

DECLARATION OF CAROLYN FELDICK

I, Carolyn Feldick, hereby declare:

1. I currently reside at 3931 Oxford Drive, Woodbury, Minnesota 55125. I also maintain a P.O. Box I am making this declaration in support of my application and request for spousal survivor benefits from my deceased husband's pension benefits from the *St. Paul Painting Industry Pension Fund*. I have personal knowledge of the following and could testify competently to the following if called at trial.
2. I married Oliver Wendell Feldick on May 6, 1961. We resided together in St. Paul, Minnesota and maintained a mailing address of P.O. Box 600265, St. Paul, Minnesota, 55106. We remained married until Oliver's death. We were never legally separated or divorced.
3. In November of 1993, Oliver left me and our adult sons and moved to California, where he continued to live until his death in August 2009. Even while Oliver lived in California, we would have casual contact. He would sometimes call me, or send me holiday cards. We would talk about our children. I remember one time, Oliver asked me about information concerning his pension; and I provided him with this information. I also remember that Oliver had heart surgery, and he called me to talk about that because he had complications from this surgery.
4. Around 2007, as a result of some health issues I later developed, I was forced to apply for medical assistance. I also applied for Social Security to determine if I qualified for early social security benefits. Because of my meager work record, and because I had an insufficient amount paid into the fund, Social Security informed me that I was ineligible for benefits under my own work record.
5. I was then advised by Social Security to apply for benefits under Oliver's work record. The determination of that application showed that - as Oliver's wife - I was entitled to a portion of his Social Security benefits. Shortly after, I received another letter from Social Security informing me that I might be eligible for pension benefits under Oliver's record and that I should contact the pension plan administrator.
6. Around late December 2007, I contacted Wilson McShane to inquire about this letter I received from Social Security. I spoke to a woman (I think her name was "Amanda"), told her who I was and informed her that I had received this letter from Social Security regarding Oliver's pension. I asked if she could explain to me what the letter meant, but instead, the focus of our conversation was regarding Oliver's pension record.
7. I was then informed by this person that, according to the information on file with Wilson McShane, Oliver had withdrawn his entire pension from the Fund in 2002, taking it as a lump-sum payment. That was when I first became aware that Oliver had withdrawn his pension.
8. The person at Wilson McShane then explained to me that in order for Oliver to take out his pension in the lump-sum, that my signature would have been required allowing Oliver to do this. I

assured her that I never knew that such a paper existed nor did I ever see or sign such a paper. I also informed her that I was never contacted by anyone from Wilson McShane regarding this matter.

9. By then it became apparent to me that my familiarity and knowledge of the rules as well as my rights concerning my husband's pension were clearly unknown. For example, I was unaware that - as Oliver's wife - my signature would be required before he could withdraw his pension. I was also unaware that I might be entitled to a portion of his pension.

10. At no time during my conversations with people at Wilson McShane was I told that an attempt was ever made by Wilson McShane to locate me before the process of Oliver's pension withdrawal took place. I was never informed of the facts concerning that withdrawal; for example, the amount of the pension, or any other pertinent or significant facts of the transaction. They offered no details about the transaction whatsoever.

11. I was never told that Oliver had signed a notarized waiver form claiming he had no spouse when he took his pension in 2002. The only information given to me by Wilson McShane was that there was a paper with a notarized signature allowing Oliver to cash out his pension.

12. I then contacted Bart Winter at the Department of Labor about this matter. Mr. Winter then did some follow up and spoke to Wilson McShane. I was then informed by Mr. Winter that Wilson McShane stated that they had tried to locate me before releasing the lump-sum pension to Oliver. Wilson McShane claimed they found multiple addresses for me or thought I might have changed my name. I could not believe what I was hearing.

13. I have continuously maintained a Post Office Box at a St. Paul Postal station since 1991 [P.O. Box 600265, St. Paul, Minnesota 55106]. I have continued to receive some of my mail there ever since. Oliver received mail there as well while living in Minnesota and before leaving the state in 1993. I remember Oliver received mail from Wilson McShane at that very P.O. Box and continued to receive mail there even after he moved to California. (See attached Exhibit "1" to this Declaration).

