

2011

## Rhonda Malloy v. Mary Beth Malloy : Unknown

Utah Court of Appeals

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### Recommended Citation

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IN THE UTAH COURT OF APPEALS

RHONDA H. MALLOY, an individual;  
RHONDA H. MALLOY, personal  
representative of the Estate of DAN  
MALLOY (deceased),

Appellant,

v.

MARY BETH MALLOY, an individual,

Appellee,

BRIEF OF THE APPELLANT

20110704  
App. No. ~~20100750~~

Civil No. 100904217

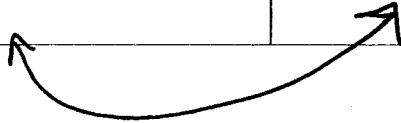
ON APPEAL FROM THE SECOND DISTRICT COURT,  
WEBER COUNTY, UTAH

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Pro Se



FILED  
UTAH APPELLATE COURTS  
DEC 05 2011

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### **LIST OF THE PARTIES**

The following are a list of all the parties to the proceeding in district court.

Rhonda H. Malloy, individually and as Personal Representative of the Estate of Dan  
Malloy, Plaintiff/Appellant

Mary Beth Malloy, Defendant/Appellee

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF THE ISSUES

Appellant raises the following issues on appeal.

**1. Did the District Court err in finding that the insurance manual was a “governing instrument” under Utah Code Ann. § 75-2-804?**

Standard of Review: A correction of error standard reviews the legal conclusions made by a district court for correctness without giving any deference to the legal conclusions of the district court. *R & R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass’n*, 199 P.3d 917, 922 (Utah 2008).

**2. Did the District Court err in relying upon the documents identified as the insurance manual and master policy when those documents had no foundation and were not properly authenticated?**

Standard of Review: A correction of evidentiary error standard reviews the legal conclusions made by a district court for correctness without giving any deference to the legal conclusions of the district court. *State v. Whittle*, 989 P.2d 52, 58 (Utah 1999); *R & R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass’n*, 199 P.3d 917, 922 (Utah 2008).

**3. Did the District court err in finding that the governing instruments of the policy contained express language preventing operation of the automatic revocation by divorce provision of Utah Code Ann. § 75-2-804?**



Standard of Review: A correction of error standard reviews the legal conclusions made by a district court for correctness without giving any deference to the legal conclusions of the district court. *R & R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass'n*, 199 P.3d 917, 922 (Utah 2008).

## STATEMENT OF THE CASE

### A. Nature of the Case.

Defendant/Appellee Mary Beth Malloy was married to Dan Malloy on July 4, 1989. In August 1989, Dan Malloy purchased a life insurance policy through the Federal Employees Group Life Insurance ("FEGLI") in the amount of \$50,000.00 (the "Policy") and designated Mary Beth as the beneficiary of the Policy. In April 2004 Dan Malloy and Mary Beth were divorced. Dan Malloy did not revoke or change the designation of beneficiary under the Policy. Dan Malloy and Rhonda were subsequently married on June 30, 2006. Dan Malloy died on September 1, 2009. After Dan Malloy's death, Mary Beth received \$50,000.00 as the benefit paid out under the terms of the Policy. Rhonda thereafter demanded that Mary Beth surrender the proceeds of the Policy to Rhonda. Mary Beth refused to surrender the Proceeds. Rhonda, individually and as personal representative of the Estate of Dan Malloy ("Rhonda") commenced the district court case to recover the Proceeds paid to Mary Beth.

