

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: SANDRA JEAN DALE BOGGS, Petitioner v. THOMAS F.  
BOGGS, HARRY M. BOGGS AND DAVID B. BOGGS  
CASE NO: 96-79  
PLACE: Washington, D.C.  
DATE: Wednesday, January 15, 1997  
PAGES: 1-52

**REVISED**

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SUPREME COURT, U.S.  
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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   SANDRA JEAN DALE BOGGS,                   :

4                   Petitioner                   :

5                   v.                   :   No. 96-79

6   THOMAS F. BOGGS, HARRY M.                   :

7   BOGGS AND DAVID B. BOGGS                   :

8   - - - - -X

9                   Washington, D.C.

10                   Wednesday, January 15, 1997

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:58 a.m.

14   APPEARANCES:

15   MARIAN M. LIVAUDAIS, ESQ., Mandeville, Louisiana; on  
16   behalf of the Petitioner.

17   PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
18   General, Department of Justice, Washington, D.C.; on  
19   behalf of the United States, as amicus curiae,  
20   supporting the petitioner.

21   EDWARD J. DEANO, JR., Mandeville, Louisiana; on behalf of  
22   the Respondents.

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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-79, Sandra Jean Dale Boggs v. Thomas F.  
5 Boggs, et al.

6 Mrs. Livaudais.

7 ORAL ARGUMENT OF MARIAN M. LIVAUDAIS

8 ON BEHALF OF THE PETITIONER

9 MRS. LIVAUDAIS: Mr. Chief Justice, and may it  
10 please the Court:

11 ERISA is a comprehensive Federal program  
12 designed to ensure that employees and their beneficiaries  
13 receive their retirement benefits. It is also designed to  
14 be applied uniformly throughout the country so that  
15 employees in other parts -- all parts of the country are  
16 treated equally.

17 How does ERISA accomplish this goal? By  
18 preemption. Additionally, Congress has created a list of  
19 statutory beneficiaries who are entitled to receive  
20 benefits under these retirement plans. Only ERISA-  
21 designated statutory beneficiaries are included in the  
22 list, and only those beneficiaries are permitted to  
23 receive benefits.

24 QUESTION: Well, doesn't your position raise a  
25 significant takings issue right off the bat?

1 MRS. LIVAUDAIS: I don't --

2 QUESTION: Because a State recognizes a  
3 community property interest in something like a husband's  
4 retirement plan or other assets that he has acquired  
5 during the marriage by virtue of his efforts, that law  
6 creates -- a community property law would create a  
7 property right in the spouse to half of whatever that  
8 asset is, and along comes an ERISA law later -- after this  
9 marriage, the first marriage had been in existence and she  
10 had an interest there, along comes ERISA. You say it  
11 preempts it, even though that would be a taking of her  
12 interest. Is that right?

13 MRS. LIVAUDAIS: No, Your Honor. I don't  
14 believe --

15 QUESTION: What's wrong with that analysis?

16 MRS. LIVAUDAIS: Well, there are two problems.  
17 In the first place, this Court has said on several  
18 occasions, including *Wissner v. Wissner*, that the Federal  
19 program does not constitute a taking under the Fifth  
20 Amendment.

21 QUESTION: But that was a statute that had gone  
22 into effect and no one claimed that there was a prior  
23 thing that was affected by the statute. Here, this fellow  
24 started working in 1949, and ERISA comes along in 1975.

25 MRS. LIVAUDAIS: This -- well, at the time that

1 ERISA comes along it preempts State law, the State  
2 community property law, so that it is inapplicable.

3 QUESTION: Well, I -- I'm not sure that's right,  
4 but even if it were, it would constitute a taking of the  
5 wife's interest acquired to that date.

6 MRS. LIVAUDAIS: Acquired to that date. Well,  
7 the wife's interest that's acquired to that date is  
8 similar to putting money into a trust. When she puts this  
9 money into the trust, she becomes -- if she lives long  
10 enough she becomes a surviving spouse and is entitled to  
11 benefits as a beneficiary. ERISA speaks in terms of  
12 beneficiaries.

13 QUESTION: Well, under community property law in  
14 Louisiana she owned half of whatever he made from 1949  
15 till ERISA at least was passed, and ERISA, even if you  
16 give it effect, can't take that without giving her  
17 compensation.

18 MRS. LIVAUDAIS: Her compensation was the  
19 anticipation of the benefits she would have received had  
20 she become -- had she lived long enough to receive them  
21 coming out of the back end of the -- a retirement program.

22 QUESTION: Yes, but the Government can't simply  
23 substitute one piece of property for another piece of  
24 property without them being somehow equal. Her share  
25 would simply disappear under your view in 1975, although

1 it had existed from 1949 on.

2 MRS. LIVAUDAIS: Her anticipated benefits  
3 were -- she received through the Federal program. That  
4 was the basis in the Wissner case that said that the  
5 retroactivity in that case --

6 QUESTION: Yes, but that was a Government life  
7 insurance policy. That wasn't private property.

8 MRS. LIVAUDAIS: Well, to the extent that the  
9 benefits she would receive as a -- had she lived to  
10 participate in the retirement benefits are so much  
11 greater, and fuels -- it's really tax dollars. The tax  
12 exemptions and the tax deferrals fuel the ERISA engine  
13 that creates the wealth that creates the much greater  
14 benefits at the end than she would expect to receive just  
15 by investing some portion of her --

16 QUESTION: What she would get by outliving her  
17 husband isn't what troubles me. It seems to me that's  
18 like having an ownership in a lottery ticket, and by the  
19 time the event occurs that brings ERISA into it the  
20 lottery has been run and the ticket is a loser. It's  
21 worthless at that point. So also, it's worthless here  
22 once she dies.

23 So it's not her survivor benefits that concern  
24 me, but isn't she entitled -- isn't she entitled to the --  
25 half of all the benefits that the husband receives?



1 MRS. LIVAUDAIS: Not -- no. She is --

2 QUESTION: In a community property State, isn't  
3 his entitlement to the retirement benefits really an  
4 entitlement that's half hers, and that does continue,  
5 whether she dies or not.

6 MRS. LIVAUDAIS: She's entitled, as a -- as the  
7 wife of the participant during retirement she would  
8 receive benefits and would enjoy the retirement benefits.

9 QUESTION: Justice Scalia is completely capable  
10 of protecting his own question, but it seems to me that  
11 he's asking you --

12 QUESTION: Go, Tony, I --

13 QUESTION: He thinks that he -- I thought that  
14 he was asking the question as a matter of Louisiana  
15 community property law, and then you tell us what ERISA  
16 provides, but as a matter of Louisiana community property  
17 law, is Justice Scalia not correct that the wife has an  
18 interest in the pension fund which, I take it, would have  
19 to be valued if the community is dissolved by divorce and,  
20 under -- although I was surprised to find this, I  
21 understand the premise of the case is that this is subject  
22 to bequest under Louisiana law. That's the premise that  
23 we take the case on, is it not?

24 MRS. LIVAUDAIS: I think so, yes, but --

25 QUESTION: Well, is it the case, then, if there

1 had been no ERISA at all, would the first wife have had  
2 something to bequeath by will? Do you agree that she  
3 would have?

