"Stuck on You": The Inability of an Ex-Spouse to Waive Rights Under an ERISA Pension Plan [*McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005)]

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[T]he pension reform bill is the greatest development in the life of the American worker since social security.[1]

I. Introduction

Imagine that you are an employee of a large gas company. You have worked for over twenty years with the company and have accrued funds as part of a company-sponsored pension plan. To assure your spouse financial protection in the event that you predecease her, you name her as the contingent beneficiary to the pension plan. After your retirement, you and your wife divorce. Your wife signs a settlement agreement in which she waives any interest in your pension plan. In later years, she consents to naming your new spouse as the contingent beneficiary. You request that your company change the contingent beneficiary on the pension plan to your current wife so that if you were to predecease her, she would then receive benefits under the plan. Imagine that the company denies your request, informing you that your former spouse will remain the contingent beneficiary.

Upset with the company's determination, you file a claim with the court to compel the company to stop distributing the pension plan funds to your former wife and to distribute the funds to your current wife. You argue your case, explaining that your ex-wife waived her rights to the pension plan and consented to naming your current wife as the contingent beneficiary, but the company remains adamant that your ex-wife is entitled to the benefits. The court disregards your request, leaving your current wife without financial support.

These facts were before the United States Court of Appeals for the Third Circuit in *McGowan v. NJR Service Corp*.[2] Declining to follow the majority approach, the Third Circuit incorrectly held that a

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1. James A. Wooten, The Employee Retirement Income Security Act of 1974: A Political History 1 (2004) (citing S. Comm. on Labor and Public Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 4747 (Comm. Print 1976)).

2. 423 F.3d 241 (3d Cir. 2005).

beneficiary could not waive her rights to a pension plan by entering into a marital settlement agreement with her husband.[3] This comment will discuss the majority and minority approaches in the circuits that have addressed the issue of waiver of beneficiary rights to a pension plan under the Employee Retirement Income Security Act of 1974 (ERISA). The majority approach, referred to as the common law approach, is premised upon the theory that federal common law applies to issues not addressed by ERISA.[4] The minority approach posits that plan documents on file with an administrator govern and that the language of the statute controls the issue of waiver.[5] This comment will demonstrate that the Third Circuit should have followed the common law approach because it would have been more closely aligned with congressional intent and, in this case, more sensible.

This comment will also discuss the legislative history behind the development of ERISA and the construction of the statute. It will suggest that the policy reasons advanced by the Third Circuit in support of its rationale were misplaced. Moreover, it will explain the case law in this area and distinguish *McGowan* from those cases following the minority approach. Finally, this comment will expose the trend since the decision in *McGowan*.

II. Case Description

On May 12, 1969, James M. McGowan Sr. (McGowan) began his employment with New Jersey Natural Gas Company (NJNG).[6] McGowan participated in NJNG's Plan for Retirement Allowances for Non-Represented Employees (Plan).[7] Under the Plan, McGowan accrued benefits toward retirement.[8] During his employment, McGowan married his second wife, Rosemary Byrne (Byrne), whom he designated as the Plan beneficiary.[9] He elected to receive his benefits in an "automatic surviving spouse option," creating an annuity for his life and a fifty percent survivorship interest in favor of Byrne.[10] Under this election, Byrne, the contingent beneficiary, would receive

3. *Id.* at 243.
4. George A. Norwood, *Who Is Entitled to Receive a Deceased Participant's ERISA Retirement Plan Benefits—an Ex-Spouse or Current Spouse? The Federal Circuits Have an Irreconcilable Conflict*, 33 GONZ. L. REV. 61, 68 (1998).
5. *See* Metro. Life Ins. v. Pressley, 82 F.3d 126, 130 (6th Cir. 1996) (explaining that when a participant designated his wife as the beneficiary under a retirement plan, she remained the beneficiary even after their divorce pursuant to the terms of the plan); McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990) (reasoning that a plan administrator must rely only on the file documents to ascertain the beneficiary).
6. Brief on Behalf of Appellee New Jersey Natural Gas Co. at 2, *McGowan*, 423 F.3d 241 (No. 04-3620) [hereinafter Brief of Appellee].
7. Brief and Appendix Volume I on Behalf of Appellant James M. McGowan Sr. at 6, *McGowan*, 423 F.3d 241 (No. 04-3620) [hereinafter Brief of Appellant].
8. Brief of Appellee, *supra* note 6.
9. McGowan v. NJR Serv. Corp., No. 03-1035, slip op. at A1-A2 (D.N.J. July 23, 2004).
10. *Id.* at A2.

the funds if McGowan predeceased her.[11] Retiring on November 30, 1996, McGowan began receiving payments under the Plan.[12]

On May 24, 1999, McGowan and Byrne divorced.[13] In a marital settlement agreement, Byrne waived "any right to the New Jersey Natural Gas Company Employee Pension Plan."[14] With Byrne's written consent and the executed settlement agreement, McGowan attempted to name his first wife, Shirley McGowan (Shirley), as the contingent beneficiary.[15] The Plan's administrator denied McGowan's request to change the contingent beneficiary from Byrne to Shirley.[16]

In November 2001, McGowan married Donna McGowan (Donna).[17] He attempted to name Donna the contingent beneficiary under the Plan, but the administrator denied his nomination,[18] reasoning that the terms of the Plan did not permit McGowan to change the contingent beneficiary.[19] McGowan filed an appeal with NJNG's claims administration committee, explaining that even though his former wife Byrne had waived her rights to the pension, the Plan continued to distribute payments to Byrne each month instead of providing for his current wife Donna.[20] The committee affirmed the decision of the Plan's administrator.[21]

McGowan exhausted all available administrative remedies,[22] and on March 5, 2003, he filed a complaint in the United States District Court for the District of New Jersey.[23] He requested declaratory relief to establish the validity of Byrne's waiver of her rights and to nominate Donna as the new contingent beneficiary.[24] McGowan filed a motion for summary judgment on both counts, and NJNG filed a cross-motion, petitioning the court for summary judgment and dismissal of McGowan's claims with prejudice.[25] The district court granted NJNG's motion for summary judgment, and McGowan appealed.[26]

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11. Brief of Appellant, *supra* note 7.
12. Brief of Appellee, *supra* note 6.
13. *Id.*
14. Brief of Appellant, *supra* note 7, at 7.
15. *McGowan*, No. 03-1035, slip op. at A3.
16. Brief of Appellant, *supra* note 7, at 7.
17. *Id.*
18. *McGowan*, No. 03-1035, slip op. at A3.
19. Brief of Appellant, *supra* note 7, at 7.
20. *Id.* at 7-8.
21. Brief of Appellee, *supra* note 6, at 4.
22. *McGowan*, No. 03-1035, slip op. at A3-A4.
23. Brief of Appellee, *supra* note 6, at 5. McGowan subsequently amended his complaint, correctly naming NJNG as the defendant because the company was the Plan's administrator. *Id.*
24. McGowan v. NJR Serv. Corp., 423 F.3d 241, 244 (3d Cir. 2005). Count two requested that the court impose civil penalties against NJNG for its alleged failure to supply plan documents within the prescribed time as mandated by 29 U.S.C. § 1132(c) (2000). *McGowan*, 423 F.3d at 244. Section 1132(a)(1)(B) grants a plan participant the right to file a civil claim "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."
25. Brief of Appellee, *supra* note 6, at 5.
26. *McGowan*, 423 F.3d at 244.

The Third Circuit held, in a two-to-one decision, that federal common law did not apply and that without a Qualified Domestic Relations Order (QDRO),[27] Byrne did not effectively waive her rights as a beneficiary under the Plan.[28] The court also ruled that the district court did not abuse its discretion by refusing to award damages, reasoning that "NJNG did not act in bad faith."[29] The court examined both the minority and common law approaches to determine the validity of a pension plan beneficiary's waiver under ERISA but ultimately held that the common law approach was inapplicable to McGowan's case.[30]

III. Background

On Labor Day, 1974, President Gerald Ford signed into law the Employee Retirement Income Security Act of 1974.[31] President Ford exclaimed, "I think this is really an historic Labor Day, historic in the sense that this legislation will probably give more benefits and rights and success in the area of labor-management than almost anything in the history of this country."[32] Pension plans were not a new phenomenon; rather, companies had been sponsoring private pension plans for nearly one hundred years prior to the enactment of ERISA.[33] In the 1880s, some companies initiated private incentives to eliminate older workers and promote younger and more efficient employees.[34] The creation of private incentives led to the informal adoption of private pension plans aimed at providing senior employees the opportunity to retire while retaining wages.[35]

Pension plans, however, had numerous imperfections.[36] Few employees were afforded pension benefits because the design of most pension plans required such stringent vesting standards that many employees did not qualify.[37] Additionally, a disincentive for companies

27. Kyle Rominger, Casenote, *Divorce*, 34 Louisville J. Fam. L. 262, 263 (1995). A QDRO is a domestic relations order that assigns a portion of the participant's benefits to another individual. *Id.* The domestic relations order must satisfy certain guidelines provided in 29 U.S.C. § 1056(d)(3)(C) (2000). *McGowan*, 423 F.3d at 263 n.13.
28. *See McGowan*, 243 F.3d at 250.
29. *Id.* This comment will not address the issue of penalties under ERISA.
30. *Id.*
31. Wooten, *supra* note 1.
32. *Id.*
33. *Id.* at 17.
34. *Id.* at 20.
35. *Id.*
36. *See generally* Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. Marshall L. Rev. 773, 776 (2005) (explaining that ERISA was enacted as a result of numerous protests by participants and employees who did not receive pension benefits according to their plans).
37. Michael J. Collins, *It's Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 Lab. Law. 391, 391 (2001). Senator Harrison A. Williams explained that the Welfare and Pension Plan Disclosure Act of 1958 was insufficient to safeguard employee benefit plans. *Id.* at 391 n.4.

