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NO. 63368-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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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COURT OF APPEALS
DIVISION I
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REPLY BRIEF OF APPELLANTS

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ARGUMENT IN RESPONSE TO RESPONDENT'S BRIEF

I. THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT THAT SECTION 3 OF THE 1991 EMPLOYEE ACTION FORM SHOULD BE CONSTRUED WITHOUT REFERENCE TO THE TERMS OF THE CT 457 DEFERRED COMPENSATION PLAN.

Sandra Ingalls' claim to be the beneficiary of Lawrence Ingalls' interest in the CT 457 Deferred Compensation Plan is based entirely on one sentence of section 3 of the "General Information" on the reverse side of a "457 Deferred Compensation Plan Employee Action Form" that Lawrence Ingalls signed on December 12, 1991, not to designate a beneficiary, but to change the amount of his contributions to the plan. (CP 227-228.) Her argument repeatedly and wrongly asserts that sentence is the only provision the Court need interpret:

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.

(Respondent's Brief, p.4.)

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.

(Respondent's Brief, p. 9.)

There is reference to no other source of such provisions in the "General Information."

(Respondent's Brief, p. 9.)

the "General Information" appears to be the definitive document describing particulars of the trustee-beneficiary relationship between ICMA-RC and a participant.

(Respondent's Brief, p. 9.)

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.

(Respondent' Brief, p. 10.)

Just because you say it five times or fifty times, doesn't make it so. Section 1 of the same "General Information" clearly states:

This Employee Action Form is a deferred compensation agreement between the employer and employee identified on the reverse side that is governed by the provisions of the employer's deferred compensation plan and administered by the International City Management

Association (ICMA) Retirement
Corporation.

[Emphasis added.] (CP 228.) The plain, unambiguous language of Section 1 states that the form is to be governed by the provisions of the employer's deferred compensation plan. Section 3 cannot be read in a vacuum. It must be read in the context of the plan itself.

Ms. Ingalls argues that "There is no ambiguity in the provision which requires contextual analysis or reference to the plan." (Respondent's Brief, p. 10.) However, reference to the plan is required not so as to resolve an ambiguity. Reference to the plan is required because by the plain language of the form upon which she relies, it is to be "governed by" the provisions of the plan. (CP 228.) The definition of "govern" as an intransitive verb in the Merriam-Webster's Collegiate Dictionary, Eleventh Edition includes: "1: to prevail or have decisive influence: Control." Because the plan is designated as the governing document for the form,

if there is any conflict between the plan and the form, the plan should control.

II. THE INTERPRETATION OF SECTION 3 OF THE 1991 EMPLOYEE ACTION FORM ADVOCATED BY MS. INGALLS IS CLEARLY INCONSISTENT WITH THE TERMS OF THE 457 DEFERRED COMPENSATION PLAN.

Despite Ms. Ingalls' claims that the plan documents should be ignored because they "are overly detailed for day-to-day guidance of employer staff and employees" (Respondent's Brief, page 10), the issue of how a beneficiary is to be designated is clearly addressed in the plan and is quite straight-forward.

Section 2.07 of the plan in effect in 1991 defines "Joinder Agreement" as:

An agreement entered into between an Employee and the Employer, including any amendments or modifications thereof. Such agreement shall fix the amount of Deferred Compensation, specify a preference among the investment alternatives designated by the Employer, designate the Employee's Beneficiary, and incorporate the terms, conditions, and provisions of the Plan by reference.

(CP 29.) Section 2.03 defines "Beneficiary" as:

The person or persons designated by the Participant in his Joinder Agreement who shall receive any benefits payable

hereunder in the event of the
Participant's death.

(CP 29.)

Because a beneficiary must be designated in an agreement between an employer and an employee, the designation of a beneficiary is necessarily employer-employee specific and applies to the employee's interest in that employer's deferred compensation plan, regardless of who administers the plan. Ms. Ingalls correctly states:

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."

(Respondent' Brief, page 5.) That is exactly what the plan states.

It is not ICMA's retirement plan or ICMA's deferred compensation plan or ICMA's trust that is at issue. The 457 Deferred Compensation Plan is an agreement between the employer, CT, and its employees. RCW 41.50.770(2). The plan in effect in 1991 specifically states "This Plan shall be an agreement solely between the Employer and participating Employees." (CP 29.) ICMA is the

administrator of the plan, i.e., "The person or persons named to carry out certain nondiscretionary administrative functions under the Plan." (CP 29.) Just because ICMA also acts as administrator for the City of Snohomish 457 Deferred Compensation Plan, does not mean that the two plans are one entity or that ICMA can unilaterally change the terms of either plan as to how a beneficiary for the plan is to be designated.

