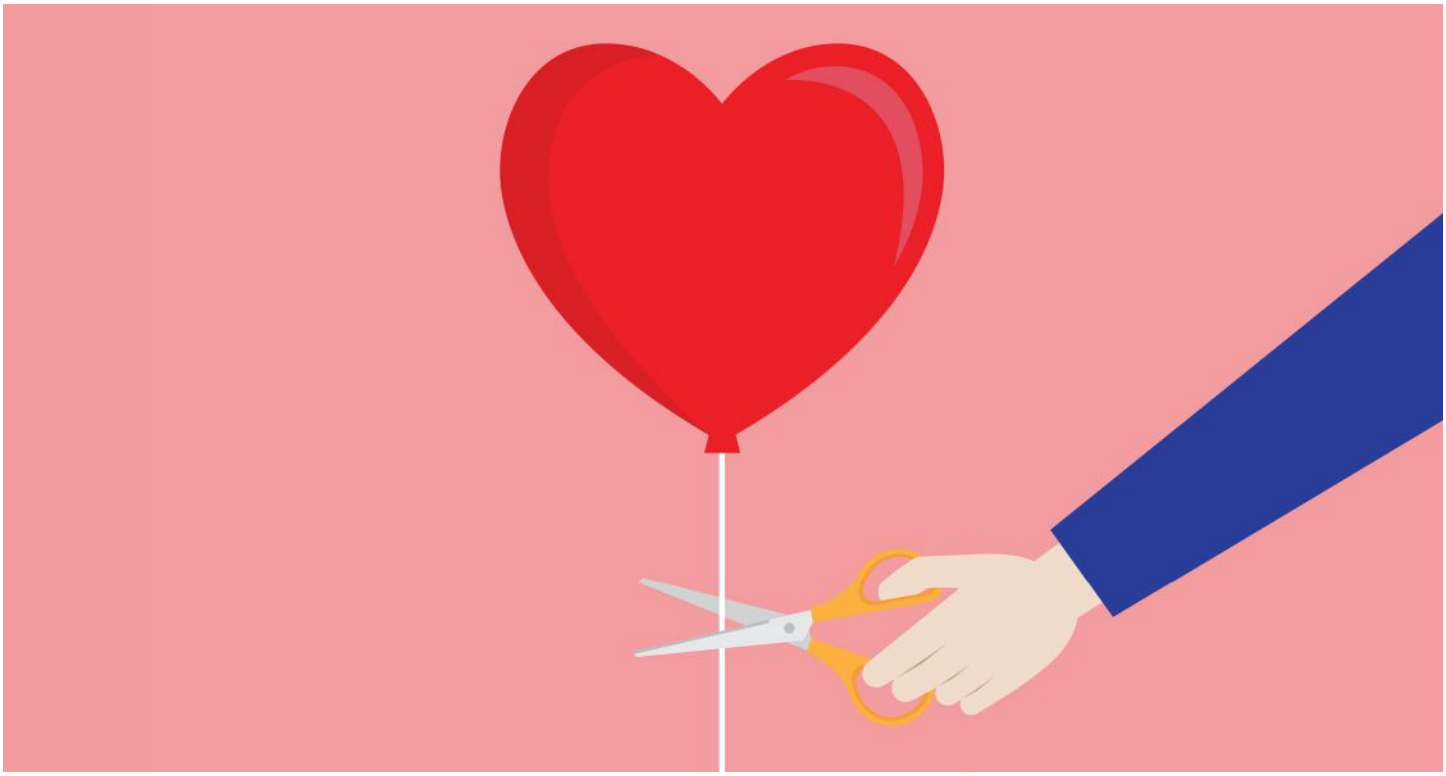
By T. Matthew Creech and C. Bailey King, Jr.

Untying the Knot of Ex-Spousal Beneficiary Designations in Non-Probate Assets



Revocation-upon-divorce statutes traditionally served to divest an ex-spouse of testamentary bequests made in their former spouse's will based on the decedent's *presumed* testamentary intent. In other words, these statutes *assume* that a decedent would "prefer that a former spouse not receive property under a will executed before the spouses divorced." Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 Quinnipiac Prob. L.J. 83, 84 and 103 (2004). A growing number of states have extended these statutes to also cover non-probate instruments, or "will substitutes," such as life insurance policies, annuities, and retirement accounts. As a result, in the majority of states, the law now assumes that a decedent would not want to enrich a former spouse, even though the former spouse is the named beneficiary, and therefore revokes such pre-divorce beneficiary designations.

The extension of revocation-upon-divorce statutes to include these non-probate assets has garnered national attention in recent years following the United States Supreme Court's decision in *Sveen v. Melin,* 138 S. Ct. 1815 (2018). That decision, however, only addressed a single issue: whether applying Minnesota's revocation-upon-divorce statute to a life insurance beneficiary designation made before the statute's enactment violated the Contracts Clause of the United States Constitution. The Supreme Court held that it does not. Mark Sveen married Kaye Melin in 1997 and purchased a life insurance policy the fol-

T. Matthew Creech is AVP & Senior Counsel at Lincoln Financial Group in Greensboro, North Carolina, where he began in 2013 following a three-year clerkship in the United States District Court for the Middle District of North Carolina and six years in private practice focusing on Life, Health and Disability litigation. Lincoln Financial Group is the marketing name for Lincoln National Corporation and its affiliates. The views expressed are those of the authors as of the date specified. **C. Bailey King, Jr.** is a partner with Bradley Arant Boult Cummings LLP in its Charlotte, North Carolina, office and serves as co-chair of the firm's business litigation practice group. Mr. King has a broad business litigation practice that includes Life, Health and Disability insurance litigation. He is an active member of both DRI, where he serves on the Commercial Litigation Steering Committee, and the FDCC, where he serves as vice-chair of the Life, Health, and Disability section..

lowing year, naming Melin as the primary beneficiary and his two children from a prior marriage as contingent beneficiaries. Sveen and Melin divorced in 2007, with no mention of the life insurance policy in the divorce decree and with Sveen taking no subsequent action to revise his beneficiary designations before his death in 2011. In 2002, Minnesota enacted its revocation-upon-divorce statute, which provides that "the dissolution or annulment of a marriage revokes any revocable [ ] disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument," which includes an "insurance or annuity policy." *Sveen*, 138 S. Ct. at 1820 (citing Minn. Stat. § 524.2-804).

