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P R O C E E D I N G S

(1:00 p.m.)

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

Mr. Furlow.

ORAL ARGUMENT OF DAVID A. FURLOW

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

22 Of course, here, in the interest of candor,
23 Dupont did in fact address in brief format -- a page or
24 two, several pages -- in its motion for summary judgment
25 the plan document's role and raised that matter again in

1 the Fifth Circuit. It's just the Fifth Circuit did not
2 consider or pass on that because it relied solely on
3 Dupont's argument that the Fifth Circuit should adhere
4 to what it believed to be the Department of Treasury's
5 interpretation of the anti-alienation statute. The
6 Department of the Treasury and the Department of Labor,
7 now in a harmonized stance, have come forth and in their
8 amicus for the government supports our position that the
9 Fifth Circuit erred in its interpretation of the QDRO
10 statute, and that's the position we take.

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

15 MR. FURLOW: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

1 right, title, claim and interest in his pension
2 benefits, then we believe he may have believed as a
3 layman that by signing that beneficiary designation form
4 prepared by DuPont, that he had indeed superseded and
5 revoked all prior designations.

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

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

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

25 MR. FURLOW: Well, Your Honor, the way I see

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

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

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

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

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

1 plan administrator, Mary Deneen, that's coming in there,
2 and there you have a copy of the divorce decree served
3 on DuPont months before they make a payout.

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

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

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

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

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

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

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

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

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

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

10 MR. FURLOW: Yes.

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

19 MR. FURLOW: Well --

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

25 MR. FURLOW: Your Honor, we submit that

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

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

25 CHIEF JUSTICE ROBERTS: It's in the opinion

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

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

22 The important thing is DuPont could have
23 avoided all of this litigation, would not have had to
24 file an interpleader, would not have had to incur a
25 dime's worth of attorney's fees, would not have had to

1 put its own interest ahead of that of the participants
2 and the beneficiaries, had they simply invoked this
3 clause as they had the power to do. They chose this
4 case.

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

10 MR. FURLOW: The problem --

11 JUSTICE SOUTER: We have the same question
12 before us.

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

14 JUSTICE SOUTER: Yes.

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

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

1 MR. FURLOW: Respondents' brief, Your Honor,
2 and you will find it specifically on pages 14A and 15A,
3 in the appendix towards the back. And if you actually
4 go to the language, we stand on a plain-meaning
5 interpretation of the ERISA statute, this reticulated
6 and complicated statute. We say every word has its
7 meaning.

8 JUSTICE KENNEDY: What do you want me to
9 read here?

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

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

19 The alternate payees there that we are
20 talking about are spouse, ex-spouse, child, or other
21 dependent. It does not refer to the plan participant
22 Mr. Kennedy; and, therefore, there was no -- his mere
23 retention of his pension benefits and his wife's waiver
24 of her contingent beneficiary payments, which would only
25 come to her upon the death of William Kennedy, meant

1 there was no transfer, not a dime's worth of money, not
2 a bit of pension benefits transferred on the date that
3 she signed that waiver. There was thus no --

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

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

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

23 MR. FURLLOW: We think that --

24 JUSTICE ALITO: A QDRO could have been used
25 to direct the payment to someone else other than the

1 ex-spouse.

2 MR. FURLOW: With respect to her waiver that
3 would have required him in advance to decide who he
4 would have transferred, what alternate payee he would
5 transfer way back at the time of his divorce in 1994.
6 He did not. He did not transfer anything to his wife.
7 She didn't receive anything at that time. She simply
8 waived her contingent right to receive something upon
9 her death, something that would occur in the future.
10 She thoroughly waived that.

11 JUSTICE SCALIA: That's not your point. It
12 seems to me your point is that the QDRO is an exception
13 to the prohibition on assignment or alienation.

14 MR. FURLOW: I believe --

15 JUSTICE SCALIA: And your point is this has
16 been no assignment or alienation, so you don't need the
17 QDRO exception. There is nothing in what happened here
18 that violates anything in the statute.

19 MR. FURLOW: I completely agree with that
20 analysis.

21 JUSTICE SCALIA: So whether he could have
22 done a QDRO or not is in your view irrelevant. You don't
23 have to come forward with excuses of why he didn't, and
24 so forth. Your basic case is the QDRO is an exception
25 from the prohibition on assignment or alienation, that

1 provision has no application here, there has been no
2 assignment or alienation, and therefore the waiver is
3 effective.

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

20 CHIEF JUSTICE ROBERTS: Well, of course you
21 only think the Solicitor General is right so far to a
22 certain extent.

