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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002218-MR

KRISTIE D. KIPHART, INDIVIDUALLY, AND
AS TRUSTEE OF THE DEMAND RIGHT
IRREVOCABLE TRUST FOR BRYCE A. BAYS APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, SPECIAL JUDGE
ACTION NOS. 07-CI-00631, 08-CI-00371, AND 09-CI-00246

JOHN WESLEY BAYS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Kristie D. Kiphart, as Trustee of the Demand Right Irrevocable Trust for Bryce A. Bays, appeals from a decision of the Knox Circuit Court awarding Appellee, John Bays, a curtesy interest in the proceeds of his

deceased wife's life insurance policies. For the reasons set forth herein, we reverse and remand to the trial court for further proceedings.

In November 2000, Appellee and Carole Kiphart, now deceased, were married in Indiana. They had one child, Bryce Bays, who was six years old at the time of his mother's death. In August 2001, the couple executed reciprocal wills. In 2006, Carole was diagnosed with cancer and subsequently died on October 28, 2007.

Prior to her death and unbeknownst to Appellee, Carole executed a new will on September 15, 2007. Under the new will, Carole left to Appellee the following:

> ITEM III
>
> General Bequest of Personal and Household Effects With A Precatory Memorandum. I give and bequeath all of my personalty and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, to my husband, John Wesley Bays, if he shall survive me . . . .

The new will also contained a handwritten holographic attachment making various specific bequests that are not the subject of this appeal. In addition, at the time of her death, Carole was insured under two policies of life insurance. The first, issued by American General Life, was in the amount of $750,000. The second, issued by Prudential Insurance Company of America, was in the amount of $125,000. Appellee was initially named the beneficiary under both policies. In April 2007,

Carole changed the beneficiary of the Prudential policy to her son, Bryce. Subsequently, on the same date that she executed her new will, Carole also established two trusts, the Demand Right Irrevocable Trust for Bryce A. Bays and the Carole Kiphart Living Trust. She named Appellant Trustee of the Demand Right Trust, and named Appellee Trustee of the Living Trust.[1] In conjunction with establishing the trusts, Carole changed the beneficiary on the American General policy to fund the first trust and, likewise, named the second trust as beneficiary on the Prudential policy. There is no dispute that the beneficiary changes were permissible under the terms of each policy.

In November 2007, Carole's will was admitted to probate and Appellant, her sister, was appointed Executrix. On December 13, 2007, Appellee filed a declaratory judgment action in the Knox Circuit Court renouncing the will pursuant to Kentucky Revised Statutes (KRS) 392.020 and KRS 392.080, and seeking to take his statutory share of the personalty and realty Carole owned at her death. The following July, Appellee filed a motion for partial summary judgment requesting that the trial court rule that certain gifts made to family members by Carole in the holographic attachment, as well as the proceeds of the insurance policies, were part of the estate for the purpose of calculating his statutory share pursuant to KRS 394.480. Appellee filed a second action in the trial court in July 2008, preserving his claim to monies he alleged he had given to Carole to be

[1] Appellee has been removed as Trustee for failing to fulfill his duties as trustee.

placed in their safety deposit box.[2] Finally, in April 2009, Appellee filed a third action to have Carole's will declared void. In October 2009, all three actions were consolidated into the current case.

In November 2009, the trial court declared Carole's will invalid as it did not meet the statutory requirements of KRS 394.040. Subsequently, in August 2011, the trial court conducted a bench trial and thereafter rendered findings of fact and conclusions of law. Relevant to this appeal, the trial court found that Appellee had no knowledge until several weeks after Carole's death that she had executed a new will, changed the beneficiary of the life insurance policies,[3] or established the two trusts. Further, the court determined that Appellee did not consent to, or have knowledge of, the change of beneficiary on the two life insurance policies and declared Carole's actions to constitute fraudulent inter vivos transfers. Therefore, the trial court concluded that the insurance policies were the personalty of Carole's estate and included the value of both in the estate for the purpose of calculating Appellee's statutory share. On November 26, 2012, the trial court entered an order awarding Appellee the sum of $454,093.38[4] plus interest. This appeal ensued.