The Supreme Court found that the Minnesota statute does not substantially impair preexisting contractual arrangements, citing several reasons. First, the statute is designed to reflect a policyholder's presumed intent of not wanting to enrich his or her former spouse, and thus supports rather than impairs the contractual scheme. Second, the law is unlikely to disturb a policyholder's expectations since it is consistent with what a divorce court could always have done. Finally, the statute is merely a default rule that the policyholder can counter "with a stroke of a pen" by simply submitting an updated beneficiary form reaffirming the designation. *Id*. at 1822-23.

The resolution of this discrete constitutional question, however, does not settle the many other legal issues related to revocation-upon-divorce statutes, such as: (i) what state's law should apply; (ii) if that state has a revocation-upon-divorce statute, does it apply prospectively only or retroactively to designations made or divorces finalized before the statute's enactment; and (iii) whether the statute's presumption of revocation can be or has been overcome by extrinsic evidence. These issues are frequently litigated with differing and often inconsistent results. In addition to the obvious importance to and effects on owners and beneficiaries of non-probate assets, the application and interpretation of revocation-upon-divorce statutes have significant, and potentially costly, implications for companies underwriting and/or administering such benefits (hereinafter, "Payors"). Payors should thus proceed with caution and scrutinize the applicable law (*to the extent possible*) before settling claims where ex-spouses have been named as a primary beneficiary.

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Revocation-Upon-Divorce Statutes Covering Non-Probate Assets

The Uniform Law Commission amended the Uniform Probate Code in 1990 to unify the law of probate and non-probate transfers by including the revocation of non-probate transfers by divorce. The applicable provision reads as follows:

> **(b) [Revocation Upon Divorce.]** 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:
>
> **(1)** revokes any revocable:
>
> **(A)** disposition or appointment of property made by a divorced individual to the divorced individual's 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,
>
> **(B)** 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
>
> **(C)** 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…

Unif. Probate Code § 2-804(b).

"Disposition or appointment of property" is defined broadly to include "a transfer of an item of property or *any other benefit to a beneficiary designated in a governing instrument.*" *Id*. § 2-804(a)(1) (emphasis added). As a result of this expansion, the model revocation-upon-divorce statute now covers non-probate assets "such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment)." *Id*. § 2-804, Comment. As a result, "the provisions of the governing instrument are given effect as if the divorced individual's former spouse (and relatives of the former spouse) disclaimed all provisions revoked by this section," even though the owner never submitted a post-divorce beneficiary change. Id. Be aware, however, that state revocation-upon-divorce statutes are inapplicable to non-probate assets governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). *See Egelhoff v. Egelhoff,* 532 U.S. 141 (2001) (holding that ERISA preempts state laws providing that an ex-spousal beneficiary designation is revoked automatically upon divorce).

Currently, at least thirty-five states have revocation-upon-divorce statutes either adopting or codifying language substantially similar to Section 2-804 of the Uniform Probate Code, all of which cover, at least to some extent, non-probate assets. Despite the similarities among the participating states' statutes, and indeed the drafters' intent to unify the law, there are important differences. For example, some statues expressly exclude life insurance

policies, while others do not; some statutes expressly provide that they apply only to designations made or divorces that occur after the statute's enactment, while others do not; and some statutes allow extrinsic evidence to rebut the presumption of revocation, while others do not.

In addition, where the statutes are silent on these issues, the inconsistent and/or uncertain application and interpretation by the courts presents even more concerning risks to Payors. Which statute applies, when does the statute apply, and under what circumstances does the statute apply are almost always unknown, unsettled, or, at a minimum, unpredictable. Compounding that uncertainty is the fact that most court decisions providing guidance on these issues are from either intermediate state appellate courts or federal courts making *Erie* predictive determinations of a particular state's law, which are subject to differing interpretations by both peer courts and the respective state's highest court (which ultimately controls).

What statute applies?

When an ex-spouse is the designated beneficiary, the first question is one of geography – What state's law do you look to? Depending on the particular facts, there can be multiple possibilities: (i) the state where the policy/contract was issued; (ii) the state where the divorce occurred; (iii) the state where the decedent resided at the time of death; or (iv) the state where the ex-spouse named as beneficiary currently resides. These states may be the same in many instances, making the state's law that applies fairly easy to determine. But there are other questions that further complicate the analysis. First, even if the choice-of-law appears straight-forward, claimants can still argue for the application of whatever law is most favorable to their position. Second, if claimants disagree with a Payor's claim decision, they can file suit anywhere the Payor is subject to personal jurisdiction. This alone creates significant litigation risk. Moreover, as discussed below, it is oftentimes impossible to predict with any certainty what law applies, and the answer to this question can be outcome-determinative. *See, e.g., Matter of Est. of Sullivan*, No. CV 2018-0741-PWG, 2021 WL 4203216, at *1 (Del. Ch. Sept. 16, 2021) ("The question is outcome-determinative; under the Pennsylvania statute . . . public policy requires the presumption that that the decedent . . . intended to remove the ex-spouse . . . as the beneficiary. . . .; under Delaware common law, the contract itself controls, here leading to [the] ex-husband . . . remaining the beneficiary, as designated in the policies.")

To determine which state's law will apply, a court will "apply the conflict of laws rules of the state in which it sits." *See, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This question cannot be answered with any certainty, though, because a claimant can file suit wherever the company is subject to personal jurisdiction. And, of course, states have differing conflicts of law rules. See Choice of Law Standards re: Insurance Coverage, September 2016, available at **https://www.tresslerllp.com/docs/default-source/Publication-Documents/50_state_choice_of_law_standards_re_insurance_coverage.pdf?sfvrsn=0#:~:text=Choice%20of%20law%20is%20governed,the%20issues%20to%20be%20decided** (last visited June 7, 2022).

