No. 99-1529

IN THE
Supreme Court of the United States

DONNA RAE EGELHOFF,

Petitioner,

v.

SAMANTHA EGELHOFF, A Minor, By and Through Her Natural Parent Kate Breiner, and DAVID EGELHOFF,

Respondents.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF FOR RESPONDENTS

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, DC 20008
(202) 237-8165

MICHAEL W. JORDAN
2201 North 30th St.
Tacoma, WA 98403
(253) 627-4040

THOMAS C. GOLDSTEIN
(Counsel of Record)
AMY HOWE
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Counsel for Respondents

September 18, 2000

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*., preempts a Washington state domestic relations law regarding the consequences of divorce on the disposition of nonprobate assets, RCW 11.07.010(3)(a), notwithstanding that such law merely establishes a default rule regarding interpretation of spousal beneficiary designations that can be avoided with no adverse consequence, provides a claim only against the divorced spouse and not any ERISA plan, can and will be implemented through a qualified domestic relations order when final judgment is eventually entered, and imposes no burden on plan administration?

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The Washington Supreme Court's opinion (Pet. App. 1a-28a) is reported at 989 P.2d 80. The Washington Court of Appeals' opinion (Pet. App. 29a-44a) is reported at 968 P.2d 924. The Washington Superior Court's summary judgment orders (Pet. App. 45a-48a) are not reported.

JURISDICTION

For the reasons described in respondents' brief in opposition to certiorari, BIO 4-5, this Court lacks jurisdiction because the decision of the Washington Supreme Court in these consolidated proceedings is not a "final judgment or decree" as required by 28 U.S.C. § 1257(a). In particular, as we discuss *infra* at 16-19, this Court's disposition of the federal issue presented may be substantially affected by whether the trial courts on remand from the Washington Supreme Court enter "qualified domestic relations orders" ("QDROs"), which are expressly immune from preemption under ERISA. 29 U.S.C. § 1144(b)(7).

Petitioner is therefore wrong to state that this Court has jurisdiction in this case because "nothing remains to be done but the mechanical entry of judgment by the trial court." Pet. Br. 1 (citation omitted). The form and content of the remedy to be entered on remand are neither pre-determined nor "mechanical" because they could take this case out of the realm of preemption entirely and, furthermore, easily could give rise to new federal-law disputes over the form and effect of the QDROs. When proceedings on remand might impact federal issues, the judgment is not final and this Court lacks jurisdiction. See *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105, 120 (1981) (decision nonfinal because subsequent proceedings may "have a significant effect on the federal constitutional issues presented"); *San Diego Gas & Elec. Co.* v.

San Diego, 450 U.S. 621, 632-33 (1981) (no finality in takings context where courts have resolved only the right or the remedy, but not both).[1] The Court therefore should dismiss this case for want of jurisdiction.

STATUTES INVOLVED

RCW 11.07.010 is reproduced as the appendix to this brief.

STATEMENT

a. Respondents Samantha and David Egelhoff ("the children") are the children of David Egelhoff ("David") and his first wife, Kate Breiner. Petitioner Donna Rae Egelhoff ("Donna") was David's second wife. David and Donna had no children.

While married to Donna, David participated in two ERISA-governed benefit plans through his employer, Boeing Corporation. He participated in an "employee pension plan," 29 U.S.C. § 1002(2), known as the Voluntary Investment Plan ("VIP" or "pension plan"), which accumulated a total value of approximately $35,000 during his employment. He also received a life insurance policy qualified as an "employee welfare benefit plan," *id.* § 1002(1), which was administered by Aetna Insurance Company and which provided an accidental-death benefit of $46,000.

David and Donna divorced in the spring of 1994. Washington community property law required that they divide all their assets between them. See Superior Court Judges Ass'n

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[1] See also *Pope* v. *Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 382 (1953) (finality rule avoids "decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation"); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69, 71 (1948) (no finality when basic right has been decided, but remedy may be accomplished "in any one of three ways" and "the matters left open may generate additional federal questions").

Educ. Comm., Benchbook Subcomm., *Washington Judges Family Law Benchbook* 39 (2d ed. 1996). Divisible "property" in Washington includes the present value of pension benefits, which for a defined contribution plan, such as David's VIP, is the account balance. *Id.* 31. By contrast, a contingent life-insurance benefit is treated as an "expectancy," not included within divisible property. *Id.*

David and Donna's jointly presented and court-approved divorce decree sets forth "an equitable division" of their community property, specifying the assets to be retained by each. JA 22, 31-34. Donna was assigned ten different pieces of property, including a business, an IRA, and stock. *Id.* 34. David received, *inter alia*, the pension plan: "100% of his Boeing retirement 401K and IRA." *Id.* 33. The contingent life-insurance benefit, as a mere expectancy, was not included in the property required to be divided and the rights to it therefore remained with David.

b. Eight weeks after the divorce, David was involved in an automobile accident and died intestate. Through means not specified in the record, but as is typical when death benefits are to be paid, the two plans obtained a copy of David's death certificate. That standard-form state certificate identifies David's date of death and states that he has no surviving spouse. See Resp. Lodging, Exh. 1.

Aetna, recognizing that Donna was divorced from David – expressing its "sincere sympathy" for her "ex-spouse's death," JA 29 – paid the life insurance benefits to her. Regarding David's VIP account balance, which automatically converted to a death benefit, JA 39, Boeing agreed to await court determination of the proper recipient. Resp. Lodging, Exh. 2.

c. Before this Court are two state-law actions, consolidated on appeal, regarding the proper disposition of the two death benefits. The suits are entirely between the children and Donna; the plans are not now and have never been parties

and no claim is stated against them. The Washington Supreme Court held, based on a state statute, that the children were entitled to the value of both assets. The court also rejected Donna's claim that the statute was preempted by ERISA.

1. The children brought a state-law conversion suit against Donna for the value of the life-insurance benefit. JA 24. The children separately moved in the probate proceedings regarding David's estate for a determination that they were entitled to the pension benefits. *Id*. 20; see RCW 11.96.070(2)(f) (disposition of nonprobate assets may be determined in probate proceedings).

2. Donna contended that she was entitled to the benefits as the designated beneficiary of the life insurance and pension plans. The life-insurance beneficiary designation form is in the record. It specifically inquires into David's marital status and designates as the beneficiary "Donna R. Egelhoff Wife." Resp. Lodging, Exh. 3. The pension beneficiary designation form is not in the record. Boeing, which has appeared as an *amicus* and is financing this litigation on behalf of Donna, has refused to provide respondents' counsel with a copy of the designation form. Donna's counsel, in turn, have refused to request the form from Boeing. Thus, although the parties have stipulated that David named Donna as the beneficiary of the pension plan, it is not known whether, as on the insurance form, he specified on the pension form "Donna R. Egelhoff *Wife*."

The children argued that Donna had waived any right to the pension proceeds by agreeing to a divorce decree allocating various assets to her and "100%" of the pension to David, and that Donna's divorce from David invalidated any prior designation of her as beneficiary of David's benefits under RCW 11.07.010. That statute provides that upon divorce, unless the divorce decree otherwise specifies, a designation "that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an

interest or power to the decedent's former spouse is revoked." RCW 11.07.010(2)(a), (b)(i), (b)(ii). Nonprobate assets include essentially all those that pass upon death through instruments other than a will. *Id.* 11.07.010(5). The statute creates a specific cause of action against an ex-spouse for the proceeds of wrongly acquired benefits. *Id.* 11.07.010(4)(a).

The statute sets only a default rule. Any instrument governing a nonprobate asset can avoid the statute by merely saying so in the instrument itself or on any particular designation. RCW 11.07.010(2)(b)(i); JA 11. Such a statement in the instrument or designation categorically exempts that nonprobate asset from the rule. *Id.* In addition, the participant can provide that the ex-spouse will remain the beneficiary. RCW 11.07.010(2)(b)(i); JA 11. Finally, the statute does not affect annuities or other benefits mandated by federal or state law or otherwise guaranteed by an instrument such as a QDRO. RCW 11.07.010(2)(b)(ii), (iii).

For instruments subject to the statute, entitlement to a death benefit is determined according to the terms of the plan "as if the former spouse failed to survive the decedent." RCW 11.07.010(2)(a). In this case, neither of the plans is in the record. In the Washington appellate courts, Boeing provided respondents' counsel with a copy of the pension plan. Resp. Lodging, Exhs. 4 (1996 version of plan), 5 (plan document detailing pre-1996 amendments). But in this Court, it has refused to provide a copy of the life insurance plan. Donna's counsel, again, have refused to request that Boeing provide the plan.

The record does contain "[a]n incomplete 'summary'" of both plans, Pet. App. 3a n.5 (state supreme court opinion), in the form of "summary plan descriptions" ("SPDs"). Under the pension SPD, if the designated "beneficiary is no longer living," or if there is "an invalid beneficiary designation" or the participant "ha[s] not designated a beneficiary on the appropriate form," benefits will be paid to the following alternate beneficiaries:

1. To [the participant's] surviving spouse.

2. If there is no surviving spouse, to [the participant's] children in equal shares.

3. To another relative designated by the Voluntary Investment Plan Committee or to [the participant's] estate.

JA 40. Thus, according to the pension SPD, because David had no "surviving spouse" when he died, entitlement to the benefits rested with respondents as David's "children."

Unlike the pension SPD, the life insurance SPD does not include an alternate beneficiary scheme.

3. Donna argued that RCW 11.07.010 was preempted by ERISA. Donna further argued that the divorce decree did not specify that David would receive the pension asset upon death and hence she did not waive her claim to it.

4. In summary orders, both trial courts held that Donna was entitled to the pension and life-insurance proceeds. Pet. App. 46a, 48a.

5. The children appealed. The Washington Court of Appeals consolidated the two cases and reversed, holding that "ERISA does not preempt the state law in question and that Donna was not entitled to the insurance proceeds or pension funds." *Id*. 30a. The court found the children entitled to the pension benefits as alternate beneficiaries under the SPD, Pet. App. 34a, and entitled to the life-insurance benefits because, absent an alternate beneficiary, David's estate became the legal beneficiary and the children are statutory heirs to his estate. *Id*. (citing RCW 11.05.040, 48.18.390).

The court of appeals held that ERISA does not preempt RCW 11.07.010, relying on this Court's cases substantially limiting ERISA preemption in "areas traditionally left to state regulation." Pet. App. 35a-36a, 40a-41a. The court of appeals found no substantial burden on plan administration because RCW 11.07.010 "does not affect the administration of

plans; instead, it affects merely the ultimate ownership of distributed benefits." *Id*. 39a (citation omitted). The court further found that Washington law required the plans to make no factual inquiries beyond those already required by ERISA and allowed conflicting claims to benefits to be resolved by the courts. *Id*. 40a & n.13. The court finally emphasized that its holding only permitted the children "to look solely to Donna for the funds," *id*. 43a, and that any potential claim against the plans would have to be addressed in "a separate action," *id.* 44a n.18.

6. Donna appealed. The Washington Supreme Court affirmed respondents' entitlement to the value of the benefits, Pet. App. 28a, and remanded for further proceedings.

The state supreme court first carefully considered this Court's ERISA preemption decisions, including its narrowing of the preemption doctrine since *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 646 (1995), Pet. App. 13a, 18a, and the presumption that ERISA does not supplant state laws in areas traditionally regulated by the states, *id.* 14a, 19a. The court found that presumption applicable because RCW 11.07.010 is an exercise of "Washington's sovereign interest in exercising its traditional police powers in the area of domestic relations and family law." *Id.* 15a; see also *id.* 19a ("RCW 11.07.010 involves an area of domestic and family [law] that has long been the traditional domain of the states.").

The presumption against preemption is not overcome here, the court concluded, because RCW 11.07.010 "does not alter the nature of the plan itself, the administrator's fiduciary duties, or the requirements for plan administration." Pet. App. 21a. Instead, when RCW 11.07.010 applies, it merely "bring[s] the [plan's] default distribution provisions into effect." *Id.* The court also rejected Donna's claims that the statute interfered with or burdened plan administration, and rejected any alleged conflict with ERISA's anti-alienation provision. *Id*. 16a-17a, 22a & n.100, 24a, 26a.

d. On remand, the trial court in the pension proceedings entered an order specifying that respondents were entitled to the benefits. Resp. Lodging, Exh. 6. No order has yet been entered in the life insurance proceedings.

e. Donna petitioned this Court, which granted certiorari.

