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COURT OF APPEALS

STATE OF NEW YORK

THE MINISTERS AND MISSIONARIES BENEFIT BOARD,

Interpleader Plaintiff,

-against-

No. 131

SNOW, et al.,

Appellants,

-against-

THE ESTATE OF CLARK FLESHER, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
September 10, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

JESSE WILKINS, ESQ.
PRESTON & WILKINS, LLC
Attorneys for Appellants
3000 Hempstead Turnpike
Suite 317
Levittown, NY 11756

BRIAN ROSNER, ESQ.
CARLTON FIELDS JORDEN BURT, P.A.
Attorneys for Respondents
405 Lexington Avenue
36th Floor
New York, NY 10174

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's start with 131.
2 Counsel, do you want any rebuttal time, counselor?

3 MR. WILKINS: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes, go
5 ahead. You've got it. You're on.

6 MR. WILKINS: Thank you. Jesse Wilkins of
7 the firm of Preston & Wilkins, appearing on behalf of
8 the appellants, LeAnn Snow and Leon Snow.

9 We're here today, Your Honor, to ask you to
10 consider answering two questions that have been
11 certified to you for your consideration. And we
12 would ask that you answer - - -

13 CHIEF JUDGE LIPPMAN: Let's start with the
14 EPTL question.

15 MR. WILKINS: Yes.

16 CHIEF JUDGE LIPPMAN: Did the EPTL control
17 this - - - this situation?

18 MR. WILKINS: Our position is that it does
19 not.

20 CHIEF JUDGE LIPPMAN: Why not?

21 MR. WILKINS: That - - - that provision
22 relates primarily to wills and testamentary
23 dispositions. We believe that the law in New York is
24 that New York courts look to the plain language of
25 contracts, such as the ones at issue here.

1 CHIEF JUDGE LIPPMAN: Where does it say
2 that? Where do you get that from?

3 MR. WILKINS: From various case laws here -
4 - -

5 CHIEF JUDGE LIPPMAN: Like what?

6 MR. WILKINS: One would be - - -

7 CHIEF JUDGE LIPPMAN: I mean, I know the
8 general proposition, obviously. But - - -

9 MR. WILKINS: Yes.

10 CHIEF JUDGE LIPPMAN: - - - as it relates
11 to this particular situation?

12 MR. WILKINS: I think if you look at the
13 case McCarthy v. Aetna Life Insurance.

14 THE COURT: Um-hum.

15 MR. WILKINS: And there, the court looked
16 at the choice of law provision. When this - - - when
17 that matter was before this court, the court decided
18 that the choice of law provision was not applicable,
19 because - - -

20 CHIEF JUDGE LIPPMAN: Well, if you - - - if
21 you're doing local - - - if you're doing New York
22 law, does that foreclose - - - if there's a choice of
23 New York law, what makes you think that that
24 forecloses a conflicts analysis under New York law?

25 MR. WILKINS: Because generally, the courts

1 think or have said in the past that when parties
2 choose the law, the substantive - - - it is the
3 substantive law or the local law that they're
4 choosing, and not necessarily choice of law - - - a
5 conflict - - - the conflicts of law provision.

6 CHIEF JUDGE LIPPMAN: What - - - what about
7 the - - - the - - - the IRB Brasil case?

8 MR. WILKINS: Yes. We - - -

9 CHIEF JUDGE LIPPMAN: What does that say?

10 MR. WILKINS: That case says that when - -
11 - when the parties have a choice of law provision,
12 that you definitely look at the substantive law of
13 the state and of the law that they have chosen. And
14 it says that a choice of law analysis is not
15 required.

16 JUDGE FAHEY: Does that apply to contracts
17 - - - this particular contract, though, that
18 analysis?

19 MR. WILKINS: Well, we think that you would
20 have to extend the rationale to this particular
21 contract, because the contracts there were large stat
22 - - - large contracts.

23 CHIEF JUDGE LIPPMAN: Yeah, but does that
24 case say that it forecloses conflict of law analysis?

25 MR. WILKINS: I believe it does. I - - - I

1 believe it said that you - - - once the parties - - -

2 CHIEF JUDGE LIPPMAN: I believe I have a
3 pretty good sense of what that case says.

4 MR. WILKINS: Yes, Your Honor.

5 CHIEF JUDGE LIPPMAN: So tell me where it's
6 - - - it says that you're foreclosed from a conflicts
7 analysis? That's what you - - - you draw from that
8 case, that it's preclusive?

9 MR. WILKINS: I drew from that case, that
10 once the parties have chosen, the - - - have made the
11 choice of law, and you apply the substantive law,
12 that is the only law that is required, the
13 substantive law of the state that has been chosen
14 pursuant to the choice of law provision in the
15 particular contract.

16 CHIEF JUDGE LIPPMAN: So that - - - that
17 contractual election prevents alteration through - -
18 - through a conflicts analysis?

19 MR. WILKINS: Well, it is my understanding
20 that that case stood for the proposition that a
21 choice of law analysis was not required. I'm not
22 sure that - - -

23 CHIEF JUDGE LIPPMAN: It doesn't preclude
24 it, right?

25 MR. WILKINS: I don't think that case says

1 specifically that it is precluded, but it certainly
2 says that it's not required once a - - -

3 JUDGE STEIN: Well, in that - - - in that
4 case there was no statutory choice of law provision,
5 right? They were talking about a common law choice
6 of law, and they were distinguishing it - - -

7 MR. WILKINS: That is correct.

8 JUDGE STEIN: Is that - - - is that what
9 you're trying to say here?

10 MR. WILKINS: Yes, but - - -

11 JUDGE STEIN: Okay. And - - - and is there
12 any precedent to deal with the question that we have,
13 which is where you - - - you know, if you refer to
14 the law of a state, and its statute includes a choice
15 of law provision?

