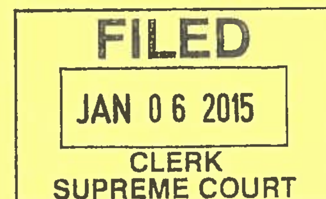


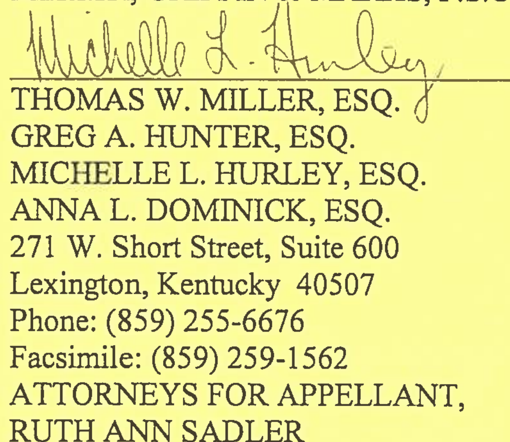
COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000809-D

RUTH ANN SADLER APPELLANT

v. APPEAL FROM AN ORIGINAL ACTION
COURT OF APPEALS CASE NO. 2012-CA-001157
FAYETTE CIRCUIT COURT CASE NO. ~~12-CI-00040~~ 96-CI-02799

BARBARA LOIS VAN BUSKIRK APPELLEE

APPELLANT'S REPLY BRIEF



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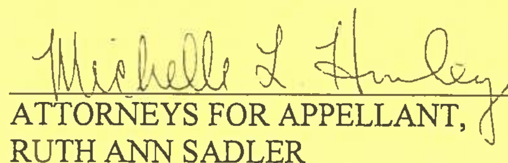
This is to certify that a true and accurate copy of this Reply Brief for Appellant was filed with the Kentucky Supreme Court and served by first class mail, postage prepaid, to: Clerk of Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Clerk of Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; Hon. Kathy Stein, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; and Amy E. Dougherty, Esq., Carolyn L. Kenton, Esq., Bluegrass Elder Law, PLLC 120 N. Mill Street, Suite 300, Lexington, Kentucky 40507, Attorneys for Appellee, Barbara Lois Van Buskirk; on this the 6th day of January, 2015.



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STATEMENT OF POINTS AND AUTHORITIES

Page

STATEMENT OF POINTS AND AUTHORITIES ....i-ii

ARGUMENT 1-8

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE AGREEMENT WAS SILENT AS TO BENEFICIAL INTERESTS AND THAT BARBARA HAD MADE NO CLAIM UPON ANY INTEREST OWNED BY RICHARD 1-2

KRE 201 1

Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384–85 (Ky. App. 2002) 2

II. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF *PING V. DENTON* AND OTHER KENTUCKY LAW 2-3

Ping v. Denton, 562 S.W.2d 314, 317 (Ky. 1978) 2

Hughes v. Scholl, 900 S.W.2d 606 (Ky. 1995) 2

Napier v. Jones, 925 S.W.2d 193 (Ky. App. 1996) 2

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 3

KRS 391.360 3

III. PERSUASIVE OUT-OF-STATE AUTHORITY SUPPORTS APPELLANT'S POSITION, INCLUDING THOSE CASES CITED BY APPELLEE 3-8

MFA Life Ins. Co. v. Kyle, 630 F.2d 322 (6th Cir. 1980) 3,4

Eschler v. Eschler, 849 P.2d 196, 201 (Mont. 1993) 4

Rountree v. Frazee, 209 So.2d 424 (Ala. 1968) 4,5

Cincinnati Life Ins. Co. v. Palmer, 94 P.3d 729 (Kan. Ct. App. 2004) 5

Daughtery v. McLamb, 512 S.E.2d 91 (N.C. App. 1999) 5,6

Hughes v. Scholl, 900 S.W.2d 606, 608 (Ky. 1995) 6

Estate of Revis v. Revis, 484 S.E.2d 112 (S.C. App. 1997) 6,7

Kruse v. Todd, 389 S.E.2d 488 (Ga. 1990) 6-8

Lynch v. Bogenrief, 237 N.W.2d 793 (Iowa 1976) 8

IV. CONCLUSION 8-9

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE AGREEMENT WAS SILENT AS TO BENEFICIAL INTERESTS AND THAT BARBARA HAD MADE NO CLAIM UPON ANY INTEREST OWNED BY RICHARD

Appellee first asserts that "Barbara made no claim on Richard's IRA account," and that "Barbara and Richard's property settlement agreement never mentioned the beneficiary interest of either of their IRA accounts." Appellee's Brief, p. 3-4. In doing so, Appellee attempts to equate the "any interest" language of the property settlement agreement with Richard's "ownership" interest only. The unambiguous language of the agreement does not support this construction.

