

# The Family Court of the State of Delaware



FELICE GLENNON KERR  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 9400  
WILMINGTON, DELAWARE 19801-3732

June 23, 2026

Judith M. Jones, Esquire  
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## LETTER DECISION AND ORDER

Alex J. Smalls, Esquire  
Team Tice  
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**Re: R----- S----- B----- v R-- B-----**  
**File No.: CN06-06549; Petition No.: 25-06819**  
**Petition Type: Divorce Ancillary Matters**

Dear Counsel:

The Court previously held a hearing on January 21, 2026, regarding a pre-nuptial agreement the parties entered into on October 2, 2005. On March 23, 2026, the Court ultimately found that the prenuptial agreement was valid and enforceable. On May 6, 2026, the Court held a status teleconference to determine if there were any outstanding ancillary matters that need to be resolved, which were not resolved through the Petition for Specific Performance of the prenuptial agreement. At the teleconference, R-- B----- (“Husband”) presented the issue that R----- S----- B-----’s (“Wife”) retirement plan was subject to the Employee Retirement Income Security Act (“ERISA”) and the prenuptial agreement the parties entered into failed to satisfy the strict waiver requirements under ERISA. Thus, Husband believed that he would be entitled to a portion of Wife’s pension regardless of the prenuptial agreement’s enforceability, as he did not properly waive his interest, as required by ERISA. The Court entered a schedule for the submission of memoranda on this issue. On May 21, 2026, Husband filed a post-trial brief through his counsel, Alex J. Smalls, Esq. On June 1, 2026, the Court received a response filed by Wife through her counsel, Judith M. Jones, Esq. Below is the Court’s analysis and decision on the matter.

Husband’s position rests on two main issues: (1) Husband was not married to Wife at the time the prenuptial agreement was executed; and (2) ERISA requires a waiver while the parties are married, not just in a prenuptial agreement, for Husband to waive his rights to Wife’s retirement accounts. Husband cited three cases to support these propositions: *Richards v. Richards*, *Hurwitz*

v. *Sher*, and *Pilot Life Ins. Co. v. Dedeaux*.<sup>1</sup> Of the three cases, the most influential is *Richards*, as it cited both *Hurwitz* and *Pilot Life Ins. Co.* as primary support.

In *Richards*, the parties executed a prenuptial agreement and waived their rights in the past and future earnings of the other.<sup>2</sup> The wife argued that she did not waive her rights to the husband's pension in accordance with ERISA and that a "spouse" can only waive ERISA rights, not a "fiancée."<sup>3</sup> Ultimately, the Supreme Court of New York County in New York relied on *Hurwitz*, a case revolving around a widowed spouse and the decedent's son. *Richards* assumed that the *Hurwitz* court would have held that a prenuptial agreement alone cannot waive ERISA rights even though they "reserve[d] judgment" on the matter.<sup>4</sup> They based this on the fact that *Hurwitz* upheld the Treasury Regulations stating that they "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes."<sup>5</sup> The Treasury Regulations stated that "[a]n agreement entered into prior to marriage does not satisfy the applicable consent requirements" when referring to ERISA.<sup>6</sup> However, what *Richards* failed to include was that *Hurwitz* expressly adopted this position as it related to spousal death benefits rather than distribution of the retirement account as a whole, stating that ERISA was amended by the Retirement Equity Act ("REA") to ensure that a spouse receives survivor benefits.<sup>7</sup>

Comparatively to *Richards*, Wife cited *Strong v. Dubin*, where a wife's interest in the marital portion of a husband's retirement assets was at issue.<sup>8</sup> The parties entered into a prenuptial agreement and wife claimed, relying on *Richards*, that she did not effectively waive her rights in husband's retirement assets.<sup>9</sup> The Supreme Court, Appellate Division, of New York held that *Richards* failed to indicate the distinction between a waiver of survivor benefits and a waiver of other pension benefits.<sup>10</sup> The court determined that the parties' prenuptial agreement expressed an intent to opt out of any statutory scheme governing equitable distribution, including the husband's retirement assets.<sup>11</sup> Additionally, they held that domestic relations of a husband and wife are governed by state rather than federal law. The court in *Strong* further explained that "...a waiver of any interest in a pension as marital property by a valid prenuptial agreement is not prohibited by ERISA."<sup>12</sup> Although a prenuptial agreement alone will not constitute an effective waiver of spousal benefits under ERISA, "...ERISA does not preempt or preclude the recognition, implementation, or enforcement of an otherwise valid prenuptial agreement with regard to a divorce proceeding."<sup>13</sup> As such, ERISA creates no substantive rights in a divorce, other than the