16 MR. WILKINS: Well, I think as the question
17 is presented to the court, it is, do the governing
18 provisions of these contracts require you to reach
19 out to that particular provision. And our position
20 is that it does not, because in the first instance,
21 you have a contract where the language is clear and
22 unambiguous. Therefore, on a contract analysis
23 basis, you simply look to the language of the
24 contract. And there, in these particular contracts,
25 we have a definition of the designated beneficiaries,

1 and we also have a provision that says how those
2 beneficiaries are to be paid. So - - -

3 JUDGE RIVERA: What exactly does it say?
4 Does it say New York statutory law; New York
5 substantive law not including conflicts law? What
6 exactly does it say?

7 MR. WILKINS: It says - - - simply says the
8 provisions are to be governed by the laws of the
9 State of New York.

10 JUDGE RIVERA: Um-hum.

11 MR. WILKINS: It does - - - there is no
12 explicit require - - -

13 JUDGE ABDUS-SALAAM: So why wouldn't that
14 include, counsel, the EPTL or any other substantive
15 law of New York?

16 MR. WILKINS: I think that the parties,
17 when they put - - - entered into this contract, had
18 the con - - - contractual law in mind. I don't think
19 they - - -

20 JUDGE ABDUS-SALAAM: Who are the parties
21 that - - - that you're talking about?

22 MR. WILKINS: Yes - - -

23 JUDGE ABDUS-SALAAM: The parties to these
24 plans would be Mr. Flesher - - -

25 MR. WILKINS: The plan administrator, and

1 the decedent.

2 JUDGE ABDUS-SALAAM: And the - - - and the
3 decedent. So - - -

4 MR. WILKINS: That is correct, Your Honor.

5 CHIEF JUDGE LIPPMAN: But it can't preclude
6 the statutory prescription, can it?

7 MR. WILKINS: I think you have to - - -

8 CHIEF JUDGE LIPPMAN: That's what I'm
9 saying. There's - - - does - - - does IRB or
10 anywhere it says that - - - that it precludes a
11 statutory prescription that - - - that that's what
12 you do?

13 MR. WILKINS: I'm not sure that it says it
14 precludes it. Our position is there is no reason to
15 extend this to that particular provision. That the
16 law does not require that, if you're simply looking
17 at this on the basis of a contract analysis. You
18 look - - -

19 JUDGE RIVERA: Yeah, but the contract
20 analysis is - - - what - - - what does - - - what's
21 the plain language of the contract; what's the intent
22 of the parties reflected in that plain language? And
23 if that is, as you agree, that the laws of the State
24 of New York govern this contract, and there's a law
25 of the State of New York that's called the EPTL,

1 Estate Powers of Trust estate laws, that's the law
2 that you turn to. And if that law happens to say,
3 for personal property - - - that's the second issue,
4 we'll get to that later - - - we look outside of New
5 York, you've - - - you've made the choice - - - the
6 parties to that contract made the choice that they
7 were adopting the way New York handles this kind of
8 distribution.

9 MR. WILKINS: Yes, pursuant to contract
10 law, I would argue, Your Honor. And again, because
11 that particular provision deals with wills and
12 probate - - - testamentary dispositions, that that is
13 not the relevant law to be looked at in - - -

14 CHIEF JUDGE LIPPMAN: What's the relevant
15 law to look at?

16 MR. WILKINS: The contract law. The
17 contract law, which says that the parties, having
18 chosen a choice of law provision, stating that New
19 York laws should govern, that is what you look - - -

20 JUDGE ABDUS-SALAAM: But what New York law
21 would govern if you don't look to the specific
22 provisions of New York law, which include the Estates
23 Powers and Trusts Law?

24 JUDGE FAHEY: I guess that what we - - -
25 what we're saying is - - - is - - - to take it a step

1 further is, why would this statute be different than
2 any other statute that we would consider part of the
3 governing law of the State?

4 MR. WILKINS: Well, for example, we have
5 the revocation statute, EPTL 5-1.4, which would
6 specifically apply to this particular dispute,
7 because it revokes any - - - any - - - any benefits
8 that have been awarded to a former spouse. And in
9 this particular instance, this is exactly what
10 happened.

11 But that law specifically addresses
12 contracts such as retirement plans and death benefit
13 plans to say - - -

14 JUDGE FAHEY: See, the way I - - - I
15 understood your argument is that IRB adopted the
16 Restatement's view of the choice of law provi - - -
17 provision. Right? I thought that was the point of
18 your argument; and that here, that the choice of law
19 provision, while it is statutory, it's simply an
20 extension - - - it's - - - it's - - - I think it goes
21 back to sixty - - - to sixties. And it's simply a
22 codification of the common law choice of law rules,
23 and therefore doesn't apply in this context. Because
24 otherwise the statutory law would apply as part of
25 our governing law. But here, it's just a com - - -

1 it's just an expression of the common law principle.
2 And pursuant to the Restatement and analysis in IRB,
3 I thought that was your argument.

4 MR. WILKINS: That - - - that IRB would not
5 apply?

6 JUDGE FAHEY: No, that IRB does apply.

7 MR. WILKINS: That it does apply?

8 JUDGE FAHEY: Yes.

9 MR. WILKINS: Yes. I think you have to
10 extend the rationale to say that it does apply.

11 JUDGE FAHEY: Um-hum.

12 MR. WILKINS: My concern - - -

13 JUDGE FAHEY: But you recognize it's an
14 extension beyond where it is right - - - we are right
15 now?

16 MR. WILKINS: Yes, it would - - - it would
17 be an extension.

18 JUDGE FAHEY: What about the will that - -
19 - I - - - there was - - - I sup - - - I thought there
20 wasn't will in Colorado. And now I understand in the
21 latest submission, there is a will in Colorado?

