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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. *WRNewswire* #15.03.19 was written by *Steve Leimberg*, co-author with Howard Zaritsky of Tax Planning With Life Insurance, Publisher of Leimberg Information Services, Inc. (LISI) and CEO of Leimberg & LeClair, Inc.

TOPIC: Marriage as Event That Changes Life Policy Beneficiary

CITATION: *Evanisa S. Fox v. Lincoln Financial Group and Mary Ellen Scarpone*, 2015 WL 751362, NO. A-3189-13T4; (Sup. Ct. NJ, App. Div. Feb. 24, 2015).

SUMMARY: The deceased insured's non-citizen wife filed suit against the designated beneficiary, the deceased insured's sister, seeking to collect the life insurance policy death benefit proceeds. The lower court dismissed the complaint and the non-citizen wife appealed.

In this New Jersey case, the higher court agreed with the lower court that the insured's marriage to his new wife, without more, was insufficient to show that he intended to substantially comply with provisions of the policy for changing the beneficiary from the insured's sister to the new wife. Specifically, the court held that:

> [1] The mere fact that the insured married the plaintiff did not, by itself, trigger the automatic change of beneficiary from the insured's sister as designated beneficiary to the insured's new wife;
>
> [2] The insured's marriage to his new wife, without more, was insufficient to show that insured *intended* to substantially comply with the insurer's requirements to changing the designated beneficiary from the insured's sister to the new wife; and
>
> [3] The insured's legally binding commitment to support his non-citizen wife, in sponsoring her application for United States' citizenship, was ineffective to effect change of designated beneficiary from the insured's sister to the new wife upon his death.

RELEVANCE: Only under limited circumstances will a designated beneficiary of an insurance policy be denied the right to receive the insurance proceeds. Accordingly, agents who learn of an insured's marriage or remarriage should alert those clients that marriage, by itself, will not in most states result in an automatic change of beneficiary to the insured's new spouse—but the result may vary from state to state. The best practice upon impending marriage (or divorce or separation) is to review the client's situation and implement desired changes as quickly as possible—using the insurer's specified procedures and meticulously documenting the client's intention.

There is—in some cases and in some states—an exception if it can be proven that there was "substantial compliance" with the method prescribed in the policy to change the beneficiary. The doctrine of substantial compliance provides that even if the policy owner had not *exactly* complied with the policy's requirements for changing beneficiaries, the proceeds could be claimed if he "substantially complied" with the terms of the insurance contract. That requires (1) "a clear expression of the insured's intention to change beneficiaries," and (2) a concrete attempt by the insured to carry out his intention as far as was reasonably in his power, *i.e.*, undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy. WARNING: Saying so doesn't make it so. An insured's mere verbal expression of an intent to change a life insurance beneficiary designation will *not* be effective.

Finally, once again, we are reminded of the emotional and financial cost of a failure "To Get AROUNDTOIT." Clients should be told: If you *want* to change your life insurance or retirement plan beneficiaries, DO IT! Do it in strict and complete compliance with the appropriate contract and instructions. Get it done in writing, get it approved in writing, and do it as quickly as possible.

FACTS: In 1992, Michael purchased insurance on his life and named his then-wife, Gail, as primary beneficiary. Michael and Gail subsequently divorced. In 1996, Michael named his sister, Mary Ellen Scarpone, as sole beneficiary. This change comported with the terms of the policy, which expressly provides:

> Beneficiary–At any time prior to the death of the Insured, the Owner may name or change a revocable beneficiary.... A change of the Owner or beneficiary must be made in writing. To be binding on the Company, the change must be signed by the Owner and any irrevocable beneficiary and must be filed at the Home Office.

In July 2012, Michael married Evanisa, a Brazilian national. On September 26, 2012, Michael executed a Form I–130 petition to sponsor Evanisa's U.S. citizenship application. Along with the petition, Michael executed a Form I–864 Affidavit of Support4 in which he agreed to support his wife at 125 percent of the poverty level. This support obligation expressly terminated upon Michael's death, and the I–864 form specifically informed him:

> Therefore, if you die, your estate will not be required to take responsibility for Evanisa's support after your death.

On November 9, 2012, before the citizenship petition was approved, Michael died in a work-related automobile accident. It is undisputed that, prior to his death:

1. Michael did not submit a new change of beneficiary form to Lincoln, and
2. Michael did not make any effort to designate Evanisa as beneficiary under the policy.

Following Michael's death, his wife, Evanisa Fox, and his sister, defendant Mary Ellen Scarpone, both applied to the insurer for the policy proceeds.

The trial court dismissed Evanisa's complaint, effectively awarding the proceeds to Scarpone, who was the designated beneficiary under the policy.

On appeal, Evanisa urged the court to adopt a "bright-line" rule that marriage creates a "presumptive right" to a spouse's life insurance benefits, thereby revoking any contrary premarital beneficiary designation made by the deceased spouse. She sued the insurer and the insured's sister—asserting, among other things, that Michael's marriage to her by itself effected a change in beneficiary as a matter of law, and that she, Evanisa, was therefore sole beneficiary. She reasoned:

> just as divorce presumptively disqualifies a former spouse from receiving anything, marriage ought to result in a presumption that she receives everything.

The court examined well-settled case law, which requires some objective showing that the deceased intended to change the policy's beneficiary.

As noted above, generally, an insured can change the beneficiary on an insurance policy only by notifying the insurer in accordance with the policy, or by substantially complying with the policy's provisions. The traditional rule regarding change of beneficiary designations under a life insurance policy is that the interest of the designated beneficiary is a vested property right, payable if he or she survives the insured, which can be divested only by a change of beneficiary in the mode and manner prescribed by the policy. Of course, this also protects the insurer, which relies on the policy terms to pay the proceeds to the designated beneficiary. Accordingly, ordinarily, demonstrated intention to change beneficiaries is insufficient if not executed in the manner prescribed in the policy for effecting such a change.

This general rule may be modified where there is "substantial compliance" with the method prescribed in the policy to change the beneficiary. Substantial compliance requires an insured to make every reasonable effort to effect a change of beneficiary. However, only under limited circumstances will a designated beneficiary be denied the right to receive the insurance proceeds.

Mere verbal expressions of intent to change a beneficiary designation will almost always be ineffective. Courts will almost certainly conclude in such cases that such a verbal expression of intent does not constitute substantial compliance with the provisions of insurance policies requiring execution of change of beneficiary forms.

Note that a number of states' laws provide that divorce automatically revokes a disposition of property made by a divorced individual to his former spouse in a governing instrument. This may, depending on the wording of a particular state's law, include a life insurance policy. Likewise, a number of states provide an intestate share to a surviving spouse unintentionally omitted from a premarital will based on the rebuttable presumption that the decedent *would* have provided for him or her. However, typically that "omitted spouse" statute applies only to wills, and does not extend to non-probate assets such as a life insurance policy.

No states, to my knowledge, have legislation granting presumptive beneficiary rights to a spouse upon marriage.

As a final attempt, Evanisa cited Michael's commitment to support her in sponsoring her citizenship application as justification for receiving the policy proceeds. (The Immigration and Nationality Act forbids admission to the United States of any non-citizen who is likely at any time to become a public charge. This provision is implemented by requiring a person who sponsors a non-citizen for admission to execute an affidavit of support. The affidavit is in the form of a contract between the sponsor and the United States, called Form I–864.)

However, Michael was under no duty to support Evanisa or provide a life insurance policy for her, as such support obligation terminated upon his death pursuant to the express terms of the Form I–864 support affidavit.

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