71900-9

71900-9

No. 71900-9-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

THE ESTATE OF CRAIG S. LUNDY, Respondent,

v.

KELLY LUNDY, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY
#14-4-00306-0

BRIEF OF APPELLANT

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 SEP -9 AM 11:31

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington State Court of Appeals

Other Authorities

Codes and Regulations

INTRODUCTION

The Estate of Craig Lundy seeks to do in this lawsuit what Mr. Lundy never did while alive – change the beneficiary of his ERISA retirement account. Mr. Lundy worked as a machinist for the Boeing Company in Everett, and for 23 years, he participated in Boeing's Voluntary Investment Plan. He designated his wife, Kelly Lundy, as beneficiary. (11/27/91 Designation; Exhibit 7 to Estate's Petition; CP 87).

Mr. and Mrs. Lundy married in 1984, and for the duration of their 25-year marriage, both worked full-time and had their own retirement accounts. They did not have children. Over time, the couple grew apart, ending their marriage in September 2009. The Dissolution Decree awarded the spouses their respective retirement accounts as separate property. (Dissolution Decree ¶¶ 3.2 & 3.3; Exhibit 3 to Estate's Petition; CP 74-75).

Despite having complete control to change beneficiaries, neither Mr. Lundy nor Ms. Lundy did. The couple did not have an acrimonious divorce and neither remarried. As Ms. Lundy explained at the hearing, "We had acquired the majority of our funds during our 26-year marriage and just felt that that was something we wanted to continue." (4/2/14 VRP 15).

Mr. Lundy died on August 4, 2013 from complications from cancer. He did not leave a will. When his intestate successors – his three brothers and one sister – discovered Mr. Lundy had not changed his beneficiary, the Estate filed this action to recover the retirement account from Ms. Lundy. On April 4, 2014, Snohomish County Superior Court Judge Eric Lucas ruled for the Estate, concluding that state law required Ms. Lundy to return the proceeds after distribution and provide an accounting. (4/2/14 Order ¶¶ 1 and 2; CP 8) (attached as Appendix A).

Because overriding Mr. Lundy's valid choice of beneficiary violates both federal and state law, Ms. Lundy respectfully requests this Court to reverse the trial court's order, enforce Mr. Lundy's federal designation, and remand to the trial court.

I. ASSIGNMENTS OF ERROR

The trial court erred as a matter of law by ordering Ms. Lundy to "immediately restore all funds she has received, and/or any funds received in the future, from the decedent's Boeing VIP Plan along with any income received thereupon to the Estate of Craig S. Lundy." (4/2/14 Order ¶ 1; CP 8). The trial court also erred by requiring Ms. Lundy to provide an accounting for all funds she received from the Boeing plan. (4/2/14 Order ¶ 2; CP 8).

Specific assignments of error are:

A. Substantial evidence does not support the finding that "Craig rarely had any contact with Kelly Lundy following the dissolution." (4/2/14 Order at 2; CP 8).

B. Paragraph 1 of the trial court's April 2, 2014 order is an error of law. (4/2/14 Order ¶ 1; CP 8).

C. Paragraph 2 of the trial court's April 2, 2014 order in an error of law. (4/2/14 Order ¶ 2; CP 8).

D. The federal Employee Retirement Income Security Act of 1974 (ERISA) preempts all claims under state law to nullify Mr. Lundy's designation of his beneficiary. 29 U.S.C. § 1144(a).

Issues pertaining to these assignments of error are:

E. Under RAP 2.5(a), this Court has "discretion to consider issues not raised at the trial court", including federal preemption. Harris v. State, Dep't of Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d 1056 (1993). Here, examining federal preemption under ERISA is "necessary to reach a proper decision." Humphrey Indus., Ltd. v. Clay St. Associates, LLC, 176 Wn.2d 662, 671, 295 P.3d 231 (2013). Should this Court review whether ERISA preempts the Estate's state law claims?

F. "An employee's ability to name a beneficiary acts as a guarantee of the complete and full performance of the contract to the exclusion of conflicting claims." Hillman v. Maretta, 133 S. Ct. 1943, 1953, 186 L. Ed. 2d 43 (2013) (interpreting the Federal Employees' Group Life Insurance Act of 1954). State law claims to recoup benefits after distribution "frustrate the deliberate purpose of Congress to ensure that a federal employee's named beneficiary receives the proceeds." Hillman, 133 S. Ct. at 1952. Like FEGLIA, does ERISA preempt state law claims that deprive a named beneficiary of retirement funds?

G. "A court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent." In re Estate of Bernard, __ Wn. App. __, __ P.3d __, No. 69608-4-I (Aug. 4, 2014). Craig Lundy died intestate, and his sole testamentary act was to name Kelly Lundy as the beneficiary to his Boeing retirement account. Did the trial court err by reversing Mr. Lundy's choice and ordering Ms. Lundy to return the retirement proceeds to the Estate?

II. STATEMENT OF FACTS

A. Craig and Kelly Lundy Were Married for 25 Years

Craig and Kelly Lundy married on January 26, 1984 in Fort Collins, Colorado. (Dissolution Petition ¶ 1.5, Exhibit 1 to Estate's Petition; CP 63). The couple lived and worked near Bellingham from then on – Mr. Lundy as a machinist at Boeing in Everett and Ms. Lundy as an Information Technology professional for PeaceHealth. (Kelly Lundy Dec. ¶ 1; CP 29). Both had retirement accounts with their respective employers and named each other as beneficiaries. (Kelly Lundy Dec. ¶ 9; CP 31). Mr. Lundy had a Voluntary Investment Plan with the Boeing Company, contributing to it during and after his marriage. (Letter from Boeing Savings Beneficiary Services at 1; Exhibit 5 to Estate's Petition; CP 81).

Over time, their marriage deteriorated. As Ms. Lundy described in her declaration, their separation and divorce was disheartening, but not acrimonious.

> I was married to Craig Lundy for 25 years, until we finalized our dissolution in September 2009. We dissolved our marriage by mutual agreement in the simplest way that we could. However, despite the fact that we were not married, we kept in close contact continuously until his death; we remained friends and cared deeply for each other. Both of us remained unmarried.

(Kelly Lundy Dec. ¶ 2; CP 29). Mr. Lundy's siblings confirmed that Ms. Lundy and he remained in contact after the divorce, but disputed whether they remained close. (Michael Lundy Dec. at 2; CP 19) ("despite the divorce, Kelly continued to be invited to family events"); (Staiger Supp. Dec. at 2; CP 11) ("Craig and Kelly were not in contact on a regular basis following the divorce; this was mentioned to me not only by Craig but also by Kelly").

Because the couple did not have children, Mr. Lundy and Ms. Lundy's dissolution was straightforward. They listed all their assets as community property, including "retirement funds in each party's name". (Findings of Fact ¶ 2.8(25); Exhibit 2 to Estate's Petition; CP 68). Neither had separate property. (Findings of Fact ¶ 2.9; CP 68).

The dissolution decree simply awarded the spouses their respective retirement funds as separate property. (Dissolution Decree ¶¶ 3.2 & 3.3; Exhibit 3 to Estate's Petition; CP 74-75) ("all retirement funds and 401Ks in his [her] name"). Neither the decree nor the findings and conclusions had a clause waiving all interest in the ex-spouse's retirement funds. The parties also did not propose or request a Qualified Domestic Relations Order (QDRO) under ERISA that creates a continuing interest in an ex-spouse's plan.

At the end of their marriage, Mr. and Ms. Lundy left as equals. Both had complete control over their finances, and, significant here, both could name new beneficiaries.

B. <u>Mr. and Ms. Lundy Did Not Change Their Beneficiaries For Four Years After the Divorce</u>

Despite having the ability, neither Mr. Lundy nor Ms. Lundy changed beneficiaries for four years after their divorce. Ms. Lundy explained why at the TEDRA hearing:

> Q. Are you surprised, or did you expect that Craig would name you as his beneficiary on his retirement account?
>
> A. I was not surprised. That is something that we had discussed after our divorce, that we felt that we wanted to continue that arrangement. We did not have children. We had acquired the majority of our funds during our 26-year marriage and just felt that that was something we wanted to continue.

(4/2/14 VRP 14-15).

Mr. Lundy had ample warning, and opportunity, to change his beneficiary if he wanted. First, Boeing periodically reminded its Plan participants to review who they designated as beneficiaries.

> Because of the large number of marriages, dissolutions, deaths, new children and other reasons for beneficiary changes, employees are *periodically reminded* in various ways to update their beneficiaries.

(Letter from Boeing Savings Beneficiary Services at 1; CP 81) (emphasis added). Second, Boeing's Summary Plan Description, sent to all employees, reminded them to change beneficiaries after a divorce.

> The Plan recognizes beneficiary designations and changes only when they are completed and received before your death. You may not designate or change a beneficiary by using other documents (such as divorce decrees, prenuptial agreements, wills or trusts).

(Letter from Boeing Savings at 1; CP 81).

Third, changing the beneficiary was easy. Boeing's 2006 Plan Summary states:

> You can designate or change your beneficiary on line by accessing the Beneficiary Information link under the Personal Information section of Boeing Savings Plans Online. Your beneficiary will take effect once the confirmation number is generated; however, it will not be displayed for one to two business days.

(2006 Summary Plan Description at 10; Exhibit 6 to Estate's Petition; CP 85). The Summary then advises "if you are not married, you can name anyone as your beneficiary, and you can change your beneficiary at any time." (2006 Summary at 10; CP 85).

Fourth, Mr. Lundy's annual statements from Boeing identified Ms. Lundy as his beneficiary. (Boeing VIP Statement at 4; Exhibit 8 to Estate's Petition; CP 92).

Fifth, both Ms. Lundy and Mr. Lundy's siblings agreed that Craig knew his finances. Ms. Lundy declared,

> Craig was the kind of person who knew what he intended, and who did what he intended. He was a skilled machinist and a competent, private, and structured person. He was aware of his choices and behaved accordingly.

(Kelly Lundy Dec. ¶ 8; CP 31). Mr. Lundy's sister Kathleen, described her brother's pride in purchasing a mobile home and investing for his retirement.

> After their divorce, Craig returned to Marysville, to be near family and friends. He was finally happy and very proud of the mobile home he had purchased. He lived a modest life and had aggressively invested in his VIP account to help bolster his retirement income. In the few years after his divorce, he was able to almost double his VIP investment.

(Staiger Dec. at 2; CP 11).

The Estate had no evidence that Mr. Lundy intended, but somehow failed, to change his beneficiary. Instead, the four siblings who stand to inherit the proceeds stated their brother did not mean to leave the retirement fund to Ms. Lundy. (Staiger Dec. at 1; CP 10) ("I believe my brother Craig had no intention of leaving his VIP to his ex-wife Kelly"); (Michael Lundy Dec. at 3; CP 20) ("I am sure that Craig did not intend his Boeing VIP plan to pass to Kelly"); (Robert Lundy Dec. at 2; CP 14) ("I am most certain that Craig's intent was to have all his assets remain with his estate").

The Estate also presented no evidence of who Mr. Lundy intended to name as beneficiary, other than Ms. Lundy.

On August 4, 2013, Mr. Lundy died of complications from cancer. (Kelly Lundy Dec. ¶ 7; CP 30-31). He died intestate, leaving his four siblings as heirs under Washington rules of intestate succession. (Order Appointing Administrator; Exhibit 9 to Estate's Petition; CP 96-97).