22 MR. WILKINS: Yes, and - - - in all the
23 proceedings below, it was - - - the assumption was
24 that there was no will.

25 JUDGE FAHEY: Um-hum.

1 MR. WILKINS: And apparently, now, there -
2 - - there is a will that had been acknowledged, at
3 least, by the Colorado court. Our position would be
4 that the will - - - the fact that there is a will, we
5 would agree with the respondents, that that does not
6 change how the an - - - how the second question
7 should be answered.

8 JUDGE FAHEY: I see.

9 MR. WILKINS: Yes.

10 JUDGE FAHEY: Thank you.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 You'll have your rebuttal. Let's hear from your
13 adversary.

14 MR. WILKINS: All right. Thank you very
15 much.

16 CHIEF JUDGE LIPPMAN: Thanks, counsel.

17 MR. ROSNER: Brian Rosner, Carlton Fields
18 Jordan Burt, counsel for the respondents. May it
19 please the court.

20 CHIEF JUDGE LIPPMAN: Well, tell - - - tell
21 us about IRB. What does that mean in - - - in
22 application to this situation?

23 MR. ROSNER: I believe that IRB answers the
24 Second Circuit's first question in the affirmative.
25 What this statute is, 3-5.1, it's a choice of law

1 directive - - - a choice of law directive, pursuant
2 to Restatement on conflicts of law Second, and this
3 court's prior decisions, is part of local law, which
4 is what is adopted when one adopts a New York State
5 governing law principle.

6 That is separate from the common law choice
7 of conflicts of law concept which - - -

8 JUDGE STEIN: Are you - - - are you aware
9 of any other statutory provisions, statutory conflict
10 of law provisions, such as EPTL 3-5.1?

11 MR. ROSNER: I'm happy you raised that. We
12 - - -

13 JUDGE STEIN: Yeah, that would be - - -

14 MR. ROSNER: - - - we did not cite them in
15 the brief, but the fact is that the New York State
16 statutes are filled with such choice of law
17 directives. The ones which, to me as a business
18 attorney, most frequently come to mind: Uniform
19 Commercial Code, Article 4A, the section on wire
20 transfers. It designates the various jurisdictions
21 whose law applies at various stages of the wire
22 transfer process, which as we all know from
23 experience, involves jurisdictions outside of New
24 York State.

25 Similarly, the statute in the UCC on the

1 issuance of securities, the law which determines the
2 validity of the security, how it is registered, the
3 obligations of the issuer, there's a choice of law
4 directive which refers to the location of the issuer.

5 And the - - -

6 JUDGE PIGOTT: The parties - - -

7 JUDGE RIVERA: Your position is, if - - -
8 if the parties agree to the application of - - - of
9 law - - - through the statutes as law, then the
10 statute is what governs, regardless of whether or not
11 it has a conflict of choice provision. That still
12 survives IRB?

13 MR. ROSNER: Yes. When the parties agree -
14 - -

15 JUDGE RIVERA: Because it's the choice of
16 that statute?

17 MR. ROSNER: When New York law governs.

18 JUDGE RIVERA: Um-hum.

19 MR. ROSNER: - - - New York governing law
20 means - - -

21 CHIEF JUDGE LIPPMAN: You go to the
22 statute, and then you go to whatever law - - -

23 MR. ROSNER: - - - law - - -

24 JUDGE RIVERA: Apply whatever the statute
25 says. Does the Restatement define local law to

1 include statutes?

2 MR. ROSNER: Oh, absolutely. Yes. And - -
3 - and I believe this was all discussed by the court
4 in the - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MR. ROSNER: - - - IRB cases.

7 CHIEF JUDGE LIPPMAN: Yes, it was.

8 MR. ROSNER: I mean, local law includes
9 everything - - -

10 JUDGE RIVERA: Everything.

11 MR. ROSNER: - - - other than those common
12 law conflicts of law principles which, frankly, this
13 court created in the 1950s and 1960s - - -

14 JUDGE RIVERA: Um-hum.

15 MR. ROSNER: - - - and was later
16 incorporated into the Restatement and adopted by
17 multiple - - -

18 JUDGE PIGOTT: Doesn't - - - doesn't life
19 insurance and death benefits pass outside the estate?

20 MR. ROSNER: If in fact, it is determined
21 that there are proper beneficiary designations, they
22 pass outside of the estate administration - - -

23 JUDGE PIGOTT: Yeah. In - - - in fact, you
24 don't include it when you - - - when you file, you
25 know, a - - - with surrogates, you don't include life

1 insurance in - - - in the amount of the estate?

2 MR. ROSNER: No. No, you do not. I mean -

3 - -

4 JUDGE PIGOTT: So it's a contract, as
5 counsel here is saying, Ministers doesn't care
6 whether these people were married, divorced, or
7 fighting. The fact of the matter is that they have a
8 contract and they said we're willing to pay it and
9 let the courts figure it out. But they're talking -
10 - - they're talking contract. They're not talking
11 anything having to do with divorce or EPTL or
12 anything else, because it's not part of the estate,
13 right?

14 MR. ROSNER: Well, there's - - - there's
15 one concept I want to follow - - - they're - - -
16 they're talking contract, but of course, contract
17 means you first look at the contract to look to
18 terms. But often the terms don't completely define
19 what - - -

20 JUDGE PIGOTT: No, but it's contract - - -
21 my - - - my point is this. I mean, they - - - they
22 now want to argue, well, you know, he's in Colorado
23 and we were divorced and all. Ministers is saying,
24 look, what - - - we've got the money. We're paying
25 it under the terms of the contract. And under the

1 terms of the contract, New York law applies. End of
2 story. And - - - and it never gets to the estate,
3 because it's not part of the estate corpus.

