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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NO. 63368-6-I

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SANDRA INGALLS,

Respondent,

vs.

ICMA-RC SERVICES, LLC, a Delaware corporation,

Defendant

and

LYNNE E. BURGETT and BRIAN J. INGALLS,

Appellants.

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BRIEF OF RESPONDENT

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## **I. BRIEF STATEMENT OF CLAIMS**

In 1991, while employed at Community Transit (CT), Lawrence H. Ingalls established a § 457 deferred-compensation trust through ICMA-RC, which trust included as a general condition that:

The employee understands that the last dated designation of a beneficiary or beneficiaries filed with the ICMA Retirement Corporation as administrator for any participating employer, shall, in the event of death prior to full distribution after retirement, control the actions of the ICMA Retirement Corporation, as administrator, of the deferred compensation funds, assets, and accumulations in all ICMA Retirement Corporation accounts established for the employee. (Emphasis added.) CP 237.

Mr. Ingalls died May 18, 2006, CP 232. The last-dated designation of a beneficiary by Lawrence H. Ingalls for his ICMA-RC accounts was signed March 24, 2003, through the City of Snohomish, CP 232, 239. Therein, Mr. Ingalls' wife, Sandra Ingalls, was designated for 100% of benefits. By summary judgment, the trial court awarded "all accounts" whether CT or City of Snohomish to Mrs. Ingalls. Lynne Burgett and Brian Ingalls appealed to this Court, claiming that the above-quoted language does not mean what it says and that, since they were the last-dated designees while Mr. Ingalls was employed at CT, they are entitled

to distribution of the accounts referable back to CT. As a party to this lawsuit, ICMA-RC takes no position as to the above provision.

## **II. ISSUES**

- (1) Is Sandra Ingalls the beneficiary of all ICMA-RC accounts of Lawrence H. Ingalls, including the deferred compensation accounts from his compensation at Community Transit?

Lynne Burgett's and Brian Ingalls' sub-issues (re-stated by Sandra Ingalls):

- (2) May ICMA-RC make interpretations which modify the clear language of the trust documents?
- (3) May the last-dated designation of beneficiary on March 23, 2003, control a previously signed designation signed when compensation was being deferred from a previous employer?
- (4) Does "all accounts" mean all accounts managed by ICMA-RC or the separate accounts managed by ICMA-RC which relate back to each employer from whom compensation was deferred?
- (5) Is there any significance to the effect of the last-designation rule where beneficiaries in a prior plan may be changed or eliminated?
- (6) How must one designate beneficiaries where the latest designation controls "all accounts"?

## **III. SANDRA INGALLS' STATEMENT OF THE CASE**

Lawrence H. Ingalls was a participant in a § 457 deferred

compensation plan provided by ICMA-RC for local government employees. "Established by the International City/County Management Association (ICMA) with the assistance of a Ford Foundation grant, ICMA-RC provides a portable retirement plan, enabling accumulated retirement assets to be transferred between employers," CP 234.

On his death, May 18, 2006, the total value of Mr. Ingalls' ICMA-RC account was \$127,552.93, CP 241. Taking advantage of ICMA-RC's "portable retirement plan," Mr. Ingalls had made contributions through two employers, Community Transit and the City of Snohomish. He started making contributions in 1991 while employed at Community Transit, CP 236. In 2001, Mr. Ingalls married Sandra Ingalls, CP 232. On March 24, 2003, while employed at City of Snohomish, Mr. Ingalls designated Sandra Ingalls as his 100% primary beneficiary in the event of his death prior to receipt of the funds, CP 239. This designation shortly preceded Sandra's deeding to their community estate the house and property she owned prior to their marriage, CP 245, and two weeks after Sandra and Mr. Ingalls had jointly applied for a loan to rebuild their community house, CP 232. Based on the records provided by ICMA-RC, Sandra Ingalls is the

100% primary beneficiary on the last-dated designation supplied by Lawrence H. Ingalls to ICMA-RC, CP 213.