C. The Trial Court Awarded The Retirement Account To The Estate, Overriding Mr. Lundy's Choice of Beneficiary

On March 2, 2014, the Estate of Craig Lundy sued Ms. Lundy under the Trust and Estate Dispute Resolution Act (TEDRA), RCW Ch. 11.96A, seeking recovery of the retirement funds. Ms. Lundy responded, and on April 2, 2014, Snohomish County Superior Court Judge Eric Lucas decided the case at the initial hearing. (4/2/14 VRP). The court heard testimony from one witness – Kelly Lundy. At the close of the hearing, Judge Lucas gave this oral ruling:

> So I took a bit of a break there to take a closer look at RCW 11.07.010. And after reviewing that I agree with Petitioner that this applies to non-probate assets wherever situated held at the time of the entry of Decree of Dissolution of marriage. And the operative language of the statute says that a non-probate asset in favor of, or granting an interest or power to the decedent's former spouse support state registered partner is revoked. So I will sign that order.

(4/2/14 VRP 36). The court entered a written order that same day. (4/2/14 Order; CP 6-8).

Ms. Lundy now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This court reviews the trial court's findings of facts for substantial evidence in the record and its conclusions of law *de novo*.

> Where the trial court has weighed the evidence our review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law.... Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. We review the trial court's conclusions of law de novo to see if they are supported by the trial court's findings of fact.

Petters v. Williamson & Associates, Inc., 151 Wn. App. 154, 163-64, 210 P.3d 1048 (2009) (citations omitted).

The Court reviews the interpretation of a trust or will document *de novo*.

> We review de novo the interpretation of a will or trust instrument. Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation.

Estate of Bernard, __ Wn. App. __, __ P.3d __ No. 69608-4-I, slip op. at __ (Aug. 4, 2014); Metro. Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir. 2006) ("we also review de novo the district court's interpretation of an ERISA insurance policy's language").

IV. ERISA PREEMPTS THE ESTATE'S STATE LAW CLAIMS

The trial court premised its oral ruling on RCW 11.07.010, a statute that automatically revokes a husband's or wife's designation of beneficiary when the couple divorces. In Egelhoff v. Egelhoff, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), the United State Supreme Court held that ERISA preempted this automatic revocation.

> The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA' s commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the

> fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8).

Egelhoff, 532 U.S. at 147, 121 S. Ct. at 1327-28. The statute now covers employee benefit plans "unless provided otherwise by controlling federal law." RCW 11.07.010(5)(a)(i).

Despite this express preemption, the Estate argued that state law, including RCW 11.07.010, could apply to recover ERISA funds after the plan administrator distributed them. (Estate's Petition at 11) ("this court should find that once an ERISA asset is distributed an estate has standing to bring suit against an ex-spouse who was not awarded that asset in the divorce decree under state law theory"). The Estate cited a footnote in a later Supreme Court case, Kennedy v. Plan Administrator, 555 U.S. 285, 299 n.10, 129 S.Ct. 865, 875 n.10, 172 L.Ed.2d 662 (2009), and lower court decisions that suggested state law claims could apply after distribution.

But a 2013 decision from the United States Supreme Court again establishes that federal law controls all aspects of designating a beneficiary, whether before or after distribution. State law cannot frustrate a federal choice of beneficiary.

A. The United States Supreme Court Found Preemption Under A Similar Federal Benefit Program

Federal law protects more than a participant's designation of a beneficiary. It protects the beneficiary's right to receive and use the funds. In Hillman v. Maretta, __ U.S. __, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013), the United States Supreme Court preempted state law claims that override a valid federal designation of beneficiary.

> [W]here a beneficiary has been duly named, the insurance proceeds she is owed under [Federal Employees' Group Life Insurance] cannot be allocated to another person by operation of state law.

Hillman, 133 S.Ct at 1953. Federal law protects the beneficiary from claims, like those here, that the deceased intended someone else to receive the funds.

> Rather than draw an inference about an employee's probable intent from a range of sources, Congress established a clear and predictable procedure for an employee to indicate who the intended beneficiary of his life insurance shall be.

Hillman, 133 S.Ct. at 1952.

Warren Hillman was a federal employee who in 1996 married Judy Maretta. He named his new wife as the beneficiary of his life insurance policy under the Federal Employees' Group Life

Insurance program. Two years later, the couple divorced. Hillman, 133 S.Ct. at 1949.

Hillman remarried in 2002, but failed to change his beneficiary. He died unexpectedly in 2008 and Ms. Maretta and Mrs. Hillman both claimed the insurance proceeds. Under a Virginia statute, a divorce or annulment "revokes a beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." Hillman, 133 S.Ct. at 1948 (quoting Section 20-111.1(A) of the Virginia Code).

The statute had a special provision if federal law prevented Section 20-111.1(A) from automatically changing the beneficiary.

> If [Va.Code Ann. § 20–111.1] is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under [§ 20–111.1] is personally liable for the amount of the payment to the person who would have been entitled to it were [§ 20.111.1] not preempted.

(Section 20.111.1(D) of the Virginia Code). In other words,

> where Section A is pre-empted, Section D creates a cause of action rendering a former spouse liable for the principal amount of the insurance proceeds to the person who would have received them had Section A continued in effect.

Hillman, 133 S.Ct. at 1948.

The Supreme Court held that the designation of a federal beneficiary preempted state laws that attempt to recover proceeds after distribution.

> It makes no difference whether state law requires the transfer of the proceeds, as Section A does, or creates a cause of action, like Section D, that enables another person to receive the proceeds upon filing an action in state court. In either case, state law displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead. As in Wissner, applicable state law "substitutes the widow" for the "beneficiary Congress directed shall receive the insurance money," 338 U.S., at 659, 70 S.Ct. 398, and thereby "frustrates the deliberate purpose of Congress" to ensure that a federal employee's named beneficiary receives the proceeds. Ibid.

Hillman, 133 S. Ct. at 1952.

This is true even if the participant had conflicting instructions in a will or other testamentary document.

> One can imagine plausible reasons to favor a different policy. Many employees perhaps neglect to update their beneficiary designations after a change in marital status. As a result, a legislature could have thought that a default rule providing that insurance proceeds accrue to a widow or widower, and not a named beneficiary, would be more likely to align with most people's intentions. Or, similarly, a legislature might have reasonably believed that an employee's will is more reliable evidence of his intent than a beneficiary designation form executed years earlier.

But that is not the judgment Congress made.

Hillman, 133 S. Ct. at 1952. For the same reasons, Craig Lundy's valid designation of his beneficiary under ERISA preempts any state law claims to the contrary.

The Estate may argue that Hillman applies only to federal life insurance, not ERISA regulated retirement plans. But this superficial distinction is not persuasive. The Supreme Court in Egelhoff v. Egelhoff, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), invalidated RCW 11.07.010 for ERISA plans, objecting that "the administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." Egelhoff, 532 U.S. at 147, 121 S. Ct. at 1327.

Like FEGLIA, ERISA has a broad preemption clause, 29 U.S.C § 1144(a), and strong protection for the rights of plan participants and beneficiaries.

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b). Allowing state law to undermine a valid beneficiary designation conflicts with the letter and purpose of ERISA. Feuer, Albert, 32 Tax Management Weekly Report 1040 (Aug. 5, 2013) (attached as Appendix B) ("state ownership claims based on contract law, a domestic relations order not satisfying plan terms, unjust enrichment, or constructive trust law may not be used to wrest benefits from an ERISA designee").

ERISA therefore preempts the Estate's claims under state law. Regardless of filing suit after distribution of the ERISA benefits, the Estate may not use state law to invalidate a federal designation of beneficiary.

B. Although Not Argued Below, Ms. Lundy May Raise The Issue On Appeal

Ms. Lundy did not raise the Hillman decision in the trial court and respectfully requests the Court to review it here. Under RAP 2.5(a),

> [t]he appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

This Court should address federal preemption for three reasons.

First, the affirmative defense of preemption raises the Estate's "failure to establish facts upon which relief can be granted." Federal law, not state, governs the designation of a beneficiary for ERISA benefits. 29 U.S.C. § 1002(8); Metro. Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir. 2006) ("under ERISA, a beneficiary is determined in one of two ways: it is designated by the participant or by the terms of an employee benefit plan").

Facts related to unjust enrichment or interpretation of a Washington divorce decree are irrelevant to determining a beneficiary under federal law. The Estate's petition and submissions fail to establish facts that justify relief under ERISA.

Second, the Washington Supreme Court has raised preemption on its own when necessary.

> Generally, this court does not consider an issue that was not raised at the trial court. New Meadows Holding Co. v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984); *see also* RAP 2.5(a). This court does, however, have discretion to consider issues not raised at the trial court. Obert v. Environmental Research & Dev. Corp., 112 Wn.2d 323, 333, 771 P.2d 340 (1989). It is appropriate to consider the preemption issue in this case in as much as numerous similar cases are currently pending that challenge the validity of RCW 51.32.225.

Harris v. State, Dep't of Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d 1056 (1993). Preemption under ERISA is critical and necessary to reaching a just decision here.

Third, preemption invalidates the trial court's ruling, regardless of its reasoning or rationale. In other words, federal preemption deprives the state court of authority to reach a decision under state law. Although Ms. Lundy should have presented Hillman to the trial court, it is an argument, similar to jurisdiction, that appellate courts necessarily review. The consequences of allowing the trial court's state law decision to stand outweigh the harm from allowing a new argument on appeal.

This Court appropriately reviews whether federal law preempts the trial court's decision.

V. The Trial Court Erred In Determining Mr. Lundy's Intent

If this Court applies state law, the trial court's decision does not withstand close scrutiny. No compelling evidence suggests that Mr. Lundy tried but failed to change his beneficiary. Implicitly recognizing this, the trial court relied on a state statute, RCW 11.07.010, rather than Mr. Lundy's actions, to justify nullifying his designation. (4/2/14 VRP 36) ("the operative language of the statute says that a non-probate asset in favor of, or granting an interest or power to the decedent's former spouse support state registered partner is revoked"). This was error under Washington law.

A. The Trial Court Erred By Applying RCW 11.07.010

The correct presumption is that Mr. Lundy's written designation of beneficiary remained his intention. As this Court recently emphasized,

> A court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. We determine that intent from the instrument as a whole. Similarly, the touchstone of contract interpretation is the parties' intent. We follow "the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.

In re Estate of Bernard, __ Wn. App. __, __ P.3d __, No. 69608-4-I (Aug. 4, 2014); In re Riemcke's Estate, 80 Wn.2d 722, 728-29, 497 P.2d 1319 (1972) ("whenever possible, the actual intent of the testator should be ascertained from the language of the will itself, unaided by extrinsic facts").

No ambiguity exists with Mr. Lundy's designation of beneficiary. In 1991, he wanted his wife, Kelly, to have his retirement account on his death. He kept that designation throughout his life.

The question is whether Mr. Lundy meant to change the beneficiary during the four years after his divorce. As described above, Mr. Lundy had ample opportunity to make the change, and no written evidence exists that he wanted, but somehow failed, to complete it. Instead, his brothers and sisters can only infer his intent from the circumstances. None provide direct evidence that Mr. Lundy wanted to name his siblings, not his ex-wife, as beneficiaries.

The trial court made no findings of fact on this issue; the court's written order is silent on Mr. Lundy's intent. Furthermore, the court's oral ruling suggests that it considered RCW 11.07.010 determinative. (4/2/14 VRP 36). Under that statute,

> If a marriage or state registered domestic partnership is dissolved or invalidated, or a state registered domestic partnership terminated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse or state registered domestic partner, is revoked.

RCW 11.07.010(2)(a). The United States Supreme Court held this statute expressly preempted for ERISA benefits. Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) (recognized in RCW 11.07.010(5)(a)(i)).

The trial court erred by applying this statute post-distribution. As detailed above, the United States Supreme Court invalidated a similar state statute in Hillman v. Maretta, __ U.S. __, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013). State statutes cannot override a federal designation of beneficiary – regardless of whether applied pre- or post-distribution.