4 MR. ROSNER: Okay, well, no - - -

5 JUDGE PIGOTT: Right?

6 MR. ROSNER: - - - the - - - the first
7 issue was whether, in fact, they are proper
8 beneficiary forms, which should pass by probate. So
9 first there's a court proceeding which, you know, if
10 this was occurring in New York State, it could be in
11 Surrogates Court, to determine whether, in fact,
12 these are - - - whether, in fact, the beneficiary
13 forms were proper, pursuant to the contract; whether
14 they'd been voided by some law, such as a revocation
15 statute; whether, in fact, they do become part of the
16 estate through the intestacy process or if there's a
17 conflict between the beneficiary forms and a will
18 which - - -

19 JUDGE PIGOTT: No, they don't become part
20 of the estate under intestacy either.

21 MR. ROSNER: Excuse me?

22 JUDGE PIGOTT: They don't - - - they don't
23 become part of the estate under intestacy either.

24 MR. ROSNER: Oh, I'm sorry. If - - - if -
25 - - but if there's a competing will.

1 JUDGE PIGOTT: It still doesn't.

2 MR. ROSNER: No it - - - excuse me. If - -
3 - if the life ins - - - if the beneficiary
4 designations are defeated and the contract does not
5 provide a provision as to where the property goes in
6 the absence of any beneficiary, then they do become
7 part of the estate through - - -

8 JUDGE PIGOTT: Well, to the extent that it
9 may escheat the state or something, sure. But my
10 point - - - my only point is that as Ministers points
11 out, this is a contract. End of story. New York law
12 applies to - - - and contract law applies to this
13 case.

14 The fact that you may be fighting over
15 something in - - - in a matrimony or something else,
16 figure it out. But it's not part of the estate.

17 MR. ROSNER: But it - - - the analysis
18 doesn't end with the statement that contract law
19 applies, because legislatures can intervene as the
20 various legislatures of the states have done in this
21 situation, by enacting revocation statutes which void
22 beneficiary designations and require a different
23 disposition of assets.

24 JUDGE PIGOTT: But it's still a contract
25 issue. It's not an estate issue.

1 MR. ROSNER: It - - - no. It ceases to be
2 a contract issue if the beneficiary forms are
3 revoked. And then one must look to see what law
4 applies to determine what happens to the proceeds.
5 It may be contract, if in fact, the contract applies
6 to the situation. But if the contract does not apply
7 to the situation, then assets would pass by
8 intestacy.

9 JUDGE ABDUS-SALAAM: Before - - - before we
10 get too deeply into the first question, could you
11 address the second question. Your adversary didn't
12 exactly address the second question either. But
13 what's your position on whether this is property - -
14 -

15 MR. ROSNER: In general, the Estates Power
16 and Trust Statute in whole is a very broad statute
17 which deals with what happens to property of a person
18 after the person dies, that deals with - - - there's
19 sections which deal with testamentary dispositions,
20 sections which deal with intestacy, sections which
21 deal with the testamentary substitutes, such as those
22 of - - - of the types of assets which pass by
23 contract by beneficiary designation. It's one big
24 statute with the sections relating to each other.

25 Just as there's one revocation statute

1 which deals with everything. If - - - if there is a
2 beneficiary designation in a will or in an insurance
3 policy or in a retirement plan, in a trust, it is all
4 - - - it is all controlled by the one revocation
5 statute of the Estates Power and Trust Act (sic).

6 Similarly, we have a choice of law
7 directive regarding whose law applies to the kinds of
8 property that exist. There's two kinds of property:
9 real property and personal property. And there's two
10 ways of passing property. You can pass it by a will
11 and you can pass it not by a will. And not by a will
12 includes no will - - - intestacy - - - or includes
13 one of the testamentary substitutes, such as the
14 insurance and retirement plan beneficiary
15 designations.

16 So 3-5.1 is the overarching statute which
17 covers the entire issue of what happens when you have
18 personal property which is being transferred after a
19 decedent dies.

20 Again, there - - -

21 JUDGE RIVERA: So what about EPTL 13-3.2
22 that refers to a person entitled to receive
23 retirement and death benefits, and goes on to say
24 that the rights of such person shall not be impaired
25 or defeated by any statute or rule of law governing

1 the transfer of property by will, gift, or intestacy?
2 Does that sound applicable or - - -

3 MR. ROSNER: That was a statute which was
4 enacted prior to the present EPTL, and it was dealing
5 with the very, very specific problem when you look at
6 the case law and the legislative history at the time.

7 What courts were doing is that they weren't
8 recognizing the legitimacy of the testamentary
9 substitutes that were transferring assets. And there
10 were - - - what they were saying in case - - - cases
11 of Totten trusts and insurance policies and
12 retirement plans, is that unless you fill out the
13 beneficiary form, not pursuant to the terms of the
14 contract which governs that particular asset, but
15 unless you fill it out so that it complies exactly
16 with how one executes and forms a will, we're going
17 to void it.

18 And indeed, I think, there was a series of
19 cases which resulted in beneficiary designations
20 being voided, even though they complied completely
21 with the contract, but being voided on the grounds
22 that they didn't comply with the way that one would
23 execute and fill a will.

24 So this statute and that language was
25 enacted for that specific purpose to deal with that

1 problem.

2 JUDGE RIVERA: So it's superseded by the
3 other provisions. Is that what you're saying? With
4 respect to - - - to this case and the facts in the
5 case?

