No. 17-521

In The
Supreme Court of the United States

CAROLYN LAZAR,

Petitioner,

v.

MARK G. KRONCKE, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE THOMAS KRONCKE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Contracts Clause protects only pre-existing contracts, not donative transfers. An Individual Retirement Account is a trust, not a contract. The account owner's beneficiary designation is a donative transfer.

The decedent herein designated his then wife as his IRA beneficiary in 1992, but revoked that designation and re-designated her in 2001. They contracted to divide the IRA when they divorced in 2008.

Does Arizona's 1995 revocation-on-divorce statute retroactively impair any contract in violation of the Contracts Clause?

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A.R.S. § 14-2804

A. 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 a divorced couple before or after the marriage [or] divorce, the divorce . . . :

1. Revokes any revocable:

(a) Disposition . . . of property made by a divorced person to that person's former spouse in a governing instrument. . . .

* * *

C. Provisions of a governing instrument are given effect as if the former spouse . . . disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary . . . capacity, as if the former spouse . . . died immediately before the divorce. . . .

* * *

I. For the purpose of this section:

* * *

4. "Governing instrument" means an instrument executed by the divorced person before the divorce. . . .

26 U.S.C. § 408(a)

> **(a) Individual retirement account.** For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries.

INTRODUCTION

A statutory revocation upon divorce of the designation of a spouse as an IRA beneficiary affects only the donative transfer contemplated by the IRA. An IRA is a trust and its beneficiary designation is a donative transfer. Neither is a contract. Therefore, a statutory revocation of the beneficiary designation does not impair any contract.

Moreover, the question presented by Petitioner Lazar becomes merely theoretical when the facts of this case are fully revealed. In 2001, *after* the enactment of Arizona's revocation-on-divorce statute in 1995, Kroncke expressly "revoked" his 1992 designation of Lazar as primary beneficiary and his estate as contingent beneficiary and named Lazar and their marital trust as his primary and contingent beneficiaries, respectively. When Kroncke and Lazar divorced, they contracted to divide the IRA and Lazar disclaimed her interest in the marital trust. Because Kroncke's operative beneficiary designation was made after Arizona enacted its statute, this case does not involve

retroactive application of the statute to a pre-existing contract in violation of the Contracts Clause.

STATEMENT OF THE CASE

Petitioner Carolyn Lazar and decedent George Thomas Kroncke were married when he established an Individual Retirement Account at Charles Schwab & Co., Inc. in 1992. E.R. 428. His account application designated Lazar as his primary beneficiary in the event of his death and his estate as the contingent beneficiary. E.R. 470-471, 798-799.

Kroncke's application, also referred to as the "Adoption Agreement," adopted the Schwab Individual Retirement Plan. *Id*. The Plan recites that Schwab "will act as Custodian of the individual retirement accounts under the Plan." It further recites that "[a]ll such accounts are intended to qualify as 'individual retirement accounts' within the meaning of Section 408 of the Internal Revenue Code of 1954, as amended, and are established and maintained for the exclusive benefit of the individuals for whom the accounts are held or their beneficiaries." E.R. 614.

Also in 1992, revisions to the Uniform Probate Code were approved to adapt to the prevalence of multiple marriages in our society. Section 2-804, an "intent-serving default rule," provides for the revocation of probate and nonprobate transfers to a former spouse in the event of divorce. Arizona followed suit,

adopting its revocation-on-divorce (ROD) statute, A.R.S. § 14-2804, effective January 1, 1995.

After the enactment of Arizona's statute, Kroncke submitted a new IRA Beneficiary Form dated September 3, 2001. E.R. 484-485. It expressly "revoke[d] any prior designations . . . of primary or contingent beneficiaries." E.R. 485. The new form again designated his then wife as his primary beneficiary, but changed his contingent beneficiary from his estate to the Kronckes' marital trust.

Lazar and Kroncke divorced in 2008. E.R. 429; Supp. E.R. 269. In doing so, they entered into a Property Settlement Agreement – after the enactment of Arizona's ROD statute – to divide Kroncke's IRA account, 14.4% to Lazar and the rest to Kroncke. Supp. E.R. 275 at 276-277. Lazar has never contended that she did not receive her share of the IRA pursuant to that agreement. Lazar also "revoked her share in the [marital] trust." E.R. 77.

