**No. _____**

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**In the Supreme Court of the United States**

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SCOTT ANDOCHICK, M.D.,

PETITIONER,

v.

RONALD BYRD, INDIVIDUALLY; JUNE BYRD, INDIVIDUALLY; AND RONALD AND JUNE BYRD, AS CO-ADMINISTRATORS OF THE ESTATE OF ERIKA L. BYRD,

RESPONDENTS.

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**On Petition For A Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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GEORGE O. PETERSON
*Counsel of record*
TANIA M. L. SAYLOR
PETERSON SAYLOR, PLC
10555 Main Street, Suite 320
Fairfax, VA 22030
(703) 225-3620
gpeterson@petersonsaylor.com
tsaylor@petersonsaylor.com
*Counsel for Petitioner*

## QUESTION PRESENTED

This Court expressly left open the question of whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a claim by an estate to enforce a purported waiver against the designated beneficiary of ERISA-governed benefits following distribution of the benefits. *Kennedy v. Plan Admin. DuPont Savings and Investment Plan,* 555 U.S. 285, 299, fn 10 (2009) ("Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits **after** they were distributed.") (comparing *Boggs v. Boggs,* 520 U.S. 833, 853 (1997) with *Sweebe v. Sweebe,* 474 Mich. 151, 156–159, 712 N.W.2d 708, 712–713 (2006) and *Pardee v. Pardee,* 2005 OK CIV APP. 27, ¶¶ 20, 27, 112 P.3d 308, 313–314, 315–316 (2004)).

This case falls squarely within the issue left open by this Court's prior decision in *Kennedy*. Within that framework, the question presented is:

Whether ERISA's statutory protections and broad preemption provision protects designated beneficiaries from claims by an estate to enforce a purported waiver of those benefits incorporated into a state law divorce decree and property settlement agreement when the deceased plan participant had the opportunity to change her designated beneficiary but did not do so.

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## JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 2013. This Court has federal question jurisdiction under 28 U.S.C. § 1254(1). On May 20, 2013, this Court granted a thirty (30) day extension to file this Petition. *See Scott Andochick, Applicant v. Ronald Byrd, et al.*, Application 12A1106.

## STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C §§ 1001 *et seq*. ("ERISA") is involved in this appeal.

## STATEMENT OF THE CASE

This is an ERISA appeal that picks up where *Kennedy v. Plan Admin. DuPont Savings and Investment Plan,* 555 U.S. 285 (2009) ("*Kennedy*"), left off and seeks resolution of one key issue expressly left open by this Court: whether or not ERISA preempts an estate's claim against the

beneficiary of ERISA-governed benefits from a claim based on a purported waiver in a property settlement agreement incorporated into a state divorce decree when the deceased plan participant had the opportunity to change the beneficiary designation, but did not do so.

Erika L. Byrd ("Erika") passed away on April 10, 2011. Prior to her death, Erika participated in two ERISA-governed plans as an attorney at Venable, LLP: the Venable, LLP Retirement Plan ("401(k) Plan") and the Venable, LLP Life Insurance Plan ("Life Insurance Plan"). Erika executed a beneficiary designation for her 401(k) Plan on March 16, 2006 and she executed a beneficiary designation for her Life Insurance Plan on March 6, 2006 when she first became employed at Venable, LLP. Petitioner, Erika's then spouse, was named as the sole beneficiary for both plans.

On August 20, 2007, Erika and Petitioner entered into a Marital Settlement Agreement ("MSA"), which was incorporated by the Montgomery County Circuit Court of Maryland in a December 31, 2008 Final Decree of Divorce. At the time of her death, more than three years after the MSA, Erika had not changed the beneficiary designation, notwithstanding an opportunity to do so.

Following Erika's death, the Venable 401(k) Plan Administrator determined that Petitioner was the proper recipient under the Venable Plan Documents ("Plan Documents"), as he was the designated beneficiary of the 401(k) Plan. The Respondents claimed entitlement to the 401(k) Plan

benefits and the Life Insurance Plan benefits ("ERISA Benefits") based upon the MSA and demanded that Petitioner sign waivers or additional documents to effect the waiver **prior** to his receipt of those benefits. Petitioner contended on the other hand that ERISA preempts the MSA incorporated into the Maryland divorce decree and that Erika, as master of her own ERISA Benefits, could have changed the beneficiary designations at any time in the three and ½ years before her death.

Prior to receipt of ERISA Benefits, on July 13, 2011 Petitioner filed a Complaint in the Eastern District of Virginia seeking a declaration, among other things, that ERISA preempts any claim by the Respondents for the ERISA Benefits based upon the MSA which was incorporated into the Final Decree of Divorce because Petitioner was the designated beneficiary of the 401(k) Plan and Life Insurance Plan held by his former spouse, Erika. *See Andochick v. Byrd*, E.D.V.A., 1:11cv739 ("Declaratory Judgment Action"). Petitioner contended that Erika had complete control over her beneficiary designation and that designation, in accordance with the Plan Documents, should control.

The District Court denied the Respondents' first Motion to Dismiss on September 2, 2011 and ruled from the bench that the Complaint properly raised a claim arising under 29 U.S.C. § 1132 similar to *Boggs v. Boggs*, 82 F.3d 90, 94 (5th Cir. 1996) *rev'd on other grounds*, 520 U.S. 833 (1997). The Respondents then filed their Answer and Counterclaim to the Complaint on September 12,

2011. Petitioner filed a Motion for Partial Summary Judgment, in part, related to ERISA preemption.

After the Declaratory Judgment Action was filed by Petitioner, Respondents re-opened the divorce proceedings in Montgomery County, Maryland by substituting as parties for Erika. The Respondents moved to have Petitioner held in contempt of court for not executing a waiver for the ERISA Benefits prior to Petitioner's receipt of the benefits. *See June Elizabeth Byrd and Ronald Duane Byrd v. Scott Andochick*, (Montgomery County, Maryland Cir. Ct.; Family Law No. 68769). ("Divorce Proceeding").

The federal court stayed the Declaratory Judgment Action pending resolution of the motion for contempt in the Divorce Proceeding. In so doing, the district court expected that the state court could, and would, make a determination on the ERISA preemption issue set before the district court in the Complaint and more particularly in Petitioner's Motion for Partial Summary Judgment.

At the December 21, 2011 contempt hearing in the Divorce Proceeding, the state court held Petitioner in contempt for not executing a waiver of the ERISA Benefits prior to receipt of those benefits, but refused to rule upon the ERISA preemption issue. Thereafter the federal court lifted the stay and requested an Amended Complaint to recite what occurred in the Divorce Proceedings.[1]

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[1] The finding of contempt is currently on appeal to the Maryland Court of Special Appeals. That court has not yet decided the case. That, however, does not make this Petition

The Respondents filed a Motion to Dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Petitioner failed to state a cognizable claim. Petitioner filed another Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56, arguing that ERISA preempted the Respondents' claims.

On May 9, 2012, the U.S. District Court entered an Order granting the Respondents' Motion to Dismiss and denying Petitioner's Motion for Partial Summary Judgment as moot, finding that ERISA did not preempt the purported waiver in the MSA incorporated into the Maryland divorce decree.

Subsequently, the Venable Life Insurance Plan Administrator filed an interpleader, *Principal Life Insurance Company v. Andochick et al.,* Case 1:12-cv-00536-TSE-TCB, in the Eastern District of Virginia. The proceeds were paid into the Clerk of the Court. That case remains pending. The 401(k) benefits are frozen by order of the Montgomery County Circuit Court.

On appeal, the Fourth Circuit affirmed the United States District Court's decision. Petitioner now seeks certiorari to this Court.

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unripe, as the issue of ERISA preemption is only before the Maryland Court of Special Appeals to the extent it is a defense to a finding of contempt for failing to execute a waiver prior to receipt of the benefits. The Fourth Circuit did not weigh in directly on that issue, but it is clear that ERISA prohibits pre-receipt of benefits actions such as the finding of contempt. Had Petitioner purged the contempt by signing the waiver he likely would have waived the relief sought in the instant petition.

## REASONS FOR GRANTING THE PETITION

This Court should review the Fourth Circuit's decision for several reasons. First, this case provides a vehicle for deciding a key legal issue expressly left open by this Court's prior decision in *Kennedy*. The issue has generated conflict and confusion among various courts pre-dating and post-dating *Kennedy,*[2] and given the widespread application of ERISA to the populace, it is of sufficient national importance as to warrant review. Second, a review of both the pre-*Kennedy* and post-*Kennedy* decisions reveals a conflict among the lower courts on the issue left open by *Kennedy* and addressed by this Petition. This split is highlighted by contrary decisions between the Sixth Circuit that pre-date *Kennedy* on the one hand and the Third and Fourth Circuits on the other, as well as an acknowledged split between the Sixth Circuit and Michigan state courts. Third, the Fourth Circuit, like the Third Circuit, misunderstood this Court's prior decision in *Boggs*, leading both Circuits to the erroneous conclusion that ERISA protections ended upon receipt of ERISA-governed benefits to plan beneficiaries. Given the disparate lower court precedent and the misapplication of this Court's prior precedent, this Court should grant review and decide the issue once and for all.

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[2] *See* Feuer, Albert, *The Kennedy Supreme Court Giveth with Footnote 13, but Taketh With Footnote 10: the Department of Labor and Many Lower Courts Miss the Decision's Ultimate Meaning,* Tax Management Compensation Planning Journal, 39 CPJ 111, June 3, 2011 ("Two footnotes in the Kennedy decision have created considerable confusion about the application of the decision and pre-Kennedy decisions to … those designees who are the former spouse of participants but 'waived' their right to such benefits.").

## I. This Case Presents an Opportunity to Resolve an Important Issue Expressly Left Open By this Court's Prior Decision.

The issue before the Court in *Kennedy* was whether the estate of an ERISA plan participant could hold an ERISA plan administrator liable for paying benefits to the plan participant's designated beneficiary in accordance with its plan documents when the designated beneficiary purportedly waived her rights to such benefits under a divorce decree. *Id*. at 290. This Court provided a bright line rule and held that the ERISA plan administrator was obligated to follow the plan documents which required payment of the benefits to the plan participant's designated beneficiary. *Id*. at 304.

This Court, however, expressly declined to rule upon the issue now presented and stated:

> Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits after they were distributed. Compare *Boggs v. Boggs,* 520 U.S. 833, 853, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) ("If state law is not pre-empted, the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit"), with *Sweebe v. Sweebe,* 474 Mich. 151, 156–159, 712 N.W.2d 708,

> 712–713 (2006) (distinguishing *Boggs* and holding that "while a plan administrator must pay benefits to the named beneficiary as required by ERISA," after the benefits are distributed "the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds"); *Pardee v. Pardee,* 2005 OK CIV APP. 27, ¶¶ 20, 27, 112 P.3d 308, 313–314, 315–316 (2004) (distinguishing *Boggs* and holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as "the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed").

*Id.* at 300, fn 10.

In declining to express a view, this Court was cognizant of its prior precedent as bearing on this issue and the state court authority distinguishing (albeit incorrectly) this Court's decision in *Boggs*.

The present case, therefore, presents this Court the opportunity to decide the issue left open in *Kennedy* and to clarify the scope of ERISA preemption. This issue is highly likely to be a recurring issue given the vast number of plan participants and beneficiaries of ERISA-governed benefits. This Court should grant review in order to set a uniform rule so that the same result applies regardless of what federal or state court is deciding the issue.

Granting review to clarify the issue presented in this case will provide final authority to plan beneficiaries and competing claimants to those benefits and thereby curb future litigation on this issue. Moreover, as evidenced by the fact that the present dispute caused the plan administrator of the life insurance benefit to interplead the proceeds into the court, a clear and definitive rule in this case will likely ease the administrative burden and costs to plan administrators.[3]

### A. The Court's decision in *Boggs* provided a broad framework for ERISA preemption of state law impacting an ERISA beneficiary's receipt of benefits.

Since this case picks up where *Kennedy* left off, a critical starting point begins with the cases cited in footnote 10 on this issue. In that regard, the obvious starting point is this Court's prior decision in *Boggs*. That case involved ERISA preemption of state law based claims to ERISA benefits already received by a beneficiary and those payable in the future. The plan administrator was not a party to the action so, unlike *Kennedy*, that case did not deal with the plan administrator's obligations under ERISA. Instead, the case dealt solely with non-

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[3] Following this Court's decision in *Kennedy* it seems fairly clear that the plan administrator would have no risk of double liability for paying the Petitioner as the designated beneficiary of the life insurance proceeds. Yet, the plan administrator felt compelled to interplead the funds for a resolution evidencing a clear desire to avoid litigation risk by being named as a party defendant to a lawsuit.

beneficiaries' state law based claims against an ERISA beneficiary's past receipt of benefits and future entitlement to benefits.

Free from discussion of the plan administrator's obligations under ERISA, *Boggs* establishes the broad preemptive force of ERISA to benefits already received by a designated beneficiary **and** future undistributed benefits to a designated beneficiary in the face of a competing claim based upon state law. Since this critical point was missed by the Fourth Circuit below, and by the Courts in *Sweebe* and *Pardee*, a critical examination of *Boggs* is necessary.