In 1991 when Mr. Ingalls opened his ICMA-RC account, one of the forms which Mr. Ingalls signed stated on the reverse side, CP 237:

3. If the benefits are paid to the employee under an option requiring the purchase of an annuity, designation or re-designation of a beneficiary or beneficiaries may have to be repeated at the time, in accordance with the requirements of the annuitor. The employee understands that the last dated designation of a beneficiary or beneficiaries filed with the ICMA Retirement Corporation, as administrator for any participating employer, shall, in the event of death prior to full distribution after retirement control the actions of the ICMA Retirement Corporation, as administrator, in the distribution of the deferred compensation funds, assets, and accumulations in all ICMA Retirement Corporation accounts established for the employee. (Emphasis added.)

The above quote appears to be the only formal statement in the ICMA-RC trust for Mr. Ingalls concerning designation of beneficiaries prior to full distribution of a participant's retirement accounts.

After Mr. Ingalls' death, when Mrs. Ingalls applied to ICMA-RC for Mr. Ingalls' deferred compensation funds, ICMA-RC staff took the position that Mr. Ingalls was required to name a beneficiary for each

employer in whose plan Mr. Ingalls had participated. On April 2, 2007, Mrs. Ingalls' counsel, Paul Bishop, pointed out that ICMA-RC's staff position was inconsistent with the above language of the trust, CP 215-216. On May 15, 2007, an ICMA-RC representative communicated its position that, despite the clear language above, ICMA-RC considers that employment at a separate government entity constitutes a different "plan" and that, accordingly, there must be a primary beneficiary change for each "plan," CP 219-220. The ICMA-RC representative cited to no formal written statement or documents or contracts, such as the plans for CT or Snohomish, to support his interpretation. Nor did he explain how the "plan" related to "all accounts" held by Mr. Ingalls and he failed to explain how filing with ICMA-RC through "any participating employer" did not control the primary beneficiary designation for "all accounts" when the terms of the trust established by ICMA-RC for Mr. Ingalls clearly stated that the "last dated designation of a beneficiary or beneficiaries filed with the ICMA Retirement Corporation, as administrator for any participating employer, shall, in the event of death prior to full distribution after retirement, control the actions of the ICMA Retirement Corporation, as administrator, in the

distribution of the deferred compensation funds, assets, and accumulations in all ICMA Retirement corporation accounts established for the employee." (Emphasis added.)

A copy of a "Quarterly Portfolio Financial Summary" for Lawrence Ingalls (October 1, 2006-December 31, 2006) provides a "Summary of all ICMA-RC Accounts," CP 241. Attached to that are balances for Snohomish and CT, the total of which is included in the Summary sheet. Thus, a participant, having Section 3 of the General Information above in mind, would find nothing in the quarterly reporting of accounts which conflicted with the statement that the last-dated designation of a beneficiary "filed with the ICMA Retirement Corporation" controls distribution of the funds "in all ICMA Retirement Corporation accounts established for the employee."

#### **IV. ARGUMENT**

RCW 41.50.770 authorizes political subdivisions to contract with an employee to defer a portion of the employee's income pursuant to 26 U.S.C. § 457 and "deposit or invest" such deferred income in banks or investment companies. RCW 41.50.780 states, with regard to moneys in the state-administered deferred compensation program, that

the funds are to be held "in trust" for the plan participants and their beneficiaries. So there is ample authority for the proposition that deferred-compensation moneys deposited with an investment company by a municipal employee establishes a trust relationship with the depository. This is Washington common law:

An express trust is one created by the act of the parties; and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists.

*Westview Invs. Ltd. v. U.S. Bank*, 133 Wn. App. 835, 845, 138 P.3d 638 (2006). The significance of establishing clearly that we are dealing with a trust in dealing with the ICMA-RC accounts is that the legal analysis centers on understanding the intent of the settlor—the person who establishes the trust. In dealing with the interpretation of trust documents, courts have said that the intent and purpose of the settlor must be derived from the terms of the instrument, construing all of its provisions together. *Waits v. Hamlin*, 55 Wn. App. 193, 776 P. 2d 1003 (1989). So, really, the interpretations of a trust administrator carry very little weight in a legal analysis of the terms of an express

trust, since it is the intent of the settlor of the trust, like a testator who signs a will drafted by someone else, which is the point of view and understanding which the court must look for in interpreting the trust documents.