to provide funds as an intermediary arose because the funds were often taxed as company revenue pursuant to federal income tax regulations.[38] Frequently, retirement funds were unavailable to support employers' obligations.[39]

A. *Federal Regulations Affecting Pension Plans Prior to ERISA*

With the establishment of the income tax in 1913, Congress began promulgating legislation that indirectly affected private pension plans.[40] The legislation resulted in a higher rate of taxation for intermediaries that financed pension plans.[41] In 1935, Congress enacted the Social Security Act, which relieved private pension plans of the burden of supporting a broad range of employees by implementing a program that paid employment pension funds to most private employees.[42] Other legislation indirectly affected pension plans, but it was not until the Welfare and Pension Plans Disclosure Act of 1958 (WPPD) that Congress enacted legislation to directly control pension and welfare plans.[43]

Congress implemented the WPPD to guide pension plan administration.[44] Prior to its enactment, plan administrators frequently misused or stole fund assets.[45] This abuse led employees to hesitate to resign and fear termination before their plans vested.[46] The belief that employers may not possess the assets necessary to satisfy their obligations left many employees in peril.[47] In response to persistent improper administration, Congress amended the WPPD in 1962, criminalizing certain conduct by plan administrators.[48] Despite these congressional adjustments, private pension plans across the nation continued to fail due to the absence of mechanisms designed to safeguard against employer abuse in plan administration.[49] The Studebaker-Packard Plant's closing in South Bend, Indiana, aptly illustrates

38. WOOTEN, *supra* note 1, at 23. An intermediary is a pension trust that holds or finances funds to pay employee pension plans. *Id.* at 22-23.

39. Feuer, *supra* note 36.

40. WOOTEN, *supra* note 1, at 23.

41. *Id.*

42. *Id.* at 27.

43. H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

44. *Id.*

45. WOOTEN, *supra* note 1, at 4.

46. *Id.* Before ERISA, pension plans required employees to work many years with a company or attain a certain age before their plans vested. *Id*.

47. *Id.*

48. H.R. REP. NO. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4641.

49. *See, e.g.*, Collins, *supra* note 37, at 392 (explaining the failure of the Studebaker pension fund).

the prevalent failure of pension plans prior to the enactment of ERISA.[50]

After suffering years of financial difficulties, Studebaker closed its production plant, resulting in the termination of over 5,000 workers.[51] This calamitous event caused 11,000 members of the United Automobile Workers Union to lose some or all of their pension benefits and prompted Congress to seriously examine the problem of securing employees' pension plans.[52] The Studebaker plant closing was regarded as the "focusing event" driving the campaign for legislative reform and the development of ERISA.[53]

B. *ERISA Policy Goals*

Congress enacted ERISA primarily "to protect the rights of employees to receive their retirement benefits" and to ensure the availability of funds to participants and their beneficiaries.[54] ERISA's broad goals also provide clear standards for the administration of ERISA plans.[55] Controversy exists regarding whether these goals should protect plan administrators or plan participants and their beneficiaries.[56] Congress attempted to remedy this controversy by including the anti-alienation provision within ERISA to ensure that funds are available for participants upon retirement,[57] regardless of the participant's liabilities.[58] As a further remedy, Congress designed ERISA as a uniform scheme of administration aimed at streamlining administrators' duties.[59]

Obvious inequities resulted when courts attempted to apply ERISA's dual objectives to marital settlement agreements.[60] In response

50. *See generally* Wooten, *supra* note 1, at 51-79 (detailing the events leading to the Studebaker plant closing); Collins, *supra* note 37, at 392 (citing Steven J. Sacher et al., Employee Benefits Law 5 (2d ed. 1998)) (same).

51. Collins, *supra* note 37, at 392.

52. *Id.*; *see also* Wooten, *supra* note 1, at 51-52. The closing of the Studebaker plant caused some former employees to commit suicide. 119 Cong. Rec. 204, 19446 (1973) (statement of G. W. Dietrich).

53. James A.Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683, 684 (2001).

54. Leslie A. Kulick, *What Are the Limitations on QDROs?*, 61 J. Mo. B. 89, 89 (2005).

55. Michael Alan Frazee, *ERISA—Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment*, 10 W. New Eng. L. Rev. 317, 317 (1998).

56. Aaron Klein, *Divorce, Death, and Posthumous QDROS: When Is It Too Late for a Divorcee to Claim Pension Benefits Under ERISA?*, 26 Cardoza L. Rev. 1651, 1655-56 (2005).

57. Julie McDaniel Dallison, *Disappearing Interests: ERISA Impliedly Preempts the Predeceasing Nonemployee Spouse's Community Property Interest in the Employee's Retirement*, 49 Baylor L. Rev. 477, 484 (1997).

58. *Id.* at 482. The United States Court of Appeals for the Seventh Circuit, in *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, recognized that the spendthrift provision's purpose is to protect participants from unwise assignment or alienation. 897 F.2d 275, 279 (7th Cir. 1990) (en banc).

59. Klein, *supra* note 56.

60. *See, e.g.*, Dallison, *supra* note 57, at 483-84 (outlining different marital property distribution approaches taken by California courts and courts in common law property states).

to these inequities, Congress enacted the Retirement Equity Act (REA) to eliminate unfair decisions.[61] The REA, however, led to mass confusion.[62]

C. *Retirement Equity Act of 1984: Creating the QDRO*

In 1984, Congress amended ERISA by enacting the REA, commonly known as the QDRO amendment.[63] Prior to the amendment, courts exempted state domestic relations orders from the anti-alienation provision to effectuate alimony, maintenance, or garnishment of funds for child care purposes.[64] Pursuant to 29 U.S.C. § 1056(d)(1) of ERISA, "benefits provided under the plan may not be assigned or alienated."[65] The REA amended § 1056(d)(3) by adding the QDRO to permit distribution of property regulated by ERISA upon divorce.[66]

The QDRO is a domestic relations order that assigns part of the participant's pension plan benefits to another individual.[67] To qualify as a QDRO, the domestic relations order must satisfy the guidelines provided in § 1056(d)(3)(C),[68] which require that the domestic relations order contain the following:

> the name and last known mailing address . . . of the participant and the name and mailing address of each alternate payee[,] . . . the amount or percentage of the participant's benefits to be paid by the plan to each . . . payee, or the manner in which such amount . . . is to be determined, the number of payments or period to which such order applies, and each plan to which such order applies.[69]

With minimal direction from Congress, courts struggle to interpret the guidelines in § 1056(d)(1), the anti-alienation or assignment clause.[70] Two approaches have developed from court interpretations.[71] One approach emphasizes that federal common law should fill the gaps left by ERISA.[72] The second approach, followed by a minority of courts,

61. *Id.*
62. *Id.* at 483-89.
63. Kulick, *supra* note 54.
64. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278 (7th Cir. 1990) (en banc).
65. 29 U.S.C. § 1056(d)(1) (2000).
66. Klein, *supra* note 56, at 1653-54.
67. Rominger, *supra* note 27.
68. *Id.* at 263 n.13.
69. § 1056(d)(3)(C)(i)-(iv). A domestic relations order satisfies these requirements only when it does not require a plan (1) to provide benefits that are outside the scope of the plan; (2) to increase benefits; and (3) to pay an alternate payee funds that were obligated to another payee. § 1056(d)(3)(D)(i)-(iii).
70. *See generally* Norwood, *supra* note 4, at 64 (citing Altobelli v. IBM, 77 F.3d 78, 79 (4th Cir. 1996); McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990)) (explaining that there is no consistent answer because jurisdictions are split as to whether plan administrators must abide by the documents on file or by a separate agreement entered into by the participant and beneficiary).
71. *Id.*
72. *Id.* at 68.

purports that strict adherence to the statute is necessary to comply with congressional intent.[73]

D. *The Federal Common Law Approach Versus the Minority Approach*

The common law approach provides that a beneficiary may waive her interest in an ERISA benefit plan, without the statutory requirement of a QDRO, by entering into a marital settlement agreement incorporated into a divorce decree.[74] Under this rationale, ERISA does not address the issue of waiver of benefits by a beneficiary; consequently, courts must develop common law to fill this gap.[75] According to the common law approach, a "waiver is valid if, 'upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest.' "[76] Additionally, the individual must have voluntarily entered into the waiver.[77]

In *Altobelli v. IBM*,[78] the United States Court of Appeals for the Fourth Circuit held that a participant's ex-spouse could waive her beneficiary interest in a pension plan through a marital settlement agreement.[79] In reaching this conclusion, the court followed the common law approach articulated in *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*[80] and reasoned that the anti-alienation or assignment clause of § 1056(d)(1) focused on assignment or alienation of benefits by a participant, rather than *waiver* of benefits by a beneficiary.[81] The court in *Altobelli* relied on *Fox Valley* for the proposition that federal courts are permitted to develop federal common law when determining the outcome of the issue.[82] A number of other circuits have taken a similar approach,[83] holding that the waiver of bene-

73. *See generally* McGowan v. NJR Serv. Corp., 423 F.3d 241, 244-45 (3d Cir. 2005) (explaining the common law approach but applying the minority approach to hold a waiver invalid).