14. At no time did Wilson McShane attempt to contact me at that P.O. Box or any other address where I lived. I do not believe that Wilson McShane ever made a concerted effort to contact me concerning the lump-sum distribution to Oliver of his entire pension fund. This, despite the fact that Oliver had received previous communications from Wilson McShane concerning his pension at this very P.O. Box. I think this demonstrates that Wilson McShane had this address in their files.

15. As for Oliver's claim when he obtained his lump-sum pension benefit that he had "no spouse" or could not locate me, that is completely untrue. I know he knew how to locate me. He had my phone number and address, and we did talk and correspond when he was living in California. Oliver was also in contact with our children who continued to live in Minnesota during the time he lived in California, and I would often hear about Oliver through my children when they called or visited me. Therefore, I believe with any real effort, Wilson McShane should have been able to locate me as well.

16. I believe that Wilson McShane failed in their obligation to protect my interests and my rights concerning my interest in Oliver's pension.

I declare under penalty of perjury under the laws of the State of Minnesota that the above is true and correct to the best of my knowledge and if called as a witness, I could and would testify competently to the facts stated in this Declaration.

Executed this eighth (8th) day of April 2011, in North St. Paul, Minnesota

Signature of Carolyn Feldick

Notary

Carolyn Feldick Case Law
(Claim-Draft #1)

Oliver Wendall Feldick was a member of the St. Paul Painters; Union local 61 from approximately 1961 to 1993. He worked as a painter for several employers in the painting industry and during his career as a painter he was employed by numerous contractors. Oliver Feldick was also a participant in the *St. Paul Industry Pension Fund*. In 2002, Oliver Feldick reached age 62, retired, and applied for – and received – a single lump-sum distribution from the *St. Paul Industry Pension Fund* (the “Fund”) in the form of a single-life annuity in the amount of \$149,161.53.

Carolyn Feldick (“Carolyn”) was the legally married spouse of Oliver Feldick (“Oliver”) until the time of his passing. They were married on May 6th, 1961. They remained married, and were so in September 2002, when Oliver Feldick submitted his application for pension benefits; and they remained married at the time Oliver passed away in 2009. There never was a divorce, a judicial decree of separation, partition of community property, or a proceeding for abandonment.

In the process of applying for his pension benefits, Oliver filled out two forms provided by the Fund. The first form (attached as Exhibit #1) listed Oliver’s current address, social security number, identified his Union Local, and date of birth. On this form, Oliver also identified Carolyn as his spouse, listed her date of birth, her social security number, and the date of their marriage. Nowhere on this form does Oliver represent that he is (i) no longer married, or (2) that his wife is deceased. This form apparently is used for the participant to select the benefit they are applying for; in Oliver’s case, he selected “Pension (Normal-Early).” This form concludes with a certification statement reading:

“In applying for Pension Benefits from the St. Paul Paining Industry Pension Fund, I certify the above statements are true to the best of my knowledge. I agree and understand that a false statement may disqualify me for pension benefits, and that the Trustees shall have the right to recover any payments made to me because of a false statement.”

After this certification statement, this form is signed by Oliver W, Feldick and dated 09-08-02 (September 8, 2002).

The second form (attached as Exhibit “2”) connected to the pension distribution is entitled *Participant’s Analysis of Retirement Benefits Available*. This form lists Oliver’s date of birth and also lists Carolyn’s date. This form appears to be the form where Oliver selected the pension benefit option. The form lists four options: 1) Joint and Survivor Benefit (under which are four Joint and Survivor options are offered); 2) Normal Benefit; 3) Lump Sum Payout Benefit (with a statement reading “You can cash out on your retirement date with a payout of \$149,161.53); and 4) Combination of Above Benefits. Oliver placed a check mark next to the “Lump Sum Payout Benefit” option. The bottom of this form there is a statement reading:

“You and your spouse must sign and have this form notarized indicating that you have reviewed your options and agree on your choice.”