Acknowledging this, the Estate asserted two claims against Ms. Lundy: (1) breach of contract or waiver, and (2) unjust enrichment. Neither is persuasive.

B. Ms. Lundy Did Not Waive Her Ability To Be The Beneficiary

The parties' dissolution decree transformed two community assets – the couple's respective retirement funds – into separate property. In its TEDRA petition, however, the Estate argues the decree had an additional term, implied at law. "The plain language of [RCW 11.07.010] supported by the public policy of this state mandates that ex-spouses waive their beneficiary rights pursuant to a dissolution." (Estate's Petition at 15; CP 58). This is a broad statement and unsupported by federal and state law.

First, the Supreme Court's ruling in Hillman blocks incorporating RCW 11.07.010 into the dissolution decree. Hillman, 133 S.Ct. at 1953 ("proceeds will be paid to the named beneficiary and *the beneficiary can use them*") (emphasis added). This is merely reintroducing a preempted statute through an implied contract term.

Second, the parties' objective intent contradicts this alleged implied term. Given the reminder of his beneficiary on his annual statement, Mr. Lundy knew after his divorce that Ms. Lundy would inherit his retirement account. Furthermore, both Mr. and Ms. Lundy kept their existing beneficiaries intact after the divorce and before his death. This was not a mistake, but rather an acknowledgement of their time together.

Third, Ms. Lundy testified that this was Mr. Lundy's express intent.

> I strongly believe that Craig was aware that he had named me as the beneficiary on his retirement account and that he intended not to change that designation after our marriage dissolved. After the divorce we decided that we would leave each other as the designated beneficiaries on our retirement accounts, because we had accumulated the majority of the funds in those accounts while we were married and we did not have children. For that reason, I left Craig as the beneficiary on my retirement accounts and I believe he intentionally left me as the beneficiary on his. He actually referenced several times over the last 4 years (and as recent as June 2013) that his retirement funds would go to me.

(Kelly Lundy Dec. ¶ 9; CP 31).

Although it objected to this evidence under the dead man statute, RCW 5.60.030, the Estate waived its objections by presenting Ms. Lundy's testimony in its direct case. (4/2/14 VRP 4) ("in that declaration...you stated that you had several conversations with Craig Lundy following the divorce, about what should happen with this retirement plan");(Staiger Supp. Dec. at 1) ("Craig had no intention of leaving his VIP to his ex-wife Kelly"). Furthermore, the trial court did not rule on or grant the Estate's objection.

"The protection of the [dead man] statute may be waived...when the protected party introduced evidence concerning a transaction with the deceased." Bentzen v. Demmons, 68 Wn. App. 339, 345, 842 P.2d 1015 (1993). Because the Estate introduced Ms. Lundy's testimony as evidence of Mr. Lundy's intent for his retirement account, it cannot now exclude it.

Finally, Ms. Lundy did not waive her right to accept the retirement funds *if Mr. Lundy kept her as beneficiary*. The divorce decree extinguished any claim Ms. Lundy had under community property laws. It did not forbid her from accepting the funds at Mr. Lundy's death. "A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct." Mike M. Johnson, Inc. v. Cnty. of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). Ms. Lundy did not expressly waive her ability to remain as Mr. Lundy's beneficiary, and her conduct did not imply it.

C. Complying With Mr. Lundy's Wishes Is Not Unjust Enrichment

The Estate's last argument is that paying the retirement funds to Ms. Lundy is unjust enrichment.

> Kelly has been unjustly enriched here by receiving the entirety of her ex-husband's retirement and the court should award it to his estate. Craig spent a lifetime earning his retirement, it was awarded to him in his divorce decree and it should be returned to his family as this is the equitable thing for the court to do.

(Estate's Petition at 17; CP 60).

It is neither inequitable nor unjust to follow Mr. Lundy's written instructions.

> A person is unjustly enriched when he or she profits or enriches himself or herself at the expense of another contrary to equity. Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction. The mere fact that a defendant has received a benefit from the plaintiff is insufficient alone to justify recovery. The doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying.

Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 490, 254 P.3d 835 (2011) (citations omitted).

Mr. Lundy did not remarry, did not have children, and did not name his siblings as heirs in a will. And as important, he did not name his brothers and sister as beneficiaries of his retirement account. Their claim exists because of the state intestacy laws, not Mr. Lundy's expressed intent. The only person Mr. Lundy chose as his beneficiary was Ms. Lundy. After 25 years of marriage, she may justly and equitably inherit her ex-husband's retirement account.

CONCLUSION

The Estate of Craig Lundy asserted three claims to Mr. Lundy's retirement account: (1) under RCW 11.07.010; (2) under an implied term to the Lundys' divorce decree; and (3) under the doctrine of unjust enrichment. None of these claims invalidate Mr. Lundy's express designation of Kelly Lundy as his beneficiary and his leaving that designation in place for four years after his divorce.

Because the trial court erred by overriding Mr. Lundy's designation, Appellant Kelly Lundy respectfully requests that this Court reverse the trial court's judgment, uphold Mr. Lundy's choice of beneficiary, and remand this case to the trial court.

DATED this 8th day of September, 2014.

BURI FUNSTON MUMFORD, PLLC

By ______________________
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Appellant to:

Hansen McConnell & Pellegrini, PLLC
Attn: Perry W. McConnell
1636 Third Street
Marysville, WA 98270

J. Bruce Smith
Barron Smith Daugert PLLC
300 N. Commercial St.
Bellingham, WA 98225

DATED this 8th day of September, 2014.

____
Philip J. Buri

2014 SEP -9 AM 11:32

APPENDIX A

FILED

2014 APR -2 PM 2:42

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

CL16541798

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

THE ESTATE OF CRAIG S. LUNDY,	**NO. 14-4-00306-0**
Plaintiff,	**ORDER**
vs.	
KELLY LUNDY,	
Defendant.	

THIS MATTER, coming on regularly for hearing before the undersigned Judge/Court Commissioner of the above-entitled Court upon the Petition of KATHLEEN STAIGER, PR/Administrator for the ESTATE OF CRAIG S. LUNDY for an Order for Recovery of an Estate Asset, and the Court having reviewed the Petition of the PR/Administrator, the Court file herein, Declaration of Kathleen Staiger, Petition for Dissolution of Marriage, dated May 29, 2009, Findings of Fact and Conclusions of Law, dated September 23, 2009, Decree of Dissolution, dated September 23, 2009, Death Certificate of Craig Lundy, November 8, 2013 letter from Boeing Savings Beneficiary Services, Selected pages from Summary Plan Description provided by Boeing, Beneficiary Designation Form for Boeing VIP Plan, Craig

LAW OFFICES
HANSEN McCONNELL & PELLEGRINI PLLC

1636 THIRD STREET
MARYSVILLE, WASHINGTON 98270
(360) 658-6580 • FACSIMILE (360) 651-6762

ORIGINAL

17

Lundy's Boeing VIP Account Value as of 12/31/13, Order Appointing Administrator and Declaring Solvency, entered October 2, 2013, and having heard argument of counsel and being fully advised in the premises

THE COURT FINDS:

That Craig Lundy spent the majority of his professional career working as a Machinist at Boeing.

That During his employment, he steadily contributed to his retirement plan which was known as a Boeing VIP Plan (401K).

That the value of that plan was $497,435.77 as of December 31, 2013.

That Kelly Lundy is the named beneficiary and is listed as Craig's wife on the beneficiary form signed nearly 18 years prior to the divorce on November 27, 1991, and this designation was unchanged at the time of Mr. Lundy's death.

That the Summary Plan description provided by Boeing indicates that you "must designate your spouse as your beneficiary."

That Craig was not represented in the divorce proceeding and Kelly was represented by Pamela E. Englett, Attorney at Law.

That Craig rarely had any contact with Kelly Lundy following the dissolution and they never reconciled or cohabited post-dissolution.

LAW OFFICES
HANSEN McCONNELL & PELLEGRINI PLLC

1636 THIRD STREET
MARYSVILLE, WASHINGTON 98270
(360) 658-6580 • FACSIMILE (360) 651-6762

NOW THEREFORE, it is hereby;

ORDERED, ADJUDGED, AND DECREED that the Respondent, Kelly Lundy, shall:

1) Immediately restore all funds she has received, and/or any funds received in the future, from the decedent's Boeing VIP Plan along with any income received thereupon to the Estate of Craig S. Lundy.
2) Provide an accounting to the Estate of Craig S. Lundy for all funds received from decedent's Boeing VIP Plan.

DONE IN OPEN COURT THIS 2nd day of April, 2014.

Judge/~~Court Commissioner~~

PRESENTED BY:

Perry W. McConnell, WSBA #40688
HANSEN, McCONNELL & PELLEGRINI, PLLC
Of Attorneys for Plaintiff

Approved as to Form:

J. Bruce Smith, WSBA #11600
Of Attorneys for Defendant

LAW OFFICES
HANSEN McCONNELL & PELLEGRINI PLLC

1636 THIRD STREET
MARYSVILLE, WASHINGTON 98270
(360) 658-6580 • FACSIMILE (360) 651-6782

APPENDIX B

Bloomberg BNA

Tax Management Weekly Report™

Reproduced with permission from Tax Management Weekly Report, 32 TMWR 1040, 8/5/13. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

The Supreme Court Finds Federal Life Insurance Rules Preempt State Law in Hillman v. Maretta and Reinforces ERISA Protections for ERISA Plan Participants and Beneficiaries

BY ALBERT FEUER, ESQ.

The Supreme Court recently decided in *Hillman v. Maretta*,[1] that the federal laws governing a life insurance program for federal employees preempt a state equitable remedy. The decision suggests that a state law ownership claim, whether based on domestic relations law (other than one complying with plan terms), contract law, property disposition on death law, a court order, or other equitable principles, is preempted if it attempts to limit the ability of a participant in a plan governed by Employee Retirement Income Security Act of 1974, as amended ("ERISA") to choose beneficiaries, or the right of a beneficiary chosen by the participant under the plan terms to receive and keep those designated benefits.[2] Similar conclusions may be reached with respect to the lump-sum survivor benefits from the Federal Employees Retirement System ("FERS"), which is the major retirement program for federal civilian employees hired after 1986.[3] The FERS provides covered federal employees with 401(k)-like benefits under a plan known as the Federal Thrift Savings Plan.[4] These ERISA and FERS conclusions are supported by the ringing endorsement of *Hillman* and its reasoning in the Court's majority opinion of *United States v. Windsor*.[5]

THE FEDERAL LIFE INSURANCE PROGRAM AND THE PREEMPTION DECISION OF THE HILLMAN SUPREME COURT

The Federal Employees' Group Life Insurance Act of 1954 as amended (FEGLIA), provides civilian employees and former employees of the federal government (hereinafter both referred as "employees") with group life insurance.[6] To the extent that a domestic relations order pertaining to an employee expressly provides that a person shall be paid FEGLIA life insurance benefits and such order is filed with the federal government before the employee's death, such person shall be entitled to those benefits.[7] To the extent there is no such order, and the employee has not assigned the incidents of ownership of the employee's policy,[8] the employee may designate a beneficiary, and if the employee or the em-

[1] 569 U.S. __, 133 S. Ct. 1943 (2013). *See* U.S. Supreme Court Holds that FEGLIA Preempts State Laws Purporting to Change Designated Life Insurance Beneficiary, Winston & Strawn LLP Appellate & Critical Motions and Employee Benefits & Executive Compensation Practices, June 2013 (a good discussion of the decision by a counsel to the successful litigant) available at *http://www.winston.com/siteFiles/Publications/Maretta.pdf* (last visited July 31, 2013) and Supreme Court Finds Federal Law Preempts State's Insurance Beneficiary Statute Scheme for FEGLIA Policies, SEMMES, June 2013 (a good discussion of the decision) available at *http://www.semmes.com/publications/cases/2013/06/hillman-v-maretta.asp* (last visited July 31, 2013), and Deborah L. Jacobs, "Supreme Court Favors Ex-Wife Over Widow In Battle For Life Insurance Proceeds," FORBES (6/3/13) (using decision to recommend employees keep their designations current) available at *http://www.forbes.com/sites/deborahljacobs/2013/06/03/supreme-court-favors-ex-wife-over-widow-in-battle-for-life-insurance-proceeds/* (last visited July 31, 2013).

