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## **WHO RECEIVES THE PROCEEDS OF LIFE INSURANCE**

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There are certain exceptions to the general rule that life insurance proceeds are payable to the beneficiary named on the policy. When these exceptions are not considered during planning, challenges from heirs and disastrous consequences to the estate plan may be the result. In assessing whether any of these exceptions apply, you will want to discuss a number of issues with your client regarding his life insurance policies including: Who is currently the named beneficiary on his policies; What other family relationships exist; What type of insurance does the client own (*i.e.*, cash value (also referred to sometimes as “permanent” insurance) or term); From where does he obtain the insurance (*i.e.*, private, insurance provided as a benefit of employment, ERISA plans, federal employment plans, military benefits); What have been the sources of funds for payment of the premiums (*i.e.*, community property or separate property funds); What is the purpose of the insurance (*e.g.*, to provide for loved ones, to pay off outstanding debt, or perhaps a key man policy to help his business continue in his absence); Is there a community property agreement that addresses insurance in any way; Has the client previously been divorced; What does the divorce decree require in terms of maintenance of insurance and support for minor children; How does the client desire to dispose of the proceeds? These are just a few questions estate planning lawyers should ask to help create the overall estate plan for a client. In this article, we address certain issues that will inform estate planning attorneys of the pertinence of these questions.

### **General Rule: Proceeds of a Life Insurance Policy Are Paid to the Named Beneficiary**

In the ordinary course, the beneficiary that the insured has named under his life insurance policy receives the proceeds of that policy. The policy owner has the right to change the beneficiary designation so long as he is competent to do so. While a named beneficiary generally has nothing more than a mere expectancy in the policy during the insured's life, upon the death of the insured, the named beneficiary's rights vest and the beneficiary becomes entitled to the policy proceeds.<sup>1</sup> The rights of a beneficiary to receive the proceeds of a life insurance policy arise under the law of contracts and insurance.<sup>2</sup> A number of exceptions, however, override this general rule.

### **Exception No. 1: The Insured Was Not Competent at the Time He Made the Designation**

Washington's insurance statutes specifically state that an individual must possess “competent legal capacity” in order to insure “his or her own life or body for the benefit of any

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person.”<sup>3</sup> Washington case law is consistent and applies a capacity to contract standard. As explained by the Washington Supreme Court in 1942:

The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred; that everyone is presumed sane; and that this presumption is overcome only by clear, cogent and convincing evidence. That he was perhaps eccentric and excitable is not denied. Moreover, that he exercised poor business judgment, likewise, cannot be contradicted. Yet even though these are conceded, they do not spell mental incapacity to contract.<sup>4</sup>

Thus, if the insured was not competent, his designation may be overturned by clear, cogent and convincing evidence of his lack of mental capacity.

### **Exception No. 2: The Beneficiary Dies Before the Insured Dies or the Beneficiary Disclaims the Proceeds of the Policy**

If the direct or primary beneficiary designated under the policy dies before the insured dies, the secondary or contingent beneficiaries named in the policy would receive the proceeds.<sup>5</sup> If there is no other beneficiary named at the time of the insured’s death, the proceeds of the policy would be paid pursuant to the terms in the policy, often to the insured’s estate. Ordinarily, when the beneficiary named in a life insurance policy dies after the insured but before payment of the insurance proceeds, the proceeds become part of the beneficiary’s estate, since they are regarded as having vested in the beneficiary upon the insured death.<sup>6</sup> Typically, if the primary or direct beneficiary survives the insured for however short a time, the rights of the contingent beneficiaries are cutoff.<sup>7</sup> There is at least one case of which we are aware, however, where the principal beneficiary died before the amounts due under the policy were paid and the proceeds went to the surviving contingent beneficiary because of a clause in the policy.<sup>8</sup>

In the case of simultaneous death of the insured and primary beneficiary, the Uniform Simultaneous Death Act instructs that unless the policy or other relevant instrument provides otherwise, the beneficiary must survive the insured by at least one hundred and twenty hours or the beneficiary is considered to have predeceased the insured.<sup>9</sup>

Similarly, a beneficiary may disclaim proceeds of a life insurance policy, in which case, unless the policy (or other estate planning instrument) directs to the contrary, the interest disclaimed shall pass as if the beneficiary had died immediately prior to the date the interest was transferred.<sup>10</sup> In the case of life insurance policies, that would mean the person disclaiming the policy proceeds will be deemed to have died immediately prior to the insured.

