91965-8

FILED
JUL 24 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Court of Appeal Cause No. 71900-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF CRAIG S. LUNDY, Petitioner,

v.

KELLY LUNDY, Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUL -1 PM 2:49

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The petitioner, the Estate of Craig S. Lundy asks this court to accept review of the Court of Appeals decision designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division One decision which reversed the trial court decision. A copy of the decision is in the Appendix, pages A-1 through A-12. No motion for reconsideration has been filed. The published opinion was filed on June 1, 2015.

C. ISSUES PRESENTED FOR REVIEW

1) Is an issue of substantial public interests present when the court of Appeals held that ERISA preempts all state law claims by an estate to recover an ERISA governed 401(k) plan after it has been distributed to an ex-spouse?

2) Is an issue of substantial public interest present when the Court of Appeals relied upon *Boggs* and *Carmona* to preempt the estate's post-distribution state law claim to recover an ERISA governed 401(k) plan?

3) Is an issue of substantial public interest present when the Court of Appeals found that a waiver of a beneficial interest in a divorce decree must be express and cannot be implied by application of Washington State law?

4) Is an issue of substantial public interest present when the Court of Appeals allowed ERISA to invade an area of traditional state concern?

D. STATEMENT OF THE CASE

1) Procedural Background

Petitioner, the Estate of Craig Lundy ("The Estate"), filed a law suit under TEDRA in Snohomish County Superior Court on March 3, 2014. The Plaintiff-Estate alleged that the defendant, the ex-wife of the decedent, should disgorge the funds received from the decedent's ERISA governed 401(k) retirement plan because it violated the terms of their divorce decree. In the alternative, the Estate claimed that the ex-wife was unjustly enriched upon receipt of those funds. Following a bench trial, Judge Eric Lucas, entered an order awarding the retirement plan to the estate. The Appellate Court reversed this decision.

2) Craig Divorced His Wife, Kelly, Three Years Before He Died.

The decedent, Craig S. Lundy, married defendant Kelly Lundy on January 26, 1984. (CP 40). The parties divorced on September 23, 2009. *Id.* They have no children together. (CP 41). Craig died on August 4, 2013 intestate and without issue. *Id.* Kathleen Staiger, Craig's sister, was appointed Personal Representative. (CP 96-97). Craig's heirs at law are his four siblings. *Id.*

Craig was a career machinist at Boeing. (CP 3). During his employment, he steadily contributed to his retirement plan which was known as a Boeing VIP Plan (401(k)). *Id.* The value of that plan was $497,435.77 as of December 31, 2013 representing by far the largest asset of his estate. *Id.* 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. (CP 3). This designation was neither altered nor reaffirmed following the divorce. *Id.* The Summary Plan description provided by Boeing indicates that you "must designate your spouse as your beneficiary." *Id.* The Boeing plan is governed by Federal Law (ERISA).

3) Craig Was Expressly Awarded His Boeing VIP (ERISA) Retirement Plan In The Divorce Decree.

The divorce decree entered by Whatcom County Superior Court states in the section titled "Property to be awarded the Husband" that, "The husband is awarded as his separate property the following property [...] All retirement funds and 401(k)s in his name." (CP 77).
It further awards Kelly Lundy "All retirement funds and 401(k)s in her name." *Id.* Kelly testified that the value of her retirement account is roughly equal to Craig's. (VRP 8). The relationship was dissolved because, as Kelly alleged in her Petition for Dissolution, the marriage was

"irretrievably broken." (CP 63-73). Craig was not represented in the divorce proceeding and Kelly was represented by counsel. (CP 3).

4) Craig And Kelly Were Rarely In Contact After Their Divorce.

Based on the evidence provided to the court, the trial court found that Craig rarely had any contact with Kelly Lundy following the dissolution. (CP 3). They never reconciled or cohabited post-dissolution. *Id.* This is corroborated by the defendant's sworn testimony in which she testified that she never visited Craig's home following the divorce. (VRP 5). This was not a close relationship, but a divorced couple who had parted ways based on no shared interest.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1) Introduction: Size and scope of ERISA Retirement Plans

The standard for a Petition for review is whether the appealing party has raised an issue of "substantial public interest." RAP 13.4(b)(4). As a preliminary matter, it is important to note the size and scope of ERISA governed retirement plans in Washington State to understand the impact of the Court of Appeals' ruling. The Petitioner has been unable to establish the precise number of state residents subject to ERISA. Certainly for Snohomish County, Boeing is the chief employer and all of its employees participate in ERISA retirement programs. According to the Bureau of Labor, "Most voluntarily established, private-sector retirement plans" are

governed by ERISA. *See* United State Dep't of Labor Employee Benefits Summary, www.dol.gov/ebsa/faqs. Any divorcing Washington residents where either has a 401(k) or other federally governed plan is affected.

2) There is a substantial public interest when the Court of Appeals finds that ERISA preempts all state law claims by an estate to recover an ERISA governed 401(k) plan post-distribution.

The Court of Appeals decision runs contrary to the past five years of case law development nationwide by barring post-distribution suits under state law to recover ERISA governed retirement plans. (*See* A-1). While this was the trend prior to 2009, it gained near universal application in published opinions following the U.S. Supreme Court's decision in *Kennedy v. Plan Administrator,* 555 U.S. 285, 300, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009). This case provides the Washington Supreme Court with an opportunity to join the trend, limit the scope of ERISA to its stated objective, and restore state authority to govern an area of traditional state concern. The Court of Appeals declined to do so by relying upon pre-*Kennedy* case law, primarily an unnecessarily broad reading of the U.S. Supreme Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001).

