THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
Marvin H. Dukes, III, Special Circuit Court Judge

Case No.: 2019-000518
Opinion No.: 5947

On Petition for Writ of Certiorari
to the South Carolina Court of Appeals

Richard Walter Meier and the Estate of
William Carl Meier, by and through
Conrad Meir, its Personal Representative,.....Appellant

v.

Mary J. Burnsed,.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

A. INTRODUCTION

This is an action to determine who is entitled to receive the proceeds of a life insurance policy (hereinafter the "Policy") issued by Transamerica Premier Life Insurance Company, Inc. (hereinafter "Transamerica") in the amount of $250,000.00 on the life of William Carl "Bill" Meier (hereinafter "Bill"), who died on December 26, 2017. ROA, PP. 60-87. The Petitioner Mary J. Burnsed (hereinafter "Burnsed") contends that she is entitled to the proceeds of the life insurance policy because she was the named beneficiary at the time of Bill's death. The Appellants contend that the designation of Burnsed as the beneficiary of the life insurance policy was revoked by operation of §62-2-507 of the South Carolina Code of Laws, since Bill did not re-affirm her designation following their divorce.

The sequence of events leading up to this case is as follows.

First, Bill and Burnsed were married on July 19, 1997 and on June 16, 1998, Bill took out a policy of life insurance on his life with Transamerica. He named Burnsed as the primary beneficiary of the policy. Bill's son from a prior marriage, the Appellant Conrad Meier (the current Personal Representative of Meier's Estate), was a minor at the time, so Bill named his brother, the Appellant Richard Walter Meier, as the contingent beneficiary.

Second, on November 26, 2002 Bill and Burnsed divorced. ROA, pg. 125-126. Following their divorce, Bill maintained ownership of the Policy, paid the premiums as they fell due, and maintained the Policy on his life in full force and effect.

Third, in 2013, the South Carolina General Assembly amended §62-2-507, expressly providing that a divorce decree automatically revokes the designation of a spouse as the beneficiary of a life insurance policy unless the insured prior to his death re-affirms the designation.

Finally, on December 26, 2017 Bill suddenly and unexpectedly died. Prior to his death, he did not change the beneficiary designation on his life insurance policy, nor did he re-affirm the designation of Burnsed as the beneficiary.

B. FACTUAL BACKROUND

It is important to have a good understanding of the facts underlying this case, as this case illustrates precisely the type of injustice that the subject statute was enacted to prevent.

On June 16, 1998, about one year after he married Burnsed, Bill took out the subject life insurance policy with Transamerica. Bill wanted to name his son Conrad as the beneficiary, but could not since Conrad was still a minor. ROA, pg. 128, ¶4. Accordingly, he named his then wife Burnsed as the primary beneficiary, and his brother, the Respondent Richard Walter Meier, as the contingent beneficiary. ROA, pg. 103.

Bill and Burnsed did not stay together very long, and a Final Decree of Divorce was issued on November 26, 2002. ROA, pg. 39, ¶3. The Decree of Divorce, which was granted on the grounds that the parties had lived separate and apart since June 15, 2001, gives neither party any interest in the assets of the other party, and expressly recites that each party waives any claim he or she may have against the other party. ROA, pg. 101.

After their divorce, Burnsed and Bill remained friends, but they were not particularly close. According to his best friend, it was "simply Bill's nature" to maintain a "friendly and cordial relationship with Ms. Burnsed." ROA, 132, ¶6. In his words, Burnsed "was just one of his (Bill's) many friends." *Id.* Burnsed "was just one of Bill's ex-wives," and Bill "had many friends with whom he was much closer than (Burnsed)." ROA, pg. 129-131, ¶6.

Bill's death on December 26, 2017 was "completely unexpected." Up until the moment he died "he appeared to be in good health, with a long life ahead of him." ROA, pg. 129, ¶5. On that

date, Bill and his best friend were playing golf. After Bill took his second shot on the sixth hole, he "collapsed and was unresponsive," passing away a few moments later. Up until that moment Bill appeared to be "hail, hearty and in good general health." ROA, pg. 131, ¶3

At the time of his death, Bill and his girlfriend, Martha Hatfield, lived together. They had begun dating in or around May of 2016 and were romantically involved with each other. ROA, pg. 129, ¶3 and ¶4. At the time of his death, Bill "was making plans for the future." As his best friend David Carroll put it: "(Bill) had discussed with me buying jewelry and a ring for his longtime girlfriend, Martha Hatfield, after the holidays. He was looking forward to continuing and deepening his relationship with her." ROA, pg. 132, ¶4. Martha Hatfield confirmed that "Bill and I discussed the future, including spending the rest of our lives together." ROA, pg. 130, ¶7.