23 MR. FURLOW: To a certain extent.

24 CHIEF JUSTICE ROBERTS: Then you throw them
25 under the train because you don't -- you certainly don't

1 think they are correct by saying, look, the only way you
2 can do this is by modifying the plan. I still don't
3 know how the plan administrator is supposed to know that
4 the person whose name appears on the plan documents,
5 which the plan participant can change at any time, isn't
6 the person that they are supposed to send the benefits
7 to. Now, you tell me here they knew about the divorce
8 and all that stuff. Maybe, maybe not. But we are
9 trying to develop a rule for all cases and it seems to
10 me the easiest, most administrable rule is to say
11 whoever's name appears there gets the money, and if they
12 are not supposed to because of some collateral dispute,
13 well, they can sort that out in litigation. Maybe Kari
14 has a suit against Mrs. Kennedy or her estate, but
15 that's not a matter for the plan to worry about.

16 MR. FURLLOW: Well, Your Honor, let me
17 address that. First, we don't throw the Solicitor
18 General under the tracks. We simply point out the fact
19 that they have gone off track in terms of their plan
20 documents. And specifically, Your Honor, I would say I
21 agree with the Manning versus -- the Manning decision of
22 the Texas, of the Fifth Circuit, which we cited in
23 there, that says that sections 1102 and 1104 of ERISA,
24 that's Justice Scalia, 29 USC 1102 and 1104, are
25 a very thin reed indeed to on which to cobble together a

1 plan document's rule. And specifically DuPont then goes
2 one bridge too far going way beyond that to say that
3 these ever meetable, ever changeable beneficiary
4 designations -- thousands of them constitute plan
5 documents. When the Ninth Circuit addressed issues of
6 what constitutes plan documents in the salaried
7 employees of Hughes versus Hughes administrator case and
8 said that a list of the participants and their addresses
9 could not be considered a plan document because it did
10 not correspond with that detailed listing of the plan
11 documents under Section 1024 and 1025. Indeed under
12 Section 29 USC, section 1025, Your Honors, if these are
13 plan documents then the administrator has a duty to
14 disclose them to any person, participant or beneficiary
15 who asked and as the Ninth Circuit pointed out there is
16 substantial dangers there of going way beyond what
17 Congress, a very liberal Watergate Congress in 1974,
18 intended ERISA to be, which is a protection for
19 participants and beneficiaries, not for plan
20 administrators. And it exposes those participants and
21 beneficiaries to loss of privacy, telemarketing, and
22 other things because one person could get such a list
23 and sell it to others.

24 CHIEF JUSTICE ROBERTS: I must have missed
25 -- where did Watergate come from.

1 (Laughter.)

2 MR. FURLOW: Just putting in context the
3 intentions of the 1974 Congress, which was concerned
4 about participants and beneficiaries. Those were the
5 sole purposes for which section 1102 was designed to
6 protect, not the convenience of plan administrators as
7 DuPont would lead this Court to believe.

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Ms. Kruger.

12 ORAL ARGUMENT OF LEONDR A. KRUGER

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE

15 MS. KRUGER: Mr. Chief Justice, and may it
16 please the Court:

17 The Fifth Circuit decided this case on the
18 grounds that ERISA's anti-alienation provision forbids a
19 divorcing spouse from relinquishing an interest in his
20 or her ex-spouse's pension plan benefits unless the
21 waiver takes the form of a qualified domestic relations
22 order.

23 We agree with Petitioner that the Fifth
24 Circuit misinterpreted both the anti-alienation
25 provision and the QDRO exception to that provision. But

1 we disagree with Petitioner's further submission that
2 merely because ERISA does not forbid waivers in the
3 divorce context or otherwise, that a plan administrator
4 may be required as a matter of Federal common law to
5 recognize such waivers even when those waivers conflict
6 with the beneficiary designation the plan administrator
7 has on file.

8 JUSTICE KENNEDY: Well, are the provisions
9 of page 49 of the appendix consistent with the statute?

10 MS. KRUGER: Indeed, Your Honor, we think
11 that they are. The statute directs plan administrators
12 to administer the plan in accordance with the plan
13 documents and further requires administrators to pay
14 benefits to persons who are either participants under
15 the plan or who are beneficiaries within the meaning of
16 the statute.

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

19 MS. KRUGER: Well, the Court of Appeals
20 determined that it need not reach this point because it
21 decided the case on different grounds; namely, the
22 anti-alienation grounds. But, again, we think that if
23 the Fifth Circuit was incorrect in its reasoning but
24 reached the correct overall conclusion, then its
25 judgment should be affirmed.

1 JUSTICE SCALIA: Well, we -- I mean, we
2 could have -- you know, we should have thought of that
3 when we limited our -- our grant of certiorari to the --
4 to the one question on which you agree with the
5 Petitioner. But we did do that, didn't we, even though
6 the other one was -- was explicitly put under our nose,
7 and we said we -- we are not going to get into that? We
8 just want to decide this question, which is an important
9 question all by itself.

10 MS. KRUGER: Well, for several reasons, Your
11 Honor, we think it would be appropriate for the Court to
12 answer both the plan documents question as well as the
13 anti-alienation question.