In *Estate of Egelhoff v. Egelhoff*, 139 Wn.2d 557, 989 P.2d 80 (1999), a unanimous Washington Supreme Court ruled that ERISA governed plans are subject to RCW 11.07.010 which provides that non-

probate beneficiary designations are automatically revoked upon divorce. In consequence, the estate of the deceased worker was awarded the decedent's life insurance and retirement plan notwithstanding an unchanged beneficiary designation naming the surviving spouse as the beneficiary. *Id.* at 580. The court emphasized "Washington's sovereign interest in exercising its traditional police powers in the area of domestic relations and family law." *Id.* at 570. So even though federal law appeared to compel distribution to the ex-spouse, the state Court determined state law would prevail in the divorce setting.

The U.S. Supreme Court reversed in *Egelhoff,* supra. Relying upon ERISA's stated objective of protecting the uniform application of law and the need to establish one rule for plan administrators to follow, the Court determined state law must yield. *Id.* at 152. This ruling did not find RCW 11.07.010 unconstitutional or invalidate the statute, but barred its direct application.[1]

Eight years later, in *Kennedy,* the Court revisited the issue of whether ERISA preempts state law claims by an estate to recover an ERISA governed retirement plan post-distribution. *See Kennedy,* 555 U.S.

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[1] The Supreme Court rejected an analysis of preemption that would "turn on 'infinite connections,' [citation omitted]" , but required an impermissible burden on the objectives of ERISA. It found the Washington statute "had a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration." *Id.,* at 147-148. This is the logical scope of ERISA's potentially infinite reach into areas of traditional state jurisdiction.

285. This issue was brought to the attention of the Court because several other courts had narrowly interpreted the prior decision in *Egelhoff* and allowed for post-distribution suits against the ERISA plan beneficiary under state law theories of waiver and unjust enrichment. *See e.g., Pardee v. Estate of Pardee,* 112 P.3d 308 (OK Div. 2, 2004); *Sweebe v. Sweebe,* 712 N.W.2d 708 (Mich. 2006).[2] In *Kennedy*, the decedent had an ERISA governed retirement plan and failed to remove his ex-spouse post-dissolution. *Kennedy,* 555 U.S. at 289. The decedent had been awarded the retirement plan in the divorce decree and his estate sued the plan administrator. *Id.* The Court found that the plan administrator properly followed the laws governing ERISA by distributing the funds to the ex-spouse. *Id.* at 299-300. However, the Court noted it did not "express any view as to whether the Estate could have brought an action in state or federal court against Liv [ex-spouse] to obtain the benefits after they were distributed." *Id.* at 300 (Emphasis added). It cited *Egelhoff*, for the proposition that the purpose of ERISA is for the protection and efficiency of the plan administrators in the distribution of benefits. *Id. Kennedy* did not analyze the consequence of a post-distribution suit against a

[2] The *Sweebe* court explained: "Today's decision is not in conflict with the United States Supreme Court's decision in *Egelhoff [citation omitted].* In *Egelhoff*, the Court addressed a mandatory state statute that ... governed the distribution of benefits in all applicable cases, requiring plan administrators to administer plans in accord with differing state requirements." *Sweebe,* 712 N.W.2d at 711.

beneficiary as the facts presented involved a claim against the plan administrator.

Following the decision in *Kennedy,* subsequent courts found that once benefits had been distributed, the federal interest in protecting ERISA was satisfied and that an estate could bring a suit directly against an ex-spouse to recover them. *See e.g., Andochick v. Byrd,* 709 F.3d 296 (4th Cir. 2013); *Kensinger v. URL Pharma, Inc.,* 674 F.3d 131 (3rd Cir. 2012). The decision in *Kennedy* was summed up by the Third Circuit as having closed one door (actions pre-distribution of ERISA retirement plans), but having "**opened another [door]**" to by expressly stating that they were not blocking suits post-distribution. *Kensinger*, 674 F.3d at 134. The Fourth Circuit recognized the near universal interpretation of the case law by holding that,

> ERISA does not preempt post-distribution suits against ERISA beneficiaries. We note that in reaching this conclusion, we adopt the same view as every published appellate opinion to address the question.
> *Andochick,* 709 F.3d at 301.

Notwithstanding this potent trend, the Court of Appeals herein decided to deny the same relief to Washington estates. While it apparently acknowledged the *possibility* of post-distribution suits in the aftermath of *Kennedy,* it firmly closed the door, reading ERISA's mandates to require

that a non family member (ex spouse) retain the distributed benefits at the expense of the decedent's family. (A-8).

Under our facts, the decedent, Craig Lundy divorced his spouse in 2009 and passed away thereafter. The divorce decree awarded him his Boeing VIP Plan, but he neglected to remove his wife as the beneficiary under the plan according to the mandatory form he filled out in 1991. A suit was brought directly against the beneficiary, not the plan administrator. This scenario is squarely within the open door acknowledged in *Kennedy* and applied in favor of estates seeking post-distribution relief from ex-spouses. *See, Kensinger,* supra, and *Andochick,* supra. Although the cases did not limit the theories for which state law claims can be brought, those advanced by the Estate rely on state contract law and unjust enrichment.