After this statement, there is a line identified as "PARTICIPANT'S SIGNATURE" where Oliver W. Feldick signed his name and another line identified as "SPOUSE'S SIGNATURE" where the words "NO SPOUSE" are written (apparently by Oliver). This form is dated "09-25-02." The form also has a Notary Republic listed, and the form is notarized (with a date of 09-30-02).

When considered together, these two forms are inconsistent and contradictory. The first form indicates Oliver is married to Carolyn; the second form indicates Oliver has no spouse. It is also important to note that the forms were signed within seventeen (17) days of each other; the first form was dated September 8th, 2002, the second form was dated September 25th, 2002 (and notarized apparently on September 30th 2002).

In 1984, the Congress of the United States enacted the Retirement Equity Act ("REA") amending the *Employee Retirement Income Security Act* ("ERISA") to require that a qualified joint and survivor annuity be provided to the surviving spouse of a participant of an employee benefit plan, unless the surviving spouse has waived his or her rights to benefit plan proceeds and consented to the participant's election of an alternative benefit form. 29 U.S.C. § 1055(c)(2), *Vilas v. Lyons*, 702 F. Supp. 555.

Unless a participant properly and legally waives the requirement, ERISA requires plan participants to take retirement benefits as a joint and survivor annuity, which pays benefits to the participant for life and to a surviving spouse for life, rather than as a single life annuity, which pays greater sums than does a joint and survivor annuity, but pays during the participant's life only. See 29 U.S.C. §1055(a) (1), (c) (1)(A) (i) & (c)(7)(A). Alternatively, the participant may establish to the plan administrator's satisfaction that he could not obtain the consent, either because he had no wife or could not locate her. See 29 U.S.C. §1055(c)(2).

The court in *Vilas* noted that "[i]n the absence of *actual knowledge* of fraud or coercion in the inducement or *actual knowledge* of invalidity, the plan administrator may rely on a waiver that conforms on its face, and he will not, by doing so, expose himself to the plan to liability for relying on it." *Vilas*, p. 559.

A Senate Report, No. 99-313 provides that "[t]he spousal consent form is to contain such information as may be appropriate to disclose to the spouse the rights that are relinquished." (*Vilas*, p. 560).

ERISA defines a "beneficiary" as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

The waiver by Oliver Feldick is void; as such, Carolyn Feldick is still a beneficiary "who is or may become entitled to receive a benefit."

From *Hearn v. Western Conference of Teamsters Pension Trust Fund*:

"ERISA protects pension plans from large, unexpected liabilities that could arise when plan administrator reasonably rely on waivers of spousal benefits that turn out to be invalid." See ERISA §205(c)(6).

"If pension plan administrator satisfies its fiduciary duties in determining that spouse's consent to waiver of benefits is valid or that such consent cannot be obtained, that determination shall be treated

as valid for purposes of discharging the plan from liability to the extent of payments made pursuant to ERISA.”

“When pension plan paid benefits to participant who falsely informed the plan that he was not married, provision of ERISA governing joint and survivor annuities discharged the plan from liability to the participant’s widow, however, to the extent that its debt to her exceeded its overpayments to her deceased husband.”

“Pension plans may bring restitution actions against deceptive plan participants and their estates.”

“Trustee is liable for mistaken payments to the wrong person, even if the mistake was reasonable.”

“ERISA §205(c)(2) provides: – Each plan shall provide that an election [to waive the joint and survivor annuity] shall not take effect unless (A)(i) – the spouse of the participant consents in writing to such election, . . . or (B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse [or] because the spouse cannot be located . . .”

“If the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent or in accepting the representations of the participant that the spouse’s consent cannot be obtained, then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal consent valid on its face, which the administrator has no reason to believe is invalid; the plan would certainly be allowed to rely on the consent even if it is, in fact, invalid.”