74. *See, e.g.*, Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280-81 (7th Cir. 1990) (en banc) (establishing that a beneficiary may waive her interest without a QDRO); Norwood, *supra* note 4, at 64.

75. Norwood, *supra* note 4.

76. *McGowan*, 423 F.3d at 245 (quoting Clift v. Clift, 210 F.3d 268, 271-72 (5th Cir. 2000)).

77. *Id.*

78. 77 F.3d 78 (4th Cir. 1996).

79. *Id.* at 79-80.

80. 897 F.2d 275, 281 (7th Cir. 1990) (en banc) (stating that either ERISA or federal common law determines whether a beneficiary may waive her interest in an ERISA benefit plan).

81. *Altobelli*, 77 F.3d at 81. Altobelli worked for IBM and participated in two pension benefit plans. *Id.* at 79. He did not designate a beneficiary under the two plans but did designate his wife as beneficiary under an insurance policy held with IBM. *Id.* The pension plans provided that if the participant did not name a beneficiary and had an insurance policy with IBM, then the beneficiary of the insurance policy would also be the beneficiary of the pension plans. *Id.* at 79-80. Upon divorce, Altobelli's ex-wife signed a waiver of her interest in her "[h]usband's IBM pension and other deferred compensation plans." *Id.* at 80.

82. *Id.* (citing Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 562 (4th Cir. 1994)).

83. Mohamed v. Kerr, 53 F.3d 911, 917 (8th Cir. 1995) (holding that ex-spouse waived her rights in former husband's life insurance policy); Brandon v. Travelers Ins. Co., 18 F.3d 1321,

ficiary rights in an ERISA plan is effective when the divorce decree specifically addressed the plan.[84]

In contrast to the common law approach, the method developed by the United States Court of Appeals for the Sixth Circuit in *McMillan v. Parrott*[85] posits that the plan administrator must abide by the plan documents on file.[86] Basing its analysis on ERISA's statutory scheme and language,[87] the Sixth Circuit held that participant's ex-spouse was entitled to the proceeds from an ERISA plan because she was on file as the named beneficiary.[88] Specifically, the court relied on 29 U.S.C. § 1104(a)(1)(D), which provides that the administrator must distribute funds according to the "documents and instruments governing the plan."[89] The United States Court of Appeals for the Third Circuit recently joined the Second and Sixth circuits by adopting this approach.[90]

IV. Court's Decision

In *McGowan v. NJR Service Corp.*, the Third Circuit considered whether ERISA permits a contingent beneficiary to waive her rights to a pension plan in a marital settlement agreement.[91] McGowan named his wife, Byrne, as the fifty percent joint and survivor contingent beneficiary to his pension plan.[92] McGowan and Byrne later divorced, and Byrne signed a marital settlement agreement waiving her rights to McGowan's pension plan.[93] The court, however, held that Byrne did not effectively waive her rights and that she remained the contingent beneficiary of McGowan's pension plan and was entitled to receive payments instead of Donna, McGowan's current wife.[94]

1326-27 (5th Cir. 1994) (same); *Fox Valley*, 897 F.2d at 281 (holding that a beneficiary may waive her rights to pension funds in a marital settlement agreement).

84. Norwood, *supra* note 4, at 71.

85. 913 F.2d 310 (6th Cir. 1990).

86. *Id.* at 311-12. Dr. Norman Parrott created the ERISA plans when he was married to Barbara whom he named beneficiary of the plans. *Id.* at 311. After naming Barbara as beneficiary, the couple divorced and each signed a broad waiver of "any and all" claims. *Id*. Dr. Parrott remarried and died less than twenty-four hours after his wedding. *Id.* at 310.

87. Norwood, *supra* note 4, at 67.

88. *McMillan*, 913 F.2d at 312.

89. *Id.* at 311 (quoting § 1104(a)(1)(D)).

90. McGowan v. NJR Serv. Corp., 423 F.3d 241, 245 (3d Cir. 2005); Krishna v. Colgate Palmolive Co., 7 F.3d 11, 15 (2d Cir. 1993); *McMillan*, 913 F.2d at 311. In *Krishna v. Colgate Palmolive Co.*, the United States Court of Appeals for the Second Circuit held that the outside documents, in this case a will, could not designate a beneficiary. 7 F.3d at 15. The participant executed a codicil to his will in which he changed the beneficiary to his accounts held at Colgate Palmolive Company. *Id*. at 12. The court held that ERISA preempted New York law and that the administrator was only required to examine the documents on file to ascertain the beneficiary. *Id.* at 15-16.

91. *McGowan*, 423 F.3d at 244.

92. Brief of Appellant, *supra* note 7. When McGowan nominated Byrne as the survivor contingent beneficiary, he created "an annuity for his life, with a 50% survivor annuity payable to his spouse, [ ] Byrne." Brief of Appellee, *supra* note 6.

93. Brief of Appellant, *supra* note 7, at 7.

94. *McGowan*, 423 F.3d at 248.

A. *Opinion of the Court*

The court held that ERISA addressed the issue of waiver by a beneficiary[95] and that Byrne could not waive her beneficiary rights through the marital settlement agreement.[96] McGowan contended that the federal common law approach should resolve whether Byrne had waived her rights under the Plan.[97] According to McGowan, a waiver is valid when it clearly identifies the right waived and is entered into voluntarily.[98] McGowan explained that, even though plans should be administered according to the plan documents, when ERISA is silent, federal common law should fill the gaps.[99] For this proposition, McGowan cited cases from other circuits following the common law approach.[100] NJNG, on the other hand, defended its decision not to give effect to Byrne's waiver, relying on § 1104(a)(1)(D), which provides that plan administrators are bound to discharge their duties "in accordance with the documents and instruments governing the plan."[101] NJNG claimed that it was obligated to comply with the statute and lacked discretion to evaluate Byrne's outside waiver contained in the marital settlement agreement.[102]

Assuming that the court would adopt the common law approach, McGowan argued that his current wife, Donna, should be nominated as the new contingent beneficiary.[103] McGowan asserted that ERISA is silent on the issue of disbursement of funds after divorce and that nomination of a new spouse as the contingent beneficiary and recalculation would not be burdensome on the administrator.[104] Therefore, following the common law approach, the outcome would be a simple redistribution of the benefits to Donna.[105]

Contrary to McGowan's argument, NJNG contended that, even if the waiver could be construed as valid, the waiver would not be effec-

95. *Id.* at 245.
96. *See id.* at 246.
97. Brief of Appellant, *supra* note 7, at 11.
98. *Id*. McGowan cited *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir. 1990) (en banc) for the common law approach and *John Hancock Mutual Life Insurance Co. v. Timbo*, 67 F. Supp. 2d 413, 420 (D.N.J. 1999), in which the district court held that the common law approach should prevail. *See* Brief of Appellant, *supra* note 7, at 11.
99. Brief of Appellant, *supra* note 7, at 14. McGowan cited *Hancock*, 67 F. Supp. 2d at 420, in which the court explained that "ERISA provides no guidance as to what acts constitute a valid waiver of benefits." *See* Brief of Appellant, *supra* note 7, at 11.
100. Brief of Appellant, *supra* note 7, at 15 (citing Clift v. Clift, 210 F.3d 268, 271 (5th Cir. 2000); Nat'l Auto Dealers v. Arbeitman, 89 F.3d 496, 500 (8th Cir. 1996); Altobelli v. IBM, 77 F.3d 78, 80 (4th Cir. 1996); Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994); *Fox Valley*, 97 F.3d at 281).
101. Brief of Appellee, *supra* note 6, at 9 (quoting 29 U.S.C. § 1104(a)(1)(D) (2000)).
102. *Id.*
103. Brief of Appellant, *supra* note 7, at 20.
104. *Id.* at 22-23. McGowan's argument was also based on the REA's purpose: to protect the participant's spouse. *Id.*
105. *Id.*

tive because it failed to comply with guidelines regulating waivers under the Plan.[106] Because McGowan decided to receive his retirement benefits in the form of a "qualified joint and survivor annuity" (QJSA), specific rules governed how and when a spouse could waive her rights.[107] In this case, Byrne was required to waive or revoke her rights within the "[ninety]-day period ending on the annuity starting date."[108]

Agreeing with NJNG, Judge Franklin Van Antwerpen determined that § 1104(a)(1)(D) required plan benefits be administered according to the documents on file.[109] Concluding that the common law approach was inapplicable because the statute addressed the issue presented,[110] Judge Van Antwerpen explained that the statute ensures that "plans [are] uniform in their interpretation and simple in their application."[111] He further reasoned that this "extremely important policy goal" ensures that participants, beneficiaries, and administrators can identify their rights with certainty, which in turn limits costly disputes that arise over the effect of outside documents on distribution plans.[112]

McGowan noted that evidence does not suggest an increased cost in administration of pension plans in jurisdictions following the common law approach.[113] Judge Van Antwerpen, however, relied on the United States Supreme Court's decision in *Egelhoff v. Egelhoff*,[114] which held that ERISA preempted a state statute.[115] The Court reasoned that reducing administrative burdens and limiting costly disputes required preemption of the state statute.[116] The Court stated in *Egelhoff* that requiring plan administrators to examine state law to determine a beneficiary would burden administrators by forcing them to become familiar with the states' statutes governing distribution of ERISA regulated funds.[117] Judge Van Antwerpen contended that

