DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

CA06-136

September 6, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTEENTH DIVISION [ECN1989-5712]

HONORABLE MACKIE M. PIERCE, JUDGE

REVERSED AND REMANDED

KEVYN ALLEN
APPELLANT

V.

JOHN ALLEN (DECEASED)
APPELLEE

Kevyn Allen, appellant, and Dr. John Allen, deceased, were divorced by decree filed of record July 9, 1990. At the time of the divorce, the parties' child, Krystn, was three years old. A property-settlement agreement was entered into by the parties, and the agreement was incorporated into the divorce decree. Paragraph four of the agreement, which forms the basis for this appeal, provided as follows:

> 4. LIFE INSURANCE - For the support of the child, Husband shall maintain a life insurance policy on his life, in the minimum amount of $100,000.00, until the child reaches majority, dies or marries, whichever is first to occur. The beneficiary of said policy shall be the child or a trustee for the benefit of the child. Husband shall immediately provide Wife with a copy of the insurance policy.

Other paragraphs in the agreement provided that Dr. Allen was required to pay child support in the amount of $1,000 per month (paragraph two) and to carry Krystn's health insurance (paragraph three).

In an order filed on June 17, 1996, the trial court increased Dr. Allen's child-support obligation to $1,435 per month and found that Dr. Allen was in arrears on child

support in the amount of $705. In the same order, the trial court further ordered Dr. Allen, pursuant to paragraph four of the agreement, to keep the life-insurance policy in the amount of $100,000 in full force and effect, with Krystn being the sole beneficiary; to repay all outstanding loan balances secured by the life-insurance policy within thirty days; and to refrain from encumbering the life-insurance policy for any reason.

In a subsequent order filed on May 13, 2002, the trial court held that there had been a material change in circumstances that warranted a reduction in the amount of child support paid by Dr. Allen. In this order, the trial court reduced the child-support obligation to the amount of the social-security benefit Krystn was receiving, which was $745 per month, and held that Dr. Allen was not obligated to pay any support in excess of what Krystn was receiving in these social-security benefits as of May 1, 2002. In the same order, the trial court denied Dr. Allen's separate motion to modify the life-insurance provision (paragraph four) of the agreement, holding "that said provision is contractual and non-modifiable."

Dr. Allen died in June 2004, and Krystn did not turn eighteen until October 2004. Upon Dr. Allen's death, appellant Kevyn Allen discovered that, even though he had been denied permission to alter the terms of the life-insurance provision in both the 1996 and 2002 orders, Dr. Allen, in November 2001, had changed the beneficiary of the life-insurance policy, placing one-half of the proceeds into a trust for Krystn which provided that she meet certain requirements, and the other one-half of the proceeds into the JEA Limited Partnership. Upon learning of this change in beneficiary, appellant Kevyn Allen filed a petition requesting that the trial court enforce the property-settlement agreement in the divorce decree; order that if payments of the life-insurance proceeds had been made to

other parties that those payments be set aside; and direct that payment of the proceeds be made to Krystn Allen.

A hearing was held on appellant's petition on September 19, 2005. At that hearing appellant Kevyn Allen testified that the purpose of the life-insurance provision in the agreement was that if Dr. Allen died, Krystn would receive the proceeds from the life insurance policy to pay for her college, but then she admitted on cross-examination that the $100,000 was not specifically for a college fund. She further testified that it was her intent and Dr. Allen's intent for Krystn to have the money upon his death for whatever reason she might need. On cross-examination, Ms. Allen agreed that the insurance policy was to cover Dr. Allen's child-support obligation if he were to die before Krystn turned eighteen; that Krystn received social-security benefits until she turned eighteen in October 2004; and that she, the appellant, was not making a claim for any child-support arrearage.

Lexie Allen Saunders, Dr. Allen's daughter and appellant's former stepdaughter, testified that Dr. Allen had set up the trust for her half-sister Krystn's benefit, using one-half of the life-insurance proceeds. Regarding the terms, she stated that the trust provided that until Krystn turned eighteen, $325 per month was to be paid to Kevyn Allen and $344.69 in quarterly medical insurance; the trust then provided that the residual should be paid to Krystn over the next four years in monthly installments so long as Krystn was enrolled in college and maintained a "C" average; if Krystn dropped out of school, the trust provided that no payment was to be made to her until the age of thirty, with the trustee having the discretion to delay full disbursement of the funds until Krystn reached the age of thirty-six; and the trust provided that if Krystn predeceased Dr. Allen or she died before the complete distribution of the trust corpus that the remainder would be

distributed to the JEA Limited Partnership. Lexie also testified that the remaining $50,000 from the life-insurance policy was distributed to the JEA Limited Partnership, a partnership set up by Dr. Allen for his four daughters; however, Lexie stated that she did not receive any money from the partnership.

Krystn Allen testified that she turned eighteen in October 2004 and was currently enrolled at UCA as a sophomore. Krystn did not know her grade-point average for the current semester, but she guessed that it was 2.5 or 3.0 her freshman year.

After the hearing, the trial court denied Ms. Allen's petition. The trial court found that paragraph four was contractual in nature, was not subject to modification by the trial court, and was governed by the rules of contract law. The trial court also found that Dr. Allen's child-support obligation after his death was paid by the social-security benefits Krystn received until her eighteenth birthday, and that there was no child-support arrearage owed by Dr. Allen or his estate. In its order, the trial court specifically found:

> 4. The life insurance required to be maintained by Defendant for the benefit of the minor child was to insure that the child received child support in the event of the death of the Defendant prior to the child's eighteenth birthday. This in fact happened. The child then received the balance of the child support due; not from any insurance policy, but from the Defendant's estate.
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> 5. The Plaintiff received the benefit of her bargain with the Defendant in the property settlement agreement. There was no mention in paragraph 4 of any additional obligation of Defendant nor was there any mention of any other issue that was contemplated by the parties. The provision in question was for the specific purpose of insuring payment of child support in the event Husband died during the child's minority.
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> 6. The child support was paid. Even though the Defendant was technically in contempt for not keeping the policy of $100,000.00 in effect for the benefit of the child, neither the child nor the Plaintiff suffered any damages as a result of this breach. Since there are no damages, Plaintiff and the child are not entitled to any award from the Court.