6 MR. ROSNER: Yes - - - yes.

7 JUDGE RIVERA: The other provisions are the
8 ones that apply?

9 MR. ROSNER: Yes.

10 CHIEF JUDGE LIPPMAN: Okay. Counsel, any -
11 - - anything else?

12 JUDGE PIGOTT: You're saying 13 - - - 13-
13 3.2 doesn't apply anymore?

14 MR. ROSNER: No, it certainly does apply.
15 I - - - I mean, it - - - it - - - the purpose of that
16 is to - - - it states how a beneficiary designation
17 must be completed so as to comply with the Estates
18 Power and Trust Law. And it states very specifically
19 that the way it is to be completed is not the way
20 that you attest to a will.

21 I mean, previously, what the courts were
22 doing is that they were voiding the designations
23 because they didn't comport with how you - - - you
24 prepared a will. And indeed what the current case
25 law is, which applies that, in that they uphold the

1 section that - - - I believe that the beneficiary
2 designation must be signed and it must be in writing.
3 And - - - and indeed, if there's a beneficiary
4 designation which is not signed, it will be invalid
5 under the - - - it will be voided under that section,
6 and the property would have to be distributed
7 elsewhere.

8 So - - - so certainly, that section is very
9 much alive. And also there's portions of that
10 section where it - - - one of the things it wanted to
11 distinguish is that the - - - the - - - the
12 alienation provisions are different regarding
13 nontestamentary transfers and - - -

14 JUDGE RIVERA: We have - - - we have proper
15 - - -

16 MR. ROSNER: - - - other transfers.

17 JUDGE RIVERA: - - - designation here.
18 You're not - - - you're not disputing the designation
19 that they filed out the forms properly, correct?

20 MR. ROSNER: Well, as a matter of fact, we
21 are. But that's not one of the issues that we - - -
22 we proceeded on - - - on summary judgment.

23 JUDGE RIVERA: So - - -

24 MR. ROSNER: Actually one of our arguments
25 which we have had to go back to trial on - - -

1 JUDGE RIVERA: Well, with respect to what
2 we have to decide - - -

3 MR. ROSNER: In respect to what - - -

4 JUDGE RIVERA: - - - on these certified
5 questions.

6 MR. ROSNER: - - - we - - - yes. That is -
7 - - we are not challenging the form in which the
8 beneficiary - - -

9 JUDGE RIVERA: So then is that why - - -

10 MR. ROSNER: - - - designation - - -

11 JUDGE RIVERA: - - - saying 13-3.2(a)
12 doesn't apply?

13 MR. ROSNER: No, the - - - it doesn't apply
14 to the extent that it means that 3- - - - 3-5.1 is
15 not applicable to the situation.

16 JUDGE RIVERA: That it doesn't supersede
17 3-5.1, is that what you mean?

18 MR. ROSNER: No, it actually pre - - - it -
19 - - it existed prior to 3-5.1. And 3-5.1 is the more
20 overarching statute which refers to all distributions
21 of property. Again section - - - the Section 13 was
22 designed for the specific purpose of preventing
23 beneficiary designations being voided because they
24 weren't filled out in the form in which a will was
25 formed (sic) out.

1 JUDGE PIGOTT: Doesn't your - - - doesn't
2 your interpretation lead to a situation where you can
3 - - - you know, depending on what state you're in,
4 the contract gets construed differently? Like
5 because he's in Colorado it's different than, let's
6 assume, he - - - you know, he was in the state of New
7 York or something like that? I mean, you - - - it
8 ends up that the contract party, you know, or the - -
9 - in this case, Ministers, is subject to this choose
10 your own adventure type thing where wherever he ends
11 up is going to - - - going to impair the contract in
12 one fashion or another.

13 MR. ROSNER: No, the - - - 3-5.1, which - -
14 - which is the rule that you look to the decedent's
15 domicile regarding issues of personal property, I
16 mean, that - - - that's the - - - although it's a
17 statute now, that was actually part of the common law
18 of England when this country was - - -

19 JUDGE PIGOTT: Well, I know. But my - - -
20 no, my point is this - - -

21 MR. ROSNER: - - - was originally - - -

22 JUDGE PIGOTT: - - - that - - - that it's
23 real property in one state and - - - and personal
24 property in another. And all Minister's trying to do
25 is do what it says it's going to do under the

1 contract. And - - - and if it's in Colorado it's one
2 thing; it's in Florida, another. And that's not the
3 intent of the parties.

4 MR. ROSNER: It - - -

5 JUDGE PIGOTT: That's why New York law
6 would apply and the EPTL shouldn't.

7 MR. ROSNER: The - - - the differences
8 aren't between real property and personal property.

9 JUDGE PIGOTT: Yeah - - -

10 MR. ROSNER: I think everybody - - - I
11 don't think anyone is saying that this is - - - that
12 insurance proceeds are not personal property. The -
13 - -

14 JUDGE PIGOTT: Well, the big deal is that
15 it's in Colorado, right?

16 JUDGE STEIN: In other words, why would
17 they - - - why would they pick New York law, if they
18 were going to have to then go to all these other
19 states to figure out who was going to get the
20 benefits?

