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DEC 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

11-2073

LORI LEBLANC, et al. : CASE NO. _____

APPELLANT, :

V. : ON APPEAL FROM THE SECOND

WELLS FARGO ADVISORS, LLC, : DISTRICT COURT OF APPEALS

et al., : CASE NO. CA 024348

APPELLEES. :

NOTICE OF PENDING MOTION TO CERTIFY A CONFLICT

COUNSEL FOR APPELLANT
 David D. Brannon
 BRANNON & ASSOCIATES
 130 West Second Street, Suite 900
 Dayton, Ohio 45402
 Telephone: (937) 228-2306
 Facsimile: (937) 228-8475
 Attorney for Lori Leblanc and Gloria Welch
 E-Mail: davidbrannon@branlaw.com

COUNSEL FOR APPELLEE:
 James D. Brookshire, Esq.
 Dungan & Lefevre Co., L.P.A.
 210 W. Main Street
 Troy, Ohio 45373
 (937) 339-0511
 (937) 335-4084
 Attorney for Cynthia Morris
 E-Mail:jamesb@dungan-lefevre.com

COUNSEL FOR APPELLEE:
 Pamela K. Ginsburg, Esq.
 Ulmer & Berne LLP
 600 Vine Street, Suite 2800
 Cincinnati, Ohio 45202
 Telephone: (513) 698-5020
 Attorney for Wells Fargo Advisors, LLC

COUNSEL FOR APPELLEE:
 Paul Courtney, Esq.
 575 South Dixie Dr.
 Vandalia, Ohio 45414
 Email:Pcourtney14@gmail.com
 Attorney for Bruce Leland

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Now come Appellants Lori Leblanc individually and on behalf of the Estate of John Burchfield and Gloria Welch, by and through counsel, and pursuant to S.Ct. Prac. R. 4.4(A), hereby give notice of their Pending Motion to Certify a Conflict filed with the Second District Court of Appeals. A copy of the motion to certify is attached as Exhibit 1.

Respectfully submitted,



David D. Brannon (0079755)
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following this 9th day of December, 2011, by regular U.S. Mail.

PAUL COURTNEY M
575 SOUTH DIXIE DRIVE
VANDALIA OH 45377
Attorney for Bruce Leland

PAMELA GINSBURG K
600 VINE STREET SUITE 2800
CINCINNATI OH 45202
Attorney for Wells Fargo Advisors, LLC

JAMES BROOKSHIRE D
210 WEST MAIN STREET
TROY OH 45373
Attorney for Cynthia Morris



David D. Brannon (0079755)

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IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO

LORI LEBLANC, et al.

*

CASE NO.: CA 024348

Plaintiffs-Appellants,

*

IN THE MONTGOMERY CO.
COURT OF COMMON PLEAS

vs.

*

CASE NO.: 2010 CV 01926

WELLS FARGO ADVISORS, LLC,
et al.,

*

APPELLANT'S MOTION FOR
CERTIFICATION OF A CONFLICT
TO THE OHIO SUPREME COURT

Defendants-Appellants.

*

*

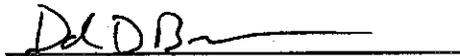
Now come Appellants Lori Leblanc and Gloria Welch ("Appellants), by and through counsel, and move the Court, pursuant to App.R. 25, to certify a conflict between the Court's decision in this case and the Ninth District Court of Appeals' decision in *Kelly v. May Assoc. Fed. Credit Union*, 8th Dist. No. 23423, 2008-Ohio-1507. Exhibit 1, attached. The question which Appellants ask this Court to certify to the Supreme Court is as follows:

Where there is a dispute between potential beneficiaries of an individual retirement account ("IRA"), when the custodian of that account files an interpleader action and waives compliance with its change of beneficiary procedure, is a subsequently intended beneficiary still required to show that the owner of the IRA account substantially complied with the change of beneficiary procedure in order to recover?

A memorandum in support follows.



Respectfully submitted,



David D. Brannon (0079755)
BRANNON & ASSOCIATES
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com

MEMORANDUM

This Court held in the appeal at bar that “the trial court correctly granted summary judgment to Cynthia Burchfield because the decedent did not comply with the contract provision for change of beneficiary, and even if the contractual method for change of beneficiary is deemed to be waived, the decedent did not substantially comply with the provision...substantial compliance with the contract provisions remains necessary, as part of an ‘intent of the decedent’ analysis, even when actual compliance has been waived.” *Leblanc v. Wells Fargo Advisors LLC*, 2nd Dist. No. 24348, 2011-Ohio-5553, p. 6. Exhibit 2, attached. Effectively, this Court’s holding declined to adopt the Ninth District Court of Appeals’ interpretation. In *Kelly v. May Assoc. Fed. Credit Union*, 8th Dist. No. 23423, ¶¶ 13,18, the Ninth District Court of Appeals, declining to adopt a substantial compliance standard and permitting a custodian to waive compliance, held:

A custodian of an individual retirement account who files an interpleader action when there is a dispute between potential beneficiaries of that account, just like an insurer who files an interpleader action under similar circumstances, waives compliance with its change of beneficiary procedure.