It was Bill's desire and intent that his family, particularly his son Conrad, be the beneficiary of the subject life insurance policy. Martha Hatfield stated:

> "Bill was close to his family, particularly his son Conrad. Bill discussed with me his life insurance policy, which he indicated was significant. He faithfully paid the premium every month. It was Bill's desire and intent that, in the event of his passing, the proceeds from his life insurance policy would go to his family, particularly for the benefit of his son Conrad.
>
> The bulk of Bill's estate is the proceeds of his life insurance policy. Bill would never have "disinherited" his son Conrad for the benefit of (Burnsed). Bill would roll over in his grave if he knew that "(Burnsed) was trying to take these benefits away from his family."

ROA, pg. 130, ¶¶7, 8 and 9. This was confirmed by Bill's best friend, David Carroll, who stated:

> "Although we did not get into specifics, prior to his passing Bill had discussed with me his desire and intent that, when he eventually did pass, "everything" go to his son, Conrad.
>
> Over the years, I had met one of Bill's ex-wives, Mary Burnsed. Bill had maintained a friendly and cordial relationship with Ms. Burnsed. This was simply Bill's nature. Although Ms. Burnsed was a friend of Bill's, she was just one of his many friends. Bill had other friends, as well as family, with whom he was close. Bill would never have left the bulk of his estate to Ms. Burnsed to the exclusion of

> his family. Ever since I have known him, Bill considered himself and Ms. Burnsed to be financially independent of each other, with no financial ties between them."

ROA, pg. 132, ¶¶ 5 and 6.

Finally, approximately a year prior to his death, Bill had a discussion concerning this life insurance policy with a friend of his who is a paralegal. He was apparently under the mistaken impression that he needed to prepare a Will to change the beneficiary. The paralegal explained that a Will was not necessary for this purpose. The paralegal stated:

> "Bill went on to explain that he had taken this policy out many years ago, when Conrad was a child, and he could not name Conrad as the beneficiary since he was a minor. During the course of our conversation, Bill never told me the identity of the current beneficiary of his policy, but he made it clear that it was his intent and desire that the beneficiary of his life insurance policy had to be changed to someone other than who was designated at that time."

ROA, pg. 128, ¶3. Unfortunately, he unexpectedly passed away before doing so.

C. LEGISLATIVE INTENT AND PURPOSE

The underlying premise of the revocation-upon-divorce laws is that former spouses would not intend to benefit each other in any way other than that required by their Divorce Decree. Obviously, this is an assumption, but it is one steeped in common sense and every day observation and experience. See *Spitko, E. Gary, The Expressive Function of Succession Law and The Merits of Non-Marital Inclusion,* 41 Ariz. Law Review 1063, 1084 and footnote 112 (1999).

Revocation-upon-divorce is not a new concept. Revocation-upon-divorce was originally an English common law principal 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). Eventually, revocation-upon-divorce became untethered from the Doctrine of Revocation By Implication, and it became its own common law doctrine in the early twentieth century. *Id.*, at 656. See also *Durfee, Revocation of Wills by Subsequent Change*

in the Condition or Circumstances of the Testator, 40 Mich. L. Rev. 406, 406 (1942) ("Among the oldest rules in the Law of Wills are those by which a Will is held to be revoked by implication by certain changes in circumstances of the testator."); and *Stein, Implied Revocation of Wills After Divorce and Property Settlement,* 4 Duke Bar Journal 122, 126 (1954) ("In the vast majority of cases the testator's failure to revoke his Will subsequent to divorce is due to neglect, and that to find an implied revocation usually gives effect to a testator's real intentions.").

In 1946 the American Bar Association adopted a model probate code which provided "If 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." Model Probate Code, Section 53 (1946).

In 1962, the Counsel of the American Bar Association Section of Real Property Probate and Trust Law appointed a special committee to consider updating the model code to promote greater national uniformity. This project culminated with the model code being replaced in 1969 by the Uniform Probate Code. Amado, *Uniform Probate Code Section 6-201 A Proposal to Include Stocks and Mutual Funds, 72 Cornell L. Rev., 397, 406, Footnote 74 (1987).* The 1969 Uniform Probate Code retained the revocation-upon-divorce provision for devises by Will to the testator's former spouse. Uniform Probate Code, §2-508 (1969).

In 1990 the Uniform Probate Code was amended 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 pre-divorce dispositions made by a divorced individual to the former spouse." Uniform Probate Code, §2-804; *Waggoner, Rights in our Multiple Marriage Society: The Revised Uniform Probate Code,* 26 Real Property Probate and Trust Journal, 683, 693 (1992). This inclusion of life insurance policies and other

non-testamentary instruments to the revocation-upon-divorce statute was motivated by several factors. The drafters of the Uniform Probate Code enumerated these factors as follows:

> In the twenty or so years between the original promulgation of the Code (in 1969) and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) The decline of formalism in favor of intent-serving policies; (2) The recognition that Will substitutes and other *inter vivos* transfer have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) The advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage.

Uniform Probate Code, Article II, Prefatory Note (1990).

In short, the drafters of the Code recognized that the rationale for the revocation-upon-divorce provision applied equally to probate and non-probate transfers.