### B. Course of Proceedings.

The district court action was filed by Rhonda in the Second District Court on June 2, 2010, under case number 100904217. (R. 1-10.) The case named Appellee Mary Beth Malloy as Defendant. The action against Mary Beth was based on breach of contract,

civil contempt, breach of duty of good faith and fair dealing and unjust enrichment under Utah Code Ann. § 75-2-804. On June 28, 2010, Mary Beth filed an Answer in this matter. (R. 1- ) On February 20, 2011, Plaintiff filed a Motion for Summary Judgment. (R. 1- ). On February 25, 2011, Mary Beth filed a response to Rhonda's Motion for Summary Judgment and filed her own Motion for Summary Judgment. (R. 1- ) On April 6, 2011, the district court heard oral argument from both parties on their respective motions for summary judgment. At the conclusion of the Hearing, the district court took the matter under advisement and instructed the parties to submit supplemental memoranda addressing the issue of preemption. (R. 227.) On April 25, 2011, Rhonda filed her Supplemental Memorandum in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Countermotion for Summary Judgment and again objected to the admission of the Manual and Master Policy documents as they lacked foundation and were not authenticated. (R. 237.) On May 2, 2011, in response to Plaintiff's Supplemental Memorandum, Mary Beth filed a Reply to Plaintiff's Supplemental Memorandum with an Affidavit in Support of Exhibits (the "Affidavit") as an exhibit to the memorandum. (R. 255.) On May 13, 2011, the district court entered a Memorandum Decision denying Plaintiff's Motion for Summary Judgment and granting Mary Beth's Motion for Summary Judgment. This appeal followed.

**C. Disposition at district court or agency.**

The district court found for Mary Beth and denied Rhonda's claims for relief. The district court determined that Mary Beth was the beneficiary of the Policy and that her divorce from Dan Malloy did not revoke the designation of beneficiary based on an

exception to Utah Code Ann. § 75-2-804. The district court found that the insurance policy, the insurance manual and the beneficiary election form were the governing instruments of the Policy and that the insurance manual provided an exception to § 75-2-804. The district court did not reach the issue of whether a private right of action was created by Utah statute enabling Rhonda to recover the Proceeds from Mary Beth. The district court awarded summary judgment to Mary Beth and denied Rhonda's claims for relief. (Memorandum Decision, Order Granting Motion for Summary Judgment; R. 273-281.)

#### STATEMENT OF RELEVANT FACTS

The pertinent facts found by the Court are stated below: (*See* Memorandum Decision, Order Granting Motion for Summary Judgment; R. 273-281.):

1. Mary Beth married Dan Malloy on July 14, 1989. (R. 274.)
2. Dan Malloy obtained an insurance policy (the "Policy") through the Federal Employees' Group Life Insurance plan in August 1989. (R. 274.)
3. Mary Beth was designated as the beneficiary of the Policy as of August 1989. (R. 274.)
4. Mary Beth and Dan Malloy were divorced in April 2004. (R. 274.)
5. The Honorable Ernie W. Jones entered a Decree of Divorce (the "Decree") dissolving the marriage of Defendant and Dan in April 2004. (R. 13-15.)
6. The Decree provided that the Mary Beth was not awarded any part of Dan Malloy's retirement by stating that "...each of the parties should be awarded their own

retirement” and that “...neither party is awarded alimony, past, present or future.” (R. 13-15.)

7. Rhonda married Dan Malloy after his divorce from Mary Beth in July 2006. (R. 274.)

8. Dan Malloy died on September 1, 2009. (R. 274.)

9. Dan Malloy did not change the beneficiary of the Policy prior to his death. (R. 274.)

10. Mary Beth claimed the proceeds of the Policy, amounting to \$50,000, plus interest (the “Life Insurance Proceeds”). (R. 46.)

11. Mary Beth received the Life Insurance Proceeds. (R. 46.)

12. The Office of Federal Employees’ Group Life Insurance paid the Life Insurance Proceeds to Mary Beth pursuant to the most current designation of beneficiary on file for the Policy, which was completed by Dan Malloy on August 24, 1989 (the “Beneficiary Designation”). (R. 62.)

13. Rhonda made demand to Mary Beth in April 2010 for the Life Insurance Proceeds but Mary Beth never paid the Life Insurance Proceeds to Rhonda. (R. 46.)

14. On February 7, 2011, Rhonda moved for summary judgment in the district court. (R. 58.)

15. On February 22, 2011, Mary Beth responded to Rhonda’s Motion for Summary Judgment and filed a Countermotion for Summary Judgment. (R. 76.)