In conclusion, the Court of Appeals erred by effectively barring the estate's post distribution suit under state law.

3) There is a substantial public interest when the Court of Appeals relies upon *Boggs* and *Carmona* to require preemption's application post distribution.

The Court of Appeals erred in applying *Boggs* and *Carmona* to block the application of Washington State law. Neither party cited either of these cases in their briefing materials which are distinguishable as they represent the law prior to *Kennedy* and have substantially different facts from our

own. The decision in *Boggs* was written in 1997, twelve years prior to *Kennedy* and the original decision in *Carmona* was published pre-*Kennedy*. *See, Carmona v. Carmona,* 544 F.3d 988 (9th Cir. 2008). The subsequent republication of the decision in *Carmona* added language briefly acknowledging *Kennedy*, but found that it was inapplicable to their facts. *See, Carmona v. Carmona,* 603 F.3d 1041 (9th Circ. 2010).

In *Boggs,* the decedent's pre-deceased first wife had made a will leaving her alleged community property share of her husband's ERISA governed annuity benefits to their sons. *Boggs v. Boggs,* 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). The first wife died and the husband remarried. *Id.* at 836. Upon his later death, the sons of the first marriage claimed their mother's share under her will. *Id.* at 837. The second wife sued to claim her joint and survivor's interest in her husband's pension-annuity. *Id.* The Court found that the state community property law allowing testamentary control of the annuity by the first wife's estate was in direct conflict with the purpose of ERISA which specifically required the benefits pass to the named surviving spouse. *Id.* at 843. Even the plan participant *inter vivos* could not change his second wife's entitlement, as the stated purpose of the annuity according to ERISA § 1055 was to

ensure a stream of income to surviving spouses.[3] It is self-evident in the instant case that there was no surviving spouse to protect, and no annuity to preserve. *Boggs,* is inapposite.

The Court in *Kennedy,* when addressing the issue of post-distribution suits, cited several court cases that expressly distinguish the holding in *Boggs*. *Kennedy,* 555 U.S. at 300. The subsequent case law that has allowed for post-distribution suits under state law claims has further distinguished *Boggs* allowing for claims under state law theories. *See, e.g. Andochick,* 709 F.3d 296; *Kensinger,* 674 F.3d 131.

Similar to the decision in *Boggs,* the majority of the decision in *Carmona* relies upon pre-*Kennedy* jurisprudence and deals with a different ERISA section and concern. The facts in *Carmona* did not support a post-distribution suit since the retirement plan at issue plan had vested in the former spouse prior to the time the parties divorced. *Carmona,* 603 F.3d at 1048.

Lupe Carmona designated his eighth wife, Janis, as his survivor beneficiary under two pension plans which provided qualified joint and survivor annuity benefits. *Id.* at 1048. While they were still married, Lupe retired and began collecting pension benefits. *Id.* When the pair divorced

[3] "ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity." *Boggs,* 520 U.S. at 843.

two years later, Lupe sought to revoke Janis's designation as his survivor beneficiary. *Id.* The plan administrators refused to do so even though the Nevada family court awarded the pension plans to Lupe Carmona. *Id.* The state court ordered the plan administrators to change the beneficiary from Janis to Judy based upon the divorce decree. *Id.* The appellate court in *Carmona* overturned the decision on the basis that the **benefits had already vested in Janis prior to the divorce**, because he received them when he retired at which time they were married. *Id.* at 1062 (Emphasis added).

This is not our case. In *Carmona*, the court determined that the annuity vested prior to the time that any facts arose supporting a state law claim to divest the beneficiary. This is a critical distinction. Once funds have vested, a party owns them and cannot waive them. In our case, *Kennedy,* and the other case law discussed, the alleged waiver and facts giving rise to the claim occurred prior to vesting. Furthermore, the purpose that ERISA is concerned with in *Carmona* is the same as *Boggs* in that the annuity was required to pass to the surviving spouse at the time of vesting. This leads to unique policy concerns that are entirely absent in our case and overlooked by the Court of Appeals, *viz.* the protection of a surviving spouse.

Furthermore, while the facts did not support application of *Kennedy* or the subsequent case law, the court in *Carmona* did acknowledge the ruling in *Kennedy* and its binding effect. Following the passing of *Kennedy,* the court added a section that contradicted their prior statements limiting constructive trusts, saying: "it may not be that all constructive trusts instituted by state courts, particularly those that seek to recover ill-gotten gains, will have sufficient connection with or reference to an ERISA plan to trigger ERISA's preemption provision." *Carmona,* 603 F.3d at 1062. This statement is followed by a footnote which states that , "In *Kennedy,* the court explicitly declined to express a view on whether an action could have been brought to obtain benefits from the former spouse after they had been distributed to her." *Id.*

Acknowledging that the law had changed post-*Kennedy,* a Ninth Circuit Federal District Court decided a similar case to our own and did not regard itself as bound by *Carmona. Hohu v. Hatch,* 940 F.Supp.2d 1161 (N.D. Cal. 2013). In *Hohu,* the deceased husband of the Plaintiff, Linda Hohu, was an employee and had a life insurance plan and stock units governed by ERISA. *Id.* at 1165. The Plaintiff was his wife at the time of the beneficiary designation and they subsequently filed for divorce. *Id.* John Hohu died during the divorce proceedings and before a final judgment had been entered. *Id.* John's estate sued the wife under the

California probate code attempting to assert a constructive trust based upon the application of California family law. *Id.* at 1165. This is a very similar factual scenario to our own, where an estate is suing an ex-spouse under state probate and family law regarding an ERISA based retirement plan in the post-distribution setting.