**A. THE DEFERRED COMPENSATION AGREEMENT IS A TRUST**

In this case the trust "instrument" constitutes the documents involved in the creation and maintenance of Larry Ingalls' ICMA-RC accounts. The above-quoted Section 3 is found on the reverse side of a form entitled "457 Deferred Compensation Plan Employee Action Form," CP 236-237. It is entitled "General Information." In addition to the primary beneficiary provision, the "General Information" includes a statement that the "Employee Action Form" constitutes an agreement between the employer, the employee, and ICMA-RC; a provision regarding retirement age; limits on the amount that may be deferred; and a provision regarding conflict with state or local law. A reasonable person looking over this "General Information" would have no reason not to believe that these were important requirements of ICMA-RC regarding the control of the funds in ICMA-RC's hands

which should guide a participant's decisions on investment issues and, in this case, designation of a beneficiary. The "General Information" makes no reference to any other source where other more specific provisions defining the relationship between ICMA-RC and the participants in its retirement plan may be found. For a participant establishing a trust relationship with ICMA-RC, the "General Information" is the final word.

Thus, even if we apply the "context rule" of *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), to the above-quoted Section 3, its context relates to the basis of the agreement and the trustee's rules and regulations and provisions for holding, investing, and paying out deferred compensation to participants. There is reference to no other source of such provisions in the "General Information." Other ICMA-RC literature covers the investment portfolio and rules for transfers and allocations and a guide to withdrawals, but the "General Information" appears to be the definitive document describing particulars of the trustee-beneficiary relationship between ICMA-RC and a participant. In discovery, ICMA-RC produced a template for the plan for all employers providing deferred compensation through ICMA-RC,

CP 25-34, 42-58, 64-88. The plan documents seem to incorporate § 457 requirements but are overly detailed for day-to-day guidance of employer staff and employees. It is not known how CT and Snohomish acknowledged the ICMA-RC plan. Lynne Burgett and Brian Ingalls argue in their appeal brief, essentially, that the existence of separate agreements between ICMA-RC and Snohomish and Mr. Ingalls and ICMA-RC and CT and Mr. Ingalls supports their position that beneficiaries must be named for each plan, but there are no conditions in the plan template document regarding designation of beneficiaries that conflict with Section 3 of the General Information (and, actually, the plan is not really drafted as an agreement).

Section 3 of the General Information is on the action form which is drafted as an agreement and is the only definitive statement regarding designation of beneficiaries. There is no ambiguity in the provision which requires contextual analysis or reference to the plan:

Context may not be used, however, to contradict, modify or add to the written terms of an agreement. Nor may context be used for the purpose of importing into writing an intention not expressed therein.

*Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001).

Thus, Section 3 states clearly:

- the "last dated designation of a beneficiary" (or most current designation);
- "shall" (mandatory);
- "in the event of death prior to full distribution after retirement" (the period from deposit to distribution of the funds held by ICMA-RC before or after retirement);
- "control the actions of the ICMA Retirement Corporation, as administrator" (ICMA-RC will act in its fiduciary capacity to a plan participant);
- "in the distribution of the deferred compensation funds, assets, and accumulations in all ICMA Retirement Corporation accounts established for the employee" (all accounts are controlled by the last dated designation). [Emphasis added.]

To adopt any other interpretation than that the most current designation controls "all accounts" is clearly arbitrary and has no basis in the terms of the establishment of the trust. To provide Section 3 of the General Information to a participant and then later adopt an interpretation contrary to the clear language, as was done by the ICMA-RC staff, creates an ambiguity allowing ICMA-RC to launch a guessing game as to who the participant intended as his or her beneficiary for his "accounts." Further, ICMA-RC, as a party to this case, provided no

briefing, legal analysis, or argument to support or explain its staff's position.

**B. WHAT IS AN "ACCOUNT" IN ICMA PARLANCE?**

To succeed in their claim for benefits, Lynne Burgett and Brian Ingalls argue that "account" means each three-way contract between ICMA-RC, an employer, and an employee; if there is more than one employer, there is more than one account. At the outset, it is necessary to point out that for purposes of the issue in this case it makes no difference whether "accounts" relates to investment categories or any kind of classification of amounts on deposit with ICMA-RC relating back to the source of the deferred compensation: the beneficiary provision in question states that the last-dated designation controls all ICMA-RC "accounts" ("all" means "all" regardless of what or how many classifications of amounts on deposit there are). So a change of beneficiary for one employer changes the beneficiary for all employer "accounts." This is what the trust says and is consistent with portability from employer to employer.