South Carolina's Probate Code is modeled after the Uniform Probate Code. See, *e.g., Wilson v. Dallas,* 403 S.C. 411, 429, 743 S.E.2d 746, 756 (2013). Following the 1990 amendment to the Uniform Probate Code, the South Carolina General Assembly amended §62-2-507 pursuant to 2013 South Carolina Laws Act 100 (SB 143). This amendment, which went into effect on January 1, 2014 added non-probate transfers to those effected by the revocation-upon-divorce statute. The Reporter's Comment to §62-2-507 explains:

> "The 2013 amendment expands this section to cover 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 or annulment. This section effectuates a decedent's presumed intent: without a contrary indication by the decedent, a former spouse will not receive any probate or non-probate transfer as a result of the decedent's death."

S.C. Code Ann. §62-2-507, Reporters Comment.

ARGUMENT[1]

I. EVERYTHING IN ACT 100 POINTS TO ITS APPLICATION TO THIS CASE.

The Petitioner argues that the Court of Appeals wrongfully failed to apply the presumption that statutes are presumed to be prospective in their application. The Court, however, did not ignore this presumption. To the contrary, it expressly recognized it. The Court of Appeals concluded, however, that the presumption against statutory retroactivity did not prevent it from concluding that the statute applied to the facts before it because: (1) It was not being applied retroactively; (2) Application of the statute was expressly authorized by the express terms of the statute; and (3) The statute is remedial.

A. THE STATUTE IS NOT BEING APPLIED RETROACTIVELY

The Petitioner argues that the Court of Appeals wrongfully failed to apply the "strongest maxim of statutory construction" that the General Assembly is presumed to have intended prospective application of its laws. This argument overlooks the fact, however, that prospective application of a statute is nothing more than a presumption, it is not an absolute mandate. In its Opinion, the Court of Appeals expressly recognized this presumption, but for good reasons as outlined in its Opinion determined that it did not prevent the application of the statute to the facts of this case inasmuch as application of the statute to the facts of this case was not an impermissible retroactive application.

There is nothing "backwards in time" about the application of the statute to the facts of this case, which involves the designation of a beneficiary in a life insurance policy. "A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf v. USI Film Products,* 511 U.S. 244, 269, 114 S.Ct. 1483, 1499

[1] Appellants' have counter-stated each of the Petitioner's nine (9) arguments.

(1994). Simply because Bill's divorce antedated the statute's enactment does not automatically mean that the statue is retroactive. It is the event that **triggers** the application of the statute that controls. In this case, which involves the designation of a beneficiary in a life insurance policy, **the triggering event is the death of the insured**. It was not until Bill's death that the statute applied and went into effect. It was only when Bill died, without either changing the beneficiary designation or reaffirming his designation of Petitioner as the beneficiary of his life insurance policy, that the statute went into effect. Bill's death, not the divorce, is the event that triggered the application of the statute.

This exact issue was confronted by the Court in *Stillman v. Teachers Ins. & Annuity Ass'n,* 343 F.3d 1311 (10th Cir. 2003), in which the life insurance policy was purchased during the marriage, the parties then divorced, the revocation-upon-divorce statute was then enacted, and the policyholder then died without changing the designation of his ex-spouse as the beneficiary. The Court, noting the presumption against retroactive legislation, stated:

> "The principal difficulty in applying the non-retroactivity presumption is in determining what constitutes retroactivity in a particular context. To determine whether a statute is being applied retroactively, it is necessary to compare two (2) dates: (1) The date the statute went into effect, and (2) The date of the activity to which the statute applies."

Id., 343 F.3d at 1315. Since the effective date of the statute is never in dispute, the key inquiry is about "what activity is targeted by the statute." *Id.* The Court concluded that it was the policyholder's **death** that triggered the application of the statute, as opposed to the divorce that had taken place years earlier. The Court concluded that only when the policyholder died could the application of the statute be determined since, up until he passed away, he could have changed the designation of the beneficiary on his policy or alternatively, he could have confirmed the

designation. Accordingly, the statute did not go into effect, nor did the statute have any applicability, until the policyholder died. *Id.*

The same result on similar facts was reached in *In Re Estate of Dewitt,* 54 P.3d 849 (S.Ct. Colo. 2002). The sequence of events – marriage, life insurance policy taken out, divorce, statute passed, death of policyholder, was the same as in the instant case. The Supreme Court of Colorado found that the statute acted to revoke the designation of the ex-wife as the beneficiary of the policy, even though she remained the named beneficiary at the time of the insured's death, stating:

> "We find that the plain language of the foregoing provision indicates the General Assembly's intent that the **death** of an insured-decedent on or after (the effective date of the amendment), triggers application of the statute, notwithstanding that the insurance contract may have been entered into, and the divorce may have occurred, before the effective date of the statute."

Id., 54 P.3d at 856 (emphasis in original).

Accordingly, the South Carolina Court of Appeals in its Opinion in this case simply concluded, as has almost[2] every other Court that has examined the issue, that the application of this statute to the facts of this case is prospective, not retroactive, inasmuch as the event that triggers the application of the statute is the death of the policyholder.