The only issue on appeal concerns the trial court's rulings with respect to the life insurance policies. Appellant argues that the trial court erred in characterizing

[2] The trial court found no evidence to support this claim and denied it. Appellee has not appealed this issue.

[3] Actually, the record established Appellee learned of Carole's change of beneficiary to the American General policy on approximately November 8, 2007, when he first sought payment under the policy after Carole's death on October 28.

[4] One half of the value of Carole's personalty, including the life insurance policies, was $516,717.06. Such sum was subject to a setoff in the amount of $76,002.62, which was the total of Appellee's and Bryce's ownership interest in the assets of the estate.

the insurance proceeds as personalty of Carole's estate. Appellant contends that proceeds of life insurance policies that have a named beneficiary other than the estate of the deceased insured are not personalty of the deceased and, therefore, are not subject to a claim of dower or curtesy by a surviving spouse. Having reviewed the applicable law, we must agree.

As noted, the trial court conducted a bench trial in this action. Accordingly, our review is based upon the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.1. CR 52.01 provides that a trial court's findings of fact shall not be set aside unless they are clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. On appeal, "the test is not whether the appellate court would have decided it differently, but whether the findings of the [trial] court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008)(citation omitted).

Kentucky's dower and curtesy statute, KRS 392.020, provides that a surviving spouse shall have an absolute estate in one-half of the surplus real estate and surplus personalty left by the decedent. While this statute relates to intestate estates, pursuant to KRS 392.080(1)(a), a surviving spouse may renounce the deceased spouse's will and receive his or her share of the deceased spouse's estate under KRS 392.020, as though no will had been made. The only difference between a surviving spouse's interest under KRS 392.020 and KRS 392.080 is that the latter limits the survivor's share to a one-third interest in any real estate the

decedent possessed rather than half. The purpose of these statutory provisions is "to insure that a surviving spouse will not be left disinherited and destitute." *Hannah v. Hannah*, 824 S.W.2d 866, 868 (Ky.1992).

The trial court herein found that the insurance policies, not being real estate, were necessarily personalty of the estate and that Carole's actions in changing beneficiaries without Appellee's knowledge constituted fraud on his "dower"[5] interest.[6] However, because we believe the trial court erred in its characterization of the life insurance proceeds as personalty, its finding of fraud is unnecessary and irrelevant.

KRS 392.020 does not define what constitutes the "surplus personalty" of a decedent's estate. In Black's Law Dictionary, "personalty" is defined as: "Personal property; movable property; chattels; property that is not attached to real estate." *Id*. at 1144 (6th ed. 1990). In Kentucky, the Court in *Ruh's Ex'rs v. Ruh*, 270 Ky. 792, 110 S.W.2d 1097, 1101-02, (1937), reaffirmed the principle first adopted in *Towery v. McGraw*, 22 Ky. L. Rptr.155, 56 S.W. 727, 982 (Ky. App. 1900), that "'surplus personalty' . . . may properly be defined as all of the personalty remaining after the payment of all 'funeral expenses, charges of administration and debts.'" Later Kentucky courts have expounded upon this

[5] The trial court uses the term "dower" which actually refers to widows. We will hereafter substitute the correct term "curtesy," denoting a widower.

[6] Curiously, in denying Appellee's 2008 motion for summary judgment, the prior trial judge assigned to the case ruled that "the life insurance policies, of course, paid out upon the death of Carole Bays. Unlike the certificates of deposit in [*Harris v. Rock*, 799 S.W.2d 10 (Ky. 1990)], the insurance proceeds were not the property of Carole Bays at the time she died." It is unclear how or when this ruling was set aside.

general principle. For example, in *Ruh*, *supra,* the Court found a bank's safety deposit box which held decedent's bonds, stocks, notes, securities, and life insurance payable to his estate, to constitute personalty of the decedent. *Id*. at 1104. Interestingly, the decedent in *Ruh* owned a life insurance policy of which the surviving spouse, who renounced her husband's will, was the beneficiary. Significantly, the Court did not limit the widow to her statutory "dower" share of the policy proceeds but, rather, permitted her to receive the proceeds in their entirety. One would assume that had the Court believed this life insurance policy to be an asset of the estate, the surviving spouse would have been required to forfeit one-half of its value as a result of her renunciation.

