

IN THE SUPREME COURT OF TEXAS

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PATSY KEEN,

Petitioner,

v.

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATE  
OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER,

Respondent.

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ON APPEAL FROM THE TEXAS COURT OF APPEALS, WACO, TEXAS

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BRIEF FOR THE SECRETARY OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR, AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR THE SECRETARY OF LABOR, UNITED STATES  
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ISSUE PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., preempts a Texas statute that terminates a designation of a spouse as beneficiary of a pension plan upon divorce absent redesignation in the divorce decree or thereafter. Egelhoff v. Egelhoff, 121 S. Ct. 1322 (2001). The question presented is whether, as a matter of federal common law, either the Texas rule of constructive waiver or one recognizing actual waiver under a particular divorce decree should be applied to petitioner, who is designated as the primary beneficiary of pension benefits under her deceased ex-husband's ERISA pension plans.

## INTEREST OF THE SECRETARY OF LABOR

As the federal agency with primary enforcement authority for Title I of ERISA, the Department of Labor has a significant interest in how ERISA is construed to provide for beneficiary determinations under an ERISA plan. In the interest of giving faithful adherence to the language and purposes of the statute, the Secretary of Labor argued for ERISA preemption of state redesignation rules and against application of a common law waiver rule in Egelhoff, both before the United States Supreme Court and the Washington Supreme Court. Although the Supreme Court in Egelhoff settled the preemption question, it did not directly address whether the same result -- revocation upon divorce of an ex-spouse's designation as a plan beneficiary -- may be achieved under federal common law, either by a wholesale adoption of the state redesignation rule or by finding and giving effect to a waiver by the ex-spouse in her beneficiary interest in the divorce proceeding. Because the Secretary believes that application of federal common law under either rationale conflicts with the statutory scheme and the reasoning of Egelhoff, and because there is some disagreement in the courts on these issues, the Secretary submits this amicus brief to help this Court decide this recurring issue.

## STATEMENT OF THE CASE

Francis (Frank) Weaver and petitioner Patsy Keen were married from 1967 until 1982. During some of this time, Frank was employed at Baylor College of Medicine, which, as an employee benefit, made contributions to two Teacher's Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF) annuity contracts in Frank's name. Weaver v. Keen, 43 S.W.3d 537, 539 (Tex. Ct. App. 2001). These contracts are ERISA-governed pension plans. Frank named Patsy the primary beneficiary, and his mother, Rita Weaver, the contingent beneficiary of a death benefit under the plans. Ibid. In 1982 Frank and Patsy divorced, and as part of the property settlement and dissolution decree Frank was granted the annuity contracts as his "sole and separate property." Ibid.

Frank married respondent Diana Weaver in 1983 and remained married to her until his death in 1995. 43 S.W.3d at 539. At no time, however, did he change his designation of beneficiary on the annuity contracts. Thus, at the time of Frank's death, Patsy remained designated as the primary beneficiary on the annuities. Ibid. Relying on this designation, the plan paid part of the death benefits to Patsy. Ibid.

Rita Weaver, Frank's mother, brought suit as contingent beneficiary against Patsy and the plan administrators to recover the benefits already paid and to prevent the payment of the



remaining death benefits. When Rita died shortly after filing the suit, the second wife, Diana, as executrix of both Frank's and Rita's estates, continued the suit, which proceeded to bench trial. 43 S.W.3d at 539. The trial judge held that Patsy, as designated beneficiary, was entitled to the benefits, and awarded her benefits under both contracts. Ibid.

The Texas appellate court reversed, holding that, under federal common law, the divorce automatically terminated Patsy's designation as the primary beneficiary under the annuity contracts. 43 S.W.3d at 544. In fashioning this federal common law rule, the court noted that it was adopting, without modification, a Texas redesignation statute, which it had held was itself preempted. Id. at 541, 544. As an alternative ground for its ruling, the court reasoned that the property settlement agreement signed by Patsy and approved by the divorce court waived her rights under the plan, even if a divorce does not automatically waive such rights. Id. at 543-544. The court of appeals therefore held that the contingent beneficiary under the annuity contracts, Rita, was entitled to the benefits under the plans, and thus awarded the proceeds to Diana as executrix of Rita's estate. Id. at 544.