B. APPLICATION IS EXPRESSLY AUTHORIZED BY THE EXPRESS TERMS OF THIS STATUTE

Additionally, the Petitioner's argument overlooks the simple fact that, as a plain matter of statutory construction, the statute expressly applies to the facts of this case. Stripped to its bare essentials, the statute mandates that "a Court Order . . . relating to . . . the divorce . . . of a marriage

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[2] One exception is based on the erroneous conclusion that such an application would be an unconstitutional Contracts Clause violation. See, *Metropolitan Life Insurance Company v. Melin*, 853 F.3d 410, 414 (CA8, 2017). This misconception was firmly laid to rest in *Sveen v. Melin*, 138 S.Ct. 1815 (2018) in which the United States Supreme Court firmly held that these statutes do not violate the Contracts Clause of the Constitution. *Id.*, 138 S.Ct. at 1818. The other exception is *Shaw v. U.S. Financial Life Insurance Company*, 2022 IL.App. (1st) 211533, ____N.E.3d ___ (2002) whose revocation on divorce statute, unlike South Carolina, is not based on the Uniform Probate Code.

. . . revokes any revocable . . . beneficiary designation made by a divorced individual to the divorce individual's former spouse in a governing instrument." S.C. Code §62-2-507(c). Since Bill's life insurance policy is a "governing instrument" within the meaning of §62-2-507(a)(4), and his designation of Burnsed as the primary beneficiary of his life insurance policy was and is "revocable" within the meaning of §62-2-507(a)(5), and a divorce is an act that revokes the designation of a spouse as the beneficiary of a life insurance policy in accordance with §62-2-507(c), then according to the plain, clear and unambiguous language of the statute, it applies to the circumstances of this case. When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the Court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear meaning of Section 62-2-507 is reinforced by Section 4(B)(1) of Act No. 100[3] which expressly mandates that the statute applies to estates of decedents dying **after** January 1, 2014. Similarly, §4(B)(2) of Act No. 100 mandates that the statute applies to judicial proceedings concerning estates of decedents and trusts commenced on or **after** January 1, 2014. In her Petition, the Petitioner attempts to re-write the foregoing provisions to read "probate estates" as opposed to "estates" which would include both probate and non-probate estates. It is respectively submitted that if the General Assembly had meant to say "probate estates" it would have said so. Instead, it purposely chose the broader, all-encompassing reference to simply "estates". It is worth noting that the driving force behind the enactment of §62-2-507, which extended the revocation-upon-divorce principle from wills to nontestamentary dispositions such as life insurance policies, was to eliminate the distinction between testamentary and nontestamentary transfers. S.C. Code Ann. §62-2-507, Reporter's Comment.

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[3] Section 62-2-507 came into being in 2013 when the South Carolina General Assembly passed Act No. 100, with an effective date of January 1, 2014.

Finally, any remaining doubt as to the application of the statute to the facts of this case should be removed by §4(B)(4) of Act No. 100, which expressly provides that "any rule of construction or presumption provided in this Act (applies) to governing instruments executed before" January 1, 2014. As previously noted, a life insurance policy is a "governing instrument" as defined in the statute, and the life insurance policy in this case was executed before January 1, 2014.

C. THE STATUTE IS REMEDIAL

All of this make sense when the remedial purpose and legislative intent behind §62-2-507 is considered. Revocation-upon-divorce laws are designed to clarify and effectuate a decedent's intent, not change it, after he or she is dead and unable to clarify his or her intent. These statutes apply only if, after a divorce, the now deceased person has not taken the formal steps during his or her lifetime to clarify his or her intent. The underlying premise behind these revocation-upon-divorce laws is that former spouses would not intend to benefit each other in any way other than that required by their divorce decree. In this case, the divorce decree between Bill and the Petitioner expressly provided that neither would have any financial obligation to the other in any form or fashion. In the decree, "each party waives any claim he/she may have against the other party." ROA, pg. 126. With respect to life insurance, an insured retains the right and ability to amend his beneficiary designation and has the right to clarify his intent to include a former spouse as a beneficiary. It is only when the insured fails to confirm the beneficiary designation after his divorce and before his death that the revocation-upon-divorce law kicks in and deems that the decedent would not have wanted his ex-spouse to benefit under the life insurance policy.

This is not a new concept. As previously noted, it dates back to English common law. It grew out of the English common law Doctrine of Revocation By Implication and was originally

applicable only to wills, but then over the years gradually expanded to include life insurance policies and other nontestamentary instruments such as trusts. When §62-2-507 was amended in 2013 the Reporter's Comment explained that the purpose of the statute is simply to "effectuate a decedent's presumed intent." S.C. Code Ann. §62-2-507, Reporter's Comment.

Section 62-2-507 is modeled on the Uniform Probate Code, which has been adopted by many states. One of those states is Utah, which has a revocation-upon-divorce statute similar to South Carolina's. In discussing that statute, the Tenth Circuit Court of Appeals stated:

> "The statute attempts to effectuate the intention of the donor, the Uniform Probate Code provision on which (the statute) is modeled derives from the recognition 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. Revocation upon divorce 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."