SUMMARY OF ARGUMENT

1. Petitioner has attacked an imagined version of Washington law and speculative applications of that law that have little to do with this case. For three overarching reasons not even addressed by petitioner, respondents' claims under Washington state law are not preempted. First, RCW 11.07.010 is strictly optional – any instrument governing a nonprobate asset, including ERISA plans, can completely opt out of the law. The statute expressly states that the divorce-revocation rule does not apply whenever "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise." RCW 11.07.010(2)(b)(i); see also JA 11. In short, Washington law simply sets a default rule, which creates no cognizable burden on ERISA plans.

Second, the cases under review, and any subsequent final judgments therein, are exclusively between Donna and the children, and do not involve or create rights against any ERISA plans. Whatever burdens on ERISA plans that petitioner may imagine arise from other portions of Washington law; the provision at issue in this case imposes no conceivable burden whatsoever on any ERISA plan.

Third, when the abstract rights in this case are reduced to actual judgments, they can be in the form of qualified domestic relations orders ("QDROs"), which are expressly exempt from ERISA preemption. 29 U.S.C. § 1144(b)(7). Indeed, the initial order entered on remand regarding the pension proceeds already satisfies the requirements of a QDRO. Any conceivable dispute over the exempt status of the eventual orders is best taken up on remand and only by this Court after the entry of final orders in this case.

2. Petitioner's affirmative arguments are incorrect.

a. This case represents a ideal example of where this Court's presumption against preemption of state law applies at its fullest. The case involves the traditional state-law area of family law and domestic relations, dealing as it does with the consequences of divorce. Washington has a strong interest in seeing that the default consequences of divorce are compatible with its community property regime and with the treatment of all other devisable assets. The presumption against preemption is confirmed rather than rebutted by ERISA's QDRO provisions, which provide an unimpeachable safe harbor for a certain class of orders that would otherwise conflict with ERISA provisions, but that in no way imply preemption of all other domestic relations orders that do not so conflict.

b. Numerous other longstanding state laws dealing with beneficiary designations corroborate that this area is one of traditional state, not federal, law. In particular, state laws concerning revocation of benefits for "slayers" who kill their spouses, state simultaneous death statutes, and state law governing the content of such common beneficiary terms as spouse, children, death, and divorce, all show sweeping and important state involvement in beneficiary determinations.

c. Nor does RCW 11.07.010 interfere with the uniform administration of ERISA plans or impermissibly "bind" plan administrators to certain choices. The numerous exceptions to ERISA preemption illustrate that uniformity is only one goal among the many animating ERISA. Uniformity routinely has yielded to other important goals and should not be given talismanic weight, especially where there is no danger of deterring the adoption or maintenance of benefit plans. Furthermore, RCW 11.07.010 does not create an impermissible burden on plans by requiring them to determine the marital status of plan participants. Two ERISA provisions already require the identical inquiry, demonstrating both that Washington law imposes no new administrative requirement and

also that Congress concluded that an inquiry into participants' marital status would not unduly burden ERISA plans. Nor will ERISA plans be impermissibly burdened by multiple state laws or the risk of double liability. The variation in state law is minor at best, the applicable law can be readily determined, and plans can always specify which law to apply or opt out entirely. Finally, in any instance of conflicting claims, plans can always leave resolution of the dispute to the parties and the courts without themselves having to bear the decisional burden.

d. Petitioner is also wrong in her claim that RCW 11.07.010 conflicts with various ERISA provisions imposing duties on plans vis-à-vis beneficiaries and, relatedly, constitutes a prohibited "alienation" of benefits from a beneficiary to a third party. RCW 11.07.010 provides that entitlement to benefits is determined under the provisions of the plan, and consequently any alternate recipient is also a beneficiary under the plan and under ERISA. ERISA defines "beneficiary" as "a person designated by a participant, *or by the terms of an employee benefit plan*, who is *or may become* entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added). Here, the children plainly fit that definition because the pension plan expressly provides that they "may become entitled" to benefits in a variety of circumstances – *i.e.*, if there is no surviving spouse and the named beneficiary predeceases the participant, or the beneficiary designation is "invalid," or the participant fails to make a designation at all. JA 40. For the same reason, RCW 11.07.010 does not conflict with ERISA's "anti-alienation" provision: There is no alienation in this case, and the benefits are paid out according to the terms of the plan, not to any third-party assignee.

e. Nor does RCW 11.07.010 conflict with the duty of plan administrators to abide by the terms of the plan. 29 U.S.C. § 1104(a)(1)(D). State law does not require anything in conflict with the plan, and even if it did, only ERISA's provisions themselves, and not the ERISA plans, can preempt

state law. Congress has not delegated such preemptive authority to plans that they may write their way out of all state laws merely by saying so in an ERISA plan.

f. Even were this Court to find that ERISA preempted state law in this area, because ERISA does not address this issue at all, courts will inevitably have to choose or create law to fill those gaps. If this Court were to favor application of federal law, and hence the creation of a federal common-law rule, the net result should be the same: Any federal common law should look to state law for its content and hence adopt state statutes governing the impact of divorce on beneficiary designations in those states having such statutes or comparable common-law rules.

g. Finally, petitioner has not overcome the presumption against preemption because she has not produced documents essential to her claims – the life-insurance plan and the pension plan designation form – which are not in the record and which her counsel refuse to request from Boeing.

ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED ON SEVERAL GROUNDS NOT ADDRESSED BY PETITIONER.

A. RCW 11.07.010 Allows Plans To Opt Out and Thus Does Not Impose A Substantial Burden.

Petitioner's argument fundamentally rests on the assertion that RCW 11.07.010 will interfere with ERISA plan administration because plans must determine the marital status of their participants and because the states disparately treat spousal designations upon divorce. Those burdens are imaginary for a variety of reasons discussed below, but there is one especially glaring flaw in petitioner's argument: RCW 11.07.010 sets only a *default rule*, from which plans can *completely* opt out at their own discretion. The divorce-revocation rule does not apply whenever "[t]he instrument

governing disposition of the nonprobate asset expressly provides otherwise." RCW 11.07.010(2)(b)(i); see also JA 11.

Having to express a decision to opt out is not a cognizable burden. The pension plan SPD already states that "*documents* such as divorce decrees" cannot change a designation, JA 40 (emphasis added), and the SPD need only further specify that the same rule applies to *statutes* regulating designation upon divorce. Including such a statement is no burden at all because ERISA plans are regularly amended in numerous respects. *E.g.*, Resp. Lodging, Exh. 4, at 14-1 (pension plan may be amended "at any time and for any reason"). For example, between 1994 and 1996, the pension plan at issue in this case was amended in seven different respects. Resp. Lodging, Exh. 5, at 3.

This minor effort required of the plan to express its choice to avoid Washington's default approach is trivial compared to the cost for avoiding the preferred state options in *Travelers* or *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A.*, 519 U.S. 316 (1997). In *Travelers*, a plan was free to insure through someone other than the Blues, but would pay a considerable premium if it exercised that choice. 514 U.S. at 650, 652. And in *Dillingham*, the apprenticeship programs could likewise ignore California's requirements, but only at the cost of their beneficiaries not qualifying for apprentice wages on certain projects. 519 U.S. at 319, 332. Yet in both of those cases, this Court found that state law merely created an incentive to choose a preferred path, not an impermissible burden on plans. *Travelers*, 514 U.S. at 659-60; *Dillingham*, 519 U.S. at 332. In this case, by contrast, there is no adverse consequence to any plan or beneficiary that chooses to avoid RCW 11.07.010.

Any incidental burden on plans is also far overborne by the state's substantial interest in setting a default rule. As noted below, Washington applies the same rule of revocation upon divorce to all probate and nonprobate assets. See *infra* at 22-23. Citizens of Washington are therefore able to man-

age their affairs with a clear understanding that past probate and nonprobate designations of former spouses are ineffective. Indeed, such uniformity was a principal purpose of extending the divorce-revocation rule from wills to nonprobate assets. See *infra* at 22-23. When this uniform rule will not apply – as when an ERISA plan would avoid the revocation rule – it is essential that Washington citizens be on notice so they will know to file a revised beneficiary designation form. RCW 11.07.010 simply requires that such a choice appear explicitly so that affected citizens can manage their affairs accordingly.[2]

Petitioner's contrary approach would hold that spousal designations are automatically revoked by statute for all wills and nonprobate assets *except* ERISA plans, as to which state law is preempted. Such a rule would cause serious confusion and injustice if for no other reason than that average citizens, not conversant in ERISA coverage or preemption, will not understand which designations are revoked upon divorce.

It is virtually inconceivable that Congress intended to prevent states from adopting such a clear default rule regarding the disposition of assets upon divorce. Because determinations regarding beneficiary status are squarely within the traditional sphere of state regulation, particularly as applied to family law, a strong presumption exists that Congress did not intend to preempt divorce-revocation statutes at all. See *infra* at 19-20. But when those statutes simultaneously address any federal administrative concerns by allowing ERISA plans to opt entirely out of the statute, there is no serious basis for invalidating state law.

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[2] The pension SPD in this case illustrates the state's concern. The SPD instructs participants that they must designate their spouses absent the spouse's express consent to the contrary. JA 39-40. But the SPD does not explain that any such obligation terminates upon divorce. Without the plain statement required by RCW 11.07.010, participants may be left seriously confused about the effect of a divorce on their designations.

B. The Final Judgments In This Case Will Run Only Against Donna, Not Against The Plans.

Petitioner's purported concerns for the administration of ERISA plans are wholly misplaced for the further reason that the Washington Supreme Court's holding does not impose any duties on ERISA plans or create any rights against such plans. Instead, this is a state-law action brought under a statutory provision that applies only to private parties. Donna possesses an asset (the life insurance proceeds) and asserts that she is entitled to retain the value of another (the pension proceeds). The children dispute her claim, based on the specifics of Donna's divorce decree and the legal consequences of divorce in general.

Critically, the provision on which the children rely allows them to state a claim *only* against Donna, not against the plans. Under subsection (4)(a) of RCW 11.07.010, "a former spouse * * * who, with actual knowledge * * * receives payment or transfer of a nonprobate asset to which that person is not entitled under this section is * * * personally liable for the amount of the payment or value of the nonprobate asset[] to the person who is entitled to it under this section."

As the Washington Court of Appeals explained, "the children [would] have to bring a separate action" against the plans. Pet. App. 44a n.18. Such a suit would be brought under a different provision, subsection (3)(a), which expressly provides that a plan "is *not* liable for making a payment or transferring an interest in a nonprobate asset to a decedent's former spouse whose interest in the nonprobate asset is revoked under this section." RCW 11.07.010(3)(a) (emphasis added). The only exception is if the plan pays benefits to the former spouse with "actual knowledge" that the marriage has been invalidated, which is defined to require "written notice * * * received after the decedent's death and within a time that is sufficient to afford the payor or third party a reasonable opportunity to act upon the knowledge." *Id.* 11.07.010(3)(d). The notice must identify the specific nonprobate asset and

must "inform the payor * * * of the revocation of the provisions in favor of the decedent's spouse." *Id.* There is a specific presumption, defeatable "only by clear and convincing evidence," that five-days notice is not sufficient. *Id.*[3]

Although petitioner is wrong about preemption even as to suits that *are* brought against ERISA plans directly, that question is entirely academic. Petitioner herself recognizes that the Washington Supreme Court decision resolves matters only "[a]s between the parties to this case." Pet. Br. 2. Even if this Court were to agree with Donna that an action against the plans would be preempted, such an advisory ruling would only argue for severing subsection (3)(a), leaving in place the children's right to proceed against Donna under subsection (4)(a). See *Leonard* v. *Spokane*, 897 P.2d 358, 361-62 (Wash. 1995) (unlawful provisions are severed unless legislature clearly would have intended to the contrary).[4]

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[3] After the Washington Court of Appeals decision, the children did in fact bring such an action under this provision against Aetna, which in turn asserted that the claim was preempted by ERISA. That case settled, however, before that dispute could be resolved. Under the terms of the settlement, the children retain a substantial direct financial interest in recovering the life-insurance proceeds from Donna.

