Cite as 2022 Ark. App. 158

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-21-198

	Opinion Delivered April 6, 2022
TERESA JAMES APPELLANT V. MARY CYNTHIA MOUNTS; JAMES PHILLIP ROCCONI; AND RICHARD ANTHONY ROCCONI, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES R. ROCCONI, DECEASED APPELLEES	APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT [NO. 52CV-18-154] HONORABLE DAVID F. GUTHRIE, JUDGE REVERSED

MIKE MURPHY, Judge

The appellant, Teresa James, appeals the decision of the Ouachita County Circuit Court awarding the death benefits of a life insurance policy owned by her ex-husband, James Rocconi, to his children, instead of to her. She was the named beneficiary on the policy, but the circuit court found that James had effectively changed the beneficiary designation. On appeal, she argues this finding was in error. We agree with the appellant and reverse.

Our standard of review on appeal from a bench trial is whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Found. Telecomms., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 238, 16 S.W.3d 531, 536 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court,

having considered all the evidence, is left with a firm conviction that an error has been committed. *Mauldin v. Snowden*, 2011 Ark. App. 630, at 2, 386 S.W.3d 560, 562.

We determine the rights of designated beneficiaries in life insurance policies in accordance with contractual law, with some exceptions. *Allen v. First Nat'l Bank of Fort Smith*, 261 Ark. 230, 235, 547 S.W.2d 118, 120 (1977). When a life insurance policy reserves to the insured the right to change the beneficiary but specifies how the change may be made, the change must be made in the manner and mode prescribed by the policy. *Nunnenman v. Est. of Grubbs*, 2010 Ark. App. 75, at 3–4, 374 S.W.3d 75, 78. One exception is that an insured may change the beneficiary in a will or a divorce decree, but to do so, the language in the will or decree must be sufficient to identify the insurance policy and explicit in its intent to change the beneficiary. *Id.*; *see also Kent v. USAble Life*, 84 Ark. App. 359, 361, 141 S.W.3d 895, 896. The supreme court has also held that substantial compliance with an insurance policy's provisions regarding changing beneficiaries may also be acceptable. *Tibbels v. Tibbels*, 232 Ark. 857, 859, 340 S.W.2d 590, 592 (1960) ("[I]f the insured has done everything reasonably possible to effect a change in beneficiary, a court of equity will decree that to be done which ought to be done.").

When a contract is free of ambiguity, its construction and legal effect are questions of law for the court to determine. *Tri-Eagle Enters. v. Regions Bank*, 2010 Ark. App. 64, 373 S.W.3d 399. A trial court's conclusions of law are reviewed de novo on appeal. *Hickman v. Courtney*, 361 Ark. 5, 9, 203 S.W.3d 632, 635 (2005).

With these rules in mind, we now turn to the undisputed facts of this case.

Around September 2005, James Rocconi applied for $300,000 in term life insurance with Allianz Life Insurance Company of North America. James designated himself as the owner and his then-spouse, Teresa, as the beneficiary. Teresa filed for divorce on September 8, 2016. The following day, James changed his last will and testament to reflect that Teresa should not receive any share of his estate, and it should pass to his three children.

On October 17, 2016, James called Allianz requesting information to change the beneficiary designation on his policy. Allianz faxed James a form to change the policy designation, and that form was faxed back to Allianz that same day. The form was not completely filled out. Two days later, Allianz mailed James a letter stating that it had received his request to change the beneficiary, but the form was neither signed nor dated, and he needed to submit a signed form. James never resubmitted the form.

James and Teresa were divorced by decree of the Ouachita County Circuit Court on April 18, 2017. James passed away that following November. Allianz notified Teresa that she was the named beneficiary, and she submitted the paperwork to receive payment. James's children, the appellees, brought this suit before Allianz made payment, seeking declaratory judgment as to who was entitled to the funds. Allianz tendered the life insurance proceeds into the court's registry and was dismissed from the action.