In *Hohu,* the court referenced *Kennedy* to support their holding that the post distribution suits are appropriate after the funds have been distributed to the designated beneficiary. *Id.* at 1174. The court cited the above quoted, post-*Kennedy* added language in *Carmona* as supportive. *Id.* at 1175. Otherwise, the court disregarded *Carmona* – apparently recognizing that the remainder of that opinion had been outmoded post-*Kennedy* or was factually distinguishable. The court went on to state that since *Kennedy,* "ERISA does not preempt post-distribution suits against ERISA beneficiaries." *Id.* (Citing *Andochick v. Byrd,* 709 F.3d 296, 301 (4th Cir. 2013)). The court said that, "In reaching this conclusion, we adopt the same view as every published opinion to address the question." *Id.*

The plaintiff in *Hohu* was attempting to do the exact same thing as the estate here, except here the parties had been divorced for some time. The goal was to bring a suit under state family and probate law in the post-distribution setting to recover an estate asset. *Id.* at 1174. There, the court recognized that the ruling in *Kennedy* and subsequent case law allowed for

this and that *Carmona* had incorporated this decision. The decision in *Kennedy* only makes sense if the court is considering allowing for a different result under a post-distribution state law claim than would occur under ERISA. This is how subsequent courts have interpreted it and what we are asking the court to do in using Washington state law, including use of RCW 11.07.010 to interpret the terms of the parties' divorce decree.

4) There is an issue of substantial public interest when the Court of Appeals found that in Washington, waiver of a beneficial interest in a divorce decree must be express and cannot be implied by application of state law.

The Court of Appeals cited *Wagner v. Wagner,* 95 Wn.2d 94, 621 P.2d 1279 (1980) to support their position that RCW 11.07.010 was not part of the Lundy's divorce decree, stating: "Further, to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive." *Id.* at 102. That very same decision previously explained how to interpret a divorce decree, and which terms are automatically incorporated therein. In *Wagner,* the court stated that:

> It is the general rule that parties are presumed to contract with reference to existing statutes [...] and a statute which affects the subject matter of a contract is **incorporated into and becomes a part thereof** [...] **If the parties to a contract wish to provide for other legal principles to govern their contractual relationship, they must be expressly set forth in the contract...**
> *Id.* at 98-99 (Emphasis added)

Since *Wagner,* the Washington State Supreme Court has updated the test for determining waiver: "A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right." *See, e.g. Schroeder v. Excelsior Mgmt. Grp., LLC,* 177 Wn.2d 94, 106, 297 P.3d 677 (2013). However, Washington Courts have not changed the way that state law is incorporated into statutes absent express preclusion. *See e.g., In Re Sagner,* 159 Wn. App. 741, 749, 247 P.3d 444 (2011) (quoting *Wagner* 95 Wn.2d at 94).

In application to our facts, the court is to interpret this contract to determine the intent of the parties as a matter of law. Specifically, the court must determine whether the ex-spouse agreed to waive her rights as a beneficiary of the ex-husband's Boeing VIP Retirement Plan. The language of the contract itself awards the Boeing VIP Plan to the husband as his sole and separate property (and vice versa). To determine the terms that are automatically incorporated into the contract itself, the parties are to look to state law. *Sagner,* 159 Wn.App. at 749. If the statute applies, then it is incorporated into the contract unless there is an express statement in the contract excluding the applicable statute. *Id.*

In Washington State, there is a statute which explicitly discusses the effect of awarding a party a non-probate asset in a divorce decree. When a party is awarded an asset in a divorce decree, by statute, there is an automatic revocation of the beneficiary designation of an ex-spouse prior to the divorce:

> (1) This section applies to all nonprobate assets, wherever situated, held at the time of entry of a decree of dissolution [...]
> (2)(a) If a marriage [...] is dissolved [...] 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 [...] is revoked.
>
> RCW 11.07.010.

This statutorily imposed waiver of a future interest as a beneficiary can only be revoked with an express statement to the contrary.

Egelhoff did not deem RCW 11.07.010 unconstitutional for all purposes. This law still operates in Washington to direct the disposition of all assets governed by state law. Based upon the subsequent case law's interpretation, *Egelhoff* only declared that this statute could not be directly applied to frustrate ERISA's mandate that plan administrators follow the existing beneficiary designations. *Egelhoff,* 139 Wn.2d at 557. That state law, however, is good law and remains valid in interpreting the agreed decree of dissolution voluntarily entered into by the parties for purposes of retention of the assets post-distribution. This indirect and narrow application of RCW 11.07.010 for purposes of interpreting the Lundy's

divorce decree in a post-distribution suit does not contradict the purpose of ERISA. This case is unlike *Boggs* or *Carmona* in that the beneficiary is not the wife, but the ex-wife. There is no such statement in ERISA protecting the interests of ex-spouses as beneficiary at the expense of the decedent's family.

