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# Is F.S. §732.703 Susceptible to a Constitutional Challenge by a Former Spouse Whose Claim for Benefits is Denied?

by Donna L. Eng and Scott Konopka

It's a common scenario: A spouse takes out a life insurance policy during the marriage and designates the other spouse as the beneficiary. Subsequently, they divorce, and the spouse who purchased the policy neglects to change the beneficiary designation. Is the former spouse who is named as the beneficiary entitled to collect the proceeds to the policy after the death of the spouse who purchased the property? Based on F.S. §732.703, the answer should be no. But, can a former spouse defeat application of the section by arguing that the section violates his or her constitutional right to freedom of contract, or that the section violates his or her vested rights as a beneficiary under the policy? As will be shown below, based on the Uniform Probate Code and the rulings of other states with similar revocation on death statutes, the answer to that question should also be no.

In 1976, Florida "created the Florida Uniform Probate Code Study Commission," and ultimately adopted portions of the Uniform Probate Code.<sup>1</sup> F.S. §732.703 is loosely modeled on Uniform Probate Code §2-804, which revokes the designation of a former spouse as a beneficiary to a contract. The Uniform Probate Code section provides in relevant part:

§2-804. Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by Other Changes of Circumstances.

(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 his [or her] 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....<sup>2</sup>

F.S. §732.703 became effective July 1, 2012. The purpose of F.S. §732.703(2) and its counterpart in the context of wills, F.S. §732.507(2),<sup>3</sup> is to prevent certain assets or accounts from passing at death to a former spouse if the decedent did not intend for them to inherit, subject to certain exceptions.<sup>4</sup> In *Carroll v. Israelson*, 169 So. 3d 239, 243 (Fla. 4th DCA 2015), the Fourth District observed the purpose behind F.S. §732.507:

It is an understatement to say that animosities arise in divorce proceedings which are inconsistent with wills executed when everything was rosy in the marriage. Divorce attorneys typically advise clients to revise their estate plans for the post-divorce world. However, with all the stress of divorce litigation, it is not uncommon for people to resist the idea of their own mortality and procrastinate their post-divorce estate planning. And then they die with a will in place that provides for the former spouse. Section 732.507(2), Florida Statutes (2012), protects divorced persons from their inattention to estate planning details.

F.S. §732.703 provides in relevant part:

(2) A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was judicially dissolved or declared invalid by court order prior to the decedent's death, if the designation was made prior to the dissolution or court order. The decedent's interest in the asset shall pass as if the decedent's former spouse predeceased the decedent....

(9) This section applies to all designations made by or on behalf of all decedents dying on or after July 1, 2012, regardless of when the designation was made."<sup>5</sup>

Since §732.703 was first enacted in 2012, no Florida courts have addressed the constitutionality or validity of the section. However, the courts that have addressed §732.507(2) have applied it with no issues as to its constitutionality or validity.<sup>6</sup>

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Courts in states with revocation upon divorce statutes that are similar to Florida's statute have observed that such statutes further the public policy of implementing an insured spouse's probable intent to provide for his or her new family or spouse in the wake of a divorce.

### **Public Policy Behind U.P.C. §2-804 and Similar State Statutes**

The U.S. Court of Appeals for the 10th Circuit has observed that §2-804 of the Uniform Probate Code "derives from the recognition that when spouses are sufficiently unhappy with each other that they obtain a divorce, neither is likely to want to transfer his or her property to the survivor on death."<sup>7</sup> As a result, state legislatures that have enacted revocation upon divorce statutes have done so for policy reasons. As noted by the 10th Circuit, in enacting these statutes, state legislatures have exercised "the legislative judgment that when the transferor leaves unaltered a will or trust or insurance beneficiary designation in favor of an ex-spouse, this failure to designate substitute takers more likely than not represents inattention rather than intention."<sup>8</sup>

Courts in states with revocation upon divorce statutes that are similar to Florida's statute have observed that such statutes further the public policy of implementing an insured spouse's probable intent to provide for his or her new family or spouse in the wake of a divorce.<sup>9</sup>

### **Revocation Upon Divorce Statutes in Other States**

At least 21 other states have either adopted U.P.C. §2-804 or have adopted their own revocation upon divorce statutes.<sup>10</sup> With the exception of a line of cases following *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322-1323 (8th Cir. 1991), and *Paronese v. Midland Nat'l Ins. Co.*, 550 Pa. 423, 706 A.2d 814, 818-19 (Pa. 1998), courts have generally found that these statutes do not violate

constitutionally protected rights.<sup>11</sup>

Moreover, even if courts have not specifically addressed the constitutionality of the statutes, courts routinely apply their revocation upon divorce statutes to void beneficiary designations made to former spouses.<sup>12</sup> Because there is no Florida caselaw discussing the constitutionality of F.S. §732.703, a review of caselaw from other states may provide guidance for Florida practitioners.

### **Whether Retroactive Application of F.S. §732.703 Is Unconstitutional**

Since the constitutionality of F.S. §732.703 has not yet been addressed, a former spouse seeking to enforce the policy's beneficiary designations may argue that the section is unconstitutional because the statute impairs his or her rights to freedom of contract under the United States and Florida constitutions, and his or her vested rights as a beneficiary under the terms of the contract. In support, the former spouse may cite *Paronese* and *Whirlpool*.<sup>13</sup>

In *Paronese*, Midland National Insurance Company issued a life insurance policy to Francis J. Meyers, Jr.<sup>14</sup> Meyers originally designated two of his children as primary beneficiaries. Upon his marriage to Paronese, Meyers changed the beneficiary designations so that Paronese was the primary beneficiary, and three of his children were the contingent beneficiaries. A short time after Meyers changed the beneficiary designations, the Pennsylvania Legislature amended its probate code, and enacted 20 Pa. C.S. §6111.2:

§6111.2 Effect of divorce on designation of beneficiaries

If a person domiciled in this Commonwealth at the time of his death is divorced from the bonds of matrimony after designating his spouse as beneficiary of a life insurance policy...any designation in favor of his former spouse which was revocable by him after the divorce shall become ineffective for all purposes unless it appears from the wording of the designation or from either a court order or a written contract between the person and his spouse that the designation was intended to survive the divorce....<sup>15</sup>

After Pennsylvania enacted Pa. C.S. §6111.2, Meyers executed a will, leaving nothing to Paronese, and divorced her. Meyers died less than one year later.<sup>16</sup> After considering cross motions for summary judgment filed by Paronese and Meyers' children, the trial court ruled that Paronese was entitled to the insurance proceeds because Pa. C.S. §6111.2 was unconstitutional and should not be applied to her.<sup>17</sup> The Pennsylvania Supreme Court agreed and affirmed.