21 MR. ROSNER: Well, of course when - - -

22 JUDGE STEIN: Isn't - - - isn't that the
23 purpose of the - - - I think that's what Judge Pigott
24 is asking. Isn't that the purpose of the choice of
25 law provision in the contract, which is that all we

1 have to do is look under New York law to - - - you
2 know, to what happens here? We don't have to go
3 looking to various other states, because this is all
4 happening - - -

5 MR. ROSNER: Sure, I understand. When you
6 pick New York law, you are including in your pick
7 choice of law directives which is not just this
8 statute, but all those other statutes which I
9 mentioned in - - -

10 JUDGE STEIN: Well, that's the question - -
11 -

12 MR. ROSNER: - - - the UCC and everywhere
13 else. I mean - - -

14 JUDGE STEIN: - - - that's the question.
15 But aren't we looking to the intent of this contract?

16 MR. ROSNER: The intent was to pick New
17 York law as governing law.

18 JUDGE PIGOTT: My point is that the
19 contracting parties are not these two. The
20 contracting parties is Ministers and - - - and the
21 beneficiary. They picked New York law.

22 MR. ROSNER: No, the contracting party was
23 the Ministers and the decedent - - -

24 JUDGE PIGOTT: Right, right.

25 MR. ROSNER: - - - who - - - who decided to

1 move to Colorado, where - - -

2 JUDGE PIGOTT: Right, but they said New
3 York law. New York law. I don't care where I am,
4 New York law. And now we're trying to say, well,
5 wait a minute. By saying New York law, you're really
6 saying we have a statute that says if you had moved
7 to Florida, it's Florida law; if you'd moved to
8 Oregon, it's Oregon law; if you'd moved to Canada,
9 it's Canadian law. And that's not true. They said
10 we want New York law no matter what. I think that's
11 what they're arguing.

12 MR. ROSNER: Okay, but you see - - -

13 JUDGE PIGOTT: It's a contract and that's
14 how you decide it.

15 MR. ROSNER: - - - if - - - if you pick New
16 York law, you would have that statute which says that
17 if you are domiciled when you die elsewhere, that law
18 applies. But that's the law which pretty much
19 everyone in the United States has. I mean, EPTL - -
20 -

21 JUDGE PIGOTT: No, see - - -

22 MR. ROSNER: - - - 3-5.1 - - -

23 JUDGE PIGOTT: - - - I'm saying EPTL
24 doesn't apply.

25 MR. ROSNER: Excuse me.

1 JUDGE PIGOTT: I'm - - - I'm arguing, as I
2 think they are, EPTL doesn't apply. This is a
3 contract between an insurance company and a
4 beneficiary. He's going to die. That's the only way
5 he's going to get his money. So - - - other than - -
6 - I know there's the other part. But so - - - and
7 he's saying when I die, New York law applies. And -
8 - - and now we want to say, well, New York law
9 applies, and that means the law of any state applies,
10 because the EPTL has these provisions. And - - - and
11 Ministers is saying, no. That - - - we - - - we - -
12 - this is a contract. And this is - - - we want New
13 York law to apply - - - New York contract law to
14 apply to a contract.

15 JUDGE FAHEY: Otherwise the contract would
16 be meaningless.

17 JUDGE RIVERA: What's the underlying
18 contract law that would apply if we interpret it that
19 way?

20 MR. ROSNER: The underlying contract law
21 which applies is the law of New York State.

22 CHIEF JUDGE LIPPMAN: You're saying the law
23 of New York State includes these conflicts
24 provisions.

25 MR. ROSNER: The law of New York State

1 includes these choice - - -

2 CHIEF JUDGE LIPPMAN: Choice of law, yeah.

3 MR. ROSNER: - - - choice of law
4 directives. It unqualifiedly includes these choice
5 of law directives. And when people choose New York
6 law - - -

7 CHIEF JUDGE LIPPMAN: So - - -

8 MR. ROSNER: - - - as a governing law - - -

9 CHIEF JUDGE LIPPMAN: - - - so unless
10 you're saying - - - unless in some way you're saying
11 local law, period, the law of New York includes - - -
12 includes - - -

13 MR. ROSNER: What the gov - - - what the
14 parties can say - - -

15 CHIEF JUDGE LIPPMAN: - - - this
16 prescription, yeah.

17 MR. ROSNER: - - - if they wish to avoid -
18 - -

19 CHIEF JUDGE LIPPMAN: Yes, that was my
20 question.

21 MR. ROSNER: - - - the choice of law
22 directives - - -

23 CHIEF JUDGE LIPPMAN: Yes.

24 MR. ROSNER: - - - if they wish to avoid it
25 in the Estates Power and Trust Act (sic), in the

1 Uniform Commercial Code, in the family law, in ten
2 different other statutes which have choice of law
3 directives - - -

4 CHIEF JUDGE LIPPMAN: Yes, go ahead.

5 MR. ROSNER: - - - contracting parties are
6 free to say we choose New York law as governing law,
7 however, we do not wish Section 3-5.1 Estates Power -
8 - -

9 JUDGE PIGOTT: When is - - -

10 MR. ROSNER: - - - and Trust Law - - -

11 JUDGE PIGOTT: - - - when has that ever
12 been found in a contract?

13 MR. ROSNER: Excuse me?

14 JUDGE PIGOTT: When has that ever been
15 found in a contract? See you just - - - you just
16 listed six - - - I don't know how many there are - -
17 -

18 MR. ROSNER: There's more, yeah.

19 JUDGE PIGOTT: Hmm?

20 MR. ROSNER: Yes.

21 JUDGE PIGOTT: And you don't do that. You
22 say it's bound by New York contract law - - -
23 contract law. It's a contract. We want New York
24 contract law to apply. And you don't think about,
25 you know, gee, what happens in the Family Court Act

1 or what happens you know, in the - - - in the UCC or
2 what happens anywhere. You say we want contract law
3 to apply. And then all of a sudden, somebody's
4 saying, well, wait a minute, New York law has got all
5 these other things, you didn't say that you didn't
6 want the EPTL to apply. And they're saying well - -
7 - I mean, this is the - - - this is the argument,
8 that we didn't. We said contract law applies.

