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No. 71900-9-I

THE SUPREME COURT
FOR THE STATE OF WASHINGTON

THE ESTATE OF CRAIG S. LUNDY, Petitioner,

v.

KELLY LUNDY, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY
#14-4-00306-0

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This case is not the appropriate vehicle for further review. The trial court made a clear legal error, and the Court of Appeals corrected it. The trial court ruled that RCW 11.07.010 nullified Craig Lundy's earlier federal designation of his wife as beneficiary for his Boeing retirement benefits. (4/2/14 VRP 36) (RCW 11.07.010 "applies to non-probate assets wherever situated held at the time of the entry of Decree of Dissolution of marriage"). But under RCW 11.07.010, the Legislature specifically excluded employee benefit plans like Mr. Lundy's that are governed by the federal Employment Retirement Income Security Act (ERISA). RCW 11.07.010(5)(a)(i) ("provided otherwise by controlling federal law"). In other words, the trial court applied a statute that by its terms did not apply.

The Court of Appeals correctly ruled that the State statute cannot reverse a federal choice of beneficiary – whether before or after distribution of the benefits.

> [S]tate law claims to recover postdistribution ERISA benefits have been thus far rebuffed. Kennedy [v. Plan Admin. for Dupont Savings and Investment, 555 U.S. 285, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009] does not recognize an open question in the context of a state-law-based claim to postdistribution of ERISA

> benefits, but only in the context of waiver by private agreement between the parties.

Estate of Lundy v. Lundy, No. 71900-9-I, slip op. at 10 (June 1, 2015). Despite this, the Estate of Craig Lundy asks this Court to accept review and reverse.

Respondent Kelly Lundy respectfully requests this Court to deny the Estate's Petition for Review for three reasons. First, RCW 11.07.010 expressly excludes ERISA-governed plans like Mr. Lundy's. Second, the parties did not waive their ability to serve as each other's beneficiary or receive benefits. Third, the Estate's flawed legal argument makes this case inappropriate for further review.

I. THE LEGISLATURE EXCLUDED FEDERAL BENEFIT PLANS FROM THE SCOPE OF RCW 11.07.010

A. State Law Mandates A Change In Beneficiaries After Divorce

Under RCW 11.07.010, a couple's divorce automatically revokes any designation of the ex-spouse as the beneficiary for a non-probate asset.

> If a marriage...is dissolved or invalidated...a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse...is revoked. A provision affected by this section must be interpreted,

> and the nonprobate asset affected passes, as if the former spouse...failed to survive the decedent, having died at the time of entry of the decree of dissolution...

RCW 11.07.010(2)(a). This means, for example, that a wife's designation of her husband as beneficiary for her life insurance policy ends automatically on divorce. The proceeds would go to the wife's alternative beneficiary, or if none, to her estate.

The purpose for this statute is straightforward: "the Legislature codified the assumption that divorcing couples want to change the beneficiary designations on nonprobate assets upon dissolution or invalidity of their marriage." Mearns v. Scharbach, 103 Wn. App. 498, 507, 12 P.3d 1048 (2000). Until 2001, the statute applied to all probate assets, regardless of whether the benefit plan also had to comply with the federal ERISA regulations. This changed with Egelhoff v. Egelhoff, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d (2001).

B. The United States Supreme Court Found RCW 11.07.010 Preempted For ERISA-Governed Benefit Plans

In Egelhof, the United State Supreme Court held that ERISA preempted Washington's automatic statutory revocation.

> The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the

> beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA' s commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8).

Egelhoff, 532 U.S. at 147, 121 S. Ct. at 1327-28.

The Supreme Court unequivocally exempted the Boeing Retirement Plan – the same Plan at issue here – from State control over a participant's choice of beneficiary. Egelhoff, 532 U.S. at 144, 121 S.Ct. at 1326 ("Mr. Egelhoff was employed by the Boeing Company, which provided him with a life insurance policy and a pension plan").

C. The Washington Legislature Incorporated Federal Preemption Into RCW 11.07.010

In response to Egelhof, the Washington Legislature immediately amended RCW 11.07.010 to exclude ERISA plans. Under RCW 11.07.010(5)(a)(i), automatic revocation does not apply to non-probate assets controlled by federal law.

> (5)(a) As used in this section, "nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under only the following written

> instruments or arrangements other than the decedent's will:
>
> (i) A payable-on-death provision of a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account, *unless provided otherwise by controlling federal law.*

RCW 11.07.010(5)(a)(i) (emphasis added). In 2002, the Legislature amended the statute solely to add the italicized phrase. Laws of 2002, ch. 18 § 1.

The Legislature added this phrase to recognize that the statute does not apply to benefit plans governed by ERISA.