Traditionally, in cases involving instruments that govern the disposition of non-probate assets, courts in most states have applied the *lex loci contractus* rule. That is, the law of the state where the contract was formed should apply. Increasingly, however, courts have begun to adopt a more flexible approach in these disputes, most notably the "most significant relationship" approach taken by the Restatement (Second) of Conflicts of Laws (hereinafter, the "Restatement"). Under the Restatement's approach, the following six subjective factors are relevant in determining the applicable law:

(a) The needs of the interstate and international systems;
(b) The relevant policies of the forum;
(c) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
(d) The protection of justified expectations;
(e) The basic policies underlying the particular field of law;
(f) Certainty, predictability, and uniformity of result; and
(g) Ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

Some instruments that govern the disposition of non-probate assets, such as trust documents, have a choice-of-law provision, and such provisions will ordinarily be enforced under the Restatement's approach, *unless* "the chosen state has no substantial relationship to the parties or the transaction" or "application of the chosen law would be contrary to a fundamental policy of a state which has a materially greater interest." *Id.* § 187. In contract cases where there is no choice-of-law provision, Section 188 of the Restatement further provides that a Court should consider "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* § 188. Finally, with respect to one specific type of non-probate asset, life insurance contracts, the default rule is that the applicable law should be the "law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship." *Id.* § 192.

Given the subjective and competing nature of these factors, it is nearly impossible for Payors to predict what law any particular court would apply when administering benefit claims. For example, in a recent case, the Delaware Chancery Court had to determine which law to apply to a claim brought by an ex-husband to a death benefit under a life insurance policy issued in Delaware to a then-Delaware resident who subsequently moved to and died in Pennsylvania. *Matter of Est. of Sullivan*, 2021 WL 4203216, at *1. The question was "outcome-determinative." Pennsylvania (the state where the insured resided at the time of her death) had a revocation-upon-divorce statute that applied to non-probate assets, meaning that the former spouse

would not be entitled to the death benefit; Delaware's revocation-upon-divorce statute, on the other hand, did not. *Id*. In analyzing the issue, the Court correctly started with the "presumption that Delaware law [would] appl[y]" based on the Restatement's default rule that life insurance contracts are governed by the state where the insured was domiciled at the time the policy was applied for. *Id*. at *14. However, the Court determined that Pennsylvania had a "more significant relationship," based on Pennsylvania's "policy, provided via statute," revoking a designation made in favor of an ex-spouse. *Id*. at *17-18. As a result, the Court found that Pennsylvania law applied, and the former spouse was not entitled to the death benefit.

In contrast, in another recent case, a federal district court in Nevada was faced with the question of whether to apply Nevada or Florida law to a trust established in Nevada by a then-Nevada resident who subsequently moved to and died in Florida. *Czerniewski v. TD Ameritrade, Inc*., No. 2:18-CV-02078-KJD-VCF, 2021 U.S. Dist. LEXIS 61901 (D. Nev. Mar. 29, 2021). Again, the issue was outcome-determinative. Florida's revocation-upon-divorce statute was determined not to apply to trusts, meaning the former spouse would not be entitled to the death benefit; Nevada's revocation-upon-divorce statute did. *Id*. at *11-13. In determining that the Nevada statute should apply, the court relied upon the trust's choice-of-law provision and discounted Florida's interest in the dispute as the state where the insured resided at the time of his death. *Id*.

Interestingly, the burden this unpredictable analysis puts on Payors with ex-spousal beneficiary designations has not been lost on the United States Supreme Court. In the ERISA context, the Supreme Court determined that state-by-state revocation-upon-divorce statutes were preempted and did not apply to ERISA plans. In reaching this conclusion, the Supreme Court noted that requiring plan administrators to "maintain a familiarity with the laws of all 50 States [and] be attentive to changes in interpretations of those statutes by state courts . . . is exactly the burden ERISA seeks to eliminate." *Egelhoff*, 532 U.S. at 151 (2001). For non-ERISA benefits, though, that burden remains.

When does the statute apply?

The analysis does not end with simply determining which statute applies. The next question is one of timing – When does the statute apply? Does it apply only to divorces finalized before the statute's enactment, or does it also apply to post-enactment divorces? For the sake of simplicity, this issue will be broadly framed as whether the revocation-upon-divorce statute is prospective or retroactive. If prospective, the statute applies only to divorces finalized after the statute is enacted. If retroactive, the statute applies to all divorces regardless of when they were finalized.

Of the states that have addressed the issue, the prevailing view is that revocation-upon-divorce statutes operate retroactively – although arriving at that conclusion by differing paths. Nevada has a specific statutory provision that applies its statute on the date of death "regardless of when the divorce or annulment occurred." Nev. Rev. Stat. Ann. § 111.781 (10). The Supreme Court of Colorado found that the legislature intended for its revocation-upon-divorce statute to apply to all deaths following enactment, "notwithstanding that the insurance contract may have been entered into, *and the divorce may have occurred*, before the effective date of the statute." *Hill v. DeWitt (In re Estate of DeWitt)*, 54 P.3d 849, 856 (Colo. 2002) (emphasis added). The sole case currently addressing Mississippi's recently enacted statute likewise concluded that "an application of the plain language of the statute suggests that" the beneficiary designation naming the former spouse was invalidated despite the divorce predating the statute's enactment. *State Farm Life Ins. Co. v. King*, No. 3:21-CV-50-CWR-LGI, 2022 U.S. Dist. LEXIS 37411, at *4 (S.D. Miss. Mar. 3, 2022).

Many states applying revocation-upon-divorce statutes retroactively, as defined here, focus on the ambulatory nature of the governing instruments. As with a will, they do not create a vested right but only an expectation of payment at the time of death. Because beneficiary designations can be altered at any time prior to death and have no legal effect until that time, the governing instruments "must be interpreted and applied at death in order to effectuate the transferor's final intent." *Thrivent Fin. v. Andronescu*, 300 P.3d 117, 119-20 (Mont. 2012); *see also Hadfield v. Prudential Ins. Co*., 973 A.2d 387, 390 (N.J. Super. Ct. App. Div. 2009); *Matter of McCauley v. N.Y. State & Local Employees' Ret. Sys*., 46 N.Y.S.3d 262, 265 (N.Y. App. Div. 2017); *Otto v. Estate of Moen,* No. 00-C-0171-C, 2000 U.S. Dist. LEXIS 22571, at *10-12 (W.D. Wis. Nov. 29, 2000); *Hill*, 54 P.3d at 856.

