

ORAL ARGUMENT – 1/12/00
99-0313
BARNETT V. BARNETT

DWYER: I'm going to talk primarily about the summary judgment issues and the situation below as it has to do procedurally with the judgment rendered by the CA. Our petition was filed because the CA went beyond the pleadings in the summary judgment motions and the law in granting a joint and several judgment against Ann Dies for the entire ½ of the Prudential policy proceeds. As stated in the brief, the CA can only render such judgment or decree as the court below should have rendered. As such, it could only grant the relief that the plaintiff actually requested for which the plaintiff met its burden of proving that there were no contested issues of fact and as a matter of law they were entitled to judgment.

In order to determine that, which the CA did not examine any of the facts or the summary judgment motions, they have to examine the procedural record. The plaintiff's second motion for partial summary judgment and the first amended 2nd motion for partial summary judgment, which is the one the court actually granted, state in their request that they want to determine that the policies of insurance and the life of her deceased husband are community property; that their interest in the life insurance policies were not forfeited under ERISA; and that she was deprived of her community interest in the life insurance proceeds through constructive fraud. All of these motions were for partial summary judgment, not final summary judgment.

The prayers for relief in both motions pray as to my client and the other donee defendants, that each defendant transferee of Dora Ernestine Barnett be declared a constructive trustee for the benefit of plaintiff and to pay to her the sums of money each of them received with pre-judgment and post-judgment interest. Request for relief are identical in the motions that were granted by the CA.

Dies did not file a motion for summary judgment. So we're not dealing with the issue of cross-motions for summary judgment as to my client, Dies. The court denied the plaintiff's motion for summary judgment by a written order on the grounds that fact issues existed on the issue of civil conspiracy, on the issue of whether constructive trust should be imposed against Dies.

Before the CA can render a final judgment, both parties must have sought a final summary judgment in their cross-motions. It didn't exist in this case. The procedural history below doesn't support that level of case law upon which the respondent relies in the CA granting a final summary judgment against the petitioner, Dies. The only motion that could have been granted sought only partial relief and only to the extent of actual money received. The summary judgment evidence which is undisputed goes to my client received a gift of \$10,000. That gift came from Ernestine Luck Barnett, who was the beneficiary under the will of Christopher Barnett.

The summary judgment evidence in the case and all that summary judgment that there was showed a check register. The summary judgment evidence showed that there was in fact a check written out to my client for \$10,000...

HANKINSON: Could the CA properly render judgment against your client for \$10,000?

DWYER: No.

HANKINSON: Why not? What issue remains open as to the your client?

DWYER: The issue of whether or not there is any proof of civil conspiracy. The issue or not of whether there is any proof of constructive fraud. The whole theory of constructive fraud on which the plaintiff's case lies says that the spouse cannot defraud the other spouse by giving away community property. By designation of the beneficiary is what they claim in this case, or the cases are replete with many ways in which someone gave away community property.

HANKINSON: Is there a challenge before this court to the decision related to the constructive fraud claims separate and apart from the joint and several liability issue?

DWYER: I certainly challenge it on why we're here. I don't think the CA could have done it. I don't think the TC could have done it.

HANKINSON: I understood your challenge to be that because it was no determination that there was a conspiracy that the rendition of judgment on joint and several grounds was not proper.

DWYER: There is also a challenge on the issue of there is no right to oppose a constructive trust as to my client. The facts are clear that Ernestine Luck Barnett even under the opinion of the CA had \$468,000 worth of cash that was hers to give as she pleased. The plaintiff in a constructive trust has to establish arrest, has to trace it into the hands, and show that they have an equity or interest in it. There is no proof of that. There is no summary judgment proof of that. And there was no evidence introduced at trial.

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DANA: I represent Dora Ernestine Luck Barnett. She is the mother of the decedent, Christopher Allen Barnett. And I also represent the 7 co-defendants whom the CA referred to as the West defendants.

This is probate litigation as the court well knows that involves ERISA community property considerations; probate code provisions, the effect of a directive verdict in a jury trial; joint and several liability. Many issues are presented and I think they've been fairly adequately briefed by all sides in this case.

Given the constraints of my time, I would like to limit my discussion to ERISA community property as it relates to this case and to the issue of attorney's fees.