The obvious reason that this Court cited *Boggs* in the *Kennedy* decision is because *Boggs* establishes that ERISA protections extend beyond actual receipt of benefits by a plan beneficiary. This is evident by the fact that *Boggs* does **not** distinguish between pre-receipt and post-receipt claims against beneficiaries under state law. This Court drew no distinction between the two and thereby emphasized the broad reach of ERISA preemption.

*Boggs* involved a claim by step-children against their step-mother, asserting that under Lousiana law, they were entitled to **both** distributed and undistributed pension plan benefits that their deceased mother had an interest in under state law. *Id*. at 837 ("They further sought a judgment awarding … [the step-mother's] survivor annuity payments, **both received and payable**.") (emphasis added).

The district court found for the step-children and the Fifth Circuit affirmed under the view that "Louisiana law affects only what a plan participant may do with his or her benefits after they are received and not the relationship between the pension plan administrator and the plan beneficiary." *Boggs*, 520 U.S. at 838. This Court reversed and stated several principles directly impacting the issue now presented.

This Court rejected any argument that ERISA's broad protections for beneficiaries went no further than actual receipt of those benefits. In doing so, this Court rejected two related arguments by the step-children. First, the step-children contended that their claims "affect only the disposition of plan proceeds after they have been disbursed by the [plan administrator], and thus nothing is required of the plan." *Id*. at 842. Second, the step-children asserted that ERISA was not concerned with the step-mother's state law obligation after she receives the survivor annuity payments because they "fai[l] to implicate the regulatory concerns of ERISA." *Id*. at 842. In rejecting those two arguments, this Court emphasized that "[t]he principal object of the statute is to protect plan participants and beneficiaries." *Id*. at 845, citing *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.").

Notably, this Court had the opportunity to carve out post-receipt of benefits claims from ERISA protections. But rather than draw a distinction

between pre-receipt claims and post-receipt claims, the Court stated:

> The axis around which ERISA's protections revolve is the concepts of participant and beneficiary. When Congress has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, upsetting the deliberate balance central to ERISA. **It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits**.

*Id*. at 854. (emphasis added). Accordingly, this Court has drawn a wide sphere of protection from state law based claims against a beneficiary of ERISA benefits.

### B. The Two Contrary State Cases Cited in Footnote 10 of *Kennedy* Incorrectly Distinguished *Boggs*

The two state law cases cited as contrary authority in footnote 10 of *Kennedy* missed several of the critical points in *Boggs* and therefore erroneously distinguished *Boggs* as not providing post-receipt protections from state law based claims.

The Michigan Supreme Court in *Sweebe v. Sweebe*, 474 Mich. 151 (2006), erroneously distinguished *Boggs* on two fronts. First, the court suggested that *Boggs* was not on point because it involved pension benefits whereas *Sweebe* involved life insurance benefits. *Id.* at 159. But that distinction is clearly incorrect, as none of this Court's prior precedent has drawn a distinction between ERISA governed life insurance proceeds and pension plans. Second, the court suggested that its decision did not conflict with "ERISA because the plan administrator's responsibilities do not change." *Id.* But that reasoning is clearly flawed in light of the fact that this Court rejected the very same argument advanced by the step-children in *Boggs*. *Boggs* at 842. Similarly, the Oklahoma Court of Appeals in *Pardee v. Pardee*, 112 P.3d 308 (OK 2004), misunderstood *Boggs* as only applying to pre-distribution benefits. Neither of these cases presented an accurate analysis of this Court's decision in *Boggs*.

## II. The Issue of Whether a Purported Waiver in Divorce Decree or Property Settlement Agreement Has Led to Conflicting Decisions Among the Lower Courts

The lower courts addressing the issue presented in this Petition have come to conflicting results both pre-dating *Kennedy* and post-dating *Kennedy*. The conflict has manifested itself as between various federal circuit courts and in a particularly developed split between one federal

court of appeals and a state supreme court within its boundaries. Given the propensity for further conflict, this Court should grant review to ward off any future conflicts.

### A. Sixth Circuit Decisions Conflict With Fourth Circuit and Third Circuit

In several pre-*Kennedy* cases, the Sixth Circuit found that ERISA's broad protections preempt any state law based claims based on a purported waiver in a divorce decree. In *McMillan v. Parrott*, 913 F.2d 310 (1990), the deceased plan participant designated his former wife as the beneficiary of his ERISA governed plans in 1982. *Id.* at 311. Later that year, the plan participant and his former wife entered into a property settlement agreement including a broad waiver of "any and all" claims against the other. *Id.* "Despite this language, after the divorce [the plan participant] never removed [his former spouse] as the beneficiary of his plans." *Id.* The plan participant died in 1986 less than 24 hours after having re-married.[4]

The court in *McMillan* found that the plain statutory language in ERISA dictated the result by requiring the plan administrator to adhere to its own plan documents, which required payment to the

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[4] The case does not disclose the circumstances of his death, the nature of his relationship to his widow, or whether there was any evidence that the plan participant intended to designate his new wife but did not have the opportunity to do so. Presumably, because none of those facts would have been a relevant factor in the Sixth Circuit's decision.

designated beneficiary. *Id*. at 311. The court went on to note that the plan "participant is the master of his own ERISA plan" and he kept his former spouse as the designated beneficiary for four years after their divorce without having changed the designation. *Id*. at 312.[5]

The Sixth Circuit followed the same result in *Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 2431 (1997). That case involved an interpleader action by the plan administrator of ERISA governed life insurance benefits after competing claims were made by the decedent's estate and ex-wife as the designated beneficiary. *Id*. at 128. Like this case, the plan documents required payment to the designated beneficiary. The decedent had designated his ex-wife as the beneficiary in 1979. They divorced five years later, and the divorce decree expressly stated that "any rights of either party in any policy or contract of life, endowment or annuity insurance of the other, as beneficiary, are hereby extinguished …" *Id*. at 128.

The decedent passed away in 1993 having never changed his beneficiary designation naming his ex-wife as the designated beneficiary. *Id*. The estate asserted, among other things, that the 1984 divorce "constituted a waiver" of the ex-wife to the

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[5] The court stated in *dicta* that it did not believe the broad waiver in the marital settlement agreement would be an effective waiver. The court couched its statement in terms of "[e]ven if we were to resolve the question by reference to federal common law...." It was therefore not necessary to the court's holding. *Id*. at 312.

insurance proceeds. *Id*. Relying on ERISA's broad preemption provision and its prior decision in *McMilllan*, the Sixth Circuit reversed. *Id*. at 130.[6]

In contrast to the Sixth Circuit's approach, the Fourth Circuit (in the case below) and Third Circuit in *Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (2012), have gone the other way and found claims premised on purported waivers in marital settlement agreements not preempted under ERISA. While the approach of the Fourth and Third Circuits is flawed based upon this Court's past precedent, *see* Section III below, it is clear that there is an inter-Circuit conflict on this issue.

Given the disparate treatment among the federal circuit courts, this Court should grant review to resolve the issue once and for all.

### B. Sixth Circuit Conflict with Michigan Supreme Court

It is no argument that the Sixth Circuit's decision pre-dates *Kennedy*. The continued vitality of the Sixth Circuit's decisions in *McMillan* and *Pressley* as binding precedent on federal courts within the Sixth Circuit has led to recent acknowledged splits between the Sixth Circuit and at least one state court within the Circuit's

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[6] The court also noted, similar to the instant case, that a beneficiary of an ERISA governed insurance policy has "no extinguishable or waivable rights in the policy prior to the death of the insured." *Id*. at 130, fn 2. This is so because the plan participant retains the right to re-designate a beneficiary at any point before death.

territorial boundaries. This continuing conflict makes the venue of the litigation – either state court or federal court – outcome determinative.

The Sixth Circuit – state court conflict is highlighted in *Starling v. Starling*, CIV.A. 09-CV-12147, 2009 WL 3628014 (E.D. Mich. Oct. 30, 2009). The litigation began in state court, but was removed under federal question jurisdiction.[7] The Court in *Starling* found that the widow of a plan participant's breach of contract claim predicated on an explicit waiver found in the plan participant and his former wife's divorce decree was preempted by ERISA.

The court in *Starling* noted that it was bound by Sixth Circuit precedent, but expressly identified the acknowledged split between the Sixth Circuit and the Michigan state courts on the issue.[8] In doing so, the court rejected the plaintiff's reliance upon a decision of the Michigan Court of Appeals in *Moore v. Moore*, 266 Mich. App. 96, 700 N.W.2d 414 (2005) which very explicitly rejected the Sixth

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[7] Petitioner is not endorsing the basis for removal in that case based on a federal question jurisdiction. *See Metropolitan Life Ins. Co. v. Gen. Motors Corp.*, 481 U.S. 58, 63 (1987). But it is clear that in other instances the litigants may find themselves in federal court based upon diversity jurisdiction or a declaratory judgment action, such as the instant case, under 29 U.S.C.A. § 1132.

[8] Notably, even the Michigan Supreme Court in *Sweebe v. Sweebe*, cited in footnote 10 of *Kennedy*, attempted to distinguish *McMillan* and *Pressley* by suggesting that the plan administrators had not yet paid the benefits in those cases. That, of course, is a false distinction based on a proper reading of *Boggs*, *infra*.

Circuit's decisions in *McMillan* and *Parrott*. *Id*. at * 4-5.

As noted by *Starling*, the state court in *Moore v. Moore* explicitly rejected *McMillan* and *Pressley* and stated:

> [T]he federal courts are split on the question whether ERISA preempts an attempt to explicitly waive a named beneficiary's rights to an interest in an ERISA-regulated benefits plan. The United States Court of Appeals for the Sixth Circuit has held [in *Pressley*] that a common-law waiver cannot override the designation of a named beneficiary under ERISA. The trial court here relied on *Pressley* to rule in favor of plaintiff. However, *Pressley* represents the minority view on this issue. The majority and better view holds that a person can explicitly waive his rights to ERISA plan benefits even where he may be the named beneficiary. With respect to questions of federal law, this Court is not bound by precedent from federal courts except the United States Supreme Court. **However, where the United States Supreme Court has not resolved an issue, a state court may choose among conflicting lower federal court decisions, as we do, to adopt the rule it determines to be most appropriate.**

*Starling* at *5, *citing Moore*, 266 Mich. App. at 102, 700 N.W.2d 414 (citations and footnote omitted).

What is clear is that until this issue is resolved, there is a strong likelihood that within the confines of the Sixth Circuit this issue will be decided solely on the basis of whether an action is brought in state or federal court. Venue dependent outcomes conflict with one of ERISA's primary goals of providing nationwide uniformity. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

### C. Conflict Between State Courts

There is even conflict among state courts on this issue. The Court previously highlighted the approaches taken by the Michigan Supreme Court and the Oklahoma Court of Appeals in footnote 10 of *Kennedy*. Since *Kennedy*, the Georgia Supreme Court has similarly decided the issue in *Appeleton v. Alcorn*, 291 Ga. 107 (2012).

In contrast to those decisions, however, the Appeals Court of Massachusetts, relying upon, *Staelens v. Staelens,* 677 F.Supp.2d 499 (D. Mass. 2010), found that claims like the ones in the instant case were preempted by ERISA. *McMorrow v. Langevin*, 79 Mass. App. Ct. 1126, 948 N.E.2d 919 (2011).

As with the conflicts between the Sixth Circuit and the Third and Fourth Circuits, and the conflict between the Sixth Circuit and the Michigan state courts, the disparate treatment between state courts on this issue warrants review of the instant case.

## III. The Fourth Circuit, Like the Third Circuit, Misinterpreted this Court's Prior Precedent With Respect to the Scope of ERISA Preemption

The Fourth Circuit, following the Third Circuit's decision in *Estate of Kensinger, supra*, clearly misunderstood this Court's precedent in *Boggs* and applicable precedent in *Egelhoff v. Egelhoff*, 531 U.S. 141 (2001).

Despite the fact that this Court in *Kennedy* pointed to *Boggs* as speaking to the issue expressly left open and addressed in this case, the Fourth Circuit found that Petitioner's reliance on *Boggs* "seems dubious indeed." *Andochick* at 300. But the Fourth Circuit fundamentally did not understand the breadth of the ERISA preemption identified in *Boggs* or the fact that *Boggs* involved state law claims to **both** ERISA benefits already paid and those that would be paid in the future. *Andochick* at 300 ("Further, as several other courts have noted, while the suit in *Boggs* took place after benefits were distributed, unlike the case at hand it involved a claimed interest in *undistributed* plan benefits."). In rejecting Petitioner's arguments, the Fourth Circuit viewed *Boggs* as only applying to future, undistributed ERISA benefits. *Id.* at 300, *citing Estate of Kensinger*, 674 F.3d at 138. But that recitation of *Boggs* is clearly erroneous as addressed in Section I(A) above.[9]

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[9] The Fourth Circuit is undoubtedly correct that *Boggs* involved application of community property laws rather than a purported waiver under state law, but that hardly detracts from the broad and expansive role of ERISA preemption as

Moreover, the Fourth Circuit placed undue emphasis on ERISA's concern for administrative convenience for plan administrators while significantly downplaying this Court's prior precedent focusing on the protections afforded to plan participants and beneficiaries. *Andochick* at 299. While the Fourth Circuit correctly identified the ERISA-related concerns at issue in *Kennedy* (involving only a suit by a non-beneficiary against a plan administrator), it paid scant attention to ERISA's broader goals of protecting beneficiaries as addressed in this Court's prior precedent.