According to Arizona's ROD statute, Kroncke's designation of Lazar as his IRA beneficiary was automatically revoked upon entry of their divorce decree. *In re Estate of Lamparella*, 210 Ariz. 246, 252, ¶¶ 35-36 (App. 2005). The statute treated Kroncke's designation of Lazar as though she had disclaimed it. There is no evidence in the record of any writing by which Kroncke ever redesignated Lazar as his primary beneficiary after their divorce, as Arizona's ROD statute permits. *Id*., ¶ 39.

Kroncke died in 2012. E.R. 429. After both Lazar and Kroncke's estate sought payment from Schwab (E.R. 430, 794), this litigation followed. The procedural trail is long and winding.

Lazar filed suit against Schwab for breach of contract and against Schwab and the estate for declaratory relief in the Central District in California. E.R. 808-814. Schwab counterclaimed and crossclaimed for interpleader relief. E.R. 791-807. Lazar then amended her complaint to allege that Arizona's ROD statute violates the Contracts Clause. E.R. 779-789.

The estate moved to dismiss Lazar's amended complaint on several grounds. Doc. 98. Lazar filed the 2001 beneficiary form in opposition. E.R. 459 at 462, 484-485. The district court dismissed for lack of federal court jurisdiction because Lazar had no vested contract interest in the IRA and therefore lacked standing to make a Contracts Clause claim. Pet. App. 77a.

Schwab was discharged from the interpleader action. Pet. App. 95a. Nevertheless, Lazar filed a second amended answer to Schwab's counterclaim and crossclaim against the estate that re-asserted her dismissed Contracts Clause claim and made various other claims. E.R. 423-444. The district court granted the estate's motion to dismiss for lack of personal jurisdiction in California, but transferred the case to the District of Arizona. Pet. App. 54a.

In Arizona, the estate moved to dismiss for failure to state a claim. At oral argument, Lazar again raised the 2001 beneficiary designation. E.R. 77-81. The court

granted the motion, but declined to revisit the Contracts Clause claim, noting that the previous dismissal was the law of the case. Nevertheless, the Arizona district court said it would have reached the same result for the same reasons. Pet. App. 27a.

Although Lazar "implored the [District] Court not to look beyond the pleadings in ruling on the motion to dismiss" (Pet. App. 45a, n.8), her Petition relies on her own post-dismissal declaration to support various assertions regarding the parties and their relationship that were not alleged in her crossclaim. Pet. 4-5. That declaration was filed months later in opposition to the estate's motion for attorneys' fees. It was not included in the Excerpts of Record provided to the Ninth Circuit. Likewise, Lazar's assertions about the conversion of the IRA (Pet. 5) were not made in her pleading. *See* E.R. 423-444.

REASONS FOR DENYING THE PETITION

I. No conflict exists; this case stands alone because it does not involve a relevant contractual relationship.

This case is unique. It differs from all of the cases that Lazar argues to be in conflict. Pet. 9-11. Unlike those cases, all of which involved insurance policies, this case does not involve a relevant contractual relationship. Instead, it involves a fiduciary relationship – a trust – and its donative transfer beneficiary

designation. It therefore does not stand in conflict with any contractual relationship case.

A. Without a contractual relationship to impair there can be no violation of the Contracts Clause.

Analysis of whether a change in state law has operated as a substantial impairment of a contractual relationship begins with whether there is such a relationship. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). If not, this Court "need not reach the questions of impairment." *Id*.

B. An IRA is a trust.

IRA's are creatures of statute, as this Court has recognized. 26 U.S.C. § 408; *Clark v. Rameker*, 134 S.Ct. 2242, 2245 (2014).

Moreover, as proclaimed by Congress, an IRA is a trust:

> (a) Individual retirement account. For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries. . . .

26 U.S.C. § 408(a). This Court has also recognized that IRA's are trusts. *Rousey v. Jacoway*, 544 U.S. 320, 322 (2005) ("each [IRA] account is 'a trust,'" citing statute).

C. A trust is not a contract.

Trusts and contracts are different by definition. "Traditionally, a trust [is] a 'fiduciary relationship' between multiple people." *Americold Realty Trust v. ConAgra Foods, Inc*., 136 S.Ct. 1012, 1016 (2016). As defined in the RESTATEMENT (THIRD) OF TRUSTS § 2:

> A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

In contrast, a contract is "'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'" *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005), quoting RESTATEMENT (SECOND) OF CONTRACTS § 1.