As this court knows, this case involved an employee who worked for HL&P. He had 3 life insurance policies. They had total benefits of \$637,955. These are all sides I think agree and the CA acknowledged ERISA plans. They are what ERISA actually refers to as an ERISA welfare plan. I don't think this case would be here if Christopher Allen Barnett had designated on the plans his mother, Dora Ernestine Luck Barnett, as the beneficiary. The respondent, the widow in this case in her brief before you, has acknowledged that to the extent that she says, Had that occurred, these policy proceeds would be what the law refers to as 'non probate assets'. They would pass outside of the estate. In her pleading before the TC, she acknowledged that ERISA benefits are by definition neither separate nor community property.

Christopher Allen Barnett was not an academic. He typed his own will on his own computer. And in his will, he said, I leave everything to my mom. There were some other dispositions but for purposes of this case as it relates to the policy proceeds he said, I leave them to my mother.

ENOCH: Once the proceeds were paid to the estate, does ERISA have any more concern about what happens to that money?

DANA: Yes. The SC in a case cited by the widow held in *Boggs v. Boggs*, what the Ft. Worth CA has called the seminal case, the seminal decision on ERISA benefits. In that case Ms. Boggs was married to Mr. Boggs for a number of years. Mr. Boggs was the employee and he had the ERISA benefits. Mrs. Boggs executed her will in which she said, I leave my half of the benefits yet to be received to our 3 sons. Mrs. Boggs then died. At the time of her death, Mr. Boggs had not yet received his benefits. He was still employed. Thereafter, Mr. Boggs married a new wife. Then Mr. Boggs died. The contest was between the sons, who believed they had inherited under their mother's will and the new spouse. The sons said, We are entitled to those benefits because we're not challenging the plan. They waited until the benefits poured into the hands of the wife, and they then sued the wife for their share of those benefits. They said, ERISA is not implicated because we're not attacking the plan. ERISA has no more interest once the proceeds are paid to this wife. It's a suit purely between us. The SC in a 1997 decision said, "It does not matter that respondents, who were the sons, have sought to enforce their rights only after the retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefit. Their estate law claims are preempted.

The truth of the matter is and the long and short of it is, that ERISA benefits truly are not separate or community. They rise above that. Under the preemption clause...

HANKINSON: Boggs is different than this case. Because the SC in Boggs looked at the particular type of benefits that were at issue that were subject to a provision of an ERISA that would

had an anti-alienation provision, which meant it put at issue the actual purported transfer of the interest in those benefits from the deceased wife to her sons which occurred before the point in time that the employee died and purported to leave them to his second wife. So we really do have in that instance the whole basis of the claim was something that occurred at a point in time before the benefits were paid. And we have the specific anti-alienation provision of ERISA at issue that was found to be the _____ source of the conflict with the community property law.

DANA: Respectfully, I think the Boggs case addressed both benefits that did have anti-alienation provisions and those that did not.

ENOCH: But to the extent the Boggs's sons were suing, it was dependent on whether or not their mother's will had some effect on their father's benefits. In Boggs, the sons' claim against their father's second wife was dependent on how the court decided their mother's will affected the benefits under the plan.

DANA: I would agree.

ENOCH: In this case, there is no activity that this claim is being predicated on whose rights are to what amount of those benefits. They've already been paid as they were directed to be paid, which is to the estate?

DANA: Correct.

ENOCH: And the interest in that amount of money is as between the husband and the ex-wife, and not as to where the benefits should have been paid. She's now arguing he has an estate, he's got money in that estate and now we want to divide the estate according to community property.

DANA: Exactly. But you can't do that under ERISA because the ERISA benefits are not community property. They are not properly characterized as community or separate. *Boggs* makes that representation. And the problem she has is as you know the cornerstone of community property rights is the inception of title doctrine. She's saying these benefits which are neither separate nor community are paid after my husband's death and then when he's dead, when the marriage is dissolved by death, then she says they spring into life as community property. Well by definition when the marriage is dissolved by the death of a spouse, there can never become a community property claim to rights that are recognized and realized and received thereafter.

ENOCH: Suppose he hadn't left a will?

DANA: Had he died in testate?

ENOCH: Right. Then there would be nothing you could do with the money since the money is not affected by state law, which otherwise says how you have a distribution if you are in

testate. It just kind of sits there. It seems to me that's your argument, that since it's not community and it's not separate, then any effort to try and decide how those funds get distributed would be preempted by ERISA.

DANA: No, I don't know that that's my argument. Obviously if he died in testate and naming his estate as the beneficiary of the policy proceeds, then the plan administrator would properly pay those proceeds into the estate and there being no disposition by will, then the state probate in testacy laws would direct the disposition of the policy proceeds. I'm just saying that when it goes by will and he specifically directs "I want this to go to my mother," community property considerations should not just spring into being where they did not previously exist.