[4] This Court's decision in *Boggs* v. *Boggs*, 520 U.S. 833 (1997), is not to the contrary. Preemption as to the suit between private individuals in *Boggs* was based on a conflict with a substantive provision of ERISA that directed benefits to surviving spouses. Louisiana law sought to divert benefits from the ERISA-mandated recipient and towards a new class of non-participant, non-beneficiaries not recognized at all by ERISA. 520 U.S. at 843, 847. In the current case, however, ERISA has no substantive policy favoring any specific elective beneficiary, and RCW 11.07.010 creates no new class of recipient. Rather, the statute merely invalidates a particular designation, thereby leading to a different, but existing, beneficiary having primary claim to the benefits. See *infra* at 39-41. In addition, under the Louisiana law in *Boggs*, the plaintiffs' claimed right applied equally to the plan itself, 520 U.S. at 854, unlike the distinct provision of Washington law relied upon by respondents.

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987), much relied upon by petitioner, in fact supports respondents' view that, absent a spe-

C. The Final Orders in This Case Can Be QDROs That Are Fully Immune from Preemption.

A third overarching reason why petitioner's theory of preemption is flawed is that it looks at the rights under RCW 11.07.010 in the abstract, without considering the form of court order that would implement those rights. In particular, the statute can and generally will be effectuated through a qualified domestic relations order, which is expressly exempt from ERISA preemption. See 29 U.S.C. § 1144(b)(7).

Seeming to recognize that she would lose this case were her divorce decree a QDRO directing revocation of beneficiary designations, Donna argues that the decree does not in fact mention death benefits and is not technically in the form of a QDRO. Pet. Br. 23-24 n.11. But those arguments are irrelevant to the eventual remedial orders in these cases because the trial courts on remand from the Washington Supreme Court can and will expressly address the disputed benefits and satisfy the technical requirements for QDROs. Indeed, the order on remand in the pension proceedings already satisfies the QDRO requirements. And even if that order is not "qualified," it (like the eventual order in the life-insurance proceedings) can later be framed as a QDRO.

As relevant here, a court order is a QDRO under ERISA if it: (1) is a domestic relations order; (2) recognizes an alternate

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cific substantive concern for a recipient of benefits such as a surviving spouse, ERISA is uninterested in the disposition of benefits as between private parties in a subsequent suit not involving an ERISA plan: "ERISA's pre-emption provision does not refer to state laws relating to 'employee benefits,' but to state laws relating to 'employee benefit plans.'" 482 U.S. at 7. The Court thus concluded that "[t]he argument that ERISA pre-empts state laws relating to certain employee benefits, rather than to employee benefit plans, is refuted by the express language of the statute, the purposes of the pre-emption provision, and the regulatory focus of ERISA as a whole. If a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems." *Id.* at 19.

payee's right to receive benefits; (3) specifies the name and address of the participant and of each alternate payee, the plan to which such order applies, and the amount or percentage of benefits to be paid each alternate payee; and (4) does not increase or require new benefits under the plan. 29 U.S.C. § 1056(d)(3)(B)-(D).

ERISA defines a "domestic relations order" as "any judgment, decree, or order (including approval of a property settlement agreement) which * * * relates to the provision of * * * marital property rights to a spouse, former spouse, child, or other dependent of a participant, and * * * is made pursuant to a State domestic relations law (including a community property law)." 29 U.S.C. § 1056(d)(3)(B)(ii). Any order in this case plainly would relate to both the "former spouse" (Donna) and to the "child[ren]" of the deceased participant (respondents). Furthermore, RCW 11.07.010 governs the disposition of assets upon divorce and therefore falls within state domestic relations law, while divorce decrees applying the statute are entered pursuant to state community property law. Indeed, the Washington Supreme Court explained that this case involves "Washington's sovereign interest in exercising its traditional police powers in the area of domestic relations and family law." Pet. App. 15a; cf. *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 834 (1988) (relying upon state supreme court's characterization of state law as "procedural").[5]

The order on remand in the pension proceedings further identifies the "alternate payees" – the children, see 29 U.S.C. § 1056(d) (child qualifies as alternate payee) – as well as the participant, plan, and benefit amounts involved. See Resp. Lodging, Exh. 6, at 1 (order applies to all of "the proceeds in

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[5] The orders on remand are thus simply domestic relations orders implementing the expected and intended legal effect of Donna and David's original divorce decree by rejecting Donna's claim that she held any right to the plan benefits after the divorce.

the Voluntary Investment Account (VIP Plan)" of David Egelhoff). The order also references a prior stay order to which the plan had agreed and which expressly applies to "the Boeing Company Voluntary Investment Plan of David A. Egelhoff, deceased." Resp. Lodging, Exh. 2. That the addresses are not listed on the face of the remand order is not a disqualifying defect, particularly because that information is in the court file and well known to Boeing. See S. REP. NO. 98-575, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2566 ("The committee intends that an order will not be treated as failing to be a qualified order merely because the order does not specify the current mailing address of the participant and alternative payee if the plan administrator has reason to know that address independently of the order."); see also *Stewart* v. *Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1151 (CA9 2000) (absence of current mailing address "is not a fatal defect"; citing legislative history and collecting cases). And, again, any potential defect can and will be cured through further proceedings in the trial court.

Any objection by Donna that the plans would not treat the orders on remand as QDROs faces two insuperable obstacles. First, the plans' QDRO provisions are not in the record and, once again, Boeing has refused to make those provisions available to respondents' counsel and Donna has refused to ask Boeing to provide them. Second, any disagreement over the required form of the orders only confirms that the judgment in this case is not yet final. See *supra* at 1-2. On remand, the children would be in a position to cure any asserted defects in the trial courts' remedial orders. Furthermore, federal-law disputes easily could emerge regarding the form and effect of the QDROs.

In the end, the mere possibility that the final orders in this case can be in the form of QDROs demonstrates that ERISA does not preempt RCW 11.07.010. See S. REP. NO. 98-575, *supra*, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 2565 ("Be-

cause rights created, recognized, or assigned by a qualified domestic relations order, and benefit payments pursuant to such an order, are specifically permitted under the bill, State law providing for these rights and payments under a qualified domestic relations order *will continue to be exempt* from Federal preemption under ERISA." (emphasis added)). Petitioner's effectively facial attack on the statute is thus both premature and wrong on the merits.

II. PETITIONER'S ASSERTED BASES FOR PREEMPTION ARE ERRONEOUS.

Repeated variously in the context of both conflict and field preemption, petitioner's alleged tensions between RCW 11.07.010 and ERISA are mistaken. Neither the specific terms nor the general and mixed purposes of ERISA demonstrate an intent by Congress to preempt this traditional area of state regulation. The provision of state law relied upon by respondents does not interfere with plan administration, bind plan choices, undermine protections for beneficiaries, or in any other way impermissibly burden ERISA plans.

A. A Strong Presumption Against Preemption Applies In This Case.

1. Through a flawed analysis of both ERISA and Washington state law, petitioner claims that RCW 11.07.010 intrudes on an area that Congress intended to reserve exclusively for federal law. But as this Court has recognized in its seminal *Travelers* decision and elsewhere, preemption analysis under ERISA must begin with the

> starting presumption that Congress does not intend to supplant state law. * * * Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, * * * we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.

514 U.S. at 654-55 (citations and quotation marks omitted) (emphasis added); see also *Boggs*, 520 U.S. at 840; *DeBuono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997); *Dillingham*, 519 U.S. at 336. In the areas of family law and family property law, the presumption against preemption is especially strong, and such state law "must do '*major damage*' to *'clear and substantial*' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (citation omitted) (emphases added).

An appropriately restrained notion of ERISA preemption thus looks not to *any* interaction between state law and ERISA plans or concerns, but rather only to "those 'conflicting directives' from which Congress meant to insulate ERISA plans." *Travelers*, 514 U.S. at 662 (citation omitted). Furthermore, when a multitude of state laws would be swept away by any particular preemption theory, that consequence speaks not to the proper breadth of ERISA, but rather makes suspect the particular theory of preemption and calls for even greater attention to the presumption that Congress did not mean to displace traditional areas of state law. *Id*. at 661, 664-65. In areas in which ERISA has nothing to say on the issues addressed by state law, sweeping preemption of such law would be "unsettling" to say the least, and should be avoided. *Dillingham*, 519 U.S. at 330; *Travelers*, 514 U.S. at 665.

2. Petitioner attempts to turn the presumption against preemption of family law on its head by arguing that state law survives only insofar as ERISA provides "precisely tailored and specific means" such as the QDRO provisions for sustaining state law. Pet. Br. 23-24. The short answer is that *Travelers* and its progeny categorically reject a sweeping implied preemption that would leave such a narrow space for state law. Those cases instead adopt a flat presumption against preemption that views state law as filling all the space not expressly forbidden it by Congress.

The longer answer is that petitioner misunderstands ERISA's QDRO provisions, which establish a safe harbor under which domestic relations orders will *per se* be exempt from preemption regardless whether they might otherwise constitute an impermissible alienation or impermissibly "relate to" an ERISA plan. That safe harbor does *not*, however, create the inference that all other domestic relations orders, or domestic relations law generally, are thereby preempted. Rather, the 1984 amendments adopting the QDRO provisions were understood by Congress to confirm that state law governing rights among family members "will *continue* to be exempt from federal preemption under ERISA." S. REP. NO. 98-575, *supra*, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 2565 (emphasis added). Numerous domestic relations orders are not preempted notwithstanding that they do not technically qualify as QDROs.[6] Indeed, the anti-alienation rule (which is the primary basis for alleging a conflict with domestic relations orders and hence the primary impetus for the QDRO provisions) does not apply *at all* to non-pension plans. 29 U.S.C. § 1056(d)(1). Given the limited problem QDROs were meant to solve, there is no "*inclusio unius*" inference that would exclude all other applications of state domestic relations law.[7]

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[6] For example, simple divorce decrees impact ERISA plans but are not thereby automatically preempted. Benefits payable to a "spouse" are utterly at the mercy of a state court order of divorce, which alters the recipient or entirely eliminates the payment of such benefits.

[7] The QDRO provisions thus raise an inference of preemption only as to state law that independently conflicts with ERISA. In *Boggs*, this Court's discussion of QDROs went to maintaining a narrow exception to the effect of *conflict* preemption, not to defining broader field preemption. 520 U.S. at 841. But here there is no conflict between RCW 11.07.010 and ERISA's substantive requirements, hence there is no need for a QDRO. Indeed, if anything, the QDRO provisions support respondents' position. As the federal government acknowledged below, Pet. App. 53a n.1, if the parties' intent were truly that Donna would receive the benefits, she could

3. By addressing the intersection between divorce and the disposition of nonprobate assets, RCW 11.07.010 spans two areas of traditional state concern: family law and probate and trust law. Similar statutes revoking designations of former spouses in wills are longstanding and now exist in virtually every state.[8] These statutes are based on the conclusion that "because most testators do not want to benefit ex-spouses, such a will no longer reflects the intentions of the testator. Justice will more often be served if divorce is treated as a species of partial revocation and litigation on the question is foreclosed." John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1135 (1984). In recent years, there has been a growing recognition that the same rationale applies to the death benefits payable under nonprobate assets – such as life insurance policies, pension accounts, joint accounts, and revocable trusts – which are "functionally indistinguishable" from wills.

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have secured a QDRO to that effect, which would not have been affected by RCW 11.07.010.