On appeal, Ms. Allen argues that the trial court erred both in its interpretation of the property-settlement agreement and in its application of the law to the agreement. Domestic-relations cases are reviewed *de novo* on the record, and this court will not reverse a trial court's findings of fact unless they are clearly erroneous; a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *See Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004). We agree that the trial court's decision was clearly erroneous, and we reverse and remand.

Appellant relies heavily upon the case of *Orsini v. Commercial National Bank*, 6 Ark. App. 166, 639 S.W.2d 516 (1982), in asking this court to reverse the trial court's denial of her petition, and we find it to be persuasive. In that case, Ron Orsini agreed in his 1974 divorce decree to maintain insurance on his life in the amount of $50,000, with the beneficiary being Stacy Renee Orsini, his minor daughter with Mary Linda Orsini. At the time Ron Orsini was murdered in March 1981, he had changed the beneficiary of two $25,000 life-insurance policies to his new wife, Mary M. Orsini. Commercial National Bank, guardian of Stacy Orsini's estate, filed suit to collect the insurance proceeds, and the trial court found in favor of the bank on the basis that Stacy was a third-party beneficiary of the property-settlement agreement and as such had a vested interest in the insurance proceeds. The trial court also held that the change of beneficiary was in violation of the agreement and decree; that Ron had breached his fiduciary relationship to Stacy; and that a constructive trust was to be instituted upon the proceeds of the life-insurance polices. This court affirmed the imposition of a constructive trust upon the life-insurance proceeds, holding that the property-settlement agreement and its incorporation

into the divorce decree constituted sufficient evidence to support the finding that Stacy was a third-party beneficiary of the agreement and that the language was specific enough for the trial court to find that the two policies were intended to be maintained with Stacy as the named beneficiary. In support of the holding that the trial court properly impressed a constructive trust upon the insurance proceeds, this court quoted from *Gutierrez v. Madero*, 564 S.W.2d 185, 190 (Tex. Civ. App. 1978), "Equity regards as done that which ought to have been done. The imposition of a constructive trust on the insurance proceeds for the benefit of the minor children is necessary to place the parties in the position they would be in had Rudy Gutierrez not violated the decree."

If a trial court approves and incorporates an independent property-settlement agreement into a divorce decree, the agreement may not be subsequently modified by the trial court; however, it is subject to interpretation by the court. *Rogers v. Rogers*, 83 Ark. App. 206, 121 S.W.3d 510 (2003). In the present case, paragraph four in the Allens' property-settlement agreement mandated that Dr. Allen maintain at least $100,000 in life insurance with Krystn as beneficiary or in trust for her benefit for her support until she reached the age of eighteen, died, or married, whichever occurred first. Although the trial court on two occasions had refused Dr. Allen's request to modify the life-insurance paragraph in the agreement, Dr. Allen ignored those orders and changed the beneficiaries as he saw fit. He died three months before Krystn turned eighteen, which triggered this petition challenging his actions. After the hearing on Ms. Allen's petition to enforce the agreement, the trial court determined that Ms. Allen had received the benefit of her bargain in the agreement with Dr. Allen, finding that the purpose of the life-insurance paragraph was to insure that Dr. Allen paid his child support, and that the child support

was in fact paid by social-security benefits. The trial court also held that neither Krystn nor Ms. Allen suffered any damages as a result of Dr. Allen's breach because Krystn did in fact receive her child support until she turned eighteen.

We hold that the trial court's decision was clearly erroneous because the trial court modified the parties' independent agreement. We further hold that damages were suffered as a result of Dr. Allen's breach of the agreement. The trial court reasoned that the insurance provision was included in the agreement to insure that child support was paid if Dr. Allen died during Krystn's minority, but nothing in paragraph four provides that it is for the procurement of child support. Rather, child-support obligations were addressed in paragraph two of the agreement. If the parties had intended for the insurance to merely secure the child-support payments, they could have easily provided for that contingency in the agreement. They did not do so. Likewise, if Dr. Allen had done what he was contractually obligated to do, Krystn would have received the $100,000 life-insurance proceeds at the time of his death, which event occurred before she turned eighteen.

Appellee argues that if Krystn is allowed to receive the insurance proceeds, she will be unjustly enriched because her child support has already been paid. We disagree, and we hold that *Orsini, supra*, supports this position. Dr. Allen entered into an independent property-settlement agreement to keep at least a $100,000 life-insurance policy on his life with Krystn as the beneficiary until she turned eighteen. The agreement did not provide for decreasing amounts of insurance in proportion to the child support remaining to be paid as Krystn got older. Notwithstanding, Dr. Allen deliberately and unilaterally changed the insurance beneficiaries in November 2001, prior to the trial

court's issuance of the second order in May 2002. The insurance paragraph was all or nothing. The bright line in this case was whether Krystn was eighteen or not at the time Dr. Allen died. Dr. Allen died three months before Krystn turned eighteen. She is entitled to the benefit of the bargain made between her parents in their property-settlement agreement.

Reversed and remanded.

PITTMAN, C.J., and GLADWIN, J., agree.