

IN THE SUPREME COURT OF OHIO

NATIONWIDE LIFE INSURANCE CO.

Plaintiff

vs.

KARL R. KALLBERG, ADMINISTRATOR

Defendant

and

KATHLEEN M. JASKIEWICZ

Defendant-Appellee

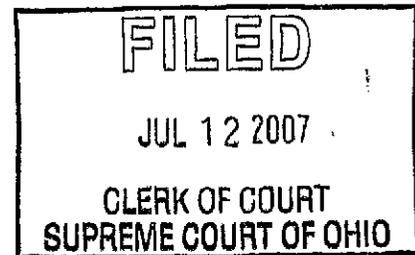
and

KAREN KALLBERG

Defendant-Appellant

CASE NO.: 07-1055

On Appeal from the Lorain County Court  
of Appeals, Ninth Appellate District



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**APPELLEE KATHLEEN M. JASKIEWICZ'S MEMORANDUM IN RESPONSE TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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## I. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This matter presents no significant issue regarding the application of R.C. 1339.63 given that Appellant was not designated a beneficiary to the insurance policy at issue until nearly six (6) years *after* the enactment of that statute. Accordingly, Appellant's expectancy interest in that contract arose after the effective date of R.C. 1339.63 and the trial court was correct in applying said statute. Indeed, the appellate court properly affirmed the trial court's grant of summary judgment to Appellee because the application of R.C. 1339.63, in this case, does not violate the contracts clause of Section 28, Article II of the Ohio Constitution.

Neither this Court's pronouncement in *In re: Estate of Holycross* (2007), 112 Ohio St. 3d 203, 2007-Ohio-1, nor *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St. 3d 164 addressed the application of R.C. 1339.63 to an ex-spouse beneficiary when said beneficiary was designated after the effective date of the statute. This Court did, however, decline to hear a discretionary appeal in *W. & S. Life Ins. Co. v. Braun* (1996), 116 Ohio App. 3d 423,<sup>1</sup> where R.C. §1339.63 was applied to a policy of insurance issued prior to the statute's date because the change in beneficiary occurred after the statute's effective date. Such are the same facts presented herein. In both *Schilling* and *In re: Estate of Holycross*, the ex-spouse beneficiaries were designated at the inception of the policies *prior* to the effective date of R.C. 1339.63.

In both *W. & S. Life Ins. Co.* and this case, the decedents were granted the absolute right to change beneficiaries, said designations taking effect when they were made. Thus, Appellant had no expectancy or other interest in the policy of insurance until February 17, 1996, the date that the Decedent herein executed an Application for Change of Beneficiary

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<sup>1</sup> Discretionary appeal not allowed (1997), 78 Ohio St. 3d 1425.

Designation. This designation, nearly six (6) years after the enactment of R.C. 1339.63, subjected the policy to the statute without impairing any obligation of contract. Certainly, the carrier had no obligation to Appellant whatsoever, potential or otherwise, prior to her being designated a beneficiary in February of 1996.

Appellant wrongfully characterizes the holding of the Ninth District Court of Appeals in this matter, as well as that of the Tenth District Court of Appeals in *W. & S. Life Ins. Co.* as "loopholes" to the holdings of *In re: Estate of Holycross* and *Schilling*. In both of those cases, the ex-spouses were appointed beneficiaries at the inception of the policies therein, well before the enactment of R.C. 1339.63. Here and in *W. & S. Life Ins. Co.*, the beneficiaries at issue were designated after the statute's effective date and those courts properly applied R.C. 1339.63 to divest the ex-spouses of any interest in the policies.

## II. STATEMENT OF CASE AND FACTS

Plaintiff Nationwide Life Insurance Company ("Nationwide") filed a Complaint in Interpleader against Karl R. Kallberg, Administrator of the Estate of Eric J. Kallberg ("Decedent"), Appellant Karen Kallberg ("Appellant") and Appellee Kathleen M. Jaskiewicz ("Appellee") concerning the distribution of Decedent's life insurance proceeds. Nationwide issued the policy to Decedent on January 23, 1986. Appellant had no rights, expectant or otherwise, in the policy at this time. In fact, at the date of inception, Decedent's first wife, Mary Kallberg, was the designated beneficiary. R.C. 1339.63 became effective on May 31, 1990. Thereafter, Decedent executed a change of beneficiary designation naming his brother, Karl Kallberg, the primary beneficiary on January 24, 1991. On July 29, 1991, Decedent again changed the primary beneficiary back to Mary Kallberg, still his wife at the time. Sometime thereafter, but prior to the events at issue herein, Decedent and Mary Kallberg terminated their

marriage. Appellant and Decedent were married on January 18, 1996. It was not until February 17, 1996, that Decedent executed a change of beneficiary designation naming Appellant the primary beneficiary and Appellee, Decedent's sister, contingent beneficiary. Thus, both Appellant and Appellee's expectancy interests in Decedent's life insurance policy arose after the effective date of R.C. 1339.63.