“Mrs. Hearn and the Fund are both victims of Mr. Hearn’s deception. Accordingly, the question of equitable relief doesn’t come up. We note, however, that the victim of collusion might have equitable defenses to a survivor’s suit for benefits or an offsetting equitable action for unjust enrichment. In any case, plans may bring restitution actions against deceptive participants and their estates.”

“Congress was very concerned about surviving spouses. Indeed, it enacted Section 205(c)(6) as part of a bill that added strict spousal consent requirements for waiver of survivor benefits. The very Senate Report on which the Trust Fund relies recommends passage of the bill “because the committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely.” “Absent Section 205(c)(6) – the Fund would have been liable to Mrs. Hearn for the full amount of her annuity.”

From *Rice v. Rochester Laborers’ Annuity Fund*

(Attorney of spouse in divorce warned Plan that husband may try to take distribution before divorce final)

“Held: [The Plan] administrator failed to live up to the prudent man standard of care and therefore, spouse retained all rights to obtain survivorship benefits that she had prior to Fund’s lump-sum distribution to participant.”

“The application required the applicant to fill out either Section I, certifying that he was not legally married, or Section II, for married participants, requiring a waiver of the spouse’s fifty-percent lifetime

annuity benefit. Remarkably, Harold Rice filled out *both* Sections I and II. In Section I, he indicated that he was not married, but Section II contained the purported signature of 'Carrie Rice' professing to waive all interest in the spousal annuity, the signature was notarized but plaintiffs claim, and defendants do not dispute, that the signature was in fact a forgery."

"The Fund's administrator failed to act as a prudent administrator should have acted under all the circumstances. The Fund's administrator erred in accepting the conflicted request form without question and without further inquiry. The administrators as fiduciaries are charged with acting prudently under the circumstances."

"It is up to the fund to take whatever steps are necessary to insure that plaintiff's survivorship's rights are protected in all respects."

"Defense contemplated under ERISA statute providing that consents or waivers of spousal survivor's rights shall discharge plan from liability exists only if plan administrator acted according to the prudent man standard of care."

"If plan administrator complies with statutory requirements regarding waiver of spousal survivor's annuity rights, he is shielded from liability as long as he acts consistent with his fiduciary obligations and he cannot ignore obvious warning that suggest an obligation to inquire."

"Standard from submitted by participant was ambiguous and contradictory on its face."

"Contrary to the Pension Plan's argument, the express terms of section 1055(c)(6), as well as the REA's somewhat sparse legislative history on this point, establish that a plan administrator's determination that spousal consent cannot be obtained must be judged by the standard of fiduciary care set forth in Section 1104. Accordingly, this court must reject the Plan's contention that Section 1055(C)(2) intends a wholly subjective standard of care, and instead determine whether the plan administrator acted prudently under the circumstances."

"The plan administrator in this case simply accepted, without further questioning or investigation, Mr. Lester's unverified statement that his wife could not be located. At a minimum, a prudent plan administrator in such circumstances would have questioned Mr. Lester about his statement that he could not locate his wife. A prudent plan administrator might also have tried to contact Lester (wife) at her last known address or telephone number."

29 U.S.C. Section 1055(c) (2) requires written consent from spouse.

Sec. 1055(C)(6) provides that consents to waivers or spousal survivor's rights pursuant to Sec. 1055(c)(2), shall "discharge the Plan from liability to the extent of payments made . . . if the plan fiduciary acts in accordance with the "prudent man" standard of care set out in Section 1104."

The Rice court stated that the Plan's administrator cannot ignore obvious warning signs that suggest an obligation to inquire. The court stated "if the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent . . . then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal

consent, *valid on its face*, which the administrator has *no reason to believe* is invalid, the plan would certainly be allowed to rely on the consent even if it is, in fact, invalid.”