14 One is that it is an alternative ground for
15 affirmance.

16 The other is that it was properly raised in
17 the Court of Appeals. It was raised in the cert
18 petition as well as in the brief in opposition.

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

23 MS. KRUGER: I --

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

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

3 JUSTICE BREYER: Well, could we do this? I
4 mean, what's bothering me about this is -- is you have a
5 very strong argument following the plan documents. They
6 have had some chance to reply to it, but not a full
7 chance. It seems a little unfair, and the Fifth Circuit
8 had -- would probably know what they'd say. Okay. Can
9 we, say, grant the question now and ask that people file
10 an additional brief if they want to say something?

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

15 MS. KRUGER: Well, Your Honor, I think it
16 would be possible to -- to either order for the briefing
17 on the issue or to grant the question now at this
18 juncture. I think it would also be conceivable to read
19 the question that the Court did grant on as encompassing
20 the Federal common law --

21 JUSTICE BREYER: I want to be fair to them.
22 I mean, we want -- you want to be fair to the other side
23 to be sure they have a chance to say everything they
24 have to say. That's what's worrying me.

25 MS. KRUGER: Well, Your Honor, that is an

1 important consideration. I do think that in the opening
2 brief the Petitioners did brief the question of what
3 effect is to be given to a waiver if indeed a waiver is
4 not prohibited by the anti-alienation clause. And that
5 Federal common law rule that Petitioners suggest is one
6 that does, I think, naturally invite some consideration
7 of the conflicting statutory directive in the form of
8 the plan documents principle that this Court has
9 recognized in its earlier cases. And certainly in its
10 reply brief Petitioners did address this issue in full.

11 JUSTICE SCALIA: Did -- did we recognize in
12 earlier cases that beneficiary designations are plan
13 documents?

14 MS. KRUGER: Well, Your Honor, I think the
15 question of whether beneficiary designation forms
16 count as plan documents, is a little bit beside the
17 point. The -- the plan documents in this case do
18 specify a procedure for determining who is to receive
19 benefits. It says that benefits will be paid to the
20 designated beneficiary, the person who is designated by
21 the participant. And it says that changes to those
22 beneficiary designations shall be made in the manner
23 that's prescribed by the plan.

24 And so, because the plan sets out a
25 procedure for changing beneficiary designations, we

1 think that it would be inappropriate to look beyond that
2 to require plan administrators to look to extrinsic
3 documents in order to determine whether one of them
4 overrides that designation.

5 JUSTICE SCALIA: Again, assuming there has
6 been a change of beneficiary designation, and, of
7 course, the argument you're confronted with is: I
8 haven't changed anything. The prior beneficiary simply
9 -- simply refused to accept it, waived it. I haven't
10 changed the designation at all.

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

15 And in that case in order to effectuate the
16 -- the interests of all parties involved in order to
17 provide certainty to all parties in ascertaining what
18 their rights are with respect to the plan, then it is
19 incumbent on the plan administrator to abide by the
20 designated beneficiary.

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

25 MS. KRUGER: Well, again, Your Honor, we

1 think it would be appropriate for the Court to go on to
2 address that question because the issues have been fully
3 aired both in the Fifth Circuit and in the briefing in
4 this Court. But if the Court were inclined to -- to
5 reserve that question for a later time, I think that
6 would be fine as well. And --

7 CHIEF JUSTICE ROBERTS: Am I right in
8 understanding that there is a fairly sharp circuit split
9 on that question, even that majority of the circuits are
10 contrary to the Government's position?

11 MS. KRUGER: That is correct. There is a
12 circuit split on the question as was raised in the
13 petition for certiorari, and the Second and Sixth
14 Circuits are the circuits that have to date agreed with
15 the position that we are espousing here: That the plan
16 documents control and preclude formulation of a Federal
17 common law rule of the sort that Petitioner proposes.

18 CHIEF JUSTICE ROBERTS: And which circuits
19 are on the other side?

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

22 The reason why the plan documents rule is so
23 important in this case is because it serves important
24 statutory interests in certainty, certainty of the
25 parties as well as certainty of the administrators.

1 And it is clear; it is easy to apply; it
2 makes it possible for administrators to do their jobs
3 without fear of further litigation in case they happen
4 to make what a court may later in the proceedings
5 determine is the wrong choice.

6 For that reason, we think that ERISA is
7 clear, and that it doesn't permit the kind of Federal
8 common law rule that Petitioner proposes, which is one
9 that would essentially revise the statute to override
10 the plan documents rule and would require substantial
11 burdens on the plan and would yield uncertainty for the
12 parties.

13 For that reason we would ask the Court to
14 affirm the judgment of the Court of Appeals on
15 alternative grounds or, alternatively, it should remand
16 for further proceedings.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Levy.