HANKINSON: When you characterize *Boggs* as saying basically if ERISA benefits are at issue community property has nothing to do with anything. I mean it's not even in the picture. I take it that's the way you read *Boggs*?

DANA: That's the way I read *Boggs*.

HANKINSON: Then if as an employee I use some of my income to purchase supplemental life insurance through my employer, that's subject to ERISA because it's an insurance plan that's provided by my employer. But I'm using community funds to purchase that. But does that mean that after I die that my husband would have no claim whatsoever towards anything to do with those insurance benefits and I could do with them whatever I want even though I've used community to purchase them?

DANA: Absolutely. And the cases are numerous on that point and are consistent. Your husband would have a claim for reimbursement for 1/2 of the community funds used to purchase or to pay those premiums.

HANKINSON: Well but you just said though that once you get into ERISA community property law has absolutely nothing to do with anything. And that would make it seem like he couldn't even make the claim for recovery of half the amount of money that I spent to purchase the insurance.

DANA: No. I don't think that that's the argument. I don't think that's my position. The case law on that is clear. The policy proceeds go according to the plan documents executed by the plan participant. The right of reimbursement, however, exists because those were community funds.

HANKINSON: The right of reimbursement exist because under federal law it's recognized or because under state law it's recognized?

DANA: No, under state law it's recognized. But that doesn't affect the disposition of

the policy proceeds, which are governed by federal law.

HANKINSON: But if under federal law the policy proceeds are distributed the way the employee has designated under the plan, so like in this case the decedent designated his estate, and in fact the plan then placed the proceeds to the estate at that point in time if as a result of the distribution of the estate and so on and so forth, there is not a fair allocation of the community as a result of that are you saying that Texas law can have nothing to do with in that particular instance stepping in in terms of making sure that the spouse is fairly treated?

DANA: Yes, because that is an area preempted by ERISA. That is not to say that the widow...

HANKINSON: But the plan documents have already been fulfilled. The plan did exactly what it was supposed to do. It paid the proceeds of the insurance policy to the designated beneficiary. They are finished. They've written their check. They've gone home. Why doesn't state law at that point in time step up to the plate in terms of deciding what happens during the course of the probate proceeding and in terms of what ends up happening if in fact someone has a claim under state law to the proceeds at that point in time?

DANA: Because ERISA says they don't have a claim. ERISA says they are not burdened by the restraints of community property law. ERISA doesn't recognize that distinction.

HANKINSON: There are ERISA benefits from now for all times basically is what you're saying?

DANA: Right.

HANKINSON: There's not a point in time where after they've been played out, the interest that congress has said to be furthering by ERISA have been fulfilled?

DANA: Exactly.

HANKINSON: And so there's not a point in time where that ever ends?

DANA: No. The preempted reach of ERISA by case law is extremely broad. ERISA paints with a very broad brush. Less you be concerned that the surviving spouse is sort of left out without benefits, she has as you referred to earlier, the non-alienation protections that are allowed to her.

HANKINSON: But not for life insurance.

DANA: Not for life insurance. And ERISA is specific in that regard. It's what the US

SC in *Boggs* referred to as a delicate balance between the rights of the participant and the rights of the non-participant's spouse. It says, the axis around which ERISA's protections revolve is the concepts of participant and beneficiary. A spouse is not a beneficiary under the non-alienation provisions of ERISA. Had Christopher Allen Barnett designated his mother as his beneficiary, we wouldn't be having this discussion. Why should that change because he says in a non-academic doing the things the way he thinks is right - I will name my estate as beneficiary...

ENOCH: Let's suppose the proceeds were paid to his mother. But there's a judgment lien against his mother and someone finds out about it and as the proceeds are paid and they are deposited in a bank account somebody garnishes that bank account. Would you be arguing that because the proceeds were paid to the mother through a ERISA plan, those proceeds are exempt from execution under state law to satisfy some other debt?

DANA: No, not once they are in the hands of the beneficiary.

ENOCH: Now suppose we've got proceeds from the ERISA plan that's paid as it is supposed to be to this gentleman's estate. And this gentleman has a judgment lien pending against him and they find out the estate now holds these funds. Could the judgment creditor then bring a collection action against the estate for those funds?

DANA: I think he could.

ENOCH: Why can't the wife bring a claim against those funds?

DANA: Based on community property because the funds were not community property.

