IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8843

Summary Calendar

CLEO JONES,

Plaintiff-Appellant,

v.

SYLVESTER BENNETT, ET AL.,

Defendant-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CA-009)

(July 1, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Cleo Jones appeals from the district court's grant of summary judgment to Sylvester Bennett and the court's denial of Jones' motion for partial summary judgment in a suit brought to determine to whom the proceeds of an insurance policy, tendered into the court by the insurer, on the life of Sharron Bennett, should be paid. We reverse and remand.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Sylvester Bennett was the spouse of Sharron Bennett. Cleo Jones is Sharron Bennett's mother. Sharron had two children--one by Bennett and one by a previous relationship. Bennett and Sharron separated in 1989, and Sharron moved to California with her two children and her mother. Bennett and Sharron did not live together after that time.

In 1990, Sharron purchased a life insurance policy through her employer, the Federal Deposit Insurance Corporation ("FDIC"), which provided coverage through Metropolitan Life Insurance Company ("Metropolitan"). She designated her mother to be the beneficiary of the Basic Life Insurance Coverage, in the amount of $50,000, by filling in her mother's name on the beneficiary blank provided. She also selected two optional coverage plans listed on the same page. Under Option #1, Sharron selected an additional $150,000 in coverage. She signed her name but did not fill in a name on the beneficiary blank for that plan. Sharron also chose Option #3, a family plan pursuant to which $10,000 would go to her spouse and $5,000 to each eligible child. Option #1 is the only coverage plan at issue in this case.

The Metropolitan Master Policy contains the following language regarding designation of beneficiaries:

> The "Beneficiary" is the person or persons you choose to receive any benefit payable because of your death.
>
> You make your choice in writing on a form approved by F.D.I.C. This form must be filed with the records for This Plan.

The policy provides that if there is no designated beneficiary when the insured dies, the benefits will be paid in the following order of precedence:

> (a) Widow or Widower;
> (b) Child or Children in equal shares, with the share of and [sic] deceased child distributed among the decedents of that child;
> (c) Parents in equal shares or the entire amount to the surviving parent;
> (d) Duly appointed executor or administrator of your estate;
> (e) Next of kin under the laws of your state of domicile at the time of your death.

The policy further provides the following to effect a change of beneficiary:

> You may change the Beneficiary at any time by filing a new form with the employer. You do not need the consent of the Beneficiary to make a change. When the employer receives a form changing the Beneficiary, the change will take effect as of the date you signed it. The change of Beneficiary will take effect even if you are not alive when it is received.
>
> A change of Beneficiary will not apply to any payment made prior to the date the form was received by the Employer.

In the fall of 1991, Sharron was diagnosed with cancer. When she was informed that her condition was terminal, in the spring of 1992, she and her children and mother moved to Waco, Texas to be closer to other family members. In April 1992, Sharron's brother and sister contacted Lawrence Johnson, a Waco attorney, and asked him to help Sharron get her affairs in order. Johnson prepared a will and a Designation of Beneficiary form, which Sharron reviewed and signed in his presence. Both documents were also signed in the presence of Larry Wilbur and Linda Lewis, the two witnesses to the will. The Designation of

Beneficiary, prepared in the form of an affidavit, was notarized by Johnson but was not signed by either of the witnesses.

The will left all of Sharron's estate to Jones, who was also designated as guardian of Sharron's children. The Designation of Beneficiary stated in part:

> By this instrument, I hereby designate CLEO JONES as the sole beneficiary with respect to any and all life insurance policies, in which the benefits are to be paid upon my death, and that I have the authority to designate the beneficiary.
>
> By this instrument, I hereby revoke the designation of any beneficiary other than CLEO JONES, made prior to today's date, with respect to any and all life insurance policies . . . .

Jones was also designated the beneficiary of any benefits resulting from illness or medical health claims. At the time she signed the Designation of Beneficiary, according to the affidavit of Sharron's sister, Sharron believed that she had already designated Jones as the beneficiary of all of her life insurance policies.

Johnson testified by deposition that Sharron had instructed him not to give the Designation of Beneficiary to anyone until after she died. Following Sharron's death on May 24, 1992, Johnson gave a copy of the Designation of Beneficiary to Jones and Sharron's brother. The brother sent a copy of the document to the FDIC, which, in turn, sent a copy to Metropolitan as one of the required documents for processing a claim for retiree death benefits. Johnson retained the original document until June 25, 1993, when he and Joseph Layman, attorney for Jones,

sent it to the FDIC, where it was placed in the FDIC file relating to the claim for Sharron's life insurance proceeds.