19 ORAL ARGUMENT OF MARK I. LEVY
20 ON BEHALF OF THE RESPONDENTS

21 MR. LEVY: Mr. Chief Justice, and may it
22 please the Court:

23 In light of the Court's questions, I want to
24 begin with the plan documents argument and first the
25 procedural question of whether it's properly before the

1 Court. We think that it is.

2 It's well within the settled doctrine of an
3 alternative ground for affirmance. It was raised below,
4 and the Fifth Circuit has decided the issue in other
5 cases. We don't dispute that. So we know what the
6 Fifth Circuit thinks about this issue, and, therefore,
7 there is no point in a remand.

8 JUSTICE SCALIA: Do you know of any case in
9 which we've done this --

10 MR. LEVY: I do.

11 JUSTICE SCALIA: -- rejected the question
12 and then decided it?

13 MR. LEVY: I apologize if it's not in the
14 brief, but a case I could find was called Piper Aircraft
15 versus Rayno 454 U.S. 235. And in that case the court
16 limited its grant of certiorari, but then went ahead and
17 decided a question that wasn't subsumed within that
18 question because they found it appropriate to the proper
19 disposition of the case.

20 CHIEF JUSTICE ROBERTS: No, no. But is that
21 a case in which the question the court decided was
22 presented in the petition, the court said we are not
23 going to take that question then they decided it on that
24 ground anyway.

25 JUSTICE SCALIA: That's what I'm asking.

1 Yes.

2 MR. LEVY: I'm not sure of the answer to
3 that. But that's the closest case I could find --

4 JUSTICE SCALIA: Yes. You are sure of the
5 answer. You don't know of any case.

6 MR. LEVY: No, I think Piper is at least a
7 first cousin if not a direct sibling of the issue that
8 we've got here. I don't disagree that it is in the
9 Court's discretion. The Court has discretion, I think,
10 one -- either way whether it wants to decide this or
11 wants remand, but we think it would be appropriate --

12 CHIEF JUSTICE ROBERTS: I guess you agree
13 that it's a question of which the circuits have split,
14 so presumably there are good arguments on both sides,
15 and it's one that your friend hasn't had a full
16 opportunity to brief here. So we'd have to be pretty
17 confident of the answer, I think, to go ahead and decide
18 it.

19 MR. LEVY: Well, actually I think the Court
20 will be confident if it looks into it. But beyond that
21 this is the classic case of an alternative ground for
22 affirmance of the judgment. When that arises, the
23 topside party always has to deal with that issue in its
24 reply brief and only in its reply brief. So there is
25 nothing unfair about the --

1 JUSTICE SCALIA: It would be the classic
2 case but for the fact that we had rejected that
3 question. Had we not been asked to decide it and said
4 no, it would be the classic case, I agree.

5 MR. LEVY: And I agree. That makes it
6 within the Court's discretion. It doesn't have to
7 decide it, but we think there are good reasons here.
8 It's been fully briefed, including by the Petitioner for
9 the reason I just said. Four amici have addressed it;
10 we have addressed it. So it's properly before the
11 Court, and there is nothing unfair about deciding it.
12 In addition --

13 JUSTICE SCALIA: Can we expect that to
14 happen in future cases when we turn down a question and
15 amici and people come in and brief the question anyway
16 and then ask us to decide it?

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

20 JUSTICE GINSBURG: I think there is a
21 question of the way it was phrased. And perhaps the
22 Court just didn't get it, what that question on which we
23 didn't grant cert was driving at.

24 MR. LEVY: I would be loathe to make that
25 suggestion, Justice Ginsburg.

1 (Laughter.)

2 MR. LEVY: But it may well -- it's possible
3 that that could be the explanation or the Court with
4 fuller consideration -- I mean, the issue has been fully
5 briefed. The Court knows more about the issues than it
6 did at the time it granted cert, and we think it is free
7 -- to decide this.

8 And I do want to point out that there is a
9 relationship between the questions. Both the question
10 granted and the question that wasn't granted -- wasn't
11 denied, but it wasn't granted -- raise similar
12 considerations. They both get into the same statutory
13 scheme. They both get into the same considerations of
14 plan administrability. We think it would be most
15 efficient for the Court to resolve the conflict now and
16 not leave the uncertainty to continue any further.

17 JUSTICE SCALIA: Undoubtedly we should have
18 granted it.

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

23 JUSTICE KENNEDY: Would you like to argue
24 the question that is here?

25 MR. LEVY: Yes --

1 (Laughter.)

2 MR. LEVY: -- I would. I take it the Court
3 doesn't need argument on the merits of the plan
4 documents issues, since that's already been discussed,
5 so let me turn to the QDRO question. That is the
6 question that was -- that was granted and was discussed
7 fully in the briefs.

8 Now, as to the QDRO part of the case, the
9 rule of law that governs this case is that pension plan
10 administrators must pay benefits in accordance with a
11 qualified domestic relations order, and they may not pay
12 benefits in accordance with a nonqualified order.