4 MRS. LIVAUDAIS: Yes.

5 QUESTION: So that premise is correct.

6 MRS. LIVAUDAIS: That is correct.

7 QUESTION: I find that troubling, but what I'm  
8 not clear on is whether I have to reach that particular  
9 trouble. Has anyone raised the issue of a taking in this  
10 case?

11 MRS. LIVAUDAIS: No, they haven't.

12 QUESTION: May I also ask in that -- does the  
13 record tell us when the husband's pension benefits vested?

14 MRS. LIVAUDAIS: No, I -- well, I can't answer  
15 that. I really don't think so.

16 QUESTION: I couldn't find it myself.

17 MRS. LIVAUDAIS: But it really wasn't considered  
18 to be important. It vested during the --

19 QUESTION: But it would -- of course, it would  
20 be important if you're claiming there was a taking of  
21 vested benefits. You'd have to know when they vested and  
22 whether they vested.

23 MRS. LIVAUDAIS: They vested during his first  
24 marriage to --

25 QUESTION: But surely they didn't vest in 1949,

1 when he first started paying in.

2 MRS. LIVAUDAIS: No.

3 QUESTION: No.

4 QUESTION: Well, if there is a takings problem  
5 in the case, though, isn't that a reason for interpreting  
6 ERISA so that it doesn't raise that problem by saying that  
7 there isn't the sort of preemption that you're arguing  
8 for?

9 MRS. LIVAUDAIS: Well, the result there is that  
10 if that -- if you reach that and you say that there is no  
11 preemption, then State law in effect redefines who the  
12 beneficiaries of ERISA are, because if you say that there  
13 is no preemption of the community property law, then the  
14 nonparticipant spouse becomes --

15 QUESTION: Well, not at all. There's a  
16 statutory argument here to be addressed if we wish, I  
17 guess, and that's whether there was any alienation here at  
18 all under the statutory provision in ERISA.

19 If Dorothy's estate, if she had a community  
20 property interest in part of what was distributed to Isaac  
21 by virtue of Louisiana law, when she dies, why doesn't  
22 that interest, whatever it is, just continue to exist as  
23 part of her estate, and once there is a distribution, why  
24 doesn't her estate stand in her former shoes and say part  
25 of that is mine, and she -- that isn't an alienation under

1 ERISA.

2 MRS. LIVAUDAIS: But the -- well, you have to

3 start with the premise that she has a property interest --

4 QUESTION: Absolutely.

5 MRS. LIVAUDAIS: -- in the plan.

6 QUESTION: Absolutely.

7 MRS. LIVAUDAIS: Because without a property

8 interest in the plan --

9 QUESTION: Under Louisiana law.

10 MRS. LIVAUDAIS: -- she can't have a property

11 interest --

12 QUESTION: But she doesn't interfere with

13 anything. Just at the time of his death her interest

14 still remains, and it passes to her estate. There's no

15 alienation.

16 MRS. LIVAUDAIS: Well, under the facts of this

17 case what you say may be true, but that would not be true

18 had she not bequeathed her -- an interest to -- had she

19 not used the usufruct provisions of Louisiana law, because

20 at the time she died, and then her husband remarried,

21 the -- he would have lost his statutory usufruct and

22 therefore those -- the sons would have been in a position

23 to claim their benefits, or claim their interest in their

24 father's -- their mother's estate against their father's

25 benefits and therefore he would -- in effect, the



1 participant would have, in effect, lost half of his  
2 benefits in that instance. Yes, well -- yes, because --

3 QUESTION: Well, you focus a lot on the 1984  
4 amendments to ERISA, but I thought that Dorothy Boggs died  
5 in 1979, so how could that affect it? How could that --  
6 how could the 1984 amendments -- the bank and leave it

7 to -- MRS. LIVAUDAIS: He didn't retire --

8 QUESTION: -- construe what the law was at the  
9 time she died? -- anybody I want?

10 MRS. LIVAUDAIS: Well, he didn't retire until  
11 1985, at which point the 1984 amendments applied and the  
12 selection or the choice to take the joint survivor's  
13 annuity was exercised. Had he died --

14 QUESTION: Now, he also got some lump sum  
15 settlement? -- can in the --

16 MRS. LIVAUDAIS: That is correct. write a

17 will -- QUESTION: And some stock as well?

18 MRS. LIVAUDAIS: At the time he retired.

19 anyone. QUESTION: Uh-huh.

20 QUESTION: What is the lump sum? I mean, think  
21 just of the lump sum. Smith dies. He gets -- let's say  
22 he's got \$200,000 in a lump sum from his employer. right. I

23 can do that. MRS. LIVAUDAIS: Correct.

24 QUESTION: His will says the \$200,000 goes to a  
25 Martian, or it goes to Smith, or it goes to Jones, goes to

1       anybody.   ERISA doesn't stop that, does it?

2               MRS. LIVAUDAIS:   Yes, well -- yes, because --

3               QUESTION:   ERISA says I can't take --

4               MRS. LIVAUDAIS:   Well --

5               QUESTION:   -- \$200,000 I got out of my pension

6       plan which I happened to put in the bank and leave it

7       to --

8               MRS. LIVAUDAIS:   Oh, you could -- I'm sorry.

9               QUESTION:   -- anybody I want?

10              MRS. LIVAUDAIS:   I'm sorry.   He had rolled it

11      over into a --

12              QUESTION:   I'm not saying what happened here.

13      I'm trying to say --

14              MRS. LIVAUDAIS:   If it was in his bank account

15      or in a coffee can in the --

16              QUESTION:   No, I just say this, I write a

17      will --

18              MRS. LIVAUDAIS:   -- he could leave it to

19      anyone.

20              QUESTION:   I write a will, and my will says, the

21      money I get in a lump sum from my pension fund, when I die

22      I would like that will to go to John Black, all right.   I

23      can do that, can't I?

24              MRS. LIVAUDAIS:   Yes.

25              QUESTION:   And can I leave it to my wife?

1 MRS. LIVAUDAIS: You can leave it to your wife.  
2 QUESTION: Yes, and if the State law says that  
3 this money has to go to John Black or to my wife, is there  
4 any problem with that?  
5 MRS. LIVAUDAIS: No.  
6 QUESTION: No. And if State law says when you  
7 die the reason that it has to go to your wife is because  
8 she had a community property interest, is that any  
9 different?  
10 MRS. LIVAUDAIS: No.  
11 QUESTION: No. Then if that's no different, and  
12 if the wife, knowing that she gets it, happens to write a  
13 piece of paper in advance that says when I die, that money  
14 will go to my children, is that a problem?  
15 MRS. LIVAUDAIS: Well, the problem is that it's  
16 not hers to leave --  
17 QUESTION: Oh, no, no. She says, if I get this  
18 money when my husband dies, because State law gave it to  
19 me, I will then give it to my children. Is that a  
20 problem?  
21 MRS. LIVAUDAIS: No, it is not.  
22 QUESTION: All right, then how is that different  
23 from this case as to the \$200,000, except for the rollover  
24 into the IRA, which is separate, which I think has nothing  
25 to do with it? But except for the rollover into the IRA,

1 how is that different from this case as to the money?

2 MRS. LIVAUDAIS: Well, when the --

3 QUESTION: I mean, I don't want to have mixed  
4 you up with all the questions, but as I'm seeing it, all  
5 this is is a State law called a community property law  
6 that says what will happen on the death of the husband to  
7 the money that was a fixed sum that came into the  
8 possession of the wife because of State law community  
9 property, and she later on left it by will but she didn't,  
10 because there was another State law -- or whatever, but to  
11 somebody else.

