ORIGINAL

IN THE SUPREME COURT OF OHIO

LORI LEBLANC, et al.	:	**CASE NO. 11-2073** 11-2160
APPELLANT,	:	
V.	:	**ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO**
WELLS FARGO ADVISORS, LLC, et al.,	:	**CASE NO. CA 024348**
	:	
APPELLEES.		

NOTICE OF CERTIFIED CONFLICT OF APPELLANTS LORI LEBLANC, ET AL.

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

NOTICE OF CERTIFIED CONFLICT

Now come Appellants Lori Leblanc, et al., and hereby give notice, pursuant to S.Ct. Prac. R. 4.1, of their appeal of the Second District Court of Appeals' decision in *Leblanc v. Wells Fargo Advisors LLC*, 2nd Dist. No. 24348, 2011-Ohio-5553. Exhibit 1, attached. The Second District Court of Appeals, in a Decision and Entry dated December 19, 2011, has certified a conflict between its decision in *Leblanc* and the decision of the Ninth District Court of Appeals in *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507. Exhibit 2, attached. The *Kelly* Decision and Journal Entry are attached as Exhibit 3. The Second District Court of Appeals certified the conflict on the following rule of law:

"In a dispute between (1) a specifically designated and (2) a clearly intended beneficiary of an individual retirement account (IRA), where the account custodian files an interpleader action and purportedly waives compliance with its change of beneficiary procedure, is the 'clearly intended' beneficiary required to show that the owner of the IRA account substantially complied with the change of beneficiary procedure in order to recover?"

Appellants respectfully request that this Supreme Court accept jurisdiction over this appeal, and reverse the decision of the Second District Court of Appeals in this case. Appellants further request that this appeal be consolidated with Appellants' discretionary appeal of the decision of the Second District Court of Appeals, currently awaiting a decision on jurisdiction under Case No. 11-2073.

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 21st day of December, 2011, by regular U.S. Mail.

PAUL COURTNEY M
575 SOUTH DIXIE DRIVE
VANDALIA OH 45377

PAMELA GINSBURG K
600 VINE STREET SUITE 2800
CINCINNATI OH 45202

JAMES BROOKSHIRE D
210 WEST MAIN STREET
TROY OH 45373

David D. Brannon (0079755)

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

LORI LeBLANC, et al.	
Plaintiff-Appellants	Appellate Case No. 24348
v.	Trial Court Case No. 10-CV-1926
WELLS FARGO ADVISORS, LLC, et al.	(Civil Appeal from Common Pleas Court)
Defendant-Appellees	

. . . .

OPINION

Rendered on the 28th day of October, 2011.

. . . .

DAVID D. BRANNON, Atty. Reg. #0079755, Brannon & Associates, 130 West Second Street, Suite 900, Dayton, Ohio 45402
Attorney for Plaintiff-Appellants, Gloria Welch and Lori LeBlanc

JAMES D. BROOKSHIRE, Atty. Reg. #0056200, Dungan & LeFevre Co., LPA, 210 West Main Street, Troy, Ohio 45373
Attorney for Defendant-Appellee, Cynthia Burchfield

PAMELA K. GINSBURG, Atty. Reg. #0071805, Ulmer & Berne, LLP, 600 Vine Street, Suite 2800, Cincinnati, Ohio 45202
Attorney for Defendant-Appellee, Wells Fargo Advisors, LLC

PAUL COURTNEY, Atty. Reg. #0020085, 575 South Dixie Drive, Vandalia, Ohio 45377
Attorney for Defendant-Appellee, Bruce Leland

. . . .

HALL, J.

Lori LeBlanc and Gloria Welch appeal from the trial court's decision and entry sustaining a cross motion for summary judgment filed by appellee Cynthia Burchfield. The motion concerned, among other things, the disposition of individual retirement accounts ("IRAs") held in the name of John Burchfield by the custodian, Wells Fargo.

