IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
CLARK COUNTY, OHIO

Brenda MacEwan, et al. Plaintiff	:	CASE NO. 20110402
-vs-	:	JUDGE RICHARD P. CAREY
Larry A. Warner, Jr. et al. Defendants	:	**ENTRY**

This matter is born of Exceptions filed by the Plaintiffs to the Defendant/Executor's first and partial accounting. Specifically now before the Court is a Motion for Summary Judgment filed on behalf of the Plaintiffs and a Memorandum contra filed on behalf of the Defendant. Some history. Mary Jane Kimberlain died on June 21, 2011, leaving two heirs: Brenda MacEwan and John Vickers, Jr.---a niece and nephew respectively---who are the Plaintiffs herein. On October 21, 2002, the decedent executed her Last Will and Testament, now admitted to probate, which named the Plaintiffs as the co-beneficiaries of her residuary estate. The Plaintiffs were also two of three primary beneficiaries named on the decedent's New York Life Annuity Policy. On November 4th, 2002, the decedent amended this Annuity by adding as a fourth beneficiary Larry A. Warner, Jr., the Executor of her estate and the Defendant in this action. In her amendment, the decedent, describing the "relationship", typed the word "executor" to the right of Mr. Warner's name. The question at bar: does the Defendant take one-fourth of the proceeds from this policy in his individual capacity, or in a fiduciary capacity for the benefit of the estate.

Civ.R. 56(C) provides, in relevant part, the following:

***Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, a trial court may not grant a motion for summary judgment unless the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is mad. See, *e.g. Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E. 2d 1164, 1171.

In responding to a motion for summary judgment, the nonmoving party may not rest on "unsupported allegations in the pleadings." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47. Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact. Specifically, Civ.R. 56(E) provides:

****When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Consequently, once the moving party satisfies its Civ.R. 56 burden, the nonmoving party must demonstrate, by affidavit or by producing evidence of the type listed in Civ.R. 56(C), that a genuine issue of material fact remains for trial. A trial court may grant a properly supported motion for summary judgment if the nonmoving party does not respond by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 62 N.E.2d 264, 273; *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1031.

There are no relevant facts in dispute in this case. The parties have afforded this Court with the Annuity policy documents concerning the designation of beneficiaries. There is no evidence that the decedent ever expressed or otherwise explained her intentions concerning said policy. Accordingly, this matter presents a question of law as to a potential estate asset and, to that end, is appropriate for summary judgment herein.

Perhaps the consideration should begin with an examination of the decedent's communication to the life insurance company, in as much as the language therein, if clear and unambiguous, would resolve any issues concerning the intentions of the decedent and, potentially, dictate the outcome. In her November 4th letter, the decedent wrote:

> "I want to restate my primary beneficiaries…to the following:
> Equal shares to each:
>
> | Name | Relationship | Social Security# |
> |---|---|---|
> | Jo Ann Malatinsky | sister-in-law | xxxxx3907 |
> | Brenda MacEwain | niece | xxxxx6371 |
> | John T. Vickers | nephew | xxxxx7242 |
> | Larry A. Warner | executor | |
>
> "

The only thing clear about this communication is that it is unclear. The Plaintiff, contending that the decedent's intentions are "sacrosanct", would have this Court discern "the most plausible

explanation" as to why the decedent would describe Larry A. Warner as "executor"; which is, as promoted, that she was leaving Mr. Warner these proceeds in his fiduciary capacity as the future executor of her estate. The Defendant, on the other hand, is quick to point out that the "intent of the decedent is not the dispositive factor in resolving the apparent conflict in beneficiaries. Rather, the name, and not the status of the beneficiary controls in determining the proper recipient of the proceeds of the policy." Citing *Cannon v. Hamilton* (1963), 174 Ohio St. 268, 155.

Indeed, there seem to be two legal approaches employed in reviewing designation of beneficiary documents. The first, and that promoted by the Defendant, is that "words used to describe a beneficiary are 'descriptive only' and do not affect the beneficiary's rights under the life insurance policy." *Overhiser v. Overhiser*, 63 Ohio St.77, p. 82 (1900). (See also, *Congrove v. Ogan*, 2002-Ohio-1467). The second, as advanced by the Plaintiff, is that said "descriptive words" may have been *intended* to create a "legal status," which would then dictate the nature in which the proceeds were to be employed by the beneficiary. To this end, she directs the Court to *Colonial Life & Accident v. Leitch*, 2008-Ohio-6616, *Faircloth v. Northwestern Nat'l Life Ins. Co.*, 799 F. Supp. 815 (S.D. Ohio 1992), and *In re Estate of Cynthia M. Lemon*, 6th App. Dist. No. F-00-005 (Sept. 22, 2000).