The appeals court reaffirmed these holdings in an opinion denying a motion for rehearing that was filed after the Supreme Court granted review in Egelhoff. 43 S.W.3d at 544-546. The

court stated that Egelhoff, which by that time had been decided, "does not affect the analysis applicable to this case" because the Texas court was fashioning and applying a federal common law rule, rather than directly applying the Texas redesignation provision. Id. at 544.

#### SUMMARY OF THE ARGUMENT

ERISA requires that employee benefit plans be administered "in accordance with the documents and instruments governing the plan," 29 U.S.C. 1104(a)(1)(D), and specifically defines beneficiaries as those "designated by a participant or by the terms of an employee benefit plan." 29 U.S.C. 1002(8). Moreover, ERISA prohibits pension plan benefits from being "assigned or alienated" from participants and their designated beneficiaries except in specific enumerated situations inapplicable here. Because ERISA itself provides the applicable rules governing payments to beneficiaries, it leaves no gap for federal common law to fill.

The decision below is therefore incorrect. Whether under a theory of constructive waiver as embodied in the Texas redesignation law or under a rule that allows particular divorce decrees to defeat a designated beneficiary's pension rights, the court of appeals' application of federal common law is inconsistent with the scheme enacted by Congress. So long as the designation of Patsy was never revoked according to the

method provided in the plans, it remains valid under ERISA and must be given effect, and federal common law cannot be invoked to render it invalid.

This conclusion is strongly supported by the reasoning of the United States Supreme Court in its recent decision in Egelhoff. In that case, the Court held that ERISA preempts a Washington State redesignation law; like the Texas law adopted as federal common law here, it automatically revoked a spousal designation upon dissolution of a marriage. The Court reasoned that a state law that requires plan benefits to be paid to anyone other than the beneficiary as specified in the plan documents conflicts with ERISA and is thus preempted. Given this rationale, the Washington Supreme Court dismissed the case on remand, although the defendants there were making the same waiver argument that respondent Diana Weaver makes here. Likewise, this Court in Barnett v. Barnett, No. 99-0313, 2000 WL 33651828 (Dec. 6, 2001), recently held that a preempted action for "fraud on the community" could not be recast as federal common law to defeat a valid beneficiary designation under ERISA. For similar reasons, this Court should reject the argument that the valid designation of Patsy Keen under the ERISA-governed annuity contracts is overridden, as a matter of federal common law, either by the fact of her divorce or by the terms of her divorce decree.

## ARGUMENT

THE TERMS OF ERISA AND THE PENSION PLAN DOCUMENTS THEMSELVES GOVERN AND CLEARLY PROVIDE THAT BENEFITS MUST BE PAID TO THE DESIGNATED BENEFICIARY, PATSY KEEN

ERISA is a "comprehensive statute designed to promote the interest of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). To this end, ERISA provides detailed standards regarding the rights of plan participants and beneficiaries, and the obligations of plans with respect to the payment of benefits. For instance, under ERISA, "beneficiary" is defined as the "person designated by a participant, or by the terms of an employee benefit plan."<sup>1</sup> 29 U.S.C. 1002(8). Moreover, ERISA provides that, unless inconsistent with other ERISA provisions, plans are to be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D). Additionally, ERISA contains an anti-alienation provision that, subject to specific, limited exceptions, prohibits pension plans from "assign[ing]" or "alienat[ing]" pension benefits. 29 U.S.C. 1056(d)(1). This provision, applicable only to pension

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<sup>1</sup> The "participant" under ERISA is "any employee or former employee of an employer, . . . who is or may [be] eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employers . . . or whose beneficiaries may be eligible to receive any such benefit[s]." 29 U.S.C. 1002(7). Accordingly, Frank Weaver was the participant in the pension plans, and Patsy Keen, the person he designated in accordance with the terms of those plans, see p. 3, supra, was his beneficiary.

plans, is designed "to safeguard a stream of income for pensioners (and their dependents)" by ensuring that pension benefits are not diverted to others. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990); see also H.R. Rep. No. 807, 93d Cong., 2d Sess. 67-68 (1974).