In support of her argument that the statute was unconstitutional, Paronese argued, *inter alia*, that retroactive application of the statute would violate Pa. Const. art. I, §17, which provides that "[n]o...law impairing the obligation of contracts... shall be passed," and U.S. Const. art. I, §10, which provides that "[n]o [s]tate shall...pass any [l]aw impairing the [o]bligation of [c]ontracts."<sup>18</sup> Paronese also contended that Pennsylvania precedent provided that the contracts clauses of the Pennsylvania and U.S. constitutions protect contracts freely arrived at from subsequent legislative impairment or abridgement.

In affirming the trial court, the Pennsylvania Supreme Court reasoned, *inter alia*, that the statute

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In concluding that the statute was inappropriate, the Eighth Circuit observed that although some individuals would prefer to provide for their new family, others might not....

operated as a substantial impairment of a contractual relationship because selection of the beneficiary is the entire point of a life insurance policy, and that divorce should not automatically lead to the conclusion that the insured intended to terminate the contractual benefits for the former spouse.<sup>19</sup> The court also determined that retroactive application of the statute to *Parsonese* would violate the federal and Pennsylvania contracts clauses.<sup>20</sup> However, instead of providing any substantive discussion as to why retroactive application of the statute would violate *Parsonese*'s rights under the contracts clauses, the court simply reasoned that Pennsylvania rules of statutory construction permitted it to decline to apply the statute retroactively.<sup>21</sup>

In *Whirlpool*, James Ritter, an employee of Whirlpool, entered into a group life insurance plan with Aetna Life Insurance Company and designated his wife, Darlene, as the only beneficiary.<sup>22</sup> Two years later, the Oklahoma Legislature passed Okla. Stat. Title 15, §178(A), which provides that "if a party to [a] contract with the power to designate the beneficiary of any death benefit dies after being divorced from the beneficiary named to receive such death benefit in the contract, all provisions in such contract in favor of the decedent's former spouse are thereby revoked," and that "[i]n the event of either divorce or annulment, the decedent's former spouse shall be treated for all purposes under the contract as having predeceased the decedent."<sup>23</sup> The statute further provided that it applied to "life insurance contracts, annuities, retirement arrangements, compensation agree-

ments and other contracts designating a beneficiary of any right, property or money in the form of a death benefit," and to those persons "dying on or after November 1, 1987."<sup>24</sup> James and Darlene divorced two years after the statute became effective.<sup>25</sup> James remarried less than a month after the divorce, contrary to a term in the divorce decree that provided that the parties were not permitted to remarry for a period of six months after the divorce.<sup>26</sup>

A few months after his divorce and remarriage, James died of a gunshot wound allegedly inflicted by Darlene.<sup>27</sup> Whirlpool and Aetna filed an interpleader action, and deposited the insurance proceeds and other death benefits with the clerk of court. The district court determined that the Oklahoma statute prevented Darlene from receiving any of the insurance proceeds, and that the funds should go to James' second wife, notwithstanding the fact that they married within six months after the divorce, in violation of the divorce decree. Darlene appealed.<sup>28</sup>

The Eighth Circuit agreed with Darlene that retroactive application of the Oklahoma statute was unconstitutional.<sup>29</sup> In support of that holding, the Eighth Circuit first concluded that James' contractual obligation naming Darlene as the beneficiary would be substantially impaired by retroactive application of the statute.<sup>30</sup> The Eighth Circuit reasoned that the contracts clause is "designed to enable individuals to order their personal and business affairs according to their particular needs and interests," that "once arranged, those rights and

obligations are binding under the law, and the parties are entitled to rely on them," and that the obligations protected by the contract include not only the express terms of the contract, but also to contemporaneous state law as to interpretation and enforcement.<sup>31</sup> The Eighth Circuit noted that at the time that James designated Darlene as his beneficiary, Oklahoma law provided that she would remain the beneficiary unless and until he designated someone else; that the impairment would be significant because one of the primary purposes of a life insurance contract is to provide for the financial needs of another person designated by the insured; and, when Oklahoma changed the statute, it "effected a fundamental and pejorative change in the very essence of those contracts."<sup>32</sup>

The Eighth Circuit next considered whether the new statute was designed to solve a general or social economic problem, and whether it does so in a reasonable and appropriate manner.<sup>33</sup> Although the court acknowledged that the statute appeared to address a general social concern, in that it was designed to address a fundamental change in a family situation such as a marriage, divorce, or birth of a child, and to anticipate that the insured likely would have intended to provide for his or her new family members, "the fact remains that the legislature's chosen method effects direct and fundamental changes to pre-existing contracts, as opposed to merely tangential effects on such agreements."<sup>34</sup> The Eighth Circuit further concluded that the law was not merely general social legislation because the statute "directly alters the obligations and expectations of the contracting parties," and that the statute, as applied retroactively, was inappropriate in light of its intended purpose and underlying rationale.<sup>35</sup>

In concluding that the statute was inappropriate, the Eighth Circuit observed that although some individuals would prefer to provide for their new family, others might not, and that because it was possible that James may have consciously decided to leave his former spouse, Darlene, as the beneficiary, application of the

statute would frustrate that intent.<sup>36</sup> The court stated:

The legislature, in passing this statute, determined that people fail to consider the need to change their insurance policies after experiencing a change in family relations. We do not quarrel with this conclusion. However, this same conclusion suggests that an individual could rely on the pre-existing law and neither know nor expect that the rules governing his policy have changed, and thus might fail to consider the need to investigate potential changes in the law. Having determined that some individuals are inattentive regarding their insurance policies, the Oklahoma legislature can hardly expect these same individuals to be cognizant of changes in the law respecting those policies. Given the avowed purpose of this law, it is inappropriate and unreasonable for the legislature to apply it to pre-existing contracts.<sup>37</sup>

Although a practitioner representing a former spouse might rely on *Paronese* and *Whirlpool* in support of an argument that the former spouse should be entitled to the proceeds of an insurance policy naming him or her as a beneficiary, that argument should fail in Florida.

