of the protections.

Our understanding is that if Congress wanted to say -- use more limited language than or may become, it could have. It could have said --

QUESTION: Yes, but it's also the case that the -- and I will assume the premise of your argument that there may be a considerable class of individuals who may object to plan administration. It does not follow from that that every one of those individuals in fact gets some money in the pocket at the point of distribution.

MR. GOLDSTEIN: No, but the first class, the group of people who are protected by the statute, are denominated in the statute as beneficiaries.

QUESTION: It seems to me what you're arguing is that it does not pose a conflict with the plan if you require the plan to pay out to a contingent beneficiary instead of to the main beneficiary.

I mean, the mere fact that it's somebody who was

not entitled to it, but would be entitled to it if the person entitled to it weren't around, that's still a conflict, it seems to me. Just because they both are called beneficiaries of some sort, you're still requiring payment not to the beneficiary named.

MR. GOLDSTEIN: Well, Justice Scalia, there are many times when an ERISA plan pays benefits to someone other than a named beneficiary, so we're going to have to find the conflict somewhere else.

ERISA plans pay benefits out under the spousal annuity. ERISA plans pay ERISA benefits out under the QDRO provisions. It is many times not the case that they pay it out directly to the person whose name is on it. In fact, the plan here reserves the right to determine that the individual named is incompetent, and not to pay them then, either.

QUESTION: But the spousal annuity provision, I mean, the spouse at the time of death may not be named, but it's clear on the face of the plan and the accompanying law of ERISA that the spousal annuity goes to the spouse at the time of the beneficiary's death, or --

MR. GOLDSTEIN: Let me deal with what I take to be the premise of your point, which is that a conflict with the terms of the plan would be sufficient to cause preemption, if the plan said, you can't do this, and

second -- so I'll return to that in just a moment, whether or not that would be sufficient to cause ERISA preemption, but let me deal with it on the facts of this case, and it is important to return to the text of the statute again. With the stroke of a pen, you can write into any nonprobate asset, including an ERISA plan, divorce revocation statutes do not apply.

Justice Ginsburg, you asked the petitioner's lawyer, wouldn't there also be the problem you wouldn't know which State law applies. The Attorney General of Washington in her brief at footnote 6 has explained under this statute, you don't have to say, Revised Code 1107010 doesn't apply, Alabama Code, da-da-da. It is, you just say, divorce revocation statutes don't apply.

An earlier question also said, and --

QUESTION: Mr. Goldstein, you said the Washington statute, but there are a number of statutes, and they are various, so it wouldn't obviate the conflicts problem.

MR. GOLDSTEIN: Justice Ginsburg, it would in one sense and potentially not in another. The Court is asked to pass on a particular statute with three safe harbors that Justice Breyer has identified. I'm not representing to you that the same rationale would save all of them.

I think, though, your point goes more particularly to what does the administrator do in a conflict of laws problem? There's the hypothetical, for example, that someone's from Oregon, someone from Washington, someone from Texas. The plan operates in a multi-State arena.

There are two important points. The first is that there is the safe harbor both under the text of ERISA and under this plan -- under this statute, that says, if you have any doubt, don't pay. You don't have to go to court. Just don't do it. Just send a letter to the people who want the money and say to them, come back to us when you have figured it out or a court has told you what to do.

And so in terms of getting to the practicalities, Justice Ginsburg, of how is this going to work for administrators --

QUESTION: Doesn't that conflict with ERISA? I mean, isn't he supposed to pay out the money promptly to the person entitled to it, and you're saying it doesn't conflict with ERISA to tell him to sit on his hands until litigation terminates 2 years hence?

MR. GOLDSTEIN: Justice Scalia, it is frequently the case, in fact, that ERISA plans have some doubt. The Court discussed probably the most obvious cases, slayer

statutes, simultaneous death happens actually not infrequently, but there are lots of times -- Justice Stevens, the middle name of all the children is Joseph. There are many times when you don't pay immediately.

ERISA provides in its enforcement section, and the circuits uniformly agree, that what the plan should do there is simply put the money aside and wait for the claiming participants to fight it out.

QUESTION: Would you refresh my recollection? Does the statute take care of the situation when the beneficiary is incompetent, or a child, or something like that? Does it provide paying to a conservator, or is that done as a matter of State law?

MR. GOLDSTEIN: Does -- ERISA does not.

