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No. 71900-9-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE ESTATE OF CRAIG S. LUNDY, Respondent,

v.

KELLY LUNDY, Appellant.

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is an appeal of a decision entered in the Snohomish County Superior Court following a bench trial under TEDRA which ordered the ex-wife of the decedent, Craig S. Lundy, to transfer any funds received from the decedent's Boeing VIP Plan (An ERISA governed plan) to his estate. (4/2/14 Order at 2; CP 8). The Appellant's primary basis for appeal is that the trial court erred by failing to apply federal preemption to bar the Estate's (Respondent's) state law claims. (Brief of Appellant at 3, 12-24). The Appellant's attorney largely relies upon one case to support his position: *Hillman v. Maretta*, ___ U.S. ___, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013). This position is a complete about-face of the argument advanced at the trial court level, during which the Appellant's attorney conceded that preemption did not apply and argued other grounds. (4/2/14 VRP 28). As a preliminary matter, the Respondent moves to dismiss this claim of error for not being properly before the court.

Should the court elect review this claim of error, the reason that the Appellant's attorney previously made the decision to concede the inapplicability of federal preemption because the case law fully supports the Respondent's position. The Respondent dedicated the majority of her Petition at the trial level to addressing the federal preemption issue and

will again address this in section 4(C) and 4(D) of this brief. (*See* Estate's Petition at 5-11; CP 49-55). These sections show that *the vast majority of cases support that state law claims are appropriate post-distribution of an ERISA governed asset.* The only new case presented by the Appellant is inapposite as it applies to the Federal insurance statute, FEGLIA, and not ERISA. *Hillman,* 133 S.Ct. 1943.

Focusing on the federal preemption issue is a necessity for the Appellant since without it the intent of the decedent is clear. The decedent and the Appellant divorced in 2009 because their marriage was "irretrievably broken" and both agreed to keep their own retirement accounts. (Exhibit 3 to Estate's Petition at 2-3; CP 76-77). This mutually signed divorce decree shows the intent of the parties to keep their retirement accounts both at the time and waive their beneficiary rights as interpreted by Washington Law. (*See* Section 4(E) *infra.*). The statute, RCW 11.07.010, is deemed incorporated into the decree thus supplying the intent of the parties regarding their beneficiaries and requiring no recourse to extrinsic or parole evidence. There is no evidence that the parties intended to alter the provisions of their divorce decree or ever reaffirmed each other as beneficiaries. The Appellant's sole remaining arguments rely on evidence that blatantly violates the Deadman Statute.

There is no admissible evidence that supports her position that Craig intended otherwise.

II. STATEMENT OF ISSUES

a. Whether the issue of federal preemption is properly before the court when it was waived at the trial court.

b. In the alternative, whether the state law claim is preempted by federal law.

c. Whether the trial court properly awarded the ERISA governed retirement plan to the estate under the theory of breach of contract and/or waiver.

d. In the alternative, whether the ex-wife would be unjustly enriched if she were to receive the retirement funds at issue.

III. STATEMENT OF FACTS

A. Craig Divorced His Wife, Kelly, Three Years Before He Died.

The decedent, Craig S. Lundy, married Defendant Kelly Lundy on January 26, 1984. (Staiger Dec. at 1; CP 40). Craig's date of birth is March 12, 1950 and he was 33 years old on the date of his marriage. *Id.* The parties separated in February, 2009 and then divorced on September 23, 2009 following a twenty-five year marriage. *Id.* They have no children together. *Id.* at 2; CP 41. Craig Lundy died on August 4, 2013 without issue. *Id.* Kathleen Staiger, Craig's sister, was appointed Personal Representative and granted nonintervention powers by order of the court dated October 2, 2013. (Exhibit 9 to Estate's Petition, Order Appointing

Administrator and Declaring Solvency at 1-2; CP 96-97). No Will was located and this is an intestate estate. *Id.* Craig's heirs at law are his four siblings: Kathleen Staiger (Petitioner herein), Robert Lundy, Wayne Lundy and Michael Lundy. *Id.*

Craig Lundy spent the majority of his professional career working as a Machinist at Boeing. (4/2/14 Order at 2; CP 3). During his employment, he steadily contributed to his retirement plan which was known as a Boeing VIP Plan (401K). *Id.* The value of that plan was $497,435.77 as of December 31, 2013 representing by far the largest asset of his estate. *Id.* Kelly Lundy is the named beneficiary and is listed as Craig's wife on the beneficiary form signed nearly 18 years prior to the divorce on November 27, 1991. (4/2/14 Order at 2; CP 3). This designation was neither altered nor reaffirmed following the divorce. *Id.* The Summary Plan description provided by Boeing indicates that you "must designate your spouse as your beneficiary." *Id.* The Boeing plan is governed by Federal Law (ERISA).

B. Craig Was Expressly Awarded His Boeing VIP (ERISA) Retirement Plan In The Divorce Decree.

The divorce decree entered by Whatcom County Superior Court states in the section titled "Property to be awarded the Husband" that,

"The husband is awarded as his separate property the following property [...]

> **All retirement funds and 401Ks in his name**." (**Emphasis Added**). (Exhibit 3 to Estate's Petition, Divorce Decree at 3; CP 77).

It further awards Kelly Lundy "All retirement funds and 401Ks in her name." *Id.* Kelly testified that the value of her retirement account is roughly equal to Craig's. (4/2/14 VRP 8). The relationship was dissolved because, as Kelly alleged in her Petition for Dissolution, the marriage was "irretrievably broken." (*See* Exhibits 1 & 2 to Estate's Petition, Petition for Dissolution and Findings of Fact and Conclusions of Law; CP 63-73). Craig was not represented in the divorce proceeding and Kelly was represented by Pamela E. Englett, Attorney at Law. (Order at 2; CP 3). Craig did not change the beneficiary designation prior to his death. *Id.*

C. Craig And Kelly Were Rarely In Contact After Their Divorce.

Based on the evidence provided to the court, the trial court found that Craig rarely had any contact with Kelly Lundy following the dissolution. (Order at 2; CP 3). They never reconciled or cohabited post-dissolution. *Id.* This was supported by the testimony of Craig's sister, Kathleen. (Staiger Dec. at 1-2; CP 40-41). This is corroborated by the Appellant's sworn testimony in which she testified that she never visited Craig's home following the divorce. (4/2/14 VRP 5). Other than house

sitting and watching her cats while his ex-wife was away, there were only one or two occasions following their divorce that Craig went over to her home to help with "things around the house." *Id.* at 4-5. This was not a close relationship, but a divorced couple who had parted ways based on no shared interest. Appellant called no witnesses. The Respondent, however, called Kelly to testify and the court had opportunity to asses her credibility. This court should not upset a finding of fact based as it was on substantial sworn testimony.

D. The Trial Court Awarded Craig's Retirement Account To His Estate In Accordance With Craig And Kelly's Agreement In The Divorce Decree.

The trial court awarded Craig's Boeing VIP Account to his estate. (Order at 2; CP 3). The court issued its ruling based on the issues and evidence before it and argument presented, namely that the effect of the divorce decree waived Ms. Lundy's future beneficiary interest and that no agreement to the contrary was entered into post-dissolution as there was no admissible evidence supporting this claim. The Respondent objected both in writing and then at the court proceeding to evidence regarding Ms. Lundy's alleged post-divorce conversations with the decedent regarding his Boeing VIP Plan. (Plaintiff's Reply at 2; CP 22; 4/2/14 VRP 21 – 22, 32-33).