At the outset, it must be noted that in 2010, after *Paronese* was decided, Pennsylvania amended its revocation upon divorce statutes.<sup>38</sup> Moreover, unlike the Pennsylvania statute at issue in *Paronese*, F.S. §732.703(9) expressly provides on its face that “[t]his section applies to all designations made by or on behalf of all decedents dying on or after July 1, 2012, regardless of when the designation was made.” As such, any reliance on *Paronese* fails.

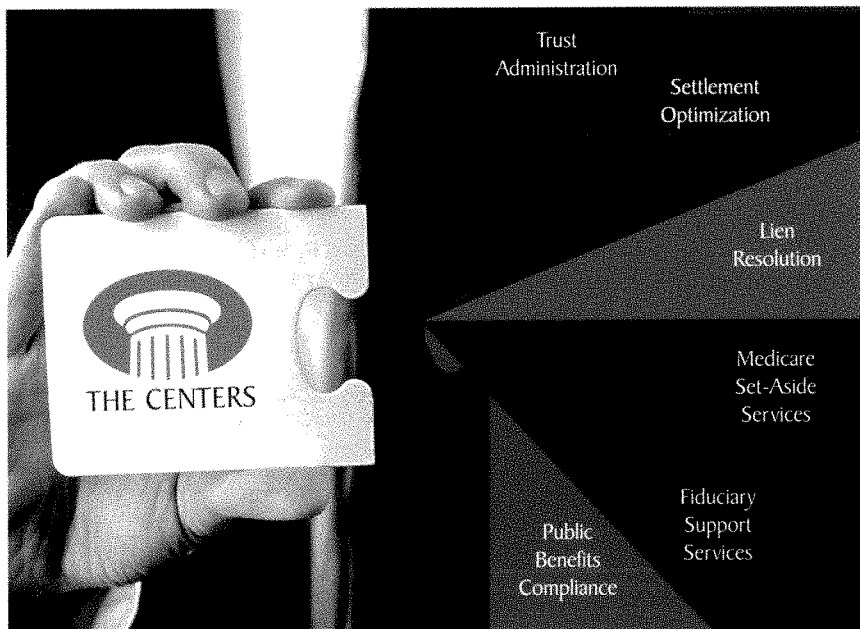
Courts in other states and outside the 11th Circuit are divided on the issue of whether retroactive application of laws revoking a former spouse’s beneficiary interest in a life insurance policy violates the Contract Clause.<sup>39</sup> However, many courts have acknowledged that the *Whirlpool* decision has been widely criticized and rejected by the Joint Editorial Boards of the Uniform Probate Code and the Uniform Commercial Code, the U.S. Court of Appeals for the 10th Circuit, and numerous state and federal courts, largely because *Whirlpool* failed to distinguish between donative transfers and contracts.<sup>40</sup> A closer look at a few of these opinions reveals the

flaws in the *Whirlpool* analysis, and may be of some guidance to Florida practitioners in the event they are presented with the issue of a former spouse seeking to recover proceeds as a designated beneficiary to an insurance policy.

In May 2002, the U.S. District Court for the Eastern District of Wisconsin noted that *Whirlpool* has been disapproved by Joint Editorial Board of Uniform Commercial Code because “the decision is inconsistent with the nature of life insurance policies, which

give the beneficiary no contractual rights, and inconsistent with Supreme Court precedent which...has never applied the Contract Clause to invalidate laws that merely set default rules or dictate methods of construction.” The court also noted that the drafters of the Wisconsin statute have rejected *Whirlpool*.<sup>41</sup>

A few months later, in *In re Estate of DeWitt*, 54 P.3d 849, 855-861 (Colo. 2002), the Colorado Supreme Court, in an en banc opinion, addressed *Whirlpool* and the issue of



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retroactivity. Although much of the opinion focuses retrospectively based on Colorado law, the court nevertheless made several observations that have been observed by other courts that disagree with *Whirlpool*, including: 1) Beneficiaries to a life insurance policy have no vested rights in the policy, and have only an expectancy interest; 2) the statute did not unconstitutionally impair any vested rights of the decedents in the policies because the decedents should expect that their policy designations would be regulated by statute; 3) the statute serves the public interest and statutory objectives, which recognize the intent of a divorced spouse to revoke the designation of a former spouse as a beneficiary under the policy; 4) the statute did not violate the beneficiaries' freedom of contract because the beneficiaries are not parties to the contract, and have no standing to raise such a claim; and, 5) the statute did not violate the decedent's freedom of contract because the statute only affected the donative transfer aspect of the life insurance policy.<sup>42</sup>

In support of its determination that Colorado §15-11-804(2) does not violate the decedent's freedom of contract, the Colorado Supreme Court quoted the Joint Editorial Board for the Uniform Probate Code:

A life insurance contract is a third party beneficiary contract. As such, it is a mixture of contract and donative transfer. The Contracts Clause of the federal constitution appropriately applies to protect against legislative interference with the contractual component of the policy. In [*Whirlpool*] and comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract.... The divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue.<sup>43</sup>

The following year, in *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003), the 10th Circuit similarly noted that the Joint Editorial Board for the Uniform Probate Code issued a statement asserting that the Contracts Clause analysis contained in the *Whirlpool* opinion was "manifestly wrong." After quoting the same passage of the *Statement of the Joint Editorial Board for Uniform*

*Probate Code Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents*, as was quoted above in *DeWitt*,<sup>44</sup> the 10th Circuit continued by noting that the Utah statute did not impair any right to contract:

TIAA-CREF served two functions with respect to the annuities at issue. First, it funded the annuities, agreeing to make the payments called for in the annuity contracts. Second, it was to act in essence as an escrow agent, making the payments as directed by the annuitant, Dale. The contract between TIAA-CREF and Dale with respect to the second function calls for TIAA-CREF to follow proper instructions regarding where to make the payments.