[8] Only the District of Columbia, Louisiana, Mississippi, and Vermont lack revocation-by-divorce statutes applicable to wills. Ala. Code § 43-8-137; Alaska Stat. § 13.12.804; Ariz. Rev. Stat. § 14-2804; Ark. Code Ann. § 28-25-109; Cal. Prob. Code § 6122; Colo. Rev. Stat. § 15-11-804; Conn. Gen. Stat. § 45a-257c; Del. Code Ann. tit. 12, § 209; Fla. Stat. § 732.507; Ga. Code Ann. § 53-4-49; Haw. Rev. Stat. § 560:2-804; Idaho Code § 15-2-508; 755 Ill. Comp. Stat. § 5/4-7; Ind. Code § 29-1-5-8; Iowa Code § 633.271; Kans. Stat. Ann. § 59-610; Ky. Rev. Stat. Ann. § 394.092; Me. Rev. Stat. Ann. tit. 18-A, § 2-508; Md. Code Ann., Est. & Trusts § 4-105; Mass. Ann. Laws ch. 191, § 9; Mich. Stat. Ann. § 27.12807; Minn. Stat. § 524.2-804; Mo. Rev. Stat. § 474.420; Mont. Code Ann. § 72-2-814; Neb. Rev. Stat. § 30-2333; Nev. Rev. Stat. § 133.115; N.H. Rev. Stat. Ann. § 551:13; N.J. Stat. Ann. § 3B:3-14; N.M. Stat. Ann. § 45-2-804; N.Y. Est. Powers & Trusts Law § 5-1.4; N.C. Gen. Stat. § 31-5.4; N.D. Cent. Code § 30.1-10-04; Ohio Rev. Code Ann. § 2107.33; Okla. Stat. tit. 84, § 114; Or. Rev. Stat. § 112.315; 20 Pa. Cons. Stat. § 2507; R.I. Gen. Laws § 33-5-9.1; S.C. Code Ann. § 62-2-507; S.D. Codified Laws § 29A-2-804; Tenn. Code Ann. § 32-1-202; Tex. Prob. Code Ann. § 69; Utah Code Ann. § 75-2-804; Va. Code Ann. § 64.1-59; W. Va. Code § 41-1-6; Wis. Stat. § 854.15; Wyo. Stat. Ann. § 2-6-118; Wash. Rev. Code § 11.12.051.

See *id.* at 1109, 1137-38. Moreover, the application of the revocation-by-divorce rule to nonprobate assets is regarded as necessary in light of the increasing U.S. divorce rate and the prevalence of nonprobate assets in estate planning. See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 224-26 (1991).

The Uniform Probate Code therefore was revised in 1990 to reflect this understanding with the adoption of a new Section 2-804, which (like RCW 11.07.010) provides that unless a governing instrument or court order states otherwise, divorce revokes any disposition of property – including beneficiary designations – made to a former spouse. Since 1990, no fewer than eighteen states have adopted a version of UPC § 2-804 or some other measure to regulate beneficiary designations in nonprobate assets after divorce.[9]

Such statutes further the intent of asset-holders such as plan participants regarding the proper recipient of their assets. Washington thus determined that married persons generally intend for spousal designations to be effective only during the marriage. In the rare circumstance in which that is not the case, the parties address the issue in their divorce decree. Participants also often forget to change their designations upon divorce or, less frequently but far more tragically, die soon after the divorce. RCW 11.07.010 merely accounts for these contingencies where not otherwise provided for.

Washington did not, however, adopt a blanket rule that ignores contrary considerations. Any person or plan that does

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[9] Alaska Stat. § 13.12.804; Ariz. Rev. Stat. § 14-2804; Colo. Rev. Stat. § 15-11-804; Haw. Rev. Stat. § 560:2-804; Mich. Stat. Ann. § 27.12807; Mo. Rev. Stat. § 461.051; Mont. Code Ann. § 72-2-814; N.M. Stat. Ann. § 45-2-804; N.D. Cent. Code § 30.1-10-04; Ohio Rev. Code Ann. § 1339.63; Okla. Stat. tit. 15, § 178; 20 Pa. Cons. Stat. § 6111.2; S.D. Codified Laws § 29A-2-804; Tex. Fam. Code Ann. §§ 9.301-.302; Utah Code Ann. §§ 30-3-7.5, 75-2-804; Va. Code Ann. §§ 20-111.1, 38.2-305; Wash. Rev. Code § 11.07.010; Wis. Stat. § 854.15.

not wish to comply with the divorce-revocation rule need not do so, so long as the instrument governing the nonprobate asset contains a clear statement to that effect. RCW 11.07.010(2)(b)(i); JA 11. The statute also does not revoke any arrangements mandated by law, such as any spousal annuity required by ERISA. RCW 11.07.010(2)(b)(iii); JA 11; *Boggs*, 520 U.S. at 843. Finally, participants themselves can state that their former spouses will continue to receive benefits after the divorce. RCW 11.07.010(2)(b)(i); JA 11.

State interests are furthermore at their apex in determining the disposition of *community* property, regarding which there is otherwise a substantial risk that one spouse will double recover from the marital property. Washington requires that all property be divided equitably between spouses. See *supra* 2-3. David and Donna's divorce decree expressly assigned David "100%" of his pension and Donna received assets of equivalent value in the equitable division of their property. In order to effectuate the divorce decree, it thus was essential that state law terminate Donna's entitlement to the pension. It is for this reason that *amicus* Western Conference of Teamsters Pension Fund is wrong to suggest that it would be sufficient for the state simply to remind plan participants to change their beneficiary designations upon divorce. In a community property state such as Washington, an equitable division of property cannot be accomplished unless separate entitlements to assets are determined in the divorce itself.[10]

There is no dispute that these matters are quintessential subjects of state regulation. Federal law does not address the issue and there is no serious argument that the federal government has any relevant interest at all. Indeed, any extension of federal power into the area would raise substantial consti-

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[10] Donna's argument that the divorce does not mention the pension plan's "death benefit" is a total straw man. The "100%" value of the pension that David received in the equitable division of the marital assets simply converted to a death benefit when David was killed. JA 39.

tutional concerns. *United States* v. *Morrison*, 120 S. Ct. 1740 (2000).

4. The facts of this case perfectly illustrate that Washington's concerns were well founded. Donna claims a right to benefits without even attempting to dispute that David did not want her to receive them. Indeed, she is practically brazen in admitting that she is *frustrating* his desires. The record contains uncontradicted, sworn testimony that Donna repeatedly said she would receive the life insurance benefits only because of David's supposed "procrastination" in not changing his designation forms before being killed in the car crash and that David "would be angry if he knew this was happening because that was not what he wanted." JA 18-19.[11]

Parenthetically, the suggestion that David "procrastinated" in changing his designations is of course wrong. He died only a few weeks after the divorce. But even more important, the statute made it unnecessary for him to change the designation form. In fact, accepting Donna's position would no doubt overturn the probate proceedings for thousands of other plan participants who, like David, have died after relying on divorce-revocation statutes such as RCW 11.07.010. Given that substantial reliance interest, the appropriate course under this Court's precedents would be to apply any ruling in favor of preemption only prospectively. See, *e.g.*, *Harper* v. *Virginia Dep't of Tax.*, 509 U.S. 86 (1993).

5. Contrary to the assumptions underlying petitioner's argument, regulation of beneficiary designations is a longstanding area of state, not federal, regulation. In addition to

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[11] No one seriously suggests that David consciously intended to leave Donna as his named beneficiary "out of feelings of obligation, remorse, or continuing affection," U.S. Br. 23, and of course in this area of state family law the Washington state legislature's determinations regarding the intent of beneficiaries after divorce are entitled to greater respect than the Solicitor General's. In those rare instances in which a participant *does* wish to leave his or her former spouse as a beneficiary, RCW 11.07.010 requires only a statement to that effect.

the divorce-revocation statutes themselves, several further examples help illustrate the point.[12]

First, like every state other than New Hampshire, Washington (in the form of a so-called "slayer statute") provides that a person who kills his or her spouse is not entitled to receive any benefits or property as a result of the death. RCW 11.84.010 to -.900.[13] Such statutes are functionally indistin-

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[12] The statutes discussed in the text are in addition to those adopted by Washington and most other states providing that insurance plans must include provisions for determining alternate beneficiaries. See, *e.g.*, Ala. Code § 27-18-9; Alaska Stat. § 21.48.160; Ariz. Rev. Stat. § 20-1264; Ark. Code Ann. § 23-83-115; Colo. Rev. Stat. § 10-7-202; Del. Code Ann. tit. 18, § 3118; D.C. Code Ann. § 35-515(6); Fla. Stat. § 627.564; Ga. Code Ann. § 33-27-3(6); Haw. Rev. Stat. § 431-10D-213(6); Idaho Code § 41-2016; 215 Ill. Comp. Stat. § 5/231.1; Iowa Code § 509.2(6); Kans. Stat. Ann. § 40-434(6); Ky. Rev. Stat. Ann. § 304.16-70(1); La. Rev. Stat. Ann. § 22:176(6); Me. Rev. Stat. Ann. § 2619; Md. Code Ann., Ins. § 17-307; Mo. Rev. Stat. § 376.697(6); Mont. Code Ann. § 33-20-1207(I); Neb. Rev. Stat. § 44-1607(6); Nev. Rev. Stat. § 688B.100; N.J. Stat. Ann. § 17B:27-17; N.H. Rev. Stat. Ann. § 408:16(VI); N.M. Stat. Ann. § 59A-21-17; N.Y. Ins. Law § 3220; N.C. Gen. Stat. § 58-58-140(6); Okla. Stat. tit. 36, § 4102(6); Or. Rev. Stat. § 743.327(1); 40 Pa. Cons. Stat. § 532.6(6); P.R. Laws Ann. tit. 26, § 1408; S.D. Codified Laws § 58-16-42; Tenn. Code Ann. § 56-7-2305(a); Tex. Ins. Code Ann. art. 3.50(2)(6); Vt. Stat. Ann. § 3818; Va. Code Ann. § 38.2-3330(1); Wash. Rev. Code § 48.24.160; W. Va. Code § 33-14-14.

[13] Forty-five states and the District of Columbia have enacted some version of a slayer statute. *See* Ala. Code § 43-8-253; Alaska Stat. § 13.12.803; Ariz. Rev. Stat. § 14-2803; Ark. Code Ann. § 28-11-204; Cal. Prob. Code § 250-52; Colo. Rev. Stat. § 15-11-803; Conn. Gen. Stat. § 45a-447; Del. Code Ann. tit. 12, § 2322; D.C. Code Ann. § 19-320; Fla. Stat. § 732.802; Ga. Code Ann. §§ 53-4-6, 33-25-13; Haw. Rev. Stat. § 560:2-803; Idaho Code § 15-2-803; 755 Ill. Comp. Stat. § 5/2-6; Ind. Code § 29-1-2-12.1; Iowa Code § 633.535; Kans. Stat. Ann. § 59-513; Ky. Rev. Stat. Ann. § 381.280; La. Rev. Stat. Ann. § 22:613(D); Me. Rev. Stat. Ann. tit. 18-A, § 2-803; Mich. Stat. Ann. § 27.12803; Minn. Stat. § 524.2-803; Miss. Code Ann. §§ 91-1-25, 91-5-33; Mont. Code Ann. § 72-2-813; Neb. Rev. Stat. § 30-2354; Nev. Rev. Stat. §§ 41B.200-.420; N.J. Stat. Ann. §§ 3B:7-1 to 7-5; N.M. Stat. Ann. § 45-2-803; N.C. Gen. Stat. §§ 31A-3 to -11; N.D. Cent. Code § 30.1-10-03; Ohio Rev. Code Ann. §

guishable from RCW 11.07.010 in that they invalidate a beneficiary designation of an ERISA plan participant. See RCW 11.84.030 ("slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer"), 11.84.100(1). Yet, although slayer statutes were enacted as early as the beginning of the last century, with several predating ERISA,[14] there is absolutely no indication that Congress intended such statutes to be preempted. And the federal courts therefore have consistently held that ERISA does not preempt slayer statutes.[15]

2105.19; Okla. Stat. tit. 84, § 231; Or. Rev. Stat. §§ 112.455 to .555; 20 Pa. Cons. Stat. §§ 8801-15; R.I. Gen. Laws §§ 33-1.1-1 to -16; S.C. Code Ann. § 62-2-803; S.D. Codified Laws § 29A-2-803; Tenn. Code Ann. § 31-1-106; Tex. Prob. Code Ann. § 41(D); Utah Code Ann. § 75-2-803; Vt. Stat. Ann. tit. 14, § 551(6); Va. Code Ann. § 55-401 to -415; Wash. Rev. Code §§ 11.84.010-.900; W. Va. Code § 42-4-2; Wis. Stat. § 854.14; Wyo. Stat. Ann. § 2-14-101. Three states – Maryland, Missouri, and New York – reach the same result by common law. See *Price* v. *Hitaffer*, 165 A. 470, 474 (Md. 1933); *Perry* v. *Strawbridge*, 108 S.W. 641, 648 (Mo. 1908); *Riggs* v. *Palmer*, 22 N.E. 188, 190 (N.Y. 1889). A fourth state, Massachusetts, has applied the slayer rule to insurance policies, but not to wills. *Slocum* v. *Metropolitan Life Ins. Co.*, 139 N.E. 816, 818 (Mass. 1923).