E. The Trial Court Did Not Address The Issue Of Federal Preemption Because The Appellant Conceded The Point At Trial.

In Part IV of the Appellant's Brief, she argues that the trial court erred by failing to apply federal preemption to the Respondent's state law claims. The Appellant admits that this issue was "not argued below". (Brief of Appellant at 18). Not only did the Appellant fail to raise this issue at the trial court level, but the Appellant's lawyer affirmatively told the trial court that he agreed with Respondent that her claim was not pre-empted by federal law:

> **And the courts have said, and I (Appellant) agree with the plaintiff (Respondent in the present action), the courts have consistently said federal law doesn't pre-empt, doesn't preclude the bringing of a state court action.** (4/2/14 VRP 28, Emphasis Added).

The Appellant's counsel followed this statement by arguing that the Respondent's state law claim should not prevail on state law grounds and then concluded that, "The plaintiff (Respondent) has established that she has the right to bring the case, but not the right to win the case." (*Id.* at 30). In context, counsel's reference to the right to "bring the case" was another admission that federal law did not preempt or bar the claim. Shortly thereafter, the attorney for the Appellant again reiterated this point

and told the court, "Your honor, the plaintiff can bring a case, but they've established no right to ownership of the account." *Id.* at 31.

The Appellant has been aware of the preemption issue since the Respondent filed her initial Petition at the trial court level. The Respondent devoted nearly half her opening brief at the trial court level to advancing her position that federal law did not preempt the state court action. (*See* Estate's Petition at 5-11; CP 49-55).

The Appellant chose to concede this issue based upon her reading of the case law and instead to fight the Respondent's claim on other grounds, primarily the issue of intent. (4/2/14 VRP 28, 30, 31). Thus, the trial court did not need to rule on it. The Appellant apparently now regrets that decision and attempts to inject the preemption issue defensively for the first time on appeal and should be estopped from doing so. The only new authority that the Appellant cites in support of her position was published nearly a year prior to the trial court proceeding. *See Hillman,* 133 S.Ct. 1943. Not only was *Hillman* available to the Appellant before the trial, but that case does not address ERISA as it is solely focused on the Federal Employees' Group Life Insurance Act (Hereinafter "FEGLIA"). Respondent concludes that Appellant's trial counsel did not advance that case below having determined, as has Respondent, that it is inapposite.

In response to the Appellant's waiver of this issue, the Respondent declined to advance the argument and facts further at the trial court on this issue. After the Appellant conceded this issue, Respondent's counsel addressed the trial court regarding federal preemption and said, "It appears that the defendant, through his presentation, agrees that state law does apply … so I won't spend much time on that." (4/2/14 VRP 37). As can be seen in the report of proceedings, little to no time was spent by the Respondent further advancing this position, as it had been conceded. The Respondent brought a separate motion to dismiss this claim of error with this court and Commissioner Mary Neel denied the motion *without prejudice* to be addressed in respondent's brief. (10/27/14 Notation Ruling).

IV. ARGUMENT

A. Standard of Review

Issues of law are determined de novo. *Peters v. Williamson & Associates, Inc.,* 151 Wn. App. 154, 163-164, 210 P.3d 1048 (2009). The trial court's findings of fact in nonjury cases will not be overturned if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.,* 54 Wn.2d 570, 343 P.2d 183 (1959). "Substantial evidence" does not mean uncontradicted evidence, but rather that character of evidence which would convince an unprejudiced thinking

mind of the truth of the fact to which the evidence is directed. *Arnold v. Sanstol,* 43 Wn.2d 94, 98, 260 P.2d 327 (1953). An appellate court will not ordinarily substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently. *Beeson v. Arco,* 88 Wn.2d 499, 563 P.2d 822 (1977). The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. *State v. Chapman,* 78 Wn.2d 160, 469 P.2d 883 (1970).

B. Federal preemption is not properly before the court and the issue should be dismissed on motion.

The issue presented to this court is whether, on Respondent's motion, the Appellate Court should refuse to review Appellant's primary claim of error that was not properly raised at the trial court level: ERISA Preempts the Estate's State Law Claim. RAP 2.5(a) provides the applicable standard:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.
> RAP 2.5(a)

To clarify this standard, the Washington State Supreme Court has held on several occasions that the court "will not" consider an issue raised for the first time on appeal that fails to fall into one of these three enumerated

exceptions. *State v. Scott,* 110 Wn.2d 682, 684, 757 P.2d 492 (1988); *Herberg v. Swartz,* 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *Boeing v. State,* 89 Wn.2d 443, 450-451, 572 P.2d 8 (1978). The primary policy reason for RAP 2.5(a) is judicial economy and to promote the efficient use of judicial resources. *Smith v. Shannon,* 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A secondary reason is fairness to the opposing parties who should be able to respond to and face the relevant issues and theories at the trial level rather than at the appellate level for the first time. *See,* Lewis H. Orland & Karl B. Tegland, 2 Washington Practice 483 (4th ed. 1991).

The only exception that the Appellant claims would apply is RAP 2.5(a)(2), "Failure to establish facts upon which relief can be granted." (*See* Brief of Appellant at 19). The cases which reference RAP 2.5(a)(2) deal specifically with the sufficiency of the factual record below, and the appellate court makes a determination as to whether the trial court had adequate facts upon which to support its decision. *E.g. Gross v. Lynwood,* 90 Wn.2d 395, 583 P.2d 1197 (1978). In *Gross,* the court reviewed whether the plaintiff at the trial court level had properly established sufficient facts to support the trial court's decision that he fit within a protected class. *Id.* at 400. The court cases do not support a two-step approach of injecting a wholly new or previously conceded legal issue before the appellate court and then arguing that this renders the factual

record inadequate to address it. Simply put, the trial court did not have to rule on the preemption issue, so no factual proof was required.

Here, the Appellant is making an argument that has no grounding in either the rule or case law. Instead of challenging the factual record as allowed by RAP 2.5(a)(2), she is seeking to use the rule to inject a new legal issue, federal preemption. This is not the purpose of the rule. If the record below is inadequate regarding federal preemption, it is because the Appellant waived the defense.[1]

Despite the strong language in several Washington State Supreme Court decisions that there are no exceptions other than those listed in 2.5(a), the Court has carved out several narrow common law exceptions to be applied in exceptional circumstances, such as *Harris* which was referenced in the Appellant's brief. *Harris v. State, Dep't of Labor and Indus.*, 120 Wn.2d 461, 843 P.2d 1056 (1993). However, the court has likewise found that a party is **barred** from asserting both common law and statutory exceptions in several circumstances, including invited error, tactical waiver, and preclusion of inconsistent positions. First, "a party cannot seek review of an alleged error that the party invited." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). This

[1] That said, what other facts were necessary? The parties divorced and were awarded their respective retirement accounts. Craig's was ERISA governed. He neither revoked nor reaffirmed his beneficiary designation and he died.

doctrine has been found to apply even when one of the express exceptions to RAP 2.5(a) is affected. *See State v. Henderson,* 114 Wn.2d 867, 870-871, 792 P.2d 514 (1990). Second, if a party has consciously refrained for tactical reasons from claiming an error at trial, then the claim is barred on appeal. *See, State v. Donohoe,* 39 Wn.App. 778, 781-782, 695 P.2d 150, *cert. denied,* 103 Wn.2d 1032 (1984). Finally, a party is not permitted to maintain inconsistent positions in judicial proceedings. *See e.g., Zimmerman v. Kyte,* 53 Wn. App. 11, 14, 765 P.2d 905 (1988).

