COMMONWELATH 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.: 2013-CA-001157
FAYETTE CIRCUIT COURT CASE NO.: ~~12-CI-00040~~ 96-CI-02799

BARBARA LOIS VAN BUSKIRK — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a true and accurate copy of this Brief for Appellee 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; Thomas W. Miller, Esq., Greg A. Hunter, Esq., Michelle L. Hurley, Esq., Anna L. Dominick, Esq., 271 W. Short Street, Suite 600, Lexington, Kentucky 40507, Attorneys for Appellant, Ruth Ann Sadler; on this the 22nd day of December, 2014.

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INTRODUCTION

Appellee, Barbara Lois Van Burskirk was the named beneficiary on her ex-husband's Individual Retirement Account (IRA) at the time of his death. The beneficiary interests in the IRA accounts owned by the Appellee and her ex-husband were not addressed by their property settlement agreement or by their divorce decree. Both the trial court and the Court of Appeals correctly determined that Appellee has the right to receive the ownership interest in the IRA account for which she was named beneficiary. Further, the statutory provisions of KRS 391.360 are applicable and controlling.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee supports the appellate court's ruling, including its interpretation of case law. Oral argument would be helpful to this Honorable Court in its consideration of the law. Appellee requests that arguments be scheduled.

COUNTER STATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE

Appellee, Barbara Lois Van Buskirk (hereinafter "Barbara") was married to Richard Van Buskirk (hereinafter "Richard") for 36 years, from 1961 to 1997. Upon Richard's death in 2011, Barbara was the designated beneficiary on his Dreyfus IRA account. The Administratrix of his estate, his second wife, Ruth Ann Sadler, Appellant herein, petitioned the court in which the divorce was prosecuted for an order declaring that Barbara had no rights to the Dreyfus IRA based upon the terms of the property settlement agreement entered into pursuant to the divorce. The trial court and the Court of Appeals ruled that Barbara has a right to receive the beneficial interest in the Dreyfus account as designated by her ex-husband, the account owner. This comports with the holdings of *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978) and *Hughes v. Scholl*, 900 S.W.2d 606 (Ky. 1995). This outcome is also supported by applicable statutes.

The trial court cites the holding in *Ping*, as the "dissolution of marriage does not terminate an ex-spouse's ability to recover as a beneficiary under an insurance policy." The court went on to say:

> "It is undisputed that the property interest in the Dreyfus account belongs to [Richard]. However, both the separation agreement and the decree are silent with respect to the beneficiary interest in the account. The Kentucky Supreme Court clarified in *Hughes v. Scholl*, 900 S.W.2d 606 (Ky. 1995) that if parties wish to terminate an ex-spouse's beneficiary expectancy, they must do so explicitly. Specifically, the Court [in *Hughes*] stated: "The divestiture language should be clear and unambiguous. 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.* at 608.

"In the present case, just as in *Ping* and *Hughes*, [Richard] retained ownership of the Dreyfus account after the divorce was finalized, and he chose not to remove [Barbara] as the beneficiary of the account. Thus [Barbara] has the right to receive her beneficiary interest in the Dreyfus account." (Appellant's Brief, Appendix 5).

The Court of Appeals affirmed the judgment, finding that Barbara's status as beneficiary of the IRA was not compromised by the terms of the property settlement agreement. The property agreement remained silent as to the beneficial interest. Thus, the Court of Appeals followed the case law cited herein to determine that Barbara should prevail. (Appellant's Brief, Appendix 1). This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

Appellee agrees with Appellant's assertion that the review of a property settlement agreement is a matter of contract interpretation. Terms of an agreement are enforceable as contract terms. KRS 403.180 (5).

However, the property settlement agreement entered into between Richard and Barbara was silent as to the beneficiary designation of the Dreyfus IRA; thus, it was not assigned. The property settlement agreement contains no relevant contract term for the Administratrix to enforce.

This case presents a matter of law, and thus, is to be reviewed *de novo*. *Fletcher v. Graham*, 192 S.W.3d 350, 356 (Ky. 2006).

II. THE COURT OF APPEALS RULING CORRECTLY DETERMINED THAT THE PROPERTY SETTLEMENT AGREEMENT WAS SILENT AS TO THE BENEFICIARY INTERESTS AND THAT THE PROPERTY SETTLEMENT AGREEMENT THEREFORE WAS NOT DISPOSITIVE.