A further examination of the several Kentucky cases concerning a spouse's statutory interest in surplus personalty reveals that in each case the property actually existed and was possessed by the decedent. In *Benge v. Barnett*, 309 Ky. 354, 217 S.W. 2d 782 (Ky. 1949), the court held gifts of cash made prior to decedent's death constituted personalty of his estate. Decedent had gifted several thousand dollars (approximately one-half of his estate) to his brother and sisters before he died. The court, finding fraud on the surviving spouse's dower rights, apportioned one-half of these gifts to the surviving spouse. In *Anderson v. Anderson*, 583 S.W.2d 504 (Ky. App. 1979), the court determined that a decedent's transfer of $47,000 into bank accounts held in joint tenancy with his children had not defeated a surviving wife's dower rights in these funds. The Supreme Court held similarly in *Harris v. Rock*, 799 S.W.2d 10 (Ky. 1990), noting

that, "[t]he right to dower vests at the time of marriage or at the time of *acquisition* of subsequently *acquired* property. *Id*. at 11 (citing references omitted, emphasis added). The court further stated, "A husband is precluded not only from making gifts during his lifetime . . . but he is also prohibited from disposing of *his property* by will to defeat dower . . . ." *Id*. at 12 (emphasis added). In *Rock,* there was no question that the decedent had disposed of his property, i.e., cash.

However, exactly what property did Carole own? What property had she acquired? As relating to the life insurance, Carole merely owned two policies —not cash in the amounts of $750,000 and $125,000. The trial court made much of the terminal illness acceleration rider to the American General policy. Specifically, it held:

> The Court is also persuaded by the fact that the insurance policies in question could have been used by Carole Bays prior to her death if she desired under the Terminal Illness Accelerated Benefit Rider in deciding that the insurance policies in question are, in fact, personalty of Carole Bays' estate.[[7]] By comparison, the act of changing the beneficiaries of these two (2) insurance policies is no different than substituting one joint owner of an account for another.

There is no dispute that Carole never exercised the acceleration rider, nor any evidence she ever contemplated so doing.[8] In fact, her establishment of the

[7] While the trial court made no findings related to acceleration clauses in either policy, it nevertheless made these conclusions. We have made an extensive review of the record and found no evidence of an acceleration rider to the Prudential policy.

[8] Had Carole actually accelerated her policy and received the cash benefits, our decision might be different. As this issue is not before us, such speculation is unnecessary. *C.f., Nelson v. Metro. Tower Life Ins. Co.,* 4 F.Supp 2d 683 (E.D. Ky. 1998).

Demand Right Trust wherein she relinquished any control over these assets seems to indicate Carole had no intention of exercising this option. Simply put, the life insurance *proceeds* never were possessed by Carole, and therefore were never part of her estate. To argue otherwise is to ignore the fact that upon an insured's death, life insurance proceeds are automatically paid to the named beneficiary and do not pass through the estate—unless of course, the estate is the named beneficiary.[9] As the Supreme Court recognized in *Parks' Executors v. Parks*, 288 Ky. 435, 156 S.W.2d 480 (Ky. 1941):

> If the proposition be confined to a policy payable to the insured's estate or his personal representative, it may well be designated as such an item of property for it is part of his estate . . . . *Watson v. Watson*, 183 Ky. 516, 209 S.W. 524, 3 A.L.R. 1575; Annotations, 43 A.L.R. 573. If the insurance is payable to an individual beneficiary, it constitutes no part of the insured's estate. *Wooten's Trustee v. Hardy*, 221 Ky. 338, 298 S.W. 963.

Id. at 483.

