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No. 71900-9-I

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Other Authorities

Codes and Regulations

INTRODUCTION

Does RCW 11.07.010 control ERISA benefits after their distribution? In Egelhoff v. Egelhoff, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001), the United State Supreme Court held that ERISA preempted RCW 11.07.010's automatic revocation of an ex-spouse as a beneficiary. Respondent Estate of Craig Lundy contends the Lundys divorce reincorporates the statue either as a matter of waiver or contract. "The 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." (Response Brief at 2).

Appellant Kelly Lundy disagrees for three reasons. First, the dissolution decree had no express waiver of beneficiary rights. Second, the statute that the Estate relies on for an implied waiver – RCW 11.07.010 – expressly excludes employee benefit plans like Boeing's that are governed by "controlling federal law". RCW 11.07.010(5)(a)(i) ("provided otherwise by controlling federal law"). Third, neither spouse contracted away the right to serve as beneficiary to the other's retirement account.

Craig and Kelly Lundy made informed financial decisions before and after their divorce. Both kept their beneficiary

designations intact and unchanged. Appellant Kelly Lundy respectfully requests the Court to uphold Craig Lundy's choice and reverse the trial court's judgment.

I. WAIVER REQUIRES MORE THAN A LEGAL PRESUMPTION

A. The Lundys Did Not Expressly Waive Their Right To Serve As Beneficiaries

The Lundys' dissolution decree does not forbid them from serving as each other's beneficiary. Instead, it awards each person full ownership of his or her respective retirement account: "the husband [wife] is awarded as his [her] separate property the following property:...All retirement funds and 401ks in his [her] name." (Dissolution Decree ¶¶ 3.2 & 3.3; Exhibit 3 to Estate's Petition; CP 74-75). Both were free to name new beneficiaries *or* leave the designations unchanged.

The Estate concedes that the dissolution decree does not expressly waive Ms. Lundy's rights as a beneficiary.

> The language of the contract [dissolution decree] 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.

(Response Brief at 32) (emphasis added). Under Washington law, waiver requires unambiguous statements or actions.

> The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. 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. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego [sic] some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011) (quoting Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)).

There is no evidence that Ms. Lundy intended to waive her ability to serve as Mr. Lundy's beneficiary. In fact, her testimony is the exact opposite. Because Ms. Lundy did not waive her rights expressly or by her conduct, the Estate must prove implied waiver as a matter of law.

B. RCW 11.07.010 Excludes Non-Probate Assets Controlled By Federal Law

Both the Estate and the trial judge relied on RCW 11.07.010 to reverse Mr. Lundy's choice of Ms. Lundy as his beneficiary. (4/2/14 VRP 36; CP 6-8). Although the trial judge made no findings

on waiver, the Estate on appeal argues that the dissolution decree incorporated RCW 11.07.010 and that statute required Ms. Lundy to waive her interest.

> 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.

(Response Brief at 33) (citing RCW 11.07.010).

There is a fatal flaw in this argument however. 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).

No dispute should exist that ERISA controls the Boeing VIP benefits plan. Egelhoff v. Egelhoff, 532 U.S. 141, 144, 121 S.Ct. 1322, 1326, 149 L.Ed.2d 264 (2001) ("Mr. Egelhoff was employed by the Boeing Company, which provided him with a life insurance policy and a pension plan"). Furthermore, no dispute should exist that federal law controls Mr. Lundy's designation of a beneficiary.

> The statute [RCW 11.07.010] 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.

Egelhoff, 532 U.S. at 147.

Therefore, 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.

Because state law excludes the Boeing Plan, Ms. Lundy could not have impliedly waived her ability to remain a beneficiary based on the statute. As Ms. Lundy's counsel argued to the trial court,

> An employee benefit plan, which is – for which the benefit is provided otherwise by controlling federal law is specifically excluded from the definition of a nonprobate asset.
>
> So RCW 11.07.010 doesn't apply in any event. And even if, as the plaintiff argues, it's to be read into the Divorce Decree, even if it's to be incorporated by reference into the Divorce Decree that doesn't get the plaintiff anywhere, because the Statute writes itself out of the ERISA account, such as the Boeing Retirement account.

(4/2/14 VRP 27-28).

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 which 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.