The marital property of Barbara and Richard was assigned and divided as required by KRS 403.190. According to paragraph 5 of their Property Settlement Agreement, "Husband and Wife each have in his/her own name one or more Individual Retirement Account(s). The parties mutually agree to make no claim upon any interest owned by the other now or in the future, in the current accounts..." Further, in the same paragraph, "parties agree that any such interest owned by either party. . . shall remain their separate and individual property." (Appellant's Brief, Appendix 2, Exhibit B).

Barbara made no claim on Richard's IRA account. Richard owned the account and at all times had the right to exercise all of his ownership interests, including withdrawing any or all of the monies in this account and altering the beneficiary designation as often as he wished to do so. Richard designated Barbara as the beneficiary of this account and had filed all paperwork with Dreyfus necessary to carry out this designation. During the period of time between his divorce in 1997 and his death in 2011, a time span of 14 years, he had the right to change his beneficiary designation and failed to do so. He also at all times during his lifetime had the right to withdraw the monies from this account. His actions and omissions indicate that he wished Barbara to be the ultimate owner. Appellant has failed to present evidence that Richard had other wishes, plans, or intentions for the beneficiary designation on this account.

Barbara's and Richard's property settlement agreement never mentioned the beneficiary interest of either of their IRA accounts. At all times after their divorce, Richard maintained sole custody of his IRA account. He was free to exercise all privileges of such ownership including changing his designated beneficiary. Richard never chose to do this in the 14 years after his divorce.

Appellant asserts that Barbara is claiming an interest in Richard's property in violation of her general waiver contained in paragraph 2 of the property settlement agreement, which states in relevant part: "Wife does hereby waive, release, and relinquish unto Husband, his heirs and assigns forever, all of her right, title, and interest in and to all property now owned or hereafter acquired by Husband." The agreement further stated "the parties mutually agree to make no claim upon any interest owned by the other, now or in the future." Barbara has not done so. The beneficiary interest was controlled by the decedent. He could have done anything he wanted to with it. This assertion is not applicable to the facts at hand as Barbara is not claiming an ownership interest in the account, she was the named beneficiary of the account and asserts that a beneficial interest in the account was granted to her by Richard who at all times had control over the account during his lifetime. During Richard's lifetime, she had no legal right of ownership in the IRA, no title in the IRA and, no interest or access to the IRA account. She had no ability to demand that Richard make her a beneficiary of the IRA or that he change the beneficiary of the IRA.

Under Kentucky law a "waiver" is a voluntary and intentional surrender or relinquishment of a known right or an election to forego an advantage which the party at his option, might have demanded or insisted upon." *Weinberg v. Gharas*, 338 S.W.3d 307, 312 (Ky. App. 2011).

The Court of Appeals distinguished beneficial interest and ownership interest. The Appellant faults the lower court for only citing Black's Law Dictionary. The Kentucky Supreme Court, itself, has stated that definitions in Black's Law Dictionary are "an appropriate source" *Smith v. Higgins*, 819 S.W.2d 710, 711 (Ky. 1991). Additionally, the Court of Appeals described in detail the differences between ownership interest and beneficial interest as applied to the facts of the instant case. The lower court determined Barbara never claimed to act as an owner of the IRA. At all times Richard maintained ownership authority. He, as the owner, designated Barbara to receive the beneficial interest.

The facts of this case do not indicate that the parties to the property settlement agreement voluntarily or intentionally surrendered their beneficiary interests. The settlement agreement made no mention of the beneficiary interests, inferring therefore, that the beneficiary interest in the IRA was not an advantage that either Barbara or Richard demanded or insisted upon. The determination of the beneficial interest is in fact controlled by statute. KRS 391.360. "KRS 391.360 validates as non-testamentary certain other written instruments, such as insurance policies and pension plans, providing for the disposition of property upon the owner's death." *Spencer v. Estate of Spencer,* 313 S.W.3d 534,542 (Ky. 2010).

III. THE APPELLATE COURT CORRECTLY HELD THAT BARBARA HAS A RIGHT TO RECEIVE THE BENEFICIARY INTEREST OF THE IRA ACCOUNT WHERE SHE WAS THE BENEFICIARY DESIGNATED BY THE ACCOUNT OWNER.