Moreover, to liken a life insurance policy to a joint bank account is illogical. The two are completely different; it is a comparison of apples and oranges. The assets in a joint account actually exist, whereas the proceeds of a life insurance policy are only an expectancy and not currently existing. Both owners of a joint account actually own the contents of the account and either owner may remove the

[9] Moreover, we are perplexed by the trial court's ruling awarding Appellee one-half interest in both of the policies. A review of the American General policy indicates that before the change in beneficiary, Appellee was the beneficiary of 80% of the policy; Bryce was a 20% beneficiary. Further, the maximum payment under the Terminal Illness Rider was capped at $250,000. Carole had no ability to withdraw the remaining $500,000. Thus, pursuant to the trial court's reasoning, Appellee's curtesy interest in "his" 80% of $250,000 amounts to $200,000. As previously stated, we found no evidence to support the trial court's conclusion that the Prudential policy included an accelerated rider.

assets in the account. By contrast, the owner of a life insurance policy merely owns the contract, not the proceeds paid at the end of the policy; the beneficiary has no right to collect these assets until the death of the insured. There can be no fraud on the Appellee's curtesy interest when there was no curtesy interest in the life insurance proceeds to possess. While the trial court somehow found it significant that Carole had changed the beneficiary of the American General policy[10] without notifying Appellee, it fails to point to any authority that such fact is significant.

Certainly, it is a well-settled principle that a beneficiary has only an inchoate right to the proceeds of a life insurance policy, subject to being divested at any time during the lifetime of the insured. *See* Couch on Insurance 3d, § 58:17. Yet, Appellee maintains as a spouse, and because he was initially a beneficiary on the life insurance policy, that he now possesses a curtesy interest in the proceeds. However, neither Appellee nor the trial court has pointed to any authority which would support such a radical departure from basic hornbook law, which is well-stated in Couch on Insurance 3d:

> Marriage, in and of itself, cannot be construed as a contract by one spouse to name the other as the beneficiary of a life insurance policy . . . . If a spouse is neither beneficiary nor entitled as a substitute beneficiary by virtue of the insurance contract, the spouse is not entitled to the proceeds, and **an insured who is otherwise entitled to change the beneficiary may do so, since a spouse named as the beneficiary in a life**

[10] We find it curious that Appellee complains about his sudden removal as beneficiary to the Prudential policy given Carole had actually changed the beneficiary on that policy six months before her death. In September 2007, she again changed the beneficiary to the Living Trust.

> **policy issued to the other spouse has a mere expectancy in the policy that becomes a vested right only upon the death of the insured spouse. This is true despite the change completely destroying the interest of the other spouse.**

Section 64:2 (citations omitted; emphasis added). *See also Nelson v. Metro. Tower Life Ins. Co.*, 4 F.Supp.2d 683 (E.D. Ky. 1998); *Nat'l Life & Accident Ins. Co. v. Walker*, 246 S.W.2d 139 (Ky. 1952); *Twyman v. Twyman*, 201 Ky. 102, 255 S.W. 1031, 1032 (1923); 2-55 *Appleman on Insurance* § 90.

The trial court herein attempted to bolster its conclusion that Appellee did indeed possess a curtesy interest in the life insurance policies, writing: "Kentucky [c]ourts have long held that when it is evident that fraud on the dower has occurred, assets that are not in the decedent's estate at the time of [] death may be brought back into the estate for purposes of calculating the statutory share of the surviving spouse." What the trial court had failed to do, however, was to establish the life insurance proceeds were assets that had ever been part of Carole's estate so as to be brought *back into* the estate. Thus, because the proceeds had never been a part of Carole's estate, any determination of a curtesy interest, or fraud related to such an interest, is pointless.