### **Exception No. 3: The Community Property Rights of Another**

The named beneficiary generally will be entitled to the proceeds of life insurance “to the extent no community property rights are invaded.”<sup>11</sup> When insurance premiums are paid with

community funds, the proceeds are community property.<sup>12</sup> To what extent the spouse or former spouse who is not named as the beneficiary of the policy is entitled to the proceeds depends upon the type of policy and the extent to which community or separate property were used to pay the premiums.

### **Apportionment Rule and Risk Payment Rule**

To what extent the policy proceeds are considered community property will depend upon the type of the policy. Although there are many forms of life insurance, for this analysis, Washington courts focus on two broad classes: cash value insurance and term life insurance.<sup>13</sup>

Premiums purchasing cash value insurance pay for both cash value and protection from risk of death. The cash value, somewhat akin to a savings account, is a permanent cumulative asset against which the owner may borrow, and which the owner may receive upon cancellation of the policy.<sup>14</sup>

On the other hand, term insurance has no cash surrender value; premiums purchase only protection from risk of death for a fixed period of time. At the end of that period, there is no asset remaining. The length of time the insured has had the policy and the number of premiums paid are irrelevant.<sup>15</sup>

Before *Aetna Life Insurance Co. v. Wadsworth*,<sup>16</sup> Washington courts applied the “apportionment rule” that prorated the proceeds of the policy as separate property or community property by the percentage of the total premiums that had been paid with separate or community funds.<sup>17</sup> In *Wadsworth*, however, the Washington State Supreme Court adopted the “risk payment approach” for term life insurance.<sup>18</sup> Under the risk payment approach, only the most recent premium is considered such that if community funds were used to pay the premium, the entire proceeds would be community property.<sup>19</sup> For all policies other than term policies, specifically including cash value, the “apportionment rule” still applies.<sup>20</sup>

Here is an example of the application of this “apportionment rule.” The insured owns a cash value policy for two years before he is married, and for one year after he is married. He uses separate funds to pay the first two years’ premiums and uses community funds to pay the third year’s premium. He dies at the end of the third year. Someone other than his spouse is the named beneficiary of the policy. At the time of his death, his spouse would have a community property interest in one-third of the proceeds; in other words, the spouse would be entitled to one-sixth of the proceeds of the policy even though she is not named as a beneficiary.<sup>21</sup>

Here is an example of the application of the “risk payment rule.” Using the same scenario except that the policy is a term policy. Again, the insured uses community funds to pay the premium the third year he owns the policy. At the time of his death, his spouse would have a community property interest in the entire policy; in other words, the spouse would be entitled to one-half of the proceeds of the policy even though she is not named as a beneficiary.

### **Qualified ERISA Plans May Preempt State Community Property Laws**

Even though Washington law seeks to protect the community property rights of a spouse in the proceeds of life insurance, federal law governs life insurance benefits under qualified plans. ERISA explicitly provides that it “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .”<sup>22</sup> The U.S. Supreme Court has held that ERISA preempts Washington’s community property laws as it applies to ERISA benefit plans.<sup>23</sup> In *Ablamis v. Roper*,<sup>24</sup> the Ninth Circuit held that ERISA preempts any state community property law that arguably provides a spouse with a testamentary interest in fully vested pension benefits, and state court orders effecting testamentary transfers are not qualified domestic relations orders excepted from ERISA’s spendthrift provisions. Thus, a spouse not named as the beneficiary of life insurance benefits obtained through an employer’s qualified ERISA plan may not be able to recover her community property interest in the proceeds.