In conclusion, there is a waiver here by the application of state law. In other jurisdictions without a similar law, it may be common for a waiver may be written directly into the divorce document. Here, the Respondent and her attorney drafted the divorce decree which has no language to undo the waiver. She and her counsel signed it, showing her intent to waive her future interest in Craig Lundy's retirement account. Had she intended otherwise, she should have said so. Only if RCW 11.07.010 is deemed invalid for all purposes would it not be applicable towards interpreting this divorce decree. The Court of Appeals was in error in rejecting the statute for such purposes.

5) There is a substantial public interest when the Court of Appeals allowed ERISA to unnecessarily invade an area of traditional state concern.

The Estate presented an opportunity to the Court of Appeals to follow the current trend in the case law and allow uniformity in application of Washington State Family Law. The expansive reading of ERISA adopted by the Court of Appeals compels a caste-system for

divorce governing employee benefits for Washington residents. Whereas employees not under ERISA are subject to state law (such as Kelly), those working for ERISA employers have a different rule. This dual system may work for parties, such as Kelly, represented by knowledgeable attorneys in their dissolutions –but it is inscrutable and unfair for those, such as Craig, who act *pro se.* [4]

This impossible confusion has led multiple courts to conclude that state law should only yield to federal control to the limited extent necessary to satisfy the federal purpose of assuring uniformity for plan administrators. Any application beyond that assures nothing but non-uniformity, as evidenced in this very case. For this reason, it is squarely a "substantial public interest" that divorce laws apply uniformly and dependably across all Washington state citizens, their assets, and that a uniform standard govern.

This Court should reassert state jurisdiction over family and contract law, traditional police powers protected by the Constitution's 10th amendment. As stated in *United States v. Windsor,* 570 U.S.__(2013) (*slip op.*, at 16) "Regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states." Federal

[4] This unfairness constitutes the basis of the Estate's unjust enrichment claim. Had Kelly, a non-ERISA plan participant, died first, Craig would have taken nothing. But since Craig died first, she claims everything.

concern for plan administrators and surviving spouses is fully satisfied here. Boeing is not a party. Kelly is not a spouse. The Court of Appeals interpretation construes ERISA so as to trump the state's traditional interest only for the purpose of protecting a non family member ex spouse. This cannot be the purpose of ERISA. State law should govern.

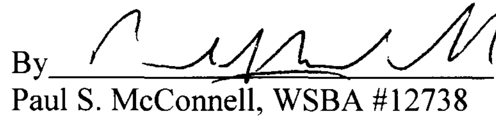
F. CONCLUSION

For the foregoing reasons, this Court should accept review, reverse the Court of Appeals decision in favor of Petitioner, and reinstate the trial court ruling.

RESPECTFULLY SUBMITTED this 29th day of June, 2015.

HANSEN McCONNELL & PELLEGRINI PLLC

By
Perry W. McConnell, WSBA #40688

By 
Paul S. McConnell, WSBA #12738

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE ESTATE OF CRAIG S. LUNDY,	)	No. 71900-9-I
Respondent,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
KELLY LUNDY,	)	
Appellant.	)	FILED: June 1, 2015

2015 JUN -1 AM 10: 21
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

APPELWICK, J. — The trial court allowed the Estate to recover Employment Retirement Income Security Act (ERISA)[1] benefits after they had been distributed to the designated beneficiary, his former wife, Kelly. The Estate relied on the couple's dissolution decree and RCW 11.07.010 to assert that Kelly waived her right to the proceeds. ERISA preempts all claims to funds based on state law. The evidence is insufficient to establish that Kelly waived by agreement with Craig the right to receive the proceeds of the ERISA beneficiary designation. We reverse.

FACTS

Craig and Kelly Lundy[2] married in 1984. For most of his career, Craig worked as a machinist at The Boeing Company. Kelly worked for the Northwest Network of Peacehealth, Inc., a large healthcare organization. Both had retirement accounts with their employers and named each other as the beneficiaries of those accounts. The couple did not have children.

Craig and Kelly divorced in 2009. The dissolution decree "awarded [to Craig] as his separate property . . . [a]ll retirement funds and 401Ks in his name." It also "awarded

[1] 29 U.S.C. § 1001, et seq.

[2] Going forward, we refer to the Lundys by their first names for clarity. No disrespect is intended.

[to Kelly] as her separate property . . . [a]ll retirement funds and 401Ks in her name." Neither changed the beneficiary of their retirement account after the divorce.

Craig died on August 4, 2013, intestate and without issue. His sister was appointed personal representative of his "Estate."

At the time of his death, Craig's retirement account was valued at $497,435.77. The account was controlled by ERISA, a federal scheme for regulating employee benefit plans. Kelly was listed as the beneficiary of the account.

On March 3, 2014, the Estate petitioned for recovery of the retirement account from Kelly. The Estate cited RCW 11.07.010(2)(a), which provides that the designation of a spouse as beneficiary of a nonprobate asset is automatically revoked upon dissolution of the marriage. The Estate argued that the trial court should incorporate RCW 11.07.010 into the dissolution decree to find waiver of Kelly's interest in the retirement account. Kelly responded that RCW 11.07.010 was preempted by ERISA and thus did not apply to Craig's retirement account. The trial court ruled in favor of the Estate.

Kelly appeals.