16. On March 18, 2011, Mary Beth filed a Reply to Plaintiff’s Response to Countermotion for Summary Judgment (the “Reply”) wherein Mary Beth attempted to

introduce an exhibit purporting to be the “master policy” document without any foundation or authentication. (R. 127.)

17. On March 31, 2011, Rhonda filed a Motion to Strike Defendant’s Reply to Plaintiff’s Response to Countermotion for Summary Judgment because of the unsupported exhibits to Mary Beth’s memoranda and because Mary Beth had raised new issues in the reply. (R. 206.)

18. On April 6, 2011, the district court heard oral argument on the motions for summary judgment and Rhonda’s Motion to Strike (the “Hearing”). (R. 227.)

19. At the Hearing, Rhonda again raised concerns as the authenticity and reliability of the Manual. (R. 293-14.)

20. At the conclusion of the Hearing, the district court took the matter under advisement and instructed the parties to submit supplemental memoranda addressing the issue of preemption. (R. 227.)

21. On April 25, 2011, Rhonda filed her Supplemental Memorandum in Support of Plaintiff’s Motion for Summary Judgment and in Opposition to Defendant’s Countermotion for Summary Judgment (“Plaintiff’s Supplemental Memorandum). (R. 228.)

22. In Plaintiff’s Supplemental Memorandum, Rhonda again objected to the admission of the Manual and Master Policy documents as they lacked foundation and were not authenticated. (R. 237.)

23. On May 2, 2011, in response to Plaintiff’s Supplemental Memorandum, Mary Beth filed a Reply to Plaintiff’s Supplemental Memorandum. (R. 240.)

24. As an exhibit to her Reply to Plaintiff's Supplemental Memorandum, Mary Beth filed an Affidavit in Support of Exhibits (the "Affidavit"). (R. 255.)

25. The Affidavit did not provide any direct testimony or other support for the Manual or Master Policy documents other than statements from counsel for Mary Beth, Jacob W. Macfarlane that he had spoken to others about the reliability of the documents. (R. 255.)

26. On May 13, 2011, the district court issued its Memorandum Decision denying Rhonda's Motion for Summary Judgment and granting Mary Beth's Countermotion for Summary Judgment. (R. 273.)

#### SUMMARY OF THE ARGUMENT

This case arises out of the receipt by Defendant/Mary Beth Mary Beth Malloy of certain life insurance proceeds paid to her as the named beneficiary of a life insurance policy covering Dan Malloy. Mary Beth wrongfully retained the insurance proceeds despite having been divorced from Dan Malloy six years previously. Rhonda bases her claim to the insurance proceeds based on the automatic revocation on divorce provision of Utah Code Ann. § 75-2-804. Utah Code Ann. § 75-2-804 operates to revoke the beneficiary designation of an insurance policy in the event of divorce between the insured and the beneficiary unless the "governing instruments" of the policy dictate otherwise. The district court erred because it found the governing instrument to be an insurance manual rather than the policy. Pursuant to Utah Code Ann. § 75-1-201 and § 75-2-802, an insurance manual is not a governing instrument. The district court also erred because even if the manual were a governing instrument, the document relied upon by the district

court that purported to be the manual was not properly authenticated and no evidence was presented to demonstrate that the purported manual was even the manual for this relevant insurance plan or even if it was a manual for the relevant insurance program, whether it was the correct version of that manual. Likewise, the master policy document presented to the district court by Mary Beth was never properly authenticated or considered by the district court. Plaintiff properly objected to this evidence. Finally, even if the policy document submitted by Mary Beth were properly authenticated and admitted, the Policy does not contain provision to prevent operation of § 75-2-804.