106. Brief of Appellee, *supra* note 6, at 11.
107. *Id.* at 10 (citing 29 U.S.C. § 1055(c)(1)(A)(i)-(ii) (2000), which provides that, under a QJSA, a participant may elect to waive or revoke the QJSA form of payment at anytime during the applicable election period).
108. *Id.* (quoting § 1055(c)(7)(A)).
109. McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005). The opinion failed to address McGowan's argument that recalculation was a minimal burden upon plan administrators, presumably because the court dismissed the common law approach, so recalculation never became an issue.
110. *Id.*
111. *Id.* (quoting McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990)).
112. *Id.* (citing Altobelli v. IBM, 77 F.3d 78, 82 (4th Cir. 1996) (Wilkinson, C.J., dissenting)).
113. Brief of Appellant, *supra* note 7, at 18. McGowan cited *Altobelli* for the proposition that having administrators examine outside documents does not create any more of a burden than the requirement of administrators to decipher QDROs. *Id.*
114. 532 U.S. 141, 150 (2001).
115. *McGowan*, 423 F.3d at 246.
116. *Egelhoff*, 532 U.S. at 149-50.
117. *Id.* at 148. Egelhoff designated his wife as the contingent beneficiary under his pension plan. *Id.* at 144. The couple divorced, but he neglected to change the designation on the plan. *Id.* The plan provided the funds to his former wife, and his children from another marriage

these same concerns would be prevalent if plan administrators were required to "familiarize themselves with the various private agreements that might exist between participants and beneficiaries to determine whether they contain valid waivers under federal common law."[118]

Judge Van Antwerpen then considered the effect of the anti-alienation or assignment clause of § 1056(d)(1) upon Byrne's waiver.[119] Byrne's waiver, he explained, would contravene ERISA's prohibition on alienation or assignment of benefits.[120] McGowan, however, argued that *waiver* was distinct from assignment or alienation, and because the statute does not mention it, waiver is not explicitly prohibited.[121] Judge Van Antwerpen agreed that the term waiver was different from the terms used in the statute but found instructive the Code of Federal Regulation's definition of assignment or alienation as "[a]ny direct *or indirect* arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary."[122] Judge Van Antwerpen warned that the waiver in this case was the functional equivalent of an assignment of benefits and that allowing a waiver would undermine ERISA's anti-alienation or assignment clause.[123] He, therefore, concluded that ERISA's statutory scheme required McGowan to obtain a QDRO to effectuate Byrne's waiver.[124]

B. *Concurring Opinion*

Judge Edward Becker agreed that Byrne's waiver violated the anti-alienation or assignment clause of § 1056(d)(1).[125] He, however, disagreed with Judge Van Antwerpen's determination that plan documents govern and that any requirement for the administrator to look beyond the documents would violate § 1104(a)(1)(D).[126] He was not

petitioned the court to grant them the funds under Washington intestate law. *Id.* The children relied on a Washington statute that applied to all non-probate assets. *Id.* The statute revoked Egelhoff's designation of his wife as beneficiary and required that the insurance and pension plan proceeds be paid to the heirs of the deceased when a provision made prior to the dissolution of the marriage granted the benefits to the former spouse. *Id*. The Court held that ERISA preempted state law because the state statute was related to an ERISA plan; thus, the statute implicated a core area of ERISA concern, namely designation of a beneficiary. *Id.* at 147.

118. *McGowan*, 423 F.3d at 246.
119. *Id.* at 248.
120. *Id.*
121. *Id.*
122. *Id.* at 249 (quoting 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (2004)).
123. *Id.*
124. *Id.* at 250; *see also supra* note 27. The court also held that NJNG did not violate 29 U.S.C. § 1132(c) (2000), the civil penalties statute. *McGowan*, 423 F.3d at 250.
125. *McGowan*, 423 F.3d at 251 (Becker, J., concurring).
126. *Id.*

persuaded by the policy argument that uniformity in interpretation and simplicity in application required holding that the waiver was invalid.[127]

Determining that Byrne's purported waiver was a prohibited assignment or alienation, Judge Becker reasoned that the waiver was not a mere renunciation, but rather an attempt by Byrne to transfer her interest to McGowan.[128] He explained that this attempt constituted an indirect arrangement aimed at permitting McGowan to assign Byrne's benefits to another individual.[129] Judge Becker dismissed the interpretation of the anti-alienation or assignment clause under the common law approach and concluded that the clause prevents assignment by participants and beneficiaries.[130] To support his position, Judge Becker speculated that McGowan must have offered Byrne something of value in return for waiving her rights in the retirement pension fund, which would be an assignment of benefits.[131] Judge Becker relied on *Boggs v. Boggs*[132] to further support the conclusion that the anti-alienation clause applies to beneficiaries.[133] Because the U.S. Supreme Court determined in *Boggs* that ERISA preempted state law, it implicitly recognized that the prohibition against assignment or alienation of funds applies equally to beneficiaries and participants.[134]

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 253. The common law approach is premised on compensating for gaps in ERISA not accounted for by Congress. *Id.* at 245 (Van Antwerpen, J., court's opinion). In *Fox Valley*, the court explained that a valid waiver should specifically refer to the plan waived and must have been entered into voluntarily. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.3d 275, 281 (7th Cir. 1990) (en banc).

131. *McGowan*, 423 F.3d at 253 (Becker, J., concurring).

132. 520 U.S. 833 (1997). Judge Becker agreed with Judge Van Antwerpen's determination that the anti-alienation clause applies to beneficiaries. *McGowan*, 423 F.3d at 253.

133. *McGowan*, 423 F.3d at 253. The issue in *Boggs* was similar to the issue in *Egelhoff*. *Compare Boggs*, 520 U.S. at 835-36 (deciding whether ERISA preempted a state law enabling a spouse to transfer by a testamentary instrument her interests in a participant's pension plan), *with* Egelhoff v. Egelhoff, 532 U.S. 141, 143 (2001) (deciding whether ERISA preempted a state statute that revoked the designation of a beneficiary to an ERISA pension plan). The U.S. Supreme Court considered whether ERISA preempted a state law that allowed a non-participant spouse to transfer a future interest in ERISA funds by a testamentary instrument. *Boggs*, 520 U.S. at 835-36. Isaac and Dorothy Boggs were married when Isaac began accumulating pension benefits. *Id.* at 836. Dorothy died and Isaac remarried. *Id.* In her will, Dorothy left one-third of her estate to her sons and the other two-thirds in a lifetime usufruct for their benefit. *Id.* Under state law, Dorothy's will would dispose of her interest in the community property acquired during her marriage. *Id.* at 837. The sons filed a complaint, claiming that Dorothy had distributed the funds now belonging to Sandra, Isaac's current wife. *Id.* The Court explained that upholding state law would undermine the principle objective created by the REA: protecting the surviving spouse. *Id.* at 843-44. ERISA preempted state law because the laws were in conflict, and it was impossible to abide by both the state and federal mandates. *Id.*

134. *See Boggs*, 520 U.S. at 843-44. In *Boggs*, the spouse of a deceased attempted to distribute her future interest in community property to her sons, but the Court ruled that ERISA preempted state law, preventing the transfer or assignment and implicitly abiding by the anti-alienation or assignment clause. *Id.* at 844.

Judge Becker interpreted § 1104(a)(1)(D) as embodying "the common-sense notion that a plan administrator should not take actions that are inconsistent with the plan's guidelines."[135] He explained that "[n]othing in the language prohibits the administrator from consulting other documents" so long as those documents do not conflict with the plan's language.[136] In fact, he noted that administrators examine outside documents to determine whether a participant executed a valid QDRO.[137] He also reasoned that, because the provisions authorizing QDROs do not mention § 1104(a)(1)(D), Congress did not perceive a conflict between the requirement that an administrator perform his duties in accordance with the documents on file and the requirement that an administrator ascertain whether a valid QDRO exists.[138]

Agreeing with McGowan, Judge Becker recognized that requiring plan administrators to examine outside documents would create only a minimal burden because administrators are already required to abide by QDROs.[139] He commented that judges may fashion federal common law to create clear standards for plan administration similar to the criteria Congress envisioned.[140] In addition, he explained that requiring administrators to recalculate pension plan benefits is "*de rigeur* for plan administrators; it is the 'stuff' of their work."[141]

C. *Dissenting Opinion*

Judge Julio Fuentes dissented, characterizing the ultimate issue as whether Byrne could waive her rights to the pension funds in the absence of a specified QDRO despite ERISA's anti-alienation or assignment clause.[142] Judge Fuentes posited two reasons that compelled him to follow the common law approach: (1) ERISA is silent on waivers; and (2) state autonomy requires developing federal common law to fill gaps in ERISA.[143]

Judge Fuentes determined that waivers are not addressed by the anti-alienation or assignment provision.[144] Citing cases involving federal common law,[145] he explained that the plain meaning of alienation is a "*conveyance* or *transfer* of property to another" and that the plain

135. *McGowan*, 423 F.3d at 254 (Becker, J., concurring).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 255.
141. *Id.*
142. *Id.* (Fuentes, J., dissenting).
143. *Id.*
144. *Id.*
145. *Id.* (citing Altobelli v. IBM, 77 F.3d 78, 81 (4th Cir. 1996); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280 (7th Cir. 1990) (en banc)).