DISCUSSION

Kelly argues that the trial court erred in granting the Estate's petition to recover the retirement account, because ERISA preempts the Estate's state law claims to the account.[3] The Estate acknowledges that, under ERISA, the plan administrator properly

[3] The Estate asserts that Kelly failed to preserve her federal preemption argument, because she conceded below that preemption did not apply. At the hearing, Kelly conceded that federal law did not preempt the Estate from bringing a postdistribution state law claim to recover ERISA funds. However, she challenged the Estate's specific state law claim, arguing that RCW 11.07.010 by its terms does not apply to assets controlled by federal law. This argument is premised directly on federal preemption. It preserves Kelly's right to challenge the state law claim on appeal.

distributed the funds to Kelly. However, the Estate challenges Kelly's postdistribution retention of the funds. The Estate asserts that the language of the dissolution decree, coupled with the presumption of revocation in RCW 11.07.010, demonstrates that Kelly waived her right to the benefits of Craig's retirement account.

In Egelhoff v. Egelhoff, 532 U.S. 141, 143, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001), the United States Supreme Court held that RCW 11.07.010 is preempted "to the extent it applies to ERISA plans." Egelhoff presented similar facts to those before us. While David and Donna Egelhoff were married, David designated Donna as the beneficiary of his ERISA-governed life insurance plan and pension plan. Id. at 144. The spouses later divorced and David died intestate soon after. Id. He had not changed his beneficiary, and the life insurance proceeds were paid to Donna. Id. David's children from a previous marriage, his statutory heirs under state law, sued Donna to recover the proceeds. Id. In a separate action, they also sued to recover the pension plan benefits. Id. at 145. They alleged that RCW 11.07.010 disqualified Donna as the beneficiary of both plans. Id. at 144-45.

The trial courts both concluded that the plans should be administered in accordance with ERISA and granted summary judgment for Donna as to both plans. Id. at 145. The Court of Appeals consolidated the two cases and reversed, concluding that RCW 11.07.010 was not preempted. Id.

The Washington Supreme Court affirmed, holding that RCW 11.07.010 did not "'refer to'" or have a significant "'connection with'" ERISA such that preemption was appropriate. In re Estate of Egelhoff, 139 Wn.2d 557, 579, 989 P.2d 80 (1999). The court reasoned that RCW 11.07.010 "does not apply immediately and exclusively to an ERISA

plan, nor is the existence of such a plan essential to operation of the statute." Id. at 574. It also emphasized that the statute "does not alter the nature of the plan itself, the administrator's fiduciary duties, or the requirements for plan administration." Id. at 575. The court concluded that the statute "does not operate to divert benefit plan proceeds from distribution under terms of the plan documents," but merely alters "the underlying circumstances to which the distribution scheme of [the] plan must be applied." Id. at 578.

The United States Supreme Court reversed. Egelhoff, 532 U.S. at 152. The Court looked to ERISA's broadly worded preemption provision, 29 U.S.C. § 1144(a), which provides that ERISA "'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan'" covered by ERISA. Id. at 146. The Court found that RCW 11.07.010 had an "impermissible connection with ERISA plans." Id. at 147. In particular, the Court emphasized that RCW 11.07.010 interfered with the administration of ERISA plans:

> 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).

Id.

> [D]iffering state regulations affecting an ERISA plan's "system for processing claims and paying benefits" impose "precisely the burden that ERISA pre-emption was intended to avoid." And as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents.

Id. at 150 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987)). As a result, the Court concluded that the funds were properly distributed to Donna, the designated plan beneficiary. See 532 U.S. at 145, 152.

After Egelhoff, there is no doubt that RCW 11.07.010 is inapplicable to ERISA benefits. The case makes clear that federal law mandates the distribution of ERISA benefits to the designated beneficiary, regardless of state law providing otherwise. However, the Estate asserts that Egelhoff does not definitively resolve the question of whether the ownership of ERISA benefits may be challenged after their distribution.

According to Kelly, state law cannot frustrate a federal choice of beneficiary either before or after distribution. She cites Hillman v. Maretta, ___ U.S. ___, 133 S. Ct. 1943, 1952, 186 L. Ed. 2d 43 (2013), where the Supreme Court found preemption of a postdistribution state law claim under a different federal benefit program, the Federal Employees' Group Life Insurance Act (FEGLIA), 5 U.S.C. § 8701 et seq.[4] Under FEGLIA, life insurance benefits are paid according to a specified "order of precedence," accruing first to the designated beneficiary or beneficiaries, and then, if there is no designated beneficiary, to the employee's widow or widower, children, parents, executor, or other next of kin. 5 U.S.C. § 8705(a). The Hillman Court struck down a Virginia statute rendering a former spouse liable to a new spouse for insurance policy proceeds the new spouse would have received were it not for federal law. Id. at 1948, 1953. The Court observed that the Virginia statute "displaces the beneficiary selected by the insured in

[4] Kelly did not raise her Hillman argument below. However, "the application of RAP 2.5(a) is ultimately a matter of the reviewing court's discretion." Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). We exercise this discretion to address Hillman to fully review the jurisprudence on this issue.

accordance with FEGLIA and places someone else in her stead." Id. at 1952. The Court concluded that the statute "thereby 'frustrates the deliberate purpose of Congress' to ensure that a federal employee's named beneficiary receives the proceeds." Id. (quoting Wissner v. Wissner, 338 U.S. 655, 659, 70 S. Ct. 398, 94 L. Ed. 424 (1950)).