12 Maybe the SG will answer that question, because  
13 I -- and if the answer depends on the IRA, that, I think,  
14 had to do with tax purposes. I don't see whether you put  
15 it --

16 MRS. LIVAUDAIS: Well --

17 QUESTION: -- but that's what I'm thinking and  
18 I'd like to get a response from that either from you or  
19 from the SG.

20 MRS. LIVAUDAIS: Well, the -- ERISA preempts the  
21 designation, or sets out who the beneficiaries are of the  
22 property. The participant is the beneficiary, the first  
23 beneficiary. His nonparticipant spouse has no -- under  
24 ERISA has no rights in the plan during the life of the  
25 participant. Our --



1 QUESTION: But she would if she divorced him,  
2 right?

3 MRS. LIVAUDAIS: Well, but State court could,  
4 under the QDRO, give her rights in it. She does not  
5 automatically have rights.

6 QUESTION: Yes, but Judge Fletcher said one of  
7 the many anomalies in this case is, you take a woman who  
8 under State law is a coowner, and she stays a coowner. If  
9 before she dies, predeceasing her husband, she divorces  
10 him, then her coownership can be realized and she can pass  
11 it on to her children.

12 But if she should stay with him till her last  
13 breath, then her coownership vanishes, and I suppose Judge  
14 Fletcher was saying, if there is another construction  
15 that's reasonable, we ought to apply that, rather than one  
16 that leads to this very odd result.

17 MRS. LIVAUDAIS: Except that the results is that  
18 under that -- under Judge Fletcher's construction she  
19 basically would have the surviving participant who has  
20 anticipated receiving these benefits and has contributed  
21 to them thinking that he is going to retire, he suddenly  
22 has to divide his benefits with people who are not  
23 retirees.

24 Granted, they -- and they're not necessarily his  
25 children. They could -- it could be a charity to whom she

1 may have left this money.

2 QUESTION: Ms. Livaudais, could I ask you,  
3 regarding Justice Breyer's question, do you acknowledge  
4 that the only effect of a community property law is to say  
5 how the husband's property goes when he dies, which seemed  
6 to me to be the hypothesis of Justice Breyer's question?

7 Doesn't the community property law make it her  
8 property immediately, before the husband dies, so it isn't  
9 a question of the husband getting all the money at the end  
10 and State law just saying where the husband's property  
11 goes. Your contention is that it is -- or the community  
12 property law says that it is her property. Half of it is  
13 hers at the outset. She doesn't get half at his death.

14 MRS. LIVAUDAIS: No, but it -- but my contention  
15 is that ERISA preempts the application of that community  
16 property law from the moment that ERISA was passed, and  
17 therefore ERISA dictates that these benefits are  
18 different. They are special property. They are not  
19 governed by the State property laws, whether community  
20 property or any other kind of State property --

21 QUESTION: Mrs. Livaudais, do I understand this  
22 to be the practical consequence of your position: for  
23 more and more older people, the pension, if it's not the  
24 principal asset, but certainly a principal asset, and so  
25 to the extent of that pension, the Federal Government has

1 done away essentially with the community regime, and is  
2 there anything specific in the statute, or -- that  
3 suggests that Congress really was trying to undo, destroy  
4 the community?

5 MRS. LIVAUDAIS: Congress was very clear on the  
6 people who Congress wanted to receive the benefits. That  
7 was the participant and the participant surviving spouse.

8 The purpose is to assure that these people in  
9 their older age are supported and are not -- it  
10 supplements their social security and they are not  
11 dependent on the State for additional support, and that is  
12 the purpose behind any -- in ERISA.

13 And therefore, in order to make sure that the  
14 benefits are confined to the people who are the employee  
15 and the employee's surviving spouse -- the QDRO's not  
16 concerned in that. Only the people who are named in the  
17 statute as beneficiaries are entitled to --

18 QUESTION: But this is so peculiar, because here  
19 is an example of a couple who were married for many, many  
20 years, until the first wife died, and under community  
21 property law in Louisiana she had a half interest in all  
22 that. That's acknowledged.

23 And how is it that we would construe ERISA to  
24 preempt that, when this may well be the major asset of the  
25 couple, indeed their only greatest asset from all those

1 years of work, and you want us to say that Congress just  
2 intended to wipe that out, to take it, even if it's a  
3 taking, and I think this is a remarkable construction that  
4 you're asking us to give this law.

5 In ERISA's preemption clause this Court has been  
6 careful, has it not, to protect the role of traditional  
7 State provisions?

8 MRS. LIVAUDAIS: Except when it related to the  
9 act, did damage to the act.

10 The purpose in -- thank you.

11 QUESTION: Thank you, Ms. Livaudais.

12 Mr. Wolfson, we'll hear from you.

13 Mr. Wolfson, does the Government recognize any  
14 difference between the two kinds of things involved here,  
15 one being an annuity and the other being a lump sum?

16 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONER

19 MR. WOLFSON: Yes. Well, Mr. Chief Justice and  
20 may it please the Court:

21 We believe that the interests in both are  
22 preempted, and we start -- I'd like to start with ERISA's  
23 broad -- broad but common sense preemption clause, the  
24 relate-to.

25 In our view really the ownership of plan assets



1 is the issue here, and nothing could relate to a plan more  
2 than the basic question of who owns the assets in -- who  
3 owns the assets in the plan, and that's a -- that is what  
4 the application of State community property law to an  
5 ERISA plan --

6 QUESTION: But under that, do you -- there's  
7 been a taking here --

8 MR. WOLFSON: I --

9 QUESTION: -- and we normally would avoid  
10 resting on some constitutional ground if we can possibly  
11 construe the statute some other way.

12 MR. WOLFSON: Well, obviously we disagree that  
13 there's a taking here, and I'd like to address that first.

14 And the first thing is, what the first  
15 Mrs. Boggs -- one has to look to what the first  
16 Mrs. Boggs' property interest in the plan would have been  
17 before 1974, because it's only pre-'74 where the taking  
18 problem might arise, and what she really had was an  
19 inchoate or contingent interest in the right to control  
20 benefits that she would have received from the plan once  
21 Mr. Boggs retired.

22 QUESTION: That's \*not my understanding.

23 QUESTION: What if the benefits had vested?

24 MR. WOLFSON: Well, we don't know whether the  
25 benefits had vested, but even if the benefits had vested,

1 Justice Stevens, I think in effect the only thing that has  
2 been removed from her property interest here is the right  
3 to make a testamentary distribution of those benefits.

4 QUESTION: She had a right under Louisiana law,  
5 I presume, if it's like most community -- to prevent any  
6 expenditures in fraud of the community. There are all  
7 sorts of ancillary provisions in community property --

8 MR. WOLFSON: One would -- I mean, one would  
9 also have to consider the plan to see that -- those might  
10 have provided her with some protections also, but what she  
11 can't do as a result of ERISA here is pass on her interest  
12 to her children.

13 QUESTION: Which is certainly one stick in a  
14 bundle of rights.

15 MR. WOLFSON: It is one, but I don't think that  
16 the removal of that right amounts to a taking, because,  
17 for example --

18 QUESTION: Well, let's just say no will. She  
19 died. She has an estate left, and subsequently he dies.  
20 Now, her estate surely is entitled to half.