The Court's prior precedent, principally in *Boggs*, has been addressed in Section I(A), and demonstrates a far broader scope of preemption of state based claims against a beneficiary. Moreover, the Fourth Circuit artificially limited this Court's ruling in *Egelhoff*. That case involved an attempt under Washington State law to override a beneficiary designation upon the participant's divorce. Specifically, this Court rejected an assertion that state law was not preempted because the law relieved the burden on the plan administrator and only impacted the ability of beneficiaries to retain the distributed proceeds. This Court directly confronted the argument from the dissenting opinion on this point by stating:

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outlined in *Boggs*. Moreover, if the issue was so distinct as to "lend [Petitioner] no support" as the Fourth Circuit suggested it would seem anomalous for this Court to have cited *Boggs* on the very issue raised herein. *Andochick* at 300.

> The dissent observes that the Washington statute permits a plan administrator to avoid resolving the dispute himself and to let courts or parties settle the matter. See post, at 6. ***This observation only presents an example of how the costs of delay and uncertainty can be passed on to beneficiaries,*** thereby thwarting ERISA's objective of efficient plan administration.

*Egelhoff*, 532 U.S. at 150, fn 3 (emphasis added). In that respect, the Court's decision in *Egelhoff* demonstrates a broader scope of protections for beneficiaries than mere convenience for plan administrators. In point of fact, the Court was expressing a concern of simply passing along the costs to beneficiaries and the claimants to those funds free of any impact upon plan administrators.

Given the recurring misunderstanding of this Court's prior precedent, principally in the case of *Boggs*, this Court should grant review to clarify the scope of ERISA preemption.

## IV. The Court Should Consider Calling for the View of the Solicitor General

The present case implicates significant issues related to the scope of ERISA preemption. The federal government, and in particular the United States Department of Labor, have a strong interest in ensuring uniform application of matters involving ERISA preemption which not only implicates plan

administrators, but has a direct impact on plan participants and plan beneficiaries. Petitioner respectfully suggests that this Court should call for the view of the Office of the Solicitor General on this issue.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE O. PETERSON
*Counsel of Record*
TANIA M. L. SAYLOR
PETERSON SAYLOR, PLC
10555 Main Street, Suite 320
Fairfax, VA 22030
(703) 225-3620
gpeterson@petersonsaylor.com
tsaylor@petersonsaylor.com

*Counsel for Petitioner*

Dated: July 3, 2013

# APPENDIX

## APPENDIX TABLE OF CONTENTS

# APPENDIX A

[Entered: March 4, 2013]

709 F.3d 296
**(Cite as: 709 F.3d 296)**

United States Court of Appeals,
Fourth Circuit.

Scott ANDOCHICK, M.D., Plaintiff–Appellant,
v.
Ronald BYRD, Individually; June Byrd, Individually; Ronald and June Byrd, as Co–Administrators of the Estate of Erika L. Byrd, Defendants–Appellees.

No. 12–1728. | Argued: Jan. 30, 2013. | Decided: March 4, 2013.

***297 ARGUED:** George Olai Peterson, Peterson Saylor, PLC, Fairfax, Virginia, for Appellant.

Karl William Pilger, Boring & Pilger, PC, Vienna, Virginia, for Appellees.

**ON BRIEF:** Michael T. Marr, Peterson Saylor, PLC, Fairfax, Virginia, for Appellant.

Before MOTZ, KING, and FLOYD, Circuit Judges.

## Opinion

Affirmed by published opinion. Judge MOTZ wrote the opinion, in which Judge KING and Judge FLOYD joined.

## OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Scott Andochick brought this declaratory judgment action, asserting that ERISA preempted a state court order requiring him to turn over benefits received under ERISA retirement and life insurance plans owned by his deceased ex-wife, Erika Byrd. ERISA obligates a plan administrator to pay plan proceeds to the named beneficiary, here Andochick. The only question before us is whether ERISA prohibits a state court from ordering Andochick, who had previously waived his right to those benefits, to relinquish them to the administrators of Erika's estate. Andochick appeals the district court's grant of the administrators' motion to dismiss the ERISA preemption claim. For the reasons that follow, we affirm.

### I.

The parties do not dispute the relevant facts.

In February 2005, Scott Andochick and Erika Byrd married. During the marriage, Erika worked as an attorney at Venable, LLP, where she participated in the Venable Retirement ("401(k)") Plan and the Venable Life Insurance Plan. Erika executed beneficiary designations for both plans, naming Andochick as her primary beneficiary. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, governs both plans.

In July 2006, Andochick and Erika separated and

entered into a marital settlement agreement. In the agreement, Andochick "waive[d] any interest, including but not limited to any survivor benefits, which he may have in Erika's Venable LLP 401(k) Plan." Further, he released and relinquished any future rights "as a beneficiary under any life insurance policy ... or any other beneficiary designation made prior to the execution of th[e] Agreement." Finally, Andochick agreed to execute any documents required to carry out the provisions of the agreement.

***298** In December 2008, Andochick and Erika divorced, and the judgment of divorce incorporated their marital settlement agreement. When Erika died in April 2011, her parents, Ronald and June Byrd, qualified as administrators of her estate.

At the time of her death, Erika had failed to name a new beneficiary of her ERISA plans. The ERISA plan administrators of Erika's 401(k) and life insurance plans determined that the proceeds of both plans should be paid to Andochick, because he remained the named beneficiary of the plans. The Byrds appealed the administrators' decisions. The administrator of the 401(k) plan affirmed its determination, but the administrator of the life insurance plan found that it was unable to make a determination and stated its intention to file an interpleader in the district court.

In addition to appealing the plan administrators' decisions, the Byrds made a direct claim on Andochick, asserting that he was in breach of the marital settlement agreement and demanding that

he sign waivers renouncing any right to the plan proceeds. Andochick refused.

On July 13, 2011, Andochick filed this action in the federal district court for the Eastern District of Virginia asking for a declaratory judgment that ERISA preempts the waiver provisions in the marital settlement agreement and the Byrds therefore have no claim to the plan proceeds. Andochick also asked for a declaratory judgment that the Byrds lacked standing to enforce the marital settlement agreement, and that the Byrds converted an automobile that properly belonged to Andochick.

Two days later, on July 15, 2011, the Byrds filed suit against Andochick in the Circuit Court for Montgomery County, Maryland, asking the court to find Andochick in contempt of the marital settlement agreement and judgment of divorce, and to order him to waive his rights to the 401(k) and life insurance proceeds. The state court found Andochick in contempt of the judgment of divorce and ordered him to take all actions necessary to renounce his interests in Erika's plan benefits. However, the court specifically declined to address what effect, if any, ERISA might have on the ultimate enforceability of Andochick's waiver.

Given this success, the Byrds returned to the federal court, which had stayed its proceedings pending conclusion of the state court action, and moved to dismiss Andochick's complaint. In response, Andochick moved for partial summary judgment. The district court granted the Byrds' motion to

dismiss as to standing and ERISA preemption and denied Andochick's motion for summary judgment as moot.[1] The district court "directed" the plan administrators "to pay the ERISA funds to Andochick," and held that, "[i]n accordance with the [state court's] order, Andochick must then waive his right to these funds, distributing them instead to Erika's estate." *Andochick v. Byrd,* No. 1:11–cv–739, 2012 WL 1656311, at *13 (E.D.Va. May 9, 2012).

Andochick timely noted this appeal, pursuing only the ERISA claim. We review de novo the district court's grant of the Byrds' motion to dismiss. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.,* 637 F.3d 435, 440 (4th Cir.2011).[2]

***299 II.**

ERISA requires that "[e]very employee benefit plan ... be established and maintained pursuant to a written instrument" that "specif[ies] the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(a)(1), (b)(4). ERISA then directs the plan administrator to discharge his duties "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D). In *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan,* 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009), the Supreme Court held that an ERISA plan administrator must distribute benefits to the beneficiary named in the plan, regardless of any state-law waiver purporting to divest that beneficiary of his right to the benefits. *Kennedy* explicitly left open the question of whether, once the benefits are distributed by the administrator, the

decedent's estate can enforce a waiver against the plan beneficiary. *See id.* at 299 n. 10, 129 S.Ct. 865 ("Nor do we express any view as to whether the Estate could have brought an action in state or federal court against [the plan beneficiary] to obtain the benefits after they were distributed."). That is the question we address today.[3]

**A.**

Though the *Kennedy* Court expressly declined to decide the issue we now address, Andochick contends that the Court's reasoning in that case dictates that ERISA must preempt waivers of the kind embodied in the marital settlement agreement. We find this argument unconvincing.

In *Kennedy,* the Court emphasized three important ERISA objectives: "[1] simple administration, [2] avoid[ing] double liability [for plan administrators], and [3] ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules." *Id.* at 301, 129 S.Ct. 865 (some alterations in original) (citation omitted).

Allowing post-distribution suits to enforce state-law waivers does nothing to interfere with any of these objectives. For in situations like that at issue here, *Kennedy****Error! Bookmark not defined.*** merely dictates that the plan administrator distribute plan benefits to the named beneficiary. This ensures simple administration regardless of whether post-distribution suits are permitted, because the plan administrator would have no role in any post-distribution proceedings. For the same reason, post-

distribution suits do not expose the plan administrator to double liability—only the named beneficiary has any claim against the plan administrator.

Finally, as the Third Circuit recently explained when addressing facts nearly identical to those at hand, "the goal of ensuring that beneficiaries 'get what's coming quickly' refers to the expeditious distribution of funds *from plan administrators,* not to some sort of rule providing ***300** continued shelter from contractual liability to beneficiaries who have *already received* plan proceeds." *Estate of Kensinger v. URL Pharma, Inc.,* 674 F.3d 131, 136 (3d Cir.2012). Permitting a post-distribution suit against a plan beneficiary based on his pre-distribution waiver does not prevent the beneficiary from "get [ting] what's coming quickly." Rather, as the district court noted, it merely prevents him from keeping what he "quickly" received. Thus, we conclude that permitting post-distribution suits accords with the ERISA objectives discussed in *Kennedy.*

**B.**

Andochick maintains, however, that *Boggs v. Boggs,* 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997), and *Egelhoff v. Egelhoff ex rel. Breiner,* 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), "establish that a pre-distribution waiver" should not be held "effective against post-distribution proceeds." Plaintiff–Appellant's Br. at 22. Given that *Boggs* and *Egelhoff* pre-date *Kennedy,* in which the Supreme Court expressly left this question open, Andochick's argument seems dubious indeed. Moreover,

examination of *Boggs* and *Egelhoff* reveals that they lend Andochick no support.

In *Boggs,* the Court held that ERISA preempted a Louisiana community property law that would have allowed a plan participant's first wife to transfer by will her interest in the participant's undistributed retirement benefits. 520 U.S. 833, 117 S.Ct. 1754. Andochick contends *Boggs* established that there is no distinction between a suit claiming entitlement to undistributed plan benefits, as in *Kennedy,* and one claiming entitlement to distributed plan benefits, as here. This argument fails.

First, *Boggs* involved a very different situation from that at issue here, and its reasoning does not logically extend to this case. Operation of the community property law at issue in *Boggs* would have resulted in the diversion of plan benefits without the consent of the plan participant. *See Boggs,* 520 U.S. at 852, 117 S.Ct. 1754 (noting that, unless ERISA preempted the state statute, "retirees could find their retirement benefits reduced by substantial sums because they have been diverted to testamentary recipients"). Here, by contrast, the plan participant and beneficiary *agreed* that the beneficiary would waive his interest in the plan benefits.

Further, as several other courts have noted, while the suit in *Boggs* took place after benefits were distributed, unlike the case at hand it involved a claimed interest in *undistributed* plan benefits. *See Estate of Kensinger,* 674 F.3d at 138 (distinguishing *Boggs* from a situation parallel to that at issue here

on the basis that *Boggs* involved a claimed interest in undistributed pension plan benefits); *Alcorn v. Appleton,* 308 Ga.App. 663, 708 S.E.2d 390, 392 (2011) (same), *aff'd,* 291 Ga. 107, 728 S.E.2d 549, 551–52 (2012); *Pardee v. Pers. Representative for Estate of Pardee,* 112 P.3d 308, 313–14 (Okla.Civ.App.2004) (same); *see also Boggs,* 520 U.S. at 854, 117 S.Ct. 1754 ("It does not matter that respondents have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits.").

Thus, *Boggs* does not lend support to Andochick's contention that ERISA preempts post-distribution suits of the kind at issue here.

*Egelhoff* is no more helpful to Andochick. In *Egelhoff,* the Court held that ERISA preempted the application of a state statute that automatically revoked, ***301** upon divorce, any designation of a spouse as a beneficiary of an ERISA benefit plan. 532 U.S. at 146–50, 121 S.Ct. 1322. The Court based its holding on the fact that the state statute required administrators to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents," *id.* at 147, 121 S.Ct. 1322, creating a "direct[ ] conflict[ ] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents." *Id.* at 150, 121 S.Ct. 1322. Post-distribution suits of the kind at issue here simply do not require plan administrators to pay benefits to anyone other than the named beneficiary.

Accordingly, *Egelhoff* is inapposite.