[14] By 1974, when Congress enacted ERISA, at least 10 states had enacted slayer statutes applicable to insurance proceeds. See, *e.g.*, D.C. Code Ann. § 19-320 (enacted 1965); Idaho Code § 15-2-803 (originally enacted 1971); Ky. Rev. Stat. Ann. § 381.280 (originally enacted 1940); N.M. Stat. Ann. § 45-2-803 (as in effect in 1953); N.C. Gen. Stat. §§ 31A-3 to -11 (originally enacted 1961); Okla. Stat. tit. 84, § 231 (originally enacted 1915); Or. Rev. Stat. §§ 112.455-.555 (originally enacted 1917); Tex. Prob. Code Ann. § 41(D) (originally enacted 1919); W. Va. Code § 42-4-2 (originally enacted 1931); Wyo. Stat. Ann. § 2-14-101 (as in effect in 1970).

[15] *Addison* v. *Metropolitan Life Ins. Co.*, 5 F. Supp. 2d 392 (W.D. Va. 1998); *Curtis* v. *Prudential Ins. Co.*, 839 F. Supp. 491 (E.D. Mich. 1993); *Connecticut Gen. Life Ins. Co.* v. *Cole*, 821 F. Supp. 193 (S.D.N.Y. 1993); *New Orleans Elec. Pension Fund* v. *Newman*, 784 F. Supp. 1233 (E.D. La. 1992); *New Orleans Elec. Pension Fund* v. *Knight*, 779 F. Supp. 845 (E.D. La. 1991); *Mendez-Bellido* v. *Board of Trustees of Div. 1181, A.T.U.*, 709 F. Supp. 329 (E.D.N.Y. 1989).

Indeed, to the extent that administrative burdens are a basis for finding ERISA preemption, there is a far *stronger* basis for invalidating slayer statutes, which vary to a far greater extent than the states' divorce-revocation rules. For example, the statutes establish no fewer than six standards for the kind of killings to which the statutes will apply.[16] Similarly, although many states' slayer statutes provide that in the absence of a conviction the applicability of the statute may be determined in a civil proceeding, the standard to be applied in that proceeding varies substantially from state to state.[17] The slayer statutes also differ in the procedural posture required to establish an individual as a "slayer."[18]

Petitioner ignores the issue of slayer statutes entirely, despite it having been highlighted in respondents' brief in opposition. BIO 10. The Solicitor General discusses the issue, but only in the final footnote on the final page of its brief. U.S. Br. 29 n.19. The federal government admits that the natural consequence of petitioner's argument is that slayer statutes are preempted. The federal government now embraces that position notwithstanding that it is contrary to the consistent view of the federal courts.

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[16] The standards are "felonious[] and intentional[]" (*e.g.*, Alabama, Arizona, California, Hawaii); "willful[]" (Texas); "felonious[]" (Alaska, the District of Columbia); "willful and unlawful" (Idaho, North Carolina, Pennsylvania); "unlawful[] and intentional[]" (Florida, Vermont); and "intentional[] and unjustifiabl[e]" (Illinois, Iowa).

[17] Some states, such as Georgia and Maine, establish a "clear and convincing evidence" standard, while others – including Alabama, Hawaii, and Indiana – require a "preponderance of the evidence."

[18] States such as Alabama specify only that a "final judgment" is required, while others – such as Alaska, Arizona, and Hawaii – indicate that the statute will apply only "[a]fter all right to appeal has been exhausted." In Illinois, a civil proceeding to establish an individual as a "slayer" for purposes of the statute may be brought to trial only after "any criminal proceeding has been finally determined by the trial court or, in the event no criminal charge has been brought, * * * one year after the date of death."

Perhaps recognizing the implausible position into which petitioner's preemption theory has forced it, the federal government suggests that it "might reasonably be argued" that the slayer rule, although not the divorce-revocation rule, is embodied in federal common law. But the government's argument makes no sense because it explicitly rests on two totally contradictory premises: that the slayer rule (a) involves a "truly unusual circumstance[] unlikely to have been contemplated by Congress or the drafters of ERISA plans," yet should be accepted as federal common law because (b) it "reflect[s] a recognized background principle of the law * * * implicit in ERISA and the plans governed by it." U.S. Br. 29 & n.18. Furthermore, Congress gave no more indication of a specific intent to preserve slayer statutes than it did regarding divorce-revocation laws. Both classes of state law have pre-ERISA roots, both involve the traditional state-law area of beneficiary designations, and Congress gave no indication in the statute or legislative history that it intended to preempt either of them. The government's attempt to distinguish these two types of laws thus makes no sense, and they would survive or fail together under ERISA preemption analysis.[19]

Second, the states' traditional regulation of beneficiary payments is further demonstrated by the Uniform Simultaneous Death Act. Washington's version of the Act provides that in the case of simultaneous death, unless the plan otherwise specifies, benefits are to be paid as if the beneficiary prede-

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[19] The Solicitor General's argument is also wrong because, as we discuss further below, cases in which it is appropriate to create independent federal common law are "few and restricted." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994). Instead, courts should "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods*, 440 U.S. 715, 740 (1979). In particular, the federal government fails to explain how "federal common law" would resolve all of the issues on which state slayer statutes vary, such as the kinds of killings that would disentitle a spouse to benefits and the appropriate standard of proof.

ceased the participant. RCW 11.05.040, 48.18.390. Similar provisions, most predating ERISA, have been enacted in every state, the District of Columbia, and the U.S. Virgin Islands.[20] Yet although such statutes both determine who will receive plan benefits and impose varying requirements on the payment of benefits by ERISA plans – including particularly in their determination of what constitutes a "simultaneous" death – the courts have not held that simultaneous death statutes are preempted by ERISA. *E.g.*, *McKinnon* v. *Teachers Ins. & Annuity Ass'n*, No. 89-C-3363, 1989 U.S. Dist. LEXIS 4568, at *3 (N.D. Ill. Apr. 26, 1989) (deriding any such suggestion as "extraordinary").

Third, there are numerous other state background laws that, at a minimum, provide default rules for interpreting beneficiary designations. Thus, state law defines basic con-

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[20] For states following essentially the same rule as Washington, see Ala. Code § 43-7-5; Ariz. Rev. Stat. § 20-1127; Ark. Code Ann. § 28-10-105; Cal. Prob. Code § 224; Colo. Rev. Stat. § 15-11-712(5); Conn. Gen. Stat. § 45a-440(d); Del. Code Ann. tit. 12, § 704; D.C. Code Ann. § 19-504; Fla. Stat. § 732.601(4); Ga. Code Ann. § 33-24-42; Idaho Code § 15-2-613(c); 755 Ill. Comp. Stat. § 5/3-1(d); Ind. Code § 29-2-14-4; Iowa Code § 633.526; La. Rev. Stat. Ann. § 22:645; Me. Rev. Stat. Ann. tit. 18, § 2-805(E); Md. Code Ann., Cts. & Jud. Proc. § 10-804; Mass. Ann. Laws ch. 190A, § 4; Minn. Stat. § 524.2-702(4); Miss. Code Ann. § 91-3-11; Mo. Rev. Stat. § 471.040; Neb. Rev. Stat. § 30-124; Nev. Rev. Stat. § 135.050; N.J. Stat. Ann. § 3B:6-5; N.Y. Est. Powers & Trusts Law § 2-1.6(d); N.C. Gen. Stat. § 28A-24-4; Okla. Stat. tit. 58, §1005; 20 Pa. Cons. Stat. § 8504; R.I. Gen. Laws § 33-2-5; S.C. Code Ann. § 62-1-505; Tenn. Code Ann. § 31-3-105; Vt. Stat. Ann. tit. 14, § 624; V.I. Code Ann. § 88(d); W. Va. Code § 42-5-4; Wyo. Stat. Ann. § 2-13-106.

Other states apply a distinct rule that any death within 120 hours is "simultaneous." See Alaska Stat. § 13.12.702(b); Haw. Rev. Stat. § 560:2-702(b); Kans. Stat. Ann. § 58-710; Ky. Rev. Stat. Ann. § 397.1003; Mich. Stat. Ann. § 27.12702; Mont. Code Ann. § 72-2-712(2); N.H. Rev. Stat. Ann. § 563:2; N.M. Stat. Ann. § 45-2-702; N.D. Cent. Code § 30.1-09.1-02; 1999 Or. Laws 131; S.D. Codified Laws § 29A-2-702; Tex. Prob. Code Ann. § 47(E); Utah Code Ann. §§ 75-2-702, 31A-22-415; Va. Code Ann. § 64.1-104.3; Wis. Stat. § 854.03(4).

cepts such as "child," "spouse," "death," and other terms commonly used in benefits contracts but infrequently defined by the contracts themselves. And, as to the designation forms themselves, state law governs issues such as forgery, duress, and capacity. There are also questions of incompetence, youth, guardianship, and many other considerations under state law that can affect designations. It is absurd to suggest that as to all of these issues ERISA plans are an island unto themselves, immune from generally applicable state law and ruled instead at the whimsy of plan administrators.

These numerous examples demonstrate not only that state statutes governing beneficiary designations are of longstanding provenance in a field that Congress did not intend to preempt, but also that petitioner's reading of ERISA would cut a wide swath through multiple statutes of every single state in the country. "The bigger the package of regulation * * * that would fall," under petitioner's view of preemption, "the less likely it is that federal regulation of benefit plans was intended to eliminate state regulation" in the manner alleged. *Travelers*, 514 U.S. at 661. And given preexisting state regulation of these types when ERISA was passed, any preemption theory that would apply to such laws would be all the more "unsettling" and "startling." *Id*. at 665.

B. RCW 11.07.010 Neither Interferes With The Uniform Administration of ERISA Plans Nor "Binds" Plan Administrators To Impermissible Choices.

Contrary to petitioner's assertions, RCW 11.07.010 does not interfere with the uniform administration of ERISA plans or impermissibly "bind" plan administrators' choices.

1. Uniformity for its own sake was not Congress' object in enacting ERISA. Rather, uniformity was simply a means to mitigate for employers some potentially inconsistent burdens that "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax*, 482 U.S. at 11.

The numerous exceptions to ERISA preemption, however, illustrate that uniformity is one goal among the many goals animating ERISA. Thus, ERISA plans are subject to diverse state regulations in insurance, banking, securities, and criminal law. 29 U.S.C. §§ 1144(b)(2)(A), (b)(4). And they are subject to all manner of QDROs, which can require payments directly contrary to what ERISA or a plan would otherwise provide.

At bottom, all state laws create some disuniformity, and that is simply the inevitable and desirable result of our federal system. Congressional solicitude for such multifarious state regulations thus sacrifices uniformity and efficiency in order to bolster and confirm the historic presumption against preemption. Such solicitude is not exceptional, but rather confirms the general rule and gives it added strength in certain areas in order to save even conflicting state laws. Where Congress desired application of a uniform rule, it so provided in the specific "provisions" of ERISA, and then further provided that such "provisions" would "supersede" state laws to the contrary. 29 U.S.C. § 1144(a). Thus, while uniformity was *one* partial goal of ERISA, it routinely has yielded to other important goals and should not be given talismanic weight, especially where there is no danger of conflicting laws deterring the adoption or maintenance of benefit plans.

The danger of burdensome conflicts simply does not exist with a law such as RCW 11.07.010. Unlike the laws discussed in *Travelers*, RCW 11.07.010 neither mandates benefits nor requires alternative methods of calculating benefits. See 514 U.S. at 657 (discussing "benefit demanded by New York" in *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983)); 514 U.S. at 657-58 (discussing Pennsylvania law at issue in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990), that "required plan providers to calculate benefit levels" based on "expected liability conditions that differ from those" in other states); 514 U.S. at 658 (discussing law in *Allessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that "prevent[ed] plans

from using a method of calculating benefits permitted by federal law"). The prior laws struck down by this Court had a substantive impact on the plans themselves, requiring added or inconsistent benefits and thus directly increasing plan costs.[21] Here, RCW 11.07.010 requires no new benefits, but rather provides a simple default rule regarding who is to receive benefits in an uncertain situation. If anything, the availability of such a default rule – not provided by ERISA itself – will *reduce* administrative burdens.