ENOCH: So if her entitlement is as a result of the community property laws and not as a result of him gaining his funds and having them saved in the account, then ERISA says that doesn't apply?

DANA: I believe that's what ERISA says.

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RESPONDENT

WATSON: I would like to respond to the first question that was asked of Mr. Dana, which was that once life insurance proceeds are paid to the estate, does ERISA have anything further to do with the disposition of the proceeds? And the 5th circuit has directly given us an answer to that in *Nickel v. Estate of Estes*. On pages 300 and 301, footnotes 4 and 6, it clearly says that ERISA does not preempt state law governing passage of the proceeds from Annie's estate to the beneficiaries in her will because the plan does not discuss how the proceeds should pass from a beneficiary's estate.

HECHT: Do you agree with petitioner's statement that if the mother had been designated as the beneficiary, we wouldn't be here?

WATSON: Oh, absolutely not.

HECHT: You would still be making a claim?

WATSON: Indeed.

OWEN: Let's assume that the deceased had specifically designated his mother as a beneficiary for the life insurance proceeds, that they did not pass through the estate, the proceeds would be under the terms of his designation paid directly to his mother.

WATSON: I have cited a number of cases in the brief where someone other than the spouse has been designated as beneficiary. Now as *Martin v. Moran* said, a designation of a life insurance beneficiary is a gift by the insured. An insured may not give himself his wife's community property by designating his estate as the beneficiary. Now there are instances in which designating another person besides the spouse as beneficiary is perfectly proper.

OWEN: What about ERISA? What impact does ERISA have? Let's assume the husband had said I want my insurance proceeds to be paid to my mother and what impact if any does ERISA have on that?

WATSON: ERISA would preempt state law if the state law tried to curtail, regulate, or affect the life insurance beneficiary designations.

OWEN: So you wouldn't be here if that had been the case?

WATSON: Oh, I would. If the mother had been beneficiary, oh yes.

OWEN: How could you challenge that under ERISA?

WATSON: In order to avoid the wife's complaint of constructive fraud of her rights. I would recognize that employee benefits are community property as *Taggart v. Taggart* said. I would also recognize that ERISA affects community property in law where the anti-alienation provisions further the policy of the federal government to keep widows and orphans off of the welfare roll when the wage earner dies. But once we get past those special provisions, which do not take away the wife's community property, it insures the wife's half and gives her more for her family. But when it gets to the life insurance beneficiary designation, and ERISA is absolutely the same as Texas law, since there is no conflict, then preemption does not come in to account. So, if the effect of making the mother the life insurance beneficiary is unfair to the wife in that the wife is deprived of her 1/2 of the community estate, then the wife has been defrauded because the husband may not give away her

property without her consent.

HECHT: So the wife can sue the plan administrator and say, Give me half the benefits?

WATSON: No, that would never happen. Because the plan administrator didn't do anything wrong.

HECHT: He's got the money.

WATSON: I don't believe there would be any cause of action to assert at that point. Because the beneficiary designated under the plan is the estate...

OWEN: No, it's the mother.

WATSON: I'm sorry. Well there could be an interpleader action perhaps. But even so that is not attacking the plan.

HANKINSON: Is the point that you're trying to make that the claim does not arise basically on the part of the spouse or the wife until after the plan has paid the designated beneficiary? I mean in terms of the constructive fraud claim that you are referring to, so therefore, there is no claim to be made against the plan until such time as the proceeds have been distributed. Is that what you're trying to say?

WATSON: Yes. That is what I am trying to say.

HANKINSON: Then does that mean that you disagree with Mr. Dana that *Boggs* completely dispenses with community property law vis-a-vis ERISA benefits at all points in time? Does *Boggs* do that?

WATSON: It did not in my opinion. There is a series of cases where the non-employee, non-participant spouse dies before the employee. ERISA being in effect a spendthrift trust not subject to disposition by testamentary or any other kind of transfer by the predeceasing, nonparticipating spouse.

HANKINSON: Does our ERISA benefits subject to being characterized as community or separate property? Mr. Dana says that *Boggs* did away with that, that this is kind of a separate category. We now have 3 categories in Texas: separate property; ERISA property; and community property.

WATSON: I believe the media, the academics if we didn't have community property in this state any more depending on who you worked for and when, we would all not have to speculate about it. There are a number of cases cited in the brief where the issue has been, does ERISA nullify

community property system.

HANKINSON: And what's the answer to that?

