

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

SHARON L. NEAL,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2014-L-074
JOHN C. NEAL, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 96 DR 000887.

Judgment: Affirmed in part, reversed in part, and remanded.

James M. Lyons, 240 East Main Street, Painesville, OH 44077 (For Plaintiff-Appellee).

Patrice F. Denman, Patrice F. Denman Co., L.P.A., 1111 Mentor Avenue, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, John C. Neal, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, granting appellee, Sharon L. Neal's, motion to establish an equitable lien. For the following reasons, we affirm in part, reverse in part, and remand the matter for proceedings consistent with this opinion.

{¶2} On April 17, 1997, the marriage of John C. Neal and Sharon L. Neal was terminated by an agreed judgment entry. That entry, which included a separation agreement that was agreed upon by both parties dividing their marital property, included

a provision, Article 4, entitled "Division of Property," in the category of life insurance. It provided in relevant part:

Life: (1) Husband shall provide a life insurance policy on his life in the sum of \$150,000.00 with wife to be the sole beneficiary. Husband shall pay the annual premiums of \$1,326.00 and keep such insurance in force during his lifetime. Husband shall also take out a \$150,000.00 term life insurance policy on the life of the wife and husband shall pay the premiums of \$302.00 per year on such policy and keep such insurance in force during wife's lifetime. In the event that wife predeceases husband, the proceeds of such policy are to be paid to the Lake County Humane Society or any other charity of wife's choice but not to any individual recipient. Husband shall keep such policies in force and shall pay total premiums of \$1,628.00 per year. Such policies will be with the CNA Insurance Company and the premium rates are guaranteed for 15 years. Husband shall provide wife on an annual basis a verification that said policies on his life and on her life are in full force and effect and also shall provide wife with proof of annual payment evidenced by copies of canceled checks.

This \$150,000.00 life insurance policy on husband is specifically for the purpose of completing the division of property between the parties, and in the event of any default by the husband and in compliance with this provision, wife shall have an equitable lien on husband's IRA with Waterhouse Securities Inc., which is presently valued at \$516,000.00 as to the marital portion.

(2) In the event said term insurance policy on husband's life in the amount of \$150,000.00 face value is not available to husband, then husband agrees that wife shall be a beneficiary to his Waterhouse Securities Inc. IRA for the like amount of \$150,000.00. Such specific beneficiary assignment to wife will not be changed, altered, or modified by husband during husband's lifetime. Such assignment is to be guaranteed by a letter attesting to such arrangement, affixed to Waterhouse Securities Designation Form, signed by Husband. The amount of \$150,000.00 shall be payable to Sharon L. Neal upon husband's death from said aforementioned Waterhouse Securities, Inc. IRA.

{¶3} From 1997 through 2011, appellant dutifully satisfied his obligations concerning the life insurance provision. When appellant's annual premium increased from \$1,628 to \$9,747 in 2012, however, he notified both appellee and the insurance

company that he would not be renewing said insurance policy. Appellant's policy expired on January 19, 2012, and appellant named appellee beneficiary of his IRA in the amount of \$158,000 in June 2012.

{¶4} Appellee filed a motion to show cause on March 7, 2013, with affidavits alleging the following: (1) appellant failed to maintain a life insurance policy on his life in the amount of \$150,000 with appellee as beneficiary; (2) appellant failed to maintain a life insurance policy in the amount of \$8,000 with appellee as beneficiary; and (3) appellant failed to provide appellee on an annual basis with proof that policies were in full force and effect and that payment was made related to said policies.

{¶5} A hearing on the contempt motion was held. With respect to the failure to maintain a life insurance policy in the amount of \$150,000 with appellee as the beneficiary, the magistrate found it could not be determined by clear and convincing evidence that appellant was in contempt. His decision further stated, "[t]his decision does not require a determination of what is an 'equitable lien' on husband's IRA or the impact of defendant's IRA having a value of less than \$150,000.00." Neither appellant nor appellee objected to the magistrate's decision, which was later adopted by the trial court.