Section 75-2-804(2) has no effect on the first function performed by TIAA CREF. As for the second function, the impact of §75-2-804(2) on TIAA-CREF's "escrow-agent" role does not constitute the impairment of a contractual right. Dale's choice of beneficiaries is a donative transaction, not a contractual arrangement. That the donative transfer must be effectuated with the assistance of a party in a contractual relationship with the donor does not transmute the donative transfer into the performance of a contractual obligation. Section 75-2-804(2) does not impair the contractual relationship between Dale and TIAA-CREF. What it does is change the import of the donative instructions from Dale — instructions that TIAA-CREF has an obligation to follow. There is no more an impairment of a contract than if Dale had made the beneficiary designation in his will, providing no instructions directly to TIAA-CREF.

The Contracts Clause addresses contracts, not donative transfers. Because no contractual obligation is impaired by §75-2-804(2), there is no violation of the federal Contracts Clause in applying the statute here....<sup>45</sup>

Several years later, in 2007, the South Dakota Supreme Court addressed *Whirlpool* and the contentions raised therein.<sup>46</sup> In the opinion, the court noted that courts have widely rejected the *Whirlpool* analysis, and adopted the majority view that the South Dakota statute, SCDL 29A-2-804, is constitutional.<sup>47</sup> In so doing, the court reasoned that 1) "the *Whirlpool* decision has been persuasively criticized by both the Joint Editorial Board (JEB) for the Uniform Probate Code and other court decisions"; 2) as a beneficiary, the former spouse had no vested interest in the retirement plan policy; 3) the statute did not impair any contractual rights of the policy holder to designate beneficiaries; and 4) the statute serves

significant and legitimate public purposes, "including promoting uniformity among state law treatment of probate and non-probate transfers and implementing a rule of construction that reflects legislative judgment that ex-spouses often intend to change their beneficiaries."<sup>48</sup>

The only courts that appear to have followed *Whirlpool* or the *Whirlpool* rationale are those for which *Whirlpool* is binding precedent and Pennsylvania and Ohio courts.<sup>49</sup> However, at the time of those decisions, Oklahoma, Ohio, and Pennsylvania had not adopted the Uniform Probate Code.<sup>50</sup> And, by the time that *Whirlpool* had been decided, the Oklahoma statute had already been amended.<sup>51</sup>

The Oklahoma statute now in effect contains a revocation on divorce provision:

*A. If, after entering into a written contract in which a beneficiary is designated or provision is made for the payment of any death benefit (including life insurance contracts, annuities, retirement arrangements, compensation agreements, depository agreements, security registrations, and other contracts designating a beneficiary of any right, property, or money in the form of a death benefit), the party to the contract with the power to designate the beneficiary or to make provision for payment of any death benefit dies after being divorced from the person designated as the beneficiary or named to receive such death benefit, all provisions in the contract in favor of the decedent's former spouse are thereby revoked. Annulment of the marriage shall have the same effect as a divorce. In the event of either divorce or annulment, the decedent's former spouse shall be treated for all purposes under the contract as having predeceased the decedent.*<sup>52</sup>

The Ohio statute now in effect also contains a revocation on divorce provision:

(B)(1) Unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section, if a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse

as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.<sup>53</sup>

Although no Florida courts have addressed the constitutionality of F.S. §732.703, it would appear that based on the above discussion, if a former spouse were to challenge F.S. §732.703 by arguing that retroactive application of the statute violates his or her rights as a designated beneficiary, or that the section violates his or her rights to freedom of contract, as was argued in *Parsonese* and *Whirlpool*, such contentions should fail. As noted above, courts in other states and outside the 11th Circuit have noted the flaws in the *Parsonese* and *Whirlpool* analysis: 1) Beneficiaries to a life insurance policy have only an expectancy interest, and no vested rights in the policy; 2) decedents should expect that their policy designations would be regulated by the legislature; 3) public policy favors revocation on divorce statutes, as such statutes recognize the intent of a divorced spouse to revoke the designation of a former spouse as a beneficiary under the policy; 4) a revocation on divorce statute would not violate a beneficiaries' freedom of contract because beneficiaries are not parties to the contract, and have no standing to raise such a claim; and, 5) revocation on divorce statutes do not violate the decedent's freedom of contract because the statute only affects the donative transfer aspect of the life insurance policy.□

<sup>1</sup> See *Basile v. Aldrich*, 70 So. 3d 682, 685 (Fla. 1st DCA 2011); *In re Estate of Kulow*, 439 So. 2d 280, 281 (Fla. 2d DCA 1983); *Dennis v. Kline*, 120 So. 3d 11, 18 (Fla. 4th DCA 2013); FLA. STAT. ANN. TIT. 42, Estates and Trusts, Refs. and Annos. ("The Florida Probate Code shall become effective on January 1, 1976.") (quoting Ch. 74-106, LAWS OF FLA.).

<sup>2</sup> U.P.C. §2-804.

<sup>3</sup> FLA. STAT. §732.507(2) ("Any provision of a will executed by a married person that affects the spouse of that person shall become void upon the divorce of that person or upon the dissolution or annulment of the marriage.").