**C.**

Because we detect no conflict with either ERISA's objectives or relevant Supreme Court precedent, we hold that ERISA does not preempt post-distribution suits against ERISA beneficiaries. We note that in reaching this conclusion, we adopt the same view as every published appellate opinion to address the question. *See Estate of Kensinger,* 674 F.3d at 135–39; *Appleton v. Alcorn,* 728 S.E.2d at 552, *aff'g* 708 S.E.2d at 392; *Sweebe v. Sweebe,* 474 Mich. 151, 712 N.W.2d 708, 714 (2006); *Pardee,* 112 P.3d at 315–16.

**III.**

For the reasons set forth above, the judgment of the district court is

*AFFIRMED.*

**Parallel Citations**

Pens. Plan Guide (CCH) P 24013P

Footnotes

[1] The court noted that Andochick's conversion claim was valued at $25,000, an amount insufficient to establish diversity jurisdiction. Given that Andochick's federal claims had been dismissed, the court refused to exercise supplemental jurisdiction over the conversion claim and dismissed it without prejudice.

[2] We note the Byrds contend that the district court should have granted their motion to dismiss without reaching the merits of the case. They maintain that res judicata bars Andochick's declaratory judgment action. We agree with the district court that the state court explicitly declined to decide what effect ERISA might have on the ultimate disposition of the plan proceeds, so res judicata does not bar Andochick from pursuing his ERISA preemption claim in federal court. The Byrds additionally argue that Andochick's claim is unsuitable for a declaratory judgment action and that Andochick lacks standing. The district court ably dealt with these arguments and we need not revisit them here.

[3] This suit names the Byrds in their individual capacities and as administrators of Erika's estate. The Byrds argued before the district court that Ms. Byrd should receive some of the plan proceeds as a second named beneficiary on one of the plans. We agree with the district court that *Kennedy* forecloses this result.

## APPENDIX B

[Entered: May 9, 2012]

2012 WL 1656311
**(Cite as: 2012 WL 1656311)**

United States District Court, E.D. Virginia,
Alexandria Division.

Scott ANDOCHICK, M.D., Plaintiff/Counter Defendant,
v.
Ronald and June BYRD, Defendants/Counter Claimants.

Civil Action No. 1:11–cv–739. | May 9, 2012.

**Attorneys and Law Firms**

George Olai Peterson, Michael Thomas Marr, Peterson Saylor PLC, Fairfax, VA, for Plaintiff/Counter Defendant.

Karl William Pilger, Boring & Pilger, P.C., Vienna, VA, for Defendants/Counter Claimants.

**Opinion**

***MEMORANDUM OPINION***

LIAM O'GRADY, District Judge.

***1** Before the Court are Defendants' Motion to Dismiss (Dkt. No. 39) and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 45). For the reasons stated in open Court, as well as the reasons provided herein, the Motion to Dismiss is GRANTED

in part, and the Motion for Summary Judgment is DENIED as moot.

**I. Background**

At issue in this cause of action are the rights to various property interests initially belonging to the now deceased Erika Byrd ("Erika"). The facts are simple and not disputed. At the time of her death, Erika was an attorney at Venable ("Venable"). She participated in the Venable Retirement Plan ("401(k)") and obtained insurance through the Venable Life Insurance Plan ("Life Insurance"). Plaintiff, Scott Andochick, the deceased's ex-husband, brings suit against Erika's parents, Ronald and June Byrd (the "Byrds"), as individuals, and in their capacity as co-administrators of Erika's estate. Specifically at issue are the rights to Erika's 401(k) and Life Insurance proceeds ("the benefits") and the right to a 2005 BMW 645i.[1]

Dr. Andochick and Erika married on February 25, 2005. A little over a year later, the couple separated on July 7, 2006, and entered into a Marital Settlement Agreement on August 20, 2007 ("MSA"). The MSA is comprehensive and "binding upon the respective heirs ... of the parties." MSA at 6.2. It includes:

- Andochick's waiver of any interest or survivorship rights in Ms. Byrd's 401(k), MSA ¶ 2.9(d);

- A release of present and future rights "as a beneficiary under any life insurance policy ... or any other beneficiary designation," including an

agreement to execute and deliver releases upon the request of the other, MSA ¶ 6.4(c);

• Andochick's agreement to make lease payments on a 2005 BMW used exclusively by Erika, MSA ¶ 2.11(b); and

• An agreement to execute documents "required to carry out provisions of this Agreement." MSA at 6.8.

On December 31, 2008, the couple divorced pursuant to a Judgment of Absolute Divorce in Montgomery County, Maryland. The judgment incorporated the MSA. Approximately two-and-a-half years later, Erika passed away on April 10, 2011. The decedent's parents, the Byrds, qualified as co-administrators of her estate shortly thereafter. In spite of the MSA, in June 2011, the plan administrator of Erika's 401(k) and Life Insurance policies determined that the policies would be paid to Dr. Andochick, because he remained the named beneficiary on the plan documents at the time of Erika's death. *See* Policies, ECF No. 38–1. The Byrds appealed the plan administrator's decision on August 3, 2011.

Andochick filed suit in this Court on July 13, 2011, arguing that ERISA**Error! Bookmark not defined.** preempts the waiver provisions in the MSA. The Byrds take the position that the MSA requires Andochick to relinquish his rights to the ERISA benefits. On July 15, 2011, the Byrds filed suit against Andochick in Montgomery County Circuit Court (the "Circuit Court"). The Byrds asked the Circuit Court to find Andochick in contempt of the MSA and the Judgment of Absolute Divorce and

to order him to waive his interest in Erika's 401(k) and Life Insurance proceeds. The Byrds also filed a motion for a temporary restraining order and a preliminary injunction. The Circuit Court granted the temporary restraining order, and the parties later agreed to the entry of a preliminary injunction. The agreed to preliminary injunction enjoined the parties from accepting any portion of the 401(k) or Life Insurance proceeds pending a final determination on the merits as to the proper beneficiary.

***2** On September 22, 2011, the Byrds filed a Motion to Stay the proceedings in this Court pending the outcome of the action they filed against Andochick in the Circuit Court. This Court granted Plaintiff's Motion, finding that the Circuit Court had a strong interest in adjudicating matters related to its prior Judgment of Absolute Divorce and the incorporated MSA. In addition, because federal courts do not have exclusive jurisdiction over the ERISA issues presented here, the Court found that the Circuit Court's ruling might interfere with an order from this Court. These fears proved unwarranted as the Circuit Court avoided the ERISA issue. *See* Trial Tr. 23:9–17, Dec. 21, 2011, ECF No. 38–6 (finding that the ERISA issue was not before the Circuit Court judge). Ultimately, the Circuit Court found Andochick to be in contempt of the its Judgment of Absolute Divorce and ordered Andochick to "execute any documents and take all actions necessary and required ... to waive and renounce any interest he has in the ... 401(k) Plan and [L]ife [I]nsurance benefits...." Order, Dec. 28, 2011, ECF No. 38–5. The Circuit Court did not address the effect ERISA

statutes may or may not have on the ultimate disposition of the benefits.

On February 17, 2012, the Byrds filed the present Motion to Dismiss the Amended Complaint (Dkt. No. 39) on the basis of res judicata and Federal Rules of Civil Procedure 12(b)(1) and (6). Andochick filed a Motion for Partial Summary Judgment on March 2, 2012, arguing that the Byrds lack standing to pursue claims against Andochick for the ERISA governed benefits, and that even if the Byrds had standing, ERISA preempts any claim they might have to the benefit proceeds.

The Court heard oral argument on this matter on March 23, 2012. At that time, the Court expressed concern with issuing an order before the Byrds exhausted their administrative remedies in pursuit of the 401(k) and Life Insurance benefits. On March 30, 2012, the Byrds filed a Status Report with the Court as to the position of both their 401(k) plan and Life Insurance plan appeals. *See* ECF No. 56. As to the 401(k) plan appeal, the Venable Employee Benefits Committee affirmed their Initial Determination and issued a final and binding determination in favor of Andochick. *See* ECF No. 56–1. This ends the administrative process with respect to the 401(k) plan.

The Venable Life Insurance Plan issued a letter indicating they were unable to make a determination as to the proper payee. *See* ECF No. 56–3. The letter indicates that the Plan intended to file an interpleader action by October 16, 2011, but to date, the Court has not been made aware of any such

action. *Id.* In effect, the Byrds have exhausted their administrative remedies both in relation to the 401(k) and Life Insurance plans, and to the extent the Court's concern with exhaustion was warranted, it has been satisfied .[2] This matter is ripe for disposition.

**II. Legal Standard**

***3** The portion of the Byrds motion filed pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the Complaint, with all facts alleged considered as true for purposes of the motion. *See Francis v. Giacomelli,* 588 F.3d 186, 192 (4th Cir.2009). A plaintiff may proceed into the litigation process only when his or her complaint is justified by both law and fact. *Id.* In that respect, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009).

Although the general rule is that a court may not consider documents outside the complaint in deciding a motion to dismiss, "a court may consider ... documents central to a plaintiff's claim, and documents sufficiently referred to in the Complaint ... without converting the motion to dismiss into one for summary judgment, so long as the authenticity of such documents is not disputed." *Am. Intern. Specialty Lines Ins. Co. v. A.T. Massey Coal Co., Inc.,* 628 F.Supp.2d 674, 678–79 (E.D.Va.2009) (quoting *Witthohn v. Fed. Ins. Co.,* 164 F. App'x 395, 396–97 (4th Cir.2006)); *Gasner v. Cnty. of Dinwiddle,* 162 F.R.D. 280, 281 (E .D.Va.1995) ("[T]he Court may consider documents not attached to, but referenced

in the plaintiffs' Amended Complaint, when testing the legal sufficiency of that pleading .... without converting the motion into one for summary judgment.") (citations omitted). In the Amended Complaint, Andochick alleges that

> 28. On June 8, 2011, the Plan Administrator for Venable LLP reached its decision and advised the Co–Administrators, the Byrds and Dr. Andochick that the 401(k) Proceeds and Life Insurance Proceeds would be payable to Dr. Andochick as required by ERISA and the ERISA-governed plan documents. A copy of that decision is attached hereto as Exhibit 3.
>
> 29. The Co–Administrators and/or the Byrds were given sixty (60) days to administratively appeal that decision. It is not clear whether the Co–Administrators and/or the Byrds have done so or intend to do so.

Am. Compl. ¶¶ 28–29, ECF No. 38. The Status Report that the Byrds filed, at the Court's request, following the hearing on this motion is "central to the Plaintiff's claim," and is, at least implicitly, "referred to in the Complaint." Andochick's entitlement to the benefits as the named beneficiary is dependent on the ultimate disposition of the plan administrator—the subject matter of the Status Report. In addition, Andochick filed a reply to the Status Report and the attached exhibits, and he did not dispute their authenticity or the relevant portion of their contents. *See* ECF No. 57. Thus, the Court finds it appropriate to consult the Status Report, and the documents attached thereto, at the motion to dismiss stage.

In any event, even without consulting the Status Report the Court would presume that Andochick is the named beneficiary according to the plan documents. This is because the Court is to "presume that all factual allegations in a plaintiff's complaint are true" at the motion to dismiss stage. *Gasner,* 162 F.R.D. at 281 (citing *Puerto Rico ex. Rel. Quiros v. Alfred L. Snapp & Sons,* 632 F.2d 365 (4th Cir.1980), *aff'd,* 458 U.S. 592 (1982)). Because Andochick's pleadings allege he is the named beneficiary, the Court is required to accept his allegations as true at this stage. *See Harrison v. U.S. Postal Serv.,* 840 F.2d 1149, 1152 n. 7 (4th Cir.1988) ( "[E]ven though the district court cited to exhibits submitted [with the motion to dismiss], the facts to which the court so referred were either alleged in the amended complaint or contained in the exhibits thereto. Harrison has therefore in no way been prejudiced because the district court referred to alternative sources for the allegations."). At its core, this Court's Opinion is based on the presumption that Andochick is the ERISA plan designated beneficiary, not on the factual accuracy of the presumption.

***4** Finally, even if the Court found it necessary to convert this matter to a Motion for Summary Judgment,[3] *see* Fed.R.Civ.P. 12(d) (requiring a court to convert a 12(b)(6)**Error! Bookmark not defined.** motion to one for summary judgment if matters outside the pleadings are considered), the Court is only required to afford the parties a "reasonable opportunity to present all material made pertinent to such a motion." Fed.R.Civ.P. 12(d); *Fayetteville Investors v. Commercial Builders, Inc.,*

936 F.2d 1462, 1471 (4th Cir.1991).[4] The only additional information the court finds "pertinent," which was not in the Amended Complaint or attached documents, is the information within the Status Report and the attached exhibits. These documents provide support for Andochicks position that he is entitled to the benefits as the individual named on the plan documents. Importantly, the Plaintiff was given an opportunity to respond to this material and did not object to the substance of the Report. So, even if the Court had converted this action under Fed.R.Civ.P. 12(d), the Court would grant summary judgment in the Defendants favor, albeit on different procedural grounds, based on the same substantive grounds as that identified within the body of this Opinion.

Andochick also filed a motion for summary judgment. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A dispute of material fact is genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In reviewing a summary judgment motion, the court "must draw all justifiable inferences in favor of the nonmoving party...." *United States v. Carolina Transformer Co.,* 978 F .2d 832, 835 (4th Cir.1992) (citing *Anderson,* 477 U.S. at 255).