13 That rule follows from two separate and
14 different analyses. One is the anti-alienation
15 provision, and the other is the QDRO provision in
16 subparagraph (H) of section 1056. They are both
17 discussed in our brief.

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

20 (Laughter.)

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

24 JUSTICE SCALIA: 21A?

25 MR. LEVY: 21A. And it's (H)(ii) and (iii).

1 And I want to start with this because it is really is
2 the more straightforward analysis and avoids a lot of
3 questions that have come up under the anti-alienation
4 provision. This argument would prevail whether or not
5 the purported waiver is deemed to be an assignment or
6 alienation under 1056(d)(1) and (d)(3).

7 Now, we think it is and I'll come back to
8 that under the IRS regulation, but let me start with
9 this alternative argument that's also made in the brief.

10 Under ERISA, a domestic relations order is
11 either a qualified order or a nonqualified order. And
12 ERISA expressly provides that if it's a nonqualified
13 order, as it is here, the plan administrator may not pay
14 benefits pursuant to that order.

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

24 Contrast that with subparagraph (H)(ii)
25 right above it, where the order is qualified: The

1 administrator shall pay the benefits to the person
2 entitled thereto under the order.

3 So, it gives you two choices. If it's a
4 qualified order, the plan must pay. If it's not a
5 qualified order, the plan --

6 JUSTICE BREYER: Well, that doesn't make too
7 much sense, does it, where all that happens is you just
8 waive. The wife waived the amount because when she
9 waives the amount, she doesn't give it to anybody. She
10 just doesn't take it. So it goes to the beneficiary --
11 it goes to the person who made up the plan. It's a
12 little hard to pay to him, because he is dead.

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

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

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

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

3 MR. LEVY: And I appreciate that.

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

9 JUSTICE SCALIA: No, it also goes to the
10 question of who is the person or persons who would have
11 been entitled to such amounts if there had been no
12 order.

13 MR. LEVY: If there were no --

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

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

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

22 MR. LEVY: I don't believe so. I think it
23 is not only helpful but dispositive. The order that is
24 referred to is the divorce decree, the qualified
25 domestic -- I'm sorry, not qualified -- the domestic

1 relations order.

2 JUSTICE SCALIA: Right.

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

4 JUSTICE SCALIA: If there had been no
5 order --

6 MR. LEVY: -- then there wouldn't have been
7 any waiver by Liv. I mean, excuse me -- yes, by Liv.
8 There wouldn't have been any waiver if there weren't any
9 divorce decree because the waiver is contained --

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

11 MR. LEVY: -- in the decree. So, if there
12 were no --

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

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

18 JUSTICE SCALIA: I got you.

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

22 JUSTICE SCALIA: I see.

23 MR. LEVY: But this is really very
24 straightforward and dispositive.

25 And the legislative history confirms this.

1 The plain text is clear, but the legislative history
2 confirms it. Congress took a specific look at this
3 specific issue in a specific context of marital
4 dissolution, and it enacted this QDRO provision. And
5 the provision is comprehensive and complete.

6 JUSTICE BREYER: I'm -- I didn't follow, I'd
7 have to admit. I think -- and you perhaps can explain
8 it to me -- but, I thought the things that you are
9 quoting are QDRO is about an effort to alienate some
10 property that would otherwise go to the person who was
11 setting up a QDRO, in other words, the wife here, in
12 other words Liv here; is that right?

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

15 JUSTICE BREYER: Okay. The one person who
16 couldn't be an alternate payee is the payor. And so, in
17 fact, when you waive something, it isn't that it
18 necessarily goes back to some alternate payee, as it
19 didn't here. It's sewage, they don't want it. It
20 simply went back to the payor. And so the language of
21 this prevision you're quoting just doesn't deal with
22 this case.

23 MR. LEVY: Well, I think it does, Justice
24 Breyer.

25 JUSTICE BREYER: I know you do, and that's

1 what I need to ask.

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

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

10 MR. LEVY: Yes.

11 JUSTICE BREYER: Now, you think that
12 includes the giver, the payor?

13 MR. LEVY: No.

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

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

19 JUSTICE SCALIA: And he says -- you say the
20 waiver is in the order?

21 MR. LEVY: Yes.

22 JUSTICE SCALIA: And without the order,
23 there has been no waiver.

24 MR. LEVY: That's correct. And the statute
25 says --

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

3 (Laughter.)

4 MR. LEVY: That's what made horse races.
5 Let me just say a further word about the legislative
6 history of this and then come back to the
7 anti-alienation provision, Justice Breyer, if I -- if I
8 might.

9 Congress made it clear that benefits are to
10 be paid pursuant to an order "if and only if" -- and
11 that's a quote from the legislative history -- the order
12 is a QDRO; in other words, the order must be a QDRO in
13 order to be paid. Congress was mindful of the burdens
14 that nonqualified orders put on plan administrators and
15 it purposely sought to avoid that by requiring that an
16 order be a QDRO, a qualified order, in order for there
17 to be payment. The QDRO provision is an objective
18 checklist that is easy for -- for plan administrators to
19 follow.