9 MR. ROSNER: That's the argument. And the
10 problem with the argument is twofold. It's that the
11 governing law which was chosen was New York law, it
12 wasn't New York contract law, it wasn't New York
13 trust law, this or that - - -

14 JUDGE PIGOTT: Well, of course it was.
15 It's a contract. I mean, you don't say, you know,
16 I'm signing a life insurance policy and - - - and the
17 Motor Vehicle and Traffic Law doesn't - - - you know,
18 doesn't apply.

19 MR. ROSNER: Well, you - - - Your Honor, no
20 one can honestly state - - - no insurance company can
21 honestly state that they're surprised by Section
22 3-5.1, because that common - - -

23 CHIEF JUDGE LIPPMAN: Is it particularly
24 relevant in this kind of situation, when you're
25 dealing with a policy about what happens when you

1 die? You follow what I'm saying? In - - - it's - -
2 - if you're saying New York law and it has to do with
3 this kind of policy, isn't it obvious that you're
4 dealing with a situation when the guy passes and you
5 collect, what's going to happen?

6 MR. ROSNER: Yes. So that would certain -
7 - -

8 CHIEF JUDGE LIPPMAN: You know what I mean?
9 That's how my mind is - - - you see the two poles of
10 this.

11 MR. ROSNER: Yes. And I - - -

12 CHIEF JUDGE LIPPMAN: The one is contract
13 law is contract law is contract law. In this
14 particular context, New York law, when you're talking
15 about a policy where someone's got to die to collect,
16 it would seem to be an obvious connection to the
17 EPTL. That's your argument, right?

18 MR. ROSNER: Yes. And - - - and also, just
19 to add to it, no one should be surprised that there's
20 a choice of law directive which says that you look to
21 the law of the decedent's domicile regarding personal
22 property. That's our law.

23 To my knowledge, that's everybody's law.
24 What the strange law would be if a state did not have
25 this principle that you look to the law of the

1 decedent's domicile - - -

2 CHIEF JUDGE LIPPMAN: So it's the same all
3 over, whatever law you're choosing?

4 MR. ROSNER: Yes, so indeed, the weird
5 thing would be if someone did not expect this law.
6 The weird thing would be if a state enacted a statute
7 - - -

8 JUDGE PIGOTT: No, I would think, if you
9 signed a contract saying if I die my car goes to my
10 son, and then you die in Colorado, and they say well,
11 under Colorado law, you can't give your car to your
12 son. You say, well, wait a minute, I die - - - you
13 know, I made this contract in New York, and I wanted
14 my kid to get the car. They say, sorry, you died in
15 Colorado, and since you're going to apply New York
16 law and the EPTL says it's the - - - the law of - - -
17 of where you died, you can't give your car to your
18 kid.

19 I mean, it - - - it - - - the point is that
20 when you make a contract, it's within the
21 contemplation of the parties, and they wanted
22 contract law of New York, it seems to me.

23 JUDGE FAHEY: One of the things that favors
24 your argument is the out-of-state courts that have
25 considered the issue generally seem to require that

1 the states' local or substantive law requires
2 application of that state's statutes. So this is a
3 statute, so it should be applied.

4 MR. ROSNER: Yes.

5 JUDGE FAHEY: That seems - - - that
6 argument - - -

7 MR. ROSNER: This is the choice of law
8 directive which is a statute.

9 JUDGE FAHEY: Working against that is the
10 statute, of course, is just what you say. It's a
11 codification of a common law principle. And the
12 Restatement and IRB Brasil seems to say that those
13 principles don't apply in this context. So it's a -
14 - - it's a close call, it's a close call.

15 MR. ROSNER: Yeah, I think IRB Brasil is
16 very clear. And again, I would - - - I believe this
17 court has said so. And I would refer to the eminent,
18 late Professor Siegel, who is - - - who explained, I
19 thought, IRB Brasil, in a brilliant note.

20 There - - - there's local law which is
21 everything except those common law conflicts of law
22 principles. And then there's law which is everything
23 including.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. ROSNER: And what we are talking about

1 is a statutory choice of law directive, not a common
2 law conflict of law - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 JUDGE FAHEY: The problem is - - - just as
5 a final note. Siegel says, Choosing New York Law - -
6 - it's the title of or the article - - - but not its
7 Choice of Law Rules.

8 MR. ROSNER: But then he explains it. It's
9 the choice of - - - it's the common law principles,
10 not the choice of law directives. I - - - I tell - -
11 - Your Honors, it's - - - there's a first point,
12 there's a second point. It would be awful if you
13 enacted an opinion saying that choice of law
14 directives were not included when you chose New York
15 law as governing law, because all those choice of law
16 directives under UCC, under securities, under the
17 wire tran - - - that's exactly what people want.

18 And to think that all of a sudden there
19 would be a gap in the - - - you know - - -

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 We're going to - - - we're going to look at it. We
22 understand your argument, and now let's hear rebuttal
23 from your adversary.

24 MR. ROSNER: Thank you so much, Your
25 Honors.

1 CHIEF JUDGE LIPPMAN: Somehow I think he
2 has a different view.

3 MR. WILKINS: Thank you, Your Honor.

4 CHIEF JUDGE LIPPMAN: Counsel. So what do
5 you make of all of this - - - the extended discussion
6 with your adversary?

7 MR. WILKINS: Well, I would like to
8 address, if I may, first, the issue of personal
9 property.

10 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

11 MR. WILKINS: And I want to say that - - -

12 CHIEF JUDGE LIPPMAN: Yes.

13 MR. WILKINS: - - - the plan benefits are
14 death benefits that come into effect at the time of
15 the decedent's death. Therefore, it is our position
16 that they could not possibly be personal property - -
17 -

18 CHIEF JUDGE LIPPMAN: The definition of
19 personal property is pretty broad, though, and
20 inclusive, isn't it?

21 MR. WILKINS: It is. But I think that it's
22 not personal property belonging to the decedent.
23 Once the decedent has become deceased, then the
24 benefits are to go to whoever he has designated.