Because the Court is convinced that Andochick has not, and cannot, state a legal basis for relief as to Counts I and II, the Court GRANTS Defendants

Motion to Dismiss with prejudice as to those Counts. The Court dismisses Count III without prejudice pursuant to its discretionary powers in 28 U.S.C. § 1367(c)(3). Plaintiff's Motion for Summary Judgment is DENIED as moot. Although there is no genuine dispute of fact, summary judgment is inappropriate here because, as a matter of law, Plaintiff cannot prevail.

**III. Analysis**

**a. Count 1: The Byrds have Standing to pursue their claim.**

The first count in the Amended Complaint asks the Court to declare that the Byrds lack standing to pursue their claims against Dr. Andochick for the ERISA-governed proceeds. The argument was made before the Circuit Court, and the doctrine of collateral estoppel precludes this Court from deciding the issue for a second time.

"Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v.. McCurry,* 449 U.S. 90, 96 (1980) (citing 28 U.S.C. § 1738). Because the Circuit Court judgment originates from Maryland, this Court must consider Maryland's preclusion doctrine. Maryland courts have settled on the following four-pronged test to determine the applicability of collateral estoppel:

> ***5** 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?

> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

*Wash. Suburban Sanitary Comm'n v. TKU Assocs.*, 376 A.2d 505, 514 (Md.1977).

As to the first prong, Andochick argued before the Circuit Court that the Byrds' lacked standing to pursue a right to the ERISA benefits. This is the identical issue he presents to this Court now. As to the second prong, the Circuit Court issued a final judgment on the merits regarding the Byrds' standing.

> MR. BOUQUET: So, the Court is taking a position that the Byrds have standing as third-party beneficiaries and that the estate has standing ...
>
> THE COURT: Yes.

Trial Tr. 52:5–10, Dec. 21, 2011, ECF No. 38–6. The Circuit Court then issued an Order, *see* Order, Dec. 28, 2011, ECF No. 38–5, and declared that the ruling was final. *See* Trial Tr. 62:16–63:6, Dec. 21, 2011, ECF No. 38–6. Third, the collateral estoppel doctrine is being asserted against Dr. Andochick, and Dr. Andochick was a party in the former adjudication. Finally, Dr. Andochick was given a fair opportunity to be heard on this matter at the hearing before the Circuit Court. In short, Count I of the Amended Complaint is barred under the doctrine of collateral estoppel, and the Byrds have standing to pursue a

claim against Andochick for the ERISA proceeds. *See also Estate of Kensinger v. URL Pharma, Inc.,* 674 F.3d 131, 134 (3d Cir.2012) (finding that the named beneficiary on the ERISA plan documents had a "presently enforceable right to the plan proceeds, and the Estate ha[d] standing to challenge that right by seeking to enforce [the] waiver" in the property settlement agreement). For these reasons, Count I is DISMISSED.

**b. Count II: Declaratory Judgment as to ERISA Preemption**

The second count of the Amended Complaint asks the Court to declare that ERISA preempts the MSA and any claim the Byrds might have to the ERISA plan benefits.

**i. Count II is not precluded by the Circuit Court decision.**

The Byrds argue that this issue, like the standing issue, is precluded by the Circuit Court decision. This Court finds otherwise. The Circuit Court made clear its understanding that it was only considering whether Andochick was required to sign a waiver based upon the language within the MSA. The court did not consider the possible effect ERISA might have on the signed waiver. *See* Trial Tr. 23:9–14, Dec. 21, 2011, ECF No. 38–6 ("There may be some reason why under ERISA the administrator doesn't have to honor that waiver ..., but that's not before me.... What's before me is can I make him sign the paper, not whether the paper does anybody any good once it is signed, in my view, at least at this point."). The question before this Court is precisely the issue that the Circuit Court avoided; to be exact, this

Court must determine whether ERISA supersedes the MSA and entitles Andochick to retain the benefits in dispute.

**ii. Count II is properly pled as a Declaratory Judgment action.**

***6** The Byrds argue that Andochick is an improper claimant under ERISA or that his claim is not a proper issue for declaratory relief .[5] Again, the Court disagrees. Declaratory judgment is a proper form of relief in this instance. The Fourth Circuit has been clear.

> [A] federal court may properly exercise jurisdiction in a declaratory judgment proceeding when three essentials are met: (1) the complaint alleges an "actual controversy" between the parties "of sufficient immediacy and reality to warrant issuance of a declaratory judgment;" (2) the court possesses an independent basis for jurisdiction over the parties (e.g., federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction.
> *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.,* 386 F.3d 581, 592 (4th Cir.2004) (citing 28 U.S.C. § 2201).

It is hardly in dispute that the present cause of action satisfies these elements. The ongoing disagreement as to who should ultimately exercise control over the benefits at issue is sufficient to establish the actual controversy requirement. Andochick takes the position that the MSA does not require him to relinquish the ERISA benefits to the Byrds. The Byrds take the opposite position. This is controversy. Additionally, the fact that at least one

of the plan administrators has refused to disburse the benefits indicates that there is an issue of sufficient immediacy to warrant a declaration from this Court as to the proper payee. Finally, the Byrds heartily dispute the plan administrator's decision that Andochick is the proper payee of the 401(k) benefits. If the Court has not been presented with an actual controversy, it is difficult to imagine any situation where this prong could be satisfied.

As to the second prong, this Court possesses an independent basis for jurisdiction under 29 U.S.C. § 1132(a)(1)(B), which provides that a civil action may be brought by a beneficiary "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." Andochick is a beneficiary clarifying his rights to future benefits under the terms of the plan. He falls squarely within the statute. *See Boggs v. Boggs,* 82 F.3d 90, 94 (5th Cir.1996).

Andochick also satisfies the final prong because the Court finds that declaratory judgment will serve a useful purpose. The Fourth Circuit has clarified that a district court does not abuse its discretion in exercising declaratory judgment when it " 'will serve a useful purpose in clarifying and settling the legal relations in issue,' and 'will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Volvo Const. Equip. N. Am., Inc.,* 386 F.3d at 394 (quoting *Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 325 (4th Cir.1937)). Given the national discordance within the circuits as to the very issue before the

Court, in addition to the fact that the Fourth Circuit has not yet considered the present issue, the Court finds that declaratory judgment is this instance will serve a particularly useful purpose and will provide future guidance to plan administrators. In addition, the ultimate disposition of the ERISA funds at issue will be directly impacted by this Court's ruling. In short, this is precisely the cause of action where declaratory judgment is warranted.

**c. ERISA does not preempt contractual claims to plan benefits subsequent to the plan administrator's disbursement of the proceeds.**

***7** To be sure, the critical issue before the Court is whether ERISA preempts the Byrds' enforcement of the waiver provision within the MSA once the benefits are distributed, or in the alternative, if ERISA does not affect post-disbursement funds. As indicated in the Supreme Court's *Kennedy* decision, this remains an open question. *See Kennedy v. Plan Administrator for DuPont Savings and Investment Plan,* 555 U.S. 285, 299 n. 10 (2009) ("Nor do we express any view as to whether the Estate could have brought an action in state or federal court against [the beneficiary] to obtain the benefits after they were distributed.").[6] In *Kennedy,* the Supreme Court's ruling only went so far as to hold that the initial ERISA plan *administrator's disbursement decision* could not be altered because of waiver language within a divorce decree. *Id.* at 299. Instead, the Supreme Court found that the plan administrator has a statutory duty to pay the benefits in strict conformity with the plan documents. *Id.* at 300. This rule establishes a straightforward and easily administrable scheme with standard procedures. *Id.* at 300–301.

Again, this action begins where the *Kennedy* decision ended. Here, the question is whether the Byrds' right to enforce the waiver provision in the MSA authorizes them to divest disbursed ERISA benefits from Andochick, the plan documents' designated beneficiary. This Court is not the first to take up this issue. *Compare Sweebe v. Sweebe,* 712 N.W.2d 708, 710 (Mich.2006) ("While a plan administrator is required by ERISA to distribute plan proceeds to the named beneficiary, the named beneficiary can then be found to have waived the right to retain those proceeds."), *Pardee v. Personal Representative for Estate of Pardee,* 112 P.3d 308, 316 (Okla. Civ.App. Div. 2 2004) ("[T]he pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed," and the divorce decree could control the allocation of ERISA funds after disbursement.), *and Alcorn v. Appleton,* 708 S.E.2d 390, 392 (Ga.App.2011) ("ERISA does not preempt claims against funds already distributed from an ERISA plan.), *with Staelens v. Staelens,* 677 F.Supp.2d 499 (D.Mass.2010) (noting that post-ERISA disposition lawsuits to enforce waiver provisions "would appear to go against the various interests which the Supreme Court deemed served by a uniform administrative scheme"),[7] *and In re Estate of Kensinger,* No. 09–6510, 2010 WL 4445752, at *7 (D.N.J. Nov. 1, 2010) (finding that permitting an estate to "assert a claim directly against [the beneficiary] to enforce the putative waiver in the Property Settlement Agreement ... would directly undermine ERSIA's [sic]stated objectives and run contrary to the Supreme Court's precedent interpreting ERISA"), *overruled by Estate of*

*Kensinger,* 674 F.3d 131.

Most recently, addressing facts virtually identical to those presented here, the Third Circuit reversed the district court's decision in *Estate of Kensigner*. The Third Circuit considered whether ERISA preempted a waiver provision in a property settlement agreement, *after* the plan proceeds had been distributed by the administrator. *Estate of Kensinger,* 674 F.3d at 134. Answering this question in the negative, the court explained that "permitting suits against beneficiaries *after* benefits have been paid does not implicate any concern of expeditious payment or undermine any core objective of ERISA." *Id.* at 137 (emphasis in original).

***8** With this backdrop in mind, the Court first looks to the language in the ERISA statutes for guidance. The relevant provision requires a plan administrator to discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter...." 29 U.S.C. § 1104. Although this language emphasizes the significance of the plan documents, it does not speak to what happens after the administrator makes the initial disbursement according to those plan documents. For this reason, it is appropriate to consider federal common law in answering this question. *See Estate of Kensinger,* 674 F.3d at 135.

The Supreme Court has identified three points of emphasis in applying the ERISA statutes. This "uncomplicated rule" focuses on " '[1] simple

administration, [2] avoid[ing] double liability, and [3] ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules.' " *See Kennedy,* 555 U.S. 285, 301 (2009) (quoting *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown,* 897 F.2d 275, 283 (7th Cir.1990) (Easterbrook, J., dissenting)); *see also Egelhoff v. Egelhoff ex rel. Breiner,* 532 U.S. 141, 148 (2001) ("One of the principal goals of ERISA is to ... 'establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.' ") (quoting *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 9 (1987)).

This Court finds persuasive and adopts the Third Circuit's reasoning, concluding that the ultimate disposition of the present ERISA benefits is subject to a two-part analysis. First, 29 U.S.C. § 1104 dictates that the benefits must be paid to Andochick in accordance with the plan documents rule. *See Boyd v. Metro. Life Ins. Co.,* 636 F.3d 138 (4th Cir.2011) ("[T]he Supreme Court construed 29 U.S.C. § 1104(a)(1)(D) as a broad endorsement of the 'plan documents rule.' " (quoting *Kennedy,* 555 U.S. at 303)). This rule ensures that each of the three goals enumerated in *Kennedy* is satisfied: (1) the rule is simple, the benefits go to the person listed on the plan documents; (2) the rule prevents double liability, only the person listed on the plan documents is entitled to the benefits; and, (3) the rule ensures that beneficiaries get what's coming quickly. Here, for example, Andochick should quickly receive the benefits as the named beneficiary.

None of these considerations are diminished by permitting an action against Andochick as a matter of contract law after the initial distribution—the second step in the analysis. Andochick argues that such a conclusion disregards the third core objective of the ERISA statutory scheme, namely, the significance placed on providing certainty to beneficiaries regarding the final distribution of ERISA benefits. But this Court agrees with the Third Circuit's analysis. An "assumption about ERISA's continuing solicitude for beneficiaries after the distribution of benefits [i]s based on an overreading of *Kennedy*." *Estate of Kensinger,* 674 F.3d at 136 (emphasis in original). Instead, the third objective is intended to ensure "the expeditious distribution of funds *from plan administrators,* not to some sort of rule providing continued shelter from contractual liability to the beneficiaries who have *already received* plan proceeds." *Id.* (emphasis in original).

***9** The concern with providing certainty to beneficiaries goes no further than ensuring that the person named on the plan documents can be certain that he is unquestionably entitled to the initial payout from the plan administrator. If that beneficiary signed a separate agreement, altering his right to retain the benefits, the federal law will not go so far as to shield that person from his obligations, based on rights that he freely contracted away. The bottom line is that ERISA does not alter common law waivers or impede challenges against beneficiaries after they have received the initial payment as a beneficiary under the ERISA plan.