meaning of assignment is "the *transfer* of rights or property."[146] Waiver, however, is "[t]he voluntary relinquishment or abandonment[,] express or implied[,] of a legal right or advantage."[147] Judge Fuentes reasoned that a waiver does not involve a transfer but merely a relinquishment of rights.[148] In support, he cited 5 U.S.C. § 8465 of the Internal Revenue Code, which governs "[w]aiver, allotment, and assignment of benefits."[149]

Judge Fuentes disagreed with Judge Van Antwerpen's characterization of Byrne's waiver as an indirect assignment.[150] He noted that Congress designed the anti-alienation or assignment provision to protect participants and beneficiaries from their creditors,[151] explaining that a waiver is fundamentally different because a waiver is "not likely to be induced by an offer from an unscrupulous, predatory character."[152] Furthermore, the participant obtains the benefits of a waiver, but if the beneficiary could assign rights to a third party, then the assignment would violate the anti-alienation or assignment clause.[153] Interpreting the Internal Revenue Code's definition of assignment in the same manner as Judge Van Antwerpen, the dissent continued, would permit third parties to invalidate otherwise valid waivers.[154]

Judge Fuentes concluded that courts should supply federal common law to close the gaps left by Congress in ERISA.[155] Applying the common law approach to ERISA, he reasoned, would "fulfill[ ] the intent of the parties to a divorce, allow[ ] spouses broader room to negotiate during the settlement of property attendant to divorce, and comport[ ] with longstanding common law domestic relations

146. *Id.* at 256 (quoting BLACK'S LAW DICTIONARY 73, 115 (7th ed. 1999)).

147. *Id.* (quoting ALEXANDER M. BURRILL, A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS § 1, at 1 (James Avery Webb ed., 6th ed. 1894)).

148. *Id.*

149. *Id.* at 256 n.13 (quoting 5 U.S.C. § 8465 (2000), which covers the Federal Employees' Retirement System). Section 8465(a) provides that an "individual entitled to an annuity payable from the Fund may decline to accept all or any part of the amount of the annuity by waiver signed and filed with the Office."

150. *McGowan*, 423 F.3d at 257.

151. *Id.* at 256.

152. *Id.*

153. *Id.* at 256-57.

154. *Id.* at 257. Judge Fuentes determined that this reading of the United States Code would "prohibit all waivers." *Id.* He explained that the court's interpretation "puts the cart before the horse" because it presupposes that if the waiver is valid, then the Plan must give effect to the renomination of Donna as the new beneficiary. *Id.* He stated that the waiver would not violate the anti-alienation or assignment clause; only renomination of Donna as beneficiary would be an assignment attempt by McGowan. *Id.* In addition, he explained that an interpretation such as the one by the court assumes that when Byrne waives her rights to the QJSA, McGowan obtains those rights, but in actuality, the right to the annuity would be destroyed, and McGowan would have nothing left to transfer. *Id.*

155. *Id.* at 259. Judge Fuentes explained that cases addressing the effect of *Boggs* on waivers have recognized that ERISA preempts state law, but those courts have continued to hold that federal common law is not in conflict with the issue of preemption. *Id.* at 258 (citing Manning v. Hayes, 212 F.3d 866, 873 (5th Cir. 2000); Metro. Life Ins. Co. v. Pettit, 164 F.3d 857, 864 (4th Cir. 1998)).

rules."[156] He agreed with Judge Becker that requiring a plan administrator to ascertain the validity of a waiver in a divorce decree placed no greater burden on the administrator.[157] He concluded that determining the validity of Byrne's waiver under the federal common law approach would not result in a serious dispute regarding the requisite specificity for a valid waiver.[158]

V. Commentary

In *McGowan v. NJR Service Corp.*, the Third Circuit erred when it followed the minority approach and held that an ex-spouse's waiver did not effectively relinquish her rights in her former husband's pension plan.[159] First, the decision conflicts with Congress's overarching policy goal for ERISA: protecting participants and their beneficiaries.[160] Second, the Third Circuit's insistence on the minority approach conflicts with long-standing interpretations of ERISA because 29 U.S.C. § 1104 comports with the theory that federal judges have the authority to create common law. Third, the court neglected to recognize that Congress's policy goal for ERISA could be satisfied by following the common law approach. Fourth, the court's reliance on the cases following the minority approach was misplaced because the facts in *McGowan* are distinguishable from the facts in those cases abiding by the minority approach. Finally, the court's decision has created precedent, resulting in more inequitable and nonsensical decisions.

A. *ERISA Protects Participants and Beneficiaries*

The Third Circuit's opinion in *McGowan* dismissed the common law approach and followed the minority approach.[161] Before reaching this conclusion, the court should have examined the legislative history behind ERISA. Congress developed ERISA to protect the interests of the participants and their beneficiaries.[162] This goal emerged from the history of pension plans.[163] Indeed, Congress primarily intended

156. *Id.* at 259.
157. *Id.* A plan's administrator must investigate the marital history of a participant to uncover any QDROs that could affect the disposition of funds. *Id.*
158. *Id.* at 260. The common law approach posits that a waiver is valid when it specifically refers to the right being waived and when the person waiving the right entered into the agreement voluntarily. *See, e.g.*, *id.* at 245 (Van Antwerpen, J., court's opinion) (citing Clift v. Clift, 210 F.3d 268, 271-72 (5th Cir. 2000)); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 281 (7th Cir. 1990) (en banc).
159. *See McGowan*, 423 F.3d at 243.
160. *See* Frazee, *supra* note 55; Kulick, *supra* note 54 (explaining that the "primary purpose of ERISA" is to protect an employee's rights to employment benefits).
161. *McGowan*, 423 F.3d at 246.
162. 29 U.S.C. § 1001(b) (2000).
163. *See generally* Wooten, *supra* note 1, at 80-117 (discussing the legislative and historical development of ERISA).

to provide support to employees because the business community and labor unions were initially opposed to ERISA.[164]

In 1962, the Kennedy Administration formed the Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, which concluded that radical reform was necessary to satisfy employees' needs.[165] The committee proposed recommendations that would lead to minimum vesting standards and higher fiduciary duties.[166] The Kennedy Administration, however, failed to complete the reform due to John F. Kennedy's assassination, and the Johnson Administration adopted the pursuit but was timid in making substantial strides toward reform.[167]

In the late 1960s, New York Senator Jacob Javits proposed a tax bill that later became a labor bill.[168] Leading private pension reform in the early 1970s, Senator Javits proposed legislation to amend the Welfare and Pension Plans Disclosure Act.[169] He noted that the amendment was aimed at "strengthening greatly the disclosure requirements [and] . . . establishing fiduciary standards to protect the rights of workers covered by . . . pension benefit[ ] plans."[170] "The fundamental purpose," he explained, is to protect the "interests of the participants and beneficiaries of employee welfare and pension benefit plans."[171] Senator Javits commented that Congress intended federal courts to develop substantive law to address issues regarding rights and obligations under the plans.[172] Prior to its enactment in 1974, the General Subcommittee on Labor explained that the bill's "most important purpose will be to assure American workers that they may look forward . . . to a retirement with financial security and dignity."[173] The bill became known as the Retirement Income Security for Employees Act.[174] The history of ERISA suggests that Congress intended ERISA to encompass common law principles to ensure the protection of beneficiaries.

164. *Id.* at 1 (citing Editorial, *Pension Security*, N.Y. TIMES, Mar. 6, 1974, at 36).

165. Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, 76 IOWA L. REV. 431, 444 (1991).

166. *Id.* at 444 n.92. The report made numerous recommendations, most important of which included the mandatory minimum vesting and funding standards for pension plans; additional studies concerning portable pension credits to ensure that employees retain the credits when transferring jobs; provisions for plan termination insurance; and disclosure provisions before any changes to an administrator's fiduciary duties would take effect. *Id.*

167. *Id.* at 444.

168. *Id.* at 445.

169. *See* 119 CONG. REC. 127, 12075 (1973).

170. *Id.*

171. *Id.*

172. Collins, *supra* note 37, at 399 n.61 (citing 120 CONG. REC. 29942 (1974)). "In addition, Senator Williams compared ERISA to the Labor-Management Relations Act of 1947, which had a well-developed common law at the time of ERISA's passage." *Id.* (citing 120 CONG. REC. 29933 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5188).

173. H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

174. 119 CONG. REC. 318, 30392 (1973).

The court in *McGowan* noted that Congress designed ERISA to protect the interests of participants and beneficiaries;[175] yet, the Third Circuit refused to apply the common law to determine whether Byrne effectively executed a waiver.[176] As a result, funds from McGowan's Plan were distributed to his ex-wife rather than his current wife.[177] This outcome clearly is not what Congress intended when the Subcommittee on Labor stated that ERISA was enacted to ensure American employees a retirement with "financial security and dignity."[178] Additionally, Senator Javits did not envision this result when he explained that federal courts should develop common law to address rights and obligations under ERISA.[179] Furthermore, this decision undermines the purpose of the qualified joint and survivor annuity (QJSA), which was designed to protect the participant's surviving spouse.[180] If Byrne continues to receive payments instead of Donna, then the purpose of the survivor annuity would be defeated. Donna would not receive the survivor annuity in the event McGowan predeceased her; rather, the funds would pass to Byrne.[181] The court should have considered the purpose of the QJSA as well as the legislative history of ERISA before concluding that the federal common law approach was inapplicable.

If the court had applied the common law approach, then it would have easily determined that Byrne's waiver was specific to McGowan's pension plan. Given Byrne's consent,[182] she undoubtedly waived her rights voluntarily. Holding that Byrne effectively waived her rights under the Plan would have furthered the purpose of the QJSA and the purpose of the original drafters.