We would also note that our decision is consistent with case law from other jurisdictions. For example, in *Bishop v. Eckard*, 607 S.W.2d 716, 717 (Mo. Ct. App. 1980), a wife claimed that her husband's act of changing the beneficiary on his life insurance policy prior to his death constituted fraud on her marital

rights. Although Missouri has a statute[11] pertaining to fraud on the dower, the law is in accord with our common law. Rejecting the wife's claim, the appellate court observed:

> The significant portion of this statute in the case at bar is the phrase "in fraud of the marital rights of his surviving spouse to share in his estate." The proceeds of an insurance policy payable to a named beneficiary do not belong to the insured's estate. *Preidman v. Jamison*, 202 S.W.2d 900, 904 (Mo.1947). See generally Appleman, Insurance Law and Practice s 771 (1966). The beneficiary's claim to insurance proceeds is through the life insurance contract and not derivatively as the insured's heir. See Appleman at s 771. Since the daughter was the named beneficiary she is entitled to the proceeds of the policy.

Although considered in the context of a divorce proceeding, the Massachussetts Supreme Court in *Gleed v. Noon*, 614 N.E.2d 676, 678 (Mass. 1993), reached a similar conclusion as to the characterization of life insurance proceeds:

> A change of beneficiary on a policy or a plan is not a conveyance, transfer, or disposal of the proceeds because

[11] At the time *Bishop* was rendered, the applicable statute was s 474.150(1) RSMo (1969), and provided:

> Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

s 474.150(1) RSMo (1969) is cited as s 474.150 RSMo (1978) in actions arising after October, 1978. The substance of the statute, however, has not been changed.

> they are not acquired until the death or retirement of the insured. See 4 Couch, Insurance § 27:62 (rev. 2d ed. 1984). See also *Lindsey v. Lindsey*, 342 Pa.Super. 72, 76–77, 492 A.2d 396 (1985); *Bishop v. Eckhard*, 607 S.W.2d 716, 717–718 (Mo.Ct.App.1980). A beneficiary's interest is a conditional interest subject to defeasance until the death of the insured. See *Strachan v. Prudential Ins. Co.,* 321 Mass. 507, 509–510, 73 N.E.2d 840 (1947); *Kruger v. John Hancock Mut. Life Ins. Co.*, 298 Mass. 124, 126, 10 N.E.2d 97 (1937). The beneficiary is only entitled to receive proceeds from a policy if the insured dies without changing the beneficiary designation. *Metropolitan Life Ins. Co. v. Tallent*, 445 N.E.2d 990, 992 (Ind.1983).

In conclusion, if the named beneficiary of a life insurance policy is also the estate of the deceased, then it follows that the proceeds are paid into the estate at death and would be considered part of the surplus personalty subject to a dower or curtesy claim. On the other hand, proceeds that are paid directly to a named beneficiary upon the death of the insured never become part of the estate. *See Parks' Executors*, 288 Ky. 435, 156 S.W.2d at 483. We believe this to be true even when, as here, the policies contain an unenforced acceleration benefit rider that would have permitted access to some of the proceeds prior to death. The fact remains that Carole did not receive any proceeds and, instead, such were paid to the designated beneficiaries upon her death pursuant to the terms of the insurance contracts.

We are of the opinion that to adopt the trial court's rationale would not only create chaos in the realm of estate planning but would also place insurance companies in an untenable position of honoring the contract of an insured in the

face of a dower or curtesy claim by a surviving spouse. Carole had the absolute authority to change the beneficiary of her life insurance policies without Appellee's knowledge or consent and did so according to the terms of the contracts. Therefore, the proceeds were directly payable to the trusts upon her death and did not become part of her estate. Accordingly, the trial court erred in ruling that the proceeds were personalty of the estate and subject to Appellee's curtesy claim.

For the reasons set forth herein, the order of the Knox Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this opinion.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. If this case is analyzed only as an insurance case, then perhaps the majority opinion is correct. But if it is analyzed as a fraud on the spouse's statutory share, as the trial court viewed it, and as John W. Bays, the Appellee, has made a very compelling case, then the majority opinion is incorrect, and the trial court should be affirmed.