The distinctions between a trust and a contract are many, too many to discuss in this brief, and have been widely recognized. *E.g*., Bogert's Trusts and Trustees, § 17; Scott FitzGibbon, *Fiduciary Relationships are not Contracts*, 82 Marq. L. Rev. 303 (1999); *In re Naarden Trust*, 195 Ariz. 526, 529-530 (App. 1999).

It suffices to say that under Arizona law "a trust is not a contract." *In re Naarden Trust*, 195 Ariz. at 527. Arizona law governs the issue. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

D. A trust is not a contract within the meaning of the Contracts Clause.

Only common contracts are within the scope of the Contracts Clause:

> It has long been settled by decisions of this court that the word "contracts" in section 10 of article 1 of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts.

Crane v. Hahlo, 258 U.S. 142, 146 (1922) (citations omitted).

No authority can be found that equates a trust to a common contract for purposes of the Contracts Clause.

E. Kroncke established a trust.

The IRA established by Kroncke's adoption of the Schwab IRA Plan is a trust, not a common contract. It is a trust by statutory definition. 26 U.S.C. § 408(a). Indeed, it was meant to be a trust because it was expressly "intended to qualify as an individual retirement account plan under Code Section 408." E.R. 621. And, consistent with the Restatement definition of a trust, there was a manifestation to create a fiduciary relationship between the Plan participant and Schwab as the holder ("Custodian") of the IRA assets with duties to deal with the assets for the benefit of those for whom the assets are held. E.R. 614, 461-462. Finally,

the IRA's trust nature was recognized by the Plan's provision for the appointment of "a successor custodian or trustee." E.R. 463.

F. Kroncke's beneficiary designation is a will substitute, not a contractual arrangement.

"A will substitute serves the function of a will. . . ." RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 7.1 cmt. *a.* They are "donative in nature." *Id*.

> A will substitute is an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.

RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 7.1(a).

"Common property or contractual arrangements that are used as will substitutes include revocable inter vivos trusts, life insurance, pension and employee-benefit accounts, . . . and annuities with death benefits." *Id*., cmt. *a*. The category of pension and employee-benefit accounts includes IRAs. RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 7.1 cmt. *d*.

Kroncke's IRA beneficiary designation is a will substitute – a donative transfer – not a contractual arrangement. As was said of the annuitant in *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003), "Dale's choice of beneficiaries is a donative transaction, not a contractual arrangement."

Kroncke's establishment of his IRA by signing an agreement to adopt the Schwab Plan does not change the donative nature of his beneficiary designation. "That the donative transfer must be effectuated with the assistance of a party in a contractual relationship with the donor does not transmute the donative transfer into the performance of a contractual obligation." *Stillman*, 343 F.3d at 1322.

G. An IRA trust is unlike a life insurance contract.

Although a life insurance contract is also a will substitute, it is significantly different from an IRA trust. As explained in the Restatement:

> An arrangement respecting either property or contract rights can be used as a will substitute. An arrangement respecting property is one under which the donor's property is segregated from other property. An example of such an arrangement is a trust. An arrangement respecting contract rights is one under which a financial intermediary incurs a contractual obligation to make a certain payment but is not required to segregate any property

> for that particular payment. An example of such an arrangement is a life-insurance contract.

RESTATEMENT (THIRD) OF PROPERTY (WILLS & DONATIVE TRANSFERS) § 7.1 cmt. *a*.

An IRA is an arrangement respecting property. As such, it is a will substitute in the nature of a trust. It is not an arrangement respecting contract rights, as is a life insurance contract. Therefore, there is no relevant contractual relationship in this case. This case is thus distinguishable from life insurance cases such as *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), and *Metropolitan Life Ins. Co. v. Melin*, 853 F.3d 410 (8th Cir. 2017).

H. This case does not create or contribute to any conflict.

Whatever conflict might exist between other cases, for the reasons detailed above this case stands alone on neither side of any split.

II. The decision below is correct.

A. Without a contractual relationship to impair there can be no violation of the Contracts Clause.

As discussed above, this case does not involve a contractual relationship. Therefore, the Ninth Circuit's decision that Lazar "suffered no contractual impairment" is correct. Pet. App. 18a.