Like the individual retirement account at issue in this case, life insurance policies typically include a procedure for designating and changing beneficiaries. It has long been the rule in Ohio that those procedures are intended to protect the insurer

from duplicate liability and the insurer is free to waive them. *Rindlaub v. Traveler's Ins. Co.*, 175 Ohio St. 303, 305, 194 N.E.2d 577 (1963); *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748, syllabus paragraph four (1926). Further, if, in the face of conflicting claims to insurance proceeds, the insurer interpleads those proceeds, it has waived any interest in the resolution of the claims, including enforcement of the procedure set forth in its policy for designating and changing beneficiaries. *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson*, 114 Ohio St. 109, 150 N.E. 748, at syllabus paragraph five. In such a case, if the insured communicated to the insurer her “clearly expressed intent” to change beneficiaries, the proceeds will be paid to the newly designated beneficiary rather than the originally designated beneficiary even though the insured failed to comply with the process set forth in the policy. *Rindlaub*, 175 Ohio St. 303, 194 N.E.2d 577, at syllabus paragraph two.

The holding from the Ninth District Court of Appeals in permitting custodians to waive compliance with its policies by voluntarily interpleading monies from IRAs in dispute is in clear conflict with this Court’s holding in the appeal at bar, because the Ninth District Court of Appeals did not require a substantial compliance test, only the “clearly expressed intent” of the owner of the IRA when the custodian interpleads the IRA monies.

This Court used the dissent in *Kelly* as the basis for its decision. In fact, this Court simply states “we decline to apply *Kelly*’s holding here.” *Leblanc v. Wells Fargo Advisors*, 2nd Dist. No. 24348, p. 12. This Court cites to the “dissenting opinion in *Kelly v. May* [which] declined ‘to extend the law regarding beneficiaries under insurance contracts to an IRA account.’” *Id.*, p. 12 citing *Kelly*, ¶37. This Court surely must recognize that the majority in *Kelly* did extend the law regarding beneficiaries under insurance contracts to an IRA account, permitting waiver of its policies by simply interpleading monies to the Court when a dispute between beneficiaries arose.

Specifically, the Ninth District Court of Appeals, and likewise that Court’s majority, extended the Ohio Supreme Court case of *Rindlaub v. Traveler's Ins. Co.* (1963), 175 Ohio St. 303, for the proposition that a financial custodian waives compliance with its change of beneficiary policy regarding an IRA by interpleading disputed funds to the court and disclaiming

any interest in the outcome. This Court, disagreeing with extending *Rindlaub* in the Second District as the Ninth District did, states “[t]he [*Kelly*] dissent factually distinguished *Rindlaub*, supra, upon which the other judges relied.” *Leblanc v. Wells Fargo Advisors*, 2nd Dist. No. 24348, p. 12. Further, this Court states, “Moreover, with its varying opinions on the bases for that decision, we decline to apply *Kelly*’s holding here.” *Id.*

The respective rules of law followed in *Leblanc v. Wells Fargo Advisors LLC* and *Kelly v. May Assoc. Fed. Credit Union* are in very direct conflict and require resolution.

Section 3(B)(4), Article IV, Ohio Constitution governs motions seeking an order to certify a conflict. Section 3(B)(4) provides: “Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.” The controlling question in the case at bar, and in *Kelly*, is whether substantial compliance with a change-of-beneficiary policy for an IRA is still necessary after an interpleader by the policy custodian. This Court has recently held that substantial compliance is required; the *Kelly* court held the opposite. The *Kelly* holding would require an opposite result applied to the same factual circumstances. The respective rules of law followed in these cases are, for this reason, in direct conflict. Accordingly, there are conflicting judgments between two appellate courts which require resolution under Section 3(B)(4), Article IV.

For this reason, Appellants respectfully move this Court, pursuant to App.R. 25, to certify this conflict to the Ohio Supreme Court for resolution.

Respectfully submitted,



David D. Brannon (0079755)
BRANNON & ASSOCIATES
130 West Second Street, Suite 900
Dayton, Ohio 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: davidbrannon@branlaw.com
Respectfully submitted,

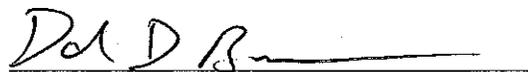
CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was served by regular U.S. Mail and/or hand delivery, postage prepaid upon the following, this 3rd day of November, 2011:

James D. Brookshire, Esq.
Dungan & Lefevre Co., L.P.A.
210 W. Main St.
Troy, Ohio 45373

Pamela K. Ginsburg, Esq.
Ulmer & Berne, LLP
600 Vine St., Suite 2800
Cincinnati, Ohio 45202

Paul Courtney, Esq.
575 South Dixie Drive
Vandalia, Ohio 45414



David D. Brannon