<sup>4</sup> See 2012 Fla. Sess. Law Serv. Ch. 2012-148 ("providing that a designation made by or on behalf of a decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse shall become void if the decedent's marriage was judicially

dissolved or declared invalid before the decedent's death, if the designation was made prior to the dissolution or order"); FLA. STAT. §732.703(3), (4)(a)-(j).

<sup>5</sup> FLA. STAT. §732.703(2), (9) (emphasis added).

<sup>6</sup> See *Galzka v. Estate of Perkins*, 184 So. 3d 635, 635 (Fla. 4th DCA 2016) (citing FLA. STAT. §732.507) (per curiam affirmance); *Carroll*, 169 So. 3d at 243 (holding that provision of favor of former spouse was void upon divorce); *Babcock v. Estate of Babcock*, 995 So. 2d 1044, 1045 (Fla. 4th DCA 2008) (citing FLA. STAT. §732.507) (noting that because of divorce, provisions in will bequeathing property to former spouse were void); *Crescenze v. Bothe*, 4 So. 3d 31, 32 (Fla. 2d DCA 2009) (noting that will's bequest to former spouse was rendered void upon divorce); *Grady v. Grady*, 395 So. 2d 643, 646 (Fla. 4th DCA 1981) (noting that FLA. STAT. §732.507 provides that a dissolution of marriage voids a prior will in favor of former spouse).

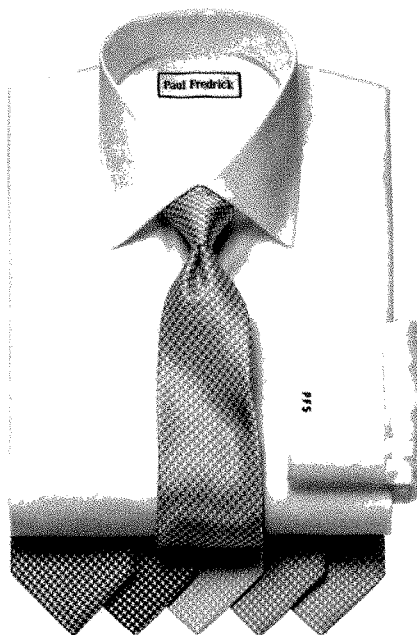
<sup>7</sup> *Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1318 (10th Cir. 2003) (quoting STATEMENT OF THE JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE REGARDING THE CONSTITUTIONALITY OF CHANGES IN DEFAULT RULES AS APPLIED TO PRE-EXISTING DOCUMENTS at 4 (1991)).

<sup>8</sup> *Stillman*, 343 F.3d at 1318 (quoting STATEMENT OF THE JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE REGARDING THE CONSTITUTIONALITY OF CHANGES IN DEFAULT

RULES AS APPLIED TO PRE-EXISTING DOCUMENTS at 4).

<sup>9</sup> See *Matter of Estate of Dobert*, 963 P.2d 327, 333 (Az. Ct. App. 1998) (citing *Coughlin v. Bd. of Admin.*, 152 Cal. App. 3d 70 (1984)); see also *In re Estate of Rodriguez*, 106 P.3d 679, 686 (Az. Ct. App. 2007) (noting revocation on divorce statutes rest on the belief that after a divorce, neither spouse will want to leave property to the former spouse); *In re Estate of Lamparella*, 109 P.3d 959, 965-966 (Az. Ct. App. 2005) (same); *Lincoln Ben. Life Co. v. Heitz*, 468 F. Supp. 2d 1062, 1069 (D. Minn. 2007) (noting that MINN. STAT. §524.2-804 "reflects legislative judgment that ex-spouses often intend to change their beneficiaries"); *Primerica Life Ins. Co. v. Madison*, 57 P.3d 1174, 1177 (Wash. Ct. App. 2002) ("The purpose of the revocation statute is to prevent an ex-spouse from recovering proceeds from a decedent's policy when the decedent fails to name a new beneficiary after dissolution.").

<sup>10</sup> See ALASKA STAT. ANN. §13.12.804(a)(1)(A) (West 2016); ARIZ. REV. STAT. ANN. §14-2804(A)(1)(a) (2016); COLO. REV. STAT. ANN. §15-11-804 (West 2016); HAW. REV. STAT. ANN. §560:2-804(b)(1)(A) (West 2016); IOWA CODE ANN. §598.20A(1) (West 2016); MICH. COMP. LAWS ANN. §552.101 (West 2016); MINN. STAT. ANN. §524.2-804, Subd.1(1) (West 2016); MO. ANN. STAT. §461.051(1) (West 2016); MONT. CODE ANN. §72-2-814 (West 2016); N.J. STAT. ANN. §3B:3-14a(1)(a) (West 2016); N.M. STAT.



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## Paul Fredrick



ANN. §45-2-804(B)(1)(A) (West 2016); N.Y. EPTL §5-1.4 (McKinney 2016); N.D. CENT. CODE ANN. §30.1-10-04(2)(a) (West 2016); OHIO REV. CODE ANN. §5815.33(B)(1) (West 2016); OKLA. STAT. ANN. TIT. 15, §178(A) (West 2016); 20 PA. STAT. AND CONS. STAT. ANN. §6111.2(b) (West 2016); S.D. CODIFIED LAWS §29A-2-804(b)(1) (2016); TEXAS FAM. CODE ANN. §9.301(a) (West 2016); UTAH CODE ANN. §75-2-804(2)(a)(i) (West 2016); WASH. REV. CODE ANN. §11.07.010(2)(a) (West 2016); WIS. STAT. ANN. §854.15(3)(a) (West 2016).