Although that court was not asked to decide that an IRA is a trust rather than a contract, or that Arizona's 1995 ROD statute does not impair the subsequent 2001 beneficiary designation or 2008 Property Settlement Agreement, this Court can affirm on any ground supported by the law and the record. *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 391 (2002) (Kennedy, J., dissenting); *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982).

B. Even if an IRA trust involves a contract, there was no impairment.

A state statute is presumed to be Constitutional, and the burden of persuasion is on the party contending it is not. *E.g.*, *Department of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 796 (1994) (O'Connor, J., dissenting); *Pollock v. Williams*, 322 U.S. 4, 26 (1944) (Reed, J., dissenting); *Ogden v. Saunders*, 25 U.S. 213 (1827).

The well settled test for a violation of the Contracts Clause is well summarized in the Opinion below:

> In conducting a Contracts Clause analysis, we first ask if the change in state law has "operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (internal quotation marks omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether

> the impairment is substantial." *Ibid*. If a substantial impairment is found, we then assess the significance of the State's justification and the legitimacy of the public purpose behind the law, such as "the remedying of a broad and general social or economic problem." *Energy Reserves Grp. v. Kan. Power & Light Co*., 459 U.S. 400, 411-412, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). We then look to whether the change in applicable law is based on reasonable conditions and is appropriate to achieve the stated public purpose. *Id*. at 412, 103 S.Ct. 697. Courts generally defer to the judgment of state legislatures as to both necessity and reasonableness so long as the state itself is not a contracting party. *Id*. at 412-413, 103 S.Ct. 697.

Pet. App. 16a.

Applying that test, the Ninth Circuit agreed with the Tenth Circuit's analysis in *Stillman* that an annuity has both contractual and donative transfer elements, revocation-on-divorce statutes affect only the latter element, and therefore do not impair any contract. *Stillman* observed, in essence, that the contractual element is between only the annuity company and the annuitant, and the contractual duties to fund and administer the annuity are not impaired by revocation-on-divorce statutes because they affect only the identity of the beneficiary – the recipient of the donative transfer. 343 F.3d at 1322. In other words, ROD statutes do not affect the contractual duty to disburse the funds to the beneficiary.

In contrasting the elements, *Stillman* reasoned as follows:

> [The annuitant's] choice of beneficiaries is a donative transaction, not a contractual arrangement. That the donative transfer must be effectuated with the assistance of a party in a contractual relationship with the donor does not transmute the donative transfer into the performance of a contractual obligation. [A revocation-on-divorce statute] does not impair the contractual relationship between [the annuitant] and [the annuity company]. What it does is change the import of the donative instructions from [the annuitant] – instructions that [the annuity company] has an obligation to follow. There is no more an impairment of a contract than if [the annuitant] had made the beneficiary designation in his will, providing no instructions directly to [the annuity company].

343 F.3d at 1322. *Stillman* therefore concluded that because "[t]he Contracts Clause addresses contracts, not donative transfers . . . no contractual obligation is impaired by [the revocation-on-divorce statute]." *Id*.

Likewise here, Kroncke's beneficiary designation is a donative transfer. As said in *Stillman*, "[t]hat the donative transfer must be effectuated with the assistance of [Schwab] in a contractual relationship with [Kroncke] does not transmute the donative transfer into the performance of a contractual obligation." Consequently, Arizona's statute effecting a change of

beneficiary on divorce did not impair any contractual obligation.

Moreover, the Ninth Circuit concluded that "[b]ecause Lazar never possessed a vested contractual right, she suffered no contractual impairment," citing *Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 80 (1937). Pet. App. 18a. The court of appeals reasoned as follows:

> The Decedent's contract with Schwab specified that Schwab would pay his chosen beneficiary in the event of his death. The beneficiary designation itself was not a contractual term. The IRA specifically provided that the Decedent could alter his beneficiary designation at any time and for any reason, so no third-party rights to the IRA could vest until his death. And, as a citizen of Arizona, the Decedent was governed by its law mandating the automatic revocation of any designation of a former spouse through operation of the ROD statute. The Decedent was free to reaffirm Lazar as his designated beneficiary but chose not to do so. Thus, Lazar's expectancy interest, which could not vest until the death of the Decedent, was extinguished upon divorce and never vested.

Pet. App. 18a-19a.