Any notion that beneficiary designations have some special need for uniformity is quite mistaken. As noted above, *supra* at 20, 22-25, 26-31, such designations fall within areas traditionally regulated by state law and, under petitioner's view, federal courts would now have to develop common law in numerous traditionally state-law areas such as marriage, divorce, death, paternity, bastardy, estate law, and even fundamental contract law. Congress cannot be presumed to have left plans to their own devices in these important areas, and where ERISA's comprehensive scheme has nothing to say about them, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994).

This Court's decision in *Fort Halifax*, upon which petitioner relies, Pet. Br. 13, 18, is not to the contrary. Although *Fort Halifax* explains that plans must determine beneficiary eligibility, 482 U.S. at 9, the case was not about beneficiaries at all. Indeed, *Fort Halifax* actually *upheld* a state law that imposed a far more burdensome requirement than RCW 11.07.010 – the obligation to pay a severance benefit. While the Court discussed the various aspects of plan administration, its preemption analysis focused on the purpose of

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[21] And in *Pegram* v. *Herdrich*, -- U.S. --, 120 S. Ct. 2143, 2158 (2000), this Court recently rejected a bid to establish uniform federal malpractice standards, holding that "ERISA was not enacted *** in order to federalize malpractice litigation in the name of fiduciary duty for any other reason."

"'eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.'" 482 U.S. at 9 (quoting 120 CONG. REC. 29933 (1974) (statement of Sen. Williams)). There was no conflict in that case and there is none here. Although plan administrators inevitably must determine who to pay, the mere existence of that task does not support preemption of background state law on matters regarding which ERISA has nothing to say.[22]

RCW 11.07.010 also does not "bind" plan administrators to any choice in the *Travelers* sense. Rather, it only sets up a rule that applies to family law situations not anticipated or addressed by ERISA, by the plan, or by the participant. If anyone anticipates or addresses the issue, state law defers to that pre-existing resolution. Such free and unburdened choice, with none of the adverse consequences of the choices in *Dillingham* or *Travelers*, hardly "binds" plan administrators to a particular choice.

This Court's decision in *Mackey* likewise demonstrates that the default rule in this case does not impermissibly bind ERISA plans to particular choices. In *Mackey*, this Court held that Georgia's garnishment statute was not preempted as it applied to "ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits." 486 U.S. at 831-32. Petitioner, addressing *Mackey* in a bare footnote, characterizes the garnishment law as merely a "procedural mechanism[] for satisfying money judgments." Pet. Br. at 15 n.5 (emphasis deleted). But the garnishment order in *Mackey* controlled benefit payments far more than does RCW 11.07.010, specifying a third-party nonbeneficiary to receive those payments. 486 U.S. at 831. RCW 11.07.010, by contrast, leaves the determination of subsequent beneficiaries entirely up to the plan. And the statute

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[22] In *Fort Halifax*, as here, the statute only set a default rule – state law imposed no obligation if the employee was "covered by a contract that deals with the issue of severance pay." 482 U.S at 5.

in this case also is no less "procedural" than the law in *Mackey* in that it merely establishes default procedures for interpreting otherwise-ambiguous beneficiary designations.

We now address each of petitioners' specific arguments regarding the disuniformity or burden allegedly created by RCW 11.07.010.

2. Donna is not correct in asserting that RCW 11.07.010 creates an impermissible burden on plans by requiring them to determine the marital status of plan participants. Two ERISA provisions already require the identical inquiry, demonstrating both that Washington law imposes no new administrative requirement and also that Congress concluded that an inquiry into participants' marital status would not unduly burden ERISA plans. First, before disbursing benefits, ERISA plan administrators must inquire into the marital status of a participant in order to determine whether to pay a surviving spouse annuity. 29 U.S.C. § 1055(a). Second, administrators must inquire whether a divorce-related QDRO exists. *Id.* § 1056(d)(3)(F); *Boggs*, 520 U.S. at 846. Washington state law requires no more.

In addition, before disbursing death benefits, plan administrators must secure formal proof of death in the form of a copy of the participant's death certificate, which in Washington (and almost certainly in all other states as well) specifically states whether the decedent left a surviving spouse. Resp. Lodging, Exh. 1. The plan need not make further inquiries. It is presumably for that reason that in disbursing the life-insurance benefits to Donna, Aetna already knew of her divorce from David, expressly referring to him as her "ex-spouse." JA 29.

Finally, in the rare instance that a plan administrator cannot determine a participant's marital status, neither ERISA nor Washington law subjects the plan to liability. Washington law immunizes plans from liability unless they had detailed knowledge of the dissolution of the participant's mar-

riage in advance of distributing benefits. RCW 11.07.010(3)(a), (d). And, in case of doubt, under RCW 11.07.010 and ERISA, plans can simply require that the competing claimants resolve their dispute in a court of proper jurisdiction, which will have the responsibility of determining the proper recipient. *Id.* 11.07.010(3)(b)(2)(i).

3. Donna also errs in asserting that ERISA plans will be impermissibly burdened because they will have to determine each state's rule regarding the treatment of beneficiary designations upon divorce or, relatedly, will be exposed to the risk of "double liability" due to conflicting state requirements.

The minor variations in state statutes identified by Donna and her *amici* do not indicate any significant differences. First, there is no substantive difference between those states that upon divorce treat the former spouse as if he or she had "disclaimed" the benefits and those that treat the former spouse as if he or she "predeceased" the participant. Under either formulation the benefits will be paid to the alternate beneficiary specified by the plans. Second, although state laws adopting UPC § 2-804 contain an express provision stating that the statute is not effective insofar as it is preempted while others do not, the distinction is meaningless because a finding of preemption *automatically* makes the relevant statutory provision inoperative.[23]

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[23] The other purported examples of inter-state variations cited by petitioner in a footnote, Pet. Br. 20 n.8, are basically imagined. Some states have not yet extended the divorce-revocation rule to all nonprobate assets, such as the example cited by petitioner, 760 Ill. Comp. Stat. 35/1, which applies only to trusts; but, as we explain in the text, that is not a basis for finding preemption. No state applies the revocation rule if "the beneficiary designation was made after the divorce." Pet. Br. 20 n.8. The states likewise uniformly do not apply the revocation rule "if the divorce decree specifically says otherwise," *id.*; only the Missouri statute does not address the issue expressly, but it is exceedingly unlikely that a court would apply the revocation rule despite the explicit, contrary intent of the participant. The same is true of states (of which there are only three) that do not explicitly state that the divorce-revocation rule does not apply if the

Amicus Western Conference of Teamsters also is not correct that preemption should arise because many states have not yet enacted statutes similar to RCW 11.07.010, such that in some jurisdictions but not others spousal designations remain effective after divorce. If this Court were to find preemption on the ground of interstate variation, then the development of state law would be frozen in its tracks because it is not reasonable to expect (and the Constitution does not contemplate) that all the states will act with identical alacrity. Variations among the states can be expected to resolve themselves with reasonable speed. Although the Teamsters are correct that the Uniform Probate Code itself was "designed years ago," WCT Br. 7, that argument is misleading: the provision in question here, Section 2-804, was not adopted until 1990. Since then, as discussed above, eighteen states have enacted a version of Section 2-804 or an equivalent statute. The rate at which states have enacted such statutes compares very favorably with the process by which states enacted revocation-by-divorce statutes applicable to wills.[24] Particularly because divorce-revocation statutes do not impose any substantial burdens on plans, see *supra* at 11-13, 32-36, that some states do not have such statutes is not a basis for finding preemption.

To the extent that state rules do vary, Donna's concern that plans will be subject to conflicting obligations is seriously overstated. Any conflict of laws issues created by di-

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participant's designation states to the contrary. Petitioner's two remaining examples involve rare factual scenarios that pose no real obstacle to plan administration. Mont. Code Ann. § 72-2-814 (applicable when participant names *relative* of spouse as beneficiary); Ohio Rev. Code Ann. § 1339.63 (inapplicable when divorced spouses remarry each other).

[24] See Mark Davis, Note, *Life Insurance Beneficiaries and Divorce*, 65 TEX. L. REV. 635, 650-51 (1987) (as of 1928, only two states had enacted a revocation-by-divorce statute applicable to wills, but that by 1960 14 states had enacted such statutes, 29 states by 1975, and 44 states by 1985). As discussed above, almost every state now has such a statute.

vorce-revocation statutes are not unique in any way. Plans can and do resolve them like any other businesses under settled legal principles. And, of course, such potential conflicts can always be avoided *ex ante* with the stroke of a pen – by having the plan opt out and set its own uniform rule regarding divorce.[25]

Assuming that a circumstance arises in which a plan does not know which state's law to follow or is subject to conflicting obligations as a result of inconsistent state laws, both ERISA and Washington law adopt the same solution: the plan can leave the matter to be resolved by the courts as between the conflicting claimants. RCW 11.07.010(3)(b)(2)(i). That is precisely what has happened in this case with respect to the pension benefits, which Boeing has not distributed while Donna and the children resolve their dispute.

To the extent that Donna relies on the argument that preemption could arise from the "burden" on a plan to determine what state law actually provides, that theory is extraordinary. Taken to its logical conclusion, it would mean that *every* state law is preempted because ERISA plans cannot be put to the burden of understanding the statutes to which they are subject. Certainly, if such an argument had merit, it would have been sufficient to invalidate the state taxing schemes at issue in *Travelers* and *DeBuono*.

Nor does Donna's argument have any practical force. Plans must already be familiar with the far greater vagaries of state insurance law, all of which is exempt from ERISA preemption. 29 U.S.C. § 1144(b)(2)(A). And respondents col-

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[25] To the extent that Donna is correct in asserting that administrators have a superseding legal obligation to follow the plan's text, see *infra* at 45-46, the plan need only announce what state law it will follow or simply opt out of these statutes entirely and adopt whatever rule it chooses. The pension plan in this case, for example, expressly states that it will be governed by Washington law. Resp. Lodging, Exh. 5, at 17-3. Alternatively, this Court could announce the governing conflict of law rule. Either approach is preferable to simply invalidating the states' laws *in toto*.

lected above several other areas in which states have taken varying approaches to the treatment of plan designations, yet the courts consistently recognize that such statutes are within the field of traditional state regulation that Congress did not intend to preempt. See *supra* at 26-31. Plans track these varying state requirements without difficulty because the law of ERISA, perhaps more than any other field, is the subject of numerous reporter systems and regularly updated treatises.

Furthermore, for small plans that operate in a single state, and are necessarily familiar with that state's laws, most participants will be married or divorced within that jurisdiction. Larger plans not only have access to still greater legal resources, but also *already* must be aware of statutes such as RCW 11.07.010 because they administer a number of assets that do not qualify for ERISA preemption. These assets can be quite extensive, including so-called "top-hat plans," excess benefits plans, deferred compensation plans, and unpaid but owing salary and bonuses in the case of sudden or unexpected death. For each, an employer's human resources department will have to follow state law, and hence having a different rule for ERISA designations merely creates, rather than alleviates, disuniformity within a single company.

C. Application Of RCW 11.07.010 Does Not Conflict With ERISA Provisions Regarding Beneficiaries and The Alienation Of Benefits.

Petitioner's next argument is that RCW 11.07.010 conflicts with ERISA provisions imposing duties on plans vis-à-vis beneficiaries and, relatedly, constitutes a prohibited "alienation" of benefits from a beneficiary to a third party.

1. Petitioner is principally wrong because she misstates how RCW 11.07.010 operates. In those instances that the statute applies – *i.e.*, when the plan has not opted out of compliance and when the participant has not redesignated his or her spouse – RCW 11.07.010 provides that the designation of a spouse is ineffective upon divorce and that entitlement to

benefits is determined *under the provisions of the plan*. Specifically, the statute triggers the plan's alternate beneficiary provisions by deeming the former spouse to have predeceased the plan participant. RCW 11.07.010(2)(a).

