[J-45A&B-2012][Lead OISA – Eakin, J.]
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-ALDUALISI, 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.
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-ALDUALISI, Appellees	:	No. 38 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 SAYLOR **DECIDED: JUNE 17, 2013**

I agree with Mr. Justice Eakin that the Superior Court's order should be affirmed, and observe, additionally, that the question this Court accepted for review erroneously characterizes the intermediate court's decision as holding that, by law, the decedent's will could not, under any circumstances, have constituted notice to TIAA-CREF to designate beneficiaries. See Alkhafaji v. TIAA-CREF, 612 Pa. 311, 30 A.3d 1100 (2011) (per curiarm). To my reading, that is not what the Superior Court held. For example, the court did not purport to foreclose the possibility that a copy of the will, if it had been sent to TIAA-CREF in a timely manner by the decedent during his lifetime (regardless of when it may have been received), could have constituted valid written notice of a change in beneficiaries. Accord Opinion in Support of Affirmance, slip op. at 3 (Eakin, J.) ("As [the will] was a writing, the decedent could have sent it to the insurer, which might have sufficed . . .."). Rather, a fair reading of the intermediate court's opinion reveals that it merely determined that the decedent failed to substantially comply with the terms of the policies in question because he never made any attempt to notify TIAA-CREF of the beneficiary changes at issue – although the record reveals that he lived for more than two months after dictating the will, was in sound mind during that time, and was undoubtedly familiar with the requirements for changing beneficiaries.[1]

[1] See Alkhafaji v. TIAA-CREF, LLC, Nos. 287 & 363 WDA 2010, slip op. at 3 n.2, 8-9 (Pa. Super. Feb. 14, 2011) ("Decedent lived more than two months after he executed the will, yet he made no effort to comply with the written notice requirement for changing beneficiaries. . . . [W]e cannot conclude that Decedent did all he reasonably could under the circumstances to comply with the terms of his policy."); N.T, April 11, 2007, at 21, reproduced in R.R. 42a (reflecting testimony that decedent was of sound mind between the time he dictated his will and the time he died more than two months later).

See generally Brief for Appellees at 2 (pointing out that the question accepted for review was not addressed by the Superior Court, as that tribunal "determined the case on separate grounds"). The issue on which this case turns is therefore whether substantial compliance with the terms of the contract was achieved. Because I believe that the Superior Court was correct in finding a lack of substantial compliance, I would affirm.

Notably, Madame Justice Todd's Opinion in Support of Reversal ("OISR") acknowledges that the annuity contracts in issue "required decedent to . . . furnish TIAA-CREF with written notice of his designated changes." OISR, slip op. at 15 n.6 (Todd, J.). The OISR, however, never addresses the issue of substantial compliance by the decedent in this material respect. Rather, the OISR merely declares at the end of the opinion that, under the circumstances, decedent properly used his will to change the beneficiaries of his annuities.[2] It is difficult to know what standard the OISR applies to find that the decedent's actions were sufficient to substantially comply with the contract's notice term. Indeed, the OISR's brief statement in this regard appears to stem from its view of the case as fundamentally involving the legal question of whether a will can ever be utilized to change beneficiaries.

In discussing this question, the OISR takes particular exception because it perceives the present, unpublished Superior Court opinion as having interpreted the intermediate court's earlier decision in Carruthers v. $21,000 (Formerly New York Life Insurance Company), 290 Pa. Super. 54, 434 A.2d 125 (1981), "to stand for the proposition that a will, as a matter of law, cannot operate to change the beneficiary of an annuity policy," OISR, slip op. at 14-15 (Todd, J.). However, that is hardly a basis for

[2] Justice Todd's OISR makes much of the fact that the policy in issue permitted receipt, by TIAA-CREF, of notice after the insured's death. It does not explain, however, how an after-death receipt provision negates the express requirement for the decedent at least to make some attempt to effectuate notice within his lifetime.

disapproving Carruthers itself, see id. at 15 ("I would, therefore, hereby disapprove Carruthers."), since Carruthers dealt centrally with the issue of substantial compliance, regardless of whether the unpublished Superior Court disposition in the present matter correctly described its holding.

To the extent, moreover, that the Justices supporting reversal view Carruthers as having expressed the same "erroneous belief" "that a will, as a matter of law, cannot operate to change" beneficiaries, id. at 14-15, such understanding is not supported by the text of the Carruthers opinion. Although Carruthers, like the present case, involved a will, there is no indication that the court viewed the will as incapable, per se, of effecting a beneficiary change. Rather, the court explained that "notice of the will was not brought to the attention of the insurer until after the death of the insured," Carruthers, 290 Pa. Super. at 57, 434 A.2d at 127, although, like here, the decedent lived several months after executing his will and was familiar with the policy's provisions relating to beneficiary changes. Furthermore, the Carruthers court highlighted, "the insured [himself] made no effort to comply with the [notice-to-insurer] provisions of his policy." Id. On this basis, the court determined, ultimately, that the insured did not "do[] all that he reasonably c[ould] under the circumstances to comply with the terms of the policy." Id. If the court had intended to hold that a will cannot, under any circumstances, effect a change of beneficiaries, there would have been little need to recite these factors as, indeed, they would have been immaterial. In my view, Carruthers was correctly decided and appropriately remains good law.

In summary, I do not read the Superior Court's decisions in Carruthers, or in the present case, as implementing a per se, state-law prohibition upon the transmittal of a will to an insurance or annuity company as a means of conveying notice of a change of beneficiary. Rather, I read them as correctly enforcing a substantial compliance

requirement that the policy-or-contract holder make some effort at effectuating notice, albeit this might be received by the company after his death.

For all of these reasons, I agree with the lead OISA that the judgment of the Superior Court should be affirmed.

Mr. Chief Justice Castille joins this Opinion in Support of Affirmance.