Other Contracts Clause cases also recognize that the contractual obligation must be vested, rather than contingent. *E.g.*, *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) ("expectations or hopes of succession,

whether testate or intestate, to the property of a living person, do not vest until the death of that person."); *Ochiltree v. Iowa R.R. Contracting Co.*, 88 U.S. 249, 252 (1874) ("the obligation of a contract within the meaning of the Constitution is a valid subsisting obligation, not a contingent or speculative one.").

Because the Ninth Circuit found no vested contractual interest that could be impaired, it was not necessary to complete the analytical progression outlined in *General Motors Corp. v. Romein* and *Energy Reserves Group v. Kansas Power & Light Co*. Pet. App. 19a.

C. Any contractual relationship was not substantially impaired.

Given the 2008 Property Settlement Agreement dividing the IRA account, Lazar could not reasonably expect that her previous beneficiary status would continue as to Kroncke's share, and therefore cannot claim any substantial impairment of that contingent interest. The following analysis in a comparable case is persuasive:

> Even if a contractual relationship were said to exist between Equitable and Koerner because of her contingent interest in the insurance proceeds before divorce, nevertheless, A.R.S. section 14-2804(A) did not effect a substantial impairment to that relationship. Consideration of the reasonable expectations of the complaining party to the contract plays an important role in determining the substantiality of the contractual impairment. *Energy*

> *Reserves Group v. Kansas Power & Light Co*., 459 U.S. 400, 416 . . . (1983) (reasonable expectations of complaining party not impaired by statute and thus statute did not unconstitutionally violate Contracts Clause, despite fact that parties' obligations had been altered). *Because, in this case, in the dissolution decree, upon the agreement of the parties, the trial court awarded the insurance policy to Dobert, Koerner lacks any reasonable basis for expecting that her beneficiary status would continue.* Thus, her interest in remaining the designated beneficiary was not substantially impaired by the revocation provision of A.R.S. section 14-2804(A) such as would offend the Arizona or United States Constitutions.

Matter of Estate of Dobert, 192 Ariz. 248, 253, ¶ 21 (App. 1998) (emphasis added).

D. *Whirlpool* is "manifestly wrong."

By agreeing with *Stillman*, the Ninth Circuit rejected *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991). Indeed, many courts and commentators have done the same.[1] As noted in *Stillman*, "[t]he *Whirlpool*

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[1] *E.g.*, *Stillman*, *supra*; *In re Proceeds of Jackson Nat'l Life Ins. Co. Policies*, No. 6:15-cv-261, 2016 WL 6806359 (M.D. Fla. Feb. 25, 2016); *Allstate Life Ins. Co. v. Hanson*, 200 F.Supp.2d 1012 (E.D. Wis. 2002); *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002); Joint Editorial Board for Uniform Probate Code, *Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents*, 17 Am. Coll. of Tr. & Est. Couns. Notes 161, 184-185 (1991); J. Rodney Johnson, *Wills, Trusts and Estates*, 27 U. Rich. L. Rev. 833, 845 (1993) (calling

line of cases has been persuasively criticized by other distinguished authorities." 343 F.3d at 1322. Even the court that decided *Whirlpool* later followed it only because it was legally bound to do so. *Metropolitan Life Ins. Co. v. Melin*, 853 F.3d 410, 413 (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.) The *Whirlpool* case controls this case.").

Perhaps the most forceful critic of *Whirlpool* is the Joint Editorial Board for the Uniform Probate Code (JEB).[2] It issued a statement asserting that the opinion is "manifestly wrong." Resp. App. 1. It went on to analyze why "the court's reasoning is mistaken at several levels." *Id*., 2. In summary, *Whirlpool* is mistaken because:

- A beneficiary designation is a donative transfer. A revocation-on-divorce statute "works no impairment of the insurance company's obligation to pay the proceeds due under the policy" to the beneficiary; it "affects only the donative transfer, the component of the policy

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Whirlpool "poorly reasoned"); Howard S. Erlanger, *Wisconsin's New Probate Code*, 71 Wisconsin Law. 6, 49 (1998) (Wisconsin UPC Drafting Committee concludes UPC Joint Editorial Board position is valid).