B. *Federal Common Law and ERISA*

ERISA does not address issues regarding waiver[183] because, in developing ERISA, Congress adopted fiduciary principles from the

175. McGowan v. NJR Serv. Corp., 423 F.3d 241, 245 (3d Cir. 2005).

176. *Id.*

177. Brief of Appellant, *supra* note 7, at 7-8.

178. H.R. REP. NO. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

179. *See supra* note 172 and accompanying text.

180. Boggs v. Boggs, 520 U.S. 833, 842-43 (1996) (reasoning that the QJSA is designed to protect the spouse).

181. *Id.* at 844 (stating that the security annuity of the surviving spouse would be undermined if heirs of a predeceased spouse were granted an interest in the survivor's annuity). This reasoning compels the court to follow the common law approach because allowing an ex-spouse to retain the survivor annuity interest in a participant's plan renders the purpose of a survivor annuity useless when the participant's current spouse is not protected.

182. Brief of Appellant, *supra* note 7, at 7.

183. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280 (7th Cir. 1990) (en banc) (explaining that ERISA is silent regarding what constitutes a valid waiver and that the law developed thus far affords little guidance).

common law of trusts.[184] Consequently, the U.S. Supreme Court stated that "a federal common law of rights and obligations under ERISA-regulated plans would develop."[185] In *Firestone Tire & Rubber Co. v. Bruch*,[186] the Court acknowledged that ERISA gathered its precepts from equity.[187] In fact, courts have developed common law in areas of ERISA concerning restitution and promissory estoppel, both of which are congruent with trust law principles.[188] Because federal common law has developed in these other areas of ERISA and because federal common law exists on the issue of waiver of a beneficiary's rights, it is unclear why the Third Circuit concluded that "federal common law should simply have no place in [its] analysis."[189]

First, the Third Circuit's view undermined the Supreme Court's recognition that federal courts have the power to create federal common law.[190] The Third Circuit should have applied the common law approach developed in *Fox Valley* to further the authority granted by the Supreme Court to create and apply substantive law to issues not explicitly regulated by ERISA.[191] Strikingly, the Third Circuit relied on § 1104(a)(1)(D) for specific requirements regarding an administrator's duties.[192] The court used the language in this section as support for its determination that common law has no place in its analysis.[193] Ironically, § 1104(a)(1)(D) imposes a fiduciary duty on the administrator.[194] Because this section was primarily derived from the common law of trusts, relying on that section for the proposition that common law has no role in answering the questions left unanswered by ERISA is nonsensical.

Second, the Third Circuit should have followed the common law approach because it is premised on the recognition that ERISA does not address waiver by a beneficiary.[195] The Third Circuit dismissed this rationale because § 1104(a)(1)(D) provides that administrators must conduct their duties "in accordance with the documents and in-

184. Norman Stein, *ERISA and the Limits of Equity*, 56 LAW & CONTEMP. PROBS. 71, 73 (1993); *see also* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989).

185. Steuart H. Thomsen & W. Mark Smith, *Developments in the Common-Law Remedies Under ERISA*, 27 TORT & INS. L.J. 750, 751 (1992) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987)).

186. 489 U.S. 101 (1989).

187. Stein, *supra* note 184, at 81.

188. *See* Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 HARV. J.L. & PUB. POL'Y 541, 545 (1998).

189. McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005).

190. *See Firestone Tire & Rubber Co*., 489 U.S. at 110; *Pilot Life Ins. Co*., 481 U.S. at 56.

191. Brauch, *supra* note 188, at 549 (explaining that Congress delegated broad power to federal courts to fashion federal common law). Because the U.S. Supreme Court has explained that federal common law principles are intrinsic in ERISA and because the legislature has not acted on the Court's decision, it is implicit that federal courts should fashion federal common law.

192. *McGowan*, 423 F.3d at 246.

193. *Id.*

194. Stein, *supra* note 184, at 74-75.

195. *See McGowan*, 423 F.3d at 245.

struments governing the plan."[196] The court, however, neglected to examine § 1104 as a whole.

Section 1104(a)(1) imposes a fiduciary or prudent man standard on the plan administrator, providing that the administrator must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[197] The statute then branches into subsections. Under § 1104(a)(1)(A)(i)-(ii), the administrator must complete his duties for the "exclusive purpose of: providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan."[198] Section 1104(a)(1)(B) provides that the administrator must perform his duties with the care of a prudent man; under § 1104(a)(1)(C), the administrator must diversify the investment to avoid substantial losses; and under § 1104(a)(1)(D), the administrator must perform his duties "in accordance with the [filed] documents."[199] This structure suggests that the administrator should first seek to protect the interest of the participant because Congress not only specified that the administrator should act in accordance with plan documents but also required that he follow the provisions of § 1104(a)(1)(A)-(D).[200] In *McGowan*, strict compliance would not further the important goal of requiring the fiduciary to act for the "exclusive purpose" of the participant.

Third, ERISA does not mention the term "waiver" regarding a beneficiary.[201] This absence alone compels the courts to apply the federal common law approach.[202] Judge Becker classified Byrne's purported waiver as an assignment or alienation of benefits.[203] He explained that the waiver was an attempt to assign the benefits derived from McGowan's pension to Donna, McGowan's current wife.[204] Judge Becker presupposed that the designation of Donna as the new contingent beneficiary was an assignment, which would violate the anti-alienation or assignment provision of § 1056(d)(1). Judge Fuentes countered that Judge Becker's reasoning placed "the cart

196. 29 U.S.C. § 1104(a)(1)(D) (2000).

197. *Id.* § 1104(a)(1).

198. *Id.* § 1104(a)(1)(A)(i)-(ii).

199. *Id.* § 1104(a)(1)(B)-(D).

200. *Id.* § 1104(a)(1)(A)-(D). One commentator refers to the statutory command that administrators discharge their duties for the primary benefit of the participant and beneficiary as the "exclusive purpose rule" of ERISA. Stein, *supra* note 184, at 71.

201. *E.g.*, Altobelli v. IBM, 77 F.3d 78, 80 (4th Cir. 1996) (holding that ERISA does not address waiver); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280 (7th Cir. 1990) (en banc) (same); Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989) (same).

202. *See* McGurl v. Truckers Employees of N.J. Welfare Fund, Inc., 124 F.3d 471, 481 (3d Cir. 1997) (explaining that federal common law is necessary when no specific federal provision applies and when there is a reasonable inference that Congress intended substantive law to apply).

203. McGowan v. NJR Serv. Corp., 423 F.3d 241, 251 (3d Cir. 2005) (Becker, J., concurring). According to Judge Becker, the anti-alienation or assignment clause of § 1056 prohibited Byrne's purported waiver. *Id.*

204. *See id.*

before the horse" and explained that the renomination of Donna was the actual conduct prohibited by the anti-alienation or assignment provision, not Byrne's waiver.[205]

If the designation of a new beneficiary is an assignment, then § 1055, the joint and survivor annuity provision, and the anti-alienation or assignment provision would be in conflict with each other because a participant's designation of a beneficiary would result in an assignment.[206] Pursuant to § 1056(d)(1), "benefits provided under the plan may not be assigned or alienated."[207] The section applies to participants and beneficiaries.[208] Judge Becker's reasoning would not only prohibit all waivers[209] but would also prohibit all initial designations of joint and survivor beneficiaries. Because the QJSA is designed to protect the participant's spouse in the event that the participant predeceases the spouse, this opposition supports a reasonable inference that Congress intended for the courts to formulate federal common law to eliminate inconsistencies within ERISA.[210] Under these circumstances, the court should have applied the federal common law approach to fill the gaps left by ERISA and to protect the interest of McGowan and his current wife.

C. *Satisfying the Policy Grounds*

Underlying the maze of ERISA provisions are certain policies that Congress intended to promote. Before enactment of the REA, ERISA maintained "a delicate balance between protecting employees, beneficiaries, and dependents, and discouraging employers from failing to provide . . . deferred compensation."[211] The REA added protection for the spouses and beneficiaries of a participant's plan.[212] Judge Van Antwerpen declared that promoting uniform interpretation and uncomplicated application mandated that the Third Circuit follow the minority approach.[213] He explained that this goal is best achieved

205. *Id.* at 257 (Fuentes, J., dissenting). As Judge Fuentes explained, waiver is different from assignment. *Id.* at 256. Assignment is the "transfer of rights or property." *Id.* at 256 (quoting BLACK'S LAW DICTIONARY 115 (7th ed. 1999)). Waiver, however, is "[t]he voluntary relinquishment or abandonment . . . of a legal right or advantage." *Id.* (quoting ALEXANDER M. BURRILL, A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR BENEFIT OF CREDITORS § 1, at 1 (James Avery Webb ed., 6th ed. 1894)).

206. *See* 29 U.S.C. §§ 1055(d), 1056(d)(1) (2000).

207. *Id.* § 1056(d)(1).

208. Boggs v. Boggs, 520 U.S. 833, 838-39 (1997) (implying that § 1056 restrains participants and beneficiaries).

209. *McGowan*, 423 F.3d at 257 (Fuentes, J., dissenting).

210. *See* Heasley v. Belden & Blake Corp., 2 F.3d 1249, 1257 n.8 (3d Cir. 1993) (explaining that he U.S. Supreme Court has "authorize[ed] the federal courts to develop federal common law to fill gaps left by ERISA." (citing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989))).