A bench trial was heard on the matter on December 14, 2020. The appellees argued that James had substantially complied with Allianz's requirement of providing notice to change the beneficiary designation. They alternatively argued that the policy language is ambiguous and "should be construed in favor of the insured, James R Rocconi, to effect the change." Recordings of phone calls made by James to Allianz were introduced. In the

first call, he asked how he could remove Teresa as a beneficiary. The Allianz representative faxed him a form. In the second call, James asked for his policy number so that he could write it on the form. James then faxed the form back to Allianz. The court also heard testimony from people close to James, including his attorney, two employees, and two of his children. The court issued an opinion on January 4, 2021.[1]

In that opinion, in addition to the above-recited facts, it found that:

> 19. The Court finds that James R. Rocconi did everything reasonably required to effect a change in beneficiary under the policy.
>
> . . . .
>
> 28. The life insurance policy. . . language is ambiguous and susceptible to more than one reasonable interpretation as to whether the notice to change beneficiary designation must be signed by the insured and dated in order to be effective.
>
> 29. The Allianz form "Request to Transfer Ownership and/ or Change Beneficiaries" is ambiguous and susceptible to more than one reasonable interpretation as to whether the form must be signed and dated for the designation of fewer than 4 beneficiaries. . . .
>
> 30. Because the Allianz change of beneficiary form language is ambiguous, the language is construed liberally in favor of the insured and strictly against the insurer.

[1]The court issued a letter opinion on December 22, 2020, and directed appellees' counsel to prepare an order reflecting that opinion. The following day, the appellant moved pursuant to Arkansas Rule of Civil Procedure 52(a)(1) for findings of fact and conclusions of law. A final order with findings of fact and conclusions of law was entered January 4, 2021. One of the points on appeal made by the appellant is that the court did not enter an order satisfying her Rule 52 motion. She contends that she did not have the opportunity to object to the order prepared by the appellees. Her argument is misplaced. The purpose of Rule 52 is not to provide opportunity to object; instead, it provides a vehicle for a movant to request certain issues to be addressed in an order. The court entered an order satisfying the Rule 52 motion on January 4. To the extent the appellant was concerned about preserving arguments for appeal, in a civil bench trial, a party may challenge the sufficiency of the evidence for the first time on appeal. *Bohannon v. Robinson*, 2014 Ark. 458, 447 S.W.3d 585.

31. Because the Allianz policy language is ambiguous, the language is construed liberally in favor of the insured and strictly against the insurer.

32. James R. Rocconi substantially complied with the policy requirements for changing a beneficiary designation.

33. The October 17, 2016 request sent by James R. Rocconi to change the beneficiary designations was effective to change the beneficiary under the policy to Mary Cynthia Mounts, James Phillip Rocconi, and Richard Anthony Rocconi.

It is a well-settled rule that the intention of the parties to a contract is to be gathered, not from particular words and phrases, but from the whole context of the agreement. *Roberts Contr. Co., Inc. v. Valentine-Wooten Rd. Pub. Facility Bd.*, 2009 Ark. App. 437, 320 S.W.3d 1. The court is to give great weight to the construction of the contract given to it by the parties, and it may look to the conduct of the parties to determine their intent. *Id.* When a contract is free of ambiguity, its construction and legal effect are questions of law for the court to determine. *Id.* Language is ambiguous if there is doubt or uncertainty as to its meaning, and it is fairly susceptible to more than one equally reasonable interpretation. *Id.* Whether ambiguity exists is ordinarily a question of law for courts to resolve. *Id.*

The life insurance policy provides the following regarding a change of beneficiary:

> You may change the named Beneficiary by sending Notice. The change will not be effective until we record it at our home office. Even if the insured is not living when we record the change, the change will take effect retroactively as of the date it was signed.

Notice is defined as "[Allianz's] receipt of a satisfactory written request."

The form that Allianz sent James when he requested a change of a beneficiary had the following information under section 3, beneficiary designation:

Complete this section to add or change beneficiaries.

- Percentages must total 100%

- If you have more than 4 beneficiaries, please list them on a separate sheet, **signed and dated by you.**

- If you do not indicate the % you would like each beneficiary to receive, the surviving beneficiaries will share equally.

(Emphasis in original.)

