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The Impact of Divorce on Beneficiary Designations:

Kennedy v. Plan Administrator for DuPont Savings and Investment Plan

Death Benefit Quandary. Here is a common problem for retirement plan administrators: a participant designates his or her spouse as beneficiary. Sometime later, the participant divorces the spouse but does not change the beneficiary designation form. If the participant dies, is the original beneficiary designation still effective in light of the divorce? What if the divorce decree specifically provides that the ex-spouse waives any plan benefit? In the past, answering these questions required a time-consuming analysis of whether there had been a waiver of retirement benefits and, if so, whether that waiver violated ERISA's anti-alienation provisions. To make matters worse, the federal courts that had addressed these issues did not always reach the same conclusion.

The Supreme Court's Decision. A recent Supreme Court case, *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, addresses, and to some extent, resolves these issues. This case involved a participant who designated his spouse as his beneficiary, got divorced and then died before changing his beneficiary designation form.

The Supreme Court made two specific determinations in this case. First, it determined that a participant or beneficiary ***can waive retirement plan benefits***. Second, it determined that any such waiver must be made ***in accordance with the terms of the plan***.

The plan at question in the *Kennedy* case provided that death benefits would be paid in accordance with the most recent beneficiary designation form on file. It did not provide that a divorce decree or other waiver of plan benefits could revoke a beneficiary designation. Therefore, even though ERISA would permit the ex-spouse to waive the death benefit, because the terms of the plan did not permit this, the plan properly paid the benefit to the participant's ex-spouse.

Options for Plan Sponsors. The *Kennedy* case creates the following options for plan sponsors:

- ***Rely Only on Beneficiary Designation Forms.*** In light of the *Kennedy* case, plan sponsors may choose to ignore external documents and rely only on the beneficiary designation forms that have been filed in accordance with the plan's established procedures. The advantage of this approach is administrative simplicity; there is no need to collect or analyze external documents to pay benefits. Its disadvantage is that benefits frequently may be paid to an individual that the participant would have not intended to receive benefits.

- ***Honor Benefit Waivers.*** Alternatively, plan sponsors may choose to amend their plans to specifically give effect to benefit waivers in divorce decrees. This would create some additional work in terms of collecting and analyzing external documents, but it would more likely provide for benefits to be paid in accordance with the participant's wishes.

New Funding Notices for Defined Benefit Plans Due by April 30

Under the Pension Protection Act of 2006 (the "PPA"), sponsors of defined benefit plans are required to provide an annual funding notice to all participants and beneficiaries. This notice is first due for the plan year beginning on or after January 1, 2008, and must be provided within 120 days of the end of that plan year. For calendar-year plans, this means that ***the first notice is due by April 30, 2009***.

The notice must include, among other things, (i) the plan's funding percentage, (ii) the value of its assets and liabilities, (iii) a description of the plan's investments, and (iv) a description of the benefits under the plan that are eligible for PBGC insurance.

Last week, the Department of Labor published a model funding notice that can be used for this purpose. Use of the model is not mandatory, but it will be deemed to satisfy the requirements of the PPA.

- **Other Options.** Presumably, plan sponsors could take other approaches to participant divorces. For example, a plan could provide that a participant's divorce automatically revokes any beneficiary designation form naming the former spouse. This would relieve the plan from having to analyze specific waivers in divorce decrees, but it might more accurately capture participant intent.

Whichever approach is desired, it will be important to review plan documents and adopt necessary amendments to ensure that they are consistent with the chosen approach. It will also be important to make sure that participants understand what impact their divorces may (or may not) have on their retirement benefits.

Contact Information. Please contact Toby Walls (404.888.8870) or David Putnal (404.888.8836) if you have questions about the *Kennedy* case or how your plans may best address the impact of divorces on beneficiary designations.