Using the same rationale, with more emphasis on presumed intent, several states consider their revocation-upon-divorce statutes to be rules of construction that set forth presumptions to be applied at the time of death regardless of when the divorce occurred. *Stillman v. Tchrs. Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1317-18 (10th Cir. 2003) (interpreting Utah's statute); *Buchholz v. Storsve,* 740 N.W.2d 107, 111-112 (S.D. 2007); *Mahi v. Variable Annuity Life Ins. Co*., 301 P.3d 1268 (Haw. Ct. App. 2013). This characterization is consistent with what was contemplated by the Uniform Law Commission when drafting Section 2-804. An article written by Professor Lawrence Waggoner, who was instrumental in drafting the Uniform Probate Code, was cited as "[t]he theory of this section [2-804]" and states in relevant part:

> [Section 2-804] merely establishes a rule of construction designed to implement intention. It reflects a legislative judgment that when the insured leaves unaltered a will, trust, or insurance-beneficiary designation in favor of an ex-spouse, the insured's failure to designate substitute takers more likely than not represents inattention rather than intention. The legislative judgment yields to a contrary intention.

Unif. Probate Code § 2-804, Comment (citing Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code,* 26 Real Prop. Prob. & Tr. J. 683, 700 (1992)). And, when a statute is based on a uniform act, courts often assume that the legislature intended to adopt the drafters' construction and their commentary is thus "highly persuasive unless erroneous or contrary to settled pol-

icy . . .” *See Morgan Keegan & Co. v. Cunningham*, 918 So. 2d 897, 906 (Ala. 2005) (citing *In re Estate of Dobert*, 963 P.2d 327, 331 (Ariz. Ct. App. 1998) and *Universal Motors, Inc. v. Neary,* 984 P.2d 515, 517 (Alaska 1999)).

With respect to the minority view that revocation-upon-divorce statutes operate only prospectively (again, defined here as applying only to divorces finalized after the statute's enactment), Iowa, Virginia, and Washington have statutory provisions that apply their statutes based on date of divorce coinciding with their statute's effective dates. A Nebraska federal district court ruled that Nebraska's statute operates only prospectively. Citing Nebraska law that “statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively,” the court found “no indication in the language of the statute that the Nebraska Legislature intended for it to operate on divorces that were already finalized . . .” *Ohio Nat'l Life Ins. Co. v. Anderson,* 500 F. Supp. 3d 881, 886 (D. Neb. 2020). Finally, in Oregon, “[t]he revocation of a designation of beneficiary . . . becomes effective upon entry of the [divorce] judgment,” and a federal district court has ruled that the statute “applies only to judgments entered on or after the statute's effective date . . .” *Midland Nat'l Life Ins. Co. v. Lacheln,* No. 3:11-cv-00957-JE, 2012 U.S. Dist. LEXIS 184732, at *16 (D. Or. Oct. 3, 2012).

Many states with revocation-upon-divorce statutes have no interpreting caselaw regarding when the statutes apply, and some that do have conflicting opinions. For instance, South Carolina's statute has been inconsistently interpreted by its federal district court to be both inapplicable since the divorce preceded the statute and applicable since death occurred after the statute's effective date. *Compare State Farm Life Ins. Co. v. Murphy,* No. 2:15-cv-04793-DCN, 2017 U.S. Dist. LEXIS 168588, at *11 (D.S.C. Oct. 12, 2017) (The couple “were divorced before the January 1, 2014, effective date of the [statute]. Therefore, [the statute] does not bar [former spouse's] claim for the $100,000 in policy proceeds.”), *with Protective Life Ins. Co. v. LeClaire*, Civil Action No. 7:17-cv-00628-AMQ, 2018 U.S. Dist. LEXIS 109786, at *11 (D.S.C. July 2, 2018) (“The statute applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after the effective date of January 1, 2014. As the Decedent *passed away after the effective date,* the instant matter must be considered within the purview of the statute.” (emphasis added)); *see also State Farm Life Ins. Co. v. Benham,* No. 2:21-CV-00695-AKK, 2021 U.S. Dist. LEXIS 241316, at *10 (N.D. Ala. Dec. 17, 2021) (The Alabama court, applying SC law, “has serious doubts about the retroactivity of the amended law.”).

An Alabama federal district court ruled that its state's revocation-upon-divorce statute did not defeat the former spouse's claim for benefits because “the statute was enacted and became effective after the entry of the divorce decree in this case.” *Miller v. Nationwide Ret. Sols., Inc.,* No. 2:15-cv-01574-JEO, 2017 U.S. Dist. LEXIS 101930, at *21 (N.D. Ala. June 30, 2017). The Alabama Supreme Court subsequently ruled that the statute “did not retroactively impair any existing contractual obligations,” but instead “created a prospective default rule, i.e., that a divorce effectively revokes any revocable beneficiary designation in favor of the former spouse, absent further action by the policyholder.” *Blalock v. Sutphin*, 275 So. 3d 519, 525 (Ala. 2018). The opinion is not clear, however, on whether this “prospective default rule” applies only to divorces that postdate the statute's enactment as found by the federal court or to all subsequent deaths regardless of when the divorce occurred, and that cannot be gleaned from the opinion because the statute was in effect at the time of the divorce at issue.