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<sup>1</sup> *Richards v. Richards*, 640 N.Y.S.2d 709 (N.Y. Sup. Ct. 1995); *Hurwitz v. Sher* 982 F.2d 778 (2d Cir. 1992); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

<sup>2</sup> *Richards*, 640 N.Y.S.2d at 709-10.

<sup>3</sup> *Id.* at 711 (citing *Hurwitz*, 982 F.2d at 781).

<sup>4</sup> *Richards*, 640 N.Y.S.2d at 711 (citing *Hurwitz*, 982 F.2d at 781, n.3).

<sup>5</sup> *Id.* (citing *Hurwitz*, 982 F.2d at 782).

<sup>6</sup> *Id.*

<sup>7</sup> *Hurwitz*, 982 F.2d at 781.

<sup>8</sup> *Strong v. Dubin*, 75 A.D.3d 66, 71-72 (1st Dep't 2010).

<sup>9</sup> *Id.* at 68.

<sup>10</sup> *Id.* at 72.

<sup>11</sup> *Id.* at 69.

<sup>12</sup> *Strong*, 75 A.D.3d at 67.

<sup>13</sup> *Id.* at 72.

survivor benefits outlined in the REA, and instead accommodates to state matrimonial law.<sup>14</sup> The express language of the ERISA waiver requirement allows a participant to “waive the qualified joint *survivor annuity* form of benefit or the qualified preretirement *survivor annuity* form of benefit.”<sup>15</sup> When reading this provision, in conjunction with the amendment of ERISA through the REA, the anticipated meaning was to allow the surviving spouse to receive survivor benefits if a plan participant died *during marriage*.<sup>16</sup>

Moreover, the question as to whether a prenuptial agreement effectively waives a spouse’s interest in the other spouse’s retirement assets was also further elaborated in *Savage-Keough v. Keough* by the Superior Court of New Jersey, Appellate Division. In *Savage-Keough*, a husband argued that ERISA’s preemption provisions preclude a pension plan participant from denying their spouse an interest in the plan, even if that interest was waived through a prenuptial agreement.<sup>17</sup> The *Savage-Keough* court distinguished *Hurwitz* which pertained to a wife’s interest in her husband’s survivorship benefits once he passed away.<sup>18</sup> The Court also disagreed “with the Richards’ court’s application of the ERISA waiver provision to the divorcing parties interest in a spouse’s pension plan as it constitutes marital property.”<sup>19</sup> The court held that any spousal rights under ERISA, do not survive a judgment of divorce, and once there is a divorce, any claim for survivorship benefits would be moot.<sup>20</sup> Therefore, once both spouses survive a marriage, a final judgment of divorce would dissolve any prospect a spouse would have of becoming a surviving spouse, and thus dissolve entitlement to survivorship benefits.<sup>21</sup> As such, although *Richards* correctly explained the ERISA provisions as it related to survivorship benefits, the court over expanded when interpreting the provisions to be inclusive of all spousal interests in retirement benefits that are considered marital property.<sup>22</sup> Applied to the instant case, ERISA does not grant Husband any rights after the divorce, so there was nothing for him to waive under ERISA once the Final Decree was entered. Husband’s claims to Wife’s pension are created by state law and can be waived under state law. If Wife had died during the marriage, Husband could have had a viable claim that the waiver was not sufficient pursuant to ERISA.

Finally, Husband cited *Pilot Life Ins. Co.*, for the general proposition that ERISA, as federal law, strictly regulates and governs employee benefit plans. However, ERISA was amended by the REA to allow retirement benefits, governed by ERISA, to be distributed through *state court* domestic relations orders, in the form of Qualified Domestic Relations Orders (“QDRO”).<sup>23</sup> This was done due to the historical refusal by federal courts to adjudicate domestic relations disputes.<sup>24</sup> As a result, Congress amended ERISA to exempt QDROs from the preemptive effect of ERISA as done in *Pilot Life Ins. Co.*<sup>25</sup> In itself, this position shows the intention for ERISA to not be

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<sup>14</sup> *Strong*, 75 A.D.3d at 72.