Andochick's argument is nonsensical that he is being deprived of what he assumed was his. Andochick must have contemplated that he was forgoing any claim to the benefits when he signed the MSA. If this was not his intent, then the parties should have worded the language within the MSA differently. The fact that he must now comply with his contractual arrangement can hardly be said to catch him off-guard or cause uncertainty in relation to his expectations regarding the benefits. Nor can it be said to interfere the ERISA's concern that the beneficiary named on the plan documents get what's coming quickly. Enforcing the MSA does not preclude Andochick from *getting* what's coming quickly; rather, the MSA precludes Andochick from *keeping* what's coming quickly.

The Court also finds support for its conclusion from the Fourth Circuit's comments in *Boyd v. Metropolitan Life Ins. Co.* 636 F.3d 138 (4th Cir.2011). In *Boyd,* the Fourth Circuit applied the plan documents rule from *Kennedy* and found that the plan administrator must pay the beneficiary named on the ERISA plan documents in spite of a waiver provision within a separation agreement. Similar to the present facts, the deceased and the named beneficiary separated and signed an agreement waiving rights as beneficiaries under any life insurance policy. The deceased spouse failed to change the designation on the plan documents, and the ex-spouse remained the named beneficiary at the time of death. The deceased's estate filed an action seeking to enforce the waiver provision, but the court upheld the plan administrator's determination that the ex-spouse was entitled to the benefits as the

named beneficiary. The Fourth Circuit was not presented with the question of whether the estate had any recourse after the plan administrator's disbursement, but in dicta, the court noted, "[n]one of this means that the separation agreement is irrelevant. Its interpretation and enforcement, however, are not matters for the plan administrator, but are between [the plan beneficiary] and the [estate]." *Id.* at 145. This language persuades the Court that the Fourth Circuit would agree with the Court's determination *sub justice,* that ERISA does not foreclose the permissibility of a separate action between the Byrds and Andochick, nor does ERISA preempt the waiver provision in the MSA in all circumstances.

***10** Accordingly, the Court is unable to grant Plaintiff the declaratory relief he seeks because it is confronted with legal authority dictating a different result. Contrary to Plaintiff's request, ERISA does not preempt all rights the Byrds have under the MSA.[8] Instead, ERISA only controls the disbursement of the benefit proceeds at the plan administrator level. Once the proceeds are within Andochick's control, he is obligated to fulfill his responsibilities under the MSA, as ordered by the Circuit Court.

**d. The beneficiary designation does not supersede the MSA's waiver provision as a final bequest.**

Andochick argues that, even assuming the Court's above findings are accurate, by leaving Andochick's name on the plan documents as the designated beneficiary, Erika expressed her ultimate intent to leave her benefits to Andochick. Explained

differently, Andochick's argument is that the MSA gave Erika the right to dispose of the benefits how she saw fit. In the MSA, Andochick waived his claim to the benefits to Erika, and the fact that she kept Andochick's name as the designated beneficiary indicates that she chose to leave the ERISA benefits to Andochick. Thus, Andochick claims he is not required to waive a right to her bequest, though had Erika named someone else as the beneficiary, he waived any right to use his role as her former husband to assert a superior claim against her chosen designee. Contrary to Andochick's arguments, this determination is not a factual question as to Erika's subjective intent;[9] rather, the question is a legal one, and is based on the clear and objective language within the MSA.

Andochick cites to other courts that have considered similar, but factually distinct, arguments. In some instances, courts have found that the language in the agreement clearly requires the ex-spouse to waive all rights, even if the spouse remains the ERISA designee at the time of death. In other instances, courts have found that a waiver provision will not strip the ex-spouse of his rights as a named beneficiary. These courts have found instead, that the waiver only precludes the ex-spouse from claiming entitlement to the benefits even when not named as the ERISA designee.[10] *See Stalens,* 677 F.Supp. at 509 (providing a general overview of the courts' varying conclusions). The differing outcomes appear to be based on the precise wording of the waiver provisions.

In *Stalens,* the separation agreement indicated that

each party would "retain" his or her separate pension agreements and plans and renounce any interest in the plans of the other. 677 F.Supp.2d at 510. The deceased spouse did not remove the ex-spouse as the designee on the ERISA benefits plan documents. The court found that the ex-spouse did not have to relinquish the benefits because the language in the separation agreement "lack[ed] the specificity which caused other courts to uphold a waiver." *Id.* (quoting *Stiles v. Stiles,* 487 N.E.2d 874, 875 n. 3 (Mass.App.Ct.1986) ("Divorce does not revoke a designation of beneficiary unless the matter is expressly touched upon in the divorce proceedings or the insurance contract so provides.")). Thus, the ex-spouse did not have to waive a right to the ERISA benefits.

***11** In *Langevin v. McMorrow,* the relevant language in the marital divorce agreement provided that the parties

> "waive[d] any right at law or in equity to elect to take under a Last Will made by the other," and "waive[d] ... all and every interest ... which either may now have or may hereafter acquire in or to any real or personal property of the other." Each retained "the right to dispose of his or her property by Will, or otherwise, in such manner as each may in his or her uncontrolled discretion deem proper." Maria also "waive[d] her right to any of [John]'s pension plan." The agreement further provided that each party would "execute ... all ... instruments that may be necessary ... to carry out the provisions" of the agreement.

No. 10–P–1591, 2011 WL 2436748, at *1

(Mass.App.Ct. June 20, 2011). The court found that the agreement permitted the deceased to freely dispose of his property as he saw fit, and nothing in the agreement barred him from "changing (or not changing) his designated beneficiary of the plan, and [the named beneficiary/ex-spouse] was entitled to retain those benefits." *Id* . at *2. The court noted that the language in the agreement stating that "no party 'will claim any interest in the estate of the other,' ... [wa]s not implicated ..., as [the beneficiary] ha[d] not brought a claim against [the deceased's] estate." *Id.*

The language of the waiver provision in the present MSA is easily distinguishable from the language analyzed in either *Staelens* or *Langevin,* and as the *Staelens* court identified, "each [of these] decisions turns on the particular language in either the plan documents or the divorce decree or both." *Staelens,* 677 F.Supp.2d at 508. The MSA's relevant language is as follows:

> Except for the rights provided in this Agreement, *each party hereby relinquishes and releases unto the other* all statutory, contractual, equitable and common law *rights that each may have or in the future may acquire to any property,* real or personal, which the other now owns or may hereafter acquire, *including* but not limited to any future expectancies and *any right,* claim or interest *as a beneficiary* under any life insurance policy, IRA account, *or any other beneficiary designation*

> *made prior to execution of this Agreement,* and each agrees that he or she will, upon request of the other, execute and deliver such releases or assurances as may be desired by the other to indicate, demonstrate or to carry out the release and relinquishment of such interests.

MSA, 6.4(c), ECF. No. 38–2 (emphasis added). The Court finds that this language clearly expresses that Andochick is not entitled to retain the ERISA benefits, in spite of the fact that he remained the named beneficiary at the time of Erika's death.[11] The MSA requires Andochick to waive his right to the ERISA benefits and to relinquish his rights to "the other," or Erika.[12]

***12** The MSA states, in clear terms, that Andochick waives any rights resulting from a "beneficiary designation made prior to execution of this Agreement." The relevant beneficiary designations were made on March 6 and March 16, 2006. *See* Policies, ECF No. 38–1. The MSA was notarized on August 20, 2007, and incorporated into the December 31, 2008 Judgment of Absolute Divorce. The beneficiary designations in question were plainly "made prior to the execution of [the MSA]," and the MSA unquestionably requires Andochick to waive his rights to those benefits.

Significantly, this issue was already decided by the Circuit Court.

> THE COURT: Well, she's waiving her right to be a

> beneficiary under the life insurance policy on his life and he's waiving his right to be one—
>
> MR. BOUQUET: I don't believe that's what it says, Your Honor.
>
> THE COURT: I think it does.

Trial Tr. 44:2–7, Dec. 21, 2011, ECF No. 38–6. The Circuit Court rejected, at least implicitly, the argument Andochick makes here, and this Court agrees. Even if such an implicit determination was not made by the Circuit Court, this Court finds that the language in the MSA requires Andochick to waive his right to the ERISA benefits.

Plaintiff's request for relief under Count II of the Amended Complaint is DENIED, and Count II is DISMISSED with prejudice as it fails to state a legal basis for relief upon which relief can be granted.

**e. Count III: Conversion**

The last Count in Andochick's amended complaint alleges that the Byrds converted and wrongfully retain possession of a BMW belonging to Andochick. Andochick asks the Court to order return of the BMW 645i or award him the fair market value of the automobile in an amount not less than $25,000.00.

The Court finds that this count is properly pled and is not precluded because of the Circuit Court decision. Nor does this count involve the Court in probate administration. Andochick is not claiming that the estate owes him a debt; rather, he alleges that the BMW does not belong to the estate in the first instance.

Nonetheless, when a Court's basis for hearing a claim is established by supplemental jurisdiction, a federal court has discretion to dismiss the supplemental claims when it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Indeed, "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." *See Shanaghan v.. Cahill,* 58 F.3d 106, 109–110 (4th Cir.1995) (citing *Noble v. White,* 996 F.2d 797, 799 (5th Cir.1993)). Factors to consider include "judicial economy, convenience, fairness, and comity." *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988).

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

***13** *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726–727 (1966); *see also Carnegie–Mellon Univ.,* 484 U.S. at 350. Considering the Court's findings as to Counts I and II above, only the conversion count remains. Each of the federal claims over which this Court had original jurisdiction[13] has been dismissed far in advance of trial; thus, the Court finds it appropriate to dismiss the remaining state court count without prejudice.

## IV. Conclusion

For the reasons stated herein, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. Plaintiff's Motion for Summary Judgment is DENIED as moot.

Counts I and II of the Amended Complaint are DISMISSED with prejudice.

Count III is DISMISSED without prejudice.

It is the Court's belief that the administrative actions are complete, and Andochick has been determined to be the proper beneficiary as designated by the plan documents. The plan administrators are directed to pay the ERISA funds to Andochick. In accordance with the Circuit Court's order, Andochick must then waive his right to these funds, distributing them instead to Erika's estate.

An appropriate Order shall issue.

Footnotes

[1] Andochick filed a three-count amended complaint. Count I seeks declaratory judgment that the Byrds lack standing; Count II seeks declaratory judgment that ERISA preempts the Byrds' claims to the plan benefits; and Count III is a claim for conversion of the BMW 645i.

[2] Andochick responded to the Byrds' Status Report and did not contest the authenticity of these documents.

[3] To be clear, the Court does not find this to be the case.

[4] The Fourth Circuit has also commented that "a motion to dismiss should not be converted into one for summary judgment without notice to the parties and without affording to the party against whom summary judgment is sought time for appropriate discovery." *Harrison v. U.S. Postal Serv.,* 840 F.2d 1149, 1152 (4th Cir.1988). If the Court were actually converting this Motion to one for summary judgment, the Court should comply with these procedural requirements. Here, the Court is not converting this motion to one for summary judgment. This portion of the Opinion is only intended to articulate that had such a conversion been necessary, the outcome of the Opinion would have remained the same.

[5] The Court considered these issues once before. *See* Dkt. No. 12 (Order denying the Byrds' Motions to Dismiss without prejudice). The Court finds that these bases for the Byrds' Motion are unavailing, and the Court will dismiss Count II on other legal grounds.

[6] Among other reasons, the fact that the *Kennedy* decision post-dates the Supreme Court's *Boggs v. Boggs* decision indicates that the Supreme Court also did not answer this question in *Boggs*. 520 U.S. 833 (1997). Indeed, in *Boggs* the majority concludes its decision by noting, "[i]t does not matter that respondents have sought to enforce their purported rights only after [the ERISA plan

designee's] benefits were distributed, since those rights are based on the flawed theory that they had an interest in the undistributed benefits." *Boggs v. Boggs,* 520 U.S. 833, 834–35 (1997). Stated another way, even though the procedural setting in *Boggs* was post-disbursement, the legal argument presented was that the party asserting the waiver provisions had a pre-disbursement right to the funds. These are not the facts here, and to the extent that the Byrds also claim they are entitled to the ERISA funds before the funds are distributed by the ERISA plan administrator, both *Boggs* and *Kennedy* foreclose that possibility.

[7] Although the holding in *Stalens* was ultimately based on a different issue than discussed here, the court there at least indicated that permitting a contractual waiver to reach disbursed ERISA benefits would be contrary to the objectives of ERISA. *But see Estate of Kensinger,* 674 F.3d at 138–39 (distinguishing the outcome in *Stalens* from the facts currently before the Court).

[8] In their briefing, the Byrds take the position that some of the money would go to Ms. Byrd individually as a second named beneficiary under the ERISA plan designation form. This is incorrect. The Court has not altered the determination that the proper payee under the ERISA plan documents is as Andochick indicated on the plan documents. Instead, the Court's decision today applies only after Dr. Andochick receives the benefits. Only then does the MSA require that he relinquish his rights. Thus, the

final disposition of the benefits would be to Erika's estate. Ms. Byrd's authority over the funds is only because of her position as an administrator of Erika's estate, not as a second named beneficiary on the ERISA documents.

[9] Andochick argues that the designation of Dr. Andochick as the ERISA-governed beneficiary on the ERISA documents provides the only source for determining Erika's intent. To the contrary, the language of the MSA is the source for determining the parties' intent, and the Circuit Court found that the language in the MSA clearly requires Andochick to waive his claims to the plan benefits.

[10] This is the argument that Andochick makes here.