Id., 343 F.3d at 1318.

In the instant case, the presumption that Bill did not want his ex-spouse to receive his life insurance policy proceeds is not simply a presumption, but is a fact. The affidavits of numerous witnesses establish that Bill always wanted his son to be the beneficiary of this policy. The only reason he named Petitioner as the beneficiary was because his son was a minor at the time and he could not name him. As one witness put it, Bill would "roll over in his grave" if he knew that his ex-wife was trying to deprive his family of this policy, which is the major asset of his estate. It's worth noting that Bill and the Petitioner were married only a few short years, had no children together, she was just one of his ex-wives, and he was getting ready to become engaged to his longtime live-in girlfriend. The presumption -- that he did not want Petitioner to have his life insurance proceeds -- is the reality in this case. ROA, pp. 127-132.

II. THE APPELLATE COURTS OF EVERY STATE WITH A SIMILAR STATUTE HAVE REACHED THE SAME CONCLUSION AS THE SOUTH CAROLINA COURT OF APPEALS.

The precise issue now before this Court has been addressed many times by the Appellate Courts of other States. This is not surprising since many States, like South Carolina, have modeled their statute on the Uniform Probate Code.

For example, in *Stillman v. Teacher's Insurance and Annuity Association*, 343 F.3d 1311 (10th Cir. 2003) the sequence of events was the same as in this case (marriage, policy purchased, divorce, statute enacted, insured's death) and the Court held that the insured's death triggered application of the statute, thereby revoking his ex-spouse's designation as the beneficiary of his policy.

In so holding, the Court concluded that it was only when the insured died that the application of the statute could be determined. Up until he passed away, he could have changed his ex-wife's designation as the beneficiary of his policy, or alternatively, he could have confirmed his ex-wife's designation as the beneficiary of his policy. Accordingly, the statute did not go into effect, nor did the statute have any applicability, until the insured died. *Id.*, 343 F.3d at 1318

The same result was reached in *In Re Estate of DeWitt,* 54 P.3d 849 (S.Ct. of Colo. 2002). As in the case *sub judice*, the life insurance policy was taken out while the parties were married and the parties subsequently divorced. The revocation-upon-death statute was amended to include life insurance beneficiaries after the divorce, and the insured died after the statute's amendment. The Supreme Court of Colorado found that the statute acted to revoke the designation of the wife as the beneficiary of the policy, even though she remained the named beneficiary at the time of the insured's death, stating:

> "We find that the plain language of the foregoing provision indicates the General Assembly's intent that the **death** of an insured-decedent on or after (the effective

> date of the amendment), triggers application of the statute, notwithstanding that the insurance contract may have been entered into, and the divorce may have occurred, before the effective date of the statute."

Id., 54 P.3d at 856 (emphasis in original).

In *Thrivent Financial for Lutherans v. Andronescu*, 368 Mont. 256, 300 P.3d 117 (2013) the sequence of events was exactly the same as in the case *sub judice* – policy taken out naming spouse as primary beneficiary, divorce, revocation upon divorce statute enacted, and insured dies without changing the beneficiary designation. The ex-wife made the same claims as the ex-wife in this case, and those claims were soundly rejected by the Supreme Court of Montana. First, the Court held that applying the statute to a divorce that pre-dated the statute's effective date, was not an impermissible retroactive application of the statute, because the statute does not go into effect until the time of the insured's death. *Id.*, at 368 Mont. at 260, 300 P.3d at 120. The Court likewise held that prior to the insured's death, the ex-wife had no vested rights in the proceeds of his insurance policy, and therefore the operation of the revocation upon divorce statute did not impair any vested rights. *Id.*

In *Buchholz v. Storsve* 2007 S.D. 101, 740 N.W.2d 107 (2007) the factual background was also similar to the facts in the case *sub judice*, except a retirement plan was involved instead of a life insurance policy. In holding that South Dakota's revocation-upon-divorce statute applied to revoke the beneficiary designation, even though the divorce occurred prior to the effective date of the statute, where the death of the plan holder occurred after the effective date, the Court emphasized the legislative intent behind the enactment of the statute, stating:

> "The Uniform Probate Code provision on which (the revocation-upon-divorce statute) is modeled derives from the recognition "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." Revocation-upon-divorce 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. Thus, (the revocation-upon-divorce statute) attributes an intent to the donor based on an assessment of the typical donor's intention. We also note that the statutory attribution is rebuttable."

Id., 740 N.W.2d at 111.

The Buchholz Court also expressly rejected one of the arguments raised by Petitioner in this case – that Bill must have wanted her to have his life insurance policy proceeds because he never removed her as the beneficiary of the policy. In rejecting this argument, the South Dakota Supreme Court stated:

> "Storsve also argues that Linda's inactions of not removing him as the beneficiary indicates her intent to leave Storve as the beneficiary despite the couple's divorce. However, we observe that Courts have considered and rejected this same argument raised by Storsve. . . . [T]he purpose of the revocation-upon-divorce or re-designation statute, as similar statutes have been termed by various Courts, would be eviscerated if a former spouse could circumvent the automatic revocation effected by the statute by submitting self-serving testimony that the decedent spouse's inaction reflected an intention to revive his or her designation of the ex-spouse as the beneficiary."