WATSON: Systematically it does not nullify the community property system. It will preempt a law that attempts to regulate a plan. Because it is ERISA regulated plans that are protected. The benefits once they are paid are subject to state law. In *Monahans v. Myers*, after the life insurance was paid to the employee's fiancée his children sued her for undue influence because the beneficiary designation was made 2 days before their father's death. ERISA's defense was asserted saying these were proceeds. The court said, no those proceeds have been distributed and state law claims will then lie. The same thing with *Ames v. Ames*, where the plan administrator terminated the plan, distributed the proceeds except for some which he pledged to the bank which was then foreclosed, and the employees entitled to those benefits then sued him and the bank, and that was a common law breach of duty _____.

ENOCH: Do I understand you to be saying that as long as you sit by and let the administrator pay the proceeds according to the plan, that's the end of ERISA? Once the proceeds have been paid according to the plan, then people can jump in and fight all they want to over this bundle of money that's sitting here?

WATSON: That is my sincere belief based on *Nickels v. Estate of Estes* because that's what it says. It's a 1997 5th circuit case and it's the only one I found that spoke directly to it.

ENOCH: So your argument to Mr. Dana really is that it's not that ERISA creates a different category of property. It's just the people can't fight over it as long as it's still a part of the plan. Once it's been paid, then state law affects where ultimately that money resides?

WATSON: That's right. That's exactly right. When the plaintiff filed suit, she filed against the mother who was the executrix. During discovery found that the proceeds had all been disbursed to a number of different people, then joined enough people where she could follow the proceeds and get her property rights restored. Those people were all served with citations that asked for joint and several liability. They did answer that they had no affirmative defense, they did not raise the issue of proportional liability or contribution. Of course they would first say I have no liability, but if I do, it is limited to so much and have cross actions against the other defendant. It just wasn't raised.

ENOCH: Except if it's a constructive trust you're trying to create, it can only be to the extent of funds they have received.

WATSON: It's not the only venue. I think that is the one most often followed because someone has received the funds or you would not be looking to them for reimbursement. But the plaintiff sued for the right to follow her funds into the hands of the transferees. These were

transferees and she asked for joint and several liability. Now the rules of procedure say to them, if you think that you're only liable proportionately rather than jointly and severally, raise that as an affirmative defense. If you don't ask for a contribution from your fellow defendants, you don't get it.

BAKER: What's the legal theory for pleading joint and several under the facts of this case?

WATSON: At the time the pleadings were filed the discovery had not gone forward to the point that it did ultimately. But since they were joint tortfeasors in effect by holding funds that they were not entitled to, then it was joint and several liability that was prayed for.

BAKER: Aren't the facts of this case that the funds they received each one of these respective defendants were gifts to them as far as the one who paid them? I mean they had no contractual right or otherwise, or were not part of the beneficiaries named in the policy or in the estate, is that correct?

WATSON: That's correct. Because the proceeds of insurance were put in to an estate checking account, and the executrix depleted the account by various disbursements and gifts, there was a breach of fiduciary duty on her part and...

BAKER: But not theirs?

WATSON: A constructive trust is one imposed by law without proof of malice or fraudulent intent...

BAKER: But only to the extent of the funds that you got if you are going to impose a trust on it as Justice Enoch was suggesting. And then their procedural question is well how can the CA under all these facts render a joint and several judgment?

WATSON: When it was not raised by the pleadings?

BAKER: No when it was not proven in summary judgment.

WATSON: There was summary judgment evidence offered.

BAKER: But would you concede that you couldn't offer any evidence as to those defendants that they got any more money than they actually got, such as in Ms. Dies' case \$10,000?

WATSON: I will concede that. I will say for the issue to be litigated and appealed if they want it in the case there are procedures, there are pleadings to be followed and evidence to be offered. But I understand what you're saying.

With regard to the issues that were determined by the partial summary judgment, I'm not entirely sure that I followed Mr. Dwyer's argument, but those issues are final even though it's an interlocutory summary judgment unless the court sets the judgment aside. So when we got to the trial of the case, the insurance issues were not submitted to the jury. They were already determined. And so a directed verdict would have no effect on those issues because they were not issues to be submitted to the jury in the first place. But in *Hendrix v. Thornton*, 973 S.W.2d 348, the court said that even though the summary judgment was interlocutory, the issues were final, and so they were not before the court.

I have worried too about what happens to proceeds from ERISA life insurance that go into an estate in the event of intestacy or do we expand the life insurance beneficiary designation from estate to read will. And if we expand it beyond that, do we say residuary beneficiary. Well what if there is no residuary beneficiary? We keep interpreting and adding to the language of the plan which we're not to do. And so we must look to state probate law to characterize property and to the relationship of any errors at law.