> One potential solution to minimize risks associated with administering claims involving divorce is to amend the beneficiary designation provision for newly issued policies/contracts

Finally, Florida's statute “applies to all designations made by or on behalf of decedents dying on or after [the statute's effective date], regardless of when the designation was made.” The statute is silent, however, on whether it applies to divorces preceding the statute's enactment – and the existing caselaw could be interpreted as contradictory. *Compare In re Proceeds of Jackson Nat'l Life Ins. Co. Policy*, No. 6:15-cv-261-Orl-31TBS, 2016 U.S. Dist. LEXIS 203124, at *13 (M.D. Fla. Feb. 25, 2016) (finding the former spouse revoked as beneficiary based on a divorce that preceded the statute's enactment), with Zapata v. Gonzalez, No. 8:18-cv-2577-T-23AEP, 2020 U.S. Dist. LEXIS 171754, at *14-15 (M.D. Fla. Aug. 3, 2020) (“[T]he dissolution of their marriage occurred subsequent to enactment of the statute. Accordingly, at the time of the dissolution of the marriage . . ., the statute was already in effect and therefore applicable.”).

How does the statute operate?

And, ultimately, the final question is one of application – Does the revocation-upon-divorce statute apply in particular circumstances, or has its presumption been rebutted? The exceptions to automatic revocation of beneficiary designations in favor of former spouses in Section 2-804(b) of the Uniform Probate Code are “as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate . . .” Once again, the issue of what evidence, if any, will be sufficient to prevent the application of a revocation-upon-divorce statute is far from clear.

There is agreement among courts that have addressed the issue with respect to “terms of a governing instrument.” That is, the governing instrument (e.g., insurance policy or annuity contract) “must expressly provide that the beneficiary designation is not revoked by divorce or words to that effect.” *Am. Fam. Life Assurance Co. of Columbus v. Parker,* 178 N.E.3d 859, 869 (Mass. 2022); *see also Buchholz*, 740 N.W.2d at 112 (“We hereby interpret the statute to require that the governing instrument contain express terms referring to divorce, specifically stating that the beneficiary will remain as the designated beneficiary despite divorce”); *Hertzske v. Snyder,* 390 P.3d 307, 313 (Utah 2017) (“The generic

language found in almost every life insurance policy regarding the standard method to change a beneficiary does not constitute 'express terms' enabling the beneficiary designation to survive revocation under [§ 2-804]. . . We therefore hold that a life insurance policy must contain language specifically stating that the beneficiary designation will remain in effect despite divorce to invoke the express terms exception"). And "the beneficiary designation itself is not sufficient" as that would render the exception meaningless. *Buchholz*, 740 N.W.2d at 112. In addition, the lack of caselaw addressing the court order exception suggests little, if any, ambiguity concerning what qualifies to rebut revocation.

The thornier issues concern what constitutes a contract sufficient to rebut revocation and if factors outside of the enumerated exceptions warrant consideration. As a starting point, there are two issues on which the considering courts have universally agreed: inaction by the decedent (*e.g.*, not updating his or her beneficiary designation) and self-serving statements made by the decedent only to the former spouse and not witnessed by anyone else are insufficient. Aside from that, there is Hawaii's prohibition of extrinsic evidence to establish the decedent's intent, *Mahi*, 301 P.3d 1268, contrasted by Wisconsin's statutory provision expressly allowing the use of extrinsic evidence to prove "an intent contrary to any provision" in the statute, Wis. Stat. Ann. § 854.15(bm), and a lot of conflicting authority and silence in between.

The Arizona Court of Appeals concluded that to defeat the revocation presumption, the former spouse must prove the intention in writing "and must otherwise comply with applicable policy terms" (i.e., confirm that decision in writing to the Payor). *In re Estate of Lamparella,* 109 P.3d 959, 966-67 (Ariz. Ct. App. 2005). By contrast, in addition to a writing in compliance with the terms of the governing instrument, a federal district court in New Mexico also allowed "an admissible statement of the decedent's intent made to a third-party with no interest in the beneficiary designation." *Primerica Life Ins. Co. v. Montoya,* No. 1:18-cv-109-JCH-CG, 2019 U.S. Dist. LEXIS 45086, at *10-11 (D.N.M. Mar. 18, 2019); see also *Motorists Life Ins. Co. v. Sherbourne*, 22 N.E.3d 1133, 1139 (Ohio Ct. App. 2014) (finding the statutory presumption rebutted when there was uncontested evidence that the decedent made post-divorce statements to, and that were memorialized by, his insurance agent that he desired his former spouse to remain as beneficiary). A New Jersey federal district court agreed with the latter approach, finding that "[t]here is nothing to suggest that the alleged oral contract . . . is insufficient as a matter of law to trigger the exception" because "the limited case law . . . does not provide guidance on whether a 'contract' need be in writing for purposes of the [statute] exception . . . [and] it is clear that under New Jersey law, contracts need not be in writing to be valid." *Degelman v. Lincoln Nat'l Life Ins. Co.,* Civil Action No. 16-286 (JLL) (SCM), 2016 U.S. Dist. LEXIS 195035, at *13-14 (D.N.J. June 21, 2016); *see also State Farm Ins. Co. v. Kitko,* 241 A.3d 648, 656 (Pa. Super 2020) ("[A] plain-reading of [the statute] leaves open the possibility that a beneficiary designation of a former spouse after a divorce decree is issued can be accomplished by either an oral designation or a written designation. If the legislature intended the beneficiary designation . . . to be in written form exclusively, then the word 'written' would have been inserted before 'designation'. . .").

The most liberal construction comes from Alaska and South Dakota. An Alaska federal district court addressing the issue did not consider the statute to be a "strict and inflexible rule" and required only proof by a preponderance of the evidence of the decedent's intent for him or her to be the beneficiary after the divorce. Using that standard, the court upheld the former spouse's designation based solely on an admissible oral statement allegedly made by the deceased insured to his agent. *State Farm Life Ins. Co. v. Davis,* No. 3:07-cv-00164-JWS, 2008 U.S. Dist. LEXIS 44003, at *5 (D. Alaska June 3, 2008). A South Dakota federal district court agreed with that interpretation, finding that "the putative beneficiary can meet her burden either by 'providing a writing from the decedent in compliance with the terms of the life insurance policy,' or by presenting an admissible statement of the decedent's intent made to a third party with no interest in the beneficiary designation. *Am. Gen. Life Ins. Co. v. Jenson,* No. 11-5057-JLV, 2012 U.S. Dist. LEXIS 33409, at *40 (D.S.D. Mar. 12, 2012) (internal citations omitted) (describing the state's characterization of the statute as a rule of construction as "a two-edged sword" because "[w]hile on the one hand it means the legislature can provide for retroactive application of the statute without running afoul of the Constitution, it also means that the rule must give way to a decedent's contrary intention.").