Buchholz v. Storsve, 740 N.W.2d at 112, citations omitted. See *Estate of Lamparella*, 210 Ariz. 246, 109 P.3d 959, 966 (Ct.App.Div. 1 2005); and *Mearns v. Scharbach*, 103 Wash.App. 498, 12 P.3d 1048, 1053 (Div.3 2000).

In fairness, it should be pointed out that there are two (2) contrary cases. One of these has been soundly rejected by the United States Supreme Court and the other case involved a statute that is <u>not</u> based on the Uniform Probate Code.

The first case is *Metropolitan Life Insurance Company v. Melin,* 852 F.3d 410, CA8 (2017) in which the Court refused to apply the Revocation Upon Divorce statute. This decision, however, was based upon the erroneous belief that such an application would be an unconstitutional Contracts Clause violation. *Id.*, 853 F.3d at 414. This issue was firmly laid to rest in *Sveen v.*

Melin, 138 S.Ct. 1815 (2018) in which the United States Supreme Court firmly held that these statutes do not violate the Contracts Clause of the Constitution. *Id.,* 138 S.Ct. at 1818.

The second case is *Shaw v. U.S. Financial Life Insurance Company,* 2022 IL. App. (1st) 211533, ___ N.E.3d ___ (2022) whose Revocation on Divorce statute, unlike South Carolina's, is **not** based on the Uniform Probate Code. The *Shaw* Court, after citing a plethora of cases from other jurisdictions, including the decision of the South Carolina Court of Appeals in this case, holding that Revocation Upon Divorce Statutes apply to revoke beneficiary designations even where the statute at issue was enacted after the date of the divorce, noted that these cases were of "limited utility" inasmuch as they were all based upon the Uniform Probate Code. The Court noted that this was "highly relevant" inasmuch as the Uniform Probate Code, and the statutes from these other jurisdictions (including South Carolina) contain a provision that any "rule of construction or presumption" applied to instruments executed prior to the effective date of the statute absent a clear indication of a contrary intent. The statute before the *Shaw* Court contained no such provision. Contrary to what the Petitioner argues in her Petition, the *Shaw* Court did not criticize the decision of the South Carolina Court of Appeals in this case, but rather cited it with approval, but noted that it could not reach the same conclusion because the statute before it was significantly different, inasmuch as the Illinois Legislature had expressly declined to follow the Uniform Probate Code. *Id.*, pg. 8 and 9. ("Finally, we find it notable that our legislature chose not to use the same language as contained in the Uniform Probate Code."). *Id.*, pp. 8 and 9.

III. THE STATUTE IS REMEDIAL.

South Carolina's Revocation Upon Divorce Statute is clearly remedial. The central driving force behind its enactment was to remedy exactly the type of wrong which Burnsed now seeks to promote. In the words of the United States Supreme Court, "[t]he underlying idea was that the

typical decedent would no more want his former spouse to benefit from his pension plan or life insurance than to inherit under his Will. A wealth transfer was a wealth transfer - - and a former spouse (as compared with, say, a current spouse or child) was not likely to be its desired recipient." *Sveen v. Melin*, 584 U.S. at ____, 138 S.Ct. 1815, 1819 (2018).

IV. THE DECISION BY THE SOUTH CAROLINA COURT OF APPEALS IS FULLY SUPPORTED BY THE DECISION OF THE UNITED STATES SUPREME COURT IN *SVEENE V. MELIN.*

Petitioner argues that the Court of Appeals erred in relying upon several cases because these cases relied upon "Professor Waggoner's theory" and "Professor Waggoner's theory" was rejected by the United States Supreme Court in *Sveen v. Melin*, 201 L.Ed.2d 180, 138 S.Ct. 1815 (2018). Quite frankly, this argument is not true and makes no sense.

In *Sveen v. Melin*, the United States Supreme Court never mentions Professor Waggoner, much less what Petitioner now calls "Professor Waggoner's theory."

The United States Supreme Court in *Sveen v. Melin* ratified and approved, as opposed to rejected, the cases upon which the Court of Appeals relied in deciding this case. The Supreme Court granted certiorari to hear *Sveen v. Melin* "to resolve a split of authority of whether the Contracts Clause prevents a revocation-upon-divorce law from applying to a pre-existing agreement's beneficiary designation." *Sveen v. Melin*, supra. 138 S.Ct. at 1821 (2018). Prior to *Sveen,* a minority of jurisdictions had held that the Contracts Clause was violated by the revocation-upon-divorce statute, while the vast majority of jurisdictions had concluded that the Contracts Clause was not violated. Those jurisdictions in the majority included *Stillman v. Teachers Ins. & Annuity Ass'n College Retirement Equities Fund,* 353 F.3d 1311 (10th Cir. 2003) and *In Re Estate of DeWitt,* 54 P.3d 849 (Colo. 2002) which are two (2) of the cases relied upon by the Court of Appeals in this case. Contrary to what Petitioner argues, *Stillman* and *In Re Estate*

of DeWitt were ratified and reaffirmed by the United States Supreme Court in *Sveen v. Melin*, not rejected.