Kelly asserts that this holding "establishes that federal law controls all aspects of designating a beneficiary, whether before or after distribution." Hillman interprets a different statute than Egelhoff, and the reasoning varies slightly between the two: Egelhoff focused on the ease of administration, while Hillman focused on ensuring ownership of proceeds. But, both cases make clear that the account proceeds go to the federally determined beneficiary regardless of state law to the contrary. Thus, while Hillman does not directly control here, it suggests that the same outcome would be appropriate in this situation.

We therefore turn back to case law addressing ERISA. Three years before Egelhoff, the Supreme Court held that ERISA preempted a state law allowing a nonparticipant spouse to transfer by will an interest in her husband's pension plan benefits to their sons. Boggs v. Boggs, 520 U.S. 833, 835-36, 841, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997). The Court rejected the argument that the state law claim, which affected only the post-distribution disposition of proceeds, thus failed to implicate the regulatory concerns of ERISA:

> The statutory object of the qualified joint and survivor annuity provisions . . . is to ensure a stream of income to surviving spouses. . . .
>
> ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity.

Id. at 843. The Court concluded that

> [i]t would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorothy, the predeceasing spouse, by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse. This cannot be. States are not free to change ERISA's structure and balance.

Id. at 844. Boggs demonstrates that ERISA can preempt state law as to the postdistribution disposition of proceeds. The difference between that case and the present is only the nature of the payments made: the Boggs decision involved annuity benefits, while here there was a lump sum payment from a retirement account.

The Estate asserts that, in Kennedy v. Plan Administrator for Dupont Savings and Investment, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009), the Court subsequently suggested that it would permit a postdistribution claim for ERISA benefits in this scenario. In Kennedy, the Court considered the effect of an ex-wife's waiver of ERISA benefits in a dissolution decree. Id. at 288. While William and Liv Kennedy were married, William designated Liv the beneficiary of his ERISA-governed savings and investment plan (SIP). Id. at 289. Upon their divorce, they signed a dissolution decree that provided: Liv "'is divested of all right, title, interest, and claim in and to . . . [a]ny and all sums . . . the proceeds [from], and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [William's] past or present or future employment.'" Id. at 289 (alterations in original). When William died, the plan administrator relied on the designation form and paid the balance of the SIP to Liv. Id. at 289-90. William's estate sued the plan administrator, claiming that Liv waived her right to the benefits and that the administrator thus violated ERISA by paying the benefits to Liv. Id. at 290.

The Kennedy Court held that the funds were properly paid to Liv, because the ERISA administrator was not required to honor the waiver in the dissolution decree when distributing the funds. Id. at 299-300. It reasoned that the plan documents "provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way. William's designation of Liv as his beneficiary was made in the way required; Liv's waiver was not." Id. at 304. The Court noted though that it did not "express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed." Id. at 299 n.10. Therefore, Kennedy signals that the propriety of postdistribution claims for ERISA benefits is an open question.

However, the Ninth Circuit has indicated that such claims cannot be premised on avoiding ERISA's mandates. See Carmona v. Carmona, 603 F.3d 1041, 1062 (2008). In Carmona, the court discussed a pre-Egelhoff case, Emard v. Hughes Aircraft, Inc., 153 F.3d 949 (9th Cir. 1998), abrogated by Egelhoff, 532 U.S. 141. See 603 F.3d at 1061-62. The Emard court held that ERISA did not preempt California law permitting the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary. 153 F.3d at 954-55. It reasoned that "ERISA is designed to ensure that benefits are paid out. It is silent as to the disposition of those funds after their receipt by the beneficiary." Id. at 955. The court further concluded that ERISA did not preempt state law requiring distribution of ERISA insurance proceeds to a person other than the designated beneficiary. Id. at 956. It reasoned:

> In enacting ERISA, Congress intended to safeguard the rights of plan participants and beneficiaries as against employers, insurers and administrators of employee benefit plans. See 29 U.S.C. § 1001 (setting

> forth Congress' findings and declaration of policy). ERISA therefore preempts state laws that concern those matters. But we see no indication that Congress intended to safeguard an individual beneficiary's rights to the proceeds of an ERISA insurance plan as against another person claiming superior rights, under state law, to those proceeds.

Id. at 958.

As the Carmona court observed, Emard was abrogated by Egelhoff. 603 F.3d at 1062; see also Egelhoff, 532 U.S. at 146 (noting the lower courts' split over whether ERISA preempts state laws and citing Emard as finding no preemption). Thus, the Carmona court said, "to the extent [Emard] can be interpreted as an end-run around ERISA's mandates, [it] no longer survives." 603 F.3d at 1062.

Like the Emard court, the Carmona court considered the propriety of a state law constructive trust on the proceeds of an ERISA account. See id. at 1061. Lupe Carmona designated his then-wife, Janis, as his survivor beneficiary under two pension plans which provided qualified joint and survivor annuity benefits. Id. at 1048. While they were still married, Lupe retired and began collecting pension benefits. Id. When the pair divorced two years later, Lupe sought to revoke Janis's designation as the survivor beneficiary. Id. The plan administrators refused to change the beneficiary and indicated that the designation was irrevocable upon Lupe's retirement. Id. In the couple's dissolution decree, the Nevada family court awarded Lupe both pension plans as his separate property. Id.