> Current Washington law provides, upon divorce, for the automatic revocation of the designation of a spouse as a beneficiary of various nonprobate assets like life insurance, pension plans, and payable on death bank accounts. A recent U.S. Supreme Court decision, Egelhoff v. Egelhoff, found that the Washington statute cannot be applied to pension plans governed by the Employment Retirement Income Security Act (ERISA) because that federal law preempts the state law. It is the hope of the proponents of this legislation that the express reference to controlling federal law contained in this bill will cause practitioners to not rely upon the Washington statute where it has been preempted by federal law.

Washington Final Bill Report, 2002 Regular Session, Senate Bill 6242 (March 19, 2002) (Attached as Appendix A).

Mr. Lundy's 401(k) plan, the Boeing VIP plan, is the archetype of an "employee benefit plan" that is "provided otherwise

by controlling federal law." RCW 11.07.010(5)(a)(i). The Legislature amended the automatic revocation statute to exclude ERISA-governed plans like Mr. Lundy's. By its terms, the statute does not apply.

II. THE PARTIES DID NOT WAIVE THEIR RIGHT TO SERVE AS EACH OTHER'S BENEFICIARY

A. No Express Waiver

The Court of Appeals confirmed that neither Craig nor Kelly Lundy expressly waived their right to serve as the other's beneficiary.

> [W]aiver is not apparent on the face of the dissolution decree. Kelly did not expressly disavow any interest in the proceeds of the account as beneficiary. The decree says only that the retirement account "is awarded [to Craig] as his separate property." Disclaiming an ownership interest is not the same as disclaiming future rights as a beneficiary. By contrast, in many cases cited by the Estate, the ex-spouse explicitly waived the right to receive ERISA proceeds.

Estate of Lundy, slip op. at 11. The Estate tacitly concedes this point, alleging that the Court of Appeals erred by ruling "that a waiver of a beneficial interest in a divorce decree must be express and cannot be implied by application of Washington State law." (Petition for Review at 1)

No evidence exists that Kelly Lundy expressly waived her right to serve as her ex-husband's beneficiary.

B. No Grounds for Implied Waiver

The Court of Appeals did not err by rejecting the Estate's arguments for implied waiver. Because state law excludes the Boeing Plan, Ms. Lundy could not have impliedly waived her ability to remain a beneficiary based on the statute.

Implied waiver requires unequivocal acts. Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 773, 174 P.3d 54 (2007) ("implied waiver of contractual rights requires unequivocal acts, and here the City's acts were, at most, equivocal"). Ms. Lundy never acted as if she had waived her right to serve as Mr. Lundy's beneficiary. In addition, the state law that allegedly waived her rights, RCW 11.07.010, does not apply to the Boeing VIP Plan. Agreeing to a division of the benefit plans did not waive her ability to remain a beneficiary, if Mr. Lundy so chose.

In addition to waiver, the Estate alleged that the Lundys' dissolution decree incorporated RCW 11.07.010 as a matter of contract. (Response Brief at 31) ("statutes which bear directly upon the subject matter of the settlement are incorporated into and become part of the decree"); (4/2/14 VRP 21) ("parties are believed

to contract in reference to applicable state law, and that's why courts will read those statutes into the document itself").

But RCW 11.07.010 does not bear directly on Mr. Lundy's right, under federal law, to name a beneficiary – even his ex-wife. As detailed above, the revocation statute expressly excludes ERISA-governed plans. Therefore, courts do not incorporate its terms into a contract or dissolution decree.

> It is the general rule that parties are presumed to contract with reference to existing statutes..., and a statute *which affects the subject matter of a contract* is incorporated into and becomes a part thereof.

Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980) (emphasis added). The automatic revocation statute does not "affect the subject matter" of Mr. Lundy's beneficiary designation. The Legislature amended it to exclude the Boeing Plan. Egelhoff, 532 U.S. at 148.

Ms. Lundy did not contract away her ability to serve as Mr. Lundy's beneficiary. Both agreed to keep their designations intact after their divorce. Because RCW 11.07.010 specifically excludes ERISA-governed plans, the dissolution decree did not include an implied-at-law term requiring them to change beneficiaries. And without the automatic revocation language in RCW 11.07.010, the

Estate has no grounds to imply a contract term or waiver that nullifies Mr. Lundy's designation.

The Court of Appeals ruled correctly that "the Estate has not established a valid postdistribution claim to recover ERISA benefits." Estate of Lundy, slip op. at 12. Without a potentially valid claim to review, this Court appropriately denies the Estate's Petition for Review.