In *Sveen v. Melin* the United States Supreme Court, in holding that revocation-upon-divorce statutes do not violate the Contracts Clause, stated:

> "First, the statute is designed to reflect the policyholder's intent – and so to support, rather than impair, a contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment."

Sveen v. Melin, 138 S.Ct. at 1822.

The United States Supreme Court expounded on the remedial purpose underlying the statute's legislative intent, stating:

> "As earlier described, legislatures have long made judgments about a decedent's likely testamentary intent after large life changes – a marriage, a birth, or a divorce. And on that basis, they have long enacted statutes revoking earlier-made wills by operation of law. Legislative presumptions about divorce are now especially prevalent – probably because they accurately reflect the intent of most divorcing parties. Although there are exceptions, most divorcees do not aspire to enrich their former partners. The Minnesota (revocation-upon-divorce) statute, like the Model Code it tracked, applies that understanding to beneficiary designations in life insurance policies and other will substitutes. Melin rightly notes that this extension raises a brand-new constitutional question because "an insurance policy is a contract under the Contracts Clause, and a will is not." But on answering that question, it matters that the old legislative presumption equally fits the new context: A person would as little want his ex-spouse to benefit from his insurance as to collect under his will. Or said otherwise, the insured's failure to change the beneficiary after divorce is more likely the result of neglect than choice. And that means the Minnesota (revocation-upon-divorce) statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term."

Id.

V. THE STATUTE IS BASED UPON A REBUTTABLE PRESUMPTION.

As previously noted, the statute is based upon the "legislative presumption" that a person would not want his ex-spouse to benefit from his insurance policy, that an insured's failure to

change the beneficiary after divorce is more likely to result in neglect then choice, and that the statute often honors, not undermines, the intent of the only contracting party to care about the beneficiary term. *Sveene v. Melin*, 138 S.Ct. at 1822.

VI. THE SOUTH CAROLINA COURT OF APPEALS PROPERLY CONSIDERED TWO (2) FEDERAL DISTRICT COURT DECISIONS.

Perhaps reflective of the extensive research and due diligence exercised by the South Carolina Court of Appeals prior to rendering its decision, the Court discusses in its Opinion two (2) unpublished[4] cases decided by the United States District Court for the District of South Carolina. These two (2) cases are *State Farm Insurance Company v. Murphy*, 2017 WL 4551489, Case Number 2:15-cv-04793-DCN (October 12, 2017) and *Protective Life Insurance Company v. LeClaire,* 2018 WL 3222796, Civil Action Number 7:17-cv-00628-AMQ (July 2, 2018).

After reciting the facts from Judge Norton's opinion in *State Farm Life Insurance Company v. Murphy,* supra, the South Carolina Court of Appeals in its Opinion simply moved on in its Opinion to the next case, apparently concluding, rightfully so, that Judge Norton's Opinion did not shed any light on the issue before the Court of Appeals, inasmuch as it is apparent from the Opinion that neither Judge Norton, nor the parties before him, briefed, discussed, or even considered the issue which was before the Court of Appeals. It is clear from Judge Norton's Opinion that the contingent beneficiary never even raised the question as to the statute's applicability to a divorce that pre-dated the effective date of the statute. The Court of Appeals, accordingly, rightfully concluded that the Opinion did not warrant further discussion.

The second unpublished Opinion is the Opinion of Judge Quattlebaum in *Protective Life Insurance Company v. LeClaire,* supra. The facts before Judge Quattlebaum are similar to the

[4] It is worth noting that unpublished opinions in both South Carolina and the Fourth Circuit have no precedential value. *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 526 S.E.2d 253 (Ct.App. 2000) and SCACR 220(a); *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996) and Fourth Circuit Local Rule 32.1.

facts now before this Court – the couple divorced in 2003, the Act went into effect in 2014, and the insured died in 2016 without changing the designation of his ex-wife as the benefit of a policy of life insurance he had taken out while they were married. In concluding that South Carolina's revocation-upon-divorce statute revoked the designation of the ex-spouse as the beneficiary of the subject life insurance policy, despite the fact that the divorce predated the effective date of the statute, Judge Quattlebaum cut to the chase, emphasizing the following two points.

First, after noting that the cardinal rule of statutory construction is a Court must ascertain and give effect to the intent of the legislature and the plain text of the statute is considered the best evidence of the legislative intent, Judge Quattlebaum concluded that the plain language of S.C. Code Ann. §62-2-507(c)(1)(i) expressly directs that the statute be applied "retroactively." *Id.,* pg. 3.