These provisions establish that Congress plainly contemplated in ERISA itself that the plan documents setting forth the "terms of [the] employee benefit plan," 29 U.S.C. 1002(8), and the participant's beneficiary designation would determine whether a person was entitled to receive benefits as a beneficiary under the plan, and that pension administrators would not apply other law to "assign[]" or "alienat[e]" the beneficiary's pension benefits. 29 U.S.C. 1056(d)(1). The determination of who is a beneficiary is thus not to be decided by reference to state family or estate law, whether directly or as a matter of federal common law.

Significantly, ERISA deviates from the designated-beneficiary rule in a few specified circumstances. However, where Congress intended plan fiduciaries to look beyond the participant's beneficiary designation to determine the proper recipient of plan benefits, it expressly so provided. Thus, under one of the two exceptions to ERISA's anti-alienation provision applicable to pensions, the plan must pay an "alternate payee," rather than the designated beneficiary, in

accordance with a state "domestic relations order" if the order is submitted to the plan and found to meet ERISA's detailed requirements for a "qualified domestic relations order" (QDRO).<sup>2</sup> 29 U.S.C. 1056(d)(3)(A); see also Boggs v. Boggs, 520 U.S. 833, 846-847 (1997); Guidry, 493 U.S. at 376. If a domestic relations order meeting the requirements of Section 206(d)(3) is determined by a plan fiduciary to be "qualified," then the payee under the QDRO becomes a beneficiary, whether or not otherwise designated by a participant. 29 U.S.C. 1056(d)(3)(J), (K).

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<sup>2</sup> The QDRO exception was added by amendment to the Act in 1984. See H.R. Rep. No. 655, 98th Cong., 2d Sess., pt. 1, at 39-40 (1984). ERISA defines a "domestic relations order" as a judgment, decree, or order that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant . . . made pursuant to a State domestic relations law." 29 U.S.C. 1056(d)(3)(B)(ii). A "qualified domestic relations order" is defined as a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," 29 U.S.C. 1056(d)(3)(B)(i)(I), and that meets certain substantive requirements spelled out in 29 U.S.C. 1056(d)(3)(C) and (D). See also 29 U.S.C. 1056(d)(3)(B)(i)(II).

The other exception to ERISA's anti-alienation provision, which has no applicability here, allows offsets to a participant's benefits if the participant has committed a fiduciary breach and the offset is made pursuant to a criminal conviction, court order or settlement. 29 U.S.C. 1056(d)(4). In addition, spouses who are beneficiaries are permitted in some circumstances to waive their portion of a joint and survivor annuity. 29 U.S.C. 1055(c)(1)(A); see H.R. Rep. No. 655, supra, at 28. Diana Weaver does not claim that she is entitled to a surviving spouse annuity.

Although ERISA thus accommodates state domestic relations orders, the orders are not self-executing in their effect on ERISA pension plans. The determination whether a state domestic relations order meets the requirements of a QDRO rests with the plan administrator and benefits are not provided to the alternate payee of pension plan benefits until the order is determined to be qualified. 29 U.S.C. 1056(d)(3)(G), (H). The QDRO provisions in Section 206(d)(3) thus confirm that the effect of divorce on ERISA beneficiary designations is a matter addressed expressly in ERISA. Cf. Boggs, 520 U.S. at 854 ("[w]hen Congress has chosen to depart from this framework, it has done so in a careful and limited manner").