"Any" is defined as follows:

1. One, a, an, or some; one or more without specification or identification:
2. **whatever or whichever it may be**:
3. **in whatever quantity or number, great or small**; some:
4. **every; all:**

Source: http://dictionary.reference.com/browse/any?s=t; last accessed December 31, 2014 (emphasis added).[1]

Therefore, the language providing that the spouses "mutually agree to make no claim upon any interest owned by the other now or in the future" necessarily includes the beneficial interests of each party in the accounts. If the parties had intended to limit the division of the IRAs to "actual" ownership, they could have imposed such a limitation. Appellee's assertion that Appellant "has failed to present evidence that Richard had other wishes, plans, or intentions for the beneficiary designation on this account", Appellee's Brief, p. 3, ignores the plain language of the settlement agreement

[1] This Court may take judicial notice of the common definition of "any." *See* KRE 201 ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

and further seeks to introduce extrinsic evidence that was not presented or argued by Appellee at the trial court level. Regardless, no consideration of any such "evidence" is permitted under the parol evidence rule. *See* Appellant's Brief, p. 14-15; *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384–85 (Ky. App. 2002) ("Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence").

II. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF *PING V. DENTON* AND OTHER KENTUCKY LAW.

The Court of Appeals incorrectly relied on *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978), in which the insurance policy at issue was not mentioned or adjudicated as part of the dissolution of the marriage. Even Appellee addressed *Ping* by stating: "Nothing in the divorce case made **any provision** for the disposition of the beneficiary interest in the policy." Appellee's Brief, p. 6 (emphasis added). *See Ping*, 562 S.W.2d at 317 ("In the case at bar, there is nothing in the record to indicate that the terms or provisions of the decree of dissolution of marriage ... made any provision for the disposition of the policy of insurance **or** of any interest of the named beneficiary") (emphasis added). *Hughes v. Scholl*, 900 S.W.2d 606 (Ky. 1995), is unpersuasive for similar reasons. The parties in *Hughes* had a property settlement agreement that "did not specifically address the insurance policies." *Id.* at 607. In contrast, here, clear language indicates both Appellee and Appellant waived his or her complete interest in the IRA of the other.

Appellee's attempt to distinguish *Napier v. Jones*, 925 S.W.2d 193 (Ky. App. 1996), is unavailing. There, the Court held: "when a circuit court has decided the issue of ownership of specific property **and made provision for it in the divorce decree, *Ping* is inapplicable.**" *Id.* at 196 (emphasis added). Appellee asserts that *Napier* is

inapplicable because the issue of "actual ownership of the asset was decided but the beneficial ownership of the asset was never addressed . . . ." Appellee's Brief, p. 7. Appellee simply ignores the plain meaning and unambiguous language of the property settlement agreement, and cites no authority for the contention that "any interest" would does not include the "beneficial interest" as a matter of law.

Egelhoff v. Egelhoff, 532 U.S. 141 (2001), is neither controlling nor persuasive. There, the Court held that federal law preempted a Washington statute providing that the "designation of a spouse as the beneficiary of a nonprobate asset . . . is revoked automatically upon divorce." *Id.* at 141. The Court held that the state statute was invalid because it "interferes with nationally uniform plan administration" of those employee retirement plans governed by ERISA. The instant case does not involve ERISA.

Finally, KRS 391.360 is not "controlling" as stated by Appellee. Appellee's Brief, p. 8. The statute merely provides that "[a] written provision for a nonprobate transfer on death in an . . . individual retirement plan . . . is nontestamentary." It does not address or control the issues in the instant case, regarding waiver of all interest in property pursuant to the plain language of a property settlement agreement.

III. PERSUASIVE OUT-OF-STATE AUTHORITY SUPPORTS APPELLANT'S POSITION, INCLUDING THOSE CASES CITED BY APPELLEE.

An examination of the facts of the out-of-state cases cited by Appellee demonstrates that those cases in fact support Appellant's position.