In this case, David designated Donna as the beneficiary of his pension plan. Upon their divorce, the designation became ineffective and Donna was deemed to have predeceased David. Petitioner attempts to suggest that it was the *statute* rather than the *plan* that determined respondents' entitlement to the benefits; that is wrong. The pension plan SPD provides that when a named beneficiary predeceases a participant, and there is no surviving spouse, benefits pass to the participant's children, JA 40 – here, to respondents. If the plan had named someone else as the alternate beneficiary – for example, the participant's most recent former spouse – that person, rather than the children, would have been entitled to the benefits.

Under the life insurance plan, the children similarly are entitled to benefits, whether as alternate beneficiaries or through David as the plan participant. Unlike the pension plan, the life insurance SPD does not set out an alternate beneficiary scheme. It is extraordinarily unlikely that the life-insurance plan does not have such a scheme, which is required by both ERISA and Washington state insurance law. The alternate beneficiary scheme presumably is included in the text of the plan itself. But the plan is not in the record, Boeing has refused to provide it, and Donna's counsel have refused to request it.

Given the state of the record, the state courts operated on the premise that the life insurance plan unlawfully lacked a provision governing alternate beneficiaries and held that, upon divorce, entitlement to the benefits should pass to the plan participant – *i.e.*, to David. Pet. App. 34a (Washington Court of Appeals decision). When David subsequently died, the benefits became part of his estate and became the property of respondents as his statutory heirs. *Id*.

2. RCW 11.07.010 therefore does not result in the payment of benefits to persons other than plan beneficiaries or participants. Donna's claim that the only "beneficiary" is the person named by the plan participant on a designation form is simply not correct. ERISA defines "beneficiary" as "a person designated by a participant, *or by the terms of an employee benefit plan*, who is *or may become* entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).[26] Here, the children plainly fit that definition because the pension plan expressly provides that they "may become entitled" to benefits in a variety of circumstances – *i.e.*, if there is no surviving spouse and the named beneficiary predeceases the participant, or the beneficiary designation is "invalid," or the participant fails to make a designation at all. JA 40.

Although it is very likely that the life insurance plan provides a similar alternate beneficiary scheme, there is no conflict with ERISA even if it does not. Under the state courts' holding, the life insurance benefits passed to David as the plan participant. ERISA plans owe, if anything, a *superior* duty to their participants (who own the assets in question, after all) than to named beneficiaries. The children became entitled to the benefits only because David died intestate and they are his statutory heirs. Pet. App. 34a-35a.

3. For the same reasons, RCW 11.07.010 does not conflict with ERISA's "anti-alienation" provision, which prohibits an arrangement "whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii).[27] Under RCW 11.07.010,

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[26] The Solicitor General argues to the contrary only by repeatedly omitting the critical "or may become" clause of the statute. U.S. Br. 6, 7, 21.

[27] Dictionary definitions confirm this understanding. "Alienate" is defined as "[t]o transfer or convey (property or a property right) to another," "alienation" as "[c]onveyance or transfer of property to another <alienation

the children do not acquire any right to benefits "from" the named beneficiary. Again, the statute simply renders the named designation inoperative and leaves it to the plan to determine who will receive the benefits.

On Donna's alternate reading, the anti-alienation provision bars any circumstance in which the beneficiary does not receive benefits because the benefits will eventually be paid to someone else. Not only does that reading ignore the requirement that benefits be received "from" the participant or beneficiary, but it would also produce ridiculous results. It would prohibit a participant from canceling a designation or naming a new beneficiary. It would also render a divorce a prohibited alienation because the divorce terminates the ex-spouse's right to the statute's guaranteed spousal annuity. 29 U.S.C. § 1056(d)(3) (F)(i) ("the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of" 29 U.S.C. § 1055 only to "the extent provided in any qualified domestic relations order").[28]

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of one's estate>," and "assignment" as "[t]he transfer of rights or property." BLACK'S LAW DICTIONARY 73, 115 (7th ed. 1999).

[28] The precedents cited by petitioner, Pet. Br. 37, only confirm respondents' view. In *Boggs*, Louisiana community property law purported to take a portion of a guaranteed spousal annuity from the participant's spouse and assign it specifically to the former spouse as part of her community property. 520 U.S. at 844. In *Guidry* v. *Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), the constructive trust remedy at issue presumed that "the benefits had not been forfeited, but that a constructive trust should be imposed so that the benefits would be paid to the Union rather than to petitioner." 493 U.S. at 369. The union's claim to the money thus existed only derivatively through petitioner's prior right, and thus was not meaningfully different from a garnishment. 493 U.S. at 372. Finally, in *Patterson* v. *Shumate*, 504 U.S. 753 (1992), the issue was whether pension benefits could be included in a bankruptcy estate for transfer to creditors who had no independent claim of right, but necessarily claimed only as far as the rights of the debtor. 504 U.S. at 755. These cases demonstrate that alienation has consistently been understood to involve the transfer to third parties of a person's continuing interest in a

Nor does Donna's reading bear any relationship to the purpose of the anti-alienation provision: avoiding spendthrifts. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). RCW 11.07.010 does not transfer rights to benefits from a beneficiary to a specific alternate recipient, as if to pay a debt or as a security interest. Indeed, any expansive reading of the anti-alienation provision in these circumstances would be inappropriate because (in contrast to a guaranteed spousal annuity) Donna never had a vested right to benefits under the plans.[29]

4. There is, in fact, a strong argument based on both the designation form filled out by David and Washington community property law that, upon her divorce from David, Donna ceased to be a beneficiary at all.[30] Under ERISA, named beneficiaries are "persons." 29 U.S.C. § 1002(8). The statute defines "person" differently than "individual," incorporating legal attributes beyond mere physical existence. Thus, "'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." *Id.* § 1002(9). For example, the designation of "John Doe, as trustee for William Smith" confers benefits upon John Doe only in his legal status as the trustee. Cf. *McKinnon* v. *Blue Cross and Blue Shield of Ala.*, 935 F.2d 1187, 1191-92 (CA11 1991) (plaintiff was beneficiary only

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pension plan, and not the loss of an interest that results in the ripening of a subsequent and nonderivative claim of right by other beneficiaries.

[29] In addition to the reasons discussed in the text, ERISA's anti-alienation provision is inapposite here because the judgment in this case is or will be embodied on remand in a QDRO (which is an exception to the anti-alienation rule, see 29 U.S.C. § 1056(d)(3)) and because the anti-alienation rule does not apply at all to life insurance benefits, see *id.* § 1056(d)(1); *Mackey*, 486 U.S. at 836.

[30] The children have never stipulated to the contrary, having agreed below only that David placed Donna's name on the designation form. JA 22.

"in her capacity as executrix"; "as an individual, [she was] neither a participant nor a beneficiary of the plan").

For the life insurance plan, David designated "Donna R. Egelhoff Wife" as his beneficiary. See Resp. Lodging, Exh. 3. But at the point their divorce became effective, there was no such person as "Donna R. Egelhoff *Wife*"; the designated person had definitionally ceased to exist. Cf. 29 U.S.C. § 1056(d)(3)(F) (distinguishing "former spouse" from "spouse" and "surviving spouse" except where expressly provided for in a QDRO). Similarly, Washington treated David and Donna's marital "community" as a distinct entity. Marriage created a new legal person – "Donna as spouse" – and it was that person whom David named as beneficiary. Upon divorce, however, the marital community was terminated and with it "Donna as spouse" ceased to exist, replaced by a legal "person" with materially different rights and duties.

5. If anything, as between the parties to this case, Congress intended to protect the children rather than Donna. Because respondents are beneficiaries under ERISA just as much as Donna, there can be no conflict with the ERISA provisions on which Donna relies, which express only a concern with beneficiaries as a *class*, not with named beneficiaries (such as Donna) in supposed preference to alternate beneficiaries (such as the children). 29 U.S.C. §§ 1001(b), 1104(a)(1). In other words, ERISA's interest in Donna is no different than if she had been selected by David because she was his mail carrier, his night-nurse, or the president of a multinational organization picked at random from the phone book. ERISA expresses no policy concerning disputes between beneficiaries. See *Emard* v. *Hughes Aircraft Co.*, 153 F.3d 949, 957 (CA9 1998) ("No ERISA provision expressly governs disputes between claimants to insurance proceeds."), cert. denied, 525 U.S. 1122 (1999).; see also *Equitable Life Assur. Soc'y* v. *Crysler*, 66 F.3d 944, 948 (CA8 1995) (citing cases). It certainly makes no difference that the children had only a contingent right to the benefits. For at the relevant

time – the date of the divorce – Donna's interest was contingent as well. She had to survive David without him remarrying (which would have shifted the pension benefits to the new spouse) or naming a new beneficiary.

This case is accordingly significantly different from *Boggs*, in which ERISA had a distinct substantive preference that the surviving spouse receive a guaranteed annuity. On that basis, *Boggs* read the QDRO protections for spouses and children to exclude other means of extinguishing the surviving spouse annuity requirement. Neither the plan nor the former participant in *Boggs* could have changed the surviving spouse's benefit status without her express written consent, and consequently it makes sense that this Court read narrowly any exceptions to such a strong and substantive statutory command. Here, by contrast, Donna's status could have been extinguished either by David himself or by a plan provision stating that spousal designations are revoked upon divorce.

Finally, ERISA protects named beneficiaries as a class strictly out of respect for the participant's choice. RCW 11.07.010 furthers Congress' intent by creating a presumption that accords with the intent of participants in the event they divorce. By contrast, as we explained above, Donna's position does nothing more than mock Congress' intent. She seeks the benefits notwithstanding that she gave them up in the divorce and that it would make David "angry," seeking to profit from what she views as his "procrastination" in not changing his designation form. JA 19.

D. RCW 11.07.010 Does Not Conflict With Administrators' Fiduciary Duty To Follow Plan Terms.

Donna fares no better in arguing that RCW 11.07.010 conflicts with the duty of plan administrators under ERISA Section 404(a)(1) to abide by the terms of the plan. 29 U.S.C. § 1104(a)(1)(D). Donna seriously overreads this provision, which merely announces a fiduciary duty, as if it were a preemption provision. She reaches that conclusion only by ap-

plying a critical unstated premise: that Section 404(a)(1) not only creates a fiduciary duty to follow the plan, but also *eliminates* a fiduciary duty to follow the *law*. The result is nothing more than a self-fulfilling prophecy: any law that an ERISA plan is said to violate is thereby automatically preempted because, necessarily, it is inconsistent with the plan.

But, plainly, Congress did not adopt petitioner's implicit premise and did not preempt all laws that are inconsistent with the terms of ERISA plans, thereby delegating the supremacy clause's awesome power to preempt state statutes to private administrators. On Donna's reading, by contrast, even though Congress expressly exempted state insurance law from preemption, 29 U.S.C. § 1144(b)(2)(A), administrators would be free to ignore that body of state law simply by adopting contrary plan provisions. In fact, on Donna's reading, administrators could adopt plan provisions that would supplant not only state law but even *federal* law other than ERISA, including federal anti-discrimination law.[31]

2. Even assuming that petitioner's overbroad reading of the duty to follow the plan were correct, she would not prevail. First and foremost, RCW 11.07.010 expressly avoids any conflict with plan terms because it sets only an easily avoidable, default standard. If the plan states that it is not subject to the divorce-revocation rule, then RCW 11.07.010 does not apply. See RCW 11.07.010(2)(b)(i).

Nor are the terms of the plans otherwise inconsistent with Washington law. The pension plan expressly provides that it

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[31] In a footnote, the Solicitor General seems to realize that Donna's argument is untenable, stating that "[w]e do not, however, read Section 404(a)(1) to 'enable employers to avoid *any* state law simply be [sic] referring to that law in [their] ERISA plan.'" U.S. Br. 23 n.13 (alteration and emphasis in original) (citation omitted). But the government says no more, and in particular fails to explain what line divides plan provisions that permissibly preempt state law from those that go too far. Whatever line the Solicitor General would want to draw, it certainly is not found in the text of ERISA.

"shall be construed according to the laws of the State of Washington, except insofar as state law has been preempted by [ERISA]." Resp. Lodging, Exh. 5, at 17-3. Plainly, then, any finding of preemption must rest on the text of ERISA itself, not the plan.