Metropolitan paid Jones the basic life insurance of $50,000 and then, because of competing claims, interpleaded the remaining $150,000, plus accrued interest, into the registry of the district court for a determination of who was entitled to the proceeds. After dismissing Metropolitan as a party, the court designated Jones as the plaintiff and Bennett as the defendant. Following discovery, Bennett filed a motion for summary judgment, and Jones filed a motion for partial summary judgment and realignment of the parties. The district court granted summary judgment in favor of Bennett, denied Jones' motion for partial summary judgment and realignment, and entered an order authorizing payment of the proceeds to Bennett. Jones filed a timely notice of appeal.

II.

We review a summary judgment de novo, applying the same criteria used by the district court. Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). We also review the district court's interpretation of an insurance policy de novo. FDIC v. Mijalis, 15 F.3d 1314, 1319 (5th Cir. 1994). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." Fed. R. Civ. P. 56(c). We review the facts drawing all inferences in the light most favorable to the nonmoving party, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994), but if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue of material fact to be resolved at trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III.

The determinative issue in this case is whether the Designation of Beneficiary form signed by Sharron on April 9, 1992, is an original designation or an attempt to make a change of beneficiary. The district court relies on a footnote in a Texas Supreme Court case, Crawford v. Coleman, 726 S.W.2d 9 (Tex. 1987), to show that Bennett, as the widower and thus the first contingent beneficiary under the policy, takes precedence over Jones, the beneficiary chosen by Sharron. The district court found that since Sharron initially failed to designate a beneficiary for the $150,000 policy, Bennett, as the first contingent beneficiary, became the "prior named beneficiary" and was in a position to challenge Sharron's attempted "change" of beneficiary in her Designation of Beneficiary, dated April 9, 1992. We find the court's reasoning unpersuasive.

Crawford concerns an interpretation of Texas Insurance Code Section 21.23, TEX.INS.CODE ANN. s 21.23 (Vernon 1981). Crawford

726 S.W.2d at 10. This section of the Insurance Code controls when the named beneficiary willfully brings about the death of the insured. Id. at 10. The footnote in Crawford rejects the distinction between "a beneficiary falling under a preprinted beneficiary provision in the policy and a beneficiary whose name is written into the policy." Id. at 10, n. 1. As the court explains:

> In each instance, the insured has selected the individual as a beneficiary even though by different means. There is no difference when an insured reads and agrees to the policy's preprinted beneficiary designations or when the insured writes out the name of the beneficiary.

Id. at 10, n. 1. Thus, the effect of the footnote is that it makes no difference whether a person is listed on an insurance form by his title only, such as "spouse" or "child" or whether he is actually specified by name. However, the Texas Supreme Court does not do away with the distinction between originally designated beneficiaries and preprinted contingent beneficiaries, as the district court seems to imply. The contingent beneficiary provisions are not interchangeable with an original designation of beneficiary, but are "an alternate means of determining a beneficiary where no designation has been made by the insured so that the insurer is protected in its payment of the proceeds of the policy." Duty v. Ignasiak, 633 S.W.2d 654, 656 (Tex. App.--Houston [14th Dist.] 1982, no writ).

Duty represents the current Texas law on the issue of original designation of beneficiaries. The facts of Duty are similar to those of the present case. In Duty, the insured made

no specific designation of beneficiary on his life insurance policy, but completed a note shortly before his suicide which requested that all of his insurance benefits be paid to his fiancee. Id. at 655. The insured's parents, as the first listed contingent beneficiaries, appealed the trial court award of the benefits to the fiancee on the grounds that the suicide note was an ineffective change of beneficiary. Id. at 655. In affirming the trial court decision, the appellate court determined that the insured had not designated a beneficiary prior to writing the suicide note. Id. at 656. Thus, the suicide note was an original designation of beneficiary, not a change of beneficiary. Id. at 656. The rationale of Duty prevails here and compels the conclusion that Sharron had not designated a beneficiary prior to signing the April 9, 1992 Designation of Beneficiary. Therefore, under Duty, Bennett is the beneficiary only if the April 9, 1992 Designation of Beneficiary did not constitute a proper designation of beneficiary. See id. at 656.

The court in Duty held that "while the intent of an insured is not relevant to a consideration of whether the insured effectively changed a previous designation of beneficiary, that same intent is controlling in a determination of whether an insured designated a beneficiary originally, as it would in construing testamentary documents." Id. at 656. To hold otherwise would allow the insurance company to defeat the power of the insured to choose the beneficiary of her insurance policy. As the court in Duty points out, the designation of a beneficiary

is solely a decision of the insured, and the court has a "responsibility . . . to ascertain and give effect to [the insured's] intention's." Id. at 656 (citing Butcher v. Pollard, 288 N.E.2d 204, 206 (Ohio Ct. App. 1972)).