QUESTION: It doesn't contemplate that. So if, in fact, the plan administrator knows that the -- say, the beneficiary is in prison, or is having a mental problem or something, he doesn't have to pay out right away?

MR. GOLDSTEIN: That's correct.

QUESTION: Yes.

MR. GOLDSTEIN: There are many times this happens.

QUESTION: If -- is there -- you're asking us, I take it, to interpret the statute, ERISA, which effectively says pay the money to the primary beneficiary.

You want to say, well, pay the money to the primary beneficiary who is a beneficiary and isn't disqualified by certain State laws, and now this is one of the State laws that might disqualify a person, and another one is a slayer statute, and a third one, I take it, is a simultaneous death statute, and are there any others --

MR. GOLDSTEIN: Those --

QUESTION: -- that anybody's been able to think of?

MR. GOLDSTEIN: No, and it is important to understand in terms of what the court is opening the doors to, that the States have been regulating this area for centuries, and that is the -- you know, this is in the area of divorce. There are normal probate areas that they have limited themselves, and if I could just mention one point --

QUESTION: Do -- I mean, one of the ways they used to regulate it is that, you know, the wife would get half the estate automatically upon death. Suppose the -- a State enacts a law that says, you know, if this benefit is not given to the spouse at the time of death, it must be.

MR. GOLDSTEIN: I understand.

QUESTION: And this is probate, this is our concern with the family and with marriage and all of that.

MR. GOLDSTEIN: Yes.

QUESTION: Surely you wouldn't say that ERISA would be overcome with that.

MR. GOLDSTEIN: That's exactly right, because that's a prohibited alienation. That's Boggs, and let me explain why this is not.

Congress provided that there are certain people, participants and their beneficiaries, when it's a spousal annuity, who have an expectation that they are going to live off pension benefits, and it specified when an alienation would occur.

This is not a situation where the money is taken away from the participant or anyone else who has a mandated right to it and give -- and let me take you to the definition. The alienation definition is not reprinted in the appendix to any brief -- I apologize -- but I will simply read it to you. Well, the statute is, and that is at the appendix to petitioner's brief at page 4, and it simply says, not very helpfully, each pension plan shall provide the benefits provided under the plan may not be assigned or alienated.

Justice Kennedy's opinion in Boggs looks to the IRS's definition and I will read it to you. This for the record is at 26 C.F.R. section 1.401A-(13)(c)(i) -- (ii). The terms, assignment and alienation, include any direct

or indirect arrangement, whether revocable or irrevocable whereby a party acquires from a participant or beneficiary a right or interest enforceable against a plan in or to any or all of the plan benefit payment.

QUESTION: That's what I thought alienation means. It means from a participant. This alienation is not from the participant. It's by operation of the State law. You're not getting it from the participant.

MR. GOLDSTEIN: We agree. It's not an alienation. That's our point, and that's the difference from the hypothetical you asked. If there was a divorce decree that said, look -- if the divorce decree here said, Donna Egelhoff is going to get 100 percent of David's pension, if that is not, Justice O'Connor, registered as a QDRO that's an alienation. You can't do it.

Now, the petitioner --

QUESTION: Excuse me, that is an alienation? Why is that an alienation?

MR. GOLDSTEIN: Because it takes it from David and gives it to Donna.

QUESTION: But David is not alienating himself. He's not taking it from himself and giving it to Donna. I thought you agreed with me that that's what alienate means. It means you can't transfer it to someone else, not that operation of law can't take it away from you and

give it to somebody else.

MR. GOLDSTEIN: I apologize, Justice Scalia. I was focusing on the take it from the person to another. You were focusing on the operation of law. I actually agree with your interpretation of operation of law. Unfortunately, I think it's precluded by Boggs. That was State community property law. I think Justice Breyer might -- some might think he had the better of that argument. That is water under the bridge, and that was community property law.

QUESTION: Yes. Yes.

MR. GOLDSTEIN: Remember, the second wife, community property law, took it. She -- the community property law is what gave it to her. So what I'm focusing on, though, is that this does not take it from somebody and give it to somebody else.

Now, there was the question put before, well, should this have been a QDRO, and there is the negative inference suggested by petitioner that Congress occupied this field, that really these sorts of things are supposed to be done by QDRO's, and I will explain to you why that's not so.

