[J-45A-2012 and J-45B-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FATIN ALKHAFAJI, ADMINISTRATOR C.T.A. OF THE ESTATE OF ABBASS ALKHAFJI, DECEASED, INDIVIDUALLY AND AS NATURAL GUARDIAN OF HER MINOR CHILDREN, Appellant v. TIAA-CREF INDIVIDUAL AND INSTITUTIONAL SERVICES, LLC, AHMED ALKHAFAJI, ALLIAH ALKHAFAJI AND SHEAMEH ALKHAFAJI-ALDUAIISI, Appellees	: No. 38 WAP 2011 : : Appeal from the Order of the Superior Court entered February 14, 2011 at No. 287 WDA 2010, reversing the Order of the Court of Common Pleas of Lawrence County, entered January 15, 2010 at No. 5 of 2008 O.C., and remanding. : : ARGUED: April 11, 2012

FATIN ALKHAFAJI, ADMINISTRATOR C.T.A. OF THE ESTATE OF ABBASS ALKHAFJI, DECEASED, INDIVIDUALLY AND AS NATURAL GUARDIAN OF HER MINOR CHILDREN, Appellant v. TIAA-CREF INDIVIDUAL AND INSTITUTIONAL SERVICES, LLC, AHMED ALKHAFAJI, ALLIAH ALKHAFAJI AND SHEAMEH ALKHAFAJI-ALDUAIISI, Appellees	: No. 39 WAP 2011 : : Appeal from the Order of the Superior Court entered February 14, 2011 at No. 363 WDA 2010, reversing the Order of the Court of Common Pleas of Lawrence County, entered January 15, 2010 at No. 5 of 2008 O.C., and remanding. : : ARGUED: April 11, 2012

OPINION IN SUPPORT OF AFFIRMANCE

MR. JUSTICE EAKIN **DECIDED: JUNE 17, 2013**

The Superior Court reversed the order of the orphan's court, which distributed decedent's retirement annuities in accordance with decedent's will, rather than the beneficiary designations in his annuity contract. Applying longstanding principles of contract and probate law, the Superior Court properly found decedent made no effort to change the beneficiary designations by the terms of his annuity contract; as such, the will did not undo his designations in the contract.

Decedent signed a property settlement agreement when divorcing his second wife, wherein he agreed to designate the children from his first two marriages as the beneficiaries of his retirement annuity contracts — he notified the appellee annuity company and made that change. Some years later, while hospitalized with spinal cancer, decedent dictated and executed a new will which called for the proceeds of his annuity contracts to go to appellant and all of his children. Decedent did nothing to give appellee notice of this change of mind, as the contract required. Two months later, he died; his executor sent copies of the will and the marital settlement agreement to appellee. Appellant filed a petition to enjoin distribution of the annuities.

Appellant frames the following question: "Is a change of beneficiaries by will permitted, as a matter of law, when the notice provisions in annuity contracts did not clearly and unambiguously preclude a beneficiary designation by will?" This second clause of this question is a red herring. The first half states the fundamental question: may a will change a contractual beneficiary? The second clause suggests that the answer is dependent on whether the annuity contract expressly prohibits it. This contract of course did not prohibit anything. Essentially, insurance contracts set forth

rights and duties of the parties, including the means by which the contract may be modified — they typically do not attempt a comprehensive list of prohibitions. Affirmative requirements for modifying a contract are not rendered meaningless by failure to preclude all other methods. If a contract requires a party to pay by certified check, that does not mean the party can pay in wampum simply because the contract does not expressly prohibit it. This annuity did not preclude changes by will, but it also did not prohibit changes by skywriting, a letter to the editor, or posting it on a Facebook page.

When a contract expressly provides the means of changing its terms, changes must be made in the manner and mode prescribed therein. This is rather basic contract law. It is beyond peradventure that to effectuate a change in the beneficiary of an insurance policy, a party must comply with the procedures set forth in the policy. Riley v. Wirth, 169 A. 139, 140 (Pa. 1933); Sproat v. Travelers' Ins. Co., 137 A. 621, 622 (Pa. 1927); Stickney v. Muhlenberg College TIAA-CREF Retirement Plan, 896 F. Supp. 412, 418 (E.D. Pa. 1995) (applying Pennsylvania law). This contract, indeed most if not all annuity contracts, expressly required one thing to change beneficiaries — notice, sent to the insurer, in writing. This annuitant manifestly knew about these requirements, for he changed his beneficiary designations in accordance with them pursuant to the agreement with his second wife. Presently, there was no attempt or effort at all to comply with the contract's terms.

Perhaps decedent could have used a will to comply with the contract requirements. As it was a writing, decedent could have sent it to the insurer, which might have sufficed had the company found it sufficiently clear. However, decedent did not do this, or try to do this. Decedent in fact did nothing — he took no steps to do the single thing the contract required. While a will could be the writing used to provide notice of a

desire to change beneficiaries, if it is not sent to the insurer by the annuitant, it is merely an unmailed letter. As concerns the annuities, there is no magic in the fact it was a will.