The appellate court based its ruling on *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978). There an ex-wife was named the beneficiary on her ex-husband's life insurance policy. When he died, she was awarded the proceeds of the policy. The court noted several factors that lead it to uphold the beneficiary interest of the ex- spouse. Nothing in the divorce case made any provision for the disposition of the beneficiary interest in the policy. The ex-husband had originally named his then wife as his beneficiary. He at all times during their marriage maintained his then wife as his beneficiary and he failed or determined not to remove her as beneficiary after the divorce. The ex-husband at all times owned and controlled the policy and had a right to change the beneficiary. Having not done so, his ex-wife was entitled to receive the proceeds. Except for the type of account in question, this case squarely meets the fact situation found in *Ping*.

The decision in *Ping* is further supported by *Hughes v. Scholl*, 900 S.W.2d 606 (Ky. 1995). There the parties' divorce decree made no provision of the wife's beneficiary expectancy. That court upheld *Ping* and found that the owner of the policy had the right to remove a former spouse, but not having chosen to do so, the court was not going to presume he had intended to do so.

The court further noted that the General Assembly has not seen fit to divest former spouses of beneficiary interests, though it has seen fit to divest ex-spouses' interests taken under a last will and testament. KRS 394.092. Because divestment of

beneficial interest is not provided for by statute, the parties divorce decree must set forth the ownership interest.

Appellant argues that *Napier v. Jones*, 925 S.W.2d 193 (Ky. App. 1996), has clarified *Ping* and necessitates a different outcome here. The facts of that case are not analogous with *Ping* at all. In *Napier* the issue was whether a court could override a joint tenancy with right of survivorship designation after the death of an owner who was specifically awarded the account in a decree of dissolution. There are two distinctions between the two cases in Appellee's opinion. In the first place, in *Napier*, both parties owned the asset prior to the dissolution action and in the second place, the surviving spouse had her interest specifically divested by the decree. The court even stated in its opinion that "when a circuit court **has decided the issue of ownership of specific property** and **made provision for it in the divorce decree**. . . " the outcome is not governed by *Ping*. *Id.* at 196 (emphasis added). In *Ping* and in the case here, the issue of **actual ownership** of the asset was decided but the **beneficial** ownership of the asset was never addressed and there was **no** provision for its disposition in the divorce decree. In fact, the beneficial interest in an asset only attaches after the death of the owner. The named beneficiary has only an expectancy which can be divested by the action of the actual owner of the asset at any time during his life.

The Supreme Court of Kentucky previously stated in *Hughes*, that while bequests of property made to a spouse in a will are automatically revoked as is the beneficiary statues of a state employee's retirement annuity, both those rules arise from "explicit statutes" enacted by the Kentucky General Assembly. *Hughes* at 607. The Court further stated, "Although it is so empowered, our legislature has not seen fit to specify what effect divorce has on the designation of a former spouse as an insurance policy

beneficiary." Likewise, no statute on record automatically revokes the beneficiary designation on the IRA at issue. *Hughes* at 607.

The trial court's decision to uphold the beneficiary designation is further supported by *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). In *Eglehoff*, the decedent had left his ex-spouse as the named beneficiary on both a life insurance policy and a pension plan. The U.S. Supreme Court upheld the designations as required by the Employee Retirement Income Security Act of 1974 (ERISA). Additionally, the Court specifically refused the prospect that state law could be used to award the property to a person other than the named beneficiary (required by ERISA). Though the Dreyfus IRA is not covered by ERISA, the case offers further support of the notion that beneficiary designations should be followed. Account managers have a right to rely on actions taken by the account owners in distributing beneficiary interests (here, Richard's designation of Barbara).

Further, the IRA is a non-probate asset. Thus, KRS 391.360 is applicable and controlling. The statute addresses transfers upon death including those of individual retirement plans, or other written instruments of a similar nature. The statute classifies these as non-probate transfers and provides for their disposition upon the owner's death. *Spencer v. Estate of Spencer,* 313 S.W.3d 534, 542 (Ky. 2010). Specifically, non-probate assets, including individual retirement plans, "owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates." KRS 391.360(1)(a). Under the laws of Kentucky, these non-testamentary transfers are treated the same as payable on death accounts, as set forth in KRS 391.300 et seq. Had the IRA had been a probate asset, KRS 394.092 would have prevented the proceeds from passing to Barbara.

Because an IRA is a non-probate asset, an agreement resulting from the parties to a divorce has no effect on the written instrument naming a beneficiary for an IRA, unless the agreement specifically extinguished the beneficiary's right to receive the property upon the death of the owner of the account. Here Barbara and Richard did not include the beneficiary designation to the IRA as part of their settlement agreement. Therefore, the IRA's rightful beneficiary is Barbara.