20 JUSTICE SCALIA: What if they had agreed to
21 the waiver apart from -- apart from the -- from the
22 domestic relations order? Just apart from that, they
23 have a separate signed waiver. We'd be in the same suit
24 that you're -- that you say we have to avoid, wouldn't
25 we?

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

3 JUSTICE SCALIA: Well, if it's an
4 alienation, but his point is that a waiver is not an
5 alienation.

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

11 JUSTICE SCALIA: What about some other
12 waiver that's -- that's not in connection with a -- with
13 a domestic relations thing? You know -- "I've made my
14 -- my eldest son a beneficiary." It turns out, you
15 know, he is fat and happy; he doesn't need the money and
16 he agrees to waive it, so -- so I can give it to an
17 impecunious daughter. Okay? What -- what happens with
18 that?

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

21 JUSTICE SCALIA: Ah. Oh, oh, oh. You're
22 jumping over to the other argument. Let's leave that
23 argument out.

24 MR. LEVY: If it's not a marital dissolution
25 context, then QDRO wouldn't apply one way or the other.

1 Now, in that context, I think what you're suggesting,
2 Justice Scalia --

3 JUSTICE SCALIA: Yes, but you would still --
4 the plan would still have to make some inquiries,
5 wouldn't it?

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

8 JUSTICE SCALIA: Yes. Not getting in the
9 plan documents.

10 MR. LEVY: It would be a different case. I
11 mean, this case involves what Congress specifically
12 looked at and specifically did in the context of marital
13 dissolution, and the reason for that is a marital
14 dissolution comes up all the time.

15 JUSTICE SCALIA: Sure.

16 MR. LEVY: It's a commonplace in these
17 benefits issues, and these are high-volumes operations.
18 The plan administrators aren't lawyers. Congress wanted
19 bright-line rules that could be easily applied here, not
20 general principles to be applied for the facts and
21 circumstances of each particular case, highly
22 fact-intensive, highly subjective inquiries. Congress
23 didn't want any of that. It didn't want the plan
24 administrator to have to look behind the face of the
25 order to the circumstances of the --

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

3 MR. LEVY: Okay.

4 JUSTICE BREYER: Okay? I think.

5 MR. LEVY: It didn't want the plan
6 administrators to have to try and divine the intention
7 of the parties, didn't want the plan administrators to
8 have to hold a factfinding hearing before it could pay
9 plan benefits. That is completely foreign to the
10 efficient and simple operation that Congress had in
11 mind.

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

14 JUSTICE GINSBURG: Before you do, leaving
15 the plan -- the beneficiary designation, you say that
16 the plan administrator is not required to give effect to
17 a waiver that conflicts with the beneficiary
18 designation. Is it just not required? Does the
19 administrator have discretion to give effect to the
20 waiver, or it -- must it disregard the waiver and
21 strictly follow the beneficiary designation?

22 MR. LEVY: I believe it must follow the
23 beneficiary designation. Indeed, my understanding is it
24 has a fiduciary duty and a legal requirement to follow
25 the plan designation. Now, the plan might specify

1 alternatives. Here, for example, the plan said, here's
2 a form that you fill out. And William Kennedy filled it
3 out with respect to a different plan, the pension and
4 retirement plan. But where the plan says, "we will pay
5 the designated beneficiary" -- and that's what this plan
6 says -- then the plan administrator is required, as I
7 understand it, to pay that designated beneficiary.

8 Now let me say a word since this came up,
9 although it's not really central to the change of
10 beneficiary designation that William filed for this
11 other plan that's not now before the Court, the pension
12 and retirement plan. And I would say only two things
13 about that: One is at JA 62, and if you look at it, it
14 says in the title and it says in the body of the
15 document that this applies to the pension and retirement
16 plan. We don't think anyone could have thought that it
17 applied to other plans and that William therefore was
18 changing the beneficiary as to those other plans. In
19 fact, at JA 28 in paragraph 10, there was a stipulation
20 of fact in the district court that William never changed
21 the designation as to the savings and investment plan,
22 the SIP that is before the Court today. So it was not
23 only not raised below, it was stipulated away and I
24 think that was --

25 JUSTICE BREYER: Let me go back for a second

1 because, while I got it five minutes late, if I have it
2 right, I still don't see why Congress would have done it
3 literally.

4 I think what you're saying is: "Read the
5 full four pages. What those four pages say are, Judge,
6 you have an order, a divorce decree. It's defined as an
7 order. Look at it. It's qualified or it isn't. If
8 it's qualified, pay the money to the person it names.
9 If it's not qualified, pay the money to the person,
10 namely Liv, who would have been entitled to the amount
11 if there had been no order."