{¶6} Thereafter, appellee filed a motion to establish an equitable lien. The trial court held that, when creating the agreement in 1997, the parties contemplated that appellant might not continue the policy coverage in year 16 by drafting provisions (1) and (2) in Article 4 of the separation agreement. Further, in spite of the premium rising over 600% for calendar year 2012, the court held that appellant had substantial funds available to him other than Social Security to pay the annual term life insurance of

\$9,747. Because appellant chose not to pay the premium, he was found in default of the agreement and ruled that appellee was entitled to the remedy set forth in provision (1) of Article 4 of the separation agreement: an equitable lien on appellant's IRA in the sum of \$150,000. The trial court also ordered an additional \$35,000 to be segregated to account for market fluctuations. The trial court ordered that if appellee predeceased appellant, the \$150,000 shall be disbursed to appellee's designated charitable beneficiary.

{¶7} Appellant filed an appeal, and as his first assigned error, appellant asserts the following:

{¶8} "The trial court erred in finding appellant in default of maintaining a life insurance policy as required by the separation agreement."

{¶9} Under this assigned error, appellant first maintains the trial court was collaterally estopped from finding him in default and granting appellee an equitable lien on the IRA because appellant was not found in contempt for failing to maintain said life insurance policy. As previously noted, appellee filed a motion to show cause. In that motion, appellee moved the trial court for an order requiring appellant to appear and show cause why he should not be held in contempt for failing to comply with the April 17, 1997 order to "maintain life insurance on his life in the amount of \$150,000 with Plaintiff as beneficiary" and "provide proof to wife on an annual basis that the policies on his life are in full force and effect, and to provide Wife with proof of annual payment evidenced by copies of cancelled checks." Subsequently, a hearing was held. In a June 27, 2013 magistrate's decision, the magistrate found, inter alia, the following:

* * * In June 2012, defendant named plaintiff beneficiary of his IRA in the amount of \$158,000.

A contempt proceeding is quasi criminal in nature. A respondent can receive jail time if found in contempt and the purge is not met. Therefore, any ambiguity in the order of the court must be interpreted in favor of respondent.

In this matter, the agreement specifically indicated husband would pay the annual premium of \$1,326.00 for the insurance policy. As outlined above, after paying the annual premium of \$1,326.00 for 15 years the premium would increase to approximately \$9,700.00 annually. The agreement does not address a specific payment amount other than \$1,326.00.

The agreement also indicates that if husband is in default, wife shall have an equitable lien on husband's IRA with Waterhouse Securities Inc., which had a marital value of approximately \$516,000.00 in 1997. This provision can be interpreted as an alternative available to husband to payment for a life insurance policy.

The agreement further indicates if the \$150,000.00 face value is not available husband/defendant agrees that plaintiff/wife shall be beneficiary to his Waterhouse Securities Inc. IRA in the amount of \$150,000.00. 'Available' is not defined. A reasonable interpretation of this provision is defendant has an alternative available to the maintenance of the \$150,000.00 policy.

Based on the above, it cannot be determined by clear and convincing evidence that defendant is in contempt of court for maintaining a life insurance policy in the amount of \$150,000.00 with plaintiff as beneficiary and failed to provide wife/plaintiff on an annual basis proof the policies were in full force and effect.

* * *

This decision does not require a determination of what is an 'equitable lien' on husband's IRA or the impact of defendant's IRA having a value of less than \$150,000.00. It would appear to be a reasonable interpretation of the agreement that defendant cannot reduce the value of the IRA below \$150,000.00 without an order of court. If necessary, this matter will be resolved by the court upon appropriate motion.