The Court in *Hughes* emphasizes that the Kentucky General Assembly has not directly addressed this situation. *Hughes* at 607. The Court further stated, "Unless and until the Kentucky General Assembly legislates a different result, we hold that the rights of an insurance policy beneficiary, including the right to receive the policy's proceeds upon the insured's death, are not affected by the mere fact of a divorce between the beneficiary and the insured."

IV. THE COURT OF APPEALS CORRECTLY RELIED UPON KENTUCKY LAW AND NOT OUT-OF-STATE CASE LAW PRESENTED BY THE APPELLANT; OTHER PERSUASIVE OUT-OF-STATE AUTHORITY SUPPORTS BARBARA'S POSITION

Multiple jurisdictions have ruled that the beneficiary designation is not affected unless the divorce decree explicitly disposes of the beneficiary designation. In fact, a majority of the states uphold the terms of an insurance contract and do not change the ex-spouse's beneficiary status even after the divorce, if the ex-spouse is listed as the beneficiary. See Raymond, Kristen. *Double Trouble- An Ex-Spouse's Life Insurance Beneficiary Status and State Automatic Revocation Upon Divorce Statutes: Who Gets*

What? 19 Conn. Ins. L.J. 399 (2013).[1] A brief discussion of out-of-state case law that supports this majority position follows.

An Illinois court ruled that only if a property settlement agreement specifically includes a termination of the beneficiary's interest will the right to the proceeds of a policy on the life of the spouse be affected, unless the policy itself or a statute provides otherwise. *Allen v. Allen*, 589 N.E.2d 1133, 226 Ill.App.3d 576, 168 Ill.Dec. 733 (Ill.App. 2 Dist. 1992) citing *O'Toole v. Central Laborers' Pension & Welfare Funds* (1973), 12 Ill.App.3d 995, 997, 299 N.E.2d 392. Similarly, North Carolina holds that the divorce decree must clearly show the intention of the parties to divest a former spouse as beneficiary. *Daughtry v. McLamb*, 512 S.E.2d 91, 132 N.C. App.380, 382 (1999). See also *Tobacco Group Ltd. v. Trust Co.*, 171 S.E.2d 807, 810, 7 N.C. App 202 (1970). Further, in *Cincinnati Life Ins. Co. v. Palmer*, 94 P.3d at 729, the Kansas court held that the divorce decree did not affect the beneficiary designation because the decree did not contain an express change of beneficiary provision. The court held that because this specific directive was not in the degree, the decree did not affect the beneficiary designation.

South Carolina also holds that divorce alone does not affect or defeat one spouse's rights as a designated beneficiary, absent a change in the designation of the

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[1] Jurisdictions that follow this rule include: Arkansas, District of Columbia, Alabama, Illinois, Indiana, Iowa, Kansas, Massachusetts, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, and Wisconsin. See, e.g., *MFA Life Ins. Co. v. Kyle*, 630 F.2d 322, 323 (6th Cir. 1980) (applying Arkansas law); *Estate of Bowden v. Aldridge*, 595 A.2d 396, 397-98 (D.C. 1991); *Rountree v. Frazee*, 209 So. 2d 424, 426 (Ala. 1968); *Allen v. Allen*, 589 N.E.2d 1133, 1137 (Ill. App. Ct. 1992); *Hancock v. Ky. Cent. Life Ins. Co.*, 527 N.E.2d 720, 723 (Ind. Ct. App. 1988); *Sorensen v. Nelson*, 342 N.W.2d 477, 479 (Iowa 1984); *Cincinnati Life Ins. Co. v. Palmer*, 94 P.3d 729, 733 (Kan. Ct. App. 2004); *Stiles v. Stiles*, 487 N.E.2d 874, 875 (Mass. App. Ct. 1986); *Eschler v. Eschler*, 849 P.2d 196, 201 (Mont. 1993); *Dubois v. Smith*, 599 A.2d 493, 497 (N.H. 1991); *Harris v. Harris*, 493 P.2d 407, 409 (N.M. 1972); *Daughtry v. McLamb*, 512 S.E.2d 91, 92 (N.C. Ct. App. 1999); *Estate of Revis v. Revis*, 484 S.E.2d 112, 116 (S.C. Ct. App. 1997); *Bersch v. Van Kleeck*, 334 N.W.2d 114, 116 (Wis. 1983).