II. THE DISSOLUTION DECREE DID NOT INCORPORATE RCW 11.07.010.

In addition to waiver, the Estate alleges 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. 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 (preempting RCW 11.07.010 because "this statute governs the payment of benefits, a central matter of plan administration").

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.

III. ERISA PREEMPTS RCW 11.07.010 PRE- AND POST-DISTRIBUTION

Repeatedly citing one phrase from the hearing transcript, the Estate argues that Ms. Lundy has waived any argument concerning federal preemption. (Response Brief at 7, 14, 19). The Estate contends the Court should dismiss Ms. Lundy's claim that ERISA

preempts RCW 11.07.010 post-distribution as well as pre-distribution. (Response Brief at 10).

This is unwarranted for three reasons. First, as detailed above, RCW 11.07.010 incorporates federal law, and preemption, by excluding ERISA-governed benefits. RCW 11.07.010(5)(a)(i). In effect, the statute recognizes that federal, not state law, determines who should receive ERISA benefits as a beneficiary. Counsel raised this issue in the trial court, preserving it for appeal.

Second, Ms. Lundy did not waive her arguments under federal law. At the TEDRA hearing, counsel acknowledged that under ERISA, state courts have concurrent jurisdiction over a suit for ERISA benefits.

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1). Subsection (a)(1)(B) authorizes civil suits "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights

to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

This does not mean that federal law is irrelevant. As counsel argued in the trial court,

> for 13 years the Egelhoff case has said that Boeing employees may designate a beneficiary of their retirement account and that designated beneficiary is not revoked by divorce. The Egelhoff case dealt with a Boeing retirement account and had that ruling.

(4/2/14 VRP 24-25). Ms. Lundy objected to applying RCW 11.07.010 post-distribution where the Supreme Court had preempted the statute pre-distribution. The Estate cannot re-introduce the preempted statute in the guise of an implied contract term or as implied waiver.

Third, the new argument on appeal – Hillman v. Maretta – reinforces this scope of federal preemption. Hillman v. Maretta, __ U.S. __, __, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013) (benefits "cannot be allocated to another person by operation of state law"). In Hillman, the Supreme Court affirmed post-distribution what Egelhoff concluded pre-distribution – ERISA, not a state statute, determines the appropriate beneficiary for ERISA-governed benefits. Although counsel did not raise Hillman below, Ms. Lundy

has maintained throughout this litigation that federal law, not RCW 11.07.010, determines her rights as beneficiary.

The trial judge heard substantial argument on why RCW 11.07.010 does not apply expressly or by implication to Mr. Lundy's designation of beneficiary. Despite this, the lower court applied the state statute without explanation or qualification. This was error under both federal and state law.

IV. THE ESTATE HAS NO EVIDENCE MR. LUNDY CHOSE HIS SIBLINGS AS BENEFICIARIES

The Estate argues that Mr. Lundy wanted his retirement benefits to go to his siblings, not Ms. Lundy. "The circumstantial evidence supports that Craig intended to leave the retirement funds to his family and not his ex-wife." (Response Brief at 40). Based on this, the Estate alleges it is inequitable for Ms. Lundy to keep the retirement benefits.

Mr. Lundy did not leave a will, or name his siblings as heirs. Mr. Lundy did not change his designation of beneficiary, despite having four years to do so. Furthermore, no member of Mr. Lundy's family has testified that he said he wanted to change his beneficiary, or that he wanted the benefits to go to his family. The

only objective evidence of Mr. Lundy's intent is his written designation of beneficiary.

All of Mr. Lundy's siblings offered declarations of what they believe he intended. Ms. Lundy has provided the most detailed evidence of what he wanted. But ultimately, Mr. Lundy should have the last say – through his written designation. The trial court erred by reversing that designation based on a preempted state statute.

CONCLUSION

The Estate of Craig Lundy attempts to introduce RCW 11.07.010 through the back door. The United States Supreme Court has held that statute preempted for ERISA-governed benefits. Lacking evidence that Appellant Kelly Lundy expressly waived her ability to remain Mr. Lundy's beneficiary, the Estate incorporates the statue 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.

Appellant Kelly Lundy respectfully requests the Court to reverse the trial court's judgment, enter judgment in her favor, and dismiss the Estate's petition.

DATED this 10 day of December, 2014.

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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 Brief of Appellant to:

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_____
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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