The next page had places to write the information for up to four beneficiaries. Following the space to write the information of a fourth beneficiary (if applicable) was the following statement:

> As the authorized signer, please sign your name and date below in the appropriate space. If you do not sign and date this page, we will not be able to process your request.
>
> Changes will take affect based on the guidelines in your contract. Allianz is not liable for any requested changes we make to your contract before this effective date.

Directly under that was a space, in bold, designating a place for the current owner to sign and date the form.

Both the policy and the change form contemplate signatures and dates in order to change a beneficiary. Neither document is ambiguous in that regard. The change form explicitly provides that if it is not signed and dated, the request will not be processed.

The appellees contend the policy provisions regarding changing beneficiaries is ambiguous. They cite *McGrew v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, 371 Ark. 567, 570–71, 268 S.W.3d 890, 894–95 (2007), for the proposition that when policy language is susceptible to more than one interpretation, we must construe the policy liberally in favor of the insured and strictly against the insurer. And while this is a true recitation of

our review in those circumstances, neither the insured nor the insurer are parties to this immediate litigation: James Rocconi is deceased; Allianz never disputed its obligation to pay.

Under contract principles, James did not effectively change the beneficiaries in his life insurance policy. Accordingly, we must determine if any exceptions apply. The policy was not mentioned with specificity in either the divorce decree between Teresa and James or James's will. The circuit court found that James's attempt to change his life insurance beneficiary designation substantially complied with the policy requirements, similar to the facts in *Tibbels v. Tibbels*, 232 Ark. 857, 859, 340 S.W.2d 590, 592 (1960). Teresa argues this finding was not supported by the evidence.

In *Tibbels*, the divorced wife of the insured and the mother of the insured both claimed entitlement to the proceeds of a life insurance policy. That policy provided the following:

> Section 13. CHANGE OF BENEFICIARY.—Any Employee insured hereunder may, from time to time, change the Beneficiary designated in his certificate by filing written notice thereof with the Insurance Company accompanied by the certificate of such Employee. Such change shall take effect upon endorsement thereof by the Insurance Company on such certificate and unless the certificate is so endorsed, the change shall not take effect.

232 Ark. at 857–58, 340 S.W.2d at 59.

At issue was a letter written by the insured to the insurance company. That letter, dated a year before his death (but mailed the same day he died), stated the following:

> Dear Sir
>
> As my wife and I are divorced I would like to have my beneficiary changed to my mother

Mrs. Chas. D. Tibbels 508 Gibson

West Memphis Ark——

Thanks

John W. Tibbels

As in the case before us now, the insurance company responded to the letter and stated it was unable to act upon the insured's request because it needed additional information. The parties made competing claims to the proceeds, and the chancery court entered a decree in favor of the appellee. The issue on appeal was whether the chancery court erred in finding that the insured's letter to the insurance company sufficiently complied with the provisions of the policy to change his beneficiary.

The supreme court affirmed, noting that the insured had mailed his written notice to the company as required by the policy, and while the insured could have included his certificate with his written request, his failure to do so was not fatal. It noted that there was no showing that the insured realized the necessity of sending the policy. The court concluded that, under these specific circumstances, there was substantial compliance with the policy provisions.

The appellees contend that the facts in this case are like those *Tibbels*. They assert that James was unaware that his signature or the date thereof was required to change the policy and that the phone call and the faxed change form (albeit unsigned) were substantially compliant.

The appellant, however, argues that the facts in this case are more like those in *Allen*, *supra*. In *Allen*, after a divorce, the insured executed a document titled "Change of

Beneficiary" and left it at his lawyer's office. The document was never transmitted to the insurance company, and the insured died approximately three years later. That policy provided that

> [a]ny Insured who has not made an irrevocable designation of beneficiary may designate a new beneficiary at anytime, without the consent of the beneficiary, by filing with the American Geriatrics Society a written request for such change, but such change shall become effective only upon receipt of such request at the Home Office of the Company. When such request is received by the Company, whether the Insured be then living or not, the change of beneficiary shall relate back to and take effect as of the date of execution of the written request, but without prejudice to the Company on account of any payment theretofore made by it.

Allen, 261 Ark. at 233, 547 S.W.2d at 120.