But, that analysis does not always end the inquiry. In one case we litigated, a insured identified his “trust” as the beneficiary in one section of his ERISA beneficiary designation form and his daughter in another section of the same form. At the time the designation was made, his daughter was the trustee and sole beneficiary of the trust. The insured subsequently remarried, named his new spouse as the trustee and sole beneficiary of his trust and explicitly disinherited his adult daughter in his will by saying she “should take nothing from my estate.” The insured, however, did not change the beneficiary designation form. The spouse/trustee argued the form was ambiguous and the court should look at the insured’s entire estate plan to ascertain his intent (especially including the fact that he disinherited his daughter). The trustee cited Ninth Circuit precedent that holds that when the designation is not clear, ERISA plans:

should be interpreted in an ordinary and popular sense as would a person of average intelligence and experience. More specifically . . . [w]hen disputes arise, courts should first look to explicit language of the agreement to determine, if possible, the clear intent of the parties. The intended meaning of even the most explicit language can, of course, only be understood in the light of the context that gave rise to its inclusion. Each provision in an agreement should be construed consistently with the entire document such that no provision is rendered nugatory. Typically, however, when a plan is ambiguous, a court *will examine extrinsic evidence to determine the intent of the parties.*<sup>25</sup>

Despite the ambiguous form and the decedent’s estate planning documents (extrinsic evidence), the court found the disinherited daughter and not the trust should receive the ERISA plan proceeds.

### **Military Benefit Plans May Preempt State Community Property Laws**

Similarly, military benefits are governed by federal law and have unique characteristics. For example, under 38 U.S.C. §1970(a), an insured may freely designate beneficiaries, and the insurance proceeds must go to the beneficiary designated in the policy. This provision has been held to *preempt state law and agreements made under state law.*<sup>26</sup> However, this rule is not absolute.<sup>27</sup> Likewise, other federal benefit plans may preempt state community property laws.

#### **Exception No. 4: Automatic Revocation Upon the Dissolution of a Marriage or a Registered Domestic Partnership**

If the insured failed to revise his beneficiary designation after a divorce or dissolution of a domestic partnership and the former spouse or domestic partner is still named as beneficiary under the policy, RCW 11.07.010(2)(a) automatically revokes the designation of the former spouse or domestic partner as beneficiary of the policy. The statute creates a legal fiction that the former spouse or domestic partner has predeceased the insured, the former spouse or domestic partner “having died at the time of entry of the decree of dissolution.”<sup>28</sup> In that case, any contingent beneficiaries named under the policy would be entitled to the insurance proceeds, or the proceeds would be paid to the insured’s estate.

#### **Policies Underlying the Automatic Revocation on Dissolution Statute**

The legislature enacted the automatic revocation statute in response to the Washington State Supreme Court’s decision in *Aetna Life Insurance Co. v. Wadsworth*.<sup>29</sup> Practitioners heavily criticized that decision because it concluded that an insured’s designation of his former spouse as a beneficiary under his insurance policy was valid even though the divorce decree had specifically purported to divest the former spouse of an interest in the policy. The court adopted this “Wadsworth rule” to “encourage individuals to carefully consider the disposition of life insurance policies in dissolution” and to “simplify the procedure of determining to whom life insurance proceeds are to be distributed.”<sup>30</sup>

In response, the legislature enacted the automatic revocation statute premised on the assumption that members of divorced marriages or dissolved domestic partnerships would *want* to change the beneficiary designations on their insurance policies. As later explained by the court in *Mearns v. Scharbach*:<sup>31</sup>

The Legislature sought to accomplish several purposes [by enacting RCW 11.07.010]. First, the Legislature codified the assumption that divorcing couples want to change the beneficiary designations on nonprobate assets upon dissolution or invalidity of their marriage. Of equal importance, the Legislature chose to accomplish this goal by adopting an automatic revocation mechanism patterned after the revocation provisions applicable to wills. By choosing this mechanism, the legislators demonstrated their understanding that life insurance and other nonprobate assets are widely used as essential parts of estate planning and should be treated accordingly. Additionally, the adoption of a bright-line rule triggered by the date of dissolution or invalidation of marriage evinces a legislative intent to encourage couples to resolve estate planning questions when terminating their marital relationship.<sup>32</sup>

#### **Exceptions to the Automatic Revocation on Dissolution Statute**

There are exceptions to the exception, however. First, the statute does not apply if the decree of dissolution of the marriage or the registered domestic partnership requires that the insured maintain the former spouse or former domestic partner as the beneficiary of the policy.<sup>33</sup> Second, the statute does not apply if the insured voluntarily redesignates the former spouse or

former domestic partner as the beneficiary after the date of dissolution. In *Mearns*, the court held that a redesignation of the former spouse as the beneficiary of the insurance policy following dissolution of the marriage must be in writing to overcome the operation of the automatic revocation statute.<sup>34</sup>