21 MR. WOLFSON: But what Louisiana could have  
22 passed -- I mean, by hypothesis Louisiana could have  
23 passed a law that said no, when she died her interest had  
24 to go to her husband. That was the terminable interest  
25 rule that has existed in other community property States.

1           It could have enacted that, and the effect of  
2   that would have been to say, although she might have had a  
3   community property interest in her plan assets, you know,  
4   or have expected to receive half of them when he retired,  
5   and assuming she was alive when he retired, she would have  
6   had to hand over everything to him.

7           QUESTION: But that's not Louisiana law.

8           MR. WOLFSON: But Louisiana could have passed  
9   that law, and I think that is really the effect of what  
10  ERISA did in her situation. That is to say --

11          QUESTION: I'm not so sure I'm willing to say  
12  Louisiana could have done that.

13          MR. WOLFSON: I guess although it certainly --

14          QUESTION: We've got these Indian claims, for  
15  instance, the --

16          MR. WOLFSON: That's right.

17          QUESTION: -- Federal efforts to prevent  
18  further fractionalization.

19          But this Court in earlier cases has certainly  
20  recognized a property interest in --

21          MR. WOLFSON: Yes. I think that -- I mean,  
22  obviously in those cases what we have argued is that in  
23  light of the Court's prior decisions the Government  
24  couldn't take away her right to make any distribution at  
25  all of any interest she might have had, but here, what it

1 does is, it -- what ERISA did would be to transfer her  
2 community interest to her husband, which she might well  
3 have done anyway to gain the benefit of the --

4 QUESTION: Yes, but she didn't do it, and the  
5 State didn't pass the law, and is it fair to say this,  
6 that if we assume that in fact there has been a taking to  
7 the extent suggested --

8 MR. WOLFSON: It --

9 QUESTION: -- your argument still -- pardon me?

10 MR. WOLFSON: It hasn't been suggested in the  
11 lower courts, and hasn't been raised, and we don't know to  
12 what extent --

13 QUESTION: Right, but it's being raised here I  
14 think in aid of the question how should we construe or how  
15 should we apply as vague a preemption provision as  
16 relates-to, and I thought from your brief that you in  
17 effect would address that question by saying, you really  
18 don't have a real issue of how to construe the vagueness  
19 of relates-to.

20 Because even if there weren't a preemption  
21 clause in this statute, you've got good old garden variety  
22 conflict preemption here as between what ERISA provides  
23 for surviving spouses and what community property law, at  
24 least as we are suggesting it, could be construed would  
25 otherwise provide, and you've got to face the fact, I



1 think you would say, that there is that conflict  
2 preemption.

3 Am I being fair to your position?

4 MR. WOLFSON: I think certainly there is a  
5 direct conflict with the provision for the survivor  
6 annuity for the -- that is, ERISA itself says a surviving  
7 spouse -- as a matter of Federal law, a surviving spouse  
8 is entitled to receive a survivor annuity unless she has  
9 elected to waive that benefit, assuming there is a  
10 surviving spouse and unless she has elected to waive that  
11 benefit beforehand by a notarized statement, and so forth.

12 QUESTION: And you say that cannot be construed  
13 to be a survivor's annuity based upon whatever may be left  
14 under State law. You're saying that has got to be  
15 determined in relation to either the contributions or the  
16 defined benefit of the plan, period.

17 MR. WOLFSON: Yes, and in fact when the -- when  
18 Congress enacted the survivor annuity, and it -- it  
19 really, I think really when Congress enacted the REA it  
20 really sort of addressed directly the situation of  
21 spouses' rights and plan benefits and occupied the field,  
22 if you will, but it said it has to be actuarially  
23 determined under certain rules which would relate to the  
24 annuity that the participant would have had if he'd only  
25 been -- if only he had been around.

1 QUESTION: Okay.

2 MR. WOLFSON: So it set up a Federal rule for

3 determining how the survivor annuity is --

4 QUESTION: Well --

5 QUESTION: No --

6 QUESTION: -- the lower courts now, before the

7 1984 amendments, had construed the statute not to make

8 such a preemption. This Court hadn't ruled on it.

9 But then Congress got busy and said, wow, we've

10 created a problem here, let's look at it, and they passed

11 this so-called domestic relations order notion hoping to

12 avoid just what you're talking about --

13 MR. WOLFSON: Well, I think that the --

14 QUESTION: -- and to address the problem of the

15 first spouse --

16 MR. WOLFSON: Yes, I --

17 QUESTION: -- or the dependent.

18 MR. WOLFSON: But what I would suggest is that

19 when Congress enacted the domestic relations order it

20 looked directly at the very compelling situation of the

21 first spouse who would have been expecting to look to be

22 supported by the spouse, or to share in those benefits.

23 QUESTION: Well, we might even shoe-horn this

24 into that domestic relations order.

25 MR. WOLFSON: I --

1 QUESTION: It says if it's made pursuant to a  
2 State domestic relations law, including a community  
3 property law, and it says that any court in the State can  
4 issue an order that is qualified under this plan. It  
5 doesn't limit it to some specialized family court, or  
6 something.

7 MR. WOLFSON: Well, I think when Congress said  
8 domestic relations law, including community property law,  
9 it might have done that for two reasons --

10 QUESTION: Well, and it also defined ultimate  
11 payee for these purposes as any spouse, former spouse, et  
12 cetera.

13 MR. WOLFSON: If that spouse has a domestic  
14 relations order that's been qualified, but there are two  
15 reasons --

16 QUESTION: Could a probate court --

17 MR. WOLFSON: No. No.

18 QUESTION: -- be such a court?

19 MR. WOLFSON: No.

20 QUESTION: Well, it says any court.

21 MR. WOLFSON: It says any court applying  
22 domestic relations law, which is the law --

23 QUESTION: Includes community property law.

24 MR. WOLFSON: Yes, but the reason why I think  
25 Congress did that -- I think there are two.

1 First, in some States domestic relations law is  
2 in a separate -- you know, in Louisiana, in fact, it's in  
3 a separate section of the code than community property  
4 law. Domestic relations law would normally be thought of  
5 in terms of support as child support and alimony, and --

6 QUESTION: I'm just looking at the provisions of  
7 the 1984 amendments.

8 MR. WOLFSON: But when you put them together --

9 QUESTION: And I think you could even shoe-horn  
10 this into that.

11 MR. WOLFSON: I don't think so, because when you  
12 put them together, I think what Congress was trying to  
13 consider was the law that would be applied in domestic  
14 relations proceedings, specifically legal separation  
15 proceedings and dissolution of a marriage, and child  
16 support proceedings, and it wanted to be sure that the  
17 courts could consider the community property law, and  
18 there's a specific -- could have been a specific reason  
19 for that.

20 In Hisquierdo and some other cases, the Court  
21 had looked at statutes that allowed division of benefits  
22 to enforce alimony orders but not community property  
23 orders.

24 I believe in Hisquierdo the railroad retirement  
25 benefit statute specifically had an exception to the



1 antialienation clause for alimony but not for community  
2 property, so Congress was removing the doubt that the  
3 State court, when it was enacting a domestic relations  
4 order, could make an equitable distribution of the  
5 property by considering among other things any right that  
6 might possibly have been said to arise under State law by  
7 virtue of the community property regime and not limited to  
8 alimony.