1) INVITED ERROR

The doctrine of invited error applies when a party, by their own actions, creates the basis for the appeal. *Henderson,* 114 Wn.2d at 867. In *Henderson,* the appealing party submitted jury instructions to the trial court. *Id.* at 868. On appeal, the appellant argued that her own jury instructions were unconstitutional. *Id.* The appellate court found that, because the appellant had instructed the trial court on how to proceed, that they could not change their mind on appeal and argue the opposite position. *Id.* at 870-871.

In application to our facts, the case law supports that the Appellant is barred from asserting an exception to the general rule of 2.5(a) based upon the theory of invited error. Our facts are similar to those in

Henderson. Appellant's counsel here instructed the trial court three times that federal preemption does not apply to this claim:

> **And the courts have said, and I (Appellant) agree with the plaintiff (Respondent in the present action), the courts have consistently said federal law doesn't pre-empt, doesn't preclude the bringing of a state court action.** (4/2/14 VRP 28, Emphasis Added).

The Appellant's counsel is now claiming that the trial court was in error for hearing the state claim that he advised the court to rule on. If there is error, the Appellant invited it and is now barred from asserting it.

2) TACTICAL WAIVER

Tactical waiver is applicable when it can be shown that a party has consciously refrained, for tactical reasons, from claiming error in the trial court. *Donohoe,* 39 Wn.App. at 781-82. In *Donohoe,* the Defendant admitted to the appellate court that during the trial he consciously refrained from arguing that the evidence was improperly admitted. *Id.* This tactical decision was made in order to devote counsel's argument to other issues before the court. *Id.* The court stated that the "Defendant must accept the consequences of this affirmative choice," and refused to review the waived issue. *Id.*

Our record supports a tactical waiver because the Appellant made the decision to waive her argument of federal preemption at the trial court level, and to focus her defense on other arguments. The court should rule

the same way that the court did in *Donohoe* and find that the Appellant must "accept the consequences of his affirmative choice." *Donohoe,* 39 Wn.App. at 781-82. The similar doctrine of judicial estoppel would also apply based upon the Appellant's tactical waiver. *New Hampshire v. Main,* 532 U.S. 742, 121 S.Ct. 1808, 149 L. Ed. 2d 968 (2001).

3) PRECLUSION OF INCONSISTENT POSITION

The closely related doctrine of preclusion of an inconsistent position is summarized in *Mueller. Mueller v. Garske,* 1 Wn. App. 406, 461 P.2d 886 (1969). "A party is not permitted to maintain inconsistent positions in judicial proceedings. It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation." *Id.* at 409. In *Mueller,* the plaintiff obtained a default judgment against the defendant. *Id.* at 408. He then appealed the terms of the default judgment and the court found that this was an inconsistent position to what he previously submitted to the court and denied the appeal. *Id.* at 417.

Under our facts, as discussed previously, the Appellant has been of two minds when presenting her argument to the trial court and now to the appellate court. At the trial court, she conceded that the state law claim was not preempted by federal law and she now contends that it is preempted. Similar to that the facts in *Mueller*, the Appellant is now

asking the court to do something directly contrary to her prior position. *Mueller,* 1 Wn. App. 406. As in *Mueller*, it would similarly cause manifest injustice to allow the Appellant to argue the opposite position at the appellate level when she had every opportunity to advance this argument at the trial court level and expressly waived the issue. It is disorderly, irregular, and a waste of judicial resources.

4) LACK OF COMPELLING REASON ON APPEAL

On occasion, the Court on appeal allows a new issue to be initiated when "fundamental justice so requires." *State v. Card,* 48 Wn. App. 781, 784, 741 P.2d 65 (1987). In *Card,* the court was faced with a new issue on appeal. *Id.* at 781. The issue was whether the police followed the proper procedure when they returned seized property to a convicted criminal. *Id.* at 782. The court found that manifest injustice could occur if a criminal was improperly returned property he had stolen and reviewed this new issue. *Id.* at 339.

A case advanced by the Appellant that falls into this general category is *Harris*. *See Harris,* 120 Wn.2d 461. Although the court in *Harris* does not expressly state that there must be manifest injustice in order to hear a new issue for the first time on appeal, it did provide a compelling reason to review the new issue. *Id.* In *Harris*, an amicus brief in support of the Appellant's position on appeal argued that federal law

preempted the state law at issue which had to do with benefits under the Department of Labor and Industries. *Id.* at 464. The court stated, "Generally the court does not consider an issue that was not raised at the trial court." *Id.* at 468. The Court made the decision to review this issue expressly because there were "numerous similar cases ... currently pending that challenge the validity of RCW 51.32.225." *Id.* (Emphasis supplied). In other words, the issue was before the court in multiple cases and appellate guidance was required.

In application, there is no manifest injustice or compelling reason under the facts before this court. This is not like *Card* in which a criminal could profit from an error made by the police if the appellate court refuses to hear this new issue. Instead, the declared public policy of this state denying benefits to a divorced surviving spouse would be followed. *See* RCW 11.07.010.

The most obvious distinction between our facts and those in *Harris* is that the federal preemption defense in that case was not waived at the trial court level. To further distinguish our facts, the court in *Harris* stated that the compelling reason for their review of the new issue was that there were "numerous similar cases... currently pending that challenge the validity of RCW 51.32.225." *Harris,* 120 Wn.2d at 464. These cases presumably properly preserved the issue on appeal. Judicial economy was

served by deciding the issue once, for all. Unlike *Harris,* there are not numerous similar cases addressing the issue raised by the Appellant pending in the State of Washington where the issue had been preserved.

Finally, unlike any case cited by Appellant, including *Harris,* this issue is not "new." Respondent argued it extensively in her briefing below and Appellant conceded. All Appellant now advances is a single case, namely *Hillman*, as her basis of reasserting the conceded issue. The *Hillman* decision was published and available to Appellant at the time of the trial. She did not elect to use it for good reason: it is not applicable as it does not deal with ERISA, the statute involved in this claim, but an entirely different federal statute. It is a solitary, inapposite case that could possibly have been used to advance the Appellant's previously conceded position by analogy, and does not change the law, as if the Supreme Court had announced a new ERISA decision. It has not invalidated the line of cases advanced by the Respondent at trial to which Appellant conceded.[2] For the foregoing reasons, the Respondent moves for dismissal of this claim of error.

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[2] Indeed, the U.S. Supreme Court declined to hear the leading ERISA case advanced by Respondent when it denied cert. following the announcement of *Hillman. Andochick v. Byrd,* 709 F.3d 296 (4th Cir.2013), *Cert. Denied* Oct. 2013.

