

## Prenuptial Waiver of Pension Benefits Now Recognized

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For the past 14 years I have counseled clients regarding prenuptial agreements and have advised them that the rights and interest to retirement assets could not be waived in the context of a prenuptial agreement. The pertinent case law had interpreted the language of the Employee Retirement Income Security Act (ERISA) very narrowly. The statute reads that a "spouse" may execute a waiver of interests in retirement assets. The courts of the State of New York had ruled that because a person attains "spouse" status only upon marriage, consequently a pre-marriage waiver of interests was not enforceable because the waiver was made by a prospective spouse and not an actual spouse. The rationale had been that the New York courts assumed that if the federal authorities had meant to include fiancés fiancées, or prospective spouses, that the ERISA statute would have stated such.

As a result for the past 14 years I have counseled my clients for prenuptial agreements that in order for such pension waiver to be valid, an addendum to the prenuptial agreement needed to be signed after the marriage ceremony. This detail was apparently very awkward and/or very cumbersome because only a small percentage of the people I had sternly forewarned actually followed through with the execution of a post-marriage waiver.

The issue has been more problematic in the context of divorces between parties who had presumed that a signed prenuptial agreement assured them of a simple straightforward divorce. Many have either been delighted or horrified to learn that due to the narrow interpretation of the word "spouse" by the New York courts, that they were either to be the beneficiary of a windfall or the victim of a pitfall.

That has now changed. A state appellate court has revisited the issue and has ruled that prospective spouses may properly and effectively waive their equitable interests and claims to retirement assets in a prenuptial agreement.

The prior ruling was enunciated in Richards v. Richards, 232 A.D.2d 303 (1<sup>st</sup> Dept. 1996), and has now been overruled by the decision of Strong v. Dubin, 901 N.Y.S.2d 214 (1<sup>st</sup> Dept. 2010).

The parties in Strong v. Dubin signed a prenuptial agreement prior to their 1992 marriage. The agreement contained a waiver as to "all claims including, but not limited to, claims for equitable distribution, distributive award, or claims against separate property of the other". Separate property was defined as being "completely and wholly rested in the name of such person in whose ownership it presently exists". In the Strong v. Dubin matter, the court at the trial level relied upon the Richards decision and ruled that the pre-marriage waiver by Ms. Dubin of her interests in her husband's pension/retirement assets was not valid and would not be recognized.

On appeal Mr. Strong asserted that a distinction existed which warranted departure from the Richards decision in that ERISA only limits the spouse's waiver of pension survivor benefits and is inapplicable to a waiver of rights, interests and claims in a divorce proceeding. It was successfully argued that pension survivor benefits differ substantially from the pension benefits which inure when one becomes pay-out eligible. The Appellate Division, First Department, agreed that ERISA did not preempt nor preclude the recognition, implementation, or enforcement of an otherwise valid prenuptial agreement with regard to a divorce proceeding.

To the credit of the Appellate Division, First Department, that court acknowledged that their prior decision in Richards should not be followed. The court instead concluded that a trial court's decision from Onondaga County (Edmonds v. Edmonds, 184 Misc.2d 928 [Sup. Ct., Onondaga County, 2000]) should be followed inasmuch as it persuasively differentiated the applicability of ERISA's bar as to waiver of survivor benefits as opposed to interests attained when achieving payout status.

I can now breathe a sigh of relief for all of my clients who did not heed my warnings and failed to have an addendum to their prenuptial agreement signed after the wedding.

For more information about this topic, or any other family law issue, please contact Eric J. Metzler: [emetzler@cdog.com](mailto:emetzler@cdog.com).

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