The circuit court found that the insured had taken sufficient acts to make the estate, and not his ex-wife, the beneficiary. In reversing, the supreme court wrote:

> The "Change of Beneficiary" executed by Dr. Allen on February 4, 1972 and left in his lawyer's office certainly cannot be considered as a substantial compliance with the contractual requirements for a change of beneficiary. Cases such as *Tibbels v. Tibbels*, 232 Ark. 857, 340 S.W.2d 590 (1960), relied upon by the trial court are limited to those situations in which the insured has done everything reasonably possible to effectuate a change in beneficiary. It cannot be said that Dr. Allen's conduct placed him in the position of having done everything reasonably possible. The record shows that he took no action for three years even though he made annual payments, surrendered and cashed policies and took out an additional policy in favor of his new wife. A mere announcement of a desire or preference, alone, does not amount to a change of a beneficiary.

Id. at 235, 547 S.W.2d at 121.

In *Tibbels* the insured had sent written instructions to the insurance company to change the beneficiary but had not included a certificate. In *Allen* the insured had signed and executed a form that was never sent. The case here is similar to *Tibbels* in that some form of request did make it to the insurance company, but *Tibbels* is readily distinguishable. Here, notice was defined as "our receipt of a satisfactory written request," and the change

form explicitly stated a signature was required. The purpose of a signature is to authenticate the writing to which it is affixed; it serves to give notice of its source and provides an indication of the intent that the individual signing the writing is willing to be bound thereby. 80 C.J.S. *Signatures* § 3 (Westlaw current through March 2022 update). To say that a required signature is wholly unnecessary on such a significant writing would be a gross overstep by this court. A court cannot make a contract for the parties. *Crittenden Cnty. v. Davis*, 2013 Ark. App. 655, at 9, 430 S.W.3d 172, 178.

Additionally, one of the key takeaways from *Tibbels* is that the insured had done all that he could do to change the beneficiary; and the distinguishing element in *Allen* is that the insured had not done all that he could do to change the beneficiary. *Compare Tibbels*, 232 Ark. at 859, 340 S.W.2d at 592 ("Of course, the insured could do nothing further about the matter, [because he was killed two and a half hours after the request was postmarked,] and could not respond to the insurance company's request for additional information.") *with Allen*, 261 Ark. at 235, 547 S.W.2d at 121 ("Dr. Allen's conduct [did not place] him in the position of having done everything reasonably possible. The record shows that he took no action for three years even though he made annual payments, surrendered and cashed policies and took out an additional policy in favor of his new wife.").

Here, James was still alive when the insurance company sent him a letter that the notice he provided was not satisfactory.[2] Like the facts in *Allen*, some time had passed

[2]The circuit court found that "there is no evidence . . . that James R. Rocconi ever received the October 19 letter from Allianz or had any knowledge before his death that Allianz requested that he resubmit the form with a signature and a date"; however, there is a rebuttable presumption that a properly mailed letter is received by the person to whom it is addressed absent evidence to the contrary. *See Travelers Ins. Co. v. Thompson*, 193 Ark.

between the request and James's death; thus, he had time to send in a compliant form or, at a minimum (even if he did miss the letter from the insurance company), follow up with the company to make sure his request was carried out. As such, James Rocconi had not "done everything reasonably possible to effect a change in beneficiary" prior to his death.

Accordingly, we reverse the decision of the circuit court and hold that the appellant is entitled to the proceeds of her late ex-husband's life insurance policy.

Reversed.

ABRAMSON and VIRDEN, JJ., agree.

Law Offices of Shepherd & Shepherd, P.A., by: *Matthew J. Shepherd*, *John Thomas Shepherd*, and *William T. Hegi*, for appellant.

Appellate Solutions, PLLC, d/b/a Riordan Law Firm, by: *Deborah Truby Riordan*; and *Trammell Piazza Law Firm*, by: *M. Chad Trammell* and *Melody H. Piazza*, for appellees.

332, 99 S.W.2d 254, 257 (1936). There was no evidence before the court that the insured *did not* receive the letter; therefore, this finding is clearly erroneous.