[2] *See* Albert Feuer, *Determining Entitlements to Receive and Keep ERISA Survivor Benefits*, 41 *Comp. Plan. J.* __ (forthcoming 2013) (discussing these ERISA issues).

Law Offices of Albert Feuer, Forest Hills, N.Y.

[3] FERS was introduced in P.L. 99-35, 100 Stat. 514 (1986) and is set forth in 5 USC §8400 *et seq.*

[4] *See, e.g.*, Summary of the Thrift Savings Plan (May 2012) available at *https://www.tsp.gov/PDF/formspubs/tspbk08.pdf* (last visited July 31, 2013).

[5] 570 U.S. __, 2013 BL 169620 (6/26/13).

[6] *See generally* Federal Employees' Group Life Insurance (FEGLI) Program Handbook (July 2008) ("FEGLI Handbook") available at *http://www.opm.gov/healthcare-insurance/life-insurance/reference-materials/handbook.pdf* (last visited July 31, 2013)

[7] 5 USC §8705(e).

[8] 5 USC §8705(f) permits assignments to be made on a plan form, which a domestic relations order may require an employee to make. If there is such an assignment the assignee has the right to choose the beneficiary.

ployee's assignee, if any, fails to do so, FEGLIA default designations takes affect.[9]

Virginia state law provided that if a person, who owns a contract providing survivor benefits, such as an FEGLIA employee, is divorced but has not revoked a designation of the person's former spouse, such designation shall be revoked.[10] However, if the state law revocation is preempted, as is the case with FEGLIA, the state law gives the default designee an "equitable remedy" to wrest the life insurance benefit from the employee's former spouse.[11] The Supreme Court relied on the FEGLIA protections for employees and their beneficiaries to hold that FEGLIA preempts the Virginia law's equitable remedy.[12] Similarly, FEGLIA would prevent the use of state law to enforce a provision in a state domestic relations order (not complying with FEGLIA designation requirements), a prenuptial agreement, a postnuptial agreement, or a similar agreement to wrest survivor benefits from a person entitled to those benefits under FEGLIA, such as those provisions at issue in the conflicting decisions which the Court decision cited as justifying its grant of certiorari.[13]

THE QUESTION THE HILLMAN SUPREME COURT CERTIFIED

The Supreme Court in *Hillman* certified a question presented as follows:

> VA. CODE ANN. §20-111.1(A) (2011) provides that a life insurance policy's revocable beneficiary designation naming a then spouse is deemed revoked upon the entry of a Final Decree of Divorce. 5 U.S.C. §8705(a) provides that the proceeds from a Federal Employees Group Life Insurance (FEGLI) policy should be paid to the beneficiaries properly designated by the employee, and if none, then to the widow of the employee. If VA. CODE ANN. §20-111.1(A) is preempted by 5 U.S.C. §8705(a) or any other federal law, VA. CODE ANN. §20-111.1(D) (2011), gives the widow (or whoever would otherwise be entitled to the insurance proceeds), after FEGLI insurance proceeds have been distributed to an ex spouse, a domestic relations equitable remedy against the ex-spouse for the amount of the insurance proceeds received.
>
> The Supreme Court of Virginia, in agreement with the Supreme Court of Alabama, the First, Seventh and Eleventh Circuits of the United States Court of Appeals and several lower federal courts, but in direct conflict with the Indiana Supreme Court, the Supreme Court of Mississippi, the Court of Appeals of North Carolina, the Appellate Court of Illinois, the Missouri Court of Appeals, the Court of Appeals of Texas, the Superior Court of New Jersey, Appellate Division, the Superior Court of Pennsylvania, and the Court of Appeals of Kentucky, held that 5 U.S.C. §8705(a) preempts a state domestic relations equitable action against the beneficiary of a FEGLI policy after the insurance proceeds of such policy have been paid to such beneficiary in accordance with the statutory order of precedence in 5 U.S.C. §8705(a).
>
> The question presented is whether 5 U.S.C. §8705(a) [the FEGLI beneficiary designation section], any other provision of the Federal Employees Group Life Insurance Act of 1954 (FEGLIA), any regulation promulgated thereunder, or any provision of the contract entered into between the United States Office of Personnel Management to administer the FEGLIA program preempt the post-distribution equitable remedy contained in VA. CODE ANN. §20-111.1(D)?[14]

The Court's decision that the Virginia statute was preempted may be reasonably interpreted as resolving many of the conflicts among the decisions presented by the petitioner about equitable remedies for breaches of state laws pertaining to contracts and domestic relations because the *Hillman* decision cites those decisions in its explanation of why it certified the question.

THE INITIAL FEDERAL EMPLOYEES GROUP LIFE INSURANCE ACT (FEGLIA) AND THE FEGLIA GOALS OF PROTECTING AN EMPLOYEE'S RIGHT TO CHOOSE A BENEFICIARY, AND SUCH A BENEFICIARY'S BENEFIT RIGHTS

The Federal Employees' Group Life Insurance Act of 1954, established a group life insurance program for civilian employees and former employees of the federal government.[15] At such time, federal life insurance was provided to members of the military under the National Service Life Insurance Act of 1940.[16] The original statute contained no provision setting forth the purpose. There is still no purpose provision. Nevertheless, the Congressional reports confirm the obvious reason why Congress enacted FEGLIA, namely to "provide low-cost group life insurance to [specified] Federal employees [and former employees]."[17] President Eisenhower's message proposing the program to Congress observed that such a program would better enable federal employees "to carry out their responsibilities to their families."[18]

FEGLIA gave specified federal employees the right to choose their beneficiaries. There was only one restriction on this choice. The designation must be made in a writing delivered to the appropriate federal office.[19] The original act does not refer to assignments of an employee's incidents of ownership in an FEGLIA policy. FEG-

---

[9] 5 USC §8705(a).

[10] *But see* Va. Code Ann. §20-111.1(C) (no revocation if the decree provides to the contrary).

[11] Va. Code Ann. §20-111.1(D).

[12] *Hillman*, 133 S. Ct. 1943 (2013).

[13] *Hillman*, 133 S. Ct. at 1949, n. 1.

[14] *See* Petitioner's Certiorari Petition in Hillman v Maretta, 133 S. Ct. 1943 (2013) (filed 4/11/12) (No. 11-1221), at i-ii available at *http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/11-1221-Hillman-v.-Maretta-Petition.pdf* (last visited July 31, 2013).

[15] Federal Employee Federal Employees' Group Life Insurance Act of 1954, P.L. 83-598, 68 Stat 736 (1954).

[16] *See, e.g., Ridgway v. Ridgway*, 454 U.S. 46 at 50-51 (1981) (discussing life insurance programs for military).

[17] H.R. Rep. No. 2579, 83d Cong., 2d Sess. 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 3052, 3055, and S. Rep. No. 1654, 83d Cong., 2d Sess. 2 (1954).

[18] President Dwight Eisenhower's Message of May 19, 1954 *reprinted in* 1954 U.S.C.C.A.N, 3056 (1954).

[19] P.L. 83-598, §4, 68 Stat. 736 at 738.

Copyright © 2013 TAX MANAGEMENT INC., a subsidiary of The Bureau of National Affairs, Inc.

ISSN 0884-6057

LIA sets forth default designees if there was no employee designation.[20] Congress deliberately chose the same "order of [beneficiary] precedence," beginning with the employee's beneficiary choice, as it had selected for lump sum payments of survivor benefits under the Civil Service Retirement Pension Act enacted in 1950.[21] The legislative history provides no reason for this choice, although Philip Young, the chairman of the United States Civil Service Commission, stated in a letter that accompanied the President's original draft proposal, "this order of [beneficiary] precedence has proved highly satisfactory for the speedy and economical settlement of claims."[22] Employees, their beneficiaries, the FEGLIA insurers, and the federal government all benefit from timely settlements.

The original act contained no express preemption provision. Such a provision may have been thought to have been unnecessary because the Supreme Court had decided four years earlier in 1950, in *Wissner v. Wissner*[23] that a soldier's parents, who were his designated beneficiaries, rather than his widow, were entitled to receive and retain all the proceeds from a life insurance policy under the National Service Life Insurance Act of 1940.[24] The Court declared that:

> The controlling section of the Act provides that the insured *"shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . . ."* Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.[25]

In March of 1966, Congress approved an amendment to the FEGLIA beneficiary designation provision, which clarified the purpose of such provision.[26] Prior to that amendment, as discussed, above, "a writing" needed to have been submitted to the specified federal office before the employee's death. The relevant Congressional reports[27] described the amendment as designed to reject *Sears v. Austin*.[28] In *Sears*, the Ninth Circuit held in 1961 that when an employee's intended beneficiary could be clearly established from a holographic will, i.e., a handwritten will, which may have been signed and witnessed but was not executed in a manner satisfying the usual probate requirements, [29] the designation was effective even though submitted after the employee's death.[30] The Senate report described the amendment as clarifying that an effective designation must "be properly received in the employing office [of the employee] or by the Civil Service Office."[31] However, that requirement was in FEGLIA as originally enacted.[32] The actual changes were additions of (1) the requirement that the writing be signed and witnessed, and (2) an explicit statement a document "not so executed and filed has no force or effect."[33] The latter, rather than the former, repudiates *Sears*, and the House report emphasized the importance of the latter provision.[34] Thus, there would be no exception to formalistic requirements of the federal government life insurance designation provisions, even if there were better evidence of the employee's intentions than a duly filed designation.

The House report stated that "[t]he ultimate objective [of the amendment] is to provide for assurance of a valid acquittance to the insurer or the Government upon payment to a claimant properly entitled under such acts."[35] The report also described how such assurance of the validity of a designation would also give the following advantages to beneficiaries:

> To avoid the financial risk of paying the life insurance twice, should the Austin v. Sears doctrine prevail, payments would have to be delayed inordinately in every case pending complete investigation and conclusive determination that no document, such as the will in the Sears case existed anywhere which might affect the determination of the proper payee. *This would work a severe hardship on the decedent's family at a time when its financial need is the greatest.* Presently, life insurance benefits are paid promptly to the persons entitled after the death of the insurer. This highly desirable policy could not in all probability be maintained if the danger implicit in the Sears decision is not overcome by legislative action.[36]

The Senate report emphasized that the purpose of the change was to:

> avoid administrative difficulties [that would result from the Sears focus on employee's wishes rather

[20] *Id.*

[21] H.R. Rep. No. 2579, 83d Cong., 2d Sess. 1 (1954) *reprinted in* 1954 U.S.C.C.A.N. 3053, 3054, and S. Rep. No. 1654, 83d Cong., 2d Sess. 3 (1954).

[22] 1954 U.S.C.C.A.N. 3057.

[23] 338 U.S. 655 (1950).

[24] *Id.* at 658-59. The decision is discussed more extensively at Albert Feuer, "How the Supreme Court and the Department of Labor May Dispel Myths about ERISA's Family Law Provisions and Protect the Benefit Entitlements That Arise Thereunder," 45 *J. Marshall L. Rev.* 635 at 654-56 (Spring 2012) ("*Feuer's ERISA Myths*") (identifying and discussing two major ERISA myths: the plan administrative convenience myth, i.e., that a major purpose of ERISA is to provide plan sponsors with administrative convenience, and the women's myth, i.e., that ERISA was amended in 1984 to make it easier for women to enforce domestic relation orders pertaining to ERISA benefits) at *http://ssrn.com/abstract=2154053* (last visited on July 31, 2013).