C. ERISA does not bar Respondent Estate's state court claim under state law for post-distribution recovery of retirement funds.

Should this court choose to review the Appellant's claim of error regarding federal preemption, the following sections IV(C) and (D) address this issue. Respondent spent considerable time in her Petition below developing her argument that federal law (ERISA) did not have the effect of preventing post-distribution suits against former spouses for recovery of retirement benefits by estates where the decedent ex-spouse had not changed his beneficiary. Appellant's counsel conceded the point in open court:

> And the courts have said, and I (Appellant) agree with the plaintiff (Respondent in the present action), the courts have consistently said federal law doesn't pre-empt, doesn't preclude the bringing of a state court action. (4/2/14 VRP 28,). [3]

By way of background, ERISA directs that plan administrators of ERISA governed funds, distribute those funds to the named beneficiaries upon the death of the subscriber. 29 U.S.C. § 1002(8). Washington state law, by contrast, automatically revokes a beneficiary designation in favor of an ex-spouse on retirement plans and other non-probate assets upon marriage dissolution. The former spouse is treated as predeceased. RCW

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[3] Appellant's counsel stated later in the trial that, "The Plaintiff has established that she has the right to bring the case, but not the right to win the case." *Id.*, at 30. Then a third time, counsel says, "Your honor, the plaintiff can bring a case, but they've established no right to ownership of the account." *Id, at 31.* Appellant instead defended her position on state law grounds other than the preemption doctrine.

11.07.010 (2)(a). Distribution of the account passes instead to the alternative beneficiaries of the nonprobate assets, or if none, to the estate. Here, no such alternate beneficiaries were named. (Exhibit 3 to Estate's Petition; CP 83). Respondent estate claimed the proceeds should be disgorged by Appellant and be properly regarded as an asset of the estate and filed her Petition to retrieve them pursuant to RCW 11.48.090 and 11.96A.

In *Egelhoff* the United States Supreme Court considered whether RCW 11.07.010 was pre-empted by ERISA as to plan administrators. *Egelhoff v. Egelhoff,* 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001). The Court was concerned with the uniformity of administration of ERISA plans nationwide and protecting plan administrators from liability for compliance with multiple state laws, and held that the plan administrator should follow the unchanged beneficiary designation notwithstanding state law to the contrary. *Id.* at 147-148. Respondent herein does not contend the Boeing plan administrator acted improperly in so distributing the fund. Indeed, Respondent concedes they were required to do so by *Egelhoff* and ERISA. It is the retention of the funds by the ex-spouse that the Respondent challenges.

Following *Egelhoff,* a substantial body of case law developed finding that while *Egelhoff* protects plan administrators from being forced to

follow state-specific statutes concerning beneficiary designations, it does not limit actions by the estate to recover those funds post-distribution under state law theories such as waiver, breach of contract or unjust enrichment. The United States Supreme Court had a clear opportunity to correct this developing line of cases in *Kennedy v. Plan Administrator,* 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (3rd Cir. 2009), but instead expressly allowed it. Both in anticipation of the holding of the *Kennedy* court and in subsequent decisions, the courts have overwhelmingly supported that ERISA does not bar to suits against an ex-spouse under state law to recover funds post-distribution of the assets. *See, e.g. Andochick v. Byrd,* 709 F.3d 296 (4th Cir. 2013); *Estate of Kensinger,* 675 F.3d 131 (3rd Cir. 2012); *Wright v. Riveland,* 219 F.3d 905, 921 (Cal. 2009); *Sweebe v. Sweebe,* 712 N.W.2d 708 (Mich. 2006); *Pardee v. Pardee,* 112 P.3d 308 (Okla. Civ. App. 2004). [4]Lower court decisions are more thoroughly reviewed in Respondent's Petition below (Estate's

[4] Both before and after *Kennedy,* the Circuit and Appellate courts have allowed for suits or actions, under the same factual circumstances, by an Estate against an ex-spouse under state law theories. This is supported by both the 3rd Circuit's decision in *Kensinger* and the 4th Circuit decision in *Andochick.* Both of these cases addressed facts nearly identical to ours in which an ex-spouse received retirement benefits post-dissolution and the estate brought suit under state law contract theory or unjust enrichment to enforce the divorce decree. These circuit courts distinguished cases that held narrowly that a suit could not be brought under a state law theory pre-distribution of assets, such as *Egelhoff.* Instead, they broadly allowed for state law claims against an ex-spouse to recover ERISA governed retirement assets post-distribution. The Ninth Circuit held similarly that suits to obtain ERISA governed assets post-distribution are appropriate under state law. *See, Wright* 219 F.3d at 921, and *Hohu v. Hatch,* 940 F. Supp.2d 1161 (N.D.Cal. 2013).

Petition at 4-11; CP 48-55). It is unnecessary to reproduce those arguments here as Appelant has not disputed the proposition, relying instead on her argument that a separate United States Supreme Court decision in a non-ERISA case, *Hillman,* effects a full reversal of course broadly applicable to ERISA, rendering the *Kennedy* based cases upon which Respondent relied outmoded or reversed.

D. Hillman v. Maretta, 133 S.Ct. 1943 (2013) does not reverse the ERISA based precedent allowing state law claims for post-distribution recovery.

Appellant advances a new version of her previously conceded federal preemption argument on appeal – namely that *Hillman* precludes Respondent's argument that post-distribution suits against former-spouse beneficiaries are viable notwithstanding federal preemption. Respondent maintains that the controlling authority in the ERISA context remains *Kennedy* and progeny, including *Andochick v. Byrd,* 709 F.3d 296 (4th Cir. 2013), *cert. denied*, -- S.Ct. --, (2013).[5]

[5] In *Andochick, supra*, the spouses separated and, as a part of the divorce decree, the wife was awarded her ERISA governed 401K plan. *Id.* at 297. She died shortly thereafter, but had failed to remove her ex-spouse as the designated beneficiary on her 401K plan. *Id.* The issue before the court was whether the estate could bring a post-distribution suit to enforce the divorce decree, treating it as a state-law waiver and recover the funds for the estate. *Id.* at 299. The court distinguished several cases, including *Egelhoff* which only limited suits pre-distribution. *Id.* They cited *Kennedy* to support that the Supreme Court had not limited a court's ability to bring a post-distribution action under similar facts. *Id.* The 4th Circuit explained that "ERISA does not preempt post-distribution suits against ERISA beneficiaries." *Id.* at 301.

In *Kennedy, supra,* the U.S. Supreme Court acknowledged the validity of post-distribution suits for recovery of ERISA governed retirement benefits. The issue before the court was whether a plan administrator under ERISA, was required to distribute the benefits to the former spouse as the named beneficiary. The Court first determined that a divorce decree could act as a waiver of benefits under an ERISA governed retirement plan, but concluded that the plan administrator "did its statutory ERISA duty by paying the benefits to Liv [former Spouse] in conformity with the plan documents." *Kennedy,* 129 S. Ct. at 875. The court reasoned that requiring plan administrators to do otherwise, "would destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going to court." *Id.* at 876. The Court looked to its opinion in *Egelhoff,* for the proposition that the Supremacy Clause applied to avoid undermining the congressional goal of not placing undue administrative burdens on plan administrators. *Id.* at 877. [6] Respondent herein has made no argument to the contrary – conceding that the employer, Boeing, is not

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[6] The *Egelhoff* Court specified the Congressional purpose at issue: "The Washington statute ... interferes with nationally uniform plan administration. One of the principal goals of ERISA is to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.' *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different States. The Washington statute at issue here poses precisely that threat."

required to look beyond the beneficiary designation in making its distribution. Boeing is not a party Defendant.