25 JUDGE RIVERA: But you're saying it doesn't

1 go into the estate? It's not part of the estate?

2 MR. WILKINS: At - - - yes, I am saying
3 that it is not part of the estate, because it is a
4 nonprobate asset.

5 JUDGE RIVERA: You're - - - you're saying
6 this is the equivalent of someone giving a - - - a
7 pre-death gift that - - - that is not part of the
8 estate, because they've relinquished their rights to
9 it? I mean, the - - - the decedent has rights to it,
10 specifically for their own use until they pass,
11 obviously - - -

12 MR. WILKINS: Up until the time of - - -

13 JUDGE RIVERA: - - - in that way.

14 MR. WILKINS: - - - time of death, yes.
15 And then upon the death, those benefits are - - -
16 have now been designated and awarded to someone else.
17 It would not pass into the estate.

18 But for the revocation statute, these
19 benefits would pass outside of the probate
20 proceeding, and they would never been attached. The
21 estate could claim no interest whatsoever to them.
22 The retirement plan benefits and the death plan
23 benefits, as such.

24 CHIEF JUDGE LIPPMAN: Not everything goes
25 into the estate?

1 MR. WILKINS: Not everything goes into the
2 estate.

3 JUDGE PIGOTT: Right, you're saying life -
4 - - life insurance, if there's a life insurance even
5 to the - - - let's say, to the spouse, and - - - and
6 if the spouse is a - - - is the recipient under the -
7 - - under a will, let's say, he or she gets what's
8 under the will. But that's not the - - - part of the
9 esta - - - the life insurance is not part of the
10 estate. You don't pay tax on it, you don't do any -
11 - - anything with it. It's a contract and - - -

12 MR. WILKINS: That is correct.

13 JUDGE PIGOTT: - - - it's over here.

14 MR. WILKINS: It - - - if it were - - - if
15 the proceeds were designated to the spouse, the
16 insurer would simply pay it directly to the spouse,
17 but not to any estate - - -

18 CHIEF JUDGE LIPPMAN: Regardless of - - -

19 JUDGE PIGOTT: Out of the estate, right?

20 MR. WILKINS: Regardless.

21 CHIEF JUDGE LIPPMAN: Regardless of
22 anything else or any - - -

23 MR. WILKINS: Regardless of anything else.

24 CHIEF JUDGE LIPPMAN: - - - provisions of
25 what happens when you - - - you die and who's

1 disqualified or not disqualified. It's nothing to do
2 with it?

3 MR. WILKINS: That would be - - - I don't
4 think there would be anything else that would require
5 that those policies come into the estate. If there's
6 a designated beneficiary, be it spouse - - -

7 CHIEF JUDGE LIPPMAN: Even though under New
8 York law, that beneficiary couldn't or shouldn't be
9 able to collect?

10 MR. WILKINS: I'm sorry, you were speaking
11 with respect to the former spouse?

12 JUDGE STEIN: Yes.

13 CHIEF JUDGE LIPPMAN: Yes.

14 MR. WILKINS: Yes. With the former spouse.
15 I - - - I think the rev - - - the revocation statute
16 would then hold, and that asset - - -

17 CHIEF JUDGE LIPPMAN: The revocation that -
18 - - so would - - - it would apply to the former
19 spouse?

20 MR. WILKINS: It would apply to the former
21 spouse. That is correct.

22 CHIEF JUDGE LIPPMAN: And - - - and then
23 once you get to that point, how do you not follow it
24 through and then say, under the place where he died,
25 you know, it - - - it can't go to the father or the

1 relative?

2 MR. WILKINS: I think the problem we have
3 here is that the revocation statute specifically
4 identifies those particular items. It identifies not
5 only the nonprobate assets; it will identify probate
6 assets as well.

7 So because that statute says specifically,
8 this specific plan, the benefit thereto can no longer
9 be awarded to the former spouse - - -

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. WILKINS: - - - it takes effect. And
12 it - - - I think it becomes very difficult to
13 overcome that statute to say that you should - - -

14 JUDGE RIVERA: But if it - - - if it's not
15 part of the decedent's rights of ownership, how can
16 that statute possibly apply?

17 MR. WILKINS: I - - - I just - - - I think
18 on its face, it would be very difficult for the
19 insurer to say that oh, we're simply going to ignore
20 this statute and pay it to the former spouse.

21 I think at that point, you look to the
22 contingent beneficiary.

23 CHIEF JUDGE LIPPMAN: Yeah, but it applies
24 - you're sort of splitting the baby here, in terms of
25 the direct beneficiary and the contingent

1 beneficiary. The statute applies as to one, and what
2 happens - - -

3 MR. WILKINS: Yes.

4 CHIEF JUDGE LIPPMAN: - - - as to the
5 other?

6 MR. WILKINS: The contingent beneficiary
7 will still be the proper - - -

8 CHIEF JUDGE LIPPMAN: That's all that's
9 left?

10 MR. WILKINS: That's all that's left. And
11 that would be the proper beneficiary.

12 CHIEF JUDGE LIPPMAN: Okay. We're going to
13 take it under advisement.

14 MR. WILKINS: All right, thank you.

15 CHIEF JUDGE LIPPMAN: Thank you both.
16 Appreciate it.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The Ministers and Missionaries Benefit Board v. Snow, et al. v. The Estate of Clark Flesher, et al., No. 131 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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