211. Paul E. Mansur, *ERISA Preemption, Community Property, and the Non Employee Spouse: A Study in Confused Equities*, 30 HOUS. L. REV. 1695, 1698 (1993).

212. *Id.* at 1702.

213. *McGowan*, 423 F.3d at 246 (Van Antwerpen, J., court's opinion).

by ensuring that "outside waivers are not binding on [p]lan administrators."[214] Uniformity, he noted, ensures that all involved parties are aware of their rights.[215] In his analogy to the U.S. Supreme Court's rationale in *Egelhoff v. Egelhoff*, Judge Van Antwerpen stated that requiring plan administrators to examine the state law of the many states to determine whether state intestate law applies is similar to requiring plan administrators to examine outside documents to determine whether a waiver is valid.[216] The concern for uniformity, he explained, is present in both situations and discourages burdening administrators with examining outside documents.[217]

Simply stated, this view is inconsistent with the statute because ERISA requires administrators to ascertain the validity of QDROs.[218] The administrator must examine outside documents to ascertain the rights of beneficiaries and participants. In such cases, the administrator is not abiding by the plan documents; rather, the administrator is abiding by § 1056(d)(3)(C), which requires plan administrators to decipher QDROs.[219] Therefore, Judge Van Antwerpen's reliance on § 1104(a)(1)(D) is misplaced due to § 1056(d)(1)'s prohibition against alienation and assignment.

Furthermore, requiring administrators to examine the law of the fifty states, as stated by Judge Van Antwerpen, is remarkably more burdensome than requiring administrators to understand one application of law, the federal common law approach. Judge Fuentes explained in his dissent that application of the common law approach "would not lead to disuniformity and complexity in the administration of ERISA plans."[220] Courts may consider any number of documents outside of the plan documents as a part of the plan. In fact, courts have held that "investment management agreements, collective bargaining agreements, apprenticeship standards and agreements, and even internal . . . 'documents and instruments governing the plan'" are part of the plan documents.[221] In such cases, plan documents lie outside of the "actual" plan documents.

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214. *Id.*
215. *Id.*
216. *Id. Egelhoff* discussed ERISA's preemption power over state intestate law. Egelhoff v. Egelhoff, 532 U.S. 143, 143 (2001).
217. *McGowan*, 423 F.3d at 246 (Van Antwerpen, J., court's opinion).
218. 29 U.S.C. § 1056(d)(3)(C) (2000).
219. *Id.* § 1056(d)(1). Sections 1104 and 1056(d)(3)(C) are in opposition, but as Judge Becker stated in his concurrence, Congress did not recognize a conflict between requiring administrators to assess QDROs and perform their duties "in accordance with the documents and instruments governing the plan." *McGowan*, 423 F.3d at 254 (Becker, J., concurring) (quoting § 1104(a)(1)(D)).
220. *McGowan*, 423 F.3d at 259 (Fuentes, J., dissenting).
221. Norwood, *supra* note 4, at 75 (citing Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 698 F.2d 802, 804 (6th Cir. 1983); Payne v. United Assoc. of Journeymen & Apprentices of Plumbing, 719 F. Supp. 1026, 1032 (N.D. Ala. 1989); Clarke v. Bank of N.Y., 687 F. Supp. 863, 864 (S.D.N.Y. 1988); Dardaganis v. Grace Capital, Inc., 664 F. Supp. 105, 108

Judge Van Antwerpen disagreed with the argument that, because administrators are required to examine QDROs, there is no increased burden in examining marital settlement agreements.[222] Because QDROs are only valid when specific requirements are satisfied, examining QDROs is patently different from requiring administrators to ascertain federal common law.[223] Deciphering federal common law, he claimed, would result in an increased risk of litigation.[224] Despite Judge Van Antwerpen's assumption, applying federal common law would not increase litigation.[225] When a plan administrator cannot ascertain whether a domestic relations order is qualified, or when there is a challenge to the domestic relations order, prudence requires the administrator to obtain a court order before dispersing payments.[226] Furthermore, litigation would not have resulted in this case because Byrne's waiver was specific to McGowan's Plan and because Byrne did not challenge the designation of Donna as the new contingent beneficiary.[227] Additionally, the requirement of the federal common law approach that the purported waiver explicitly mention the ERISA pension benefits eliminates any concern that administrators would be unable to ascertain the rights of the persons involved.

Moreover, Judge Van Antwerpen failed to recognize that the QDRO exception has confused courts and is not as easily interpreted as the judge implies.[228] Varying interpretations of the QDRO exception have led to the development of federal common law in this area.[229] Therefore, the court's implication that the QDRO provision is a "checklist" and that the federal common law approach is an

(S.D.N.Y. 1987); Marshall v. Teamsters Local 282 Pension Trust Fund, 458 F. Supp. 986, 987 (E.D.N.Y. 1978)).

222. *McGowan*, 423 F.3d at 247 (Van Antwerpen, J., court's opinion).

223. *Id.*

224. *Id.* Judge Van Antwerpen failed to note that federal common law has been developed in other areas of ERISA.

225. McGowan's brief explained that there has been no evidence tending to show an increase in litigation in the jurisdictions that follow the common law approach. Brief of Appellant, *supra* note 7, at 18.

226. *See* Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278 (7th Cir. 1990) (en banc) (stating that the fund filed an interpleader action although a beneficiary was designated on file because it was uncertain as to the legal effect of the marital settlement agreement between the parties). The fund was attempting to determine who was rightfully entitled to the benefits: the ex-spouse who seemed to have waived her rights or the mother of the deceased. *Id.* The fund sought a declaratory judgment, which implies that the administrator was obligated to examine documents outside of the plan and that examining those outside documents was no more burdensome than examining the plan documents. *See id.*; *see also* McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990). The idea that litigation would not increase due to the federal common law approach is implicit because the administrator sought declaratory relief when there was confusion between the documents on file and an outside marital settlement agreement.

227. Brief of Appellant, *supra* note 7, at 7-8, 22-23.

228. *See generally* Norwood, *supra* note 4, at 64 (explaining the different interpretations of a purported waiver's effect on a QDRO).

229. *See Fox Valley*, 897 F.2d at 279 (stating that the defendant misinterpreted the purpose of the QDRO provision and that the provision focused on assignment or alienation, not waiver).

"amorphous" standard is misguided.[230] Applying the federal common law approach in this case would have been the more sensible approach.

D. *Case Law: What the Court Ignored*

In *McGowan*, the court refused to follow the federal common law approach.[231] Instead, the court held that the documents on file govern.[232] Even the court observed the nonsensical nature of its decision, stating that "[w]e recognize that our holding produces the somewhat *strange* result whereby [Byrne] continues to enjoy the benefits of McGowan's survivor annuity, even after purportedly signing away her rights under the Plan."[233] If the court had carefully examined the case law, then it would have been persuaded that Byrne's waiver was valid. Only two circuits have disagreed with the common law approach,[234] while five have agreed with it.[235]

In *McMillan v. Parrott*, the Sixth Circuit addressed whether a former spouse, who was designated as the beneficiary to an ERISA plan, was entitled to the proceeds under that plan even though the spouse purported to waive her right.[236] Dr. Norman Parrott died leaving his former wife, Barbara, as the beneficiary to his pension plan.[237] The day before his death, Dr. Parrott married Claudia.[238] The court explained that the plan documents controlled and that Barbara was entitled to receive the death benefits because she was the named beneficiary on file.[239]

Because of ERISA's broad preemption language, the appellate court reasoned that the district court incorrectly relied on state law.[240] It then determined that federal common law was not applicable because § 1104(a)(1)(D), which provides that administrators discharge their duties "in accordance with the documents" on file, was determinative.[241] The court relied heavily on Dr. Parrott's knowledge that the documents still bore his ex-wife's name and were in his office for over

230. McGowan v. NJR Serv. Corp., 423 F.3d 241, 247 (3d Cir. 2005).
231. *Id.* at 245.
232. *Id.* at 245-46.
233. *Id.* at 248 (emphasis added).
234. Krishna v. Colgate Palmolive Co., 7 F.3d 11, 14 (2d Cir. 1993); McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990).
235. Altobelli v. IBM, 77 F.3d 78, 82 (4th Cir. 1996); Mohamed v. Kerr, 53 F.3d 911, 916-17 (8th Cir. 1995); Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1322 (5th Cir. 1994); Metro. Life Ins. Co. v. Hanslip, 939 F.2d 904, 907 (10th Cir. 1991); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 280 (7th Cir. 1990) (en banc).
236. *McMillan*, 913 F.2d at 310-11.
237. *Id.* at 311.
238. *Id.* at 310.
239. *Id.* at 312.
240. *Id.* at 311.
241. *Id.*

four years after their divorce.[242] Seemingly, the court advanced these facts to establish Dr. Parrott's intent. Moreover, the court implied that equity compelled the decision when it mentioned that Dr. Parrott had not removed his ex-wife as beneficiary because he continued to see her "socially" after the divorce.[243]

The facts in *McGowan* are distinguishable from the facts in *McMillan*. After his divorce from Barbara, Dr. Parrott retained a close relationship with his ex-wife before he remarried.[244] In *McGowan*, however, neither McGowan nor his wife were deceased when the payment distribution began.[245] Rather, he remarried and shortly thereafter attempted to change the beneficiary.[246] This case is further distinguishable because the waiver in *McGowan* specifically addressed the Plan,[247] while the waiver in *McMillan* was general and did not specifically refer to the plans.[248] Instead, in *McMillan*, the waiver provided that each spouse waived "any and all" rights he or she may have held against the other.[249]

Unlike the Sixth Circuit, jurisdictions that follow the common law approach have determined that the waivers in question were specific to pension plans.[250] In *Fox Valley*, the waiver provided that the "parties each waive any interest or claim in . . . any retirement, pension, . . . or annuity plans resulting from the employment of the other party."[251] Similarly, in *Altobelli*, the waiver stated that "[w]ife hereby waives . . . any interest that she may have in . . . [h]usband's IBM pension and other deferred compensation plans."[252] The language in the divorce agreement signed by McGowan and Byrne provided that "[w]ife waives any and all rights . . . to the New Jersey Natural Gas Company Employee Pension Plan . . . ."[253] This language is strikingly similar to the language in *Fox Valley* and *Altobelli*.