In *MFA Life Ins. Co. v. Kyle*, 630 F.2d 322 (6th Cir. 1980), the Sixth Circuit applied Arkansas law to an interpleader action filed by a life insurance company to determine which party was the proper beneficiary of life insurance proceeds. The Court

held that the former wife, as the named beneficiary, was not divested of her interest in the policy proceeds by the mere fact of divorce "absent a provision to that effect in the property settlement agreement." *Id.* at 323. However, the Court made clear: "Said property settlement agreement made **no reference** to MFA life insurance policy No. L-135307, which had been issued previously to William Kyle . . . ." *Id.* (emphasis added). This is clearly distinguishable from the instant case, in which the property settlement agreement specifically addresses the parties' individual retirement accounts and provides: "The parties mutually agree to make no claim upon any interest owned by the other, now or in the future, in the current accounts and any life insurance, retirement, pension, or annuity program, or contract either may acquire except as otherwise provided in this agreement; and said parties agree that any such interest owned by either party in a life insurance, retirement, pension or annuity program, or contract is and shall remain their separate and individual property, except as otherwise provided in this agreement." *See* Appendix 2 to Appellant's Brief, at para. 5, R.A. 34. *See also Eschler v. Eschler,* 849 P.2d 196, 201 (Mont. 1993) (property settlement agreement did not divest former wife's status as life insurance beneficiary where "no specific mention [was] made in the settlement agreement of any life insurance of either of the parties or beneficiary designations related to life insurance policies") (also cited by Appellee).

In *Rountree v. Frazee*, 209 So.2d 424 (Ala. 1968), the Court held that the ex-wife's beneficiary interest in a life insurance policy was not extinguished by a property settlement agreement. However, there, the estate relied on provisions in the property settlement agreement under which the parties waived their rights "to share in the property or in the estate of the other as a result of the marital relationship, including

dower, thirds, curtesy . . . ." *Id.* at 427. The Court concluded that "the divorce per se did not affect or defeat any of appellee's rights as the designated beneficiary." *Id.* at 426. It then noted that the insurance benefits "as the beneficiary of the policy arise out of a contractual – not a marital—relationship." *Id.* at 427. The property settlement agreement in *Rountree* is distinguishable from the contract at issue the instant case.[2]

In *Cincinnati Life Ins. Co. v. Palmer,* 94 P.3d 729 (Kan. Ct. App. 2004), the Court applied a Kansas statute that required "*any* change in beneficiary on any insurance or annuity policy to be specified in the divorce decree." *Id.* at 733 (emphasis in original). There is no similar statute here; this case presents a straightforward issue of contract interpretation.

Much of Appellee's reliance on out-of-state authority is simply for the proposition that the decree must "clearly show the intention of the parties to divest a former spouse as beneficiary." Appellee's Brief, p. 10. The language at issue here is sufficient to demonstrate the unequivocal intention of the parties to divest each other of any interest in the retirement accounts of the other. Appellee essentially urges the Court to find that the phrase "any interest" cannot include a "beneficial interest" as a matter of law. This is incorrect.

In *Daughtery v. McLamb*, 512 S.E.2d 91 (N.C. App. 1999), cited by Appellee, the Court held that the plaintiff failed to present evidence to show that the decedent ever intended to change his ex-wife as the beneficiary of his life insurance policy. However,

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[2] Moreover, life insurance policies are distinguishable from IRAs in that many life insurance policies do not have a cash value at the time of divorce. Whereas, IRAs necessarily have a present value and are subject to division. Non-cash value life insurance policies are often not disposed of in property settlement agreements, while IRAs most often are. This Court has the opportunity to clarify what specificity of language is needed to ensure property awarded to a spouse in a property settlement agreement remains with said spouse's estate post-mortem.

there, the decree at issue referred only to insurance "arising out of [decedent's] employment with the United States Air Force", it did not specifically refer to "life insurance." *Id.* at 381. Moreover, there was evidence that the decedent and the ex-spouse remained on good terms following the divorce, even continuing to share a joint checking account. *Id.* at 382-83. There are no similar facts here. Here, the reasonable presumption that ex-spouses intend to sever all ties by executing a property settlement agreement was not rebutted at the trial court level. *See* Appellant's Brief, p. 12-16 (citing former Chief Justice Stephens' Dissent in *Hughes*, 900 S.W.2d at 608-09). This Court should decline Appellee's invitation to speculate that Richard could have "chose[n] to leave his ex-wife this gift." Appellee's Brief, p. 16.