Finally, Alabama's revocation-upon-divorce statute does "not apply to any insurance policy for which the former spouse is named beneficiary, if the former spouse is listed as owner of the policy or makes premium payments on the policy following the divorce or annulment." Ala. Code § 30-4-17(h). The ownership exclusion seems obvious and likely would (or at least, should) be universally applied even absent an express statutory provision. The presumed intentions underlying revocation-upon-divorce statutes relate to the *owners* of non-probate assets (i.e., those who have the contractual authority to actually make a beneficiary change). Requiring an ex-spouse owner to redesignate him or herself as beneficiary following a divorce would be nonsensical. The more interesting question is what would/should be done in other states concerning post-divorce premium payments made by former spouses. Would courts in states without that express provision find such evidence either admissible or sufficient to rebut the presumptive revocation and, if so, what obligations would that create for Payors prior to issuing payment?

How to avoid the many risks?

The takeaways for owners of non-probate assets, whether or not they live, or lived, in a state with a revocation-upon-divorce statute, are obvious. They should specifically update their beneficiary designations following a divorce, regardless of whether they want to remove or retain their former spouse as beneficiary. They should also make sure that all divorce-related court orders specifically identify and express the intended disposition of all non-probate assets. For the reasons outlined above,

relying solely on a revocation-upon-divorce statute (or lack thereof) will not ensure that their actual intent is effectuated.

Aside from exercising extreme caution, the takeaways for Payors are much less clear. In light of the significant risks associated with making internal determinations concerning which statutes might apply, the various statutes' applicability, and the quantum of evidence that may be sufficient to rebut the statutes' presumption, Payors should consider (i) updating beneficiary designation provisions of newly issued governing instruments, (ii) undertaking internal and external education efforts, and (iii) seeking interpleader relief where appropriate depending on the individual circumstances.

Be Wary of Statutory Liability Protection

As an initial matter, Payors should be aware, but wary, of liability protection provisions contained in revocation-upon-divorce statutes. The Uniform Probate Code, along with most revocation-upon-divorce statutes (although with some variances), contains a liability protection provision for Payors that pay a benefit to the named beneficiary and sets forth certain notice requirements to alert Payors of a divorce.

> 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.

Unif. Probate Code § 2-804(g)(1) (emphasis added). However, "[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. . ." *Id*. The written notice "must 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." *Id*. at (g)(2).

There is little caselaw interpreting the liability protection provisions of revocation-upon-divorce statutes. Most involve attempts by a former spouse to use the provision offensively, arguing that a Payor should have simply paid him or her because it did not receive the statutory written notice of the potential revocation. *See, e.g., Stonebridge Life Ins. Co. v. Kissinger,* 89 F. Supp. 3d 622, 625 (D.N.J. 2015) (Former spouse argued that the payor "would not have been liable for making payment [to her] because the statute absolves a payor of liability when it does not have 'written notice of a claimed revocation.'"). It is questionable whether claimants even have standing to use the statute in this offensive manner. An Arizona federal district court, analyzing an identical provision in Uniform Probate Code Section 2-803 involving the effect of homicide on beneficiary designations, found that they do not because "the notice requirement . . . protects third party payors, not beneficiaries." *Protective Life Ins. Co. v. Mizioch,* No. CV 10-1728-PHX-JAT, 2011 U.S. Dist. LEXIS 18334, at *13 (D. Ariz. Feb. 10, 2011). "[T]he statute merely relieves a third-party payor from liability if it pays out proceeds before receiving written notice of a claimed forfeiture or revocation." *Id*. Importantly, it does not forbid a Payor from withholding proceeds unless it receives such written notice. *Id*.

Payors should avoid willful blindness of potential competing claims through reliance on the technical statutory notice requirements because actual (or possibly even constructive) knowledge obtained in the ordinary course of business may suffice. For example, in an Arizona state court case, an insurance company paid a death benefit to a former spouse despite receiving correspondence from an attorney representing the estate asserting that the divorce invalidated the beneficiary designation. *Dobert*, 963 P.2d at 329. The trial court concluded that the estate was the rightful beneficiary pursuant to the revocation-upon-divorce statute. On appeal, the insurance company argued that it did not receive proper notice of the divorce as required by the liability protection provision. *Id*. at 330. The appellate court found, though, that the insurance company received actual notice of the divorce and was not prejudiced by the notice being sent by first-class mail rather than the registered or certified mail outlined in the statute. *Id*. at 334. The court further stated that there was no evidence that the insurance company would have acted any differently had the notice been sent by the technical statutory means and questioned how the company "could have acted in good-faith reliance on the validity of the beneficiary designation after having received written notice of its revocation." *Id*.

Actual knowledge does not need to be as blatant as the letter in *Dobert*. It could be as innocuous as the marital status listed on a death certificate obtained as a prerequisite to payment coupled with the Payor's obligation to know and comply with the laws of the states in which it does business. Although some statutes specify that a Payor does not have an affirmative duty or obligation to inquire about the continued marital relationship between the decedent and beneficiary or to seek evidence concerning the marital relationship, *see* Colo. Rev. Stat. Ann. § 15-11-804, Mont. Code Ann. § 72-2-814, and N.D. Cent. Code Ann. § 30.1-10-04, such actions are not forbidden – and are actually prudent. Paying a benefit and then relying on the statute's notice provision in subsequent litigation would be fact intensive, involve costly discovery, and present the risk of double payment. *See, e.g., Volk v. New York Life Ins. Co.,* No. CV-21-82-GF-BMM, 2022 U.S. Dist. LEXIS 79936, at *8 (D. Mont. April 8, 2022) ("Any evidence of notice that would provide immunity to [payor] . . . can be developed through discovery."). In other words, it should only be relied upon as a last resort.