9 Thank you.

10 QUESTION: Thank you, Mr. Wolfson.

11 Mr. Deano, we'll hear from you.

12 ORAL ARGUMENT OF EDWARD J. DEANO, JR.

13 ON BEHALF OF THE RESPONDENTS

14 MR. DEANO: Mr. Chief Justice, and may it please  
15 the Court:

16 The case from the Fifth Circuit which we're  
17 seeking to uphold is a simple case.

18 QUESTION: I'd like to ask you a question, but  
19 I'm afraid you're going to agree with me. But maybe you  
20 won't, which would be lucky, and that is, I'm thinking of  
21 these as two separate things. One is the annuity, and the  
22 second is everything else, just plain dollars.

23 Now, the annuity, it seems to me you run into a  
24 big problem of rather specific provisions that say how  
25 annuities are supposed to be set up, but as to the other,

1     you're just going to say no.

2                 I mean, I don't see what the conflict with ERISA  
3     is to leave the \$200,000 to your wife, or to your cousin,  
4     and if this all happens through community property law,  
5     why is that any different than if it were the law of  
6     wills, and even if community property governs property  
7     during life, so what?

8                 I mean, I don't understand -- maybe you could  
9     explain what their argument against that is and what your  
10    reply is.

11                MR. DEANO: First of all, with regard to the  
12    lump sum payments, clearly the antialienation provisions,  
13    once they've been paid out of the plan, don't apply, and  
14    there's a whole line of jurisprudence that sets that out.

15                But what's I think very important conceptually  
16    to understand, and this Court has spoken to that in the  
17    Mackey case and also in the Fort Halifax case, is there's  
18    a distinct difference between State laws that deal with  
19    benefits and those that deal with plans, and that the  
20    preemption clause is not designed to preempt State laws  
21    that deal with benefits, and that makes sense.

22                If you preempted the law that dealt with  
23    benefits, you could never get to defined rights, because  
24    those laws would have been preempted, so you couldn't have  
25    a QDRO. Everything would end up in Federal court if you

1 preempted the laws.

2           So the remedy to deal with laws that are  
3 troubling, State laws that are troubling, are the  
4 antialienation provisions, and some cases have said that  
5 you preempt laws through the antialienation provisions,  
6 which doesn't make a lot of sense either, and I hope that  
7 I'm answering your question.

8           QUESTION: Your part, the part that you want to  
9 answer directly is the other part, I guess, which is 29  
10 U.S.C. 1055 has, like, about 15, or 10, or 5 specific --

11           MR. DEANO: Well, I --

12           QUESTION: -- things that are supposed to happen  
13 to these pensions, and that, why doesn't that preempt  
14 community relations -- community property law insofar as  
15 it's to the contrary?

16           MR. DEANO: I think Justice O'Connor drew a  
17 point that I think is very salient to that, and that is  
18 whether or not a probate order should be defined, or  
19 should be able to be qualified as a QDRO, and it's very  
20 interesting, I think, to take a look at the antialienation  
21 provision in 1056. The general antialienation provision  
22 in 1056 pre-REA 1984 was held not to affect property  
23 interests, marital property interests.

24           Then there was an additional sentence that was  
25 put in, and was held to that, and it's a much narrower

1 antialienation protection, and what it says is -- and I'm  
2 quoting from section (d) in paragraph -- in (3), that this  
3 alienation shall apply to the creation, assignment,  
4 recognition of a right, a benefit which is payable with  
5 respect to a participant pursuant to a domestic relations  
6 order.

7           So one of two things happens here. Either the  
8 right, which is -- certainly was designed to apply to  
9 community property inheritance rights which were not  
10 contained in the previous general antialienation -- the  
11 right, in order to be prohibited through the  
12 antialienation provision, must be one that is derived  
13 pursuant to a domestic relations order.

14           So one of two things happens. Either a probate  
15 order is a domestic relations order, in which case that  
16 antialienation provision would apply but so would the  
17 exception of a QDRO, which requires two things, that it be  
18 an anti --

19           QUESTION: What I was thinking of is, I think  
20 there's a provision that says you have an annuity, and  
21 your employer gives you an annuity. Let's say it's \$2,000  
22 a month. There's going to have to be a provision in there  
23 that if you die your present wife gets at least \$1,000 a  
24 month. Isn't that right?

25           MR. DEANO: That's correct.



1 QUESTION: All right. If that says that  
2 specifically in the statute, if there's a community  
3 property law that says, sorry, your present wife doesn't  
4 get \$1,000 a month, rather, that \$1,000 a month, which is  
5 all that's left of the annuity, goes to the first wife,  
6 that would seem like a direct conflict. Why isn't it?

7 MR. DEANO: Because this Court has decided that  
8 those types of conflicts are treated in the context of the  
9 antialienation provisions, not the preemption provisions.

10 QUESTION: Well then, why? Then tell me,  
11 because I don't know this area that well. It sounds to me  
12 as if the statute says that your pension has to provide an  
13 annuity of \$2,000 to Breyer until -- as long as he's  
14 alive, and then \$1,000 to his present wife. The community  
15 property law says, sorry, the first wife gets the \$1,000.  
16 That sounds like a direct conflict under basic principles  
17 of preemption law, and I'd like to know why it isn't.

18 MR. DEANO: Because the provision that provides  
19 for the annuity is a directive to a plan to provide for  
20 that annuity in its plan. It's a directive to  
21 administrators to draft a plan that creates this type of  
22 function, so if we began to say, plans drafted by  
23 administrators can preempt State law, we wade into very  
24 dangerous territory.

25 QUESTION: So Congress doesn't care what the

1 result is. It just wants -- it just insists that the  
2 administrators draw up a certain scheme and it's okay if  
3 the States adopt their laws in such a way that the scheme  
4 doesn't produce any particular result.

5 All Congress wants is the abstract ideal of an  
6 administrative plan?

7 MR. DEANO: No --

8 QUESTION: That doesn't seem to make any sense.

9 MR. DEANO: No. What Congress was looking for  
10 is that a plan will have to operate first in the context  
11 of State laws, but also with the power of its  
12 antialienation provisions to operate within State law, so  
13 that the antialienation provisions are the power with  
14 regard to State laws that deal with benefits.

15 QUESTION: Is the \$1,000 annuity that Justice  
16 Breyer was asking you about, is that at issue here? I  
17 thought that was not at issue.

18 MR. DEANO: That is a part of the claim --

19 QUESTION: She's not claiming that she gets the  
20 later wife's --

21 MR. DEANO: That has been set out as part of --

22 QUESTION: -- annuity, is she?

23 MR. DEANO: That is set out, has been set out as  
24 part of the claim.

25 QUESTION: A piece of it.

1 QUESTION: Part of it, not all of it.  
2 MR. DEANO: Oh, no --  
3 QUESTION: Part of it, not all of it.  
4 MR. DEANO: It's an insignificant portion of the  
5 claim.  
6 QUESTION: I had thought that the brief said  
7 that that was not the issue at all.  
8 MR. DEANO: I'd also like to just note --  
9 QUESTION: Well, is it? It is part of the  
10 issue?  
11 MR. DEANO: Yes, Your Honor.  
12 QUESTION: There is a claim for a portion of the  
13 annuity payments going to the second wife?  
14 MR. DEANO: That's correct, and before I --  
15 QUESTION: No longer a claim. You prevailed on  
16 it, in fact, in the Fifth Circuit, right?  
17 MR. DEANO: Excuse me?  
18 QUESTION: In the Fifth Circuit --  
19 MR. DEANO: Yes.  
20 QUESTION: -- didn't you succeed on the claim,  
21 and the claim included not only the lump sum amounts, a  
22 piece of those, but also a piece of the survivor's  
23 annuity?  
24 MR. DEANO: Which -- that's correct, and to  
25 maybe make that somewhat more understood, under Louisiana

1 law what is actually the claim is accounting for a  
2 usufruct, meaning --

3 QUESTION: From the three sons, yes.

4 MR. DEANO: -- accounting for the use of the  
5 property. Not necessarily that property itself, but what  
6 you're calling upon, and the right is an account for the  
7 use of the property during the life of the user.