ERISA recognizes the community property aspect of employee benefits and it did so when it provided for a qualified domestic relations order. So in the event of divorce the non-employed spouse could receive his or her interest in the plan. Since marriages are dissolved by divorce or death, the spouse was protected at death by the anti-alienation provisions of the pension and retirement funds. But since ERISA didn't really regulate the life insurance aspect, then it is not taking out of the community property system. And once again, I do disagree that if the mother had been named beneficiary that we would not be here because that gift by the husband of proceeds belonging to the wife would have been unfair to her because it left an unreasonably small amount of community property for her - divested her of her rights in the community.

ABBOTT: Assume the divorce was effectuated before the death what would the wife's claim be?

WATSON: It would be whatever the qualified domestic relations board said it would be.

ABBOTT: And that would be based upon what?

WATSON: That would be based on the family code, which is the court can divide the property according to what is just and right. And that varies. That's very subjective. But in the probate court there is no provision for anything other than property that is characterized and separate on community.

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REBUTTAL

DWYER: I don't know that you ever got an answer to your question. The question being

what would happen if Chris Barnett had named Dora Ernestine Luck Barnett as his beneficiary? The answer is, it would have gone to Dora Ernestine Luck Barnett.

HANKINSON: Why? Without any claims then afterwards why?

DWYER: Because of the preemptive sweep of ERISA.

HANKINSON: Ms. Watson has told us that ERISA does not nullify community property law but it preempts that law when there is a conflict and says that community property law is still alive and well. What's your response to that, and that seems to be an important piece of how that question would be answered?

DWYER: I would agree this case turns on that question. That is the question that you will decide.

HANKINSON: But under your view, there is no community property law any more when it comes to ERISA benefits and therefore that just answers the question?

DWYER: That is correct with regards to those that are not burdened by the anti-alienation provisions.

HANKINSON: How does that fulfill the purpose of ERISA though? ERISA is designed to protect the employees and the beneficiaries but not as against the world or the spouse, creditors or anyone else. It's to protect them as against what? The employers, the insurance companies and the administrators.

DWYER: Right.

HANKINSON: Given this broad preemptive sweep that you want us to give that wipes out any community property interest in a life insurance policy, if one exists, which is what I think your position is, how is the purpose of ERISA fulfilled? The purpose of ERISA is not designed to cut spouses out of the loop.

DWYER: To some extent it is. Portions of ERISA specifically are intended to protect spouses and other portions are intended to allow the participant to have 100% control of the disposition of his benefits. And you have to look at which is involved.

HANKINSON: And her position is, that's why he gets to designate whoever he wants to designate.

DWYER: And then she grabs it once he's done it.

HANKINSON: Well do you disagree that if the proceeds are then paid out to his estate, the plan is finished, a creditor of the estate cannot come in and make a claim on it?

DWYER: No. I think if he does it that way, I believe it is subject to attachment by a creditor.

HANKINSON: Well then why wouldn't it be subject to a constructive fraud claim by the spouse?

DWYER: Because it's not community property.

HANKINSON: No, that ultimately goes to the merits of it. Under your view it sounds like no one can ever touch that money because it gets protected for all time.

DWYER: Let me read this one paragraph from the *Nickel* case that Ms. Watson cites to you. It says, if designation on file controls ERISA administrators and courts need look no further than plan documents to determine the beneficiary.

HANKINSON: I think she agrees with you about that. I heard her agree and say that she doesn't have any complaint at that point in time. That in fact, the plan and ERISA would require that that beneficiary receive the proceeds. It's after the proceeds have been paid and are in the hands of the beneficiary that at that point in time if there are other interests under state law that would then come at interest and we would be looking to state law for that resolution.

DWYER: Can any cogent argument be framed to suggest that ERISA for whatever reason wants to protect the rights of the participant to designate his beneficiary, but if he makes the mistake of passing it through his estate, he has forfeited that right. I don't see the distinction. I see a legal technicality that allows the wife to in effect thwart what ERISA tried to allow him to do.

HANKINSON: But the 9th circuit disagrees with you.

DWYER: Which case is that?

HANKINSON: It's a recent 9th circuit case in which the panel determined that once the beneficiary had been paid, then under California community property law the constructive fraud claim could be brought against...

DWYER: Is that pre or post *Boggs*?

HANKINSON: Post.

DWYER: I'm not familiar with that case.