<sup>11</sup> *Stillman*, 343 F.3d at 1314-1322 (citing Joint Editorial Board's view that §2-804 "merely establishes a rule of construction"; Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 699-700 (1992)) (holding that UTAH CODE ANN. §75-2-804(2) is constitutional and may be applied retroactively to beneficiary designations made before the effective date of statute; observing that decedent retained right to change beneficiaries until the time of his death, and that the statute, when viewed as a mere rule of construction, simply operates to effect the decedent's intent at the time of death); *Matter of Estate of Dobert*, 963 P.2d 327, 331-332 (holding that Arizona §14-2804 is constitutional; rejecting former spouse's contention that retroactive application of the section impaired her rights under life insurance policy because former spouse was neither a party to the contract nor had any vested rights in the contract); *In re Estate of Lamparella*, 109 P.3d at 967 (citations omitted) (reaffirming constitutionality of Arizona section §14-2804; observing that pursuant to the section, the designation to the former spouse was automatically revoked on dissolution of marriage; noting that many states have revocation on divorce statutes like Arizona); *Allstate Life Ins. Co. v. Hanson*, 200 F. Supp. 2d 1012, 1017-1020 (E.D. Wis. 2002) (finding Wisconsin §854.15(3)(a) constitutional); *Buchholz v. Storsve*, 740 N.W.2d 107, 113-114 (S.D. 2007) (citing *Stillman*, 343 F.3d 1311; *Hanson*, 200 F. Supp. 2d at 1016) (agreeing with majority view that the South Dakota statute, SCDL 29A-2-804, is constitutional); *In re Estate of Becker*, 32 P.3d 557, 560-564 (Colo. Ct. App. 2001) (holding §15-11-804(2)(a) (i) is constitutional and can be applied retroactively based on plain language of statute; following position stated by Joint Editorial Board for Uniform Probate Code and *In re Estate of Dobert*, 963 P.2d 327, and *Mearns v. Scharbach*, 5 P.3d 29 (Wash. App. 2000); rejecting *Whirlpool*); *In re Estate of DeWitt*, 54 P.3d 849, 857-861 (Colo. 2002) (en banc) (holding that Colorado §15-11-804(2) may be applied retroactively and is constitutional; following position stated by Joint Editorial Board for Uniform Probate Code and rejecting *Whirlpool*); *Lincoln Benefit Life Co.*, 468 F. Supp. 2d at 1064-1070 (citing *Stillman*, 343 F.3d at 1322; *Hanson*, 200 F. Supp. 2d 1012, 1019 (E.D. Wis. 2002)) (holding Minnesota §524.2-804, Subd.1(1) consti-

tutional because ex-spouse had no vested rights in the life insurance contract, and the section did not substantially impair decedent's contractual rights under the contract); *Mearns v. Scharbach*, 12 P.3d 1048, 1056 (Wa. Ct. App. 2000); *Grzely v. Singer*, 971 N.E.2d 481, 487 (Ohio Ct. App. 2012) (noting Ohio Supreme Court "has consistently held R.C. 5815.33 (and its predecessor R.C. 1339.63) to be constitutional, because it provides a means by which an individual may retain their former spouse as beneficiary"); *Mearns*, 12 P.3d at 1054-1056 (citing *In re Estate of Dobert*, 963 P.2d 327) (finding surviving divorced spouse has no impairment of contract claim as a mere beneficiary to life insurance policy; holding Washington R.C.W. 11.07.010 is constitutional and does not violate state or federal right to contract because the statute advances legitimate public purpose; disagreeing with *Whirlpool*); *Otto v. Estate of Moen*, No. 00-C-0171-C, 2000 WL 34236018, at \*3-4 (W.D. Wis. Nov. 29, 2000) (holding that although the section automatically revoked the decedent's designation of his ex-wife as a beneficiary, Wisconsin §854.15 is "not an unconstitutional retroactive impairment of contract" because the decedent retained the ability to change beneficiary designations until the time of his death).

<sup>12</sup> *State Farm Life Ins. Co. v. Davis*, No. 3:07-CV-00164, 2008 WL 5245332, at \*1-4 (D. Alaska Dec. 17, 2008) (noting that State Farm's insurance agent may have had an obligation to know about Alaska's revocation on divorce statute or to inquire with State Farm about the effect of the divorce and the possible need to revise the policy); *In re Estate of Rodriguez*, 160 P.3d at 686-687 (citing *In re Estate of Lamparella*, 109 P.3d at 965; *In re Estate of Dobert*, 963 P.2d at 333; *Coughlin v. Bd. of Admin.*, 152 Cal. App. 3d 70 (1984)) (holding that trial court erred in application of Arizona §14-2804 to provisions of a trust because dispositions in the trust became irrevocable on death, but recognizing that many states have "revocation on divorce statutes"); *In re Estate of Johnson*, 304 P.3d 614, 616-617 (Colo. Ct. App. 2012) (noting that under §15-11-804(2), "divorce revokes any revocable disposition of property made by the divorced individual to the former spouse in a governing instrument, including beneficiary designations in insurance policies"; and rejecting contention that the section could not be applied to insurance policy at issue); *In re Danca*, No. C1-98-1497, 1999 WL 232664, at \*1-3 (Minn. Ct. App. April 20, 1999) (affirming application of MINN. STAT. §524.2-804 (1998) in probate action); *Johnson v. Johnson*, No. A06-1415, 2007 WL 2363888, at \*6-8 (Minn. Ct. App. August 21, 2007) ("Because the QDRO is not an enforceable court order that clearly indicates husband's intent to retain wife as his beneficiary after the dissolution, the district court correctly applied MINN. STAT. §524.2-804, subd. 1."); *Gillespie v. Estate of McPherson*, 159 S.W.3d 466, 472 (Mo. Ct. App. 2005) ("We find the [e]state was entitled to judgment as a matter of law