Third, federal ERISA preempts the automatic revocation statute. In *Egelhoff v. Egelhoff ex rel. Breiner*,<sup>35</sup> the employer provided life insurance benefits. Two months after the insured obtained a divorce from his second wife, he died. The policy named the second wife as the beneficiary. The children of the first marriage sued asserting that the beneficiary designation was automatically revoked by RCW 11.07.010(2)(a). The U.S. Supreme Court, however, held that Washington's automatic revocation provision was preempted by ERISA.<sup>36</sup>

A recent Pennsylvania case has added a twist to ERISA preemption. The court in Pennsylvania held that the remedy provided by the revocation on divorce statute was not preempted by ERISA.<sup>37</sup> The insured and his wife were divorced. The insured never changed the designation of his ex-wife as beneficiary of the life insurance policy that was part of his employee benefits subject to ERISA. After the insurance company paid the proceeds of the policy to the ex-wife, the administrator of the estate brought an action to require the ex-wife to surrender the proceeds to the contingent beneficiary under the policy. The appellate court affirmed because the Pennsylvania revocation on divorce statute makes the ex-spouse answerable to anyone prejudiced by the payment and because it does not impact the administration of the ERISA plan so it is not preempted.<sup>38</sup>

Fourth, the automatic revocation statute does not apply to foreign divorce decrees. In *Henley v. Henley*,<sup>39</sup> the insured named his second wife as beneficiary of his life insurance policies. Later they obtained a divorce in Hong Kong and the insured never changed the beneficiary designation. After the divorce, the insured moved to Washington where he lived at the time of his death. The children of the prior marriage sued for the proceeds of the insurance policy. The Washington State Supreme Court held that the automatic revocation statute is limited to decrees of dissolution entered by the superior courts of the State of Washington.<sup>40</sup>

#### **Exception No. 5: The Equitable Vesting Doctrine for the Support of Minor Children**

Planning that involves divorced parents or parents of a dissolved domestic partnership and minor children raises special considerations because Washington law recognizes a narrow exception to the general rule that an insured's designation of a beneficiary will generally be upheld. Under Washington law, where a divorce decree or dissolution of domestic partnership agreement requires the insured to maintain life insurance as security for his or her obligation to provide support for minor children and adequately identifies the policy, the children will have an equitable interest in the proceeds of the policy even if the insured later *changes* the beneficiary before his or her support obligations expire.<sup>41</sup> In *Aetna Life Ins. Co. v. Bunt*,<sup>42</sup> the Supreme Court recognized this narrow exception of equitable vesting.<sup>43</sup> In *Bunt*, the final decree of dissolution incorporated a separation agreement whereby the insured agreed to pay child support. The decree also ordered the insured to name the parties' two minor children as irrevocable beneficiaries of his life insurance policy. The insured remarried and, contrary to the express order of the court, changed the beneficiary designation to his second wife. The insured died and the minor children and the second wife both claimed entitlement to the proceeds. The Supreme

Court held that the children acquired an equitable interest in the proceeds of the life insurance policy and invalidated the insured's change of beneficiary.<sup>44</sup>

### **When Used as Security for the Support for Minor Children**

Under Washington law, equitable vesting applies only when the insurance is used to secure an obligation of support for minor children, and the insured has died while the children are still minors.<sup>45</sup> *Bunt* recognized that a divorce can raise special concerns about the financial support of children and that it is the policy of the State of Washington to protect children in divorce proceedings.<sup>46</sup> Providing equitable vesting when life insurance is used to secure support obligations for minor children is consistent with the protections that Washington courts afford minor children of divorced parents.<sup>47</sup> Where a life insurance policy is used as security for child support, equity favors the children to preclude the insured's right to change beneficiaries. Washington courts have upheld security for support provisions as long as the father's obligation to maintain his children as beneficiaries on his life insurance ceases when his support obligation ceases.<sup>48</sup>

### **So Long as the Policy is "Adequately Identified"**

The application of the equitable vesting doctrine turns on whether or not the divorce decree adequately identified the insurance policy. A divorce decree will *not* encumber a particular life insurance policy under the equitable vesting doctrine unless it adequately identifies it.<sup>49</sup> In *Bunt*, for example, the dissolution decree specifically identified the policy, and the court held that the minor children were equitably vested in the proceeds of that policy.<sup>50</sup> The decree in *Bunt* stated that the insured would "name their two minor children as irrevocable beneficiaries of the Aetna life insurance policy available to [him] as a Boeing employee."<sup>51</sup> At the time that the insured died, he had changed the beneficiary designation of that policy to his second wife.