[11] Andochick argues that if Erika had not wanted him to keep the ERISA proceeds, she should have modified the plan documents. But the opposite could equally be true. That is, if Erika had wanted to express her intent to benefit Andochick with the benefits, she and Andochick could have modified the MSA. As it stands, the language in the agreement is clear. Andochick waived his rights to the ERISA proceeds.

[12] *See supra* note 3 (the rights are released to Erika's estate, not to Ms. Byrd individually).

[13] Based on the pleadings, the Court presumes the conversion claim is valued at $25,000. Because this amount falls short of the amount in controversy requirement necessary to the

exercise federal diversity jurisdiction, the Court finds there are no independent grounds for federal jurisdiction over the conversion claim. *See* 28 U.S.C. § 1332.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**(Alexandria Division)**

| | | |
|---|---|---|
| **SCOTT ANDOCHICK, M.D.** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No.: 1:11cv739 (LOG/JFA)** |
| | ) | |
| **RONALD AND JUNE BYRD, AS CO-ADMINISTRATORS OF THE ESTATE OF ERIKA L. BYRD *et al.*** | ) | |
| | ) | |
| **Defendants.** | ) | |

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**ORDER**

Before the Court are Defendants' Motion to Dismiss (Dkt. No. 39) and Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 45). For the reasons stated in open Court, as well as the reasons provided in the accompanying Memorandum Opinion, the Motion to Dismiss is GRANTED in part, and the Motion for Summary Judgment is DENIED as moot.

May 9, 2012
Alexandria, Virginia

/s/
Liam O'Grady
United States District Judge

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**(Alexandria Division)**

| | | |
|---|---|---|
| **SCOTT ANDOCHICK, M.D.** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No.:** |
| | ) | **1:11cv739** |
| **RONALD AND JUNE BYRD, AS CO-ADMINISTRATORS OF THE ESTATE OF ERIKA L. BYRD *et al.*** | ) | **(LOG/JFA)** |
| | ) | |
| **Defendants.** | ) | |

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**AMENDED COMPLAINT**

COMES NOW Plaintiff Scott Andochick, M.D., by counsel, and for his Amended Complaint against Ronald and June Byrd, as the Co-Administrators of the Estate of Erika L. Byrd, and Ronald Byrd, individually and June Byrd, individually, states as follows:

### I. PARTIES AND JURISDICTION

1. Plaintiff Scott Andochick, M.D. ("Dr. Andochick") is a resident of Maryland.

2. Defendants Ronald and June Byrd, as Co-Administrators of the Estate of Erika L. Byrd ("Co-Administrators"), qualified in Fairfax County

Circuit Court to administer the Estate of Erika L. Byrd on or about April 14, 2011. The Co-Administrators are residents of the Commonwealth of Virginia. The Co-Administrators have made a claim against certain ERISA-governed benefits payable to Dr. Andochick and, without suggesting the Co-Administrators have legal standing to make such a claim, have taken an antagonistic position to Dr. Andochick.

3. Ronald Byrd ("Mr. Bryd") is an individual residing in the Commonwealth of Virginia. Mr. Byrd has made a claim against certain ERISA-governed benefits payable to Dr. Andochick and, without suggesting he has standing to make such a claim, has taken an antagonistic position to Dr. Andochick.

4. June Byrd ("Mrs. Bryd") is an individual residing in the Commonwealth of Virginia. Mrs. Byrd has made a claim against certain ERISA-governed benefits payable to Dr. Andochick and, without suggesting she has standing to make such a claim, has taken an antagonistic position to Dr. Andochick.

5. A portion of this Complaint is based on the application of the Employee Retirement Income Security Act of 1974, and therefore this case arises, in part, under federal law. Accordingly, this Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

6. In addition, there is complete diversity between Dr. Andochick, the Co-Administrators, and Mr. Byrd and Mrs. Byrd (collectively the "Byrds"), and the amount in controversy exceeds $75,000, exclusive of interest and costs. Accordingly, this

Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

## II. FACTS

### A. FACTS RELATED TO ERISA-GOVERNED BENEFITS

7. This case involves a dispute relating to ERISA-governed benefits, a breach of contract claim, and a constructive trust claim with respect to a motor vehicle.

8. Erika L. Byrd ("Erika") was the ex-wife of Dr. Andochick. She was also the daughter of Mr. and Mrs. Byrd, the Co-Administrators of her Estate.

9. On April 10, 2011, Erika passed away at the age of 43.

10. Erika's parents, the Byrds, qualified as the Co-Administrators of her Estate on April 14, 2011.

11. At the time of her death, Erika was an attorney and was partner at Venable LLP.

12. As an attorney at Venable LLP, Erika participated in the Venable LLP Retirement Plan ("401(k) Plan") and obtained insurance through the Venable LLP Life Insurance Plan ("Life Insurance Plan").

13. On or about the time of Erika's death, the 401(k) Plan was valued at $181,231.34 ("401(k) Proceeds").

14. The Life Insurance Policy had benefits payable in the amount of $250,000.00 ("Life Insurance Proceeds").

15. For the purposes of this lawsuit, the ERISA-governed Venable LLP employee benefits total $431,231.34, exclusive of interest and costs.

16. On or about April 26, 2011, either the Co-Administrators and/or the Byrds,[10] contacted the Plan Administrator for Venable LLP's ERISA-governed benefits and made a claim for such benefits.

17. The Co-Administrators and/or the Byrds were advised that, at the time of her death, Erika's sole primary beneficiary of her 401(k) Plan and Life Insurance Plan was her ex-husband, Dr. Andochick.

18. Erika executed the beneficiary designation for her 401(k) Plan on March 16, 2006 and Life Insurance Plan on March 6, 2006 when she first became employed at Venable LLP. Copies of both designations are attached in redacted form collectively as Exhibit 1.

19. At the time of her death, the contingent beneficiary of Erika's 401(k) Plan was Mrs. Byrd.

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[10] It is important to note the distinction between the Co-Administrators of the Estate and the Byrds in their individual capacities. The former is a representational capacity only and requires the Co-Administrators to administer the Estate subject to any and all creditor claims. Throughout this Complaint, the allegations are lodged in the alternative because it is not clear in what role the Co-Administrators or the Byrds have made such claims. There, however, is not an identity of interest between the two and the distinction must be kept in mind.

20. According to the Venable LLP Life Insurance Plan, if Dr. Andochick – as the sole beneficiary of Erika's Life Insurance policy – predeceased Erika, then the Life Insurance Proceeds would be payable to the Byrds in their individual capacities.

21. The Co-Administrators of the Estate, therefore, would never have a claim for entitlement to the 401(k) Proceeds or Life Insurance Proceeds as they would constitute non-probate assets under any scenario or claim of right.

22. The Co-Administrators and/or the Byrds nevertheless claimed entitlement to both the 401(k) Proceeds and Life Insurance Proceeds.

23. The Co-Administrators and/or the Byrds claimed entitlement based upon the Marital Settlement Agreement entered into between Erika and Dr. Andochick on or about August 20, 2007 ("MSA") and incorporated, but not approved, by the Montgomery County Circuit Court of Maryland in a December 31, 2008 Final Decree of Divorce. A copy of the Final Divorce Decree and MSA are attached hereto as Exhibit 2.

24. For purposes of ERISA, the Final Divorce Decree is not a Qualified Domestic Relations Order as that term is defined in 29 U.S.C. § 1056.

25. In addition, the Co-Administrators and/or the Byrds have incorrectly contended that Virginia Code § 20.1-111.1 (automatic revocation of beneficiary designation upon divorce) applied despite the fact that Erika and Dr. Andochick were divorced in Maryland and Maryland has no such statute or common law rule. Neither Dr. Andochick nor the MSA are subject to Virginia Code § 20.1-111.1.

26. The Plan Administrator for Venable LLP also advised Dr. Andochick that he was the named beneficiary of the 401(k) Plan and Life Insurance Plan.

27. The Co-Administrators and/or the Byrds' claim, however, triggered ERISA requirements for the Plan Administrator to make a determination under its Plan documents as to whom the 401(k) Proceeds and Life Insurance Proceeds should be paid.

28. On June 8, 2011, the Plan Administrator for Venable LLP reached its decision and advised the Co-Administrators, the Byrds and Dr. Andochick that the 401(k) Proceeds and Life Insurance Proceeds would be payable to Dr. Andochick as required by ERISA and the ERISA-governed plan documents. A copy of that decision is attached hereto as Exhibit 3.

29. The Co-Administrators and/or the Byrds were given sixty (60) days to administratively appeal that decision. It is not clear whether the Co-Administrators and/or the Byrds have done so or intend to do so.

30. The Co-Administrators and/or the Byrds then made a direct claim to Dr. Andochick and asserted that he was in breach of the MSA in which Dr. Andochick purportedly waived any claim or right to take the 401(k) Proceeds or Life Insurance Proceeds.

31. The Co-Administrators and/or the Byrds demanded that Dr. Andochick sign waivers or renunciations with respect to such benefits and have threatened suit against him.

32. Dr. Andochick maintains that the MSA merely gave Erika the right to change the

beneficiary designation on her ERISA-governed 401(k) Plan and Life Insurance Plan, but that she chose not to do so for various reasons.

33. After execution of the MSA on August 20, 2007, Erika could have changed the beneficiary designation on her ERISA-governed 401(k) Plan and Life Insurance Plan at any time. She did not.

34.. Upon information and belief, Erika would have been advised by either the Plan Administrator or the human resources department at Venable LLP that she could have changed her beneficiary designation on her 401(k) Plan and Life Insurance Plan in the calendar years 2007, 2008, 2009, 2010 and 2011. Despite likely being advised of her right to do so, as permitted by the MSA, Erika elected not to change the beneficiary designation at any point prior to her death.

### B. FACTS RELATED TO INDEPENDENT CLAIMS AGAINST THE ESTATE

35. In addition to the issues related to Erika's ERISA-governed 401(k) Plan and Life Insurance Plan, there are other controversies between Dr. Andochick and the Co-Administrators of the Estate.

36. Those issues involve a claim for the return of a BMW 645i vehicle valued in excess of $25,000.00. While such a claim is not premised on application of federal law, they independently meet the threshold for diversity jurisdiction under 28 U.S.C. § 1332 and this Court has original jurisdiction to hear the claim.

**Returning the BMW or Paying Fair Market Value**

37. Pursuant to the MSA, Dr. Andochick was required to make lease payments on a BMW 645i that was registered in his name in Maryland, but for which Erika was to be given exclusive use during the term of the lease.

38. At lease expiration, however, Dr. Andochick purchased the vehicle through a loan from BMW Financial Services, Inc. in August 2008.

39. Dr. Andochick continues to pay the monthly payments on the loan.

40. Unbeknownst to Dr. Andochick, and despite BMW Financial Services, Inc.'s lien on the vehicle in Maryland, Erika was able to register the vehicle in her sole name and without any reference to BMW Financial Services, Inc.'s lien, through the Virginia Department of Motor Vehicles.

41. Despite demand by Dr. Andochick, the Co-Administrators have refused to return the BMW 645i and, upon information and belief, the Byrds now use the vehicle.

**C. FACTS RELATED TO THE MARYLAND STATE COURT ACTION**

***Pertinent Procedural History***

42. On September 30, 2011, Dr. Andochick filed a motion for partial summary judgment as to Counts I and II of the Complaint (*see* Dkt No. 18).

43. The oral argument for the motion for partial summary judgment was set for October 21, 2011 (*see* Dkt No. 20).

44. On October 14, 2011, the Byrds filed their brief in opposition to Dr. Andochick's motion for partial summary judgment (*see* Dkt. No. 24).

45. On October 17, 2011, four days before the scheduled hearing, this Court entered an Order granting Defendant Byrds' motion to stay these proceedings pending the Maryland state court's decision in *June Elizabeth Byrd and Ronald Duane Byrd v. Scott Andochick*, (Montgomery County, Maryland Cir. Ct.; Family Law No. 68769) ("Maryland State Court Action") (*see* Dkt. No. 25). The Order is attached as Exhibit 4.

46. On November 17, 2011, Dr. Andochick appealed this Court's Order granting the stay (*see* Dkt No. 27).

47. On December 21, 2011, the Maryland State Court Judge, the Honorable Thomas L. Craven presided over the contempt hearing in the Maryland State Court Action. Judge Craven would not take up, and did not rule upon, the ERISA preemption issue, but instead left that determination to this Court. The order entered in the Maryland State Court Action is attached as Exhibit 5.

48. On January 26, 2012, Dr. Andochick filed a Motion to Lift Stay (*see* Dkt. No. 30).

49. At the January 28, 2012 Status Conference, the Honorable Liam O'Grady lifted the stay, and an order reflecting new pleading deadlines was entered (*see* Dkt. No. 36).

50. Also, on January 28, 2012, the parties filed an Agreement of Voluntary Dismissal in the Fourth Circuit Court of Appeals. An order

dismissing the appeal was entered on January 30, 2012.

***The December 21, 2011 Contempt Hearing in the Maryland State Court Action***

51. The Maryland Circuit Court's Order, entered December 28, 2011 reflects that the state court did **not** rule on the ERISA preemption issue. *See* Exhibit 5. The order is completely silent on that issue. *Id.*

52. That silence is explained in the transcript of the contempt hearing. The Maryland judge limited the issue before him to whether the Court could enforce by contempt the court's order and incorporated marital settlement agreement in favor of the Estate of Erika Byrd and her parents individually. *See* Transcript, attached as Exhibit 6.