## **ARGUMENT**

### **I. The District Court Erred in Finding that the Insurance Manual was a “Governing Instrument” under Utah Code Ann. § 75-2-804.**

This case arises out of the receipt by Defendant/Mary Beth Mary Beth Malloy of certain life insurance proceeds paid to her as the named beneficiary of a life insurance policy covering her ex-husband, Dan Malloy. Plaintiff/Appellant Rhonda Malloy was thereafter married to Dan Malloy until his death in 2009. After Mary Beth received the insurance proceeds, Rhonda demanded that Mary Beth surrender the insurance proceeds and deliver them to Rhonda. Rhonda bases her claim to the insurance proceeds on the automatic revocation on divorce provision of Utah Code Ann. § 75-2-804. § 75-2-804

operates to revoke the beneficiary designation of an insurance policy in the event of divorce between the insured and the beneficiary.<sup>1</sup> Specifically, § 75-2-804 states that:

Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) revokes any revocable:

- i. disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

Utah Code Ann. § 75-2-804(2).

In general terms under the Utah Probate Code, a “governing instrument” is a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

Utah Code Ann. § 75-1-201(19).

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<sup>1</sup> Where the beneficiary designation is not revoked due to preemption by federal statute (in this case FEGLIA), § 75-2-804 appears to create a private right of action in the case of a divorce permitting recovery against the former spouse who has received the insurance proceeds, as found by courts in other jurisdictions. *See, e.g., In re Estate of Paul J. Sauers, III, Deceased*, 971 A.2d 1265 (Pa. Sup. 2009). The district court did not reach the issue of whether any such private right was indeed created.



Under § 75-2-804, the definition of “governing instrument” is further refined to include only those documents “executed by the divorced individual before the divorce or annulment of his marriage to his former spouse.” Utah Code Ann. § 75-2-804(1)(d). A district court’s interpretation of a statute is a question of law that is reviewed by the appellate court for correctness, giving “no deference to the legal conclusions of the district court...” *R & R Indus. Park, L.L.C. v. Utah Prop. & Cas. Ins. Guar. Ass’n*, 199 P.3d 917, 922 (Utah 2008).

Mary Beth has acknowledged that the governing instruments in this case are the Policy and the Designation of Beneficiary executed by Dan Malloy in 1989. Neither of those documents contains the “express terms” necessary to constitute an exception to the revocation provision of § 75-2-804. The Manual is not a “governing instrument” under §§ 75-1-201 or 75-2-804. There is nothing to suggest that the Manual is anything other than an interpretation of the Policy. To make it so would be to allow administrative interpretation of a statutory scheme to trump a well-defined State law. Moreover, it cannot be said the Dan Malloy “executed” the Manual at any point.

Similarly, the beneficiary designation form executed by Dan Malloy contains no “express terms” that would except it from operation of § 75-2-804. Although the beneficiary designation form does advise policyholders to keep designations current, it does not expressly state that divorce will not invalidate the appointment of beneficiary under the Policy as required § 75-2-804. The Policy likewise lacks any express language indicating that divorce does not affect the designation of a beneficiary. What the Policy document does contain is direction on how beneficiaries are identified. The statute at

issue here clearly identifies the policy and documents “executed” by the insured as the “governing instruments.” The Manual is not the policy and is not a document “executed” by Dan Malloy and is therefore not a governing instrument. The district court erred determining that the Manual was a “governing instrument” under § 75-2-804.

**II. The Insurance Manual and Master Policy Documents Relied Upon by the District Court in Granting Mary Beth’s Motion for Summary Judgment Had No Foundation and Were Not Authenticated.**

Utah Rule of Civil Procedure 56 requires that motions for summary judgment be supported by affidavits, depositions and responses to discovery requests. Rule 103(a) of the Utah Rules of Evidence permits a finding of error where the error affects a substantial right and objection is made to the offered evidence. Where documentary evidence is relied upon by the district court in formulating its decision, evidentiary error with regard to that evidence is reversible without deference to the district court. *Merrill v. Bailey & Sons Co.*, 106 P.2d 255, 258 (Utah 1940). Rule 901 of the Utah Rules of Evidence requires that documentary evidence be authenticated prior to admission. Utah Rules of Evidence 901(a). In her Motion for Summary Judgment to the district court, Mary Beth submitted copies of what purport to be the master policy document and the insurance manual. Rhonda, in memoranda and before the district court at oral argument, objected to these documents as inadmissible for failing to adhere to the Utah Rules of Evidence.