The cases in which courts followed the minority approach contained waivers with general language. In *Krishna v. Colgate Palmolive*

242. *Id.* at 312.
243. *Id.* at 311.
244. *Id.*
245. McGowan v. NJR Serv. Corp., 423 F.3d 241, 243 (3d Cir. 2005).
246. Brief of Appellant, *supra* note 7, at 7.
247. *Id.* The waiver in *McGowan* provided that "[w]ife waives any and all rights, title, interest or claims, to all of the aforesaid property of the [h]usband and to all bank accounts, life insurance policies and *any right to all New Jersey Natural Gas Company Employee Pension Plan* of the [h]usband." *Id.* (emphasis added).
248. *McMillan*, 913 F.2d at 312 n.2. The waiver provided that "[e]ach party hereby waives, relinquishes and forever releases the other party of any and all claims he or she may have against the other for dower, curtesy, alimony, maintenance, property settlement, and all other claims." *Id.*
249. *Id.* at 311.
250. *See* Altobelli v. IBM, 77 F.3d 78, 80 (4th Cir. 1996); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 277 (7th Cir. 1990) (en banc).
251. *Fox Valley*, 897 F.2d at 277.
252. *Altobelli*, 77 F.3d at 80.
253. Brief of Appellant, *supra* note 7, at 7.

Co.,[254] the Second Circuit also followed the minority approach when it interpreted provisions in a will.[255] Colgate Palmolive Company (Colgate) employed Brij Kapur and funded his life insurance plan.[256] The policy provided that the beneficiary was the person named on the documents maintained by the employer.[257] Kapur named Krishna as the beneficiary under the plan but later executed a will that purported to grant his accounts with Colgate to his younger brother.[258] In letters, Kapur explained to Krishna that he was no longer the beneficiary of the plan because Kapur had executed a new will.[259] Kapur then executed a subsequent will in which he revoked his prior wills and failed to mention the accounts held with Colgate, but provided in the residuary clause that "[a]ll the rest, residue and remainder of my estate both real and personal of whatsoever kind . . . I give, devise and bequeath to my sister-in-law."[260] Upon Kapur's death, Krishna demanded the proceeds from Kapur's life insurance policy.[261]

Based on the letters, the district court concluded that Kapur undoubtedly intended to replace Krishna as the beneficiary.[262] The appellate court reversed, relying on cases that interpreted ERISA's preemption clause to invalidate state law that "relates to" an employee benefit plan.[263] The court explained that adopting federal common law and requiring the administrator to look beyond the documents on file would be counterproductive to the goal of uniformity in the administration of pension plans.[264]

The facts in *Krishna* are drastically different from the facts in *McGowan*. First, at the time challenges to the pension plans were advanced, McGowan was available to explain his intent to name Donna as the new contingent beneficiary, while the participant in *Krishna* was deceased. McGowan's presence and expressed wishes *assured* the administrator of his intent to name Donna the new contingent beneficiary. Second, the will in *Krishna* did not mention the employee accounts for which benefits were waived.[265] Byrne's waiver in *McGowan*, however, specifically mentioned the pension plan.[266] Byrne agreed to the waiver and even wrote a letter consenting to the

254. 7 F.3d 11 (2d Cir. 1993).
255. *See id.* at 16.
256. *Id.* at 11-12.
257. *Id.* at 12.
258. *Id.*
259. *Id.*
260. *Id.* at 13.
261. *Id.*
262. *Id.*
263. *Id.* at 14 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Settles v. Golden Rule Ins. Co., 927 F.2d 505, 508 (10th Cir. 1991)).
264. *Id.* at 16.
265. *Id.* at 13.
266. Brief of Appellant, *supra* note 7, at 7.

nomination of a new contingent beneficiary.[267] Third, the decision in *Krishna* was based on ERISA's preemptive power over state law and not on whether a beneficiary executed a valid waiver.[268]

In *McGowan*, the court should have applied the federal common law approach and should not have relied in part on *Krishna*, which focused on the preemptive power of ERISA over state testamentary law.[269] Likewise, the court should not have relied on *McMillan* because the facts were distinguishable. In *McGowan*, Donna was afforded no protection, and Byrne, who was no longer McGowan's spouse, retained the spousal protection and continued to receive monthly payments from the Plan.[270] The Third Circuit's holding in *McGowan* abrogated the intent of Congress when it amended ERISA by enacting the REA.[271]

E. *Trends*

Because of the Third Circuit's rationale, *McGowan* permits courts to continue to grant inequitable and nonsensical decisions. For example, in *Smith v. E.I. DuPont de Nemours & Co.*,[272] a case similar to *McGowan*, the United States District Court for the District of Delaware held that an ex-spouse who waived her rights under an ERISA pension plan continued as the beneficiary, even though her former husband remarried and nominated his current wife as the beneficiary.[273]

Ronald Smith (Smith) acquired funds as a part of his pension plan with E.I. DuPont de Nemours & Company (DuPont).[274] He completed a Spouse Benefit Option (SBO) in which he designated his wife at the time, Charlotte Smith (Charlotte), as the beneficiary.[275] In 1991, Smith retired and began receiving payments, which were reduced to provide for his wife, Charlotte, according to the

267. McGowan v. NJR Serv. Corp., No. 03-1035, slip op. at A3 (D.N.J. July 23, 2004).
268. *See generally Krishna*, 7 F.3d at 12-17 (citing a number of cases for the proposition that ERISA preempts state testamentary law).
269. McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005).
270. Brief of Appellant, *supra* note 7, at 22.
271. *See* Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (codified as amended in scattered sections of 29 U.S.C.) (explaining in the preamble that the purpose of the act is "to improve the delivery of retirement benefits and provide greater equity" for workers and spouses under employee pension plans).
272. 402 F. Supp. 2d 519 (D. Del. 2005).
273. *Id.* at 523. Ronald and Charlotte Smith entered into a separation agreement in which both waived any interest in each other's pension plans. *Id.* at 521. Ronald married his current wife and attempted to nominate her as the new beneficiary. *Id.* The plan administrator denied his request. *Id.* Ronald obtained a waiver from his ex-spouse in which she stated, "I hereby consent to waive my right to receive such benefits as the Participant's spouse under the Retirement Equity Act." *Id.* Even with that explicit language, the plan administrator refused to follow the waiver and separation agreement. *Id.*
274. *Id.* at 520.
275. *Id.* at 520-21. Smith claimed that he did not intend to name Charlotte as the beneficiary; however, the company asserted that he filled in the box on the form that designated her as the beneficiary. *Id.* at 521.

SBO.[276] In 1993, the couple divorced, and Charlotte expressly waived her right to the pension plan.[277] In 2002, Smith remarried and attempted to nominate his new wife as the beneficiary.[278] The administrator denied his request, and Smith, after obtaining a second waiver from Charlotte,[279] filed a claim in the district court.[280]

The district court relied heavily on *McGowan* for the proposition that "[p]rivate agreements waiving benefits, such as a divorce decree, do not determine the rights of the parties."[281] Instead of simply applying the federal common law approach, the court reasoned that the plan documents on file governed.[282] The court noted that ERISA does not expressly prohibit waivers, but citing *McGowan*, it reasoned that recognition of waivers would undermine the anti-alienation or assignment clause.[283] By granting DuPont's motion for summary judgment, the court left Smith's current wife without spousal protection.[284]

VI. Conclusion

In *McGowan v. NJR Service Corp.*, the United States Court of Appeals for the Third Circuit erred when it held that a beneficiary had not effectively waived her rights to her ex-husband's pension plan. In its decision, the court did not recognize that ERISA's overriding policy objective is to protect participants and their beneficiaries. It further failed to consider the legislative history of ERISA and the development of the QJSA, which should have persuaded the court to apply the federal common law approach.

Moreover, the court misinterpreted the statute. The resemblance of ERISA to the common law of trusts, the structure of the statute, and ERISA's silence on the issue of waiver should have led the court to determine that the federal common law approach applied. Instead, the court neglected to observe the common law and followed the minority approach. Additionally, the policy ground and the case law relied on by the court were misplaced. The court should have recognized that *McGowan* was distinguishable from cases that followed the minority approach and was more similar to cases that applied the common law approach. If the court would have applied the common law approach, then Donna would likely be receiving the spousal protection guaranteed by the REA.

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 520.
281. *Id.* at 522.
282. *Id.* (citing McGowan v. NJR Serv. Corp., 423 F.3d 241, 246 (3d Cir. 2005)).
283. *Id.* at 523 (citing *McGowan*, 423 F.3d at 248).
284. *Id.*