Ms. Ingalls claims that "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." [Emphasis added.] (Respondent's Brief, page 181.) That might be correct. However, there is a contractual prohibition against allowing one change of beneficiary for all accounts in all plans. That contractual prohibition is inherent in the 457 deferred compensation plan itself which states that a beneficiary must be designated in a

Joinder Agreement between an employer and an employee. (CP 29.)

III. THE TERMS "PLAN" AND "ACCOUNT" ARE DEFINED IN THE PLAN.

There is no need to guess at the meaning of the terms "plan" or "account" as used in the General Information on the back of the 1991 Employee Action Form, as Ms. Ingalls does on pages 12-16 of her Brief. Those terms are defined in the plan document by which the form is to be governed.

Article I of the plan in effect in 1991 states:

The Employer hereby establishes the Employer's Deferred Compensation Plan, hereinafter referred to as the "Plan." The Plan consists of the provisions set forth in this document.

(CP 29.)

Section 2.01 of the plan defines "Account" as:

The bookkeeping account maintained for each Participant reflecting the cumulative amount of the Participant's Deferred Compensation, including any income, gains, losses, or increases or decreases in market value attributable to the Employer's investment of the

Participant's Deferred Compensation, and further reflecting any distributions to the Participant or the Participant's Beneficiary and any fees or expenses charged against such Participant's Deferred Compensation.

[Emphasis added.] (CP 29.)

Each employer establishes its own deferred compensation plan and an employee has a bookkeeping account in an employer's plan.

However, the 1991 plan document also makes it clear that it is the employer who establishes the account and invests the funds deferred by the employee. (CP 29, Section 2.01; CP 30, Section 6.01.) That distinction becomes important when reading Article 3 of the General Information on the 1991 Employee Action Form. The sentence of that Article relied upon by Ms. Ingalls is entirely consistent with the terms of the plan if the unstated understanding that it is the employer who establishes the account for the employee is added at the end as follows:

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 [by the employer].

(CP 228.)

IV. THE RESPONDENT'S TRUST ANALYSIS FAILS BECAUSE IN 1991 THERE WAS NO TRUST ESTABLISHED FOR THE BENEFIT OF MR. INGALLS.

The CT 457 deferred compensation plan that was in effect in 1991 provided that compensation which an employee agreed to defer belonged to the employer and not to the employee and was not held in trust by the employer for the employee's benefit:

Section 6.01 Investment of Deferred Compensation:

All investments of Participant's Deferred Compensation made by the Employer, including all property and rights purchased with such amounts and all income attributable thereto, shall be the sole property of the Employer and shall not be held in trust for Participants or as collateral security for the fulfillment of the Employer's obligations under the Plan. Such property shall be subject to the claims of general creditors of the Employer, and no Participant or Beneficiary shall have any vested interest or secured or

preferred position with respect to such property or have any claim against the Employer except as a general creditor.

(CP 30.)¹. ICMA, as administrator and agent for the Employer, was charged with making disbursement of benefits on behalf of the Employer in accordance with the provisions of the Plan. (CP 30, Section 3.02.). In 1991 there was no trust established by Mr. Ingalls, his employer or ICMA for Mr. Ingalls' benefit. There is no need to guess at the settlor's intent as there is no trust and there is no settlor. Instead there is a contractual arrangement whereby Mr. Ingalls agreed to have CT retain control of part of the compensation he had earned, invest it, and pay it back to him at retirement or to his beneficiary following his death in accordance with the terms of the plan. The plan gave Mr. Ingalls the right to contract with his employer, CT, as to who the beneficiary would be for that employer's plan in the event of Mr. Ingalls' death. (CP 29, Article 2.03.) The interpretation of Section 3 of the

General Information on the 1991 form urged by Ms. Ingalls would deprive him of that contractual right.

V. THE ABILITY TO DESIGNATE DIFFERENT BENEFICIARIES FOR DIFFERENT EMPLOYERS' 457 DEFERRED COMPENSATION PLANS WAS AN IMPORTANT RIGHT OF THE EMPLOYEE, MR. INGALLS, WHICH SHOULD NOT BE DEEMED FORFEITED BY HIM ABSENT CLEAR AND COMPELLING EVIDENCE.

Ms. Ingalls argues that depriving Mr. Ingalls of the right to designate a beneficiary for his interest in the CT Plan different from the beneficiary for his interest in the City of Snohomish plan is insignificant. She queries: "What difference does it make that one is not changing one's accounts according to the employer source of the deferred compensation?"