In *Sullivan v. Aetna Life & Cas.*,<sup>52</sup> on the other hand, the decree of dissolution did not refer to the specific policy at issue and the court declined in that case to extend the principle of equitable vesting recognized in *Bunt*. The decree in *Sullivan* stated only that "[e]ach party shall maintain a minimum of \$10,000 life insurance with their minor child as beneficiary until said child attains majority."<sup>53</sup> As a result, the children did not have a superior right to the named beneficiary, but instead the beneficiary provision controlled.

In *In re Marriage of Sager*,<sup>54</sup> the decree was more specific than the decree in *Sullivan*, but less specific than the decree in *Bunt*. Like *Bunt*, it said the insured was to maintain life insurance that existed through his employment for the benefit of his minor children, but like *Sullivan* it did not identify the employer or the insurer. The court of appeals nevertheless held that it adequately identified the policy that existed through the insured's employment. The court in *Sager* upheld the minor children's right to equitably vest in the policy the insured had through his employer at the time he died.<sup>55</sup>

### **Open Questions About the Equitable Vesting Doctrine**

While the equitable vesting doctrine is the law of Washington, it may be applied differently in other states. Still, given the relatively few decisions in Washington about the doctrine, a number of questions remain: What if the divorce decree requires the insured to name

the first wife as the irrevocable beneficiary, instead of the minor children, does the doctrine still apply? What if the insured did not *change* the named beneficiaries, but instead the policy in the decree lapsed due to nonpayment of the premiums?

### **Exception No. 6: Slayers and Abusers**

Obviously there cannot be much planning to avoid this exception, but under RCW 11.84.100(1), the insured's slayer or an abuser who has financially exploited the insured while he was a vulnerable adult, is not entitled to the proceeds of the life insurance policy of which he is the named beneficiary. Like the automatic revocation statute, RCW 11.84.100(1) operates under the legal fiction that the slayer or abuser is deemed to predecease the insured.<sup>56</sup> Instead the proceeds are paid to any secondary or contingent beneficiary or to the insured's estate. Under Washington law, the slayer is barred from receiving the proceeds only if the killing was willful and intentional, and not if it was negligent or unintentional.<sup>57</sup> The legislature adopted the provisions regarding financial exploitation in the 2009 legislative session and as yet there is no case law about those provisions of the statute.<sup>58</sup>

### **Exception No. 7: Estoppel**

Estoppel may be another very limited exception to the general rule that the named beneficiary is entitled to the proceeds of the life insurance policy. Estoppel precludes one from asserting a right which might otherwise have existed, when another has relied to their detriment on that person's act or conduct. In *Porter v. Porter*,<sup>59</sup> the surviving spouse had listed four life insurance policies as the insured/decedent's separate property on the inventory of his estate. At a trial of a creditor's claim brought by the first wife, at which the first wife had devoted no effort toward the status and character of those policies, the surviving spouse was estopped from then asserting that those policies had actually been community property. There likely are other situations in which estoppel may apply.

### **Exception No. 8: Super Wills Cannot Alter Who Receives the Proceeds of an Insurance Policy**

The "Testamentary Disposition of Nonprobate Assets Act," affectionately referred to among estate planners as the "super will" statute, Title 11.11 RCW was adopted in 1998 as a vehicle for assuring an owner/decedent's "interest in any nonprobate asset *specifically referred to* in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will."<sup>60</sup>

The "super will" does not apply to life insurance proceeds because life insurance policies are specifically carved out of the definition of "non-probate assets."<sup>61</sup> Under Title 11 RCW, a non-probate asset "does not include . . . [a] payable-on-death provision of a life insurance policy, annuity or similar contract, or of an employee benefit plan."<sup>62</sup> Thus, certain provisions pertaining to non-probate assets simply do not apply to life insurance policies, including the "super will" statute.