8 QUESTION: Yes, but the result of it would be  
9 that the current wife, who's getting something like \$1,800  
10 a month, or something like that, that she would in fact  
11 have to pay over a piece of that, whatever is the -- it  
12 could be reduced to a lump sum, but a piece of her monthly  
13 benefits.

14 MR. DEANO: That's correct, and I think --

15 QUESTION: What kind of a plan was this? Where  
16 does this survivor's annuity come from? Did payments come  
17 from Isaac during his life that went into a specific fund,  
18 and it was that fund that's used to pay out the survivor  
19 benefits, or is it some other kind of plan?

20 MR. DEANO: It's my understanding that the total  
21 pension benefits, meaning life insurance policies, meaning  
22 lump sums and this annuity, were provided over the life of  
23 the entire employment of Isaac and during that --

24 QUESTION: Not out of any specific fund that  
25 matched, dollar for dollar, what he put in?



1 MR. DEANO: I don't believe so.

2 QUESTION: What if Isaac had died before his  
3 retirement and without having remarried? Would his heirs  
4 have received anything?

5 MR. DEANO: If Isaac -- under Louisiana law, if  
6 Isaac --

7 QUESTION: He hadn't remarried.

8 MR. DEANO: If he had not remarried --

9 QUESTION: And he died before any survivor's  
10 annuity had been paid, what would happen?

11 MR. DEANO: The heirs of Dorothy would have --

12 QUESTION: His heirs.

13 MR. DEANO: And his heirs.

14 QUESTION: Would his heirs get anything?

15 MR. DEANO: His heirs would inherit his  
16 property, his part of the community property. Any  
17 separate property owe an accounting to the heirs of  
18 Dorothy.

19 QUESTION: Would they be entitled, if they were  
20 not dependent children, to any portion of the survivor's  
21 annuity in that circumstance?

22 MR. DEANO: If Isaac -- oh, had Dorothy  
23 survived? Is that --

24 QUESTION: No. No. She's gone, he's gone.

25 QUESTION: There's no survivor.

1 QUESTION: There are no survivors except adult  
2 children. What happens?

3 MR. DEANO: Well, I don't believe under the plan  
4 there would be any survivor's annuity.

5 QUESTION: Of course not, and --

6 QUESTION: No.

7 QUESTION: But that's the puzzlement about this  
8 case.

9 QUESTION: That's been the puzzle.

10 QUESTION: How can the first wife claim the  
11 annuity that wouldn't have existed if the first wife  
12 hadn't died?

13 MR. DEANO: Because that annuity --

14 QUESTION: I mean, had he not remarried there  
15 would have been no annuity. At the time she died, that  
16 was it. The right to an annuity comes about later because  
17 he remarries, and now the first wife, who at the time of  
18 her death had no claim, gets a right to the second wife's  
19 annuity. It seems very strange to me. I can't imagine --

20 MR. DEANO: That right, that annuity was paid  
21 for first of all with community funds, and also --

22 QUESTION: Well, but you just told me they  
23 weren't traceable. You know, this is a real puzzle to  
24 figure out, and if you acknowledge in the circumstances I  
25 ask about that, oh, well, then there wouldn't be a

1 survivor's annuity, I'm not sure that that creates a  
2 problem then when the first wife died.

3 MR. DEANO: Perhaps I misunderstood your  
4 question with regard to a fund.

5 QUESTION: Well, I --

6 QUESTION: I thought the --

7 MR. DEANO: If the money was paid from community  
8 funds --

9 QUESTION: Why couldn't I think that what was  
10 bought with the community funds was, as I described it  
11 earlier, a lottery ticket? The wife has a chance. If she  
12 outlives the husband, she has a right to this annuity, but  
13 at the time of her death, the lottery was over. She had  
14 lost. There's nothing left to that.

15 MR. DEANO: Because -- and the answer to that  
16 question is because she has a certain claim, certainly on  
17 the benefits that her husband --

18 QUESTION: That's the other part of the case. I  
19 acknowledge that.

20 MR. DEANO: Okay.

21 QUESTION: That's a different part, the  
22 husband's --

23 MR. DEANO: And those benefits were reduced due  
24 to this -- due to this annuity, so that the community  
25 funds not only paid for the survivor's annuity, but the

1 other funds that she would otherwise have a claim upon,  
2 which were the funds that were received by her husband,  
3 were reduced in order to purchase this annuity.

4 QUESTION: So there's this right as a matter of  
5 State law --

6 MR. DEANO: That's correct.

7 QUESTION: That as a matter of State law,  
8 husband and wife 1 work together for 30 years, build up a  
9 million dollars in an IRA, or in some kind of a retirement  
10 account with a pension, and at the end, eventually wife 1  
11 is long -- is gone, but eventually that million is used to  
12 buy an annuity which says, \$2,000 a month to husband, on  
13 husband's death, \$1,000 a month to wife 2.

14 You are saying under the law of Louisiana, since  
15 that \$1 million which paid for the annuity was jointly  
16 built up during their community, wife 1 is entitled to  
17 one-half the proceeds of that eventually, or some share of  
18 that. Is that right?

19 MR. DEANO: And also, that's correct --

20 QUESTION: And that is the State law of  
21 Louisiana, and my question was, why, in fact, doesn't this  
22 particular provision that says half has to go to wife 2  
23 trump that, and your answer was what it was. Is that  
24 where we are?

25 MR. DEANO: That's correct.

1 QUESTION: All right.

2 MR. DEANO: And the answer is that the State  
3 laws dealing with benefits, and it's been held, are not  
4 preempted but they have to deal with the antialienation  
5 provisions in ERISA.

6 QUESTION: Can you explain that to me further,  
7 because that's the point -- I wanted to come back to that.  
8 I don't understand your argument about the significance of  
9 the antialienation provision if we assume a conflict which  
10 would otherwise give rise to a preemption.

11 MR. DEANO: This Court has stated that, first of  
12 all, the State laws that deal with benefits, and this is  
13 in Fort Halifax v. Coyne, are not preempted. They have  
14 to -- and that's been followed in a line of jurisprudence  
15 with Guidry v. Sheet Metal Workers and other cases,  
16 that --

17 QUESTION: So you're saying there's no conflict  
18 preemption under --

19 MR. DEANO: No. What I'm saying is that when  
20 there is a conflict, preemption is not the remedy.  
21 Preemption --

22 QUESTION: Okay.

23 MR. DEANO: -- has not -- has been rendered not  
24 the remedy for a conflict or troubling situation with  
25 State laws, State laws dealings with benefits as opposed



1 to State laws dealing with benefit plans. Now --

2 QUESTION: What is the remedy, if --

3 MR. DEANO: The remedy is the antialienation  
4 provisions in ERISA, and this Court has reasoned that if  
5 the law, the State laws first of all were preempted there  
6 would be no need for the antialienation provisions, and so  
7 the fact that the antialienation provisions are there are  
8 certainly an indication that the State laws that deal with  
9 benefits are not preempted, and that line of cases has  
10 been --

11 QUESTION: Why isn't there -- now, I'm sorry,  
12 this is probably a very stupid question, but why isn't the  
13 antialienation provision explicable in terms of rights  
14 under the ERISA plan as distinct from rights under State  
15 law?