Mary Beth submitted the Manual and Master Policy to the district court without providing any foundation for that document. There was no supporting affidavit or other appropriate evidence demonstrating the reliability of those documents. There was simply

no admissible evidence or testimony before the district court that provided any foundation for the Manual or the Master Policy documents.

There is likewise no evidence that the Manual in its current iteration bears any relationship or similarities to the policy that was purchased by Dan Malloy more than twenty years ago. There is no evidence demonstrating that the Manual of any vintage is indeed a fair representation of the Policy such that it would constitute a “governing instrument.” Only after Rhonda objected to the documents for a third time in her Supplemental Memorandum in Support of Motion for Summary Judgment did Mary Beth attempt to offer any foundation for the objectionable documents. However, that was accomplished by way of an affidavit from Mary Beth’s counsel that only alleged that counsel had verbal assurances from third parties that the documents were what Mary Beth claims they are. There was no testimony offered from those third parties, and the statements contained in counsel’s affidavit are inadmissible under Utah Rule of Evidence 802.

The district court’s reliance on the Manual affects the substantial right of Rhonda to the proceeds of the life insurance policy of Dan Malloy. It was primarily the Manual upon which the district court relied in rendering its decision. Because the district court relied on the Manual, which was afflicted with evidentiary problems, and because the district court’s reliance on that Manual affects a substantial right of Rhonda, the district court’s decision must be overturned and this matter remanded to the district court.

**III. The Governing Instruments of the Policy Contain No Express Language Preventing the Automatic Revocation by Divorce Provisions of Utah Code Ann. § 75-2-804.**

Utah Code Ann. § 75-2-804(2) states that:

Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) revokes any revocable:

- i. disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

It should go without saying that express terms are those terms that are express, not implied. Section 75-2-804 also clarifies, for the purposes of revocation upon divorce, "governing instrument means a governing instrument executed by the divorced individual before the divorce or annulment of this marriage to his former spouse." Thus, the governing instruments here are limited to the Policy and Designation of Beneficiary. In those governing instruments, there are no express terms that would render § 75-2-804 inoperative.

The only express term contemplated by § 75-2-804 is found in the Manual. As noted above, the Manual as presented to the district court suffered from evidentiary defects that subject the district court's decision to reversal. Also as noted above, the Manual is not a governing instrument. The Policy, which the parties have agreed is a governing instrument, lacks any express language indicating that divorce does not affect

the designation of a beneficiary. What the Policy document does contain is direction on how beneficiaries are identified.

Underlying this matter is the fact that it was Congress' intention to streamline the process of payment of benefits under FEGLI policies that primarily drives the designation provisions. *O'Neal v. Gonzalez*, 839 F.2d 1437, 1440 (11th Cir. 1988). This is not to say that FEGLIA has no interest in identifying the correct beneficiaries of the insurance benefits under its umbrella. For example, built in to FEGLIA is a mechanism to allow changes to beneficiaries by submission of a court order to the employing agency prior to the death of the covered individual. 5 U.S.C. § 8705. Nevertheless, FEGLIA has been structured to achieve administrative efficiency in order that benefits may be paid out without subjecting the administrator to liability and litigation over who was paid and who should have been paid. In fact, § 75-2-804 specifically absolves a third-party payor of liability for payments to individuals who should otherwise have received benefits had the payor received written notice. Utah Code Ann. § 75-2-804(7)(a). It is only after the payor has paid that § 75-2-804 becomes important. Notable too is the purpose of § 75-2-804. Such statutes exist to effectuate the presumption that a policyholder does not want to benefit his former spouse, and would have likely changed the beneficiary designation had it occurred to him to do so. *Stillman v. TIAA-CREF*, 343 F.3d 1311, 1314 (10th Cir. 2003). There is no reason that a former spouse should assume that an expectation interest is protected, and § 75-2-804 provides a method to accomplish this without imposing any duty on FEGLI or otherwise affecting the operation of FEGLIA.