12 Okay. You read that literally as you want
13 and what it says is: "Liv, you're being divorced. You
14 want a divorce; your husband wants a divorce; you're
15 going to be divorced. You cannot waive the benefit
16 under the plan." Now, why would Congress not want her
17 to be able to waive it? Why?

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

20 JUSTICE BREYER: I can understand an anti-
21 alienation provision. That's some guy who is going to
22 come along and grab this money when you want to take
23 care of a widow, and you want to take care -- but -- but
24 this isn't that. It's just -- she just wants to waive
25 it; she doesn't want it. That's the widow herself.

1 Okay, so why would Congress --

2 MR. LEVY: Two things: One, we think that
3 purpose does apply here. I mean, the point of
4 anti-alienation provision is to guard against the
5 temptation to trade off future pension benefits in
6 exchange for immediate economic gain or advantage.
7 That's exactly what Liv did in the divorce. She got the
8 Mercedes, she got other things. She traded off her
9 pension benefits, and we think that falls squarely
10 within the purpose of the anti-alienation provision.

11 JUSTICE BREYER: I see.

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

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

1 have done that.

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

9 MR. LEVY: It's not necessary. It's simply
10 another alternative, but I agree with you, Mr. Chief
11 Justice, that the most direct and straightforward --

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

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

18 Now, let me turn to this issue about what is
19 an assignment or alienation when we disagree with our
20 friends from the Solicitor General's Office. We think
21 Liv's purported waiver here was an assignment or
22 alienation within the IRS definition. The IRS
23 regulation is reprinted at page 15 of the body of the
24 red brief, and it provides that assignment or alienation
25 is defined to include any direct or indirect arrangement

1 whereby a party acquires an interest from the
2 beneficiary. And I've left out the not -- the
3 not-critical language for present purposes. So it talks
4 about an indirect arrangement whereby a party acquires
5 an interest from the beneficiary.

6 Now, the government argues that that
7 definition requires that the beneficiary, first, must
8 direct the transfer and, second, it must direct it to a
9 third party. The government's argument rests not on the
10 language of the regulation that I just read but on a
11 legal argument that this is what terms meant at common
12 law. But that position simply can't be squared with the
13 language of the regulation. As I just said, the
14 regulation includes an indirect arrangement within the
15 definition of "assignment or alienation."

16 JUSTICE SOUTER: But isn't -- isn't the
17 problem that it's got be an indirect arrangement, and
18 what you are arguing for here is an indirect effect.
19 And it has that indirect effect on your reasoning
20 because of the -- of the waiver and because of probate
21 law. And it seems to me, as I read the -- the IRS reg,
22 the "arrangement" that it's referring to is an
23 arrangement which in and of itself would -- would effect
24 the transfer. And that is not the case here.

25 MR. LEVY: Well, we think it is. The

1 arrangement here effected transfer to the estate under
2 the plan default rule. The estate was next in line. So
3 if this is a relinquishment -- I don't want to use the
4 word "waiver." But if this is a relinquishment of her
5 interest, then it went to the estate.

6 That's what the plan provides, but it's not
7 just the phrase "indirect arrangement" that we rely on,
8 Justice Souter. It's also the phrase "a party
9 acquirer." It doesn't say a party acquirer at or by the
10 direction of the beneficiary. -

11 JUSTICE SCALIA: Well, that's -- that's the
12 point that troubles me. It's -- it's the "acquirer's"
13 language.

14 Does -- does the person who -- who receives
15 the -- the refused benefit acquire it from the other
16 person? He certainly doesn't do so for Federal tax
17 purposes.

18 MR. LEVY: Well, that's back to the
19 disclaimer, Justice Scalia.

20 JUSTICE SOUTER: The only person who
21 acquires it -- the only entity that acquires it is the
22 estate.

23 MR. LEVY: Yes, that's right under the
24 default rule. And if the default rule had a -- if the
25 plan had a different default rule, under the default

1 rule maybe it goes to the children.

2 JUSTICE SCALIA: Does he acquire it from a
3 participant or beneficiary?

4 MR. LEVY: He acquires it from the
5 beneficiary list.

6 JUSTICE SCALIA: I thought the -- the notion
7 is it's as though the -- it's as though the devise to
8 the person refusing it had never occurred. I mean,
9 there is -- there is no gift tax payable or anything
10 else.

11 MR. LEVY: Well, there is no gift tax
12 payable if it's a qualified disclaimer, and it won't be
13 in a divorce case because there will be consideration
14 and that prevents a qualified disclaimer. So that's a
15 different situation, but the word "acquired" doesn't
16 mean --

17 JUSTICE GINSBURG: You made the contention
18 now -- and I think you have it in your brief -- that if
19 you get something in return for a disclaimer, then the
20 disclaimer is not effected. That it's effected only if
21 you receive nothing in return. Now what -- what is the
22 source of that contention that you can't disclaim if you
23 get something in return?