### **Exception No. 9: Creditors' Rights to the Proceeds of Life Insurance**

Washington law provides life insurance beneficiaries a complete exemption for claims of creditors against the insurance proceeds, protecting all classes of beneficiaries, all proceeds, and exempting proceeds from both the insured's and the beneficiary's creditors.<sup>63</sup> The exemption applies to group policies as well as individual policies.<sup>64</sup> There are, however, five exceptions to this broad exemption:<sup>65</sup>

First, it does not extend to the owner's federal gift and estate tax liability.<sup>66</sup> Moreover, section 2035 of the Internal Revenue Code "recaptures" for the donor's estate any policy of life insurance on the life of the donor transferred by the donor gratuitously within three years of the donor's death.<sup>67</sup>

Second, it does not apply to the proceeds of individual life insurance where the proceeds are deliberately made payable primarily to the insured or to the estate of the insured.<sup>68</sup> If, however, the proceeds are payable to the insured or his estate only because the primary beneficiary has predeceased the insured, then the exemption remains in force.<sup>69</sup>

Third, it does not apply to life insurance provided under federal law to federal employees, although a separate federal exemption covers such insurance.<sup>70</sup> "Any payments due or to become due under Servicemembers' Group Life Insurance or Veterans' Group Life Insurance made to, or on account of, an insured or a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."<sup>71</sup>

Fourth, it does not apply to the proceeds of insurance to the extent of any premiums paid with intent to defraud creditors, nor to "any claim to or interest in such proceeds ... by ... any person to whom rights thereto have been transferred with intent to defraud creditors."<sup>72</sup>

Fifth, although not an exemption *per se*, support claims by children and former spouses are not considered "creditors' claims" for purposes of this broad exemption.<sup>73</sup>

## Conclusion

While generally the proceeds of a life insurance policy are paid to the named beneficiary, that is not always the case. Estate planning practitioners can help their client understand the circumstances under which the proceeds may not be paid to his intended beneficiary and can help plan to avoid some (but obviously not all) of those circumstances.

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<sup>1</sup> RCW 48.24.160; *Standard Ins. Co. v. Schwalbe*, 110 Wn.2d 520, 523, 755 P.2d 802, 804 (1988); *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 656, 689 P.2d 46 (1984).

<sup>2</sup> *In re Killien's Estate*, 178 Wash. 335, 340, 35 P.2d 11, 14 (1934).

<sup>3</sup> RCW 48.18.030.

<sup>4</sup> *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 101, 109, 120 P.2d 527, 531 (1942)(finding decedent had mental capacity sufficient to surrender insurance policies prior to death despite eccentric nature and poor business decisions).

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<sup>5</sup> *Federal Old Line Insurance Co. v. McClintick*, 18 Wn. App. 510, 514, 569 P.2d 1206 (1977). An exception to this rule applies when the insured is the slayer of the primary beneficiary, in which case the proceeds are paid to the estate of the primary beneficiary even though he has predeceased the insured. RCW 11.84.100(2).

<sup>6</sup> *Stenneck v. Kolb*, 91 N.J. Eq. 382, 111 A. 277, 279 (1920); 4 R. Anderson, *Couch Cyclopedia of Insurance Law* § 27:137 (2d ed. 1960).

<sup>7</sup> *Rossetti v. Hill*, 161 F.2d 549, 550 (9th Cir. 1947).

<sup>8</sup> *McClintick*, 18 Wn. App. at 514-15.

<sup>9</sup> RCW 11.05A.020-.030.

<sup>10</sup> RCW 11.86.041(1); RCW 11.12.120.

<sup>11</sup> *Mearns v. Scharbach*, 103 Wn. App. 498, 506, 12 P.3d 1048, 1052 (2000) (quoting *Wadsworth*, 102 Wn.2d at 659).

<sup>12</sup> *Porter v. Porter*, 107 Wn.2d 43, 49, 726 P.2d 459 (1986).

<sup>13</sup> *Wadsworth*, 102 Wn.2d 656.

<sup>14</sup> *Id.* at 659.