beneficiary or a provision in the life insurance contract providing for the ineligibility of the beneficiary if the couple is not married at the time of death. *Estate of Revis v. Revis*, 484 S.E.2d 112, 326 S.C. 470, 477 (S.C. Ct. App. 1997) citing *Duncan v. Investors Diversified Servs. Inc.*, 285 S.C. 467, 470, 330 S.E.2d 295, 296 (1985) ("Generally, and by analogy, with respect to an ordinary life insurance policy, it is an elementary principle of law that if a policy is validly issued, then, in the absence of a contrary provision in the policy, a contrary statute, or a contrary insurance regulation, the rights of the beneficiary are not affected even though the beneficiary ceases to have an insurable interest in the life of the insured."). An insured's designation of the beneficiary of his or her life insurance policy is a contractual matter between the insured and the insurer. *Id.* at 470. The South Carolina court stated that during "the lifetime of the insured the named beneficiary has no vested property right in a life insurance contract, but merely an expectancy, where a right to change the beneficiary has been reserved to the insured in the policy. Complete control of the policy remains with the insured." Thus, in South Carolina, a general waiver or release is not controlling on the beneficiary designation. However, that court found that the expectancy of a beneficiary interest could be contracted away. Here, in the case at hand, the settlement agreement of the Van Buskirks was silent on the issue of beneficiary designations.

Appellant relies upon several cases from other states and jurisdictions; several of these cases rely upon certain phrases in divorce decrees that is not present in the case at hand. See *Kruse v. Todd*, 389 S.E.2d 488, 20 GA 63 (Ga. 1990). In *Kruse,* the Court found that the divorce settlement covered the beneficiary designation of the IRA because it awarded each spouse their individual IRA and stated that the former spouse "shall have no interest therein." *Id.* at 69-70. The Van Buskirk's divorce settlement is

not phrased in such a fashion. Here, the property settlement decree in paragraph 5, which addresses insurance and retirement specifically, states: 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... and said parties agree that any such interest owned by the other party in a life insurance, retirement, pension, or annuity program, or contract is and shall remain their separate and individual property.

Further, the *Kruse* court found that the divorce settlement was not specific enough to include the beneficiary designation of the insurance policy. The court stated, "we find that the agreement expresses no intent that Kruse release her expectancy interest as a beneficiary of Dr. Todd's life insurance policy. First, 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. [2]" *Id.* at 67 (emphasis added). While the settlement agreement contained a general waiver[3] of actions, suits, claims, and obligation from one another (and from their estates), the court found that this general waiver of claims did not extend to the beneficiary designation on the life insurance

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[2] Paragraph 7 of the Settlement Agreement states, in relevant part: "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." *Kruse*, 20 Ga. at 65.

[3] Paragraph 17 of the Settlement Agreement states: "Except as otherwise expressly provided, the parties shall and do mutually remise, release, and forever discharge each other from any and all actions, suits, claims, demands, and obligations whatsoever, both in law and in equity, which each of them ever had, now has, or may hereafter have against the other upon or by reason of any matter, cause, or thing up to the date of the execution of this Agreement." *Id.*

Paragraph 18 of the Settlement Agreement states, in pertinent part: "Except for those rights and claims for which this Agreement provides, ... and except for the provisions of any valid Last Will and Testament of the other, each party hereby waives and releases his or her respective rights and claims against the other or the estate of the other including, but not limited to, alimony, division of property, curtesy, year's support, and any rights or claims he or she may have against the other or the estate of the other by reason of the marriage of the parties." *Id.* at 65-66.

policy. Additionally, the court ruled that the general waiver of rights and claims to the estate of the ex-spouse, did not defeat the beneficiary designation of the ex-wife on the life insurance. *Id.* at 67.

Appellant cites another Georgia case, *DeRyke v. Teets,* 702, S.E.2d 205 (Ga. 2010), which contains language in the divorce settlement that differs greatly from the instant case. In *DeRyke,* the divorce settlement stated: "Each Party expressly waives all of his or her right, title, and interest in and to any pension, profit sharing, or employee benefits plans of the other Party. This provision expressly includes 401(k)s, retirement plans, pension plans, and profit-sharing plans. This provision shall not prohibit a Party from voluntarily providing benefits from his or her plan to the other Party at any subsequent date. Pension, profit sharing, and employee benefit plans are defined to exclude any and all Social Security or other governmental benefits the Parties may be entitled to by virtue of marriage." Again, this language is not comparable to that found in the Van Buskirk's agreement.