While the issue of the application of the Supremacy Clause was squarely before it, the *Kennedy* Court made very clear that it did not intend to reverse decisions relating to *post-distribution suits* by estates against former spouses. The Court stated: "Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv [former spouse] to obtain the benefits *after they were distributed* [emphasis supplied]." *Id.* at 875 *note 10.*[7] In reliance on *Kennedy*, other state courts and federal courts have followed that reasoning to allow actions as the instant action now before the court. No Supreme Court decision *and no reported decision at any level that Respondent has identified* has found otherwise and *Kennedy* continues to represent the controlling precedent.

Appellant can make no argument from the ERISA case law on the subject at hand. Appellant turns instead to a federal-preemption-by-analogy argument arising out of an entirely different statute, FEGLIA –

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[7] That note goes on to acknowledge state court opinions expressly permitting post-distribution actions: "*Sweebe, 474 Mich. 151* ... holding that 'while a plan administrator must pay benefits to the named beneficiary as required by ERISA' after the benefits are distributed 'the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds.'; *Pardee,* 112 P.3d 308 *(2004)* ... holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree as 'the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed.'"

the Federal Employees' Group Life Insurance Act. *Hillman, supra,* was decided in June, 2013, many months prior to trial in the instant action. Appellant (as Defendant below) had that case available but did not raise it at the trial court for good reason – it has no application to ERISA. The *Hillman* decision, reached by the same unanimous Court that decided *Kennedy*, is utterly silent regarding ERISA. FEGLIA is built on different legislation, legislative history, and its own extensive body of precedent.[8] That decision contains no *dicta* or footnote indicating the Court was retracting or narrowing its remarks in *Kennedy* or saw any application whatsoever to ERISA. The Court made no effort whatsoever to alter or correct the consistent line of cases that has developed thereunder. While Appellant has found an article in a tax newsletter asserting the applicability of *Hillman* to ERISA by analogy, no court has done so.[9] Any

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[8] The *Hillman* Court identified a very different Congressional purpose for FEGLIA in its preemption analysis. Unlike *Egelhoff, supra at n.6,* which found that ERISA's purpose was to assure uniformity for plan administrators, the *Hillman* Court found the Congressional purpose at stake for FEGLIA was "to accord federal employees an unfettered 'freedom of choice' in selecting the beneficiary of the insurance proceeds and to ensure the proceeds would actually 'belong' to that beneficiary." *Hillman,* 133 S. Ct. at 1952[citation omitted, emphasis added]. The Court explained that "purposes and objectives preemption" required a careful analysis of Congressional purposes. Citing *Egelhoff,* it recognized a "presumption against preemption" of state domestic relations laws, requiring "major damage" to "clear and substantial" federal interests prior to overriding the state law. *Id.* at 1950. Appellant herein has identified no conflict whatsoever with the purposes of ERISA identified in *Egelhoff.* ERISA and FEGLIA are different statutes.

[9] The 4th Circuit in *Andochick v. Byrd, supra* explained that "ERISA does not preempt post-distribution suits against ERISA beneficiaries." *Andochick,* 709 F.3d at at 301. The court emphasized the uniformity of the case law on this point by stating that they adopted the "same view as every published appellate opinion to address the question." and

such interpretation would massively expand the reach of the preemption in *Hillman* beyond the federal employees covered by FEGLIA, to the millions of *private* as well as public employees nationwide who participate in ERISA based retirement plans. Without clear guidance from the Supreme Court that it has elected to reverse course, no such policy-reversing decision should be reached here.[10]

Indeed, the Supreme Court in the aftermath of its *Hillman* decision had just such an opportunity on the Petition for Cert. in *Andochick v. Byrd, supra.* The 4th Circuit had held, "We hold that ERISA does not preempt post-distribution suits against ERISA beneficiaries." *Andochick,* 709 F.3d at 301. The Petitioner to the U.S. Supreme Court stated the question on appeal as follows:

> **QUESTION PRESENTED**
>
> This Court expressly left open the question of whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a claim by an estate to enforce a purported waiver against the designated beneficiary of ERISA-governed benefits following distribution of the benefits. *Kennedy v. Plan Admin. DuPont Savings and Investment Plan,* 555 U.S. 285, 299, fn 10 (2009) ("Nor do we express any view as to whether the Estate could have brought an action in

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affirmed the holding of the lower court which awarded the asset to the Estate under state law and not the ex-spouse *Id,* [Emphasis supplied].

[10] Indeed, Respondent has identified two reported ERISA cases since *Hillman,* that follow the *Kennedy* line by allowing post-distribution suits by estates of divorced spouses. *See, Hennig v. Didyk,* 2014 WL 3705175 (Tex. Ct. App. 2014), and, *Estate of Couture,* 89 A.3d 541 (N.H., 2014).

> state or federal court against Liv to obtain the benefits **after** they were distributed.") [citations omitted]. This case falls squarely within the issue left open by this Court's prior decision in *Kennedy*. Within that framework, the question presented is: Whether ERISA's statutory protections and broad preemption provision protects designated beneficiaries from claims by an estate to enforce a purported waiver of those benefits incorporated into a state law divorce decree and property settlement agreement when the deceased plan participant had the opportunity to change her designated beneficiary but did not do so. [Pet. for Writ of Cert., p. i.]

The Respondent stated the issue similarly, though more briefly:

QUESTION PRESENTED

Whether ERISA preempts a civil action against a designated plan beneficiary who has previously waived the right to retain the ERISA benefits once they have been paid out by the ERISA plan and are no longer subject to the control of the plan administrator. [Respondent's Brief in Opposition, p. i.]

The Supreme Court had decided *Hillman* in June, 2013. The *Andochick* briefs were filed with the Court in August, and the petition for cert. denied in October, 2013 without comment. Simply put, the Supreme Court has had a perfect opportunity to correct its comment in *Kennedy* and to bring the circuits and state courts in line with *Hillman* and has declined to do so. The argument Appellant makes by analogy from *Hillman* and FEGLIA is academically interesting, but the clear and overwhelming precedent for ERISA remains *Kennedy, Andochick, et al.*

E. The Trial Court Properly Applied State Law to the Facts in Determining Craig's Intent

The trial court's decision under state law was proper and withstands close scrutiny. Unless this court overturns the trial court's ruling, federal preemption does not apply post-distribution of an ERISA governed retirement account. Consequently, it is necessary for the court not only to look to the beneficiary designation on the decedent's retirement plan itself, but also to look to examine whether there are any claims under state law that require post-distribution disgorgement of the asset. The Respondent presented two such theories to the trial court: 1) Contract/Waiver; 2) Unjust enrichment.