As an initial matter, the trial court set forth very explicit findings of fact detailing the extent to which the decedent and her sister, the Appellant, Kiphart, ransacked the decedent's lock box and bank accounts, including a

SEP/IRA,[12] transferred a $20,000 truck to Kiphart's son, and secreted the decedent's jewelry valued at $11,900.[13] Within sixty days prior to the decedent's October 28, 2007 death, and without Bays' knowledge or consent, the decedent revised her will to substantially exclude Bays, created two inter vivos trusts to his complete exclusion, and changed the beneficiary designations on her two substantial life insurance policies to exclude Bays and instead designate her trusts.[14] And, as noted by the majority opinion, Kiphart, who was complicit in the

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[12] On October 2, 2007, less than a month before the decedent's death, Kiphart transferred approximately $91,000 in the decedent's certificates of deposits directly to herself, which Kiphart then used to satisfy a number of pecuniary bequests under the decedent's revised will, or a holographic "pour-over" will handwritten on the back of the revised will. According to the trial court's Findings of Fact, Conclusions of Law and Judgment, entered December 21, 2011, the trial court previously entered an order voiding the revised will and the holographic provisions. That order is not a part of this appeal. The trial court also detailed a number of cash transfers between the decedent and Appellant, a number of which were unaccounted for. In addition, Bays made a claim against the estate for almost $125,000 cash given to the decedent by him during the marriage to be used to build a house. The trial court found "insufficient credible evidence" to support this claim or that the cash remained in the lock box. The trial court therefore denied the claim.

[13] The trial court found that while "the location of the jewelry . . . is uncertain, there is no dispute about [the decedent's] ownership of those items[.]"

[14] Two policies and two trusts are involved. The larger policy, issued by American General Life Insurance Co., was for $750,000. For that policy, the beneficiary was changed on September 20, 2007, to Demand Right Irrevocable Trust for Bryce A. Bays. The smaller policy, issued by Prudential Insurance Co., was for $125,000. For that policy, the beneficiary was changed on October 5, 2007, to Carole Kiphart-Bays Living Trust dated 9/15/07. Under the terms of the Living Trust, the decedent designated herself as trustee, and provided that on her death, John Wesley Bays would serve as successor trustee. As I review the record, neither the trustee, nor the Carole Kiphart Bays Trust dated 9/15/07 is a party to this appeal. Thus, we have no jurisdiction over those parties and no ability to adjudicate anything or the trial court's judgment with respect to that trust. *See Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006). *Flick v. Estate of Wittich*, 396 S.W. 3d 816 (2013), arguably provides authority that the notice of appeal was adequate, but in *Flick*, the notice designated the Estate of Wittich as the appellee. The court held that was sufficient to put the fiduciaries on notice. In this case, neither the Carole Kiphart Bays trust nor its trustee was named. Furthermore, a very careful reading of the Carole Kiphart Bays trust demonstrates that Kristie Kiphart has no legal or beneficial interest in that trust. She therefore has no standing to assert any claim on its behalf. *See Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985) (holding that standing requires "a judicially recognizable interest in the subject matter of the suit[]"). While my comments are, therefore, largely directed to the American General policy and the Bryce A. Bays Demand Right

monetary and personal property transfers, was the trustee of the Demand Right Irrevocable Trust for Bryce A. Bays and, therefore, the newly designated beneficiary.

The majority opinion has effectively ignored an important consideration. Under CR 52.01, "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The trial court made a finding that the decedent's creation of the trusts and the change of the insurance beneficiary created an inter vivos transfer in fraud of the spouse's statutory share. KRS 392.020. This finding must be viewed in the context of all the other transfers that occurred. In *Benge v. Barnett*, 309 Ky. 354 at 358, 217 S.W.2d 782 at 784, the court "'reaffirm[ed] the conclusion . . . that a [spouse] may not make a voluntary transfer of either . . . real or personal estate with the intent to prevent his [surviving spouse] from sharing in such property at [] death and that the [surviving spouse], on the [spouse's] death, may assert [] marital rights in such property in the hands of the donee.'" *Id.* (quoting *Martin v. Martin*, 282 Ky. 411, 422, 138 S.W.2d 509, 514 (1940)).