The ICMA-RC literature and contractual documents in the record do not make any distinction between employee accounts and

employee-employer accounts. If we parse through the ICMA-RC literature, "account" generally refers to the total balance held by ICMA-RC credited or debited to a participant, like a bank account or an investment company account. The "Quarterly Portfolio Financial Summary," CP 241-243, shows a summary of all "accounts," in the total balance held by ICMA-RC. Thus, the most straightforward interpretation of Section 3 is that "account" refers to the balance in ICMA-RC's hands credited to a participant, and "control" of all accounts refers to control of the sum total in ICMA-RC's hands, regardless of whether the deferred compensation was deposited in the participant's account(s) from one or more employers. No other interpretation works without changing the meaning of "account" in the ICMA documents.

### **C. WHAT IS A "PLAN" IN ICMA-RC PARLANCE?**

Since Lynne Burgett and Brian Ingalls argue that "accounts" are plan-specific only, what do the documents say about the term "plan"? (Again, this analysis is superfluous, since Section 3 refers to "all accounts," not the accounts in each plan.)

The form entitled "457 Deferred Compensation Plan Employee

Action Form," CP 236-237, which is the form where Section 3 is found, does not define "Plan." "Plan" is used in the title of the form which on the reverse side provides "General Information" regarding the relationship between ICMA-RC and the participant. The front side of the form covers name of the participant, his/her employer, the ICMA-RC Account number, employee information (address, et cetera), designation of beneficiary, amount of deferred compensation and allocation of future contributions, transfer of existing account balances, and signatures.

On the reverse side, Section 5 of the General Information states that amounts contributed to other § 402 or § 457 plans are treated as if such amounts were included in the present "plan" to avoid going over the maximum deferral amount. Further, the term "plan" is ambiguous. Is this talking about ICMA-RC plans between different municipalities or just § 457 plans in general? Perhaps an employee at Community Transit might have deferred compensation in a CT-ICMA-RC-employee "plan" and a CT-Hartford-employee "plan." Isn't the clause simply saying a participant cannot double or otherwise increase 457 deferral by participating in another § 457 "plan" whether or not it's with

another employer? In that sense, plan accounts are considered together, not separately. And doesn't this specific use of the term "plan" in Section 5 as relating to deferred compensation from separate employers auger for the interpretation that by not using the term "plan" in Section 3 above, ICMA-RC really intended to mean what it said, *i.e.*, that the total accounts of the employee for all employers are controlled by the last-dated designation of primary beneficiary? If ICMA-RC wanted to restrict designation of beneficiaries to each "plan," it was familiar with the meaning of the term and could have used it in Section 3 as it did in Section 5.

Generally, the sense in which the term "plan" is used above and elsewhere in ICMA-RC documents has to do with § 457 and § 401-402 "plans" that allow compensation not to be taxed until retirement and invested for future retirement. A participant has an "account" in a "plan"; he or she does not have a "plan" in an "account." Plans and accounts are distinct. If the drafter of Section 3 of the General Information wanted a participant to change the designation of beneficiary form for each "plan," as Lynne Burgett and Brian Ingalls argue for, then the drafter would have said that a change of beneficiary

form must be made out for each "plan," and would not have said that the change of beneficiary form controls "all accounts" for "any participating employer."

#### **D. INTENT OF THE SETTLOR**

Mr. Ingalls being the "settlor" of his deferred compensation trust accounts, it is his intent which must be determined. *Waits v Hamlin, supra*. Thus, it is important to consider that Mr. Ingalls made the change of beneficiary after his marriage to Sandra Ingalls and after she had conveyed her separate interest in her home to their community. Assuming that at some time he had read, or should have read, Section 3 of the General Information, wouldn't he believe that there was nothing left to do once he had gone to the City of Snohomish and signed the change of primary beneficiary form? The most recent change of beneficiary controlled "all accounts." He didn't have to chase over to CT and get another form to change his beneficiary, and where is he told to do that?