Washington law doesn't intend to say that the kids will get the money. That's the whole point, that the plan will decide who gets the money. Washington law wants

David, after the divorce, to decide who will get it. Say there's a third wife. David -- say he's a serial marrier. If there's a third wife, David wants to be able to name her. If there's a QDRO, he can't. If the divorce decree said, the money goes to the kids, he's out of luck. That's a registered decree under Washington State law.

All Washington is trying to do here is say, look, when you divorce, the intent is that the spouse, your ex-spouse isn't going to get the money. Go fix the problem some other way, and it says to the plans, or any other nonprobate asset, you don't want to comply, say you're not going to comply. You have any doubts, don't comply. And it says to the participant himself, if you don't want this to be the rule, just say so, either in the divorce decree or even in your designation.

There really is nothing going on here that Congress didn't want to happen. There's nobody -- unlike Boggs, where we had the actual spouse who was going to get the spousal annuity, or we had the pension benefits after death in the hands at least of the estate of the pensioner, none of that applies here.

We're in a situation where Congress left it up to anybody to name a designee, and unless there's some real practical problem for the ERISA plan, unless something's -- it's just not workable, I could understand

a reason to preempt it. But when you're going to take away simultaneous death, slayer statutes -- in the footnote in which they address the issue in their reply brief, petitioner says, Justice Scalia, that it preempts state law definitions of what it is to die, who's a spouse, what's a child, common law issues frequently regulated by the States.

I should make one final point, and that is that there is at the very least one alternative narrow holding that I don't understand the answer to for this Court, and that is that we sued petitioner under a provision of State law that lets us just sue her, and if the problem is the practical administration of this rule, that it will cause a burden for ERISA plans, the rule at the least ought to be that that's not preempted. It's a State law conversion suit. We can go after her for the money.

QUESTION: It seems to me, and maybe you have an answer to it, that the manner in which this State law differs from laws that say who a wife is, who a child is and so forth, is that this is a State law that is directed explicitly to the manner in which a contract, an ERISA contract in particular, should be interpreted. It is directed precisely to the intent of the parties to an agreement, and it says this is what they shall be deemed to intend. It operates directly and explicitly upon the

agreement itself.

MR. GOLDSTEIN: Two points. The first is that, of course, it doesn't operate in such a fashion if there's any contrary expression of intent by any of the parties, be it the plan or the participant.

The second is that I do think in these ERISA cases we get the unfortunate sense that this statute is about ERISA plans, and it's not. There's a separate statute, of course, that deals with every form of will. This statute deals with every conceivable form of nonprobate asset. It's really important under State law.

Most of the money that is held by individuals now is either in your home or in a life insurance plan or in a pension, whether qualified or not, and you get the situation that you have here, and that is that Donna Egelhoff already got equivalent assets. She's going to come along and recover again. The children are going to be completely out of luck for no sensible purpose at all.

If there are no further questions --

QUESTION: Thank you, Mr. Goldstein.

Mr. Kilberg, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM J. KILBERG

ON BEHALF OF THE PETITIONER

MR. KILBERG: Thank you, Mr. Chief Justice.

Just a few points. The last point that Mr.

Goldstein made, which suggests broader preemption than I think the statute entails, ERISA preempts State law only insofar as it relates to an employee benefit plan. No one is suggesting that the State statute is preempted with regard to other nonprobate assets.

Mr. Goldstein also mentioned that they had sued, the respondents here had sued petitioner, not the plan. Well, that is true. That, of course, was true in Boggs as well and, as the Court said in the Boggs decision, there, as here, the premise of the lawsuit is based on a displacement of ERISA provisions and plan provisions.

A point with regard to the contingent beneficiary notion. If Mr. Goldstein is correct, and respondents are beneficiaries under ERISA because they have a contingent right, then their only cause of action would be under section 502(a) of ERISA. That would be their exclusive right, and they would have had to sue the plan under those provisions rather than the petitioner under the State statute.

With regard to the QDRO point, Qualified Domestic Relations Order point, the fact is that a QDRO could have been fashioned that provided that the spouse had given up any interest that she might have as a beneficiary. The fact here is, that wasn't done. That provision is a relatively easy one to effect. It wasn't

done, and that's the reason that respondents must lose.

Unless the Court has any questions for me --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kilberg. The case is submitted.

(Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.)