[25] *Id.* at 659 (citations omitted and emphasis added).

[26] P.L. 89-373, §1, 80 Stat. 78 at 78 (1966).

[27] S. Rep. No. 1064, 89th Cong., 2d Sess. 2-3, *reprinted in* 1966 U.S.C.C.A.N. 2070, 2071-72, and H.R. Rep No. 508, 89th Cong., 1st Sess. 2 (1965), 2-3.

[28] 292 F.2d 690 (9th Cir. 1961).

[29] Cal. Prob. Code §§6110-11 (discussing the validity of holographic wills).

[30] *Sears*, 292 F.2d at 695 (the employee had not submitted any designation to the federal government before his death, but after his death a holographic will was submitted. The California had approved the will, which named a friend of the employee rather than his children to receive his FEGLIA insurance).

[31] S. Rep. No. 1064, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2070, 2071.

[32] The amendment also permitted submission to the Civil Service Office in certain circumstances not relevant in *Sears*.

[33] P.L. 89-373, §1, 80 Stat. 78 at 78 (1966). *See also* S. Rep. No. 1064, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S.C.C.A.N. 2070, 2072 (showing the statutory changes)

[34] H.R. Rep. No. 508, 89th Cong., 1st Sess. 2 (1965) at 3. The *Sears* court disregarded the isurance policy that included both provisions. *See Sears*, 292 F.2d at 695, n. 2.

[35] *Id.* at 1.

[36] S. Rep. No. 1064, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2070, 2072 (emphasis added).

than compliance with the statutory requirements] for the Civil Service Commission [the predecessor of the Office of Personnel Management] and the insurance companies [providing the FEGLIA policies], and *more important seriously delay paying insurance benefits to survivors of Federal employees*.[37]

Thus, the beneficiary designation provisions served important administrative purposes for the employee and for the employee's beneficiary. The employee could choose any beneficiary by complying with the designation rules and if the employee complied with such rules the beneficiaries or the beneficiaries could be assured of quickly obtaining the benefit. The same changes were made with respect to the survivor benefits provided under the Civil Service Retirement Act,[38] so designations under this Act would be treated in the same manner.

The Supreme Court used a similar explanation in 2001 in *Egelhoff v. Egelhoff*,[39] when it held therein that ERISA preempted the application of a revocation-upon-divorce state law to the benefits distributed from an ERISA life insurance plan.[40] In contrast, the *Sears* court described the beneficiary designation provisions as designed to protect an insurer from a double payment obligation.[41] Thus, the *Sears* court found those provisions as not controlling when the proceeds were deposited with the court, and the employee's intent could be ascertained in documents that were not submitted to federal government before the employee's death but otherwise complied with those provisions.[42]

THE ENHANCEMENT OF FEGLIA BENEFITS AND EMPLOYEE DESIGNATION PROTECTIONS, SUCH AS LIMITS ON THE ASSIGNMENT AND THE WAIVER OF DESIGNATION RIGHTS

Two amendments enhanced the available FEGLIA insurance. The first was part of an act approved by Congress in December of 1967 that improved a broad range of compensation for federal employees.[43] The second was in an act approved by Congress in October of 1980 that was directed solely at improving FEGLIA benefits and was approved in 1980.[44]

The 1980 amendment introduced the current FEGLIA express preemption provision:[45]

> (d)(1) The provisions of any contract under this chapter [5 USC §§8701 et seq.] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance *to the extent that the law or regulation is inconsistent with the contractual provisions*.
>
> (2) For the purpose of this section, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and a territory or possession of the United States.[46]

None of the relevant Congressional reports describe the significance of such provision. The provision only addresses inconsistencies with the terms of FEGLIA insurance contracts, rather than with the FEGLIA statute or regulations. There seem to be two relevant contracts, the group contract between the federal government and insurers to provide insurance or to operate the FEGLIA program,[47] and individual insurance policies owned by the employee.[48] Thus, state law may not interfere with the contract protections for the employee's beneficiary choices or with the contract protections for FEGLIA beneficiaries. This raises the question of the effectiveness of a feature required by FEGLIA or the regulations thereunder, which the contract disregards.[49]

A Supreme Court decision in 1981, the next year, about the preemptive effects of another federal insurance statute suggested that the FEGLIA explicit preemption section may not have been needed. The Supreme Court held, in *Ridgway v. Ridgway*,[50] that a soldier's second wife, who was his designated beneficiary, rather than his children, was entitled to receive and retain all the proceeds from a life insurance policy under the Servicemen's Group Life Insurance Act of 1965,[51] a successor to the National Service Life Insurance Act of 1940[52] that the Court considered in *Wissner*. The Court relied on its *Wissner* reasoning as follows: "Here, as there, it appropriately may be said: 'Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.' "[53]

The dubious value of the FEGLIA express preemption section is shown by two relatively non-controversial decisions.[54] In 1986, the Tenth Circuit decided, in *Metropolitan Life Ins. Co. v. McMorris*,[55] that FEGLIA preempts a divorce decree requiring a federal employee to maintain life insurance for the benefit of

---

[37] *Id.* (emphasis added).

[38] P.L. 89-373, §2, 80 Stat. 78 at 78 (1966).

[39] 532 U.S. 141 (2001).

[40] *Id.* at 149, n. 3 (the question was the statute seemed from preemption by permitting the plan to avoid a double payment by refusing to make a benefit payment until the parties resolve the dispute about ownership of the benefit).

[41] *Sears*, 292 F.2d at 693.

[42] *Id.*

[43] Postal Revenue and Federal Salary Act of 1967, P.L. 90-206, §302, 81 Stat 613 at 646-648 (1967).

[44] Federal Employees Group Life Insurance Act of 1980, P.L. 96-427, 94 Stat 1831 (1980), *reprinted at* 1980 U.S.C.C.A.N. 3868.

[45] P.L. 96-427, §5, 94 Stat. 1831 at 1834 (1980).

[46] 5 USC §8709(d) (emphasis added).

[47] *See* FEGLI Handbook, above, note 6, at 2, 115, 213.

[48] *See* FEGLI Handbook, above, note 6, at 146.

[49] *See, e.g.*, Amicus Brief by the United States in Hillman v Maretta, 133 S. Ct. 1943 (2013) (filed 12/14/12) (No. 11-1221) at 32 n. 12 (observing that the contract lacks some provisions that FEGLIA requires) available at *http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-1221_resp_amcu_usa.authcheckdam.pdf* (last visited July 31, 2013). A similar question may be raised about the effectiveness of an ERISA plan document, which does not comply with ERISA requirements. *See Kennedy v. Plan Adm'r of the Du Pont Sav. & Inv. Plan*, 555 U.S. 285, at 301, n. 11 (2009).

[50] 454 U.S. 46 (1981).

[51] *Id.* at 56, 62. The decision is discussed more extensively at *Feuer's ERISA Myths*, above, note 24, at 678-80.

[52] *Id.* at 50.

[53] *Id.* at 56 (quoting *Wissner*, 338 U.S. at 658).

[54] *But see Hillman* 133 S. Ct. at 1949, n. 1. Both decisions are described as being among the conflicting decisions, which the Court will resolve. Thus, after the *Hillman* decision both decisions remain good law.

[55] 786 F.2d 379 (10th Cir. 1986).

 Copyright © 2013 TAX MANAGEMENT INC., a subsidiary of The Bureau of National Affairs, Inc. ISSN 0884-6057

his children.[56] In particular, Met Life, which had paid the employee's designees, was not required to also pay the proceeds to the children.[57] The court relied on *Ridgway* and its analysis, but also stated that the children may have a claim against the employee's estate for the employee's violation of the divorce decree.[58] In 1996, the Second Circuit decided in *Metropolitan Life Ins. Co. v. Sullivan*,[59] that a state law power of attorney may not be used to change an FEGLIA beneficiary.[60] The court relied on the portion of the FEGLIA express preemption section referring to state laws relating to benefit payments.[61]

On January 25, 1984, the Office of Personnel Management issued final FEGLIA regulations,[62] although earlier regulations had been released by the Civil Service Commission.[63] Those regulations emphasize the breadth of an employee's right to choose a beneficiary by stating that "A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted." [64] The only change that has been made in this provision since its release is a change in the location of the regulation.[65]

In July 1984, FEGLIA was amended to make federal judges eligible for FEGLIA insurance.[66] This amendment also permitted a federal judge to assign the incidents of ownership of the judge's FEGLIA policy, if any, pursuant to regulations.[67] In October 1986, the assignment regulations were released.[68] Effective assignments were those that used a prescribed federal form, which were signed by the employee and two witnesses and were submitted to the employee's employing office.[69] In 1994, all employees became eligible to make assignments of their incidents of ownership of an FEGLIA policy.[70] In September of 1997, the regulations were updated to permit all employees to make assignments.[71] The location of the regulation changed,[72] and the number of the prescribed form was omitted, but there were no substantive changes to the earlier regulation. There have been no further substantive changes to the regulation.[73]

[56] *Id.* at 381.

[57] *Id.* at 380.

[58] *Id.* at 381.

[59] 96 F.3d 18 (2d Cir. 1996) (*per curiam*).

[60] *Id.* at 19.

[61] *Id.* at 20.

[62] 49 Fed. Reg. 3033 (1/25/84).

[63] *See, e.g.,* H.R. Rep. No. 508, 89th Cong., 1st Sess. 2 (1965) at 2 (describing how the *Sears* court disregarded such regulations).

[64] 49 Fed. Reg. 3033 at 3039 (1/25/84).

[65] 5 CFR §870.802(f).

[66] "Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, §§205-09, 98 Stat. 333, 350-51.

[67] Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, §208, 98 Stat. 333, 351.

[68] 51 Fed. Reg. 39361 (10/28/86).

[69] 5 CFR §874.301 (1986).

[70] P.L. 103-336, §4, 108 Stat. 2661, 2662 (1994).

[71] 62 Fed. Reg. 48731 (9/17/97).

[72] 5 CFR §870.902 (1997).

[73] *See* 64 Fed. Reg. 72459, 72464 (12/28/99), and 75 Fed. Reg. 60573, 60585 (10/1/10) (later non-substantive changes).

CONFLICTING PREEMPTION HOLDINGS ABOUT THE EFFECT OF STATE LAW CLAIMS ON THE OWNERSHIP OF FEGLIA BENEFITS AND A FEGLIA AMENDMENT PERMITTING A DOMESTIC RELATIONS ORDER TO DESIGNATE FEGLIA BENEFICIARIES

The adoption of the statutory and regulatory amendments that addressed the selection by employee persons of their beneficiaries was followed by conflicting decisions about whether state laws determining the ownership of FEGLIA benefits may be used to wrest benefits from the FEGLIA designee.[74] The federal courts often found preemption and the state courts often found no preemption. State law claims not based on the ownership of the FEGLIA benefits, such as a claim for unpaid rent from the beneficiary were not at issue.