The annuity contracts in this case provided that death benefits were to be paid to the "[b]eneficiary . . . as designated by the [p]articipant in the application," and further provided that the "[p]articipant may designate or change the beneficiary by giving written notice to [the plan administrator]." Plan Docs. ¶ 9; see also id. ¶ 18. Frank Weaver designated his first wife, Patsy, as the primary beneficiary and never changed that designation by written notice to the plan administrator or otherwise. Moreover, the settlement agreement does not qualify as a QDRO because, among other deficiencies, it does not specifically identify an alternate payee on Frank's death, but instead merely makes Frank

Weaver the sole owner of the annuities.<sup>3</sup> In any event, the estate does not claim to have sought a QDRO. Thus, creating federal common law that awards benefits pursuant to a divorce decree, but in derogation of the plan documents, would "reduce the QDRO provisions to a meaningless footnote." Metropolitan Life Ins. Co. v. Pettit, 164 F.3d 857, 864 (4th Cir. 1998). Because it is clear under ERISA and the governing plan documents that Patsy is entitled to the benefits, there is simply no gap here occasioning the need to create federal common law. See Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) ("[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute").

A number of cases have held that federal common law may be applied to trump a designated beneficiary of a pension plan, as the court below emphasized. Weaver v. King, 43 S.W.3d 537, 542

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<sup>3</sup> ERISA defines "alternate payee" as "any spouse, former spouse, child, or other dependent of a participant" who is named in a domestic relations order to receive all or some benefits under a plan "with respect to such participant." 29 U.S.C. 1056(d)(3)(K). Accordingly, even if the divorce settlement here were read as assigning the death benefits in Frank Weaver's annuity contracts to himself (to be passed through his estate), see p. 17 & note 6, infra, it would not meet the "alternate payee" requirement to establish a QDRO. (Nor would a designation of Rita Weaver, which was not made in any event, have qualified unless she were a dependent of her son Frank.)



(Tex. Ct. App. 2001).<sup>4</sup> See e.g., Estate of Altobelli v. IBM Corp., 77 F.3d 78, 81 (4th Cir. 1996) (giving effect to domestic relations order by construing it as a waiver of pension benefits); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278-279 (7th Cir.) (recognizing federal common law waiver in pension plan context but holding that language in divorce decree was not sufficiently express to constitute waiver) (en banc), cert. denied, 498 U.S. 820 (1990); Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989) (same in context of profit-sharing plan). Because ERISA itself provides the applicable rules governing payments to

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<sup>4</sup> Similarly, courts have frequently considered the effect of divorce decrees on life insurance policies issued under ERISA welfare plans. Compare Metropolitan Life Ins. Co. v. Marsh, 119 F.3d 415, 421 (6th Cir. 1997) (rejecting application of federal common law and holding that plan administrators are to follow plan documents to determine beneficiary under life insurance policy but recognizing divorce decree as QDRO); and Pettit, 164 F.3d at 864 n.7 (in life insurance context, rejecting federal common law theory to give effect to divorce decree that does not qualify as QDRO), with Manning v. Hayes, 212 F.3d 866 (5th Cir. 2000) (rejecting application of Texas redesignation statute to automatically revoke rights on divorce but holding that a former spouse may waive her interest in life insurance proceeds where her waiver is explicit, voluntary and in good faith); Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994) (federal common law waiver principles applicable in life insurance context), cert. denied, 513 U.S. 1081 (1995); cf. TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 699 (9th Cir. 2001) (remanding to district court for determination of whether application of California's constructive trust provisions to life insurance proceeds survives Egelhoff). These cases are not directly on point here, however, because they do not involve pension plans but instead involve welfare plans, to which ERISA's anti-alienation provision does not apply.

beneficiaries, these courts' recognition of federal common law is misguided; ERISA simply leaves no room for a judge-made creation of additional special ERISA rules in derogation of existing rules expressly provided by the statute. See McMillan v. Parrott, 913 F.2d 310, 310-312 (6th Cir. 1990) (rejecting a federal common law of waiver in this context and holding that written designation controls).

