

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1031

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF MILDRED L. ZIMMERMAN,
DECEASED:**

RUTH M. ERICKSON,

APPELLANT,

V.

ALVIN ZIMMERMAN,

RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

VERGERONT, J. Ruth Erickson appeals an order declaring the Mildred Zimmerman Revocable Trust to be the proper beneficiary of a life insurance annuity policy. She contends that her deceased mother, Mildred

Zimmerman, did not change the beneficiary of the policy under the terms of the contract and therefore she, Erickson, should remain the sole beneficiary. We conclude that Zimmerman did complete an “act that unequivocally indicate[d] an intention to make the change” under § 632.48(1)(b), STATS., by creating a revocable living trust comprised of all her assets, including the annuity benefits. We therefore affirm.

BACKGROUND

In 1990, Mildred Zimmerman purchased an annuity policy from Life USA Insurance Company for a single premium of \$2,500. Erickson, the oldest of Zimmerman’s five children, sold her the policy and was named as the sole primary beneficiary. The annuity contract included the following instructions under the heading of “How to Change a Beneficiary”:

You may change the named Beneficiary by sending a satisfactory written notice to us. The change will not be effective until we record it at our Home Office.

Zimmerman never notified the insurance company of a change in beneficiary.

On November 7, 1991, Zimmerman created a revocable living trust, with herself as the trustee until her death or disability, at which time Erickson was to succeed her. The trust provided for an equal distribution of assets among Zimmerman’s children upon her death. With respect to the property transferred to the trust, the trust instrument states:

Grantor hereby gives, transfers, assigns, deeds, and delivers to Trustee the properly listed in Schedule A, annexed hereto and made a part hereof, to have and to hold the same in Trust to be administered and distributed as provided herein.

The attached Schedule A is one page and contains an underlined heading "Preliminary Inventory." There is a blank space beneath this heading, followed by:

ASSIGNMENT

I hereby assign and transfer all of the assets in the above account to Mildred L. Zimmerman as Trustee of the MILDRED L. ZIMMERMAN TRUST dated the 7 day of Nov., 1991.

This is followed by the signatures of two witnesses and Zimmerman. Under another heading, "RECEIPT," Zimmerman signs as trustee, acknowledging "[r]eceipt of the above items."

Attached to Schedule A is a preprinted inventory worksheet containing the name of Mildred L. Zimmerman and a date of October 19, 1991. Next to the preprinted items are several handwritten entries. On the line next to the Life Insurance (Death Benefit) is written \$3,500.

Also on November 7, 1991, Zimmerman executed a General Asset Assignment. The General Asset Assignment stated, in part:

The undersigned, as Grantor of MILDRED L. ZIMMERMAN TRUST, declares that all of the following assets and property, whether individually, particularly, or generally as hereafter described, whether presently owned or hereafter acquired by grantor, are hereby forever conveyed, transferred, assigned, and deeded over to Trustees of MILDRED L. ZIMMERMAN TRUST to form a part of the Trust Estate, to be held by the said Trustee for the uses and purposes and upon the terms and conditions of said Trust:

All of my tangible and intangible personal property including without limitation all household furniture and furnishings, bank accounts, certificates of deposit, mutual and money market funds of all kinds, securities, agency and custody accounts, notes, real estate wherever located

(including mortgages, land contract interests, leaseholds, and mineral interests), jewelry, antiques, and any and all other assets wherever located.

Mildred Zimmerman died in 1995. Erickson claimed that she, and not the trust, was the beneficiary of the annuity. After a hearing on this issue, the trial court found: “based on the trust instrument ... the annuity which was mentioned was intended by Mildred Zimmerman to be part of the trust.” The court then granted the petition of Alvin Zimmerman, Mildred’s son, that the trust be declared the proper beneficiary of the annuity policy, not Erickson.

Erickson moved for reconsideration based on the terms of the annuity contract, which was not available to the court at the first hearing. After the second hearing, the trial court denied the motion to reconsider and held:

that the general asset assignment was executed after the annuity had been in place; that the terms of the general asset assignment governed; and that the intention of Mildred Zimmerman under all of the circumstances was that the annuity contract was to be part of the disposition of all her assets which were covered in the general asset assignment.

The court also indicated that it drew the inference that Zimmerman was unduly influenced by Erickson, based on Erickson’s testimony that she sold her mother the annuity policy that named her as the beneficiary.

ANALYSIS

Section 632.48, STATS., governs the designation of beneficiaries in insurance contracts. It states, in pertinent part:

[N]o life insurance policy or annuity contract may restrict the right of a policyholder or certificate holder:

....

(b) *Change of beneficiary*.... [T]o change the beneficiary without the consent of the previously designated beneficiary. Subject to s. 853.17 [a provision in a will cannot change the beneficiary], ... any act that unequivocally indicates an intention to make the change is sufficient to effect it.

The dispositive inquiry in this case is whether the creation of the trust and the asset assignment was an “act that unequivocally indicate[d] an intention to make the change” in the beneficiary designation of the annuity.

Because resolution of this case requires us to interpret the statute and apply it to documentary evidence,¹ our review is de novo. See *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989) (we decide construction of a statute, or its application to a particular set of facts de novo); *State ex rel. Sieloff v. Golz*, 80 Wis.2d 225, 241, 258 N.W.2d 700, 705 (1977) (when reviewing documentary evidence, the court “need not afford a trial court’s findings any special deference”).