For example, in 1988, the Eleventh Circuit held, in *O' Neal v. Gonzalez*,[75] that FEGLIA preempts an attempt to impose a constructive trust to enforce an agreement by an employee to designate his girlfriend as his FEGLIA beneficiary.[76] This holding rested on two assertions. First, the beneficiary designation section was established not merely for the administrative convenience of the FEGLIA insurer but for the convenience of the designated beneficiary, who was given assurance that she would be paid the benefit regardless of other documents or equities.[77] Second, permitting another party, in this case the employee's aunt, to wrest the benefits from the designee would make the beneficiary designation meaningless.[78]

In contrast, in 1991, the Court of Appeals in Missouri held, in *Kidd v. Pritzel*,[79] that FEGLIA does not preempt the use of a constructive trust to enforce (1) a divorce decree requirement that the employee maintain his children as his FEGLIA beneficiaries, and (2) a will requirement that the employee's sisters, who were his FEGLIA beneficiaries, hold the FEGLIA benefit in trust for those children.[80] The holding rested on three assertions. First, "the sole purpose of this [FEGLIA beneficiary designation] section has been to provide for the speedy and economical settlement of claims."[81] Thus, there

[74] *See Hillman*, 133 S. Ct. at 1949, n. 1. Both decisions are described as being among the conflicting decisions, which conflict the Court was resolving. Thus, it is reasonable to conclude that after *Hillman* the decision finding preemption is good law, but the other decision is no longer good law.

[75] 839 F.2d 1437 (11th Cir. 1988).

[76] *Id.* at 1438 (he replaced his girlfriend by his aunt for a portion of the FEGLIA benefit).

[77] *Id.* at 1439-40.

[78] *Id.* at 1440.

[79] 821 S.W.2d 566 (Mo. App. 1991). This decision relied in large part on the reasoning of a federal court that did not find preemption, *Rollins v. Metropolitan Life Ins. Co.*, 863 F.2d 1346 (7th Cir. 1988) (holding that ERISA did not preempt the imposition of a state law constructive trust against the employee's designee, his estranged wife, in favor of the employee's children).

[80] *Id.* at 575.

[81] *Id.* at 569. The court mentions but disregards why one purpose of the 1966 amendment to the FEGLIA designation provisions was to avoid "serious delay" in the payments of survivor benefits. The purpose as discussed, above,, was to benefit the employees and their designated beneficiaries. *Id.* at 569-70.

was no dispute about the sister's right to receive the FEGLIA benefit.[82] Second, *Ridgway* and *Wissner* may be distinguished because those decisions rested on anti-attachment provisions that are not part of FEGLIA, and *Ridgway* referred to permitting constructive trusts in cases of fraud or breach of trust.[83] Third, the FEGLIA express preemption section applied only to matters of group life insurance, i.e., payments by the FEGLIA insurer, rather than the designee's entitlements.[84] Thus, that section had no application after the insurer made those payments.[85]

In 1998, Congress amended FEGLIA to provide that domestic relations orders could affect benefit entitlements in two ways.[86] First, a statutory beneficiary designation was introduced. FEGLIA benefits would be paid to a person "to the extent expressly provided for in the terms" of a domestic relations order or an agreement incident to such order, if such order was filed with the appropriate office before the employee's death.[87] Second, a domestic relation order may direct an employee to assign the incidents of ownership to an FEGLIA policy to another person.[88]

The relevant Congressional report[89] first confirms that under current law a domestic relations order does not affect the payment of FEGLIA benefits.[90] The amendment permits specified orders and agreements incident to such orders to do so. However, to prevent employees from frustrating such orders, the law also permits state courts to direct an employee to assign the policy to a specific individual, who may maintain the policy and select beneficiaries at will.[91]

These two provisions address neither the *O' Neal* situation nor the *Kidd* situation. First, the new provisions do not apply to agreements that are not incident to a domestic relations order, such as the one between an unmarried couple in *O' Neal*. Thus, the provisions offer no way for one member of an unmarried couple to obtain the FEGLIA benefits of the other. Second, a state court order directing an employee to maintain a beneficiary designation, such as the one in *Kidd*, is not covered by either of the new provisions. Thus, such an order may not be enforced to compel the employee to maintain beneficiaries and thereby affect the right to receive FEGLIA benefit payments. However, if the order had directed the employee to assign the benefits of ownership to a representative of the children, the representative could have named the children as the beneficiary of the FEGLIA benefits. Third, the provisions do not address the *Kidd* issue of whether a state law ownership claim may ever be used to wrest benefits from an FEGLIA designee.

After 1998, the courts continued to issue conflicting decisions whether state laws determining the ownership of FEGLIA benefits may affect distributed FEGLIA benefits.[92] The federal courts often found preemption and the state courts often found no preemption.

For example, in 2002, the Mississippi Supreme Court held, in *McCord v. Spradling*,[93] that FEGLIA does not preempt the use of state contract law to enforce a prenuptial agreement after the distribution of benefits.[94]

In contrast, in 2005, the First Circuit held, in *Met Life Ins Co. v. Zaldivar*,[95] that FEGLIA preempted a state constructive trust from being imposed to enforce a divorce decree requiring an employee to name his children as his FEGLIA beneficiaries rather than his widow.[96]

Finally, in 2012, the Indiana Supreme Court held, in *Hardy v. Hardy*,[97] that FEGLIA did not preempt the use of the equitable remedy of constructive trust to enforce a divorce decree requiring an employee to designate his first wife and grandchildren, rather than his second wife, as his FEGLIA beneficiaries.[98] This decision described the 1998 domestic relations additions to FEGLIA as confirming the principle that state domestic relations orders always override the beneficiary designation sections, although some may not affect the right to receive FEGLIA benefit payments from the federal government.[99]

ALL THE SUPREME COURT JUSTICES AGREE THAT FEGLIA PREEMPTS THE VIRGINIA REVOCATION UPON DIVORCE STATUTE

The nine justices issued four distinct *Hillman* opinions, each of which held that FEGLIA preempted the Virginia revocation upon divorce law. Justice Thomas found that the ordinary meaning of the text and structure of FEGLIA directly conflicts with the Virginia law.[100] In particular, FEGLIA gives a federal employee the right to choose a beneficiary, which right may not be waived or restricted.[101] This right, as well as the beneficiary's right to the survivor benefit, would be "meaningless," if state law requires the beneficiary to pay another person the benefit amount.[102] Thus, the Virginia law was preempted.[103] In short, Justice Thomas found preemption because the state law equitable remedy conflicts with the FEGLIA provisions that protected the federal employees' right to select beneficiaries, and thus the benefit rights of those designated beneficiaries. Justice Thomas's majority opinion in *Egelhoff v. Egel-*

[82] *Id.* at 569, n. 4.

[83] *Id.* at 570-71. However, the court did not mention that the Supreme Court in *Ridgway* rejected the application of those equitable principles to an individual who disregarded the terms of a divorce decree.

[84] *Id.* at 572-73.

[85] *Id.* at 573.

[86] P.L. 105-205, 112 Stat. 683 (1998).

[87] P.L. 105-205, §1, 112 Stat. 683 (1998).

[88] P.L 105-205, §2, 112 Stat. 683, 683-84 (1998).

[89] H.R. Rep. No. 105-34, 105th Cong., 1st Sess. (1997).

[90] H.R. Rep. No. 105-34, 105th Cong., 1st Sess. 2 (1997).

[91] *Id.* This feature was added to the version of H.R. 1316, 105th Cong. 1st Sess. (1997), that on Apr. 15, 1997, was reported out of the House Committee on Government Reform and Insight.

[92] *See Hillman*, 133 S. Ct. at 1949, n. 1. Three decisions are described as being among the conflicting decisions, which the Court will resolve. Thus, after *Hillman* it is reasonable to conclude that the decision finding preemption is good law, but the other decisions are no longer good law.

[93] 830 So.2d 1188 (Sup. Ct. Miss. 2002).

[94] *Id.* at 1204.

[95] 413 F.3d 119 (1st Cir. 2005).

[96] *Id.* at 120.

[97] 963 N.E.2d 470 (Sup. Ct. Ind. 2012).

[98] *Id.* at 472.

[99] *Id.* at 480. There is no discussion of why both the statute and legislative history say nothing about this point.

[100] *Hillman*, 133 S. Ct. at 1955-56 (Thomas, J. concurring).

[101] *Id.* at 1955.

[102] *Id.* at 1956.

[103] *Id.*

 Copyright © 2013 TAX MANAGEMENT INC., a subsidiary of The Bureau of National Affairs, Inc. TMW ISSN 0884-6057

hoff,[104] that ERISA preempted a Washington revocation upon divorce statute similarly focused on the conflict between that law and the ERISA requirement that a plan's designation terms determine plan beneficiaries.

Justice Alito declared that one purpose of FEGLIA was to implement the expressed wishes of the employee.[105] The Virginia law conflicted with this purpose by overriding the only expression of intent, the designation; thus, it was preempted.[106] However, if there were expressed intent contrary to the designation, Justice Alito would not permit the beneficiary to retain the benefit.[107] Justice Alito did not discuss the 1966 addition to the beneficiary designation section discussed above, which aimed to reverse *Sears* and prevent such inquiries.[108] Justice Alito disregarded the principle that transfer on death dispositions are generally determined not by the best evidence of intent but by whether disposition satisfies formalistic requirements, such as those required for the probate of a will.[109]

The seven other justices joined an opinion of Justice Sotomayer, although Justice Scalia did not agree with one point. First, the justices decided to follow the court below and consider only conflict preemption but not the express FEGLIA preemption section.[110] Second, unlike Justice Thomas the justices decided to look beyond the statutory language and consider whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[111] Third, the Justices cite *Ridgway* for the principle that state laws "governing the economic aspects of domestic relations . . . must give way to clearly conflicting federal enactments."[112] Fourth, the Justices cited and presented the reasoning of *Wissner* and *Ridgway*, discussed above, which concluded that the survivor benefits belong to the beneficiary named by the employee.[113] Fifth, the Justices observed that FEGLIA, like the laws at issue in those decisions, gave first priority to the employee's beneficiary choices, which importance was emphasized by the FEGLIA regulation prohibiting the waiver of the employee's designation right.[114] The Court stated:

> It makes no difference whether state law requires the transfer of the proceeds, as Section A [of the Virginia statute] does, or creates a cause of action, like Section D, that enables another person to receive the proceeds upon filing an action in state court. In either case, *state law displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead*.[115]

The majority disagreed with Justice Alito's characterization of the FEGLIA objective. They identified the same FEGLIA objectives upon which Justice Thomas based his opinion,[116] i.e., giving employees the right to choose a beneficiary by satisfying the plan designation terms, with the expectation that the designee will receive and be able to use the benefits. Thus, they declared:

> Rather than draw an inference about an employee's probable intent from a range of sources, Congress established a clear and predictable procedure for an employee to indicate who the intended beneficiary of his life insurance shall be. Like the statutes at issue in *Ridgway* and *Wissner*, FEGLIA evinces Congress' decision to accord federal employees an unfettered "freedom of choice" in selecting the beneficiary of the insurance proceeds and to ensure the proceeds would actually "belong" to that beneficiary. *Ridgway*, 454 U.S., at 56. An employee's ability to name a beneficiary acts as a "guarantee of the complete and full performance of the contract to the exclusion of conflicting claims." *Wissner*, 338 U. S., at 660. With that promise comes the expectation that the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them.[117]

The Court rejected the assertion that the presence of the statutory beneficiary designation for certain domestic relations orders filed with the plan prior to the employee's death shows that state law overrides the employee's designations in other circumstances.[118] The Court also rejected the assertion that *Wissner* and *Ridgway* depended on the anti-attachment provisions in those federal statutes.[119]

Justice Scalia did not join the part of Justice Sotomayor's opinion that asserted that the 1998 introduction of the statutory beneficiary designation for certain domestic relations orders filed with the plan prior to the employee's death[120] supported the idea that FEGLIA protected distributed FEGLIA benefits. This abstention may have resulted from the fact that as discussed above, the amendment did not address that issue.

The Court's majority opinion for *Windsor*,[121] which overturned the Defense of Marriage Act (DOMA),[122] re-

---

[104] 532 U.S. 141 (2001) (holding ERISA preempted a revocation-upon-divorce statute that like the one in *Hillman* acted upon distributed benefits).