Second, in response to the ex-spouse's argument that "retroactive" application of the statute would violate the Contracts Clauses of the State and Federal Constitutions, Judge Quattlebaum noted that this question had been "squarely" decided by the United States Supreme Court in *Sveen v. Melin* and there was no constitutional violation. Judge Quattlebaum emphasized that the United States Supreme Court in *Sveen v. Melin* specifically referenced South Carolina as one of twenty-six (26) states having adopted a revocation-upon-divorce law substantially similar to the one at issue before the Supreme Court. Judge Quattlebaum noted that "this binding precedent controls" and therefore rejected the ex-spouse's argument. *Id.,* pg. 4.

VII. DECISIONS BY THE APPELLATE COURTS OF ILLINIOS, PENNSYLVANIA AND MASSACHUSETTS SUPPORT THE DECISION BY THE SOUTH CAROLINA COURT OF APPEALS.

As previously noted, in *Shaw v. U.S. Financial Life Insurance Company*, 2022 IL at App. (1st) 211533, ____ N.E.3d ____ (2022) the Third Division in the First District of the Appellate

Court of Illinois reached a seemingly opposite conclusion because the statute before it, unlike the statutes before every other Appellate Court which has faced this issue, was not based upon the Uniform Probate Code. It is not surprising, of course, that a different statute might yield a different result.

In *Parsonese v. Midland National Insurance Company,* 550 Pa. 423, 706 A.2d 814 (1998) the Supreme Court of Pennsylvania concluded that application of the Revocation Upon Divorce statute "would be unconstitutional, in violation of the Contracts Clause." *Id.,* 550 Pa. at 434, 706 A.2d at 819. As previously noted, the United States Supreme Court in *Sveene v. Melin*, supra, laid this argument to rest, concluding with finality that the Revocation Upon Divorce Statutes do not violate the Contracts Clause of the Constitution.

Finally, in *American Family Life Assurance Company of Columbus v. Parker*, 488 Mass. 801, 178 N.E.3d 859 (2022) Sean purchased a policy of life insurance on his life naming his wife, Dawn, as the beneficiary. They subsequently divorced. After Sean passed away without changing the beneficiary designation, Dawn claimed entitlement to the policy's proceeds, claiming that Massachusetts' Revocation Upon Divorce statute "does not apply retroactively to Sean's policy." *Id.,* 48 Mass. at 807, 178 N.E.3d at 864. The Supreme Judicial Court of Massachusetts disagreed, stating:

> "On its face, (the statute) clearly makes the entire Act, including the Revocation-On-Divorce provision in Section 2-804, apply retroactively to Sean's policy, because the policy was revocable until his death in 2018. This comprehensive retroactivity provision appears consistent with the intentions of the drafters of the Uniform Probate Code **and the interpretation of all the Courts and commentators that have considered the question** of retroactivity. The drafters of the Uniform Probate Code, like the Supreme Court in *Sveene*, concluded that the new default rule it adopted better reflected the intention of divorced spouses than the old rule it replaced. That intention, as summarized by the Joint Editorial Board for the Uniform Probate Code, was "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."

Id., 488 Mass. at 807-08, 178 N.E.3d at 865 (emphasis added). The Court accordingly concluded that Dawn's designation as beneficiary of Sean's life insurance policy was revoked by Sean's failure to reaffirm that designation following their divorce and prior to his death.

VIII. REVOCATION UPON DIVORCE STATUTES DO NOT RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

The Petitioner argues that the South Carolina Courts should strive to construe a statute where possible to avoid a serious constitutional question. The statute at issue in this case, however, does not raise any serious constitutional questions. Any possible constitutional questions were resolved by the United States Supreme Court in *Sveene v. Melin*, 138 S.Ct. 1815 (2018).

IX. THE SUBJECT STATUTE AFFECTS RIGHTS AND RELATIONS.

Petitioner argues that the applicability of Act 100 could affect a myriad of rights and relations and accordingly "the matter should be resolved."

The short answer is that the matter has been resolved. The South Carolina Court of Appeals has spoken, quite clearly. The Court of Appeals has decided to respect the public policy upon which the statute was founded, and to effectuate the legislative intent behind the enactment of the statute. The Court of Appeals has decided to follow the decisions and reasoning of every single Appellate Court that has examined a similar statute. A decision by the South Carolina Court of Appeals simply does not create any confusion, as alleged by Petitioner. It simply follows a long line of cases which have examined this issue in depth, from trial court decisions all the way to the United States Supreme Court.

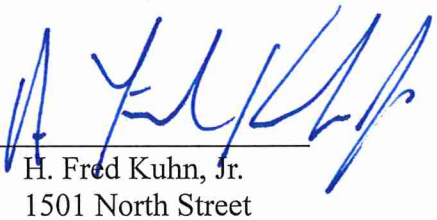
CONCLUSION

The decision by the South Carolina Court of Appeals is exhaustively researched and well-reasoned. In its decision the South Carolina Court of Appeals has simply enforced the plain and

unambiguous language of the statue and applied the clear and definite language of the statute to the facts of this case. It is accordingly respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MOSS & KUHN, P.A.

By: 

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