16 MR. DEANO: The -- this -- the speakings of this  
17 Court in the case of Mackey, and also because of the  
18 congressional -- the screening congressional intent prior  
19 to the enactment of the REA act indicated it is not -- it  
20 is not Congress' intent to preempt State laws dealing with  
21 marital property rights.

22 QUESTION: May I --

23 MR. DEANO: That has been --

24 QUESTION: Are you through with your answer? I  
25 don't want to interrupt you.

1 record in MR. DEANO: And so that that combination, and  
2 the fact that if you begin to preempt State laws, for  
3 instance you'd never be able to get to an exception to the  
4 antialienation provision, for instance, a QDRO, because  
5 the laws that would be the basis for the QDRO would be  
6 preempted. So that the remedy is not preemption, it's  
7 dealing with the antialienation provisions. you when?

8 And to answer more specifically your question,  
9 the Court reasoned that the preemption is not the  
10 useless -- would not be the useless one, as opposed to the  
11 antialienation definition of a QDRO, because it was the  
12 Congress' intent to show that any preemption of domestic  
13 rights or domestic laws was not the intent, and therefore  
14 they put that into the -- district court and in the court

15 of appeal. QUESTION: May I ask you three very brief  
16 questions? MR. DEANO: No, Your Honor.

17 MR. DEANO: Yes, Your Honor. had vested, had  
18 vested who QUESTION: One, does the record contain the  
19 plan? and's death? By the time of the wife's death?

20 MR. DEANO: To my knowledge, it does not. the

21 wife's death QUESTION: I couldn't find it. And 2, do you  
22 know that when your -- when the first wife's -- do you  
23 know when the husband's rights in the plan vested? Does  
24 the record tell us the answer to that?

25 MR. DEANO: The record -- first of all, the

1 record indicates in a stipulation of facts that the rights  
2 had vested, and I also wanted to point out that the issues  
3 of a taking was raised and argued in the district court  
4 level, argued in -- also argued in the Fifth Circuit?

5 QUESTION: Had vested when?

6 QUESTION: When?

7 QUESTION: Justice Stevens asked you when?

8 QUESTION: Yes. Does the record tell us when  
9 the husband's rights vested?

10 MR. DEANO: To my knowledge the record does not.

11 QUESTION: It does not. And -- but I -- the  
12 other -- you have answered my third question. I was going  
13 to ask you whether the takings issue had been raised, and  
14 you did argue that in the district court and in the court  
15 of appeals, and the court of appeals didn't address it

16 MR. DEANO: No, Your Honor.

17 QUESTION: When you say they had vested, had  
18 vested when, by when? By today? By the time of the  
19 husband's death? By the time of the wife's death?

20 MR. DEANO: They had vested at the time of the  
21 wife's death.

22 QUESTION: Of the first wife's death?

23 QUESTION: Which was '79.

24 MR. DEANO: That's correct.

25 QUESTION: Have there been cases in Louisiana

1 where the Louisiana legislature has passed laws changing  
2 the rights of spouses in community property, saying that  
3 what was once raw expectancy is now vested, and have  
4 those -- and if that has happened, have any of those under  
5 State law been challenged as takings, or retroactive --  
6 MR. DEANO: To my knowledge, the only changes in community  
7 property laws that have come about have been where the  
8 parties have been able to agree to make those changes.

9 QUESTION: May I -- I want to clarify one thing  
10 on the takings issue. Did you argue that there was a  
11 taking in 1974 when the statute was enacted, or when did  
12 you say the taking took place? What was your theory?

13 MR. DEANO: I believe the argument was first of  
14 all that there was a takings -- one in '74 --

15 QUESTION: You did argue that there was a  
16 takings in '74.

17 MR. DEANO: And there was one -- it was taken --

18 QUESTION: So you must have argued that there  
19 had been a vesting prior to '74, but there's no finding to  
20 that effect.

21 MR. DEANO: Right, but also a taking in that the  
22 probate order was rendered in this matter in 1980, 4 years  
23 before the enactment of the REA act, and there's  
24 discretion that the -- in section 302 that allows orders  
25 that don't meet the qualifications of a QDRO to be



1       excepted.

2               QUESTION:   But I --

3               MR. DEANO:   And that is another point as to why  
4       antialienation provisions are not allowed to preempt State  
5       laws, because they're drafted by plan administrators that  
6       do have discretion in the drafting of those plans.

7               QUESTION:   Is it --

8               QUESTION:   The Fifth Circuit interpreted the  
9       statute in such a way that there was no takings problem.  
10      It held for you down the line.

11              But one of the arguments that was raised on the  
12      other side about the Federal interest is, sparing the plan  
13      from being burdened with all these peculiarities of  
14      usufruct and forced heirship and all that, and we're also  
15      been told by one of the briefs that there are peripatetic  
16      workers who walk in and out of community property States,  
17      and the whole thing would be a nightmare for  
18      administration, so how do you respond to that?

19              MR. DEANO:   I think the accounting problem is  
20      somewhat of a bogus issue in that the administrator just  
21      deals with the judgment that's presented to them, and the  
22      rights that are contained in the judgment.   An  
23      administrator is never called upon to do -- to touch a  
24      calculator with regard to those types of problems.

25              QUESTION:   Of course, the administrator would



1 have to comply under present law since '84 with a  
2 qualified domestic relations order.

3 MR. DEANO: That's correct.

4 QUESTION: If this is not a qualified domestic  
5 relations order, then where does that leave you?

6 MR. DEANO: Well, under the amendments to the  
7 REACT, if it's not a qualified domestic relations order,  
8 it doesn't come under the enhanced antialienation  
9 sanctions that existed before. I mean, that existed in  
10 the enactment of the REA.

11 QUESTION: Well, could --

12 MR. DEANO: It follows under the old ones in  
13 which it was allowed. It was --

14 QUESTION: Could Dorothy have given her interest  
15 directly to the sons during the -- before the retirement  
16 of Isaac? Could she have signed a deed of gift to her  
17 sons?

18 MR. DEANO: Yes, Your Honor.

19 QUESTION: Of her interest, to the extent she  
20 had one, to her sons? And if so, would that require the  
21 pension administrator to abide by that?

22 MR. DEANO: If it was --

23 QUESTION: Will that possibly be an alienation?

24 MR. DEANO: If it was to a benefit that was  
25 payable, it possibly could be an antialienation --

1           QUESTION: Well, wait a minute. Under the  
2 statute it would be payable, a certain amount to the  
3 husband, and thereafter a certain amount to the then-  
4 surviving wife, if there was one.

5           MR. DEANO: Keep in mind that the funds for the  
6 most part that we're talking about in this matter had left  
7 the plan 10 years ago, for the most part, and no  
8 administrator will ever have to deal with any of the  
9 things with regard to this case.