The first approach is supported by cases which generally considered fact patterns wherein a beneficiary was named and then described as "wife". Predictably, at the point of death, the named beneficiary was no longer the spouse of the deceased. Those courts generally held that the plausible intention of the deceased, to-wit: to change the beneficiary, as the marriage had terminated, was irrelevant insofar as the "name" of the beneficiary had not changed on the policy. Thus, as those cases would hold, words of description carried no legal significance.

The second approach is supported by case law that encourages a court to discern the *intention* of the owner of the policy by way of the words of description, as well as extrinsic evidence. In *Colonial,*

id., the beneficiary was described as "wife"; in *Faircloth, id.*, the beneficiary was named as "Faircloth James H. Administrator"; and in *Lemon, id.*, the named beneficiary was described as "Pamela Meller Trustee of the Estate of Cynthia Lemon." In these cases, the court looked beyond merely the "name" of the beneficiary on the policy. They would hold that the name of the beneficiary was but one factor to be considered by the Court.

After due consideration, this Court concludes that neither approach satisfactorily suits the facts of the case at bar. This Court does concur that the "name" given as the beneficiary on the policy generally should control who receives the proceeds paid. This is true, however, so long as the words of description, to wit: "wife", "spouse", "good friend", are generic in nature. It is true precisely because those descriptions carry no independent legal significance. As such, a change in circumstance affecting the description, to wit: "former wife", "not a good friend", carries no independent legal weight.

There are, however, words of description which, in fact, do carry legal significance. When found in legal documents, and even in commercial paper, they give notice to all of the existence of a special circumstance of import. They announce a particular relationship, status, or arrangement. These words can be in the nature of office, agency, or trust; and are words such as "Treasurer," "Power of Attorney," "Trustee," "Guardian," "Executor." And when employed, such words dramatically alter matters. It is one thing, for instance, to receive a check signed by payor, "John Smith." It is altogether different to receive a check signed by "John Smith, Trustee." It legally informs of a fiduciary financial account.

In the case at bar, the decedent describes Larry A. Warner, Jr. as "executor." While apparently a good friend to the decedent, the decedent chose not to describe Mr. Warner as "friend." The Plaintiff asks the Court to weigh this factor; and also to consider that, unlike the other three beneficiaries listed on the policy, Mr. Warner's social security number is not included. I suppose the Court might also consider that the decedent executed the policy's amended beneficiary designation form virtually

simultaneously with her execution of her Last Will and Testament---wherein she left nothing to Mr. Warner. The Plaintiff contends that all of this would reveal the "intention" of the decedent that Mr. Warner take the proceeds in his fiduciary capacity, and thus for the benefit of the decedent's estate.

While the Court believes that this exercise, indeed, does support such a conclusion, this Court finds the employment of the word "executor" to be of sufficient legal import to render an examination of the decedent's *intent* irrelevant. Once the decedent chose the particular word, "executor," she *announced* a special legal relationship, status, and or arrangement. This is true even though Mr. Warner would not become the estate executor until Letters of Authority issued some time after death. Thus, the beneficiary becomes not merely "Larry H. Warner, Jr." a good friend who might help out with the decedent's final affairs; but rather "Larry H. Warner, Jr., Executor". Whether or not the decedent intended Mr. Warner to receive proceeds from the policy individually, he nevertheless must take them in the capacity of the executor of her estate.

As a result, the proceeds Mr. Warner received from the aforementioned Annuity policy must be included, as a matter of law, as an asset in the estate of Mary Jane Kimberlain. To that end, the Court grants Summary Judgment in favor of the Plaintiffs on the issue of the characterization of the proceeds.

IT IS SO ORDERED.

Insofar as this involves an estate accounting of assets, the Court finds this to be a final appealable Order.

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RICHARD P. CAREY, PROBATE JUDGE

cc: Maribeth Deavers, Esq.
Sherrille Akin, Esq.
David Layman, Esq.
John Butz, Esq.
Joseph Balmer III, Esq.