Further, although the form should be interpreted against ICMA-RC under contract law, the legal analysis should center less on contract law and more on trust law. The language should be interpreted, like a

testamentary instrument, from the viewpoint of the person signing the document, not the draftsman. From the viewpoint of the settlor, Lawrence H. Ingalls, signing the latest-dated change of beneficiary form at Snohomish changed all of his ICMA accounts.

V. **RESPONSE TO LYNNE BURNETT/  
BRIAN INGALLS ISSUES**

- (1) Lynne Burgett's and Brian Ingalls' first issue is whether Lynne E. Burgett and Brian J. Ingalls are entitled to the accounts referable to CT.

For the reasons outlined above the answer is "no."

- (2) Lynne Burgett and Brian Ingalls state their second issue as follows:

Is ICMA-RC Services' interpretation of the December, 1991 Employee Action Form, which results in Mr. Ingalls' children being the beneficiaries of his interest in the CT 457 Plan, a reasonable interpretation and consistent with the CT 457 Deferred Compensation Plan and the definitions of contract terms contained therein?

Sandra Ingalls restates the issue as follows:

May ICMA-RC staff make interpretations which modify the clear language of the trust documents?

Lynne Burgett and Brian Ingalls argue that the General

Information sheet should be read in the context of the ICMA-RC plan

and trust templates for governmental entities, CP 22-88. Those documents contain no provisions which directly contradict Section 3 of the General Information. But, the essence of Lynne Burgett's and Brian Ingalls' argument is that the implication of the requirement of a plan for each employer means that there must be a primary beneficiary designation for each. Ergo, the ICMA-RC staff was reasonable in so interpreting Section 3.

But there are several reasons why this position is unreasonable. First, although it may be administratively confusing for staff to commingle the accounts between employers, there is no statutory or common law prohibition against keeping employer accounts separate but allowing for one change of beneficiary for all accounts in all plans. Commingling is what ICMA-RC is all about. It says so in Section 2.2 of the Declaration of Trust, CP 36. It may have been that the drafter of Section 3 was not answering to staff who ran the day-to-day operations of ICMA-RC but was answering to some marketing-minded executive who thought that one change-of-beneficiary-covers-all would be a good selling point for selecting ICMA-RC as an employer's and employee's deferred compensation trust, particularly for ICMA members who

change jobs and work all over the U.S.

Second, if the plan, CP 22-34,42-58, 64-85, is generic for all employers who use ICMA-RC to hold and administer its employees' deferred compensation, CP 24, why not one change of beneficiary changes "all accounts"? It would seem unreasonable to require participants to go back to all their prior employers and execute a change of beneficiary form.

Third, the Declaration of Trust names ICMA-RC specifically to perform the duties as Trustee of the participants' deferred compensation, CP 36. Its duties include "to provide for the commingled investment of funds held by the Public Employers in connection with their Deferred Compensation and Qualified Plans," CP 36, Section 2.2, to own the trust property (deferred compensation and income therefrom), CP 36, Section 1.2, and under Section 4.2, CP 38, to make distributions of the trust property. To perform its duties as Trustee, under Section 4.1 ICMA-RC has the power to "do all such acts, take such proceedings, and exercise all such rights and privileges, although not specifically mentioned herein, as the trustees may deem necessary or appropriate to administer the trust property," CP 38.

Sandra Ingalls submits this as ample authority under the Trust agreement for ICMA-RC to establish a provision that the last change-of-beneficiary designation controls "all accounts" deposited with ICMA-RC for "any participating employer." Understanding that the plan and trust terms are generic for all participating employers, the only difference between each plan administered by ICMA-RC is the name of the employer. The investment choices are the same. The Trustees responsible for the trust property are the same. The accounting is done the same way for all participating employees. The rules for distribution by the Trustee is the same for all employees regardless of employer. The last-designated beneficiary rule is reasonable and consistent with commingling of accounts and the portability feature of ICMA-RC as a deferred compensation service provider. Accordingly, for ICMA-RC staff to advance an administrative interpretation that is inconsistent with the clear language of Section 3 is unreasonable.