[2] The JEB is "the oversight panel for the law reform activities of three organizations that promote the improvement of the law in the fields of trusts, estates, probate and guardianship. Those organizations are: (1) The *National Conference of Commissioners on Uniform State Laws*. . . . (2) The *American College of Trust and Estate Counsel*. . . . (3) The *American Bar Association's Section on Real Property, Probate and Trust Law*. . . ." Resp. App. 6-7.

that raises no Contracts Clause issue." *Id*., 2-3. Note that *Stillman* quoted from that part of the statement with approval. 343 F.3d at 1322.

- Revocation-on-divorce statutes are an "intent-serving default rule." They "serve to implement rather than defeat the insured's expectation under the insurance policy." The rationale is that a divorced party is not "likely to want to transfer his or her property to the survivor on death." The statutes "reflect the legislative judgment that [a failure to change beneficiaries] more likely than not represents inattention rather than intention." Resp. App. 3-4.[3]

- Sound policy reasons support the application of an intent-serving legislative default rule to a revocable document that exists at the time of the statute's enactment, and the Contracts

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[3] *Accord e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 158-159 (2001) (Breyer, J., dissenting) ("The Washington statute transfers an employee's pension assets at death to those individuals whom the worker would likely have wanted to receive them. As many jurisdictions have concluded, divorced workers more often prefer that a child, rather than a divorced spouse, receive those assets. Of course, an employee can secure this result by changing a beneficiary form; but doing so requires awareness, understanding, and time. That is why Washington and many other jurisdictions have created a statutory assumption that divorce works a revocation of a designation in favor of an ex-spouse. That assumption is embodied in the Uniform Probate Code; it is consistent with human experience; and those with expertise in the matter have concluded that it 'more often' serves the cause of '[j]ustice.' "); *In re Estate of Lamparella*, 210 Ariz. 246, 252, ¶ 34 (App. 2005).

Clause has never been read to prohibit application to pre-existing donative documents that have no contractual component. *Id*., 4-5.

- "There is no U.S. Supreme Court authority for the . . . extension of Contracts Clause regulation to legislative default rules." *Id*., 5-6. The *Whirlpool* court misapplied *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and ignored other contrary authority.

E. Kroncke's 2001 beneficiary designation and 2008 Property Settlement Agreement were not retroactively impaired by Arizona's 1995 ROD statute.

Even if the ROD statute would have impaired Kroncke's 1992 beneficiary designation if it was still operative when he died, it does not matter because that designation was revoked and replaced by Kroncke's 2001 beneficiary designation. The 2001 designation and the 2008 Property Settlement Agreement could not be impaired by Arizona's statute. The Contracts Clause only prohibits retroactive impairment of existing contracts. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987); *see also General Motors Corp. v. Romein*, 503 U.S. at 189.

As Lazar acknowledges, parties contract with reference to existing law: "A contract 'depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form[] a part of them as the measure of the obligation to perform them.'" Pet. 16, quoting *General Motors Corp. v. Romein*, 503 U.S.

at 189. Although Arizona's ROD statute was not "on the books" when Kroncke established his IRA and first designated Lazar as his beneficiary, the statute was law when he again designated her in 2001 and when they contracted to divide the IRA upon their divorce in 2008.

In the courts below, Lazar argued her own contract interest without success. Now, her Petition changes perspective and argues Kroncke's "rights and expectations." But they must be viewed in light of the ROD statute. After making the 2001 beneficiary designation, Kroncke had no right to expect that his IRA would be distributed to Lazar if they divorced and he then died. And certainly, in 2008, when they divorced and contracted to divide the IRA, they did so with reference to an ROD statute that would effect Lazar's disclaimer of her designation as a beneficiary if Kroncke died without changing it.

Consequently, Lazar's argument that the Ninth Circuit "impos[ed] a new, post-1995 obligation on [Kroncke] to redesignate [Lazar] as his beneficiary after their divorce" is flat wrong. If Kroncke really intended to maintain Lazar as his beneficiary after their divorce, it was the already existing ROD statute that, without any Contracts Clause violation, imposed the obligation to redesignate her in a new writing.