While these statements would seem to imply that intent is the only factor necessary to consider in determining whether a proper original designation has been made, the court in Duty also looks to whether or not the suicide note substantially complied with the insurance policy requirements. The policy in Duty, unlike the one in the present case, did not require an approved form, but only a "written request filed with the Policy-owner or at the Home Office of the Company," Id. at 655. The court found that the suicide note, delivered to the home office of the insurer after the death of the insured, not only established the insured's intent, but also satisfied the policy requirements.

The rationale behind enforcing substantial compliance with insurance policy requirements is twofold: first, it protects the insurer from being liable for multiple claims on the proceeds of an insurance policy; and second, it protects the vested interests of the prior named beneficiary from possible fraud. See Scherer v. Wahlstrom, 318 S.W.2d 456, 458 (Tex. Civ. App.--Fort Worth, 1958, no writ). The court in Scherer states the rule that "the insurer may waive compliance with regulations intended for its benefit, yet the beneficiary named has a right, by virtue of the contract, to require that a change be made substantially in accordance with the manner provided." Id. at 458. When an

original designation is at issue, there is no prior named beneficiary whose vested interests must be protected, so the only interests left to consider are those of the insurance company.

By one line of authority, the insurer can waive compliance with provisions for a change of beneficiary only during the life of the insured, the rationale being that the insurer should not be able to affect the rights of the prior named beneficiary, which vest upon the death of the insured. See Johnson v. Johnson, 139 F.2d 930, 933 (5th Cir. 1943) ("the rights of the parties become fixed at the death of the insured, and the Insurance Company [can] not thereafter by waiver affect of divest the right of the beneficiary which [becomes] vested upon the death of the insured.") In the application of this rule, it is necessary to differentiate, once again, between a change of beneficiary, where there is a prior named beneficiary, and an original designation, where there is not a prior named beneficiary. Taking this difference into account, the rule regarding the insurer's ability to waive compliance with provisions for a change of beneficiary can, by analogy, be extended to original designations, with the exception that, as regarding original designations, the waiver is effective at any time instead of only during the life of the insured.

Substantial compliance is not an issue in the present case because there is no prior named beneficiary whose vested interests must be protected and because, unlike the insurance company in Duty, Metropolitan waived its right to demand

substantial compliance when it brought an interpleader action and paid the proceeds of the policy into court. See Sbisa v. Lazar, 78 F.2d 77, 78 (5th Cir. 1935) ("The provision of the policy as to the method of effecting a change of beneficiary was one for the benefit and protection of the insurance company only; and the insurance company clearly waived it by filing the bill of interpleader and depositing the amount of the policy to be paid to those entitled to receive it as the court might direct."). It is clear that although the insurance company could have invoked the provisions of the policy for its own benefit, it chose not to do so in this case. And Bennett, as the default beneficiary, has no vested interest in payment of the proceeds that allows him to invoke the formal requirements of the policy in the face of a clear statement of the intent of the insured. Under these circumstances, the intent of the insured controls.

Sharron's intent to designate her mother as the beneficiary of her life insurance policy is uncontroverted. The April 9, 1992 Designation of Beneficiary states unequivocally that Sharron desired her mother to be the beneficiary of all of her life insurance policies. Further, in her affidavit, Sharron's sister state that Sharron told her prior to April 9, 1992, that she had designated their mother as the beneficiary of all of her life insurance policies. After April 9, 1992, according to the affidavit, Sharron told her sister that she signed the Designation of Beneficiary as "one more way of being certain that

[their] mother was the named beneficiary in her life insurance policy."

The April 9, 1992 Designation of Beneficiary leaves no doubt as to Sharron's intent. Thus, it is a proper designation of beneficiary, and there is no reason to consult the preprinted contingent beneficiary provisions of the insurance policy. Cleo Jones is, prima facie, the designated beneficiary and should receive the proceeds of the insurance policy unless Bennett is able to prove affirmatively that Sharron's signature on the Designation of Beneficiary form was forged or obtained by undue influence, as he alleges. This issue is one for which Bennett will bear the burden of proof at trial. See Follenfant v. Rogers, 359 F.2d 30, 31 (5th Cir. 1966) ("[T]he burden of proving that the real beneficiary of a life insurance policy is someone other that the beneficiary named therein is on the person so asserting.").

IV.

For the foregoing reasons, we find that the district court erred in granting the defendant's motion for summary judgment. Therefore, we REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.