by operation of [§]461.051, which revoked second wife as the beneficiary on the life insurance policy on the date of the dissolution of her marriage to [d]ecedent."); *United Investors Life v. Wilson*, 191 S.W.3d 76, 77-80 (Mo. Ct. App. 2006) (citing *Gillespie*, 159 S.W.3d 466, and Missouri §461.051) ("The dissolution of [d]ecedent and [e]x-wife's marriage effectively revoked [e]x-wife's designation as a beneficiary and her daughter's, Rachel Polson, designation as a beneficiary under [d]ecedent's insurance policy. Ex-wife was not entitled to judgment as a matter of law."); *Burgess v. Bryan*, 348 P.3d 171 at \*2 (Mont. 2014) (unpub.) ("The Burgess stepchildren were divested of their beneficiary status via [MONT. CODE ANN.] §72-2-814(2)(a)(i)... when their father and Judy divorced."); *Volk v. Goesser*, 367 P.3d 378, 391 (Mont. 2016) ("If Roy had not changed the policy, his wife Pamela would have remained on the policy throughout the pendency of the divorce. As the [d]istrict [c]ourt pointed out, upon finalizing the dissolution, Pamela would have been removed from the policy by operation of law pursuant to Montana's Uniform Probate Code §72-2-814(2)(a)(i)..."); *Thrivent Financial for Lutherans v. Andronescu*, 300 P.3d 117, 118-120 (Mont. 2013) (citing *Buchholz*, 740 N.W.2d at 111; *Stillman*, 343 F.3d at 1317-18) (holding Montana §72-2-814 applies to revoke life insurance policy's designation of former spouse as beneficiary; reasoning that the statute is rule of construction and rejecting contentions that statute operated retroactively and impaired rights of beneficiary); *Hadfield v. Prudential Ins. Co.*, 973 A.2d 387, 387-390 (N.J. Super. Ct. App. Div. 2009) (holding that New Jersey §3B:3-14 revoked designation of former spouse as beneficiary to life insurance policy upon dissolution of marriage; reasoning that the life insurance policy permitted decedent to change beneficiary any time prior to death, the former spouse had no vested rights to the policy proceeds, and that the statute could be applied even though the statute came into effect after the date of the divorce); *Diversified Investment Advisors, Inc. v. Baruch*, 793 F. Supp. 2d 577, 582 (E.D.N.Y. 2011) (noting that under current version of the statute, New York E.P.T.L. §5-1.4 (2008), a divorce revokes beneficiary designation to former spouse in a pension or retirement plan); *Pennsylvania Life Ins. Co. v. Pattison*, No. CA2006-09-073, 2007 WL 1584209, at \*3 (Ohio Ct. App. June 4, 2007) (applying Ohio R.C. §1339.63(B) (1) and holding that designation of former spouse as beneficiary of the policy was revoked as a result of divorce); *Wichek v. Wichek*, Nos. 93-DR-2002 and 572 CV 2002, 2006 WL 5164943, 83 Pa. D. & C. 4th 525, 529-533 (Pa. Ct. Common Pleas March 29, 2006) (holding Pennsylvania §6111.2 applied because decedent died after effective date of statute, and that beneficiary designation of former spouse in 401k accounts was revoked by operation of statute); *In re Estate of Hoffman*, 54 A.3d 903, 905-906 (Pa. Super. Ct. 2012) (holding that Pennsylvania §6111.2 ap-



plied to revoke designation in favor of former spouse because the beneficiary designation was made in December 2003, after the effective date of the statute); *Gray v. Nash*, 259 S.W.3d 286, 290-291 (Tex. Ct. App. 2008) (noting that when legislature enacted TEXAS FAMILY CODE ANN. CODE §9.301(a), it limited the nullifying effect of the statute to beneficiary designations made before divorce decree or annulment); *Camacho v. Montes*, No. 07-05-0003-CV, 2006 WL 2660744, at \*1-4 (Tex. Ct. App. Sept. 15, 2006) (applying TEXAS FAM. CODE §9.301(a) and holding divorce divested former spouse of any right to proceeds under policy); *Branch v. Monumental Life Ins. Co.*, 422 S.W.3d 919, 924 (Tex. Ct. App. 2014) (citing TEXAS FAM. CODE ANN. §9.301(a)) (“By statute, if an insured’s spouse is designated as a life-insurance beneficiary but the couple later divorces or their marriage is annulled, the earlier designation of the spouse as a policy beneficiary is ineffective.”); *In re Group Life Ins. Proceeds of Mallory*, 872 S.W.2d 800, 802 (Tex. Ct. App. 1994) (noting that designation of former spouse as beneficiary under policy was void based on TEX. FAM. CODE ANN. §3.632(a)-(c), the predecessor to TEXAS FAM. CODE ANN. §9.301(a)); *Madison*, 57 P.3d at 1177 (noting that Washington statute, R.C.W. §11.07.010, “provides that beneficiary designations made in favor of a spouse are revoked upon dissolution...”); *Dahm v. City of Milwaukee*, 707 N.W.2d 922, 923 (Wis. Ct. App. 2005) (citing *Hanson*, 200 F. Supp. 2d at 1021) (holding that former spouse was not entitled to receive benefits under policy because she failed to adduce evidence to rebut statutory presumption contained in Wisconsin §854.15(3) (a); reasoning that the section “creates a presumption that a divorce severs the former spouse’s interest in a ‘disposition of property made by the decedent to the former spouse’ if, under the instrument, the disposition was ‘revocable’ by the decedent when he or she was alive”).

<sup>13</sup> *Paronese*, 706 A.2d 814, 818-19 (Pa. 1998) (holding that retroactive application of Pennsylvania §6111.2 was unconstitutional impairment of freedom to contract); *Whirlpool*, 929 F.2d 1318, 1322-1323 (8th Cir. 1991).

<sup>14</sup> *Paronese*, 706 A.2d at 814-815.

<sup>15</sup> *Id.* at 815-816.

<sup>16</sup> *See id.* at 815.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.* at 816.

<sup>19</sup> *See id.* at 818-819.

<sup>20</sup> *See id.* at 819.

<sup>21</sup> *See id.*

<sup>22</sup> *Whirlpool*, 929 F.2d at 1319.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1319-1320.

<sup>25</sup> *See id.* at 1320.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 1322.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* at 1322.