Update to Beneficiary Designation Provisions

One potential solution to minimize risks associated with administering claims involving divorce is to amend the beneficiary designation provision for newly issued policies/contracts to specify what happens in the event of divorce. For example, adding language clearly stating that if the named beneficiary is a former spouse, that designation will be deemed revoked

upon divorce unless (1) the divorce decree/court order provides otherwise or (2) the designation was made after the date of the divorce. Such a change, if implemented globally by a Payor, should be sufficient to address the problem of ex-spousal beneficiary designations going forward. Of course, it does nothing to address the issue in the case of polices and contracts that have already been issued.

In addition, such action would arguably have the added benefit of eliminating future compliance with statutory divorce-related notice requirements. *See, e.g.*, Va. Code Ann. § 38.2-305 ("In any life insurance or annuity contract containing a beneficiary designation in which the designated beneficiary is the spouse of the policy owner, the following notice shall be included with the policy when issued, either attached to or incorporated into the front or first page of such contract: BENEFICIARY DESIGNATION MAY NOT APPLY IN THE EVENT OF ANNULMENT OR DIVORCE . . .").

Internal and External Education Efforts

What can be done concerning the policies/contracts already in force? Payors should explore ways to both encourage up-to-date beneficiary designations and implement safeguards to prevent premature and/or potentially incorrect payments. For example:

- Direct mailings to existing customers reminding them of the importance of maintaining up-to-date beneficiary designations, specifically highlighting issues related to divorce, and even including a beneficiary designation form for ease of completion; and/or
- Recurring messages on periodic statements/premium notices stressing the importance of up-to-date beneficiary designations; and/or
- Web-based reminders for customers to keep their beneficiary designations current, such as a beneficiary verification pop-up that needs to be acknowledged before proceeding to the website; and/or
- Communication to agents/brokers reiterating the importance of up-to-date beneficiary designations and instructing them to avoid advice based on what they believe the law is in their respective state(s). This will not only protect agents/brokers from potential claims for inaction or incorrect advice, but also Payors from claims of vicarious liability; and/or
- Training for customer-facing employees, such as customer service and claims representatives (including Third Party Administrators), on the issue to both encourage beneficiary designation review when speaking with customers and to help prevent premature and potentially incorrect benefit payments; and/or
- Legal review processes to analyze potentially affected claims on a case-by-case basis. Given the uncertain and fluid nature of the law, avoid faithful reliance on reference materials concerning revocation-upon-divorce statutes (such as 50-state compliance charts) in the administration of claims. Any such reference materials should clearly indicate the importance of legal consultation when issues arise.

The hope is that these education efforts (whether to owners directly, to their agents and brokers, or to customer-facing employees) will prompt at least some owners of non-probate assets to update their beneficiary designations following divorce. Of course, it is unlikely that these efforts will be effective at eliminating the issue entirely.

Interpleader Relief

For those remaining instances where an ex-spouse remains the designated beneficiary, the best option to minimize administration risks associated with the uncertainty of revocation-upon-divorce statutes may be to file an interpleader action. Interpleader, whether rule or statutory based, "is an equitable proceeding that 'affords a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and satisfy his obligation in a single proceeding.'" *United States v. High Tech. Prods., Inc.*, 497 F.3d 637, 641 (6th Cir. 2007) (quoting 7 Charles Alan Wright, et al., Federal Practice and Procedure § 1704 (3d ed. 2001)). The court must first determine whether the interpleader complaint was properly brought and whether to discharge the stakeholder from further liability to the claimants. If so, the court then determines the rights of the claimants to the funds.

The propriety of interpleader depends on whether the stakeholder "legitimately fears multiple vexation directed against a single fund." *Id.* "[A] stakeholder must have a good faith belief that there are or may be colorable competing claims to the stake," which "is not an onerous requirement."

A compelling argument can be made that, given the current uncertain legal landscape in this area, an interpleader would be legally justifiable in a majority of situations concerning revocation-upon-divorce statutes.

Michelman v. Lincoln Nat'l Life Ins. Co., 685 F.3d 887, 894-5 (9th Cir. 2012) (emphasis added). "It is immaterial whether the stakeholder believes that all claims against the fund are meritorious. Indeed, in the usual case, at least one of the claims will be very tenuous . . . [N]othing more is implied than that the claims alleged must meet a minimal threshold level of substantiality." *Federal Practice and Procedure* § 1704. *Even the threat of potential multiple litigation,* not merely the possibility of multiple liability, is sufficient to warrant interpleader relief. *See Auto Parts Mfg. Miss., Inc. v. King Constr. of Hous., L.L.C.*, 782 F.3d 186, 194 (5th Cir. 2015).

Thus, a compelling argument can be made that, given the current uncertain legal landscape in this area, an interpleader would be legally justifiable in a majority of situations concerning revocation-upon-divorce statutes. As with other issues concerning the statutes, though, courts have reached different conclusions. For example, consistent with the "minimal threshold level of substantiality" standard, interpleader was found to be warranted in the following cases. A federal district court

in Idaho recently ruled that the insurer acted in good faith in bringing the interpleader against the insured's former and current spouses. The court found that the former spouse had a clearly colorable claim since she was the latest-named beneficiary and the current wife's claim was likewise colorable because: she allegedly paid the premiums of the insurance policy; she allegedly submitted a change of beneficiary form; and different state's laws were possibly applicable. *Barnett v. Minn. Life Ins. Co.,* No. 1:21-cv-00018-DCN, 2022 U.S. Dist. LEXIS 45163, at *9 (D. Idaho Mar. 11, 2022). The court found the implications of the former spouse's arguments against interpleader relief "absurd" and "nonsense" because she seemed to expect that a disinterested interpleader plaintiff should not offer any reasons as to why the action was brought at the risk of providing an argument to the interested parties. *Id.* A federal district court in Nevada found an interpleader to be legally permissible even where the estate, the party that would receive the life insurance proceeds if the former spouse were revoked, disclaimed its interest. The court found that the insurer "could have reasonably concluded that there existed a potential adverse claim to the policy proceeds at the time this action was filed." *Genworth Life & Annuity Ins. Co. v. Ruckman*, No. 2:18-CV-1470 JCM (VCF), 2019 U.S. Dist. LEXIS 203250, at *7-8 (D. Nev. Nov. 22, 2019).