In short, there is nothing in the Policy or the Designation of Beneficiary that qualifies as “express terms” that would render § 75-2-804 ineffective, and in fact § 75-2-804 supplements FEGLIA in that it provides a means for proper distribution of proceeds after FEGLI has accomplished its purpose of administrative efficiency and speed in paying benefits. The result is that the Court of Appeals should vacate the judgment against Rhonda denying her claims and remand to the district court.

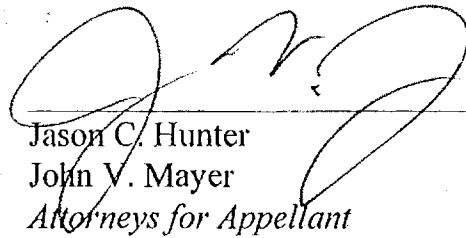
### CONCLUSION

As set forth above, the Court of Appeals should reverse the district court’s conclusion that Mary Beth was the beneficiary of the Policy and that her divorce from Dan Malloy did not revoke the designation of beneficiary. The Court of Appeals should also reverse the district court’s conclusion that the insurance policy, the insurance manual and the beneficiary election form were the governing instruments of the Policy. Upon reversing that legal conclusion by the district court, the Court of Appeals should vacate the judgment against Rhonda denying her claims.

Even if insurance manual was a “governing instrument” the Court of Appeals should reverse the district court’s decision because that document and the master policy were not properly authenticated. Upon making the determination that the documents offered to support Mary Beth’s Motion for Summary Judgment were not properly authenticated and admitted, the Court of Appeals should vacate the judgment against Rhonda denying her claims and remand to the district court.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2011.

PIA ANDERSON DORRUS REYNARD & MOSS



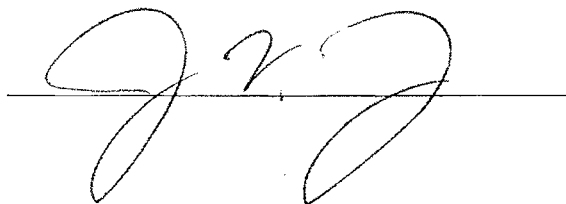
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Jason C. Hunter  
John V. Mayer  
*Attorneys for Appellant*

CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of December, 2011, I caused a true and correct copy of the foregoing **BRIEF OF THE APPELLANT** to be delivered via hand delivery correctly addressed to the following:

Mary Beth Malloy  
1747 North 450 East  
Ogden, Utah 84414

A handwritten signature in black ink, consisting of stylized cursive letters, is written over a horizontal line. The signature appears to be 'J. R. J.'



## ADDENDUM

**75-1-102. Purposes -- Rule of construction.**

(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) To discover and make effective the intent of a decedent in distribution of his property;

(c) To promote a speedy and efficient system for administering the estate of the decedent and making distribution to his successors;

(d) To facilitate use and enforcement of certain trusts; and

(e) To make uniform the law among the various jurisdictions.

Enacted by Chapter 150, 1975 General Session

### **75-1-201. General definitions.**

Subject to additional definitions contained in the subsequent chapters that are applicable to specific chapters, parts, or sections, and unless the context otherwise requires, in this code:

(1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the registrar for an order of informal probate or appointment under Title 75, Chapter 3, Part 3, Informal Probate and Appointment Proceedings.

(3) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation," refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(5) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(6) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. "Claims" does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(7) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(8) "Court" means any of the courts of record in this state having jurisdiction in matters relating to the affairs of decedents.

(9) "Descendant" of an individual means all of his descendants of all generations, with the relationship of parent and child at each generation being determined by the definition

of child and parent contained in this title.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means any person designated in a will to receive a devise. For the purposes of Title 75, Chapter 3, Probate of Wills and Administration, in the case of a devise to an existing trust or trustee, or to a trustee in trust described by will, the trust or trustee is the devisee,

and the beneficiaries are not devisees.

(12) "Disability" means cause for a protective order as described by Section 75-5-401.

(13) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(14) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration.