Donna is also wrong in asserting that the plan's terms require the payment of benefits to the named beneficiary. There are several circumstances in which benefits are paid to the alternate beneficiaries, including one particularly relevant here. The pension plan and pension SPD both state that the plan's alternate beneficiary provisions (under which respondents are entitled to benefits) are triggered if the participant's designation is "invalid." Resp. Lodging, Exh. 5, at 17-2 ("If there is no valid designation of a beneficiary * * * the benefits will be paid" to alternate beneficiaries); JA 40 (alternate beneficiary provisions apply if "you have an invalid beneficiary designation"). As a matter of Washington state law, that is precisely the result of David's divorce from Donna – his designation of her was rendered invalid.

Regarding the life insurance benefits, Donna cannot plausibly allege that RCW 11.07.010 conflicts with the plan, which is not in the record. Her counsel do not even have a copy of the plan. Boeing refuses to provide it to respondents' counsel, and Donna's counsel refuse to request it. All that is in the record is the life insurance SPD, which does not address issues relating to governing law, choice of law, or alternate beneficiaries.

3. The fact that critical documents are not in the record constitutes an independent basis for affirmance or dismissing the petition as improvidently granted.[32] Petitioner simply has

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[32] If the petition were dismissed, the Court would be free to resolve the question presented by granting certiorari in No. 00-265, *Manning* v. *Hayes* (filed Aug. 16, 2000). The conflict between the Washington Supreme Court's decision in this case and the Fifth Circuit's decision in *Manning*,

not overcome the presumption against preemption because she has not presented proof of the documents on which she principally relies. Thus, Donna contends that RCW 11.07.010 conflicts with plan terms but has not proved what the life insurance plan provides; the Washington courts therefore operated on the doubtful assumption that the life insurance plan unlawfully lacks any alternate beneficiary scheme. For all this Court knows, the life insurance plan may state that it *is* subject to RCW 11.07.010. Although the SPDs are in the record, they are only summaries of the plans themselves and do not address numerous issues. Donna also contends that the statute conflicts with David's designation of her, but there is an open question whether the designation specifies "Donna Egelhoff *Wife*."

The failure to provide any proof on these critical issues is particularly extraordinary because Donna's counsel refuse to even request the documents from Boeing – which is financing this litigation on her behalf and has filed an *amicus* brief in this Court – so that they may be reviewed by this Court.[33] Petitioner cannot expect this Court to strike down the laws of eighteen sovereign states and announce a rule of preemption that would invalidate several other statutes from every other state, see *supra* at 23, 26-31, with blinders on regarding the actual facts before it. [34]

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212 F.3d 866 (2000), was likely a principal reason the Court granted certiorari here.

[33] There is no non-strategic reason for withholding these documents from respondents. As plan beneficiaries under both the Washington Supreme Court's holding in this case and the terms of the plan, respondents have a statutory *right* to the documents. 29 U.S.C. §§ 1024(b)(2), (4).

[34] These factual uncertainties would, however, be resolved on remand in the trial courts, where respondents would have the power to compel production of the relevant documents. This is a further basis for finding the judgment nonfinal. See *Minnick*, 452 U.S. at 127 (dismissing for lack of finality in part "because of significant ambiguities in the record").

E. The Judgment Should Independently Be Affirmed On The Basis Of Federal Common Law.

Given the gaps in ERISA concerning the validity of beneficiary designations, courts will inevitably have to choose or create law to fill those gaps. Respondents maintain that the appropriate source to fill those gaps is state law. But even if this Court were to favor application of federal law, and hence the creation of a federal common-law rule, the net result ought to be effectively the same: Any such federal common law should look to state law for its content. In particular, this Court should, at a minimum, adopt state statutes governing the impact of divorce on beneficiary designations in those states having such statutes or comparable common-law rules.

As this Court noted in *O'Melveny & Myers*, 512 U.S. at 85, a bare conclusion that "'federal law governs'" includes "federal adoption of state-law rules," and hence in the absence of a conflict, abstract determinations regarding federal preemption of a given field are somewhat beside the point. The issue here, as in *O'Melveny*, is whether the state-law rule of decision is to be applied and, if it is, "it is of only theoretical interest whether the basis for that application is [Washington's] own sovereign power or federal adoption of [Washington's] disposition." *Id.* As there is no conflict between state laws such as RCW 11.07.010 and ERISA, it is not surprising that a number of courts that broadly construed ERISA preemption nonetheless reached the same substantive result through application of federal common law. See, *e.g.*, *Brandon* v. *Travelers Ins. Co.*, 18 F.3d 1321, 1326 (CA5 1994) (following approach of Seventh Circuit in "adopt[ing] state law through federal common law and determin[ing] that the provision in the divorce decree divesting the wife of her rights to the benefits in question, should be enforced"), cert. denied, 513 U.S. 1081 (1995). While respondents believe that this roundabout path is unnecessary, and that state law may apply of its own force, the incorporation of state law via

federal common law still remains an option for this Court to reach the appropriate result from a different direction.[35]

CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th St., NW
Washington, DC 20008
(202) 237-8165

MICHAEL W. JORDAN
2201 North 30th St.
Tacoma, WA 98403
(253) 627-4040

THOMAS C. GOLDSTEIN
(Counsel of Record)
AMY HOWE
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Counsel for Respondents

Dated: September 18, 2000.

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[35] Even if the Court were to hold RCW 11.07.010 preempted, the appropriate course would not be to reverse but instead to vacate and remand. The state courts have not yet addressed respondents' argument that petitioner "waived" her rights to benefits. Accord U.S. Br. 4 n.1. In addition, given that David died so soon after the divorce, the state courts may conclude that the children are entitled to the value of the benefits under the state common law rule that predated enactment of RCW 11.07.010. See *Aetna Life Ins. Co.* v. *Wadsworth*, 689 P.2d 46 (Wash. 1984).

APPENDIX

REVISED CODE OF WASHINGTON

TITLE 11. PROBATE AND TRUST LAW

CHAPTER 11.07. NONPROBATE ASSETS ON DISSOLUTION OR INVALIDATION OF MARRIAGE

11.07.010. Nonprobate assets on dissolution or invalidation of marriage

(1) This section applies to all nonprobate assets, wherever situated, held at the time of entry by a superior court of this state of a decree of dissolution of marriage or a declaration of invalidity.

(2)(a) If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity.

(b) This subsection does not apply if and to the extent that:

(i) The instrument governing disposition of the nonprobate asset expressly provides otherwise;

(ii) The decree of dissolution or declaration of invalidity requires that the decedent maintain a nonprobate asset for the benefit of a former spouse or children of the marriage, payable on the decedent's death either outright or in trust, and other nonprobate assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist at the decedent's death; or

(iii) If not for this subsection, the decedent could not have effected the revocation by unilateral action because of the terms of the decree or declaration, or for any other rea-

son, immediately after the entry of the decree of dissolution or declaration of invalidity.

(3)(a) A payor or other third party in possession or control of a nonprobate asset at the time of the decedent's death is not liable for making a payment or transferring an interest in a nonprobate asset to a decedent's former spouse whose interest in the nonprobate asset is revoked under this section, or for taking another action in reliance on the validity of the instrument governing disposition of the nonprobate asset, before the payor or other third party has actual knowledge of the dissolution or other invalidation of marriage. A payor or other third party is liable for a payment or transfer made or other action taken after the payor or other third party has actual knowledge of a revocation under this section.

(b) This section does not require a payor or other third party to pay or transfer a nonprobate asset to a beneficiary designated in a governing instrument affected by the dissolution or other invalidation of marriage, or to another person claiming an interest in the nonprobate asset, if the payor or third party has actual knowledge of the existence of a dispute between the former spouse and the beneficiaries or other persons concerning rights of ownership of the nonprobate asset as a result of the application of this section among the former spouse and the beneficiaries or among other persons, or if the payor or third party is otherwise uncertain as to who is entitled to the nonprobate asset under this section. In such a case, the payor or third party may, without liability, notify in writing all beneficiaries or other persons claiming an interest in the nonprobate asset of either the existence of the dispute or its uncertainty as to who is entitled to payment or transfer of the nonprobate asset. The payor or third party may also, without liability, refuse to pay or transfer a nonprobate asset in such a circumstance to a beneficiary or other person claiming an interest until the time that either:

(i) All beneficiaries and other interested persons claiming an interest have consented in writing to the payment

or transfer; or

(ii) The payment or transfer is authorized or directed by a court of proper jurisdiction.

(c) Notwithstanding subsections (1) and (2) of this section and (a) and (b) of this subsection, a payor or other third party having actual knowledge of the existence of a dispute between beneficiaries or other persons concerning rights to a nonprobate asset as a result of the application of this section may condition the payment or transfer of the nonprobate asset on execution, in a form and with security acceptable to the payor or other third party, of a bond in an amount that is double the fair market value of the nonprobate asset at the time of the decedent's death or the amount of an adverse claim, whichever is the lesser, or of a similar instrument to provide security to the payor or other third party, indemnifying the payor or other third party for any liability, loss, damage, costs, and expenses for and on account of payment or transfer of the nonprobate asset.

(d) As used in this subsection, "actual knowledge" means, for a payor or other third party in possession or control of the nonprobate asset at or following the decedent's death, written notice to the payor or other third party, or to an officer of a payor or third party in the course of his or her employment, received after the decedent's death and within a time that is sufficient to afford the payor or third party a reasonable opportunity to act upon the knowledge. The notice must identify the nonprobate asset with reasonable specificity. The notice also must be sufficient to inform the payor or other third party of the revocation of the provisions in favor of the decedent's spouse by reason of the dissolution or invalidation of marriage, or to inform the payor or third party of a dispute concerning rights to a nonprobate asset as a result of the application of this section. Receipt of the notice for a period of more than thirty days is presumed to be received within a time that is sufficient to afford the payor or third party a reasonable opportunity to act upon the knowledge, but receipt of

the notice for a period of less than five business days is presumed not to be a sufficient time for these purposes. These presumptions may be rebutted only by clear and convincing evidence to the contrary.

(4)(a) A person who purchases a nonprobate asset from a former spouse or other person, for value and without actual knowledge, or who receives from a former spouse or other person payment or transfer of a nonprobate asset without actual knowledge and in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, property, or benefit nor is liable under this section for the amount of the payment or the value of the nonprobate asset. However, a former spouse or other person who, with actual knowledge, not for value, or not in satisfaction of a legally enforceable obligation, receives payment or transfer of a nonprobate asset to which that person is not entitled under this section is obligated to return the payment or nonprobate asset, or is personally liable for the amount of the payment or value of the nonprobate asset, to the person who is entitled to it under this section.

(b) As used in this subsection, "actual knowledge" means, for a person described in (a) of this subsection who purchases or receives a nonprobate asset from a former spouse or other person, personal knowledge or possession of documents relating to the revocation upon dissolution or invalidation of marriage of provisions relating to the payment or transfer at the decedent's death of the nonprobate asset, received within a time after the decedent's death and before the purchase or receipt that is sufficient to afford the person purchasing or receiving the nonprobate asset reasonable opportunity to act upon the knowledge. Receipt of the personal knowledge or possession of the documents for a period of more than thirty days is presumed to be received within a time that is sufficient to afford the payor or third party a reasonable opportunity to act upon the knowledge, but receipt of the notice for a period of less than five business days is pre-

sumed not to be a sufficient time for these purposes. These presumptions may be rebutted only by clear and convincing evidence to the contrary.

(5) As used in this section, "nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset that pass on the person's death under only the following written instruments or arrangements other than the decedent's will:

(a) A payable-on-death provision of a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account;

(b) A payable-on-death, trust, or joint with right of survivorship bank account;

(c) A trust of which the person is a grantor and that becomes effective or irrevocable only upon the person's death; or

(d) Transfer on death beneficiary designations of a transfer on death or pay on death security, if such designations are authorized under Washington law.

For the general definition in this title of "nonprobate asset," see RCW 11.02.005(15) and for the definition of "nonprobate asset" relating to testamentary disposition of nonprobate assets, see RCW 11.11.010(7).

(6) This section is remedial in nature and applies as of July 25, 1993, to decrees of dissolution and declarations of invalidity entered after July 24, 1993, and this section applies as of January 1, 1995, to decrees of dissolution and declarations of invalidity entered before July 25, 1993.