III. This case is a poor vehicle.

Rather than the "ideal" or "clean" vehicle represented by Lazar, this case is anything but. It is

muddled by her inartful pleading below and has a tortured procedural history. Moreover, Lazar omits any mention of the post-ROD statute 2001 beneficiary designation and 2008 Property Settlement Agreement that are fatal to her Contracts Clause claim. If the Court were to grant the Petition it would have to also decide the effect of those events for the first time.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

**JOINT EDITORIAL BOARD
FOR UNIFORM PROBATE CODE**

November 1, 1991

Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents

The Joint Editorial Board for the Uniform Probate Code (JEB) resolves to express its disapproval of the decision of a three-judge panel of the Eighth Circuit Court of Appeals in the case of *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991). 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.

The court in the *Ritter* case held that the Oklahoma statute could only be applied to beneficiary designations that are executed after the effective date of the statute. The court reasoned that when a beneficiary designation in favor of a particular spouse is already in effect at the time that the legislature changes the rule governing the effect of divorce upon a beneficiary designation, the change impermissibly disrupts the insured's expectations and hence impairs the insured's rights under the insurance contract. The court characterized the situation in *Ritter* as an instance of retroactive legislative disturbance of contractual relations, even though the divorce (and, of course, the decedent's death) occurred after the enactment of the statute.

The JEB believes that the court's reasoning is mistaken at several levels.

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 U.S. 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. The rationale for the divorce statutes is that when spouses are sufficiently unhappy with each other that they obtain a divorce, neither is likely to want to transfer his or her property to the survivor on death. These statutes reflect the legislative judgment that when the transferor leaves unaltered a will or trust or insurance beneficiary designation in favor of an ex-spouse, this failure to designate substitute takers more likely than not represents inattention rather than intention.

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. In the *Ritter* case itself, there was no evidence that the decedent, who had remarried, intended his ex-spouse to receive his insurance benefits.

Application of intent-serving default rules to pre-existing documents. The JEB believes that there are sound policy reasons for applying an intent-serving legislative default rule to a revocable document that exists at the time of the enactment, and accordingly, that the Contracts Clause poses no constitutional obstacle to doing so. The distinctive attribute of intent-serving default rules is that they represent an attempt to protect rather than defeat the decedent's reliance. In the case of divorce statutes like UPC § 2-804 and its Oklahoma counterpart in *Ritter*, the legislature's enactment responds to two trends, the liberalization of divorce and the spread of nonprobate modes of transfer. The legislature is attempting to identify and implement the default rule that best captures the wishes of the typical citizen, while preserving the right of any affected person to opt out of the legislatively determined rule.

The Contracts Clause has never been read to pose any obstacle to the application of legislatively altered constructional rules to pre-existing donative documents such as revocable trusts that have no contractual component. The JEB believes that there is no justification for extending Contracts Clause concerns

to a statute that only affects the donative-transfer component of a life insurance policy, since the statute works no interference with the contractual component of the policy, the company's obligation to pay.

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 preexisting documents in any field of law, and especially not in the field of estates, trusts, and donative transfers. *See generally* J. Nowak & R. Rotunda, Constitutional Law § 11.8, at 394 *et seq*. (4th ed. 1991).

It should also be observed that *Ritter* is wholly at variance with the general tolerance that the Supreme Court has shown toward retroactive federal legislation imposing liabilities under the Multiemployer Pension Plan Amendments Act of 1980 (MEPPA). When an employer withdraws from an underfunded pension plan,

MEPPA allows the imposition of significant unforeseen liabilities. In *Pension Benefit Guaranty Corporation v. Gray*, 467 U.S. 717 (1984), and *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986), the Court rejected both due process objections to these retroactively imposed MEPPA obligations as well as objections based upon the constitutional protection against uncompensated takings.

About the JEB

The Joint Editorial Board for the Uniform Probate Code (JEB) is the oversight panel for the law reform activities of three organizations that promote the improvement of the law in the fields of trusts, estates, probate, and guardianship.

Those organizations are:

(1) The *National Conference of Commissioners on Uniform State Laws*, a body of delegates from each state. The Commissioners draft the uniform laws. The Commission is funded from the contributions of all the state legislatures. Commissioners are appointed by governors or from state legislatures, and include leading practitioners, judges, and law professors.

(2) The *American College of Trust and Estate Counsel*, whose 2,000 elected fellows comprise the most seasoned experts in trust and estate law.

(3) The *American Bar Association's* Section on Real Property, Probate, and Trust Law, the largest body of specialist practitioners in the field.

The JEB is responsible for updating the Uniform Probate Code and other uniform legislation in the field of trusts and estates.