10          QUESTION: But you didn't answer my question.

11          MR. DEANO: With regard to a transfer, it would  
12 be just a written donation that would be handed to an  
13 administrator. It would --

14          QUESTION: Deed of gift to children, copy to  
15 administrator?

16          MR. DEANO: Right. My -- I believe that that  
17 could be considered a non --

18          QUESTION: An alienation.

19          MR. DEANO: An alienation if it was to one that  
20 was payable --

21          QUESTION: Well then, why isn't a contemporary  
22 testamentary provision an alienation?

23          MR. DEANO: Because first of all this was not a  
24 testamentary alienation. This happened under operation of  
25 Louisiana law. This was not --

1 QUESTION: No will here.

2 MR. DEANO: There was a will, but the children's  
3 names were not mentioned in the will at all. They were  
4 forced heirs, and it happened as an operation of law, so  
5 she didn't make -- as opposed to the example that you  
6 gave, she did not make a transfer, and that has been -- an  
7 alienation has been defined as a will of transfer.

8 QUESTION: So according to you, in this  
9 situation there was no alienation at all during the  
10 existence of the plan.

11 MR. DEANO: There was a --

12 QUESTION: Because Isaac had retired, and he got  
13 whatever he got, and what she did arose -- what happened  
14 arose by virtue of Louisiana law after the benefits had  
15 been distributed.

16 MR. DEANO: That's correct.

17 Let me touch just a little bit more on the  
18 concept --

19 QUESTION: Mr. Wolfson, before you go on, two  
20 questions.

21 MR. DEANO: Yes, sir.

22 QUESTION: One, would you explain for us what  
23 happened to the lump sum that was alienated, or that was  
24 distributed?

25 MR. DEANO: The lump sum was rolled over into an

1 IRA.

2 QUESTION: Now, did he have options to -- was  
3 the money given to him, and did he then put it in an IRA,  
4 or was it within the terms of the plan?

5 MR. DEANO: It's my understanding that he took  
6 the -- they came into his ownership and then he rolled it  
7 over into an IRA.

8 QUESTION: Okay. One other question. Let's say  
9 that Isaac, that his wife pre -- she passed away in 1979,  
10 that he was quite grieved, and did not remarry, and assume  
11 that the gift that Justice O'Connor spoke about was made  
12 to the kids, or it was passed on as it was in this case,  
13 but Isaac did not remarry. What would the children get in  
14 those circumstances?

15 MR. DEANO: First they would have had -- they  
16 would have received property --

17 QUESTION: Well, let's just -- from the plan.  
18 That's all I'm interested in.

19 MR. DEANO: Oh.

20 QUESTION: Under this plan, what would they get?

21 MR. DEANO: They would not at that moment get  
22 anything, but they --

23 QUESTION: No, when he died. Let's say  
24 everything is exactly the same as it is now.

25 MR. DEANO: All right.

1 QUESTION: Except, he doesn't remarry.

2 MR. DEANO: Okay. The only thing -- he doesn't  
3 get -- they do not get a thing from the plan.

4 QUESTION: What about the \$150,000?

5 MR. DEANO: Yes.

6 QUESTION: So the \$150,000 you treat separately.  
7 Let's say that's -- we have to assume that went to a bank  
8 account or something. Is that accurate?

9 QUESTION: So the lump -- there's a difference  
10 between the lump sum and the stock as opposed to the  
11 survivor's annuity.

12 MR. DEANO: That's correct. The consideration  
13 for the survivor's annuity, however, was the reduced  
14 retirement moneys paid to Isaac during the remainder --  
15 upon his retirement, for which he purchased this --

16 QUESTION: Well, but that's the deal. That's  
17 just like the husband and wife agreeing to sell a piece  
18 of -- sell an automobile for a boat. I mean, you don't  
19 value what the wife gets on the basis of the boat.

20 If they went into the deal and traded the one  
21 for the other, it's gone, and what you have is what's in  
22 front of you, so it doesn't seem to me to say, well, they  
23 got this money only because they took less of something  
24 else -- that was what they bought.

25 MR. DEANO: Except there was something there at



1     this moment, Your Honor. I mean, it would be like  
2     presuming there wasn't something there when in fact there  
3     was something there.

4             I would just like to close by mentioning again  
5     that the remedy on State laws that confuse or are  
6     troubling to Federal concepts with regard to ERISA is not  
7     preemption, that it comes under the antialienation  
8     provisions.

9             QUESTION: Mr. Wolfson, I'm sorry to interrupt  
10    you. Do you have a better argument for the lump sum than  
11    you do for the annuity?

12            MR. DEANO: My argument with regard to the lump  
13    sum is the antialienation provisions do not apply once  
14    they've left the plan.

15            QUESTION: But do you have a better argument for  
16    the lump sum than the annuity?

17            MR. DEANO: Yes. The argument --

18            QUESTION: Justice Thomas is asking you to weigh  
19    the two arguments, which do you think is the better one, I  
20    believe.

21            MR. DEANO: Oh, I would find that there are --  
22    there is equal authority from this Court for both of them.  
23    Probably the occasion has risen more with regard to the  
24    antialienation protections following after the benefits  
25    leave the plan. That doctrine may be more rounded --

1 QUESTION: Well, I think where you're losing  
2 me -- I'm sorry to interrupt, but where you're losing me  
3 is, if he had not remarried, what is there to give away?

4 MR. DEANO: There is nothing to give away, but  
5 he would have received more benefits.

6 QUESTION: So what?

7 MR. DEANO: So that his estate would have been  
8 larger.

9 QUESTION: Suppose he gambled. Suppose he  
10 decided to go to the river boats and just feed the slot  
11 machines.

12 MR. DEANO: That would not have diminished how  
13 much funds he had used during this lifetime that --

14 QUESTION: It would not have increased the  
15 estate.

16 MR. DEANO: No, but it would have increased the  
17 amount of funds of other people that he would have had use  
18 of. He would have received more money from the plan over  
19 his lifetime, which was money partially of other people,  
20 and he would have had more money that he would have used  
21 of other --

22 QUESTION: Okay, let's say he did not remarry.

23 MR. DEANO: Okay.

24 QUESTION: And he decided to -- for the few  
25 years he was single, he was so grieved, he was so full of

1 grief that he gambled a lot. Now, what is it in the  
2 estate that they get more of?

3 I don't understand -- I just don't understand  
4 your argument.

5 MR. DEANO: Well --

6 QUESTION: That he -- there is no annuity. The  
7 only annuity available is for the survivor benefits.  
8 There is no survivor because he never remarried, so what  
9 is it for the children to get?

10 MR. DEANO: The rights that the children get is  
11 the right to account for their money that was being  
12 used --

13 QUESTION: They didn't have any.

14 MR. DEANO: They did have money. There was  
15 money that came in during his lifetime which would have  
16 been a greater amount.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Deano.

18 MR. DEANO: Thank you.

19 CHIEF JUSTICE REHNQUIST: The case is submitted.

20 (Whereupon, at 11:59 a.m., the case in the  
21 above-entitled matter was submitted.)  
22  
23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:*

SANDRA JEAN DALE BOGGS, Petitioner v. THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID B. BOGGS

CASE NO: 96-79

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Donna Marie Fedele

(REPORTER)