By contrast, interpleader was found to be improper or questioned in these cases. In another New Jersey federal district court case, the insurer's basis for seeking interpleader relief was that the divorce may have statutorily revoked the former spouse as the primary beneficiary. *Aromando v. State Farm Life Ins. Co.,* Civil Action No. 17-02418 (SRC), 2017 U.S. Dist. LEXIS 189226, at *9 (D.N.J. Nov. 15, 2017). The court ruled that the interpleader "was not properly brought" because "the divorce and settlement agreement falls squarely within the statutory exception for a 'court order, or a contract relating to the division of the marital estate'" and, thus, the competing claim "was clearly devoid of substance." *Id.* Another, and more perplexing, decision comes from a federal court in Alaska. There, the court required additional facts to determine if the insurer filed the interpleader in good faith. While recognizing that ambiguity in the revocation-upon-divorce law may have provided the insurer with a reasonable ground to file the interpleader, the record was unclear whether that was its actual basis. *State Farm Life Ins. Co. v. Davis*, No. 3:07-cv-00164 JWS, 2008 U.S. Dist. LEXIS 102217, at *26 (D. Alaska Dec. 17, 2008). The court stated the possibility that the insurer instead "based its decision on pressure from [ ] successor beneficiaries or a reluctance to choose the wrong beneficiary," *id.* – both of which are arguably, and probably in most instances, sufficient bases in their own right to justify interpleader.

Whether to file an interpleader action should be an individualized, case-by-case determination. Payors should consider if the extra costs associated with such litigation outweigh the risks of possibly paying an incorrect beneficiary, taking into account the amount at issue and the difficultly of and expense associated with recouping wrongly paid benefits. Payors can sometimes recover fees and expenses associated with filing interpleader actions, which oftentimes necessitates further costly litigation to accomplish, but there are courts that decline such efforts and consider such costs to be necessary costs of doing business. Compare, *e.g., Prudential Ins. Co. of Am. v. Richmond,* No. 06-525, 2007 U.S. Dist. LEXIS 48458, at *13-14 (D.N.J. July 2, 2007) ("The prevailing principle in interpleader actions brought in the federal courts, . . . is that it is within the discretion of the court to award the stakeholder costs, including reasonable attorney's fees, out of the deposited fund."), *and Banner Life Ins. Co. v. Lukacin,* Civ. A. No. 13-cv-6589, 2014 U.S. Dist. LEXIS 134675, 2014 WL 4724902, at *3 (D.N.J. Sept. 22, 2014) ("Because the stakeholder 'is considered to be helping multiple parties to an efficient resolution of the dispute in a single court,' courts find that the stakeholder attorney's fees are justified."), *with Metro. Life Ins. Co. v. Estate of Seagrove,* No. 1:18-CV-0920 (GTS/TWD), 2019 U.S. Dist. LEXIS 32001, at *9 (N.D.N.Y. Feb. 28, 2019) ("Courts in this Circuit routinely decline to award attorneys' fees and costs to insurance companies in interpleader actions because "minor problems that arise in the payment of insurance policies must be expected and the expenses incurred are part of the ordinary course of business.")

[i] *See* **Alabama** (Ala. Code § 30-4-17); **Alaska** (Alaska Stat. § 13.12.804); **Arizona** (Ariz. Rev. Stat. § 14-2804); **California** (Cal. Prob. Code § 5040; *but see id.* § 5040 (e) (excepting life insurance) and Cal. Fam. Code § 2024 (a) ("Dissolution or annulment of your marriage . . . does not automatically cancel your rights as beneficiary of your spouse's life insurance policy.")); **Colorado** (Colo. Rev. Stat. § 15-11-804); **Florida** (Fla. Stat. § 732.703); **Hawaii** (Haw. Rev. Stat. § 560:2-804); **Idaho** (Idaho Code Ann. § 15-2-804); **Illinois** (750 Ill. Comp. Stat. Ann. 5/503(b-5)); **Indiana** (Ind. Code Ann. § 32-17-14-2; *but see id.* § 32-17-14-2 (c) (excepting application to products sold or issued by a life insurance company unless the provisions of statute are incorporated into the policy or beneficiary designation)); **Iowa** (Iowa Code Ann. § 598.20A); **Kansas** (Kan. Stat. Ann. § 59-105); **Maine** (Me. Rev. Stat. tit. 18-C, § 2-804); **Massachusetts** (Mass. Gen. Laws Ch. 190B, § 2-804); **Michigan** (Mich. Comp. Laws § 700.2807); **Minnesota** (Minn. Stat. § 524.2-804); **Mississippi** (Miss. Code Ann. § 91-29-23); **Missouri** (Mo. Rev. Stat. § 461.051; *but see* § 461.073 (6) (excepting application to products sold or issued by a life insurance company unless the provisions of statute are incorporated into the policy or beneficiary designation)); **Montana** (Mont. Code Ann. § 72-2-814); **Nebraska** (Neb. Rev. Stat. § 30-2333); **Nevada** (Nev. Rev. Stat. § 111.781); **New Jersey** (N.J. Stat. Ann. § 3B:3-14); **New Mexico** (N.M. Stat. Ann. § 45-2-804); **New York** (N.Y. Est. Powers & Trusts Law § 5-1.4); **North Dakota** (N.D. Cent. Code Ann. § 30.1-10-04); **Ohio** (Ohio Rev. Code Ann. § 5815.33); **Oklahoma** (Okla. Stat. Ann. Tit. 15, §178); **Pennsylvania** (20 Pa. Cons. Stat. § 6111.2); **South Carolina** (S.C. Code Ann. § 62-2-507); **South Dakota** (S.D. Codified Laws § 29A-2-804); **Texas** (Tex. Fam. Code Ann. §§ 9.301, 9.302); **Utah** (Utah Code Ann. § 75-2-804); **Virginia** (Va. Code Ann. § 20-111.1); **Washington** (Wash. Rev. Code 11.07.010); **Wisconsin** (Wis. Stat. Ann. § **854.15**).