Lastly, when Sandra Ingalls challenged ICMA-RC and filed this lawsuit, ICMA-RC made no attempt to explain itself and why it had refuted the clear language of Section 3. If there is some arcane reasoning in the world of § 457 administration that makes Section 3

invalid or ultra vires, as Lynne Burgett and Brian Ingalls argue herein, ICMA-RC has not revealed it. Otherwise, ICMA-RC's position is a trick: "we know the language says that but that's not what it means."

- (3) Lynne Burgett and Brian Ingalls state their third issue as follows:

Was the agreement signed by Mr. Ingalls for the Community Transit 457 Deferred Compensation Plan on February 23, 1994, designating his children as beneficiaries of the Plan revoked or amended when Mr. Ingalls signed an agreement on March 23, 2003, designating his second wife, Sandra Ingalls, as beneficiary of his interest in the City of Snohomish 457 Deferred Compensation Plan?

Sandra Ingalls restates the issue as follows:

May the last-dated designation of beneficiary on March 23, 2003, control a previously signed designation where compensation was being deferred from another employer?

This is the fundamental issue of the case, but it can be answered the most succinctly. Section 3 states that the last-dated designation of beneficiary controls all accounts. Section 3 is on a form signed by CT and Lawrence H. Ingalls and provided by ICMA-RC regarding administration of the trust property held by ICMA-RC. It is signed by Mr. Ingalls during the first year Mr. Ingalls began making deferred

compensation contributions to ICMA-RC. Lynne Burgett and Brian Ingalls argue that a change of beneficiary form signed under one plan cannot change the beneficiary of another plan. But here we have a common plan, CP 24, and a trustee for both plans who is responsible for holding and investing the deferred compensation of both employers, establishing and administrating investment vehicles that are common to all employers and employees using the services of ICMA-RC, providing a common accounting of all funds held and invested, keeping track of when deferred compensation came in and goes out, perhaps to another account, and, most importantly, making distribution to participants or their beneficiaries in keeping with the federal rules for 457 deferred compensation. The form that allows for this common administration is an ICMA-RC form signed by the participant and his employer. So it should come as no surprise to participants that one change covers all (it probably came as more of a surprise under the clear language of Section 3 that it didn't!). And it is a rule for the participants' convenience. Further, the employer, who Lynne Burgett and Brian Ingalls believe should be involved in the decision to establish or change a beneficiary, has no legal interest in who a participant

designates as a beneficiary. No rule or provision of the plan or 457 regulations forbid it, and the trust allows it as a rule of administration. Why not allow one change of beneficiary as to "all accounts" for administrative convenience of the trustee and the participant?

So, yes, the last-signed designation of beneficiary controls "all accounts" and revokes or changes all previous designation of beneficiary for "any participating employer."

- (4) Lynne Burgett and Brian Ingalls state their fourth issue as follows:

Where both employers' deferred compensation plans clearly require that a beneficiary be designated in a joinder agreement, can a joinder agreement between an employee and one employer be used to change the terms of the joinder agreement between the employee and a different employer?

Sandra Ingalls restates the issue as follows:

Does "all accounts" in the Section 3 of the General Information mean all accounts managed by ICMA-RC or the separate accounts managed by ICMA-RC which relate back to each employer from whom compensation was deferred?

Lynne Burgett and Brian Ingalls quote the plan definitions of beneficiary and joinder agreement and argue that, since a beneficiary

is a person named in a joinder agreement and a joinder agreement is an agreement between an employer and employee, a designation of beneficiary may only be made for each plan. This argument fails to consider that Section 3 of the General Information is part of the joinder agreement and must be read together with the other documents, particularly the plan and the trust agreement. So if the General Information is read as part of the plan and trust, it starts in Section 1 by stating that this is an agreement between employer and employee identified on the other side that is administered by ICMA-RC. So that when one gets to Section 3, one reads that the last-dated designation of beneficiary filed with ICMA-RC "as administrator for any participating employer" shall control distribution of funds in "all ICMA-RC accounts established for the employee," the last-dated designation rule has become a provision in the joinder agreement as a rule of administration. By reference back to being an administrator for "any participating employer," ICMA-RC states in the "General Information" that the last-dated designation controls. This is certainly not a conflict with the plan or trust agreement. It is part of the plan and trust agreement. As stated above, the trust agreement allows ICMA-RC to formulate this rule as

part of its duties to manage and make distribution of the trust property.