“The Fund’s administrator as a fiduciary was required to act in all cases to protect the interest of beneficiaries such as plaintiff. [Citing *John Blair Communications v. Telemundo Group*, 26 F.3d 360, 367 (2d Cir. 1994)]. A fiduciary breaches his §1104 duty to a plan participant by preventing or interfering with the receipt of benefits to which the participant is entitled. [Citing *Blatt v. Marshall & Lassman*, 812 F.2d 810 (2d Cir. 1987)]. Under ERISA, a fiduciary’s duties to participants and beneficiaries are “the highest known to law.” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8; 469 U.S. 1069. Section 1104 of ERISA “is a more stringent version of the prudent person standard than in the common law of trusts.” *Reich v. Valley Nat’l Bank of Arizona*, 837 F. Supp 1259, 1273 (S.D.N.Y. 1993).

It is up to the Fund to take whatever steps are necessary to insure that plaintiff’s survivorship’s rights are protected in all respects.

This is a Section 502(a) Claim – “Spouse of plan participant had interest in pension fund because of her right to receive a survivor’s annuity and in such capacity, spouse had standing to maintain action under ERISA to clarify and establish her rights to future benefits.”

“Defense’ contemplated under ERISA statute providing that consents or waivers of spousal survivor’s rights shall discharge plan from liability only if plan administrator acted according to the prudent man standard of care.”

“Administrator of annuity fund failed to live up to the prudent man standard of care which compelled him to inquire further prior to taking action which effectively terminated survivorship interest of plan participant’s spouse and hence, fund remained liable and spouse retained all rights to obtain survivorship benefits that she had prior to fund’s lump-sum distribution to participant. [The] standard form submitted by participant was ambiguous and contradictory on its face.”

“As a fiduciary, pension fund administrator was required under ERISA to act in all cases to protect the interest of beneficiaries. Fiduciary breaches his duty to plan participants under ERISA by preventing or interfering with receipt of benefits to which participant is entitled.”

From *Strand v. Automotive Machinists Pension Trust*

The purpose of the strict waiver provisions in ERISA was “to afford better protection to women dependent on their husbands’ earnings and at the mercy of death or divorce. (Citing *Ablamas v. Roper*, 937 F.2d 1450 (10th Cir. 1991). The formalities required for spousal waiver are included to protect against the risks of a spouse’s unwitting waiver of those rights. Formalities are necessary to ensure a valid waiver of a spouse’s retirement plan [and] are consistent with the legislative policy of protecting spousal rights. (citing *Lasche v. George W. Lasche Basic Profit Sharing Plan* 111 F.3d 863, 867 911th Cir. 1997). The formalities are, therefore, to be strictly enforced. (citing *Hagwood v. Newton*, 282 F.3d 285, 290 (4th Cir. 2002).

From *Lombardo v. United Technologies Corporation*

“When information comes to the attention of the committee calling into question the validity of the notarized document, a prudent fiduciary is required to investigate.” (citing *Rice*)

“Courts have uniformly held that the clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve and protect spouses’ interests in participants’ benefits. ERISA accomplishes this purpose by establishing strict requirements that must be met to insure that the spouse consents to an act that may divest him or her of the right to receive benefits in the future. ERISA also charges plan fiduciaries with the highest of responsibilities, which are owed not only to plan participants but also to their beneficiaries.”

In 1994, congress enacted the Retirement Equity Act, which amended ERISA to require that a qualified joint and survivor annuity be provided to the surviving spouse of a participant of an employee pension benefit plan, unless the surviving spouse waived his or her rights to benefits and consented to the participant’s election of an alternative benefit form (See *Vilas. V. Lyons*, 702 F.Supp. 555, 559 [D.Md. 1988]).

Under ERISA, a waiver of a qualified joint and survivor annuity and consent to the participant’s election will be effective only if:

- (i) The spouse of the participant consents in writing to such election;
- (ii) Such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent; and
- (iii) The spouse’s consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

(See 29 U.S.C. Sec. 1055(c)(2)(A))

“When information comes to the attention of the committee calling into question the validity of the notarized document, a prudent fiduciary is required to investigate.” (See *Rice v. Rochester Laborers’ Annuity Fund*, 888 F. Supp. 494).