The primary state law claim advanced by the Respondent was contract/waiver. (Estate's Petition at 11-15; CP 55-59). The Respondent's position was and continues to be that in the parties' Divorce Decree Kelly waived her rights to be a beneficiary of Craig's Boeing VIP Plan. Obviously a written waiver is compelling evidence of intent. There was no post-dissolution agreement otherwise, and Craig would have needed to reaffirm his beneficiary designation post-divorce to nullify the contract. *Estep v. Hamilton,* 148 Wn. App. 246, 201 P.3d 331 (2008), cert. denied, 166 Wn.2d 1027. The trial court agreed with the Respondent's position as evidenced by ruling in their favor.

1. **The Appellant Improperly Injects Federal Preemption Into This Section of Her Brief.**

The Appellant again brings *Hillman* and *Egelhoff* into the section of her brief discussing federal preemption of the state law claims. If federal preemption applies to the state law claims in the post-distribution setting, then a discussion of these causes of action becomes moot as federal law would control.

The Appellant further argued the convoluted position that the trial court attempted to apply RCW 11.07.010 in the pre-distribution context based upon the wording of the trial court's ruling. On the contrary, the trial court only used RCW 11.07.010 to interpret the divorce decree in the post-distribution context to show waiver. This was the primary argument advanced by the Respondent making it the only conceivable basis for the ruling other than the theory of an implied contractual term or unjust enrichment which requires no use of RCW 11.07.010. (Estate'sPetition at 11-15; CP 55-59). The trial court was never presented with the argument that RCW 11.07.010 should be used for any other purpose than interpreting the divorce decree.

The court's oral ruling must be read in the context of both the arguments and materials presented. In the context, the Appellant's counsel

had, moments before, argued that RCW 11.07.010, by its very terms, could not be used for purposes of contract interpretation, arguing it did not apply to federal benefits under section 5 of the statute. (4/2/14 VRP 26-27). Appellant was not arguing *Egelhoff*. Respondent dealt with this statutory argument in her rebuttal and the court addressed it directly to make it clear that the terms of RCW 11.07.010 themselves did not preclude its use in interpreting the Lundy's divorce decree. The court was not blatantly violating, defying, or rejecting the Supreme Court decision in *Egelhoff*, instead it was applying state law to interpret the decree.

2. The Respondent Agrees That Craig Appointed His Ex-Wife As The Beneficiary Of His Boeing VIP Plan In 1991.

The Appellant spends a considerable portion of her brief discussing interpretation of a testamentary document. (*See* Brief of Appellant at 21-22). The Respondent agrees that the Boeing VIP Plan names, "Kelly Jean Lundy, Wife" as beneficiary on the form he filled out in 1991, going so far as to list this in the Findings of the trial Court. (Order at 2; CP 3). This designation was neither changed on the Boeing VIP Plan, nor reaffirmed subsequent to the initial designation. The attention to this matter masks the issue that is on appeal, which is whether Kelly waived her beneficiary interest under this plan pursuant to the divorce decree entered 18 years later, in 2009.

3. Craig's Ex-Wife Waived Her Beneficiary Interest in Craig's Boeing VIP Plan In Their Divorce Decree Entered in 2009.

The interpretation of a divorce decree presents a question of law for the court. *In re Marriage of Gimlett,* 95 Wn.2d 699, 705, 629 P.2d 450 (1981). The Appellant does not now argue that the Respondent improperly interpreted the divorce decree, apart from her preemption argument, because there is no other reasonable interpretation under Washington Law. (*See* Brief of Appellant at 23).

To summarize the position presented to the trial court, in interpreting a divorce decree, a reviewing court seeks to ascertain the intention of the court that entered the original decree by using general rules of construction applicable to statutes, contracts, and other writings. *Gimlett,* 95 Wn.2d 699; *Callan v. Callan,* 2 Wn. App. 446, 468 P.2d 456 (1970). The key to interpreting a contract is to determine the parties' intent. *Barton v. State, Dept. of Transp.* 178 Wn.2d 193, 308 P.3d 597 (2013). One important and applicable rule of construction to a divorce decree is that, "As a general rule parties to a marriage settlement are presumed to contract with reference to existing statutes, and statutes which directly bear upon the subject matter of the settlement are incorporated into and become part of the decree." *In Re Sagner,* 159 Wn. App. 741, 749, 247 P.3d 444 (2011) (quoting *Wagner v. Wagner,* 95 Wn.2d 94, 98,

621 P.2d 1279 (1980)) (Emphasis added). In order to exclude statutes that are incorporated under this general rule, the parties must "expressly declare their mutual intention to exclude." *Id.* Such an exclusion of statutory law cannot be implied, but must be "directly and distinctly stated or expressed." *Id.* Unless there is a clear expression of intent within the contract itself, the "general law will govern." *Wagner,* 95 Wn.2d at 98-99. In addition, the court is to look at the public policy when interpreting a contract. *See* Restatement (Second) of Contracts Section 207. Finally, another relevant rule of construction is that a contract is generally construed against the drafter. *King v. Rice,* 146 Wn. App. 662, 191 P.3d 946 (2008).

In application, the court is to interpret this contract to determine the intent of the parties as a matter of law. Specifically, the court must determine whether the ex-spouse agreed to waive her rights as a beneficiary of the ex-husband's Boeing VIP Retirement Plan.[11] The language of the contract itself awards the Boeing VIP Plan to the husband as his sole and separate property (and vice versa). However, it does not state expressly what the intent of the parties was in regards to beneficiary designations.

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[11] In Washington, a waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Bowman v. Webster,* 44 Wn.2d 667, 669, 269 P.2d 960 (1954) and *Schroeder v. Excelsior Mgmt. Grp., LLC,* 177 Wn.2d 94, 106, 297 P.3d 677 (2013).

To determine the intent, one critical tool for contract interpretation is to look and see if there are any applicable statutes which deal with the subject matter of the contract. *Sagner,* 159 Wn.App. at 749. If the statute does, then it is incorporated into the contract unless there is an express statement in the contract excluding the applicable statute. *Id.*

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:

> (1) This section applies to all nonprobate assets, wherever situated, held at the time of entry of a decree of dissolution [...]
> (2)(a) If a marriage [...] is dissolved [...] 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.
>
> RCW 11.07.010.

This statutorily imposed waiver of a future interest as a beneficiary can only be revoked with an express statement to the contrary.

Egelhoff did not deem RCW 11.07.010 unconstitutional. It only declared that in a pre-distribution setting, ERISA's mandate that plan administrators follow the existing beneficiary designation is not undone by this statute. *Egelhoff,* 139 Wn.2d at 557. State law is preempted only

insofar as there is a conflict. *Hillman,* 133 S. Ct. at 1950.[12] That state law, however, is good law and remains valid in interpreting the agreed decree of dissolution voluntarily entered into by the parties for purposes of retention of the assets post-distribution. The Respondent has already addressed why *Hillman* is inapplicable at length although the Appellant attempts to again insert it into this section of her brief, as indeed she must. For if the statute is not invalidated by federal preemption in the post-distribution setting and remains valid for interpreting the contract, her argument must fail.