- (5) Lynne Burgett and Brian Ingalls state their fifth issue as follows:

Is it reasonable to interpret the December, 1991 Employee Action Form in such a manner that it would have been impossible for Mr. Ingalls to designate his children as beneficiary of his interest in the CT 457 Plan (all of which was accumulated prior to his marriage to Sandra Ingalls) and his second wife, Sandra Ingalls, as beneficiary of his interest in the City of Snohomish 457 Plan (all of which was accumulated during their marriage)?

Sandra Ingalls restate the issue as follows:

Is there any significance to the last-designation rule where beneficiaries in a prior plan may be changed or eliminated?

At the outset, it is a nice issue as to whether Mr. Ingalls could have named his children as beneficiaries without the consent of his wife after January 1, 2006. The plan, as of January 1, 2006, so required for a community property state such as Washington. Section 2.05, CP 64. So under the circumstances of Mr. and Mrs. Ingalls' financing of their home, it probably would have been difficult to obtain her consent to designate his children as beneficiaries, but for very different reasons than Lynne Burgett and Brian Ingalls point out.

However, the last-dated designation rule itself doesn't make it impossible to change beneficiaries of those amounts derived from a prior employer, because the change would affect all accounts including those amounts in "all accounts" deferred from a prior employer. A participant, thinking that Section 3 meant what it said, would no doubt designate percentages of his total accounts to his selected beneficiaries on whatever basis the participant liked, including prior employer accounts, but also all the other factors a devisee considers in selecting heirs and gift amounts to beneficiaries. In designating beneficiaries, it would be imperative for a participant to know whether "all accounts" means all accounts only referable to each employer or "all accounts." Commonly, assets are assigned to a beneficiary in an amount or percentage of total assets, which is consistent with the "all accounts" designation rule. ICMA-RC staff's persistence in its unreasonable interpretation of Section 3, could very well thwart the intent of a participant. For example, if all accounts totaled \$200,000 and a participant wanted to give \$100,000 to his wife and \$100,000 to his children, he could not just designate each as 50% beneficiaries on one action form, because he would have to be aware of how much of the

\$200,000 came from each employer and adjust his or her percentages by employer source until he had contacted all former employers and made percentages the same with each. This complication is another reason, besides portability and marketing, for the last-dated designation rule in the first place: to make it easier to gift one's total ICMA-RC accounts, regardless of source, and assign beneficial interests by percentage. This is similar to the way a person draws up a will: one looks at one's total estate and lists one's heirs and divides it up. So no rights of designation are forfeited by the rule.

- (6) Lynne Burgett and Brian Ingalls state their sixth issue as follows:

Is it reasonable to interpret the December, 1991, Employee Action Form in such a manner that by signing it, Mr. Ingalls (together with all other plan participants who signed that form) forever forfeited the right to designate a beneficiary for his interest in the CT 457 Plan that was different from the beneficiary that was designated for any other 457 Plan in which he participated and for which ICMA-RC Services, LLC was the administrator?

Sandra Ingalls restates the issue as follows:

How must one designate beneficiaries where the latest dated designation controls "all accounts?"

This is the same issue as issue (5), both of which attempt to point out dire consequences of the last-dated designation controls rule. Lynne Burgett and Brian Ingalls argue that an employee not reading and understanding Section 3 would forfeit his or her "right" to designate a beneficiary for accounts accumulated from a previous employer. (What about an employee who did read Section 3 and later found out that there was a tricky interpretation of Section 3 that forfeited a participant's intent to change the beneficiary distribution of "all accounts"?)

What difference does it make that one is not changing one's accounts according to the employer source of the deferred compensation? None. This is what ICMA-RC decided when it drafted the last-designation rule. If this is not what ICMA-RC decided, then wouldn't it have provided a simple caveat that a change of beneficiary must be made for each employer plan? Or even, although it would be somewhat less clear, just say nothing at all and then spring it on the employee's competing beneficiaries after the employee's death. But someone at ICMA-RC thought the last-change-of-beneficiary-controls-all-accounts rule was convenient for their trust beneficiaries who had

several employers and didn't want to chase down their prior employers  
to sign change of beneficiary forms. So that is what was done.

Respectfully submitted this 7<sup>th</sup> day of August, 2009.

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