24 MR. LEVY: The -- it's -- under the Gift Tax
25 Code Justice Ginsburg, section 2518 defines a qualified

1 disclaimer, which means you don't pay gift tax on it.
2 It's as if the interest had never been transferred. And
3 one of the conditions of that qualified disclaimer is
4 that the disclaimant not accept any interest or any of
5 its benefits. So if there is consideration, if the
6 person is in a better position than they would have been
7 because they received consideration, then it won't be a
8 qualified disclaimer for gift tax purposes.

9 But there won't ever be a disqualified
10 disclaimer for that reason in a -- in the divorce
11 context. It simply --

12 JUSTICE BREYER: Is the -- is the wife --
13 I'm thinking of the Chief Justice's question, too. If
14 your -- the woman is Wife X, and her ex has a pension.
15 Doesn't something vest? Say she is in California.
16 Doesn't she have some vested right to some of that
17 pension?

18 MR. LEVY: In her own pension?

19 JUSTICE BREYER: Yes. I mean, suppose she's
20 married for 40 years to Joe Smith, Joe Smith earns a
21 pension and then he wants a divorce. Doesn't she have
22 some right to some of that money.

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

1 JUSTICE BREYER: Does she get some of the
2 money he saved?

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

4 JUSTICE BREYER: So it's not exactly that
5 you could have just changed the beneficiary. If you
6 just changed the beneficiary, you'd have to give her
7 something else.

8 MR. LEVY: After the divorce she is not
9 entitled. It's only a spouse who is entitled to the
10 benefits.

11 JUSTICE BREYER: But in the divorce
12 proceeding she's going to get some of the money, which
13 is now Justice Ginsburg's point, to which she is
14 entitled. So obviously she will get something, but
15 she's entitled to it.

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

17 CHIEF JUSTICE ROBERTS: Not, not obviously.
18 I mean it depends what the divorce is. She got the
19 Mercedes, right? I mean, she can get -- it depends on
20 the divorce arrangement, not anything under ERISA, once
21 she is a nonspouse.

22 MR. LEVY: Once she is a nonspouse she is no
23 longer entitled to those benefits under ERISA section
24 1055.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Furlow, you have three minutes
2 remaining.

3 REBUTTAL ARGUMENT BY DAVID A. FURLOW

4 ON BEHALF OF THE PETITIONERS

5 MR. FURLOW: Thank you, Your Honor. Chief
6 Justice Roberts, you were asking about the evidence
7 earlier with respect to the possession in DuPont's own
8 files of the divorce decree and of the notice that was
9 given saying: Please don't pay leave; she's already
10 waived all of her benefits. You will find that on page
11 76 of the joint appendix in the sworn amended affidavit
12 of Mary Dineen, the plan's administrator, specifically
13 at paragraph 20, page 76, where she says in bold: "Upon
14 its receipt" -- meaning the April 26, 2001, letter from
15 Kari Kennedy Duckworth -- "Exhibit No. 1 was maintained
16 as a record of DuPont with regard to the SIP account of
17 William Patrick Kennedy." That's joint appendix 76,
18 paragraph 20. It was within the regular course of
19 business of DuPont to maintain a copy of this letter
20 with other DuPont records relating to Mr. Kennedy's SIP
21 account at the time the letter was received from its
22 sender. The letter is then attached as the next exhibit
23 that follows on. That would be about pages 78 to 79.
24 And there it says the divorce decree was attached.

25 Make no mistake: DuPont had that divorce

1 decree and could see the knowing, voluntary waiver and
2 had it well in advance of making its decision to pay
3 money to a woman who went off to Norway and paid her
4 when she was over there, where there was no prospect of
5 grabbing it back and turning it over to the executor.

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

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

1 But --

2 JUSTICE SCALIA: Was this waiver only part
3 of the divorce decree? Do you agree with your friend on
4 that point?

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

8 JUSTICE SCALIA: That's not separate and
9 apart from the divorce decree.

10 MR. FURLOW: It was not separate and apart.
11 In fact, when they were transferring benefits they knew
12 what to do and they used the waiver to transfer part of
13 the benefits.

14 It is interesting, Your Honors, that they
15 talked about the plan documents rule, but their own
16 documentation says, their own plan says, that the only
17 plan documents -- and I quoted it here on page 25 of our
18 reply brief -- "The official plan documents are the E.I.
19 DuPont de Nemours & Company savings and investment plan
20 and the trust agreement," not beneficiary designations.
21 So they give no notice.

22 CHIEF JUSTICE ROBERTS: Do you have anything
23 more to say on the plan document -- the plan document
24 issue than what you've said here.

25 MR. FURLOW: Oh, I could come up with lots

1 of things. That's a bad idea.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: Okay. Thank you,
4 counsel. The case is submitted.

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

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