The Wisconsin Supreme Court construed § 632.48(1)(b), STATS., in *Empire Gen. Life Ins. Co. v. Silverman*, 135 Wis.2d 143, 399 N.W.2d 910 (1987). Based on the language of the statute, its statutory predecessor, and the committee comment, the supreme court concluded that “the focus of our inquiry

¹ In addition to the documentary evidence, Erickson and Alvin Zimmerman both testified. Erickson argues that Zimmerman’s testimony should be excluded under the dead man’s statute, § 885.16, STATS. However, the dead man’s statute does not apply if there was not an objection on this basis before the trial court. See *Giese v. Reist*, 91 Wis.2d 209, 222, 281 N.W.2d 86, 92 (1979). Erickson did not make such an objection. We also conclude that this testimonial evidence is not relevant to the issue before us: Was Mildred Zimmerman’s execution of the trust and the asset assignment an “act that unequivocally indicates an intention to make the change”? Section 632.48(1)(b), STATS. Zimmerman testified that it was Mildred Zimmerman’s general intent to transfer all of her assets to the trust, but he did not even know of the annuity at the time the trust was created. Since the testimony of neither Alvin Zimmerman nor Erickson sheds any light on the relevant inquiry, we rely on the documentary evidence.

should be on whether the insured has performed some act which unequivocally indicates an intent to change policy beneficiaries, sufficient to effect that change.” *Id.* at 157, 399 N.W.2d at 916. It is not necessary for an insured, or in this case the owner of the annuity, to comply with the terms of the policy to change the beneficiary. *See id.* at 155, 399 N.W.2d at 915. In fact, the court stated, “we need not place undue emphasis on the nature of the act performed by the policyholder” although it is necessary that the act leaves “no room for doubt” as to the policyholder’s intent. *Id.* at 158, 399 N.W.2d at 916-17. The court concluded that the insured’s act of telling his attorney he wanted to make a change was sufficient. *Id.*

We conclude that the relevant act performed by Zimmerman was the creation of the trust and execution of the related documents. Erickson contends that the “General Asset Assignment” is too broad to unequivocally indicate that Zimmerman intended to make the trust the beneficiary of the life insurance annuity. She argues that the General Asset Assignment does not specifically refer to the annuity and that it deals with transferring assets, rather than changing beneficiaries. We agree that if we were to consider the General Asset Assignment alone, there might be some room for doubt as to Zimmerman’s intent. However, the trust instrument incorporates by reference the specific items listed on the preliminary inventory, which included a handwritten \$3,500 estimate of an insurance death benefit, and these items are assigned and transferred to the trust. There is no evidence that this \$3,500 could refer to anything except the annuity purchased by Zimmerman for \$2,500, and Erickson does not argue otherwise.

In Erickson’s reply brief, she states that Schedule A is blank. This is not a reasonable interpretation of the document. Schedule A, signed by Zimmerman and witnesses, states: “I hereby assign and transfer all of the assets in

the above account to” While the space under the above “Preliminary Inventory” is blank, the next page contains an inventory worksheet with handwritten entries, Zimmerman’s name, and is dated a couple of weeks earlier than the date on which the trust and Schedule A were executed. We conclude that the only reasonable construction of Schedule A is that it incorporates the property listed in handwriting on the attached inventory worksheet.

We conclude that by creating a trust and executing an assignment to the trust of a preliminary inventory that specifically mentions a life insurance death benefit, Zimmerman completed an act that unequivocally indicated her intention to change the beneficiary of the life insurance annuity to the trust. This satisfies the requirements of § 632.48(1)(b), STATS.

Erickson also contends that, even if Mildred Zimmerman intended to change the beneficiary of the annuity, such a unilateral alteration to the annuity contract would be void because Zimmerman did not send a written notice to the insurance company as provided in the contract. We disagree. A policy owner may change the beneficiary without the insurance company’s consent as long as the rights and obligations of the insurance company remain unchanged. *See Lakeshore Commercial Fin. Corp. v. Drobac*, 107 Wis.2d 445, 446, 319 N.W.2d 839 (1982) (implying that a signatory “can validly alter the contract,” if he or she does not “change the rights or obligations under the contract of an original signatory who did not join in the modification”). Most importantly, Erickson’s argument completely overlooks § 632.48(1)(b), STATS., which directly addresses this point. While conformity with the insurance contract requirements may be relevant in a dispute with the insurance company, *see* § 632.48(2),² § 632.48(1)(b)

² Section 632.48(2), STATS., provides:

(continued)

provides that, “*as between beneficiaries*, any act that unequivocally indicates an intention to change the beneficiary is sufficient to effect it.” (Emphasis added.) It is not necessary to comply with the insurance company’s rules to change a beneficiary for purposes of § 632.48(1)(b). See *Silverman*, 135 Wis.2d at 155, 399 N.W.2d at 915.

Erickson also contends that the trial court erroneously concluded that the beneficiary designation was the result of undue influence exerted by Erickson over her mother when she sold her the policy that named her as the beneficiary. In light of our decision that the trust is the beneficiary for the reasons stated above, it is unnecessary to decide this issue.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

(2) PROTECTION OF INSURER. An insurer may prescribe formalities to be complied with for the change of beneficiaries, but formalities prescribed under this subsection shall be designed only for the protection of the insurer. The insurer discharges its obligation under the insurance policy or certificate of insurance if it pays a properly designated beneficiary unless it has actual notice of either an assignment or a change in beneficiary designation made under sub. (1) (b). It has actual notice if the prescribed formalities are complied with or if the change in beneficiary has been requested in the form prescribed by the insurer and delivered to an intermediary representing the insurer.