{¶10} Thereafter, appellee filed a "motion to establish equitable lien" and appellant filed a memorandum in opposition to appellee's motion. In his memorandum

in opposition, appellant did not raise the issue of collateral estoppel. The trial court issued its judgment and found the following issue needed resolved: “whether Husband was in default of his April 18, 1997 court-ordered obligation to maintain term life insurance of \$150,000 with Wife as the beneficiary when Husband cancelled the policy in December 2011.” The trial court then noted, “[i]f in default, Wife’s remedy is set forth in item (1) of the separation agreement’s life insurance provision set forth hereinabove. However, if it is found term life insurance of a \$150,000 policy was unavailable to Husband, Wife’s remedy is set forth in item (2) of the separation agreement’s life insurance provision set forth hereinabove.”

{¶11} The trial court found that because appellant had substantial funds available to him other than Social Security, but chose not to utilize those funds, he was in default. And, as such, appellee was entitled to the remedy set forth in the separation agreement, to wit: an equitable lien on appellant’s IRA with Ameriprise Financial Services Inc., in the sum of \$150,000.

{¶12} In *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193 (1983), the Ohio Supreme Court stated: “Collateral estoppel precludes relitigation only when the identical issue was actually decided in the former case. * * * Thus, a trial court must decide, prior to applying collateral estoppel, and appellate courts must review, whether the identical issue was actually decided in the former case.”

{¶13} The burden is upon the party seeking to invoke collateral estoppel to prove that all elements of the doctrine apply. See *Monahan v. Eagle Picher Industries, Inc.*, 21 Ohio App.3d 179, 180-181 (1st Dist.1984).

{¶14} First, we note appellant never raised the issue of collateral estoppel below. Therefore, the trial court never had an opportunity to actually decide whether the identical issue was, in fact, decided during the contempt proceeding. Further, appellant failed to provide this court and the trial court with a transcript of the contempt hearing before the magistrate from which to discern the details of what transpired. Nevertheless, we conclude that appellant is not entitled to invoke collateral estoppel against appellee.

{¶15} To support his argument on appeal, appellant maintains the trial court considered the identical issue in both proceedings: that appellant was in default for maintaining a life insurance policy as required by the parties' separation agreement. We disagree.

{¶16} In the contempt proceedings, the magistrate was asked to determine whether appellant should be held in contempt for failing to maintain the life insurance policy. The magistrate reviewed the separation agreement and stressed that the language of the agreement set forth conditional, remedial alternatives in the event appellant, due to either unavailability of the policy or default, failed to maintain the life insurance policy. Because the agreement provided for an alternative, agreed-upon means for appellee to receive the funds to which she was entitled if appellant failed to maintain the life insurance policy, the magistrate concluded appellant's actual failure did not rise to the level of contemptible conduct. Therefore, appellant could not be held in contempt. The magistrate did not conduct an analysis or make a finding as to the cause of appellant's failure to maintain the policy, i.e., whether the failure was occasioned by the policy's unavailability or through appellant's default. Conversely, in the subsequent

proceeding, the trial court stated that the issue was whether appellant “was in default of his April 18, 1997 court-ordered obligation to maintain term life insurance of \$150,000.00 with [appellee] as the beneficiary when [appellant] cancelled the policy in December 2011.” The trial court then stated this determination dictated appellee’s remedy. Because such issue was neither before the magistrate nor directly addressed by the magistrate in the contempt proceeding, it remained unresolved, and collateral estoppel was inapplicable to the subsequent proceeding.

{¶17} Appellant appears to assert that the facts establish that he was not in default, but that the life insurance policy was unavailable. Relying on the language of the separation agreement, appellant maintains the parties contemplated the rise of the fixed annual premium of \$1,326 after 15 years. Appellant states he did “not fail to act nor neglect his obligation”; after being notified of the increase in the annual premium to \$9,747, appellant immediately notified appellee that he was unable to afford such amount, as he is on a fixed income. Consequently, appellant named appellee as beneficiary on his IRA, as required by the separation agreement.