Moreover, whatever the viability of decisions applying federal common law in this context before the Supreme Court's decision in Egelhoff v. Egelhoff, 121 S. Ct. 1322 (2001), they cannot withstand scrutiny after Egelhoff. Egelhoff involved a contest for life insurance proceeds and pension benefits under two employee benefit plans between a decedent's divorced spouse, who was the designated beneficiary under both plans, and his children through a previous marriage, who were the decedent's statutory heirs under state law. Id. at 1326. The United States Supreme Court held that ERISA preempts a Washington state law that operated, like the Texas law adopted as federal common law by the appellate court here, to automatically revoke a spousal designation upon dissolution of the marriage. Id. at 1326, 1330.

Although the Supreme Court in Egelhoff decided only the preemption issue, the Court's reasoning clearly undercuts the argument made here that courts may apply federal common law to

give effect to presumptive or explicit waivers by divorcing spouses where the participant had not changed beneficiaries. For instance, the Court pointed out that ERISA specifies that plan administrators look to the plan documents to determine the appropriate beneficiary. 121 S. Ct. at 1329. The Court concluded that any state law that requires a plan benefit be paid to anyone else conflicts with ERISA and accordingly is preempted. Id. at 1329 n.4.

In so holding, the Court rejected the argument, advocated there by the respondents and the dissent, see 121 S. Ct. at 1331-1332, that "one c[ould] escape the conflict between the plan documents (which require making payments to the named beneficiary) and the statute (which requires making payments to someone else) by calling the statute an 'invalidation' of the designation of the named beneficiary, and by observing that the plan documents are silent on whether 'invalidation' is to occur upon divorce." Id. at 1328 n.1. The Court found further support for preemption of such state laws in the fact that the payment of benefits is a central matter of plan administration, and one on which ERISA sought national uniformity. Id. at 1327-1329 (citing 29 U.S.C. 1002(8), 1102(b)(4), 1104(a)(1)(D)); see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995) (the designation of beneficiaries and the payment of benefits are two areas in

which Congress, through ERISA, sought "to avoid a multiplicity of [state] regulation in order to permit the nationally uniform administration of employee benefit plans").

Like Diana Weaver in this case, the Egelhoff children made the same common-law waiver argument on remand to the Washington Supreme Court. That court dismissed the case without comment, but presumably agreed with the Secretary's argument that preemption of the state law cannot be so easily circumvented through adoption of the preempted (and conflicting) state law as federal common law.<sup>5</sup>

Egelhoff thus all but forecloses resort to federal common law in this context and instead strongly bolsters what the language of ERISA provides: plan administrators are to follow plan documents to determine beneficiary status under an ERISA-governed pension plan. In light of Egelhoff's rationale, to allow an undesignated party to claim benefits by recasting

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<sup>5</sup> While the application of federal common law does not, as theoretical matter, pose the same threat to national uniformity as does the non-preemption of state law, this case illustrates that, practically speaking, there may be no difference. Here, the Texas appeals court adopted as federal common law the Texas statute, without modification. Another court may be expected to adopt its State's law, which may differ from the Texas law in material respects. In this way, there could be as many versions of federal common law as there are courts deciding the issue, at least until the United States Supreme Court settles on a single version. This problem of non-uniformity, moreover, would be compounded if a federal common law of waiver that looks to the intent of the parties as reflected in individual divorce decrees were to be adopted.

preempted state law as federal common law would create a gaping hole in a comprehensive scheme that Congress intended to be controlled by written designations or written instructions in plan documents. The appellate court's conclusion that a divorce automatically revokes a spouse's designation is therefore contrary to ERISA.