<sup>15</sup> *Id.*

<sup>16</sup> 102 Wn.2d 652, 656, 689 P.2d 46 (1984).

<sup>17</sup> *Wilson v. Wilson*, 35 Wn.2d 364, 212 P.2d 1022 (1949).

<sup>18</sup> *Wadsworth*, 102 Wn.2d at 659.

<sup>19</sup> *Id.*; see also *Aetna Life Ins. Co. v. Boober*, 56 Wn. App. 567, 569-70, 784 P.2d 186 (1990).

<sup>20</sup> *Porter*, 107 Wn.2d at 49.

<sup>21</sup> *Id.* at 51 (holding that under the risk payment doctrine applied to term policies, the character of funds used to pay the most recent premium determines the character of the *entire proceeds* of a term life insurance policy).

<sup>22</sup> 29 U.S.C. 1144(a).

<sup>23</sup> *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001)(holding our state law preempted because it “related to” ERISA plans and directly conflicted with ERISA’s requirement that plans be administered, and benefits be paid, in accordance with plan documents).

<sup>24</sup> 937 F.2d 1450 (9th Cir. 1991).

<sup>25</sup> *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997)(internal quotations and citation omitted).

<sup>26</sup> *Ridgeway v. Ridgeway*, 454 U.S. 46, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981) (holding dissolution decrees cannot affect distribution of federally-administered military benefit plans, and benefits are not subject to constructive trust); *In re Marriage of Barrett*, 33 Wn. App. 420, 423-24, 655 P.2d 257 (1982)(provisions purporting to divide military retirement benefits are unenforceable because prohibited by federal law), *remanded*, 99 Wn.2d 1005 (1983).

<sup>27</sup> See e.g., Harry Cross, *The Community Property Law*, 61 WASH. L. REV. 13, 37 (1986)(discussing Uniformed Services Former Spouses’ Protection Act and related cases); *In re Marriage of Correia*, 47 Wn. App. 421, 735 P.2d 691 (1987) (noting a child support exception to federal statute that precluded assignment of benefits under any law administered by Veterans’ Administration). In *Gutierrez v. Madero*, 564 S.W.2d 185 (Tex. App. 1978), the court held that it was not prohibited by Servicemen’s Group Life Insurance Act from awarding proceeds of successor policy to persons other than designated beneficiary, and since former husband committed constructive fraud in violating divorce decree by changing names of beneficiaries, constructive trust was created for children with regard to proceeds. Note, however, that this case is not from the Ninth Circuit and does pre-date the Supreme Court’s decision in *Ridgeway*.

<sup>28</sup> RCW 11.07.010(2)(a).

<sup>29</sup> 102 Wn.2d 652, 656, 689 P.2d 46 (1984).

<sup>30</sup> *Id.* at 663; see also *Mearns*, 103 Wn. App. at 507.

<sup>31</sup> 103 Wn. App. 498, 506, 12 P.3d 1048, 1052 (2000).

<sup>32</sup> *Id.* at 507.

<sup>33</sup> RCW 11.07.010(2)(a).

<sup>34</sup> *Mearns*, 103 Wn. App. at 507.

<sup>35</sup> 532 U.S. 141 (2001).

<sup>36</sup> *Egelhoff*, 532 U.S. at 141.

<sup>37</sup> *In re Estate of Sauers*, 971 A.2d 1265 (Pa. Super. Ct. 2009).

<sup>38</sup> *Id.*

<sup>39</sup> 95 Wn. App. 91, 974 P.2d 362 (1999).

<sup>40</sup> *Id.*

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<sup>41</sup> *Schwalbe*, 110 Wn.2d at 523. In each instance in which equitable vesting has been applied in Washington State, the decedent *changed* the beneficiary designation, despite the obligation he had under a decree or court order. *Bunt*, 110 Wn.2d at 370 (“Contrary to express court order, George changed the beneficiary designation on the Aetna policy . . .”); *Schwalbe*, 110 Wn.2d at 522 (“In disregard of the preliminary injunction, . . . Schwalbe changed the beneficiary . . .”); *Porter*, 107 Wn.2d at 47 (“Porter violated both of these provisions” by changing the beneficiaries of his insurance policies).