(Respondent's Brief, page 28.) In this instance, it makes a big difference.

Mr. Ingalls' employment with CT was completed five years before he married Sandra Ingalls. (CP 134, 232.) His rights under the CT 457 Deferred Compensation Plan were, therefore, entirely his

¹ This was changed in the later versions of the plan agreement that were in effect in 2003 and 2006. (CP 40-61, 62-88.) Those documents provide that the employer holds the

separate property over which he was afforded total management and control.

Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of the wife, and he may manage, lease, sell, convey, encumber or devise by will such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried.

RCW 26.16.020. His rights under the City of Snohomish plan, on the other hand, were all accrued during his marriage to Sandra Ingalls and constituted community property. RCW 26.16.030.

Ms. Ingalls claims that Mr. Ingalls could have designated his children as primary beneficiaries for a percentage of the combined value of both his CT plan accruals and his City of Snohomish accruals. (Respondent's Brief, page 26.) At the same time, however, she questions whether he could have designated any beneficiary other than Sandra Ingalls without her consent while they were married. (Respondent's Brief, page

employee's deferred contributions in trust for the benefit of the employee.

25.) If she is correct in that assumption and she refused to include her stepchildren as partial beneficiaries of both plans, then Mr. Ingalls did, indeed, lose a very significant right if Ms. Ingalls' interpretation of the 1991 form prevails. Mr. Ingalls' forfeiture of that right should not be found without clear and compelling evidence of his intention to do so. No such evidence has been produced in this case.

VI. THERE IS NO EVIDENCE THAT ICMA WAS AUTHORIZED TO ADOPT, DID ADOPT OR ADHERED TO A "ONE CHANGE-OF-BENEFICIARY COVERS ALL" RULE OF ADMINISTRATION.

Ms. Ingalls argues that ICMA, as administrator of various employers' 457 deferred compensation plans, adopted in 1991 a rule that "One change-of-beneficiary covers all."
(Respondent's Brief, page 18.) She claims, without citation to any particular provision, that "the trust agreement allows ICMA-RC to formulate this rule as part of its duties to manage and make distribution of the trust property."
(Respondent's Brief, pages 24-25.) Yet, as discussed above, such a rule is clearly contrary

to the terms of the 457 deferred compensation plan contract entered into between each employer and its employees and Ms. Ingalls cites to no authority that would allow ICMA to unilaterally modify those contracts. On the one hand, Ms. Ingalls argues that ICMA should not be allowed to interpret the employee action forms that it prepared in such a way as to modify the language of the 457 deferred compensation agreement (Respondent's Brief, page 17) yet, at the same time, she argues that ICMA, on its own, is authorized to adopt a rule of administration that would clearly modify the specific terms of an employer's 457 plan agreement with its employees. (Respondent's Brief, pages 24-25.)

In any event, assuming *arguendo*, that ICMA had the authority in 1991 to adopt as a rule of administration that "one change-of-beneficiary covers all," what evidence is there that ICMA did so or that ICMA adhered to that rule and never changed it through the fifteen years from 1991 to Mr. Ingalls' death in 2006? The single piece of

evidence relied upon by Ms. Ingalls to prove the adoption by ICMA of that rule is the second sentence of Section 3 of the "General Information" on the back side of the 457 Deferred Compensation Plan Employee Action Form signed by Mr. Ingalls on December 12, 1991. (CP 227-228.) She has provided no evidence that, if that rule were adopted by ICMA in 1991, it was still in effect in 2003 when Mr. Ingalls designated her as beneficiary of his City of Snohomish deferred compensation plan.

If, as Ms. Ingalls posits, the "one change covers all" rule was part of ICMA's grand marketing plan, (Respondent's Brief, page 18) what other documentary evidence is there of that rule? Surely, ICMA would want all plan participants to be aware of that rule whenever they changed a beneficiary designation after 1991. Surely, the beneficiary designation forms would tout that the participant was, with one easy stroke, changing the beneficiary for all employers' plans administered by ICMA. Yet, there is not one post-

1991 piece of evidence in the record that ICMA's rule of administration is and has been since that time that "one change-of-beneficiary covers all."

The form signed by Mr. Ingalls in 1994 to designate his children as beneficiaries of the CT deferred compensation plan had a totally different backside than the 1991 form and did not say anything about a "one form changes all" rule. (CP 152-153.)

If the "one change covers all rule" was in effect in 2003 when Mr. Ingalls designated Ms. Ingalls as the beneficiary of the City of Snohomish deferred compensation plan, how would any person signing that form be advised of the rule? Looking at the 2003 form (CP 213), how would Mr. Ingalls know that he was changing the beneficiary designation he had signed in 1994 for the CT Plan?² The form says it is to be used to make changes to "your 457 Plan", not to "all of your ICMA accounts." The form requires the insertion of the Employer Plan Name, the Employer

² The back side of the 2003 form was not provided by Ms. Ingalls in support of her claim, nor was it provided by ICMA in response to discovery requests.

Plan Number, the job title of the participant and the date of employment. It requires the signature of the Employer and the entry again of the Employer Plan Number and was to be returned to the Employer. If Mr. Ingalls forgot the preprinted General Information regarding beneficiary designations on the back of the 1991 form he signed twelve years earlier when he wasn't designating a beneficiary (or worse yet, never read it), what on the 2003 form would lead Mr. Ingalls to believe that he was changing the beneficiaries for both the plan with his current employer, the City of Snohomish, and the plan with his prior employer, CT? The answer is nothing on that form shows the existence of an intent to change the CT plan beneficiary designation and nothing on that form shows that a "one change-of-beneficiary covers all" rule was in effect.

Not only do the beneficiary designation forms that are in the record belie the existence of a "one change-of-beneficiary covers all" ICMA administrative rule, but the beneficiary claim

forms also show that ICMA understood beneficiary designations to be plan-specific and not "one covers all." The "457 Beneficiary Withdrawal Form" provided by ICMA for Ms. Ingalls' use after Mr. Ingalls' death directs "Use this form to request a withdrawal from a 457 Deferred Compensation Plan account." (CP 173-176.) It does not state "use the form to make withdrawals from all of the deceased's ICMA accounts." The form requires both the Employer Plan Name and the Employer Plan Number be inserted in two different places and requires the signature of the participant's Employer. Ms. Ingalls filled in that form as if she were applying as beneficiary for a rollover of Mr. Ingalls' City of Snohomish deferred compensation account and it was signed on behalf of the City of Snohomish.

Similarly, the forms provided by ICMA to the children of Lawrence Ingalls to make claims as beneficiaries of his CT deferred compensation plan are plan-specific. (CP 144-145, 147-148.) Those forms required that the Employer Plan Name and

Employer Plan Number be inserted and that the form be signed by a representative of the employer named on the form.

If ICMA did decide and declare in 1991 that "one beneficiary designation covers all" and maintained that administrative rule through 2003, wouldn't there be some evidence?

VII. CONCLUSION.

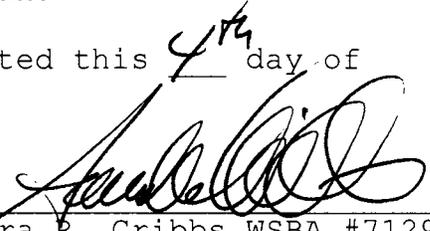
All of the documents in the record support the proposition that Mr. Ingalls was a participant in two separate deferred compensation plans, did not elect to transfer his account from one plan to the other, continued to maintain separate accounts for each of those plans, and designated different beneficiaries for each of those plans. Ms. Ingalls claims that it is Mr. Ingalls' intention that must be ascertained. However, there is no evidence of Mr. Ingalls' intent other than the documents signed by him. Clearly, in 2003 he intended his second wife to be his beneficiary for the City of Snohomish Deferred Compensation Plan. (CP 213.) Clearly, in 2003 he decided to stop

putting \$1,100 per month into his deferred retirement to free up his cash flow after he became indebted with his wife on a mortgage to build a new house. (CP 213, 211, 232.) Nothing, however, shows any intention on Mr. Ingalls' part to remove his children as the designated beneficiaries of his interest in the CT 457 Deferred Compensation Plan, all of which was accrued by him prior to his marriage to Sandra Ingalls.

To make the leap that (1) Mr. Ingalls read section 3 of the General Information on the back of the form he signed in 1991, (2) Mr. Ingalls interpreted it as Ms. Ingalls now contends, (3) Mr. Ingalls remembered it in 2003, and (4) Mr. Ingalls intended to make Sandra Ingalls the beneficiary of his interest in the CT deferred compensation plan when he filled in "City of Snohomish" and the City of Snohomish Plan Number on the Employee Enrollment/Change Form on March 24, 2003 and gave it to the City of Snohomish, would tax even Superman's powers. The summary

judgment granted to Ms. Ingalls should be reversed and Mr. Ingalls' children should be declared to be the beneficiaries of his interest in the CT 457 deferred compensation plan.

Respectfully submitted this ^{4th} day of
September, 2009.



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