{¶18} In its judgment, the trial court utilized Black’s Law Dictionary to define “default”: “By its derivation, a failure. An omission of that which ought to be done. Specifically, the failure to perform a legal duty.” The trial court then applied that definition to the facts of this case to determine whether cancelling the life insurance policy constituted default by appellant. The trial court recognized that appellant had funds available to him other than his Social Security benefits of \$812.25 per month. In addition, the trial court noted that appellant lived in his home lien free and was required to take annual minimum distributions from his IRA and had done so for the past nine

years. Also, Exhibit “1a-1d,” dated February 1997, attached to the parties’ statement in lieu of a transcript, evidences the fact that the premium would increase dramatically in year 16 of the policy. The parties were not divorced until April 1997. The projected increase was known to, at least, appellant at that time. Utilizing the common meaning of the word “default,” the trial court reasoned that, despite having funds available, appellant chose not to pay the annual term life insurance premium of \$9,747 and, consequently, found him in default for not maintaining such policy. We find this finding by the trial court supported by competent, credible evidence.

{¶19} Appellant’s first assignment lacks merit.

{¶20} Appellant’s second assignment of error alleges:

{¶21} “The trial court erred in ordering an improper modification of the previously agreed upon property division.”

{¶22} In addition to ordering an equitable lien in the sum of \$150,000 on appellant’s IRA, the trial court ordered an additional \$35,000 be added for market fluctuations. With respect to the distribution of the \$150,000, the trial court ordered that the monies shall be distributed to appellee upon the death of appellant; however, if appellee predeceases appellant, the \$150,000 shall be payable to appellee’s designated charitable beneficiary named for the segregated account.

{¶23} Appellant argues these aforementioned conditions were not included in the parties’ separation agreement, and thus, the trial court’s decision is an unlawful modification to the terms of the property division.

{¶24} As appellee recognizes in her brief, “one of the fundamental maxims of equity is, ‘*equity regards as done that which ought to be done.*’” *Klaustermeyer v. Cleveland Trust Co.*, 89 Ohio St. 142, 147 (1913) (emphasis sic.).

The broad meaning of this maxim is that where an obligation rests upon a person to perform an act equity will treat the person in whose favor the act should be performed as clothed with the same interest and entitled to the same rights as if the act were actually performed. It is closely connected with and probably derived from the principle of regarding intent and substance rather than form. * *
* The principle also lends its force to the establishment of liens and charges which could not be sustained at law, and to working out justice by fixing *rights as of the time when the obligation first accrued*, rather than according to circumstances subsequently arising.

Id., quoting 16 Cyc., 135 (emphasis sic.).

{¶25} Here, the \$150,000 life insurance policy on husband’s life was for the purpose of completing the parties’ division of property, as expressly stated in the separation agreement. The parties’ separation agreement specifically provided for two alternatives to ensure appellee received this specified amount. The parties’ separation agreement contemplated an equitable lien placed upon appellant’s IRA in the event of default by appellant. The express terms of the separation agreement also specify how the proceeds of such policy are to be paid in the event appellee predeceases appellant, which are identical to how the trial court is to apply the proceeds from the equitable lien. Although appellant argues that appellee should receive nothing if she predeceases him, it is illogical that the \$150,000 proceeds from the equitable lien would be applied differently than those from the insurance policy. Appellant cannot benefit through his own default.

{¶26} We do, however, find error in the trial court's directive to add an additional \$35,000 in value for market fluctuations, as this provision was not contemplated in the parties' original separation agreement. Further, although the trial court ordered the segregation of the additional \$35,000 for market fluctuation, this reasoning is speculative. It would eliminate \$35,000.00 from an asset to which appellant is otherwise entitled.

{¶27} Appellant's second assignment of error has merit to the extent indicated. We, therefore, affirm the trial court order that upon the death of appellant, the monies shall be distributed to appellee; however, if appellee predeceases appellant, the \$150,000 shall be payable to appellee's designated charitable beneficiary named for the segregated account. We reverse the directive of the trial court to add an additional \$35,000 for market fluctuation.

{¶28} The judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is hereby affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.