“Courts have uniformly held that the clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve and protect spouses’ interests in participant benefits.” (See *Lester v. Reagan Equipment Company Profit Sharing Plan & Employee Savings Plan*, No. Civ. A. No. 91-2946, 1992 WL 211611).

“ERISA accomplishes this purpose by establishing strict requirements that must be met to insure that the spouse consents to an act that may divest him or her of the right to receive benefits in the future. ERISA also charges plan fiduciaries with the highest of responsibilities, which are owed not only to the plan participants but also to their beneficiaries. 29 U.S.C. Sec. 1104(a)(1). (See also *Donovan v. Bierwirth*, 680 F.2d 263,272.

“Thus, the question in this case, is whether the Benefit Claims Appeal Committee acted in a manner consistent with its fiduciary duties owed to Mrs. Lombardo. Once the Committee was notified of a claimed forgery, they had a duty to at least inquire as to the validity of the notarized spouse consent form. A plan administrator cannot ignore obvious warning signs that suggest an obligation to inquire. (See *Rice*).”

The Courts provide a highly deferential standard afforded administrator's decisions. A reviewing court should not overturn a denial of benefits unless it concludes that the decision was "without reason, unsupported by substantial evidence or erroneous as a matter of law."

From *Board of Trustees of the Equity-League Pension Trust Fund v. Royce*

29 U.S.C. §1055(c)(2)(B) provides that each plan shall provide that an election to waive a surviving spouse annuity is conditioned upon a finding that spousal consent is unavailable by reason of certain designated circumstances or other circumstances as the Secretary of the Treasury may by regulations prescribe. One such other circumstance is a legal separation between the spouse and the participant.

"The REA is a 1984 amendment to ERISA designed to ensure that individuals whose spouses die before their retirement would nevertheless receive the spouses' pension benefits. Congress intended to ensure a stream of income to surviving spouses. [See *Lefkowitz v. Arcadia Trading Co. Ltd Benefit Pension Plan*, 996 F.2d 600, 601 (1993); and *Boggs v. Boggs*, 520 U.S. 833, 843 (1997)]

Under Section 1055(c)(2)(B) - each plan shall provide that a participant's election to waive the surviving spouse annuity shall not take effect unless – (B) – it is established to the satisfaction of a plan representative that spousal consent cannot be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

From *Neidich v. Estate of Henry K. Niedich*

Under ERISA, Fund's administrator, as a fiduciary, is required to act in all cases to protect interest of beneficiaries.

Where fiduciary duties arise under ERISA, they must be enforced without compromise to ensure that fiduciaries exercise their discretion to serve all participants in the plan.

From *Lester V. Reagan Equipment Company*

Plaintiff Jan Lester – Mr. Lester's widow – contends that she is entitled to benefits under several Plans. Lester further contends that the trustees of these Plans breached their fiduciary obligations, mandated by ERISA. Seeking to redress these grievances, Lester has brought suit under Section 502(a)(1)(B) [29 U.S.C. §1132(a)(1)(B) of ERISA].

It is undisputed that the Pension Plan took no steps to determine the accuracy or veracity of Mr. Lester's statement that he could not locate his spouse, other than requiring that he sign before a notary public. The Pension Plan neither attempted to contact Ms. Lester at her last-known address set forth in the notarized letter nor questioned Mr. Lester about his efforts to contact his spouse.

On March 14, 1989, Mr. Lester named Steven Lester, his son from a previous marriage, as beneficiary of his death benefit from the Profit Sharing Plan. Mr. Lester did not have his spouse's written consent to this designation.

As a beneficiary of the Pension Plan, Ms. Lester points out that, the Plan Administrator had a fiduciary duty under ERISA to act prudently and to take reasonable steps to safeguard her interest in Mr. Lester's pension benefits. See 29 U.S.C. §1002(8); 29 U.S.C. §§1101 and 1104. Thus, Ms. Lester concludes, in accepting without question Mr. Lester's unverified statement that she could not be contacted and in making absolutely no effort to contact her, the plan administrator breached his fiduciary obligation.