Under hornbook law, insurance proceeds paid to a beneficiary are generally not considered a part of a decedent's estate. *Parks' Ex'rs v. Parks*, 288 Ky. 435 at 441, 156 S.W.2d 480 at 483. And, as a general proposition, an insurance beneficiary is a mere contingent beneficiary of the proceeds of the

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Irrevocable Trust, the analysis applies equally to both policies.

policy. *Nelson v. Metro. Tower Life Ins. Co.*, 4 F.Supp.2d 683 at 684-85 (applying Kentucky law); *Twyman v. Twyman*, 201 Ky. 102 at 106, 255 S.W. 1031at 1032.

As noted by the trial court, however, Kentucky case law has long held that assets that are not technically part of the decedent's estate may be used or "brought back into the estate" for purposes of calculating the surviving spouse's statutory share. *Harris v. Rock*, 799 S.W.2d 10 (holding certificates of deposit held jointly by decedent and children were subject to wife's dower share); *Benge*, 309 Ky. 354, 217 S.W.2d 782 (holding decedent's inter vivos gifts of personalty made to siblings were subject to spouse's dower share); *Redmond's Adm'x v. Redmond*, 112 Ky. 760, 66 S.W. 745 (1902) (holding husband's placement of real property in son's name constituted fraud on spouse's dower rights); *Petty v. Petty*, 43 Ky. (4 B. Mon.) 215 (1843) (holding husband's premarital transfer of real property to children in fraud of wife's dower interest may be declared void); *Anderson v. Anderson*, 583 S.W.2d 504 (holding money deposited into a joint account between the decedent and his children subject to the assertion of a dower interest by his widow). **In all these cases, the property transferred in fraud of the spousal share was not part of the decedent's probate estate.**

Parks' Ex'rs v. Parks, 156 S.W.2d 480, does not compel a different result because it is an insurance case, and fraud on the spouse's statutory share was not an issue. Two other cases, *Nat'l Life & Accident Ins. Co. v. Walker*, 246 S.W.2d 139, and *Twyman*, 255 S.W. 1031, while both factually similar to this case — involving a life insurance beneficiary changed shortly before death from

decedent's wife to decedent's mother— in neither case was a claim of fraud on the spouse's marital share raised.

Nelson, 4 F.Supp.2d 683, superficially is perhaps closest on point, since the surviving spouse did allege fraud on the marital share.[15] A careful reading of that case, however, reveals that the insured, suffering from a terminal illness, requested the insurance company pay accelerated death benefits to himself approximately three months prior to his death. The insurance company, in turn, requested and received a doctor's certification of the insured's competency, and the spouse, despite two requests, failed to supply the company with any evidence of incompetency.[16] After the certification process, the insured received $93,471.85 of a $100,000 policy two months prior to his death. The federal district court held, "[b]ased on the undisputed facts, there is no substantive evidence that MetLife somehow participated in a scheme to defraud Ms. Nelson out of her dower rights."

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[15] A federal court's interpretations of state law in a diversity case are not binding on state courts. *Embs v. Pepsi–Cola Bottling Co. of Lexington, Kentucky, Inc.*, 528 S.W.2d 703, 705 (Ky. 1975); *Bruck v. Thompson*, 131 S.W.3d 764, 766 (Ky. App. 2004). Regardless, the facts in *Nelson* do not support the conclusions advanced by the majority opinion.

[16] The court in *Nelson* found "very significant that [Ms. Nelson] did not attempt to address or distinguish *Sloan*." 4 F.Supp.2d at 685 n.1. This reference is to *Sloan v. Sloan*, 303 Ky. 180, 197 S.W.2d 77 (1946), a case which involved claims of undue influence and mental capacity to change a will and to change life insurance beneficiaries. Since *Nelson* involved claims of competency to change beneficiaries, *Sloan* would naturally provide guidance to a federal court in a diversity case. *Sloan* did not, however, involve any claim of fraud on a spousal share, and is distinguishable from our case on that basis alone. The federal district court's first quotation from *Sloan* is, however, telling: "[t]his Court has firmly committed itself to the principles that the cancellation of an executed contract by a court of equity is the exercise of an extraordinary power and should not be resorted to except in a clear case and on strong and convincing evidence." *Nelson*, 4 F.Supp.2d at 685 (quoting *Sloan*, 303 Ky. at 188-89, 197 S.W.2d at 82). In other words, in a clear case and on strong and convincing evidence, a court of equity **will** set aside an executed contract. In my view, that is exactly what the Knox Circuit Court did in this case.