In *Larsen v. Northwestern National Life Ins. Co.,* 463 N.W.2d 777 (Minn. App. 1991), which is cited by the Appellant, relies on the rationale that "where an insured has clearly and unambiguously demonstrated an intent to change the beneficiary on a life insurance policy, this intent should be given effect unless prejudice to the insurer would result." That appellate court considered the Minnesota Supreme Court "two-part test to determine whether there has been effective change of beneficiary: (1) whether there was intent to change the beneficiary by the insured; and (2) whether the insured acted affirmatively or otherwise did substantially all possible to show intention whether or not she complied with policy change of beneficiary provisions." *Brown v. Agin,* 260 Minn. 104, 106, 109 N.W.2d 147, 151 (1961). In the case at hand, Appellant cannot show that

Richard had other intentions for his beneficiary designation. In fact, it appears quite the opposite, as he left Barbara as the beneficiary for over 14 years. Additionally, in *Larsen*, the husband died less than two months after the divorce decree was entered, unlike Richard who had almost a decade-and-a-half to effectuate any desired change.

Further in *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976), the ex-spouse, who was the named beneficiary, was awarded the beneficiary interest because the dissolution decree made no mention of the death benefits payable and therefore did not control the contingent interest of the ex-spouse. Likewise, Richard and Barbara's divorce settlement made no mention of contingent beneficiary designations. Appellant argues that *Lynch* is dissimilar to the Van Buskirk's situation and argues that *Sorensen v. Nelson*, 342 N.W.2d 477 (Iowa 1984) is applicable. In *Sorensen*, the Iowa court ruled, "When the divorce or dissolution proceedings do not expressly deal with the insurance interests, the general rule is that: [t]he wife may, upon divorce, contract away any rights in insurance on her husband's life in which she is named as the beneficiary. General expressions or clauses in a property settlement agreement between a husband and wife, however, are not to be construed as including an assignment or renunciation of expectancies, and the beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take under an insurance contract of the other, and while the failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, each case must be decided upon its own facts." *Sorensen* at 479-89, citing 4 Couch, Couch Cyclopedia of Insurance Law § 27:114 (R. Anderson 2d ed. 1960).

This line of cases from Iowa supports Barbara's position because, again, the settlement agreement in question did not address the beneficiary designations.

CONCLUSION

This court should uphold the appellate court's decision to award the proceeds of Richard's IRA to Barbara. Beneficial interests and ownership interests are distinct and separable interests. A general waiver of the rights and interests in **actual ownership** of an asset does not waive the rights and interests in the **beneficial** interests in that asset. Kentucky case law, while not directly addressing beneficiary designations in retirement assets, has supported the distinction between actual ownership and beneficial interest in other assets transferred by beneficiary designation – insurance policies. In both insurance policies and retirement accounts, the actual owners have full power and control over the asset and, during their lifetime, can liquidate the asset or change the named beneficiary.

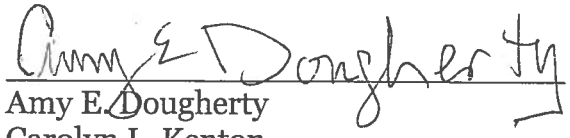
A beneficiary designation is a contractual relationship between the actual owner and the custodian of the asset. Contrary to Appellant's assertion, this designation is more (and more important) then just "an internal document between" the actual owner and the company holding the account. These companies should have certainty as to the beneficiary of these assets when the actual owner dies. It is important to the efficient operation of their business that they follow the beneficiary designation filed in their records rather than in each case, having to seek out the identity of the beneficial owner. Their ability to rely on the validity of this beneficiary designation provides certainty and economy in their administration of these accounts. This is mirrored in United States

Supreme Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), which requires that the retirement asset be awarded to the named beneficiary.

If the General Assembly wishes to provide certainty to the post death administration of these accounts, it can enact legislation controlling their disposition similar to the provisions it has enacted regarding wills in KRS 394.092 and state retirement pensions in KRS 61.542(c)(1).

Finally, there is no way to discern Richard's testamentary intent in regards to the recipient of the IRA account. Certainly he could have named anyone he chose as the beneficiary. There is nothing in the law which requires him to leave the account to his current wife. One could infer from his failure to change the beneficiary designation after being divorced for 14 years that he chose to leave his ex-wife this gift. Thus, the Court of Appeals should be affirmed.

Respectfully Submitted,



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