Furthermore it is no more sensible or consistent with ERISA to fashion a federal common law rule that would allow particular divorce decrees or other such agreements to defeat a designated beneficiary's pension rights. Given ERISA's requirements that plans follow their own beneficiary-designation requirements, a purported waiver by the parties should not be given effect if they have not obtained a QDRO or if one of ERISA's other express provisions such as those providing for a spousal annuity and allowing waiver of that interest, does not apply. 29 U.S.C. 1055(c)(1)(A). Additionally, application of such a federal common-law waiver rule to pension plans would conflict with ERISA's anti-alienation provision by "assign[ing]" or "alienat[ing]" pension benefits away from the beneficiary, i.e., the "person designated by [the] participant or by the terms of [the] employee benefit plan." 29 U.S.C. 1002(8), 1056(d)(1); see Boggs, 520 U.S. at 851-852 (relying, in part, on anti-alienation provision to hold state community-property law preempted by ERISA).

Although there is some appeal to honoring a clearly expressed waiver, it is more important to maintain ERISA's bright-line anti-alienation and beneficiary-designation rules. Under these rules, redesignations may easily be accomplished according to the plan terms, if that is what the participant wants, but cannot otherwise be defeated. Here, in any event, it is far from clear what the parties intended should happen to the annuities on Frank's death. The agreement between Frank Weaver and Patsy Keen makes the disposition of the annuities in a section entitled "Community Property," thus presumably disposing of Patsy's community interest in the pensions in this community-property state, but not addressing her interest as beneficiary. For this reason, the settlement agreement is not sufficiently express to constitute a waiver.<sup>6</sup>

Under the terms of the plan, Plan Docs. ¶¶ 9, 18, Frank Weaver could have redesignated the beneficiary at any time if

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<sup>6</sup> In this regard, we direct the Court to cases that have found similar language in divorce decrees to be insufficient to waive benefits. See e.g., Fox Valley, 897 F.2d at 277 (language that "parties . . . waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans" of the other spouse held insufficient to waive former spouse's lump sum death benefit under the deceased's pension plan); Lyman Lumber, 877 F.2d at 693 (language in divorce decree that deceased would have his own interest in profit-sharing plan "free of any interest" of former spouse not sufficient to divest her of her interest as designated beneficiary); see also Manning v. Hayes, 212 F.3d 866, 875 (5th Cir. 2000) (holding prenuptial agreement that neither party would assert any claim on the property held solely in the name of the other not sufficiently express to constitute waiver of life insurance proceeds).

the parties' intent were that the pension benefits go to his mother Rita as the contingent beneficiary on his death (or, for that matter, to his second wife Diana). The fact that he did not should be dispositive under ERISA. As in Egelhoff, it is only a sleight-of-hand that allows one to say that ERISA and the plan documents were silent on waiver; by providing a written-designation requirement, they rule out waiver by other means and leave no gap for the federal common law to fill.

Finally, this conclusion is bolstered by this Court's recent decision in Barnett v. Barnett, No. 99-0313, 2000 WL 33651828, at \*11 (Dec. 6, 2001). In Barnett, this Court held that ERISA preempts an action to recover ERISA-governed life insurance benefits under a theory of "fraud on the community," and that such a cause of action could not be recast as federal common law, at least absent actual fraud. So too the Court in this case should not uphold the court of appeals' use of the Texas redesignation statute to invent a federal common law of constructive waiver. Nor should even an actual waiver control over ERISA's express provisions on designated beneficiaries (and against alienations) for the reasons we have discussed.

CONCLUSION

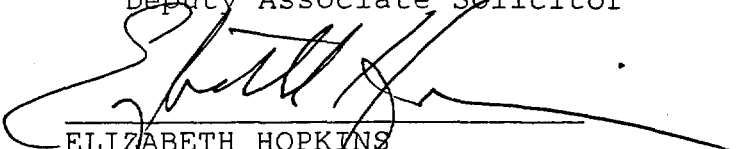
The decision of the Texas Court of Appeals, holding that under federal common law the dissolution of the marriage and the divorce settlement decree terminated Patsy's designation as the primary beneficiary under the annuity contracts, should be reversed.

Respectfully submitted.

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FEBRUARY 2002



CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Secretary of Labor, United States Department of Labor, as amicus curiae supporting petitioner were served by first-class mail, postage prepaid, this 13th day of February, 2002, upon the following counsel of record:

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