Courts also look at public policy in interpreting a contract. *See* Restatement (Second) of Contracts Section 207. In passing RCW 11.07.010, the legislature stated that its public policy was to codify "the assumption that divorcing couples want to change the beneficiary designations on nonprobate assets upon dissolution..." *Mearns v. Scharbach* 103 Wn. App. 498, 507, 12 P.3d 1048 (2000). Here, the plain language of the statute supported by the public policy of this state mandates that ex-spouses be deemed to have waived their beneficiary rights pursuant to a dissolution.

[12] As already discussed in IV(B) and (C) *infra* post-distribution suits for recovery of an estate asset under a state law claim have been found by the majority of state and federal courts to not frustrate the purpose of ERISA.

In conclusion, the subjective intent of the parties is not relevant to this discussion. Intent is objectively determined as found in the divorce decree itself and interpreted with the above rules of construction. Because the rules of construction require the court to incorporate RCW 11.07.010 into the terms of the divorce decree, the only interpretation available to the court is to find that it was the intent of the ex-wife to waive her rights as a beneficiary by awarding the proceeds of this asset to her ex-husband's estate. The Respondent and her attorney drafted the divorce decree which has no language to undo the waiver. She and her counsel signed it. Had she intended otherwise, she should have said so.

4. The Appellant's Arguments Regarding A Post-Dissolution Agreement And/Or Intent Are Irrelevant, Almost Entirely Inadmissible and Unpersuasive.

The Appellant's argument that she entered into an agreement with her ex-husband after the divorce to reaffirm is based entirely upon inadmissible evidence, which even if admitted is unpersuasive. The Respondent again objects to the proffered use of this evidence. Her remaining arguments regarding intent have no bearing since the court does not need to look beyond the terms of the contract and applicable law to determine intent.

1) Ms. Lundy's Self-Serving Testimony Is Inadmissible and Unpersuasive.

In her trial Declaration, Appellant testified at length regarding conversations with Craig regarding their intended beneficiaries. (Kelly Lundy Dec. at 3; CP 31). Respondent's counsel objected to admission of that testimony on the basis of the Deadman Statute, RCW 5.60.030, both in writing and at the hearing. (Plaintiff's Reply at 2; CP 22; 4/2/14 VRP 21-22, 32-33). Ms. Lundy's testimony regarding Craig's intent violates the Deadman Statute. The content of any communication Craig had with Kelly, or his family for that matter, about the retirement plan goes to the heart of the reason for the Deadman Statute which bars this testimony. *See,* RCW 5.60.030. Its purpose is to prevent "Interested parties from giving self-serving testimony about conversations or transactions with the Decedent." *Wildman v. Taylor,* 46 Wn. App. 546, 731 P.2d 541 (1947). The court cannot consider the content of these conversations.

The Appellant now admits that this testimony is subject to the Deadman Statute and that the Respondent properly objected to its admission, but then argues that the Respondent waived her objection during the court proceeding. (*See,* Appellant's Brief, pg. 25). Appellant correctly points out that there are several exceptions to the Deadman Statute. One such exception is for documentary rather than testimonial

evidence. *Erickson v. Robert F. Kerr, M.D., P.S.,* 125 Wn.2d 183, 188, 883 P.2d 313 (1994). Another exception is if the protected party (Respondent herein) introduces "evidence concerning a transaction with the deceased." *Bentzen v. Demmons,* 68. Wn. App. 339, 345, 842 P.2d 1015 (1993).

The basis of the Appellant's claim of waiver is a question that the Respondent asked Ms. Lundy at the trial court proceeding. The Appellant has edited the question and entirely removed the call of the question which is essential in determining whether there was a waiver. The full quote is as follows:

> Q: In that declaration – you stated that you had several conversations with Craig Lundy following the divorce, about what should happen with his retirement plan. Do you have any written documentation that claimed that Craig intended for you to receive his retirement plan after your divorce?
>
> A: We didn't put anything in writing. (4/2/14 VRP 4).

The question clearly did not introduce any "evidence concerning a transaction with the deceased." It only sought out whether there was any admissible documentary evidence and provided some necessary context for the question. Ms. Lundy introduced no evidence in response to the question regarding the details of her claimed transaction with Craig because that was not the question and she understood what was asked of her. The Respondent could only have opened the door to an exception to

the Deadman Statute by asking Ms. Lundy about the transaction itself. Although the trial court did not expressly rule on this objection, when Appellant's counsel later claimed Respondent had waived their objection the court asked, "How is that a waiver?" (4/2/14 VRP 24), apparently rejecting their argument.

In the alternative, should the court find that the exception applies, this testimony is unpersuasive for the very reasons that the Deadman Statute exists. It is a wholly self-serving statement without any support, and the decedent has no opportunity to rebut it. Further, the other interested parties are barred from admitting their own testimony regarding the transaction with the deceased and are therefore unable to offer any contradictory testimony. If the trial court did choose to consider this inadmissible testimony, it was found not to be credible as supported by the court's ruling.

2. There is No Admitted Evidence That Craig Received Any Notice From Boeing to Change His Beneficiary Designation.

Appellant argues that Craig had been warned by Boeing of the need to change his beneficiary. It is highly speculative that Craig had any notice or knowledge that he should take steps to change his beneficiary form post-divorce. Craig's beneficiary designation remained unchanged since 1991 and he should hardly be expected to be familiar with the

confusing federal and state case law that has brought us before the court today, particularly since he was unrepresented in the dissolution. There is no evidence that Craig received, read or understood any notice of this from Boeing post-divorce as alleged by the Defendant. Both the account statement and the letter to the Estate's attorney that the Appellant continually refers to were created after Craig had passed away and there is no evidence that Craig received any similar documents during his lifetime.

F. In the alternative, Ms. Lundy is unjustly enriched upon receipt of the Boeing VIP Plan.

As an alternative state law claim, Ms. Lundy is unjustly enriched upon receipt of the Boeing VIP plan. The three elements, which must be established as a matter of fact to prove unjust enrichment are: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Norcon Builders, LLC v. GMP Homes VG, LLC,* 161 Wn. App. 474 , 254 P.3d 835 (2011). The damages in a suit where there is unjust enrichment under an implied contract is the benefit unjustly conferred. *Id.*

The first question for the court is whether the defendant received a benefit. *Id.* Here, the Kelly Lundy has received a benefit, which is the

decedent's Boeing VIP Plan valued at $497,435.77. The second question is whether it was received at the plaintiff's expense and, of course, it was the decedent's retirement plan and his estate stands in his stead now that he is deceased.

The final and most important issue is whether it is unjust for the defendant to retain the retirement plan. The circumstantial evidence supports that Craig intended to leave the retirement funds to his family and not his ex-wife. Craig and Kelly divorced and never reconciled or moved back in together. (Order at 2; CP 3). The written divorce decree expresses Craig's intentions regarding his Boeing VIP Plan and finds that their marriage was "irretrievably broken." (Exhibit 2 to Estate's Petition, Divorce Decree at 2; CP 70). Unsurprisingly, the reason the parties divorced was to live their lives separately from each other and that is what they proceeded to do. (Staiger Dec at 1; CP 40). Craig moved away from Bellingham to be near his family in Marysville and bought his own place to live a life separate from his ex-wife.