III. THE ESTATE'S ERROR MAKES FURTHER REVIEW ILL-ADVISED

The Estate portrays this appeal as a path breaking case on federal preemption. "Is an issue of substantial public interest present when the Court of Appeals held that ERISA preempts all state law claims by an estate to recover an ERISA governed 401(k) plan after it has been distributed to an ex-spouse?" (Petition for Review at 1). This is far too broad a statement.

The Court of Appeals reversed the trial court for applying a preempted statute, RCW 11.07.010, through the back door.

> [The Estate] It argues that the court should look to RCW 11.07.010 to discern the parties' intent. But, as Carmona[v. Carmona, 603 F.3d 1041 (2008)] made clear, state law "cannot be used to contravene the dictates of ERISA." 603 F.3d at 1061. The Estate cannot revive a preempted statute simply by applying it in a postdistribution argument that does not directly implicate ERISA.

Estate of Lundy, slip op. at 10-11. The trial court erred by accepting the Estate's argument at face value.

Despite this, the Estate makes the same argument to this Court:

> In Washington State, there is a statute which explicitly discusses the effect of awarding a party a non-probate asset in a divorce decree. When a party is awarded an asset in a divorce decree, by statute, there is an automatic revocation of the beneficiary designation of an ex-spouse prior to the divorce...RCW 11.07.010.

(Petition for Review at 17) (quotation omitted). At the heart of the Estate's argument is a fundamental flaw – that RCW 11.07.010 somehow applies to ERISA-governed plans. The exclusion in RCW 11.07.010(5)(a)(i) applies for all purposes, especially as an implied-at-law term to all divorce decrees. Since RCW 11.07.010 cannot nullify a federal designation of a beneficiary before distribution, it cannot nullify the same designation after distribution. The United States Supreme Court pre-empted the statute from *any* application to ERISA-governed plans.

This Court should not accept review over the Estate's inherently flawed argument.

CONCLUSION

The Estate of Craig Lundy convinced the trial court to revive RCW 11.07.010 for an excluded benefit plan. The United States Supreme Court has held that statute preempted for all ERISA-governed benefits. Lacking evidence that Appellant Kelly Lundy expressly waived her ability to remain Mr. Lundy's beneficiary, the Estate incorporates the statue statute as an implied contract term in the couple's dissolution decree. But the statute, by its terms and controlling federal law, does not apply to Mr. Lundy's retirement plan.

The Court of Appeals rejected the Estate's argument and corrected the trial court's error. Appellant Kelly Lundy respectfully requests this Court to deny the Estate's Petition for Review and end this appeal.

DATED this 24 day of July, 2015.

BURI FUNSTON MUMFORD, PLLC

By _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Answer to Petition For Review to:

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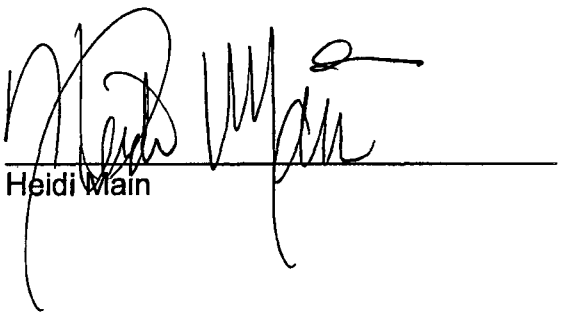
DATED this 24th day of July, 2015.



Heidi Main

APPENDIX A

WA F. B. Rep., 2002 Reg. Sess. S.B. 6242

Washington Final Bill Report, 2002 Regular Session, Senate Bill 6242

March 19, 2002
Washington Legislature
Fifty-seventh Legislature, Second Regular Session, 2002

Synopsis as Enacted

Brief Description: Modifying the definition of nonprobate asset.

Sponsors: Senators Johnson and Kline.

Senate Committee on Judiciary

House Committee on Judiciary

Background: Current Washington law provides, upon divorce, for the automatic revocation of the designation of a spouse as a beneficiary of various nonprobate assets like life insurance, pension plans, and payable on death bank accounts. A recent U.S. Supreme Court decision, Egelhoff v. Egelhoff, found that the Washington statute cannot be applied to pension plans governed by the Employment Retirement Income Security Act (ERISA) because that federal law preempts the state law. It is the hope of proponents of this legislation that the express reference to controlling federal law contained in this bill will cause practitioners to not rely upon the Washington statute where it has been preempted by federal law.

Summary: "Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument other than the decedent's will. The written instruments include a payable-on-death provision of a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account unless provided otherwise by controlling federal law.

Votes on Final Passage:

Senate	47	0
House	96	0

Effective: June 13, 2002

WA F. B. Rep., 2002 Reg. Sess. S.B. 6242

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Sincerely,
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