53. The Maryland Circuit Court did not resolve the ERISA preemption issue, but repeatedly deflected the resolution of that issue to the federal court.

54. The transcript does not support a finding that the Maryland state court included ERISA preemption issues in its resolution of the issues before that court.

55. In sum, the Maryland Circuit Court exercised its contempt powers within a Maryland family and procedural law context.

56. As is evident from the transcript attached as Exhibit 6 and the order Exhibit 5, it was not necessary for the Maryland state court in a contempt hearing to make any determination about ERISA preemption in order to make its ruling.

57. The only determination the Maryland state court made concerning ERISA preemption was that this issue was not before the court. For example:

> The Court: Well, I'm not concerned about Venable and a federal court says he can do or not do to make Venable do something. But certainly, he can do what this agreement said. Exhibit 6, 33:2–4.
>
> . . . .
>
> The Court: Still back to why I can't order him to do what he agreed to do in this agreement. Exhibit 6, 33:16–17.
>
> . . . .
>
> Mr. Bouquet:[11] *Kennedy* says you can't tamper with ERISA plan. It is what it is. And it preempts …
>
> The Court: I am not being asked to, I don't think.
>
> Mr. Bouquet: Well, but …
>
> The Court: I am being asked to have your client sign something that the

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[11] Mr. Bouquet represented Dr. Andochick in the Maryland contempt hearing.

> deceased would have had the right to make him sign. Exhibit 6, 39:16–17.

58. The Maryland judge indicated that compelling Dr. Andochick to "sign something" did not reach the ERISA preemption issue.

59. In response to this question about the Estate's rights to enforce the contract or the order, Mr. Nolan (counsel for the Byrds) argued that the answer was self-evident – in other words, the estate could force Dr. Andochick to sign additional documents. Exhibit 6, 23:8. To which the court replied:

> The Court: It may not get to the bottom line. There may be some reason why under ERISA the administrator doesn't have to honor that waiver or something, but that's not before me, I don't think. What's before me is can I make him sign the paper, not whether the paper does anybody any good once it is signed, in my view, at least at this point. Exhibit 6, 23:9–14.

60. The Maryland Circuit Court indicated that ordering Dr. Andochick to "sign the paper" may have no legal significance when ultimately confronted with ERISA preemption. For example:

> Mr. Bouquet: My client signing that [waiver] is going to have no effect.

> The Court: Well, that may be. Exhibit 6, 39:23–25.

61. The Maryland Court did not conflate the state based contempt issues with any ERISA-related issue. Instead, the Maryland Court limited its powers to asserting its contempt power, not extending it to adjudicate the ERISA preemption issue. For example:

> * Mr. Renehan:[12] [N]ow, the benefits can be paid and then they may be able to maintain an action after the benefits paid, but I don't think they have the right under ERISA or under the agreement to ask the Court to do what they're asking to do today.
>
> The Court: Well, all they're asking now is to be able to enforce by contempt his failure to sign a waiver, right? Exhibit 6, 17:17–23.
>
> * The Court: What did the agreement say that he did, was he waiving anything?
>
> ….
>
> Mr. Renehan: [S]o we don't think there's anything that says my client

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[12] Mr. Renehan represented Dr. Andochick in the Maryland contempt hearing.

> has to sign a form, which may or may not be available through the pension administrator, for him to waive and to take right under this plan. And, in fact, I think the plan provides that if he is going to sign a waiver, he can designate –
>
> The Court: Well, I'm not talking about the plan right now. We're not there yet.
>
> Mr. Renehan: I understand.
>
> The Court: We're at the point where someone's asking me to sign something, to require your client to sign something that at least arguably he had agreed to do and hadn't yet done. Exhibit 6, 18:12–23.

62. Because the state court action was a contempt hearing in a family law setting, the issue, at least as far as the Maryland Circuit Court was concerned, was not ERISA, but whether Erika and by extension the Byrds could enforce the Maryland order and the marital settlement agreement by contempt. For example:

> The Court: Well, I don't know. Is there a case where the moving party is an estate standing in the stead of a deceased party to a divorce? Is there any case anywhere? I don't

know whether there is or not. But, is there – [i]s there any case that says that contempt proceedings may be instituted by someone in the position of your client? Exhibit 6, 21:19–25.

Mr. Nolan:[13] I don't have a case right now at my fingertips, Your Honor. I'd be happy to get you one.

The Court: Well, that's what they are, aren't they, trying to do. Do either of you have a case that speaks to the issue?

Mr. Nolan: And enforce the agreement, Your Honor.

The Court: Well, do either of you have a case that talks about the enforcing party being the estate of a deceased spouse, that's what I'm asking. I don't know if it's pivotal or not, but I'm interested in knowing whether there is such –

Mr. Nolan: Well, they stand in her shoes, Your Honor

The Court: I understand your point, and I think it's a good point. But my question isn't that. It's is there a

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[13] Mr. Nolan was counsel for the Byrds before the Maryland Circuit Court.

> case that talks about a contempt proceeding in a divorce action, which this is, to hold somebody in contempt? Exhibit 6, 22:13–16.
>
> ….
>
> Mr. Nolan: I don't think there's any question that, first of all, if Erika were alive today, she could sue on that contract. She could move to, I mean the language –
>
> The Court: Well. I understand that. Can she get a court to hold someone in contempt?
>
> The Court: Okay, do either of you have a case that speaks to that question, that whether this estate can enforce that contract or that order? Exhibit 6, 23:5–7.

63. Whether the contempt order would be preempted by ERISA or not, was not decided by the state court.

64. What was before the state court, as expressly stated, was whether the court could make Dr. Andochick sign the paper (i.e., the waiver) "not whether the paper does anybody any good once it is signed." *See* Exhibit 6, 23:9–14.

65. Therefore, the state court focused on the contractual provisions of the marital separation agreement and the decedent's rights under the marital separation agreement:

The Court: Well, what's the point of having a separation agreement if the person who's favor it is written as to a certain item can't enforce it –

Mr. Renehan: Well, she could have.

The Court: -- by way of contempt?

Mr. Renehan: Well, she could have enforced it by very simply having changed the beneficiary form.

The Court: Well, she could do that too, but couldn't she under the terms of that agreement also require him to waive any rights he had in that.

Mr. Renehan: No, she couldn't have asked for a further instrument, a further agreement because she had solely within her right to change beneficiary without intervention from him.

The Court: Well, whether she did or not, if she thought she needed something that he had agreed to do and it's incorporated in a court's order, doesn't she have a right to ask the court to enforce that order? *See* Exhibit 6, 19:4–21.

66. Accordingly, the Maryland Circuit Court's ruling was not grounded upon federal law, or any considerations of ERISA preemption, but rather embraced the state court's authority (as the court saw it) to enforce its own orders and any marital separation agreement incorporated within the order, as is evidenced by:

> * Mr. Renehan: [I]f she had come in, she was still alive and she came into this Court and said, Your Honor, I want former husband under this paragraph to sign some unknown document to waive any interest in this pension plan. And the Court said to her, why do you need that, ma'am because –
>
> The Court: I wouldn't have said it to her. I would have said if the agreement requires it, I'm going to order it. Exhibit 6, 19:24–20:5.

67. Following suit, the Maryland judge ordered Dr. Andochick to sign the waiver, as a vindication of sorts of state power and because "the agreement requires it." Exhibit 6, 20:5.

68. But this ruling – as far as the Maryland judge was concerned – did not preclude a subsequent determination by this court whether the judge's order to sign the waiver will withstand ERISA preemption.

69. The Maryland judge expressed that his order "may not get to the bottom line." Dr.

Andochick is therefore seeking that bottom line determination on ERISA preemption.

**COUNT I – DECLARATORY JUDGMENT ACTION – LACK OF STANDING BY THE CO-ADMINISTRATORS AND THE BYRDS**

70. The allegations set forth in paragraphs 1–69 are incorporated herein.

71. While the Co-Administrators and the Byrds have maintained a claim to entitlement to the 401(k) Proceeds and Life Insurance Proceeds, in part, through their interpretation of the MSA, it is clear that neither the Co-Administrators of the Estate nor the Byrds have legal standing to seek enforcement of the MSA.

72. The Co-Administrators lack standing to enforce the provisions of the MSA because the Estate would accrue no benefits if the Co-Administrators' interpretation of the MSA were correct. The 401(k) Proceeds and Life Insurance Proceeds are non-probate assets and do not inure to the benefit of the Estate. Without any monetary benefit, the Estate has no legal standing to demand enforcement of the Co-Administrators' interpretation of the MSA.

73. The Byrds have no standing to enforce their interpretation of the MSA because they are not third-party beneficiaries of the MSA under Maryland law.

74. Accordingly, neither the Co-Administrators nor the Byrds have legal standing to assert any claims under the MSA and this Court ought to declare such.

**COUNT II – DECLARATORY JUDGMENT ACTION – ERISA PREEMPTION OF THE CO-ADMINISTRATORS AND BYRDS' CLAIM**

75. The allegations set forth in paragraphs 1–74 are incorporated herein.

76. For the reasons set forth in the June 8, 2011 decision by the Plan Administrator for Venable LLP, it is clear that neither the Co-Administrators nor the Byrds have any claim to the ERISA-governed 401(k) Proceeds or Life Insurance Proceeds and Dr. Andochick incorporates those reasons expressly herein.

77. Both *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285 (2009) and *Boyd v. Metropolitan Life Insurance Company*, 636 F.3d 138 (4th Cir. 2011) control any claims that the Co-Administrators or the Byrds have as to the Plan Administrator for Venable.

78. While the United States Supreme Court reserved ruling on whether post-payment claims of ERISA-governed benefits could be recovered in this precise scenario in Footnote 10 of the opinion, it is clear that such claims, assuming the MSA were susceptible to such an interpretation, are nonetheless preempted by various provisions of ERISA.

79. Additionally, even if the provision of Virginia Code § 20.1-111.1 did apply – which it does not – the automatic revocation of beneficiary designation upon divorce, which either the Co-Administrators and/or the Byrds rely upon is preempted for the reasons set forth in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

80. Moreover, the Co-Administrators and/or the Byrds' reliance on Virginia Code § 20.1-111.1, is misplaced as the provisions of that code section could not apply to a divorce decree entered under Maryland law which contains no analogous provision.

81. Accordingly, this Court should declare that ERISA preempts any claim that either the Co-Administrators and/or Byrds have under the MSA (assuming they have standing) and that either ERISA preempts application of Virginia Code § 20.1-111.1 or that it is inapplicable to the Montgomery County Circuit Court divorce decree.

**COUNT III – CONVERSION OF BMW 645i**

94. The allegations set forth in paragraphs 1–69 are incorporated herein.

95. By whatever means, Erika was able to obtain title to the BMW 645i through the Department of Motor Vehicles in Virginia.

96. Erika had no right or entitlement to do so under the provisions of the MSA or any additional agreements with Dr. Andochick.

97. The Co-Administrators of the Estate wrongfully retain possession of the BMW 645i while Dr. Andochick continues to make monthly payments on the vehicle.

98. The Court ought to order return of the BMW 645i to Dr. Andochick or award him the fair market value of the BMW 645i in an amount not less than $25,000.00.

WHERFORE, for the foregoing reasons, Plaintiff Scott Andochick, by counsel, requests entry of judgment as follows:

1. A declaration that neither the Co-Administrators nor the Byrds have legal standing to make any claims to the 401(k) Proceeds or Life Insurance Proceeds;

2. a declaration that ERISA preempts any claims by the Co-Administrators or the Byrds against Dr. Andochick for the 401(k) Proceeds or Life Insurance Proceeds;

3. a declaration that ERISA preempts application of Virginia Code § 20.1-111.1 or that it is otherwise inapplicable;

4. an Order requiring the Co-Administrators to return the BMW 645i or pay the fair market value to Dr. Andochick; and

5. such other relief as this Court deems just and proper.

**PLAINTIFF DEMANDS A JURY ON ALL ISSUES TRIABLE BY A JURY**.

Dated: February 6, 2012 Respectfully submitted,

**SCOTT ANDOCHICK, M.D.**
**By Counsel**

**PETERSON SAYLOR, PLC**

/s/ George O. Peterson

**George O. Peterson** VSB # 44435
gpeterson@petersonsaylor.com
**Tania M. L. Saylor** VSB # 65904
tsaylor@petersonsaylor.com
**Michael T. Marr** VSB # 48536
4163 Chain Bridge Road
Fairfax, Virginia 22030
703.225.3620
703.225.3621 (Facsimile)
*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of February, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send notification of such filing to the following:

Karl W. Pilger, Esquire
Boring & Pilger, P.C.
307 Maple Avenue West, Suite D
Vienna, VA 22180-4307
Phone : 703-281-2161
Fax : 703-281-9464
kpilger@boringandpilger.com
Counsel for Defendants

/s/ George O. Peterson

George O. Peterson VSB # 44435
mmarr@petersonsaylor.com
PETERSON SAYLOR, PLC
4163 Chain Bridge Road
Fairfax, Virginia 22030
703.225.3620
703.225.3621 (Facsimile)
*Counsel for Plaintiff*