<sup>34</sup> *See id.* at 1323.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See* 20 PA. STAT. & CONS. STAT. ANN. §6111.2(b) (West 2016) (If a spouse dies while divorce proceedings are pending and grounds for divorce are already established, any designation in an individual’s life insurance policy in favor of the individual’s spouse that was revocable at the individual’s death shall become ineffective and shall be construed as if the spouse had predeceased the individual, unless it appears, based on certain factors, that the designation was intended to survive the divorce.); *Diener v. Renfrew Centers, Inc.*, Civil Action No. 11-4404, 2011 WL 4401720, at \*5, n.2 (E.D. Pa. 2011) (summarizing amendments to Pennsylvania §6111.2, and noting that *Paronese* bars retroactive application of the statute).

<sup>39</sup> *See Hanson*, 200 F. Supp. 2d at 1018-1019 (*Comparing Estate of Dobert v. Dobert-Koerner*, 963 P.2d 327, 332 (Ariz. Ct. App. 1998); and *In re Estate of Becker*, 32 P.3d 557, 564 (Colo. Ct. App. 2001); and *Mearns v. Scharbach*, 12 P.3d 1048, 1054-56 (2000); with *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1322-23 (8th Cir. 1991); and *First Nat’l Bank & Trust v. Coppin*, 827 P.2d 180, 182 (Okla. Ct. App. 1992); and *Paronese*, 706 A.2d 814, 818-19). *See also Williams v. Old American Ins. Co.*, 882 P.2d 576, 577-578 (Okla. Civ. App. 1994) (holding that Oklahoma §178 cannot be applied retroactively) (citing *Whirlpool*); *Mass. Mut. Life Ins. Co. v. Curley*, 459 Fed. App’x 101, 106 (3d Cir. 2012) (holding that Pennsylvania §6111.2 cannot be applied retroactively) (citing *Paronese*).

<sup>40</sup> *See Stillman*, 343 F.3d at 1322 (“The *Whirlpool* line of cases has been persuasively criticized by other distinguished authorities.”); *American General Life Ins. Co. v. Jensen*, Civ. No. 11-5057-JLV, 2012 WL 848158, at \*14 (D.S.D. March 12, 2012) (noting South Dakota Supreme Court has rejected *Whirlpool*); *MONEY Life Ins. Co. v. Ericson*, 533 F. Supp. 2d 921, 925-926 (D. Minn. 2008) (noting that courts and the Joint Editorial Board of the Uniform Probate Code disapprove of *Whirlpool*) (collecting cases); *Heitz*, 468 F. Supp. 2d at 1068 (noting that the statute at issue in *Whirlpool* was not based on the 1990 version of the Uniform Probate Code, as is Minnesota §524.2-804); *Buchholz*, 740 N.W.2d at 113-114 (noting that many courts have determined that retroactive application of state redesignation statutes does not violate the Contracts Clause, that the *Whirlpool* decision has been “persuasively criticized by both the Joint Editorial Board...for the Uniform Probate Code and other court decisions,” and agreeing with majority view that the South Dakota, S.C.D.L. §29A-2-804, is constitutional) (collecting cases); *In re Estate of Becker*, 32 P.3d at 563 (noting that Joint Editorial Board of Uniform Probate Code has strongly criticized *Whirlpool* as inconsistent with the intent of Uniform Probate Code); *In re Estate of DeWitt*, 54

P.3d 849, 859-860 (Colo. 2002) (*en banc*) (same); *Estate of Dobert*, 963 P.2d at 332 n.3 (distinguishing *Whirlpool*).

<sup>41</sup> *See Hanson*, 200 F. Supp. 2d at 1019.

<sup>42</sup> *See In re Estate of DeWitt*, 54 P.3d at 856-859.

<sup>43</sup> *In re Estate of DeWitt*, 54 P.3d at 859-860 (quoting *JEB Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 AM. COLL. TR. & EST. COUNS. 184 app. II (1991)).

<sup>44</sup> *In re Estate of DeWitt*, 54 P.3d at 859-860.

<sup>45</sup> *Stillman*, 343 F.3d at 1322 (citing *In re Estate of DeWitt*, 54 P.3d at 859-60; *In re Estate of Dobert*, 963 P.2d at 332; *Allstate Life Ins. Co. v. Hanson*, 200 F. Supp. 2d 1012, 1019-20).

<sup>46</sup> *See Buchholz*, 740 N.W.2d at 113-114.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 114 (quoting *Heitz*, 468 F. Supp. 2d at 1066, 1069; also citing *Stillman*, 343 F.3d 1311; *Hanson*, 200 F. Supp. 2d at 1016; *Estate of DeWitt*, 54 P.3d at 859; *Mearns*, 12 P.3d at 1056; *Estate of Dobert*, 963 P.2d at 332).

<sup>49</sup> *See MONEY Life Ins. Co.*, 533 F. Supp. 2d at 925-926 (noting that courts and the Joint Editorial Board of the Uniform Probate Code disapprove of *Whirlpool*, but finding that *Whirlpool* was binding precedent); *First Nat’l Bank & Trust v. Coppin*, 827 P.2d 180, 182 (Okla. Ct. App. 1992) (interpreting same statute as *Whirlpool* and following *Whirlpool* as binding precedent); *Paronese*, 706 A.2d at 815-819 (holding that Pennsylvania §6111.2 was unconstitutional if retroactively applied to insurance policies purchased or beneficiary designations made before the effective date of the statute); *Aetna Life Insurance Co. v. Schilling*, 616 N.E.2d 893 (Ohio 1993) (holding that Ohio’s statute, R.C. §1339.63, was unconstitutional “as applied to contracts entered into before the effective date of the statute.”).

<sup>50</sup> *See In re Estate of Becker*, 32 P.3d at 563.

<sup>51</sup> *See Whirlpool*, 929 F.2d at 1320, n.2.

<sup>52</sup> OKLA. STAT. ANN. TIT. 15 §178 (West 2016) (emphasis added).

<sup>53</sup> OHIO REV. CODE ANN. §5815.33 (West 2016) (emphasis added).

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