The Plan counters that it complied with its fiduciary duties pursuant to 29 U.S.C. §1055(c)(6). The Senate Report accompanying REA §205(c)(6) [now §1055(c)(6)] states:

"If the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent or in accepting the representations of the participant that the spouse's consent cannot be obtained, then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal consent, valid on its face, which the administrator has no reason to believe is invalid, the plan would rely on the consent even if it is, in fact, invalid." [Sen. Rep. No. 578, 98 Cong.2d Sess.]

This court finds the Pension Plan's arguments contrary to the language and purpose of §1055(c). ERISA contains strict rules for protecting the spouse's interest in the participant's benefits. The clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve the benefits of spouses. Under ERISA, waiver of the qualified joint and survivor annuity, the standard form of payment from a defined benefit plan to a participant before death, is invalid unless it satisfies the rigorous rules in §1055(c).

A Plan meets the requirements of §1055(c) only if it provides that an election waiving the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor form of benefit shall not take effect unless:

(A)(i) – the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse, (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or notary public, or

(B) It is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulation prescribe.

Part 4 of subtitle B of ERISA is entitled "Fiduciary Duties," and includes the standard of care for plan fiduciaries. (29 U.S.C. §1104). This section states in relevant part:

(a) Prudent man standard of care. (1) Subject to section 403(c) and (d), 4042, and 4044 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and – (A) for the exclusive purpose of; (i) providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

The express terms of §1055(c)(6), as well as the Senate report on REA, establish that a plan administrator's determination that spousal consent cannot be obtained must be judged by the standard of fiduciary care set forth in §1104. The court in *Lester* accordingly rejects the Plan's contention that §1055(c)(2) intends wholly subjective standard of care, and instead determine whether the plan administrator acted prudently under the circumstances. The court has no trouble in deciding that the plan administrator did not.

The plan administrator in this case simply accepted, without further questioning or investigation, Mr. Lester's unverified statement that his wife could not be located. At a minimum, a prudent plan administrator in such circumstances would have questioned Mr. Lester about his statement that he could not locate his wife. A prudent plan administrator might also have tried to contact Ms. Lester at her last known address.

"What the plan fails to recognize is that a notarized letter in which the *spouse* waives her rights to the participant's benefits is materially different than a notarized letter in which the *participant* waives the spouse's rights. If the participant signs for the spouse, then the person giving up the benefits has made no representation. The presence of a notary public or plan administrator to witness the participant's signature provides the spouse with no protection because it only ensures that the participant was in fact the signing party. Therefore, in such a situation, as Section 1055(c)(6) clearly indicates, the plan representative, as fiduciary of the beneficiary, must act prudently and take reasonable steps to protect the spouse's rights."

From *Davenport v. Davenport*

Even if state court issued a post-death order finding that surviving spouse had abandoned participant, it would not have been valid under ERISA for purposes of waiving surviving spouse's benefits during applicable period before his death as required under ERISA, and participant's failure to do so, especially since he had recently changed his will to leave his estate to his four children, suggested that he did not intend to designate a different beneficiary under the plan.

After participant's death, surviving spouse was entitled to benefits under defined contribution retirement plan pursuant to ERISA, as both a participant and surviving spouse beneficiary, where spouse was a participant in the plan, plan provided for surviving spouse benefit, surviving spouse did not consent to alienating her benefits under plan, and neither a QDRO nor an abandonment order had been entered before participant's death that would have altered surviving spouses' benefits.

From *Canestri v. NYSA-ILA Pension Trust Fund and Plan*

ERISA requires that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. {29 U.S.C. §1104(a)(1)(B)}.