When Lupe remarried, he petitioned the family court to revoke Janis's designation as survivor beneficiary and substitute his new wife, Judy. Id. at 1049. After Lupe's death, the Nevada state court concluded that Janis waived her right to the plan benefits by virtue of the divorce decree and that she would be unjustly enriched if she remained the

beneficiary. Id. The court ordered the plan administrators to change the survivor beneficiary from Janis to Judy, or, in the alternative, ordered the funds Janis received to be placed in a constructive trust with Judy as beneficiary. Id. The Ninth Circuit held that the plan administrator was not required to redirect the surviving spouse benefits to Judy. Id. at 1061. It further held that the constructive trust was impermissible:

> In this case, the constructive trust that the state court created was explicitly an attempt to avoid ERISA's QDRO [(qualified domestic relations order)], preemption, and antialienation provisions. We conclude that Congress did not intend to permit the reassignment of surviving spouse benefits and, therefore the constructive trust remedy that the state court tried to impose is also preempted by ERISA. It may not be that all constructive trusts instituted by state courts, particularly those that seek to recover ill-gotten gains, will have a sufficient connection with or reference to an ERISA plan to trigger ERISA's preemption provision.
>
> But when a state court creates a constructive trust with the explicit purpose of avoiding ERISA's rules, it too must be preempted.

Id. at 1062.

Egelhoff establishes that ERISA preempts RCW 11.07.010 and other similar state statutes. Boggs indicates that ERISA preemption can apply both to pre- and post-distribution state law actions. And, Carmona explicitly disapproves of state law "end-runs" around ERISA imposed by state courts. In sum, state law claims to recover postdistribution ERISA benefits have been thus far rebuffed. Kennedy does not recognize an open question in the context of a state-law-based claim to postdistribution of ERISA benefits, but only in the context of waiver by private agreement between the parties.

Here, the Estate can establish no such agreement. It argues that the court should look to RCW 11.07.010 to discern the parties' intent. But, as Carmona made clear, state law "cannot be used to contravene the dictates of ERISA." 603 F.3d at 1061. The Estate

cannot revive a preempted statute simply by applying it in a postdistribution argument that does not directly implicate ERISA.

Moreover, waiver is not apparent on the face of the dissolution decree. Kelly did not expressly disavow any interest in the proceeds of the account as beneficiary. The decree says only that the retirement account is "awarded [to Craig] as his separate property." Disclaiming an ownership interest in not the same as disclaiming future rights as a beneficiary. By contrast, in many cases cited by the Estate, the ex-spouse explicitly waived the right to receive ERISA proceeds. See, e.g., Kennedy, 555 U.S. at 289 (ex-spouse divested of "'all right, title, interest, and claim in'" ERISA accounts); Andochick v. Byrd, 709 F.3d 296, 297 (2013) (ex-spouse waived "any interest, including but not limited to any survivor benefits" and "'released and relinquished any future rights as a beneficiary under'" ERISA plans) , cert. denied, 134 S. Ct. 235, 187 L. Ed. 2d 145 (2013); Estate of Kensinger v. URL Pharma, Inc., 674 F.3d 131, 132-33 (2012) (ex-spouse agreed to "waive, release, and relinquish any and all right, title and interest" in ERISA accounts).

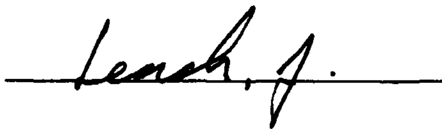
In the absence of an express agreement, waiver requires "unequivocal acts or conduct evincing an intent to waive." Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). Here, there was no such clear conduct demonstrating Kelly's intent to waive her rights as beneficiary of Craig's retirement account. The only evidence the Estate cites regarding intent is Kelly and Craig's lack of closeness after their divorce. But, we cannot infer intent from "doubtful or ambiguous factors." Id.

Federal law preempts a party's reliance on RCW 11.07.010(2)(a) for recovery of ERISA funds in the hands of the designated beneficiary. If Kennedy would allow recovery of funds from the designated beneficiary on the basis of waiver by private agreement, the

agreement here does not establish an express waiver of the rights to receive those funds as a beneficiary. The Estate has not established a valid postdistribution claim to recover ERISA benefits.[5]

We reverse.[6]

WE CONCUR:



[5] In addition to waiver, the Estate argues that awarding Kelly the account would constitute unjust enrichment, because the "circumstantial evidence supports that Craig intended to leave the retirement funds to his family and not his ex-wife." Though the parties dispute whether Craig truly intended to leave the account to Kelly, the only actual evidence as to his intent was the beneficiary designation. The Estate does not demonstrate that it would be inequitable to follow Craig's designation. We find no merit in the unjust enrichment claim. Unjust enrichment is an equitable remedy not dissimilar to the constructive trust imposed by the trial court and disapproved of by the Ninth Circuit in Carmona. 603 F.3d at 1062.

[6] We also deny the parties' various motions to strike and impose sanctions. Both parties engaged in practices that we discourage. Motions to strike sentences or sections out of briefs waste everyone's time. O'Neill v. City of Shoreline, 183 Wn. App. 15, 24, 332 P.3d 1099 (2014). The citations to unpublished cases in the briefing was in violation of our rules. GR 14.1(a); Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). However, we do not welcome motions from the parties seeking sanctions for doing so. This court is aware of its authority to award sanctions and can determine on its own when to do so. See RAP 18.9(a) ("The appellate court on its own initiative . . . may order a party or counsel [who] fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.").