<sup>42</sup> 110 Wn.2d 368, 379-80, 754 P.2d 993 (1988).

<sup>43</sup> See also *Boober*, 56 Wn. App. at 572-73.

<sup>44</sup> 110 Wn.2d at 379-80.

<sup>45</sup> See *Bunt*, 110 Wn.2d at 380-81; *Schwalbe*, 110 Wn.2d at 523; *Porter*, 107 Wn.2d at 45-48; *In re Marriage of Sager*, 71 Wn. App. 855, 858, 863 P.2d 106 (1993). In each of these cases, the decedent had a legal obligation to name his minor children as beneficiaries of a specific policy. See *Bunt*, 110 Wn.2d at 370 (under separation agreement decedent agreed to name two minor children as irrevocable beneficiaries of life insurance policy during their dependency); *Schwalbe*, 110 Wn.2d at 522-25 (decedent violated injunction prohibiting him from changing entitlements of insurance policy intended as a security for support of minor children); *Porter*, 107 Wn.2d at 45 (decree provided that Porter was to maintain certain insurance on his life with minor son as beneficiary for as long as Porter’s support obligation was to continue).

<sup>46</sup> *Bunt*, 110 Wn.2d at 380-81.

<sup>47</sup> *Schwalbe*, 110 Wn.2d at 523.

<sup>48</sup> *Porter*, 107 Wn.2d at 51 (citing *Sutherland v. Sutherland*, 77 Wn.2d 6, 459 P.2d 397 (1969); *Riser v. Riser*, 7 Wn. App. 647, 501 P.2d 1069 (1972)).

<sup>49</sup> *Sager*, 71 Wn. App. at 858, 863 P.2d 106 (1993).

<sup>50</sup> *Bunt*, 110 Wn.2d at 370.

<sup>51</sup> *Id.*

<sup>52</sup> *Sullivan v. Aetna Life & Cas.*, 52 Wn. App. 876, 879, 764 P.2d 1390 (1988).

<sup>53</sup> *Id.* at 877 (emphasis in original).

<sup>54</sup> *Sager*, 71 Wn. App. at 858.

<sup>55</sup> *Id.*

<sup>56</sup> RCW 11.84.030.

<sup>57</sup> *New York Life Insurance Co. v. Jones*, 86 Wn.2d 44, 541 P.2d 989 (1975).

<sup>58</sup> Laws of 2009, ch. 525, codified at RCW ch. 11.84.

<sup>59</sup> 107 Wn.2d 43, 49, 726 P.2d 459 (1986).

<sup>60</sup> RCW 11.11.020(1) (emphasis added).

<sup>61</sup> RCW 11.02.050(15); RCW 11.11.010(7)(a) (“super will” statute specifically incorporates the general provision definition of “non-probate assets” found in RCW 11.02.005).

<sup>62</sup> RCW 11.02.005 (15). Note that this analysis is different than what happens to a beneficiary designation upon dissolution or invalidation of marriage or domestic partnerships discussed above because there is a more-specific statute specifically governing “non-probate” assets at dissolution and invalidation of marriages or domestic partnerships (RCW 11.07 et. seq.).

<sup>63</sup> RCW 48.18.410; *Feminist Women’s Health Ctr. v. Codispoti*, 118 Wn.2d 99, 106, 821 P.2d 1198 (1991).

<sup>64</sup> RCW 48.18.420(1).

<sup>65</sup> The explanation of these exceptions comes from University of Washington Professor Thomas Andrew’s article *Creditor Rights’ Against Nonprobate Assets in Washington: Time for Reform*, 65 WASH. L. REV. 73 (1990).

<sup>66</sup> I.R.C. § 2042.

<sup>67</sup> I.R.C. § 2035(a)(2).

<sup>68</sup> RCW 48.18.410(1).

<sup>69</sup> RCW 48.18.410(2)(b); see *Elsom v. Gadd*, 93 Wash. 603, 162 P. 867 (1916).

<sup>70</sup> See, e.g., 38 U.S.C.A. § 1970(g) (concerning life insurance for federal armed service personnel).

<sup>71</sup> *Id.*

<sup>72</sup> RCW 48.18.410(3)(b).

<sup>73</sup> *Bunt*, 110 Wn.2d at 377.