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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001565-MR

HOLLY G. STULL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 08-CI-006016

KRISTEN SHAY MCGILL, EXECUTRIX
OF THE ESTATE OF KENNETH R. STULL — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Holly G. Stull ("Holly") appeals from the August 4, 2010, opinion and order of the Jefferson Circuit Court. That order granted summary judgment to Kristen Shay McGill ("Shay"), as executrix of the estate of Kenneth R. Stull ("Kenneth"), and held that Holly was not entitled to certain life insurance proceeds. We reverse.

In 1976, Holly and Kenneth married and Kenneth adopted Holly's daughter, Shay. In 1985, Kenneth and Holly purchased an AXA life insurance policy and paid monthly premiums from their joint marital property until 2000. In 2000, Holly filed a petition for divorce, the parties separated, and Kenneth moved out of the marital home. Kenneth then changed the mailing address for the policy and instructed that the premium be paid from his personal bank account. In 2001, Kenneth converted the AXA policy to a paid-up extended term policy. Under this arrangement, the monthly premium would be withdrawn from the accumulated cash value of the policy until it was depleted.

In 2002, Kenneth was diagnosed with multi-system atrophy. That same year, he executed a will in which he named Shay as the sole heir of his entire estate. In 2004, Kenneth was diagnosed with Lewy body dementia, after which he began to suffer physical and cognitive decline. On May 9, 2004, Kenneth contacted his investment advisor, Brad Sublett ("Sublett"). Sublett testified that Kenneth inquired as to the beneficiary of the AXA policy and how long it would continue under the paid-up extended term. Sublett testified that he informed Kenneth that Holly was the beneficiary and that the policy would be paid until the date identified on his annual report. Sublett also indicated that he had mailed an annual policy report to Kenneth's business address from December 2000 until July 2007.

In 2004, Kenneth designated David Borders ("Borders") and Shay as his power of attorney. Also in 2004, Kenneth moved into an assisted living

facility. In December of 2006, Kenneth and Holly entered into an agreement ("agreement"), which included the following provision: "Ken shall have as his own free and clear of any claim of Holly, the following: . . . (e) All life insurance policies on his life, if any." Pursuant to the power of attorney, Borders entered into the agreement on Kenneth's behalf. The agreement was adopted by the court and a decree of dissolution was entered on December 8, 2006. Later that month Kenneth moved into a nursing home where he resided until his death on July 9, 2007.

In August of 2007, Sublett contacted Holly and informed her that she was the named beneficiary on the AXA policy. Holly testified that she was surprised and that she was unaware that the policy existed. She also testified that she did not disclose the existence of the 2006 agreement to Sublett. Holly filed a claim for the life insurance proceeds in which she identified herself as Kenneth's wife. On September 7, 2007, Holly received the proceeds in the amount of $160,828.49.

In June of 2008, Shay, as executrix of Kenneth's Estate, filed a complaint against Holly in Jefferson Circuit Court. The complaint alleged that Holly had breached the agreement by claiming and receiving the policy proceeds; that she had committed fraud by identifying herself as Kenneth's wife in the claim for the proceeds; and that she had violated KRS 304.47-020 by committing a fraudulent insurance act. Both parties filed for summary judgment, and arguments were submitted to the trial court. On August 4, 2010, the trial court's opinion and

order, granting summary judgment to Kenneth's estate, was entered. This appeal followed.

Summary judgment is proper when it is impossible for the adverse party to produce evidence at trial supporting a judgment in his or her favor. *James Graham Brown Found., Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). The record must be viewed in a light most favorable to the party opposing the motion and all doubts must be resolved in his or her favor. *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). This Court will review a trial court's grant of summary judgment to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Holly argues that the trial court erred by awarding summary judgment to Kenneth's estate. She maintains that the 2006 agreement failed to divest her of any beneficiary expectancy because the language of the agreement did not specifically state so. We agree.

It has been held that dissolution of marriage does not divest a former spouse from his or her right to recovery as beneficiary of a life insurance policy

controlled by the other former spouse. *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978). It has further been held that parties to a divorce may waive any beneficiary expectancy to insurance proceeds, but that such a divestiture must be "clear and unambiguous." *Hughes v. Scholl*, 900 S.W.2d 606, 608 (Ky. 1995). A footnote in the Court's decision in *Hughes* clarifies that "[a] general waiver of any interest in the property of the other spouse is insufficient to destroy a beneficiary's right to receive insurance policy proceeds." *Id.* The agreement between Holly and Kenneth does not specifically address the right to beneficiary expectancy; it only addresses ownership over the policy itself. This distinction is pivotal. As owner of the policy, Kenneth retained the discretion to continue the policy, cancel it, increase it, change the beneficiary, or even cash it. He chose not to make any changes.

The trial court indicated that the agreement is clear and unambiguous in indicating that Holly forfeited all expectancy as a beneficiary to any policies which Kenneth may have held. The trial court conveyed that "Kentucky Courts have held that the term 'claim' includes by definition a right to contingent payment." In support of this conclusion, the trial court cited to the case of *McKenty v. Caldwell*, 155 S.W.2d 193 (Ky. 1941). Our reading of the *McKenty* case reveals no such holding. In fact, we are pressed to find any language in the *McKenty* case which addresses the term "claim," much less its definition. Furthermore, the *McKenty* case addresses the consequences of a named beneficiary

predeceasing the insured in a multi-beneficiary policy and is therefore not on point. *Id.*

Testimony indicates that, in 2004, four years after the dissolution action had commenced, but prior to appointing his power of attorney, Kenneth was made aware of Holly's designation as beneficiary on the policy and chose not to alter it. Of further significance is that Kenneth's knowledge of the policy's beneficiary and failure to change it came two years after the execution of his will. We must conclude that if Kenneth were lucid enough to appoint a power of attorney, that he was also lucid enough to comprehend the existence of the AXA policy and the consequence of having Holly as the named beneficiary. Borders and Shay testified that they were unaware that the AXA policy existed and that if they had known then they would have changed the beneficiary. There is no way of knowing why Kenneth failed to disclose the AXA policy to Borders and Shay. However, the testimony indicates that policy statements had been mailed to Kenneth for seven years prior to his death, three years of which Borders and Shay were serving as power of attorney. Thus, discovery of the policy was not impossible.

The trial court identified Holly's attempts to conceal receipt of the policy proceeds as indicative of her knowledge that she was not entitled to them. Although we agree that Holly's behavior is questionable, it is not conclusive. It would not be uncommon for a party to attempt to conceal an unexpected windfall. Further, the evidence indicates that, even after their separation, Holly and Kenneth

remained friends. Holly assisted Kenneth during his sickness and it was at her request that a power of attorney was appointed. It is not unreasonable to conclude that such a friendship could have persuaded Kenneth to keep Holly as the life insurance beneficiary. Although Borders testified that Kenneth indicated in 2002 that he wanted his entire estate to be left to Shay, his estate would not include any life insurance proceeds that had been designated to an individual beneficiary. *See, e.g., Parks' Ex'rs v. Parks*, 156 S.W.2d 480 (Ky. 1941).

In conclusion, we hold that the trial court erred by adjudging that the 2006 agreement divested Holly of any beneficiary expectancy. Therefore, Kenneth's estate was not entitled to judgment as a matter of law and the August 4, 2010, summary judgment was therefore inappropriate. *See Scifres v. Kraft*, 916 S.W.2d 779. For the foregoing reasons, the August 4, 2010, opinion and order of the Jefferson Circuit Court is reversed and remanded with instructions to the trial court to enter judgment in favor of Holly.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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