From the SPD

"Before your pension payments commence, you may elect to receive the single-life pension instead of the 50% joint and survivor pension. However, your spouse must consent *in writing* to your election of a single-life pension. Your spouse's signature must be witnessed by a Plan representative or a notary public." P. 13

"[A] surviving spouse benefit also is payable after the death of an active or former employee who has 5 years of continuous service after January 1, 1998 and is entitled to receive a vested pension. The benefit will begin on the first of the month next following the date the employee would have reached his 62nd birthday. The amount of the pension will be the amount the spouse would have received if employee had survived to age 62, **started a 75% joint and survivor pension** and then died on the next day." P. 14

Lump Sum Distributions –

"If you are eligible for normal or early retirement and have earned at least the minimum required years of continuous service as of the time of your retirement, you may make a one-time election to receive a full or partial lump sum payment in lieu of other benefit options. If you began participation in this Plan prior to January 1, 2000, the minimum required years of service is ten. If you began participation after December 31, 1999, the minimum required years of continuous service are twenty." (p. 15)

"If you retire and elect a lump sum distribution of your pension, the plan administrator first will figure your monthly pension and then will apply a lump sum conversion factor based on your age and the discount rate in effect for such year. The spouse of a married participant must consent in writing (on a form provided by the Plan Administrator) to the payment of a lump sum in excess of \$1000.00."

From the Plan Document

"If a participant does not have an eligible spouse on the date his pension payments are due to commence, then his pension will be paid in the form of a single life pension unless he elects to receive his entire pension as a lump sum." (p. 29)

"In the case of a Participant who has at least one-Hour of Service or one hour of paid leave on or after August 23, 1984, any election made on or after January 1, 1985 to waive the joint and 50% survivor benefit will be ineffective unless one of the following conditions is satisfied:

- (a) The spouse of the Participant provides written consent to the Plan Administrator to such election acknowledging the effect of such election and such consent is witnessed by a plan representative or notary public.
- (b) It is established to the satisfaction of the Plan Administrator that the consent required under paragraph (a) above cannot be obtained because no spouse exists or cannot be located, the Participant is deemed not married for purposes hereof, or because of such other circumstances as the Secretary of Treasury may by regulations permit."

"Lump Sum Payments. Subject to the other provisions of this Plan, a Participant may elect to receive a full or partial lump sum payment of his Early or Normal Retirement benefit, the amount of which will be the Actuarial Equivalent of the Employee's Retirement benefit if paid on a monthly or less regular basis. The foregoing provisions notwithstanding, (a) benefits *accrued* after September 1, 1994 will not be

payable in this form *unless* the Participant has attained ten (10) years of Continuous Service on or before the date of Retirement; and (b) an individual becoming a Participant in the Plan on or after January 1, 2000 may not receive benefits in this form until he or she has earned at least twenty (20) years of continuous Service.” (p. 32)

“Section 9.6 – Distributions Requiring Spousal Consent – Distributions may not be made when the present value of the non-forfeitable accrued benefit exceeds \$5000.00 unless the distribution is consented to in writing by the Participant and the Participant’s spouse, if any, or, where the Participant is dead, the Participant’s surviving spouse.”

From *Weiss v. Cigna Healthcare*

A person is a fiduciary of a benefit plan for the purposes of ERISA to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such Plan, or (ii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” See 29 U.S.C. §1002(21)(A); 29 U.S.C. §1104(a); ERISA §404(a)(1).

ERISA requires plan fiduciaries to discharge their duties with respect to a plan solely in the interest of participants and beneficiaries. ERISA §404(a)(1). Such fiduciary duties “draw much of their content from the common law of trusts.” (*Varity Corporation v. Howe*, 516 U.S. 489). These fiduciary duties “must be enforced without compromise” to ensure that discretionary power is exercised “with an eye single to the interests of participants and beneficiaries.” *John Blair Communications v. Telemundo Group*, 26 F.3d 360, 367 (2nd Cir, 1994) citing *Donovan v. Bierwirth*, 600 F.2d 263, 271 (2d Cir. 1982)).