[105] *Hillman*, 133 S. Ct. at 1956 (Alito, J. concurring).

[106] *Id.* at 1957.

[107] *Id.* at 1956-57.

[108] *But see* Transcript of Oral Argument, Hillman v Maretta, 569 U.S. __, 133 S. Ct. 1943 (2013) (Maretta argued 4/22/13) (No. 11-1221) at 26-28 (the amendment is brought up by Ms. Maretta's counsel) available at *http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1221-4g59.pdf* (last visited July 31, 2013) and Amicus Brief by the United States in Hillman v Maretta, 133 S. Ct. 1943 (2013) (filed 12/14/12) (No. 11-1221) at 16-17 (discussing such amendment), available at *http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-1221_resp_amcu_usa.authcheckdam.pdf* (last visited July 31, 2013).

[109] *But see* John Langbein, Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law," 87 *Colum. L. Rev.* 1 (1987) (arguing that the will requirements be interpreted to excuse "harmless errors").

[110] *Hillman*, 133 S. Ct. at 1949.

[111] *Id.*

[112] *Id.* at 1950.

[113] *Id.* at 1950-51.

[114] *Id.* at 1951.

[115] *Id.* at 1952 (emphasis added).

[116] *Id.* at 1952, n. 3. The majority, like Justice Alito, made no mention of the FEGLIA amendments in reaction to *Sears*.

[117] *Id.* at 1953-54.

[118] *Id.* at 1953. A similar assertion was presented in *Hardy*, discussed above.

[119] *Id.* at 1954.

[120] *Id.* at 1948.

[121] *United States v. Windsor*, 570 U.S. __, 2013 BL 169620 (6/26/13).

[122] 2013 BL 169620 at *18-19.

affirmed the *Hillman* decision and its relation to *Ridgway* and *Wissner*, while describing the state law in such general terms that the preemption would be applicable to either a revocation upon divorce statute or a waiver of an interest in survivor benefits in property settlements agreement incorporated into a divorce decree, as follows:

> By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. *Just this Term the Court upheld the authority of the Congress to pre-empt state laws, allowing a former spouse to retain life insurance proceeds under a federal program that gave her priority, because of formal beneficiary designation rules, over the wife by a second marriage who survived the husband. Hillman v. Maretta*, 569 U.S. _, 133 S. Ct. 1943, 186 L. Ed.2d 43 (2013); *see also Ridgway v. Ridgway*, 454 U.S. 46, (1981); *Wissner v. Wissner*, 338 U.S. 655, (1950). This is one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819). Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.[123]

IMPLICATIONS OF SUPREME COURT'S HILLMAN DECISION FOR (1) THE RETENTION OF DISTRIBUTED FEGLIA AND SURVIVOR BENEFITS FROM THE FEDERAL THRIFT SAVINGS PLAN, AND (2) DESIGNATIONS FOR FEGLIA AND SURVIVOR BENEFITS FROM THE FEDERAL THRIFT SAVINGS PLAN

The *Hillman* Court's opinions, the certiorari petition the Court accepted, and the list in the majority opinion of some of the conflicting cases which persuaded the Court to grant certiorari, make it reasonable to conclude that (1) FEGLIA preempts the state laws that were used to wrest benefits from FEGLIA beneficiaries, such as those that were held not to be preempted in decisions cited in the *Hillman* majority opinion; and (2) FEGLIA preempts state laws that seek to compel FEGLIA employee parties to make benefit designations rather than to assign the incidents of ownership to FEGLIA policies, such as those that were held not to be preempted in decisions cited in the *Hillman* majority opinion. These conclusions, contrary to the arguments in the *Hillman* petitioner brief,[124] do not affect the availability of federal common law doctrines to overturn FEGLIA designations, that were obtained by fraud, undue influence or when the employee lacked capacity. It is reasonable to reach similar conclusions with respect to the lump-sum survivor benefit from the Federal Thrift Savings Plan, which as discussed below, has similar beneficiary provisions.

All the *Hillman* justices, other than Justice Alito, agreed to the principle that a party with an FEGLIA life insurance policy has the unfettered right to choose a beneficiary with a designation satisfying the FEGLIA terms unless (1) the party has assigned the right pursuant to the FEGLIA terms, or (2) a domestic relations order making a designation has been filed with the appropriate office before the employee's death. All the justices, other than Justice Alito, agreed to the principle that state law ownership claims to an FEGLIA benefit may not be used to wrest such benefits from the beneficiary determined under the FEGLIA terms.

In particular, FEGLIA preempts state law ownership claims, such as domestic relations claims, constructive trust claims, contract claims, or unjust enrichment claims based on (1) a prenuptial agreement, as in *McCord*,[125] discussed above; (2) a contract between an unmarried couple, as in *O 'Neal*,[126] discussed above; and (3) a direction to change a designation in a domestic relations order, as in *Hardy*,[127] discussed above. One would expect the results to be the same for decisions finding no preemption that were cited in the certiorari petition but not cited in the Supreme Court opinion. For example, in *Fagan v. Chaisson*,[128] the court held that FEGLIA did not preempt the use of the state law equitable remedy of constructive trust against the employee's designee (his widow) on behalf of the employee's first wife to enforce a property settlement agreement awarding the first wife a portion of the FEGLIA benefit that was apparently incorporated into a divorce decree. The employee passed away in 1997 before the 1998 enactment of the provision introducing statutory beneficiary designations based on a domestic relations order.[129] That provision, if in effect, would have given the first wife a way of enforcing the settlement, namely by filing the order before the employee's death.

Hardy and *McMorris* raise the question whether FEGLIA preempts a state from imposing sanctions to compel the employee to comply with a domestic relations order directing an employee to designate a specified person as the employee's beneficiary. FEGLIA preempts such enforcement because those sanctions would violate (1) the FEGLIA prohibition on any restriction of the right to make beneficiary designations;[130] (2) the FEGLIA express preemption of state laws that relate to the payment of benefits.[131] The domestic relations order or any state court order directing the employee to make a designation does not qualify for the two exceptions for such court orders, which are limited to domestic relations orders. First, the order does not direct the employee to transfer the incidents of ownership to the

[123] *Id.* at *12 (emphasis added).

[124] Petitioner's Brief in Hillman v. Maretta, 133 S. Ct. 1943 (2013) (filed 2/22/13) (No. 11-1221) at 27, n. 11 (incorrectly asserting there is no federal remedy that addresses fraud), available at *http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-1221_pet_amcu_jhillmann.authcheckdam.pdf* (last visited July 31, 2013).

[125] *Hillman* 133 S. Ct. at 1949, n. 1.

[126] *Id.*

[127] *Id.*

[128] 179 S.W.3d 35, 41 (Tex. App. 2005).

[129] *Id.* at 40, n. 5.

[130] 5 CFR §870.802(f).

[131] 5 USC §8709(d).

 Copyright © 2013 TAX MANAGEMENT INC., a subsidiary of The Bureau of National Affairs, Inc. TMW ISSN 0884-6057

employee's policy.[132] Second, the terms of the order do not expressly provide for the payment of benefit to a specified person.[133] No further exceptions from the FEGLIA rules protecting the insurer's right to make designation may be implied because as the seven justices in *Hillman* stated "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[134]

A fortiori, FEGLIA preempts any attempt to compel the employee's estate to pay the specified person the amount of the FEGLIA benefit because the employee did not comply with a domestic relations order or other order directing an employee to designate a specified person as the employee's beneficiary. If the employee could not be compelled to comply with the order while alive, his or her estate may not be punished for failing to comply with the same order. This result is consistent with the *Hillman* principle that FEGLIA provides "meaningful" protections of the employee's right to designate the beneficiary he or she prefers, including the right of the designee to be paid and to keep the FEGLIA benefit.

FEGLIA preemption principles do not preclude the use of Federal common-law principles may be used to determining the effectiveness of the execution of an FEGLIA designation.[135] For example, forged or fraudulently obtained designations are not effective. Similarly, a designation executed when a person lacked capacity or was subject to undue influence, would not be effective. There appear to be no FEGLIA decisions on this point. However, there are such decisions with respect to plan designations under ERISA, which protects participants and beneficiaries in employee benefit plans of private employers.[136] On the other hand, the common-law doctrine of substantial compliance is not available to validate an FEGLIA designation because of the 1966 post-*Sears* amendment to FEGLIA, which added to 5 USC §8705 the following sentence "For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect."[137]

[132] 5 USC §8706(f). Such an order must also be filed with the appropriate federal office before the employee's death to be effective. 5 CFR §870.902.

[133] 5 USC §8705(e). Such an order must also be filed with the appropriate federal office before the employee's death to be effective. *Id. See also* FEGLI Handbook, above, note 6, at 210.

[134] *Hillman* 133 S. Ct. at 1953. The Court cited *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980), as the source of the quote.

[135] *But see Kidd*, 821 S.W.2d at 571 (incorrectly asserting that if FEGLIA preempted the use of equitable state remedies, such as imposing a constructive trust on distributed FEGLIA benefits, there would be no basis for overturning a designation obtained by undue influence, duress, or fraud).

[136] *See, e.g., Guardian Life Ins. Co. v. Bowes*, 2012 BL 97108 (W.D. Va. 4/20/12) (finding a death-bed beneficiary designation was effective after discussing doctrines of undue influence, lack of capacity, and fraud).

[137] P.L. 89-373 80 Stat. 78 at 78 (1966). *Cf. Phoenix Mutual Life Insurance Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994) (holding that the substantial compliance doctrine available with respect to ERISA benefit designations; in particular, designation of an employee's second wife is effective despite the failure of the employer's human resource department to fully complete the employee's designation).

The designation provisions for the Federal Thrift Savings Plan lump-sum survivor benefits[138] are similar to the FEGLIA provisions.[139] The Federal Thrift Savings Plan similarly treats as a statutory designations those domestic relations orders that direct that the survivor benefit shall be paid "to another person if and to the extent expressly provided for in the terms of any court order or decree."[140] The applicability of the *Hillman* principles is not affected by the fact that the FERS, which governs the Federal Thrift Savings Plan, also permits orders enforcing child abuse judgments to qualify as statutory beneficiary designations under the same terms as domestic relations orders.[141] Nor is this result affected by the FERS provisions giving default rights to receive payments in the form of an annuity, rather than as a lump sum, to a spouse[142] or a child[143] who survives the employee.

Thus, it may no longer be good law to permit state law ownership claims to be used to wrest a Federal Thrift Savings Plan survivor benefit from the employee's designee. In particular, it is appropriate to reconsider the validity of the reasoning of recent decisions such as a Texas decision, *Smalley v. Smalley*,[144] or a New York decision, *In the Matter of Kelly*.[145] Both permitted the Federal Thrift Savings Plan survivor benefit to be wrested by the employee's estate from the employee's designee, who was the employee's former wife, because the settlement agreement incorporated into the divorce between the employee and his designee contained a waiver by the designee of her Federal Thrift Savings Plan benefit.[146]

IMPLICATIONS OF SUPREME COURT'S HILLMAN DECISION FOR RETENTION OF DISTRIBUTED ERISA BENEFITS AND FOR ERISA DESIGNATION CHOICES

The arguments in favor of preemption of state law ownership claims by FEGLIA apply with greater force with respect to state law ownership claims that attempt to affect (1) the right of an ERISA plan participant to designate a beneficiary, or (2) the right of such designee to receive or keep a benefit. Thus, ERISA preempts state law ownership claims, such as domestic relations claims other than those consistent with the plan

[138] 5 USC §8424(d) and 5 CFR §843.205.

[139] 5 USC §8705(a) and 5 CFR §870.802.