In *Estate of Revis v. Revis*, 484 S.E.2d 112 (S.C. App. 1997), also relied upon by Appellee, the Court held that a separation agreement did not relinquish the wife's right to claim the decedent's life insurance proceeds. *Revis* is distinguishable (and in fact consistent with Appellant's position) because of the Court's initial observation: "The property settlement agreement did not specifically mention life insurance." *Id.* at 114. The property settlement agreement contained a general waiver, with no mention of life insurance policies. The agreement here contains a broad general waiver, *see* paragraph 2 of Agreement, Appendix 2; R.A. 34, but also contains the more specific waiver applicable to any interest in the other spouse's retirement accounts. *Id.* at para. 5., R.A. 34. Appellee's conclusion that, "in South Carolina, a general waiver or release is not controlling on the beneficiary designation," is therefore unpersuasive. Appellee's Brief, p. 11.

Kruse v. Todd, 389 S.E.2d 488 (Ga. 1990), further supports Appellant's position. Appellee argues that this case does not support Appellant's position because the Court found that the divorce settlement did not release the ex-spouse's expectancy interest in the decedent's life insurance policy. However, the Court's observation that Kruse's "expectancy interest as a beneficiary of the life insurance policy is not addressed by the language of Paragraph 7 of the settlement agreement" is in fact consistent with and supports Appellant's position. Paragraph 7 of the settlement agreement in *Kruse* provided:

> Any stocks, bonds, ... IRA's or any other monies wherever located presently is [sic] the sole and exclusive property of the designated depositor or named owner or recipient, and the other party shall have no interest therein.

Id. at 490.

The beneficial interest of the life insurance policy was not covered under Paragraph 7 only because the paragraph did not mention life insurance policies, as it did IRA's. The Court concluded that the language ***was*** sufficient to disclaim the beneficiary interest in the decedent's IRA:

> Kruse contends that the terms of the settlement agreement between Dr. Todd and herself do not operate to release her designation as beneficiary of the IRA.
>
> **We disagree.** Paragraph 7 of the 1986 settlement agreement provides that " *[a]ny* ... IRA's ... wherever located presently [are] the sole and exclusive property of the designated depositor or named owner or recipient, and the other party shall have *no interest* therein." (Emphasis supplied.) We find that this language clearly and unambiguously expresses the intent of the parties that Kruse release any interest in any IRA of which Dr. Todd was the designated depositor, named owner, or recipient. We further find that the release is sufficiently broad to include Kruse's **expectancy interest** in Dr. Todd's Merrill Lynch IRA. (We note that it is undisputed that, at the time she entered into the settlement agreement, Kruse was aware of the existence of the Merrill Lynch IRA).

> Accordingly, we hold that the trial court did not err in granting summary judgment to the estate concerning the IRA.

Id. at 493 (internal citations omitted) (some emphasis added).

Therefore, had Paragraph 7 listed "life insurance policies," the Court would have undoubtedly held that the language was sufficient to disclaim the former spouse's beneficial interest in those assets. *Kruse* unequivocally supports Appellant's position.

Finally, Appellee relies on *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976), asserting that it represents a "line of cases from Iowa support[ing]s Barbara's position." Appellee's Brief, p. 15. However, in *Lynch*, the Court noted:

> Finally, we have examined the provisions of the divorce decree to determine if it controlled the rights of Pauline V. Lynch in the accumulated contributions. Specific provisions governed disposition of the real estate, household furniture and fixtures. The final sentence provided 'That each of the parties hereto shall have the title to and possession of their own personal belongings.'
>
> **There is no mention of retirement or death benefits or any language of relinquishment or waiver of statutory right, or rights as designated beneficiary, in any death benefits.**

Id. at 798 (all emphasis added). Therefore, *Lynch* is readily distinguishable from the instant case, in which any interest in each spouse's retirement account was specifically waived.

IV. CONCLUSION

The plain and ordinary meaning of the contract terms employed by the parties compels the result urged by Appellant. It is clear that the parties intended to sever all ties upon divorce. Barbara should not be relieved of the terms of the contract she executed simply because no change of beneficiary form was executed by Richard. The intention of the parties is clear: at the time of the divorce, Barbara did not intend or

expect to receive any interest or make any claim, including any interest or claim ***in the future*** with respect to Richard's IRA. Likewise, Richard received no interest in Barbara's IRA. Barbara would therefore receive a windfall if she receives the proceeds as beneficiary of the IRA. The Court should not sanction this result.

For the foregoing reasons, the Court of Appeals' decision affirming the trial court must be reversed.

Respectfully submitted,

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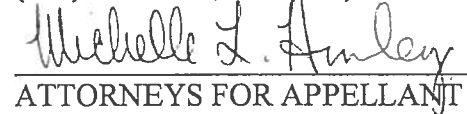

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