Appellant and Decedent terminated their marriage on December 17, 2003. The Separation Agreement by and between the parties provides that they shall retain as their "sole property" any life insurance policies..."free and clear of any claim by the other party..."<sup>2</sup>

Nationwide was compelled to file its Complaint after Appellant claimed that she was the rightful beneficiary of the policy notwithstanding R.C. 1339.63 and the parties' Separation Agreement. In rendering judgment for Appellee on June 30, 2006, the trial court properly applied R.C. 1339.63 to this matter, thereby treating Appellant as having pre-deceased her ex-husband for purposes of determining the beneficiary of the policy and awarding the proceeds to Appellee, the contingent beneficiary. This decision was affirmed by the Ninth District Court of Appeals on April 30, 2007.

### **III. RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

#### **1. Applying R.C. 1339.63 to a Beneficiary Designation Made After the Effective Date of the Statute Is Not Unconstitutional.**

Prior to the enactment of R.C. 1339.63, the general rule was that a divorce alone did not automatically defeat the right of a named beneficiary to receive life insurance or other

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<sup>2</sup> Appellant moved to strike the admission of the parties' Separation Agreement in the trial court, but the trial court overruled said motion. Appellant pursued this theory in the appellate court which agreed that the Separation Agreement was not properly authenticated, but considered any error related to its admission harmless because the trial court's decision was based solely on an analysis of the policy and application of R.C. 1339.63. Appellee, however, maintains that the Separation Agreement, as an Order of the Court, is a self-authenticating document.

contract proceeds from a former spouse *except where the terms of the divorce specifically indicate the elimination of the named beneficiary from all contract rights*, regardless of whether a change had been made in the policy. *Phillips v. Pelton* (1984), 10 Ohio St. 3d 52. The enactment of R.C. 1339.63 was the legislature's attempt to correct human oversight in one's personal affairs and avoid unintended windfall to ex-spouses. However, this Court in both *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St. 3d 164 and *In re: Estate of Holycross* (2007), 112 Ohio St. 3d 203, 2007-Ohio-1, refused to apply R.C. 1339.63 to *policies issued and beneficiaries designated* prior to the effective date of the statute. Specifically, the Court in *Schilling* stated:

Today, we hold that the provisions of R.C. 1339.63, as applied to contracts entered into before the effective date of the statute, impair the obligation of contracts in violation of Section 28, Article II of the Ohio Constitution. We note, however, that contracts entered into *on or after* the effective date of R.C. 1339.63 are subject to the provisions of the statute. 67 Ohio St. 3d at 168. (Emphasis in original.)

In both *Schilling* and *In re: Estate of Holycross*, this Court was faced with attempts to apply R.C. 1339.63 to policies of insurance that were purchased prior to the effective date of the statute on the grounds that the divorce occurred after the statute's effective date. Neither of these cases presented a situation where the ex-spouse was designated a beneficiary after R.C. 1339.63's effective date. The Tenth District Court of Appeals addressed that situation in *W. & S. Life Ins. Co. v. Braun* (1996), 116 Ohio App. 3d 423, *discretionary appealed not allowed* (1997), 78 Ohio St. 3d 1425, wherein the court presumed that the decedent therein was aware of the provisions of R.C. 1339.63 when he executed a change of beneficiaries. Because the last change of beneficiaries occurred after the effective date of R.C. 1339.63, the court therein held that the statute was properly applied to the designation and divested the ex-spouse's interest

in the insurance proceeds. In this matter, Appellant had no expectancy interest in the contract until 1996, when she was named a beneficiary. At that time, R.C. 1339.63 was in full force and effect and her interest in the contract was subject to that statute when she and Decedent divorced in 2003.