[140] *Cf.* 5 USC §8705(e) ("FEGLIA") and 5 USC §8467(a) ("FERS").

[141] 5 USC §8467(a)(2).

[142] 5 USC §8442.

[143] 5 USC §8443.

[144] 2013 BL 84942 (Tex. App.-Houston [14th Dist.] 3/28/13).

[145] 950 N.Y.S.2d 415, 36 Misc.3d 736 (NY Sur. Ct. Richmond Co. 2012).

[146] *Smalley v. Smalley*, 2013 BL 84942 (Tex. App.-Houston [14th Dist.] 3/28/13) (administrator of the employee's estate was permitted to obtain the Federal Thrift Savings Plan benefit); *In the Matter of Kelly*, 950 N.Y.S.2d at 418 (administrator of the employee's estate was permitted to obtain benefits from FEGLIA and the Thrift Saving Plan, although the administrator was the employee's son and thus entitled to at least a portion of the benefits from each plan in his individual capacity as a child if there was no surviving spouse).

terms,[147] constructive trust claims, contract claims, or unjust enrichment claims based on (1) a contract between an unmarried couple; (2) a prenuptial agreement (or post-nuptial agreement under the same reasoning); or (3) a direction to maintain or change a designation in a domestic relations order; or (4) a domestic relations order that is not consistent with the terms of the ERISA plan.

First, there is more clarity about the ERISA statutory purpose and objective. Title I of ERISA is entitled "Protection of Employee Benefit Rights"[148] because ERISA protects the participants and beneficiaries of those employee benefit plans that ERISA governs.[149] This is the dominating general purpose of ERISA. Thus, there is a little doubt that the ERISA beneficiary designation provisions, like the FEGLIA provisions, have an objective beyond providing for the administrative convenience of the benefit provider. Therefore, ERISA preempts all the conflicting state ownership claims that FEGLIA preempts.

Second, the ERISA express preemption provision is far broader than the FEGLIA express preemptions provision, which the Court did not invoke in *Hillman*. In general, ERISA preempts any state law that may or does "relate to any employee benefit plan" regulated by ERISA.[150] The FEGLIA express preemption is limited to matters inconsistent with an FEGLIA contract.[151] Thus, it is even more likely that the ERISA preemption provisions apply to state law provisions that relate to benefit designations. Therefore, ERISA preempts all the conflicting state ownership claims that FEGLIA preempts.

Third, ERISA requires plans to defer to a more limited set of domestic relations orders than does FEGLIA. ERISA limits deference to those that satisfy the plan terms, which for certain pension plans must include deference to qualified domestic relations orders ("QDROs").[152] Both laws permit orders that determine the benefit, but not those that require the participant or the employee to make a benefit designation.[153] However, even if, *arguendo*, ERISA life insurance plans must defer to domestic relations orders that meet the QDRO rules,[154] unlike the FEGLIA requirements, those rules do not require deference to state law orders requiring the assignment of the policy.[155] Therefore, ERISA preempts all the conflicting state ownership claims that FEGLIA preempts.

The preemption conclusion is not undermined by the fact that ERISA plans, may and many do, have different default designations and designation procedures than FEGLIA plans. ERISA not only gives plan sponsors and administrators the right to choose such options, but protects those options from being superseded by conflicting state law claims, except as permitted by specified exclusions to the express ERISA preemption provision.[156] ERISA plan participants and their beneficiaries, like FEGLIA insured persons and their beneficiaries, have federal entitlements to benefits pursuant to the terms of their plan that they may enforce in federal court.[157] These entitlements, like the similar FEGLIA entitlements, result in the preemption of all the conflicting state ownership claims that FEGLIA preempts.

Prior to *Hillman*, the Supreme Court created some doubt about these ERISA results by its 2009 decision in *Kennedy v. Plan Adm'r of the Du Pont Sav. & Inv. Plan*.[158] The Court therein decided that a waiver of ERISA plan benefits in a property settlement agreement incorporated into a divorce decree that was not consistent with plan terms could not be used by the designee's daughter to obtain benefits from the plan that the plan had paid to the designee, who with the participant were parties to the divorce decree.[159]

In footnote 10, the Court declined to express a view whether if the waiver were consistent with the plan terms, the waiver could be used by either the designee to decline the benefit payment from the plan or her daughter to obtain the benefit payment from the plan.[160]

The Court then declined in the same footnote to express a view whether the daughter "could have brought an action in state or federal court" to wrest the benefit from her mother, the designee.[161] At least three reasons make this a very odd dictum about an issue that was not before the Court. First, the Court had been informed that the mother lacked the resources to make such a

[147] Certain ERISA plans must follow domestic relations orders that meet the qualified domestic relations orders requirements set forth in ERISA §206(d)(3), 29 USC §1056(d)(3).

[148] The three other ERISA titles have a similar emphasis. Title II contains amendments to the federal tax provisions, many of which condition tax benefits on compliance with provisions similar to the Title I provisions. Title III describes the role of different federal entities in the enforcement of ERISA provisions. Title IV describes how the federal government insures the payment of retirement benefits from certain pension plans.

[149] ERISA §3(3), 29 USC §1002(3) (defining ERISA plans).

[150] ERISA §514(a), 29 USC §1144(a).

[151] *But see* Amicus Brief by Association of Federal Health Organizations in Hillman v Maretta, 133 S. Ct. 1943 (2013) (filed 4/1/13) (No. 11-1221) at 20, n. 5 (arguing that the FEGLIA preemption provision is broader than the ERISA explicit preemption provision because there is no insurance although it is difficult to discern which insurance provisions FEGLIA preempts which ERISA allows) available at *http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-1221_resp_amcu_afho.authcheckdam.pdf* (last visited July 31, 2013).

[152] ERISA §206(d)(3), 29 USC §1056(d)(3).

[153] *Cf.* ERISA §206(d)(3)(B)(I), 29 USC §1056(d)(3)(B)(I) requiring the order to create or recognize a specified person's benefit payment with 5 USC §8705(e) requiring the order to expressly provide for the specified person's benefit payment.

[154] Plans not subject to the QDRO rules may also choose the extent, if any, to which they wish to defer to domestic relations orders. *See generally Feuer's ERISA Myths*, above, note 24, at 739-45 (discussing which plans are subject to the QDRO rules).

[155] ERISA has no requirements comparable to 5 USC §8706(f) permitting domestic relations orders to require such assignments.

[156] ERISA §514(b), 29 USC §1144(b).

[157] *Cf.* ERISA §502(a)(1)(B), 29 USC §1132(a)(1)(B) for ERISA benefit claims with 5 USC §8715 for FEGLIA benefit claims.

[158] 555 U.S. 285 (2009).

[159] *Kennedy*, 555 U.S. at 299-300. *See generally* Albert Feuer, "Did a Unanimous Supreme Court Misread ERISA, Misread the Court's Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?" 37 *Comp. Plan. J.* 247 at 252-54 (10/2/09) (discussing the finding), available at *http://ssrn.com/abstract=1485204* (last visited on July 31, 2013).

[160] *Kennedy* 555 U.S. at 300, n. 10.

[161] *Id.*

 Copyright © 2013 TAX MANAGEMENT INC., a subsidiary of The Bureau of National Affairs, Inc. ISSN 0884-6057

payment,[162] so no case or controversy about the issue could be before the Court. Second, the relevant question is not the ability to bring an action, which is always possible, but whether there were any circumstances in which such an action would be successful, which the Court did not discuss. Third, the Court followed the dictum by comparing its own 1997 decision in *Boggs v. Boggs*,[163] which in turn cited *Wissner* and *Ridgway* and held that ERISA preempted state law ownership claims against distributed pension benefits, with two state supreme court decisions to the contrary.[164] However, neither cited state court decisions make any convincing distinctions between its holdings and the Supreme Court's holding of *Boggs*.[165]

Nevertheless, there have been numerous lower court decisions holding that ERISA does not preempt state law ownership claims based on waivers incorporated into a divorce similar to that in *Kennedy*, such as *Andochik v. Byrd*.[166] *Andochik*, like its predecessors, many of which are cited therein,[167] does not adequately distinguish the contrary holdings in either *Boggs* or *Egelhoff*,[168] which extended *Boggs* to survivor benefits from an ERISA life insurance plan.[169]

The reasonable implication of the *Hillman* decision that a property settlement agreement incorporated within a divorce agreement may not be used to wrest distributed benefits from an FEGLIA distributee makes it difficult to conceive of a convincing reason why there should be a different result for distributed ERISA benefits. The ringing endorsement of *Hillman*, in concert with *Ridgway*, and *Wissner* in *Windsor*, the decision overturning DOMA, discussed above, reinforces this conclusion about the preemptive effect of ERISA.

CONCLUSIONS

State law ownership claims may not determine FEGLIA beneficiary designations, unless they are based on statutory domestic relations designations. Thus, other state ownership claims based on contract law, state domestic relations law, or constructive trust law may not be used to wrest benefits from an FEGLIA designee. State court orders directing employees to make plan designations may not be used to impose sanctions on a non-cooperating employee during his life or after his death by compelling his estate to pay an amount equal to the amount of the insurance. Similar conclusions may be reached with respect to the lump-sum survivor benefits from the Federal Thrift Savings Plan, which is the major retirement program for federal civilian employees hired after 1986.

Similarly, state law ownership claims may not determine ERISA beneficiary designations, unless those claims satisfy the plan terms. The terms of certain pension plans must include compliance with domestic relations orders that satisfy the QDRO rules. State ownership claims based on contract law, a domestic relations order not satisfying plan terms, unjust enrichment, or constructive trust law may not be used to wrest benefits from an ERISA designee. State court orders directing employees to make plan designations may not be used to impose sanctions on a non-cooperating employee during his life or after his death by compelling his estate to pay an amount equal to the amount of the insurance.

[162] *See* Petitioner's Reply Brief on the Merits at 33-34, Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285 (filed 8/7/08) (No. 07-636) at 33-34, available at *http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_636_PetitionerReply.authcheckdam.pdf* (last visited on July 31, 2013).

[163] 520 U.S. 833 (1997).

[164] *Kennedy* 555 U.S. at 300, n. 10.

[165] *See, e.g.*, Albert Feuer, "The Kennedy Supreme Court Giveth With Footnote 13, But Taketh With Footnote 10, the Department of Labor and Many Lower Courts and Miss the Decision's Ultimate Meaning," 39 *Comp. Plan J.* 111 at 119-124 (6/3/11), available at *http://ssrn.com/abstract=1859809* (last visited on July 31, 2013).

[166] 709 F.3d 296 (4th Cir. 2013). *Cf.* U.S. Supreme Court Holds that FEGLIA Preempts State Laws Purporting to Change Designated Life Insurance Beneficiary, Winston & Strawn LLP Appellate & Critical Motions and Employee Benefits & Executive Compensation Practices, June 2013 at 2 (*Kennedy* left open the question about whether ERISA preempts the use of state law to wrest benefits in such circumstances) available at *http://www.winston.com/siteFiles/Publications/Maretta.pdf* (last visited July 31, 2013).

[167] 709 F.3d at 301. *Cf. Langevin v. McMorrow*, 79 Mass. App. 1126 (6/20/11) (ERISA preempted the enforcement of a disclaimer by the participant's former spouse of her 401(k) plan survivor benefits in a settlement agreement incorporated into a divorce decree).

[168] *Egelhoff*, 532 U.S. 141 (ERISA preempted a revocation upon divorce statute that acted upon distributed benefits as in *Hillman*).

[169] *See generally* Albert Feuer, "A Misguided Kennedy Offspring from the Third Circuit," 31 *Tax Mgmt. Wkly. Rpt.* 564 (4/23/12), available at *http://ssrn.com/abstract=2047238* (last visited July 31, 2013).