The general rule concerning a change of beneficiary requires strict or literal compliance with policy terms, though our case law has recognized an exception where an insured makes reasonable but unsuccessful efforts to send notice. This exception will recognize a change in beneficiary designation, even though notice is received after the death of the annuitant, if the annuitant made every reasonable effort to comply with the notice requirements of the policy. See Breckline v. Metropolitan Life Insurance Co., 178 A.2d 748, 750 (Pa. 1962); Riley, at 140; Sproat, at 622; In re Estate of Golas, 751 A.2d 229, 231 (Pa. Super. 2000); Carruthers v. $21,000, 434 A.2d 125, 127 (Pa. Super. 1981); Greene v. Public School Employees' Retirement System, 878 A.2d 153, 157 (Pa. Cmwlth. 2005); Dale v. Philadelphia Board of Pensions and Retirement, 702 A.2d 1160, 1163 (Pa. Cmwlth. 1997); Provident Mutual Life Insurance Company of Philadelphia v. Ehrlich, 508 F.2d 129, 132-33 (3d Cir. 1975) (applying Pennsylvania law); Stickney, at 418 (applying Pennsylvania law). A will unsent constitutes no reasonable effort at notice, much less "every reasonable effort." Equity and our case law may reward the stalwart but unsuccessful effort, but they never reward the absence of effort.

The instant policy provides:

> Procedure for Elections and Changes. You, or your Second Annuitant or beneficiary having the right to do so, may elect to change, in accordance with the terms of our certificate, any of the following by written notice satisfactory to TIAA (CREFF) [sic], sent to its home office in New York, NY. No such notice will take effect unless it is received by TIAA (CREF). When received, it will take effect as of the date it was signed, whether or not the signer is living at the time we receive it.

Trial Court Opinion, 1/15/10, at 5-6 (quoting TIAA Group Manual Section 37 and CREF GROUP Manual Section 44) (emphasis added).

As there is no "Second Annuitant or beneficiary having the right," it is the annuitant, the "you" in the above section, who must send satisfactory written notice to the home office of TIAA-CREF — it is, after all, only the parties to a contract that have the ability to modify it. The policy clearly does not contemplate, much less authorize, posthumous notice. Indeed, the contract here, and our case law, contemplates written notice to the insurer from the insured — once the party to the contract dies, the ability to modify the contract dies unless the contract provides otherwise — here, it does not. Absent a change in the terms by the means required by the contract, the obligation of the insurer is to carry out the terms of the contract as it exists.

This is for good reason. If unilateral changes in contracts by the use of testamentary instruments are posthumously recognized, insurance companies (indeed, all fiduciaries) would be unable to rely on the existing contract terms. Reliance on the beneficiary designation in the contract becomes a dangerous proposition, particularly where the existence of a will is unknown, or not promptly found or presented, or where a will contest may be anticipated, or, as here, where a wife and ex-wife compete on behalf of their children. Would the result change if the will predates the contract designation, or the contract designation predates the will?

Parties to a contract must have the ability to rely on the terms of their contract, and should not have to speculate about testamentary clauses in documents of which they have no awareness. To allow modification of non-testamentary contractual assets by testamentary documents blurs the timeless and very practical distinction between the two, notably set forth in 20 Pa.C.S. § 6108.[1] Allowing contract notice requirements to be

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[1] That statute, in relevant part, provides:

> The designation of beneficiaries of life insurance, annuity or endowment contracts, or of any agreement entered into by an

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ignored based on the lack of a prohibition of other writings is bootstrapping at its best, and is squarely against the law of contracts. Such a change in our law would cause convolutions we cannot foresee, including tax consequences, estate planning uncertainties, and family law problems — indeed, the beneficiary designation in this case being a requirement of a marital property settlement agreement, allowing it to be altered after death through a will is problematic at best.

There appears no logical basis for changing this law, nor is there a cognizable reason in equity for conflating the venerable law of contracts and the world of probate. There is no reason to depart from the line of authority requiring a party to comply with the contract entered. A will is still a will, and a contract should remain a contract. Blurring the distinction is a bad idea, and the decision of the Superior Court should be affirmed.

Former Justice Orie Melvin did not participate in the decision of this case.

Mr. Chief Justice Castille joins this opinion in support of affirmance.

Mr. Justice Saylor files an opinion in support of affirmance in which Mr. Chief Justice Castille joins.

Mr. Justice Baer files an opinion in support of reversal.

Madame Justice Todd files an opinion in support of reversal in which Messrs. Justice Baer and McCaffery join.

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> insurance company in connection therewith, supplemental thereto or in settlement thereof, and the designation of beneficiaries of benefits payable upon or after the death of a participant under any pension, bonus, profit-sharing, retirement annuity, or other employee-benefit plan, shall not be considered testamentary and shall not be subject to any law governing the transfer of property by will.

20 Pa.C.S. § 6108(a).