The trial court found that "Craig rarely had any contact with Kelly Lundy following the dissolution..." (Order at 2; CP 3). This is supported by Kelly's own sworn testimony in which she testifies that she never visited Craig's home following the divorce. (4/2/14 VRP 5). Craig went over to Kelly's house several times to watch her cats while she was out of

the home. *Id.* at 4-5. These were elderly cats that they had both owned during the marriage, but were awarded to Kelly in the divorce decree and Craig felt an obligation to them. (Supplemental Staiger Dec. at 2; CP 11). After the cats passed away, Craig never returned to the home. *Id.* Other than house sitting and watching her cats while his Kelly was away, they were both at Craig's family holidays, Thanksgiving and Christmas, because Kathleen invited Kelly. (Staiger Dec. at 2; CP 11). Craig did not inform Kelly of his illness until nearly days before he passed away. (Supplemental Staiger Dec. at 3; CP 12). Kelly has provided very limited proof of any other communication via phone or e-mail and no evidentiary evidence whatsoever in this regard. This was not a close relationship, but a divorced couple who had parted ways based on no shared interest.

Craig's family submitted declarations which emphasized that Craig had a very close and loving relationship with them following the divorce and they were taken aback at the lengths Kelly took to emphasize her relationship with Craig. As opposed to the lack of communication with Kelly, Craig would visit with his sister Kathleen every Saturday and they would meet for coffee and groceries on Sunday. *Id.* at 1. Craig moved to Marysville from Bellingham to be near his family. *Id.* Craig's siblings each provided declarations which support that Craig was proud of his independence from Kelly in living in his own home in Marysville and that

he poured his energy and love into his family the last several years of his life. (*E.g.* Dec. of Michael Lundy at 2; CP 19). It was his family that surrounded him and supported him as his illness progressed and the only reason Kelly was aware was because Kathleen told her on her own initiative. (Supplemental Staiger Dec. at 3; CP 12).

The manifest injustice of Appellant's position is evidenced by what would have happened if she had died first. Appellant works for a non-ERISA employer, a religious based health care institution. (4/2/14 VRP 10). She is employed in a responsible position and has saved a substantial sum in her retirement. (*Id.* at 9-10). As Petitioner in the divorce, she signed the divorce decree awarding the spouses their respective retirement plans and deeming the marriage irretrievably broken. As her employer is non-ERISA, there is no argument that *Egelhoff* or federal preemption would apply. She never reaffirmed her beneficiary *Id.* at 9. Instead, had she died first, RCW 11.07.010 plainly would have applied. Craig would not have been her beneficiary. Under state law, in order to maintain a beneficiary designation in favor of a former spouse after dissolution of marriage, the former spouse must be redesignated in writing as the beneficiary of the plan. *Estep*, 148 Wn. App. At 257. Evidence of the insured's post-dissolution oral statements is insufficient. *Mearns,* 103 Wash. App. 498.Appellant testified in open court:

Q. Had you updated that beneficiary designation (on her retirement account) after the divorce, but prior to his (Craig's) death?

A. No …

(4/2/14 VRP, at 9).

So here, Appellant is arguing, she should receive Craig's retirement, despite their divorce, because of federal preemption, and because he died without revoking his beneficiary designation. Meanwhile, had it played out differently, had she died first, there would be no federal preemption and Craig would have received nothing. Respondent's lips are sealed by the grave, but on his behalf, this is an outrageous position to now assert. The fact is, he never reaffirmed. Equity demands his estate prevail.

V. CONCLUSION

In conclusion, the federal preemption issue is not properly before the court as it was waived in open court by the Appellant and should be dismissed. Because this argument is the cornerstone of her brief, this court should affirm the trial court ruling.

Alternatively, should the court consider the federal preemption issue, the court should find in favor of the Respondent that the state law claims are permissible. There is a long history of case law dealing with ERISA culminating in the *Kennedy* decision that allows for state law suits

post-distribution of a retirement account governed by ERISA. The Appellant's primary case, *Hillman*, does not even deal with ERISA, but instead focuses solely on FEGLIA. The Supreme Court did not expressly overturn *Kennedy* or the many subsequent cases supporting the Respondent's position and it would be a great leap for this court to apply *Hillman* by analogy, a step that no other court has yet made.

In application of state law, a simple analysis of the divorce decree shows the intent of Kelly to waive her interest in Craig's Boeing VIP Plan. The parties are deemed to have entered into the divorce decree in reference to existing Washington law and required to expressly opt out of its application if that is their intent. Under RCW 11.07.010 beneficiary designations are revoked in nonprobate assets, such as Craig's Boeing VIP plan, upon divorce. Kelly's attorney, who drafted the divorce decree, did not write in any statement that Kelly intended not to follow this law. RCW 11.07.010 is used solely to interpret the divorce decree in the post-distribution setting, as allowed by *Kennedy* and subsequent case law.

In the alternative, Kelly has been unjustly enriched by receiving the entirety of her ex-husband's retirement and the court should award it to his estate. Craig spent a lifetime earning his retirement, it was awarded to him in his divorce decree and it should returned to his family as this is required by equity.

RESPECTFULLY SUBMITTED this 7th day of November, 2014.

HANSEN McCONNELL & PELLEGRINI PLLC

By _____
Perry W. McConnell, WSBA #40688
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By _____
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Attorney for Respondent

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 Brief of Respondent to:

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DATED this 7th of November, 2014.

_____
Perry W. McConnell

APPENDIX

No. 13-29

IN THE

Supreme Court of the United States

SCOTT ANDOCHICK,

Petitioner,

v.

RONALD BYRD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether ERISA preempts a civil action against a designated plan beneficiary who has previously waived the right to retain the ERISA benefits once they have been paid out by the ERISA plan and are no longer subject to the control of the plan administrator.

No. _____

In the Supreme Court of the United States

SCOTT ANDOCHICK, M.D.,

PETITIONER,

v.

RONALD BYRD, INDIVIDUALLY; JUNE BYRD, INDIVIDUALLY; AND RONALD AND JUNE BYRD, AS CO-ADMINISTRATORS OF THE ESTATE OF ERIKA L. BYRD,

RESPONDENTS.

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court expressly left open the question of whether the Employee Retirement Income Security Act of 1974 (ERISA) preempts a claim by an estate to enforce a purported waiver against the designated beneficiary of ERISA-governed benefits following distribution of the benefits. *Kennedy v. Plan Admin. DuPont Savings and Investment Plan,* 555 U.S. 285, 299, fn 10 (2009) ("Nor do we express any view as to whether the Estate could have brought an action in state or federal court against Liv to obtain the benefits **after** they were distributed.") (comparing *Boggs v. Boggs,* 520 U.S. 833, 853 (1997) with *Sweebe v. Sweebe,* 474 Mich. 151, 156–159, 712 N.W.2d 708, 712–713 (2006) and *Pardee v. Pardee,* 2005 OK CIV APP. 27, ¶¶ 20, 27, 112 P.3d 308, 313–314, 315–316 (2004)).

This case falls squarely within the issue left open by this Court's prior decision in *Kennedy*. Within that framework, the question presented is:

Whether ERISA's statutory protections and broad preemption provision protects designated beneficiaries from claims by an estate to enforce a purported waiver of those benefits incorporated into a state law divorce decree and property settlement agreement when the deceased plan participant had the opportunity to change her designated beneficiary but did not do so.