(15) "Exempt property" means that property of a decedent's estate which is described in Section 75-2-403.

(16) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

(17) "Foreign personal representative" means a personal representative of another jurisdiction.

(18) "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

(19) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(20) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, or by written instrument as provided in Section 75-5-202.5, but excludes one who is merely a guardian ad litem.

(21) "Heirs," except as controlled by Section 75-2-711, means persons, including the surviving spouse and state, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient

understanding or capacity to make or communicate responsible decisions.

(23) "Informal proceedings" mean those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

(24) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

(25) "Issue" of a person means descendant as defined in Subsection (9).

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(26) "Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes coowners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of coownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

(27) "Lease" includes an oil, gas, or other mineral lease.

(28) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) "Minor" means a person who is under 18 years of age.

(30) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as security.

(31) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(32) "Organization" includes a corporation, limited liability company, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

(33) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(34) "Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(35) "Person" means an individual or an organization.

(36) (a) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(b) "General personal representative" excludes special administrator.

- (37) "Petition" means a written request to the court for an order after notice.
- (38) "Proceeding" includes action at law and suit in equity.
- (39) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.
- (40) "Protected person" means a person for whom a conservator has been appointed. A "minor protected person" means a minor for whom a conservator has been appointed because of minority.
- (41) "Protective proceeding" means a proceeding described in Section 75-5-401.
- (42) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (43) "Registrar" refers to the official of the court designated to perform the functions of registrar as provided in Section 75-1-307.
- (44) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate, and, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.
- (45) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution, and closing.
- (46) "Sign" means, with present intent to authenticate or adopt a record other than a will:
- (a) to execute or adopt a tangible symbol; or
  - (b) to attach to or logically associate with the record an electronic symbol, sound, or process.
- (47) "Special administrator" means a personal representative as described in Sections 75-3-614 through 75-3-618.
- (48) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or insular possession subject to the jurisdiction of the United States, or a Native American tribe or band recognized by federal law or formally acknowledged by a state.
- (49) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.
- (50) "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this title.
- (51) "Supervised administration" refers to the proceedings described in Title 75, Chapter 3, Part 5, Supervised Administration.
- (52) "Survive," except for purposes of Part 3 of Article VI, Uniform TOD Security Registration Act, means that an individual has neither predeceased an event, including the

death of another individual, nor is considered to have predeceased an event under Section 75-2-104 or 75-2-702. The term includes its derivatives, such as "survives," "survived," "survivor," and "surviving."

(53) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(54) "Testator" includes an individual of either sex.

(55) "Trust" includes a health savings account, as defined in Section 223, Internal Revenue Code, any express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Title 75, Chapter 6, Nonprobate Transfers, custodial arrangements pursuant to any Uniform Transfers To Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, preneed funeral plans under Title 58, Chapter 9, Funeral Services Licensing Act, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(56) "Trustee" includes an original, additional, and successor trustee, and cotrustee, whether or not appointed or confirmed by the court.

(57) "Ward" means a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

(58) "Will" includes codicil and any testamentary instrument which merely appoints an

executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

Amended by Chapter 93, 2010 General Session



**75-2-804. Definitions -- Revocation of probate and nonprobate transfers by divorce -- Effect of severance -- Revival -- Protection of payors, third parties, and bona fide purchasers -- Personal liability of recipient -- No revocation by other changes of circumstances.**

(1) As used in this section:

(a) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 75-2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(c) "Divorced individual" includes an individual whose marriage has been annulled.

(d) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his marriage to his former spouse.

(e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(f) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself in place of his former spouse or in place of his former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(2) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) revokes any revocable:

(i) disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;

(ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse; and

(iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(b) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into tenancies in common.



(3) A severance under Subsection (2)(b) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

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

(5) Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(6) No change of circumstances other than as described in this section and in Section 75-2-803 effects a revocation.

(7) (a) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(b) Written notice of the divorce, annulment, or remarriage under Subsection (7)(a) shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to the decedent's estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(8) (a) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is

liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(b) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Repealed and Re-enacted by Chapter 39, 1998 General Session