Id. at 687. As noted by the court, "there cannot be a fraudulent conveyance based solely on the fact that an insured cashes in his insurance policy. A fraudulent conveyance can occur if after receiving the money the insured transfers it to a third party." *Id.* at 687 n.9. In *Nelson*, the surviving spouse appears to have brought her action only against the insurance company, which had already paid the insurance proceeds.[17] The trial court, as fact-finder, found no fraud on the spouse's share. That situation does not exist in this case; the Knox Circuit Court did find fraud.

The older cases addressing fraud on the spousal share derive the avoidance language and the right to recover the property from the recipient from KRS 378.010, the fraudulent conveyance statute. This statute reaches to "[e]very gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action . . . made with the intent to delay, hinder or defraud creditors, purchasers or other persons[.]" This language is very broad. As noted above in *Harris*, *Benge*, *Redmond*, *Petty*, and *Anderson*, bank accounts and certificates of deposit that are jointly owned or multiple party accounts,[18] assets held jointly with right of survivorship, real estate given to siblings or children prior to a second marriage, are all assets that are held outside of a probate estate. But,

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[17] The majority opinion's handwringing over the untenable position in which insurance companies would be placed is misplaced; the "untenable position" is illusory. Insurance companies and their counsel are well-acquainted with CR 22 and interpleader actions. The continued viability of CR 22 is demonstrated in this case since Prudential Insurance Co. paid its policy proceeds into the Knox Circuit Court. In addition, a life insurance company that pays out its insurance proceeds in good faith is not subject to the claims of a disgruntled spouse. *See Nelson*, 4 F.Supp.2d at 687.

[18] KRS 391.300, *et seq*.

again, because of the finding of fraudulent transfer, the surviving spouse is entitled to use those assets to satisfy the decedent's obligation to support his or her spouse.

The overriding factor for a fraudulent transfer "is the intent and purpose with which the [grantor] acts that renders the conveyance fraudulent, and this must be determined by the facts of each particular case." *Myers Dry Goods Co. v. Webb*, 297 Ky. 696, 700-01, 181 S.W.2d 56, 58 (1944) (internal quotations omitted); *Hatfield v. Cline*, 143 Ky. 565, 568, 137 S.W. 212, 214 (1911). Other cases address the participation of the grantee in the fraud, and note the victim may have recovery against even a grantee who has given value. *See, e.g., Summers v. Taylor*, 80 Ky. 429, 431-32 (1882) (holding that grantee with notice of fraudulent intent will not be protected). Here, the trial court made clear that Kiphart, the trustee, was complicit in **all** the decedent's actions. Again, all the decedent's transfers and changes must be viewed together to reach the finding of fraud. If this case only involved the change of one life insurance policy, the result arguably would be different. The one factor, thus, that makes this case unique from all other life insurance change of beneficiary cases is the trial court's finding that the change was made with the intent to defraud Bays' spousal rights.

Finally, a hypothetical. A husband and wife enter into a second marriage for each. The husband has substantial assets, $101 million; but no prenuptial agreement is in force, or perhaps a question exists as to the agreement's enforceability. Husband learns he has a terminal illness and six months to live. He takes most of his assets, $100 million, and buys life insurance, which a life

insurance company with full knowledge of his condition agrees to the contract (basically a $1 of premium for each $0.95 of coverage). Husband then sets up an irrevocable trust excluding his wife, and makes the life insurance payable to the trustee. Husband dies, and $95 million is paid into the irrevocable trust. No one would dispute that the husband has engaged in fraud on the wife's spousal share. But, under the majority opinion, the wife has no recourse because of the "magic" of life insurance and its status as a nonprobate asset.

I would affirm the Knox Circuit Court's judgment.

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