<sup>15</sup> *Savage-Keough*, 861 A.2d at 138.

<sup>16</sup> *Id.* at 136.

<sup>17</sup> *Savage-Keough*, 861 A.2d at 133.

<sup>18</sup> *Id.* at 136-37.

<sup>19</sup> *Id.* at 136.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 136.

<sup>23</sup> *Hunter v. Ameritech*, 779 F.Supp. 419, 420 (N.D. Ill. 1991).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 420-21.

completely preemptive regarding domestic relations, contrary to Husband's position. Furthermore, *Moore v. Moore* showed that ERISA has no bearing on the ownership of any distributed benefits but rather creates the obligation to pay the plan proceeds.<sup>26</sup> In *Moore*, a husband and wife entered into a prenuptial agreement where they agreed that any property they brought into the marriage, would remain separate.<sup>27</sup> The husband ultimately passed away and the wife was eventually distributed funds from the husband's retirement plans. The court held that even though the prenuptial agreement did not contain an ERISA waiver, this did not prevent a lawsuit based on common-law contract theories. Because the parties entered into a valid agreement, the wife effectively gave up any interest she had in the husband's retirement assets.<sup>28</sup>

### CONCLUSION

The Court finds that the October 2, 2005, prenuptial agreement is valid and enforceable and prevents Husband from claiming any interest in Wife's retirement benefits. The Court does not find Husband's ERISA arguments persuasive and instead adopts the interpretation presented by Wife. ERISA specifically allows a spouse to "waive the qualified joint *survivor annuity* form of benefit or the qualified preretirement *survivor annuity* form of benefit."<sup>29</sup> References to survivor annuities show that ERISA intended to address survivor benefits, rather than how retirement benefits are divided after divorce. ERISA works alongside state matrimonial law and governs the distribution of retirement plan funds, but does not determine who receives those funds. The cited cases confirm that ERISA's main purpose is to ensure that spouses who remain married are eligible for survivorship benefits when a spouse dies. As explained above, many courts have found that ERISA's waiver requirements do not apply to retirement benefits as a whole, and outlined the difference between survivorship benefits and a property interest in a spouse's retirement benefits post-divorce. Under ERISA, after a divorce, a person no longer has "spousal" rights. Husband's claim that only a "spouse" can waive an interest in retirement benefits is also incorrect. A valid prenuptial agreement is an enforceable contract between the parties. In the instant case, similarly to *Strong* and New York matrimonial law, no law in Delaware states that parties cannot waive their interest in marital property through a valid agreement before or during the marriage.<sup>30</sup> Further, this Court held in the March 23, 2026, Order on Wife's Petition for Specific Performance, that Husband and Wife entered into a valid prenuptial agreement which therefore barred any claim Husband would have regarding Wife's retirement assets. Even without an ERISA waiver, the provision stating that "any savings, including pension and 401(k) accounts, acquired before or after the execution of the agreement are not considered shared property" applies upon their separation. Therefore, the parties entered into a valid prenuptial agreement and Husband waived any property interest he would have in Wife's retirement assets.

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<sup>26</sup> *Moore v. Moore*, 297 So.3d 359, 365 (Ala. 2019).

<sup>27</sup> *Id.* at 360.

<sup>28</sup> *Moore*, 297 So.3d at 366.

<sup>29</sup> *Savage-Keough*, 861 A.2d at 138.

<sup>30</sup> *Savage-Keough v. Keough*, 861 A.2d 131, 136 (N.J. Super. Ct. App. Div. 2004) (citing *Boggs v. Boggs*, 520 U.S. 833, 847-48 (1997)).

**IT IS SO ORDERED** this \_\_\_\_\_ day of **JUNE 2026** that **Ancillary Matters are Dismissed.**

Very truly yours,

*/ Felice Glennon Kerr /*

Felice Glennon Kerr, Judge

FGK:dkr  
Date emailed:  
Date mailed: