NO. 16-1432

IN THE
SUPREME COURT OF THE UNITED STATES

ASHLEY SVEEN, ET AL.,
petitioners,

v.
KAY MELIN,
respondent.

ON *WRIT* OF *CERTIORARI* TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL IN SUPPORT OF PETITIONERS

Robert W. Goldman
Counsel of Record
Goldman Felcoski & Stone, P.A.
850 Park Shore Drive
Suite 203
Naples, Florida 34103
rgoldman@gfsestatelaw.com
239-436-1988

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STATEMENT OF INTEREST[1]

The American College of Trust & Estate Counsel ("ACTEC") is a nonprofit organization of more than 2,500 trust and estate lawyers and law professors from throughout the United States, Canada, Central and South America, Europe and Asia. Fellows of ACTEC are skilled and experienced in trust and estate law and are elected by their peers on the basis of their professional reputation, quality of their work, and their substantial pro bono contributions to the practice and the public, including lecturing, writing, teaching, and drafting court rules and legislation. ACTEC is dedicated to enhancing trust and estate law and practice through research, education, technical advice to governments, and, on rare occasions, assisting courts in understanding this discrete area of the law.

Established in Los Angeles in 1949, ACTEC's office is now located in Washington D.C. and is governed by 39 Fellows who serve on its Board of Regents, six of whom are the officers of ACTEC. Much of the work done by ACTEC is performed by committees including the Amicus Review Committee.

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[1] Counsel for the parties were not in any way involved in authoring this brief. Neither counsel for a party nor a party made a monetary contribution to fund the preparation or submission of this brief. No other monetary contributions were made. Counsel for the petitioner and the respondent were timely notified of our intent to submit an *amicus* brief and consented to the filing of a brief by ACTEC.

The Amicus Committee and the officers of ACTEC voted unanimously to approve ACTEC's filing of an amicus brief in this case.[2]

In this case, we believe we can assist the Court in understanding the history and need for revocation-upon-divorce statutes and other statutes providing default rules of construction of estate planning documents; how those statutes are intended to work; and the importance of applying these statutes to existing estate plans, including life insurance beneficiary designations.

SUMMARY OF ARGUMENT

A person's testamentary intent is the polestar that must guide all those responsible for effectuating a person's estate plan. Testamentary intent may be elusive, because of poor articulation of that intent, a change in circumstances, neglect, or some combination of the three.

Rules of construction are designed to help judges and other persons navigate, comprehend, and effectuate intent. Importantly, rules of construction are not designed to change intent. And, a person is

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[2] The Amicus Review Committee consists of Robert W. Goldman (chair), Goldman Felcoski & Stone, P.A., Naples, Florida; Carlyn S. McCaffrey (Past President of ACTEC), McDermott Will & Emery LLP, New York, New York; Professor Robert H. Sitkoff, Harvard Law School, Cambridge Massachusetts; Bruce M. Stone (Past President of ACTEC), Goldman Felcoski & Stone, P.A., Coral Gables, Florida; Margaret G. Lodise (Chair of Fiduciary Litigation Committee of ACTEC), Sacks, Glazier, Franklin & Lodise LLP, Los Angeles, California. The committee was assisted with this brief by Eliyahu Balsam, a student at Harvard Law School.

generally free to modify, reform and better articulate his or her intent in the face of mistake, a change in circumstances, or out of recognition that his or her wishes were poorly articulated. Rules of construction of testamentary intent are typically default rules in the event changed circumstances are not addressed or mistakes, or poorly articulated intent, are not corrected during a person's lifetime.

The value of these default rules in the trust and estate practice and for our citizens cannot be overstated. Indeed, they typically come into play when the lips of the testator, settlor or insured are sealed by death, leaving the courts and others searching for the decedent's true intent. With respect to the life insurance industry, conservatively speaking, the economic consequences of determining beneficial intentions are massive. In 2014, beneficiary distributions totaled at least $109.8 billion. In that same year, the "total value of all [life insurance] policies at year end was $20.1 trillion." Sitkoff & Dukeminier, *Wills, Trusts, and Estates* 471 (10th ed. 2017) (citing Am. Council of Life Insurers, Life Insurers Fact Book 50 tbl. 5.2, 66 tbl. 7.1 (2015)).

In this case, Minnesota, like many states, created a default rule of construction applicable to, among other things, beneficiary designations of life insurance proceeds. With respect to divorced spouses, if the beneficiary designation was not restated after divorce by the insured in favor of his or her former spouse, the former spouse's interest is revoked. This construction of the beneficiary designation is consistent with common notions of human behavior and intent following a divorce.

Further, beneficiary designations involve unilateral decisions of the insured that are

ambulatory and do not involve an interest vested in the designated beneficiary until the insured's death. Revocation-upon-divorce statutes are a mechanism for construing, not impeding, the beneficiary designation. Even analyzing a life insurance contract purely from the insured's point of view, these revocation-upon-divorce statutes do not impede the truly vested contractual rights of the insured to control beneficiary designations. With or without revocation-upon-divorce statutes, insureds are free to change beneficiary designations. The statutes only provide insurers and courts a mechanism for construing the insured's intent if, after a divorce, the insured neglected to address his or her beneficiary designation.

Thus, through the lens of Contract Clause jurisprudence, the statutes are constitutionally sound and either do not implicate the Contract Clause or implicate it so minimally as to save these statutes from invalidity.

ARGUMENT

I. INTRODUCTION

ACTEC'S goal is to assist the Court in understanding revocation-upon-divorce laws, their history, and their importance in the fabric of estate planning jurisprudence. From our presentation, we hope the Court will see how the reasoning of the conflicting circuit court decisions can be appropriately resolved. ACTEC also believes it would be useful to offer some tools for analyzing older cases that are vestigial remains from when judges were forced to grapple with the impact of divorce on then less-traditional estate plans, without the benefit of clarifying legislation.

Our reference to "estate planning" and "estate plan" is much broader than perhaps your grandfather or grandmother's sense of these terms—which generally referred to a last will. In modern times, wills and the probate system for administering wills after death are often a minimal side-bar to the more financially substantial portions of the plan, involving will substitutes such as pension accounts, pay-on-death accounts, revocable trusts, and, the subject of this case, life insurance. *See* Langbein, John H., *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev.1108 (1984). Unlike the probate of a will, these will substitutes are typically administered outside the court system by individuals or corporations. Courts are only used to resolve disputes. See *Id*. at 1115-20.

II. WHAT ARE REVOCATION-UPON-DEATH LAWS AND HOW DO THEY WORK?

All rules of construction are tools for clarifying intent, whether it be legislative intent, the intent of rule makers, the intent of persons in a contractual arrangement, judicial intent, or the intent of persons who made estate plans.

In general, revocation-upon-divorce laws are rules of construction designed to clarify a decedent's intent, not change it, after he or she is dead and is unable to clarify his or her intent. Waggoner, Lawrence W., *Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J., 683,699-700 (1992). They are rules that apply in default, only if, after a divorce, the now deceased person had not taken effective steps during his or her lifetime to clarify his or her intent.

The underlying premise of the revocation-on-divorce laws is that former spouses would not intend to benefit each other in any way other than that required by court decree or settlement agreement. Obviously, it is an assumption, but it is one steeped in common sense, and everyday observation and experience. See Spitko, E. Gary, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 Ariz. L. Rev. 1063, 1964 (1999).

Importantly for this Court's analysis, these laws, including the Minnesota version, recognize and yield to the ambulatory nature of the will and will substitutes described above, and do not impede the decedent's ability to amend the will, trust, or beneficiary designation any time before death. With

respect to a revocable trust, for example, the settlor might amend his or her trust to clarify the intent to retain his or her former spouse's beneficial interest. With respect to life insurance, the insured might amend his or her beneficiary designation to clarify the intent to include the former spouse as a beneficiary. It is also possible for the settlor or insured to specify in the trust instrument or the insurance policy beneficiary designation form that the beneficiary spouse's status as a beneficiary will continue undisturbed irrespective of their marital status upon death of the settlor or insured. But, if the settlor or insured does not so provide and fails to change the trust or beneficiary designation after divorce and before death, the revocation-upon-divorce law kicks in and deems that the decedent would not have wanted his or her spouse to benefit under the trust or life insurance policy.

III. HISTORY OF REVOCATION-UPON-DIVORCE LAWS

Revocation-upon-divorce was originally an English common-law principle that grew out of the doctrine of revocation by implication. *See* Wilmit, Alan S., *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L. Rev. 653, 655 (1988). Many states including Florida, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Ohio, Vermont, Wisconsin and Wyoming codified and expanded the doctrine from the late 19th Century to the early 20th Century. *Id.* Eventually, revocation-upon-divorce became untethered from the doctrine of revocation-

by-implication, and it became its own common-law doctrine in the early 20th Century. *Id*. at 656.

The American Bar Association was the first to codify the doctrine of revocation-upon-divorce for wills in its Model Probate Code of 1946. *Id.* That model law provided, "[i]f after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked." At the time, three states had similar statutes, but by the late 1980s, forty-four states had adopted some version of the law. The 1982 version of the Uniform Probate Code, section 2-508, similarly provided for the revocation of any devise to a former spouse contained in a will. "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse." *See* Wilmit at 653 (listing 44 state statutes that are substantially identical to UPC § 2-504).

State statutes and the pre-1990 UPC generally only revoked beneficial interests in wills—not will substitutes. When state statutes did revoke beneficial provisions in will substitutes, it was done "piecemeal." For example, Michigan and Ohio had statutes transforming spousal joint tenancies in land into tenancies-in-common upon divorce. *See* Mich. Comp. Laws Ann. § 552.102 (1909); Ohio Rev. Code Ann. § 5302.20(c)(5) (1985). Ohio, Oklahoma, and Tennessee had statutes revoking the interest of a former spouse in revocable inter-vivos trusts. *See* Ohio Rev. Code Ann. § 1339.62 (1986); Okla. Stat. Ann. title 60, § 175 (1987); Tenn. Code Ann. § 35-50-5115 (1963). Michigan, Ohio, Oklahoma, and Texas even had revocation-upon-divorce statutes for life-insurance and retirement-plan beneficiary designations. *See*

Mich. Comp. Laws Ann. § 552.101 (1909); Ohio Rev. Code Ann. § 1339.63 (1990); Okla. Stat. Ann. tit. 15, § 178 (1987); Tex. Fam. Code §§ 3.632-.633 (1989).

Courts generally did not extend the statutes to nonprobate transfers absent legislative enactment. They instead recognized that the legislature had not extended revocation to will substitutes. When they did find that the statutes applied to will substitutes, it was *ad hoc*, inconsistent, and unconvincing. For example, in *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75 (Okla.1981), the Oklahoma Supreme Court extended its law on revocation-upon-divorce that was expressly limited to wills to a revocable pour-over trust. The court based its decision on the fictional idea that the trust was incorporated by reference in the will and therefore it was merely construing the will. *See Id.* at 77. In *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985), the Massachusetts Supreme Judicial Court extended the Massachusetts version of UPC 2-508 to a revocable inter-vivos trust out of a sense of fairness and interpretation of the decedent's intent. The court limited its decision to the facts of that case. *Id.* at 1093.

Further, courts in the past sometimes treated the designation of a beneficial interest in life insurance as a lifetime transfer, rather than correctly characterizing it as an ambulatory, will-like expectancy that only vested on the death of the insured. And, consistent with the incorrect premise of a lifetime transfer, some of these courts held that the designation of a beneficiary created in the beneficiary an actual interest, subject to divestment. *See Gerhard v. Travelers Ins. Co.*, 258 A.2d 724, 729 (N.J. Ch. Div. 1969); Langbein, *id.* at 1136. When reading those cases, it is critical to understand that

before modern statutory recognition and validation of will substitutes, wills, and only wills, could, in legal theory, transfer property at death. Hence, judicial efforts to justify the workings of life insurance came with a heavy stench of legal fiction. *See id*. at 1128. In fact, as is now commonly reflected by statute, will substitutes like the beneficiary designation for a life insurance policy are nothing more than ambulatory death transfers, just like wills. *Id.*

The Uniform Law Commission was bothered by results which were inconsistent and which ran contrary to what it thought the average person would intend post-divorce. The 1990 version of the UPC introduced a sweeping provision to revoke upon divorce both probate and non-probate transfers "including revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, payable-on-death accounts, and other revocable predivorce dispositions made by a divorced individual to the former spouse." *See* Waggoner, *id*. at 693. The text now reads:

> (a) [Definitions.] In this section:
> (1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.
> (2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.
(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.
(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.
(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:
(1) revokes any revocable

> (A) disposition or appointment of property made by a divorced individual
> to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,
> (B) provision in a governing instrument conferring a general or nongeneral
> power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and
> (C) nomination in a governing instrument, nominating a divorced
> individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and
> (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the former spouses into equal tenancies in common. [3]

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[3] The default nature of UPC 2-804 (allowing a person to draft around the statute by designating his or her former spouse as a beneficiary after the divorce) is arguably a bit subtle. One must look to the definition of "governing instrument" and apply it to the whole statute. Perhaps unwilling to engage in that subtlety, the Minnesota Legislature provides up front: "Except as provided by the express terms of a governing instrument, other than a trust instrument under section 501C.1207, executed prior to the dissolution or annulment of an individual's marriage, a

U.P.C. §2-804.

A number of states have adopted the UPC, but there are still many states that uphold the terms of the life insurance beneficiary designation of a former spouse even after divorce. *See* Raymond, Kristen P., *Double Trouble - An Ex-Spouse's Life Insurance Beneficiary Status*, CT Insur. L. Rev 19.2, 399, 407 (2013). Sixteen states have adopted UPC 2-804: Alaska, Alaska Stat. Ann. § 13.12.804; Arizona, Ariz. Rev. Stat. Ann. § 14-2804; Colorado, Colo. Rev. Stat. Ann. § 15-11-804; Hawaii, Haw. Rev. Stat. Ann. § 560:2-804; Idaho, Idaho Code Ann. § 15-2-804; Massachusetts, Mass. Gen. Laws Ann. Ch. 190B § 2-804; Michigan, Mich. Comp. Laws Ann. § 700.2807; Minnesota, M.S.A §524.2-804; Montana, Mont. Code Ann. § 72-2-814; Nebraska, Neb. Rev. St. §30-2333; New Jersey, N.J. Stat. Ann. § 3B:3-14; New Mexico, N.M. Stat. Ann. § 45-2-804; North Dakota, N.D. Cent. Code Ann. § 30.1-10-04; South Carolina, S.C. Code Ann. § 62-2-507; South Dakota, S.D. Codified Laws § 29A-2-804; Utah, Utah Code Ann. § 75-2-804. Fourteen states have laws substantially similar to UPC 2-804, but with their preferred language to express their legislature's intent. *See* Ala. Code §30-4-17 (Alabama); Cal. Prob. Code §5040 (California); §732.703, Fla. Stat. (Florida); Iowa Code Ann.

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court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan, the dissolution or annulment of a marriage revokes any…". M.S.A. § 524.2-804 (emphasis added).

§598.20A (Iowa); Mo. Ann. Stat. §461.051 (Missouri); Nev. Rev. Stat. Ann. §111.781 (Nevada); EPTL §5-1.4 (New York); R.C. §5315.33 (Ohio); Okla. Stat. Ann. Title 15, §178 (Oklahoma); 20 Pa. S.S.A. §6111.2 (Pennsylvania); Tex. Fam. Code Ann. §§9.301, 9.302 (Texas); VA Code Ann. §20-111.1 (Virginia); RCWA 11.07.010 (Washington); Wis. Stat. Ann. §854.15 (Wisconsin).

The UPC explains that the 1990 revision to section 2-804 was designed to: "expand the section to cover will substitutes such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce." Comment to UPC § 2-804. "The logic behind revocation-by-divorce statutes clearly applies to transfers of wealth by life insurance policies." Wilmit at 654. The Restatement 3d of Property: Wills and Other Donative Transfers, § 7.2, provides:

> Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.

The comment to that provision in the Restatement explains:

> a will substitute is in reality a nonprobate will. A will substitute is therefore, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and

> other rules applicable to testamentary dispositions. Substantive restrictions on testation constitute important policies restricting disposition of property after the owner's death that should not be avoidable simply by changing the form of the death-time transfer. By contrast, rules of construction and other interpretative devices aid in determining and giving effect to the donor's intention or probable intention and hence should apply generally to donative documents.

Section 2-804 was intended to apply to instruments executed prior to the effective date of the adoption of the UPC by a state. Under U.P.C. §2-101(b)(5), "any rule of construction or presumption provided in this [code] applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent." It appears three UPC states have adopted this language: Massachusetts, MA. ST. Ch. 190B §1-101; New Mexico, N.M.S.A. §45-1-110, subsec., E.; and South Carolina, 2017 S.C. Laws Act 87, §6 (4). Other UPC states have modified this UPC provision. See, for example, Colorado, C.R.S.A. §15-17-101. States adopting revocation-upon-divorce statutes for will substitutes that are substantively similar to UPC §2-804 have also addressed application of their statutes to existing estate plans in their own unique ways. See, for example, Florida, §732.703 (9), Fla. Stat.; Nevada, Rev. Stat, Ann. §111.781, subsec., 10; New York, L. 2008, c. 173, § 2.

Important to this Court is that the Minnesota law and this case is not an isolated matter. The

validity of revocation-upon-divorce laws of many states hang in the balance.

IV. THE IMPORTANCE OF REVOCATION-UPON-DEATH LAWS IN SETTLING ESTATES

The decedent's intent is the polestar for settling estates. *See In re Glover's Estate*, 463 F.2d 1238, 1240 (D.C. Cir. 1972) ("Of all of the cardinal principles of will construction the foremost is that the intent of the testator must reign supreme."). The public policy of most, if not all states, is to expedite the resolution of estates and distribute assets to the beneficiaries as quickly as possible. *See Estate of Johnson*, 878 N.W.2d 510, 513 (Minn. Ct. App. 2016) ("the probate code should be construed to promote its underlying purpose and policies, including the 'speedy and efficient' liquidation of the estate").

For these reasons and the obvious inability of the decedent to cure any ambiguities or to now adjust to changed circumstances such as divorce, rules of construction to establish a decedent's probable intent are common to each state, for example, pretermitted spouse laws, pretermitted children laws, simultaneous death of spouse laws, antilapse and ademption laws, and revocation-upon-divorce laws.

At first blush, the application of some of these rules of construction, like revocation-upon-divorce laws, to documents in existence before the law became effective appears offensive to traditional presumptions against retroactively applied laws. But, this particular rule of construction applies only to the revocable aspects of will substitutes, including

a life insurance policy—not to any right vested in a beneficiary. *See Doering v. Buechler*, 146 F.2d 784, 787 (8th Cir. 1945) ("The appellant, the original beneficiary of the policy, had, during the lifetime of the insured, a mere expectancy, revocable by him."); *In re Morrison*, 403 B.R. 895, 901 (M.D. Fla. 2009) (beneficiary of life insurance policy acquires no vested right or interest during the life of the insured, only an expectancy, which is not a property interest). And, the rule only applies in default of a decedent changing his or her plan after divorce to clarify his or her intentions.

Further, recall that will substitutes have only recently been added to the statutory framework of revocation-upon-divorce, which previously only applied to wills. By not applying the same rule of construction to both wills and will substitutes in existence when this rule of construction became effective, our jurisprudence will devolve to unfair and unintended results, where, absent post-divorce planning, the assets of a divorced spouse pass one way under his or her will and differently under his or her will substitutes. As suggested at the outset of this brief, absent application of revocation-upon-divorce rules of construction to existing (but not vested) life insurance beneficiary designations could easily result in unintended windfalls of trillions of dollars to former spouses, who were presumably treated with fairness and justice in family court during the divorce. *See Sitkoff, id.*

V. APPLYING THESE PRINCIPLES TO THIS CASE

As the circuit court below recognized, it was paralyzed and unable to benefit from primary and secondary authorities that post-dated its decision in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991). *Metropolitan Life Insurance Company v. Melin*, 853 F.3d 410, 413-15 (8th Cir. 2017) (" 'It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.' " [citation omitted] "This court's previous opinion forecloses any conclusion other than that the statute here is unconstitutional when applied retroactively.").

The *Ritter* court correctly commenced its Contract Clause analysis with the relationship between the insurer and insured, but mis-identified the insured's ambulatory, donative right to make and change beneficiary designations as something more than a mere will substitute. The *Ritter* court also failed to recognize that the revocation-upon-divorce statute before it was simply a default rule of construction, there to assist courts and other persons settling estates in determining the decedent's true intent under the circumstances (not impede that intent). In response to these missteps, ACTEC adopts the statement of the Joint Editorial Board for the Uniform Probate Code published by ACTEC in 1991, which directly addresses *Ritter*. *Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents*, 17 American College of Trust and Estates Counsel Notes 161, 184–85 (1991). In pertinent part, the Joint Editorial Board opined:

… The JEB believes that the *Ritter* opinion is manifestly wrong. Were the error to go unnoticed and be followed elsewhere, it could seriously hamper an important and benign trend toward unifying the law of probate and nonprobate transfers.

The *Ritter* case held unconstitutional as a violation of the Contracts Clause of the federal Constitution an Oklahoma statute that resembles Uniform Probate Code
§ 2-804 (1990 revision). Both statutes deal with the disposition of life insurance proceeds when there has been a divorce. They provide that when the owner of a contract of life insurance dies after being divorced from the person who is named as the beneficiary in the policy, the designation in favor of the divorced spouse should be treated as having been revoked unless the policy owner expresses a contrary intention. The main purpose of these statutes is to take the same rule that has long been applied to transfers by will and apply it to other revocable transfers effective at death, such as life insurance.

…

No impairment of the obligation to pay. It is crucial to understand that a statute such as UPC § 2-804 works no impairment of the insurance company's liability to pay the proceeds due under the policy. A life insurance policy is a third-party beneficiary contract. As such, it is a mixture of contract and donative

transfer. The Contracts Clause of the federal Constitution appropriately applies to protect against legislative interference with the contractual component of the policy. In *Ritter* and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract. The insurance company interpleads or pays the proceeds into court for distribution to the successful claimant. The divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue. The precise question in these cases is which of the decedent's potential donee-transferees should receive the proceeds. The JEB is aware of no Supreme Court authority applying the Contracts Clause to defeat state-law default rules that affect only the choice of a donee under a third-party beneficiary contract.

Intent-serving default rule. The Contracts Clause protects contractual reliance. Because statutes such as UPC § 2-804 serve to implement rather than to defeat the insured's expectation under the insurance contract, the premise for applying the Contracts Clause is wholly without foundation.

…

These statutes do not forbid transfers to the ex- spouse. They propound a default rule, not a rule of mandatory law. Because the normal inference in such circumstances is that the transferor would not want to benefit the ex-spouse, the statutes provide that the

> transferor whose intention contradicts the norm and who does indeed want to benefit the ex-spouse must express that intention.
>
> …
>
> *No Supreme Court authority for applying the Contracts Clause to default rules.* There is no U.S. Supreme Court authority for the Eighth Circuit's extension of Contracts Clause regulation to legislative default rules. The principal Supreme Court precedent upon which the Eighth Circuit relied in *Ritter* was *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). *Spannaus* held unconstitutional a Minnesota statute that retroactively increased the pension obligations that a company would owe to its workers when the company ceased operations in Minnesota or terminated the plan. By contrast, in *Ritter,* there is no increase, decrease or other interference with the obligation of the insurer to pay the contractual proceeds. The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying altered rules of construction or other default rules to pre-existing documents in any field of law, and especially not in the field of estates, trusts, and donative transfers.

Unencumbered by other panel decisions within the court, the Tenth Circuit could, and apparently did, benefit from the work of the Joint Editorial Board cited above, and from its understanding of the nature

of the revocation-upon-divorce law as a default rule of construction designed to locate, not impede, the insured's intent. *See Stillman v. Teachers Insurance And Annuity Association College Retirement Equities Fund*, 343 F.3d 1311, 1317-19 (10th Cir. 2003). We believe this case offers a sound approach to addressing the issue before the Court. *See also In re: Proceeds of Jackson National Life Insurance Company*, 2016 WL 6806359 (M.D. Fla., February 25, 2016).

For these reasons, we believe the Contract Clause is not implicated. But, if it is implicated, the revocation-upon-divorce default rule only minimally impacts on the rights of the insured in a manner insufficient to invalidate application of the law to existing life insurance policies. Indeed, before the law was adopted the insured could amend his or her beneficiary designation as he or she pleased and that did not change after the law was adopted and became effective. *See Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983) (requiring a substantial impairment of contract to violate the Contract Clause).

CONCLUSION

Minnesota's revocation-upon-divorce law validly applies and can be used to construe life insurance beneficiary designations in existence, but not vested, at the time the law became effective.

Respectfully submitted,

Robert W. Goldman
Counsel of Record
Goldman Felcoski & Stone, P.A.
850 Park Shore Drive
Suite 203
Naples, Florida 34103
rgoldman@gfsestatelaw.com
239-436-1988