Appellant overstates the holdings of *Schilling* and *In re: Estate of Holycross* to mean that the "critical date" in every case involving R.C. 1339.63 is the date of the insurance contract. Compared to the date of the termination of marriage, that is a correct statement. However, in both *Schilling* and *In re: Estate of Holycross*, the first wife was named at the inception of the policies of life insurance and the beneficiary designation was never changed. Accordingly, *Schilling* and *In re: Estate of Holycross* are not determinative of the outcome herein insofar as Appellant's expectancy under the policy of insurance never arose until after R.C. 1339.63 was enacted. As stated by this Court and emphasized by Appellant, all persons are "conclusively presumed to know the law." *In re Estate of Holycross*, 112 Ohio St. 3d 203, 209, citing *State v. Pinkney* (1988), 36 Ohio St. 3d 190, 198. The argument can be made that, when Decedent designated Appellant a beneficiary of his life insurance contract in 1996, he knew full well that R.C. 1339.63 was in full force and effect.

The entire purpose of a life insurance policy is the payment of proceeds to a beneficiary or beneficiaries in the event of the owner's death. Accordingly, a change in beneficiaries affects a material term of the contract and the appellate court was correct to apply the law in effect at the time such change was executed. See, *W. & S. Life Ins. Co.*, citing *Wendell v. Ameritrust Co., N.A.* (1994), 69 Ohio St. 3d 74, 76, citing *Cent. Trust Co. of N. Ohio, N.A. v. Smith* (1990), 50 Ohio St. 3d 133; *Flynn v. Bredbeck* (1946), 147 Ohio St. 49, ¶ 1 of the syllabus.

**2. The Lower Courts Did Not Disregard the Intent of the Policy Holder In Applying R.C. 1339.63 to the Policy At Issue.**

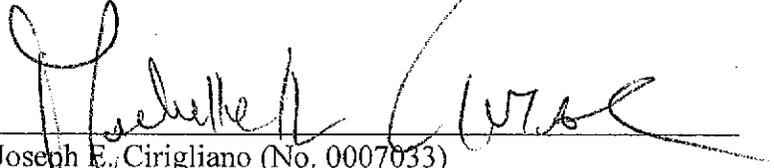
Appellant's reliance upon an affidavit submitted in the lower court attesting that Decedent indeed desired to retain Appellant as beneficiary was a self-serving piece of evidence which understandably did not convince the trial court. Moreover, Appellant's argument concerning Decedent's intent is discredited by the clear and unambiguous terms of the Separation Agreement between the parties wherein life insurance policies were to be retained as each party's sole property, "free and clear of any claim by the other party." Accordingly, Appellant's insistence regarding Decedent's intent on this matter is disingenuous at best.

A discretionary appeal is not an ideal forum for airing grievances regarding the consideration and weighing of evidence in a lower court. Although Appellant complained to the Ninth District Court of Appeals that the Separation Agreement was not properly before the trial court, Appellee maintains that, as an Order of the court, it is a self-authenticating document. Certainly, Appellant acknowledged the existence of the Separation Agreement in the very affidavit submitted to the trial court wherein she attempted to negate the clear intention of Decedent contained therein to retain his life insurance policy as his sole property, "free and clear of any claim by the other party." Appellant cannot complain that her affidavit should have been considered while, at the same time, turning a blind eye to the clear and plain terms of the Separation Agreement divesting her of any rights to the proceeds of Decedent's life insurance policy. Moreover, these issues do not present matters of public or great general interest.

#### IV. CONCLUSION

In light of the foregoing, Appellee submits that this case involves no matter of public or great general interest and respectfully requests the Court decline jurisdiction in this matter.

Respectfully submitted,



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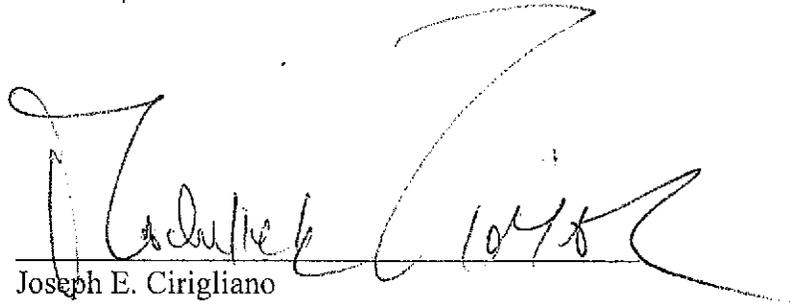
**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Appellee Kathleen M. Jaskiewicz's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction has been sent by ordinary United States mail, postage prepaid, on this 12<sup>th</sup> day of July, 2007 to:

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A handwritten signature in black ink, appearing to read "Joseph E. Cirigliano", written over a horizontal line.

Joseph E. Cirigliano  
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