LeBlanc and Welch advance two assignments of error on appeal. First, they contend the trial court erred in declaring John's two IRAs to be marital property when, they argue, one of them was separate property and the other one was, at most, commingled property.[1] Second, they claim the trial court erred in refusing to find that IRA custodian Wells Fargo Advisers waived compliance with its change-of-beneficiary procedure by interpleading the disputed funds to the court.

The record reflects that John married Cynthia on May 5, 2007. Prior to the marriage, John maintained two IRA accounts. A few days before the marriage, the first account had a closing value of $250,313.33, and the second account had a closing value of $15,334.98. When John originally opened the accounts, he designated Gloria Welch, his mother, and Bruce Leland, his stepfather, as beneficiaries. Shortly before his marriage, however, John named Cynthia as the beneficiary on both IRAs.

On October 28, 2009, John sent his Wells Fargo financial adviser, Aaron Michael, an e-mail stating that he and Cynthia were getting divorced and requesting paperwork to change his IRAs. Michael responded by e-mail, asking John to let him know who John wanted as the beneficiary. John subsequently spoke to Michael by phone and explained

[1]For purposes of clarity, we refer to John and Cynthia Burchfield by their first names.

who he wanted to be the new beneficiaries. Michael had the forms completed with Welch and Leland as primary beneficiaries, in the amounts of 75 percent and 25 percent respectively.[2] Lori LeBlanc, John's sister, was listed as the contingent beneficiary. Michael proceeded to send John these necessary change-of-beneficiary forms. Before doing so, Michael pre-dated them November 2, 2009, as he believed John would return them to him by then.

Cynthia served John with a complaint for divorce and a restraining order on November 5, 2009. The restraining order prohibited John from, inter alia, transferring any accounts or any other interest in any asset. Around the same time, John spoke to Michael again and advised him that the change-of-beneficiary forms were "taken care of." Michael assumed this meant John had mailed the forms back to Wells Fargo.

John committed suicide on December 16, 2009. After his death, Michael and one of John's co-workers, Jeff Miller, discovered the signed and completed change-of-beneficiary forms in an envelope among John's personal papers. Michael gave the forms to his manager at Wells Fargo. A dispute then arose regarding the beneficiary of the IRAs.

Welch filed the present action in March 2010. Joining her as a plaintiff was LeBlanc, who was acting as executor of John's estate. In their complaint, LeBlanc and Welch sought, among other things, a declaratory judgment enforcing the change-of-beneficiary forms. Cynthia filed a counterclaim, seeking a determination that she was the proper beneficiary of the IRAs. Wells Fargo, which also had been named a party, originally filed its answer. Shortly thereafter, Wells Fargo was granted leave to file an amended answer.

---

[2] Bruce Leland has since disclaimed any interest in probate or non-probate assets of the decedent, and he was dismissed from the case.

It filed an answer and a counterclaim and crossclaim for interpleader on May 27, 2010. Therein, Wells Fargo asserted no interest in the dispute and offered to hold the IRA funds in trust or to turn them over to the court pending resolution of the matter.

LeBlanc and Welch moved for partial summary judgment in July 2010. Their motion addressed only the proper beneficiary of the IRAs. Cynthia responded with a September 2010 cross motion for summary judgment on all issues, including the beneficiary of the IRAs. On November 16, 2010, the trial court filed separate entries denying the motion filed by LeBlanc and Welch and sustaining the motion filed by Cynthia.[3] With regard to the two IRAs, the trial court held that Cynthia was the sole beneficiary of them. (Doc. #57 at 8). In reaching this conclusion, the trial court found that John's change-of-beneficiary forms were of no legal effect because he had failed to comply with Wells Fargo's written policy, which required them to be returned to the company.[4] Furthermore, with regard to the larger of the two IRAs, the trial court held that it qualified as marital property because John had deposited $74,062.47 into it during the marriage. Based on its determination that the larger IRA was marital property, the trial court reasoned that Wells Fargo could not waive compliance with its change-of-beneficiary procedure or actually change the beneficiary without Cynthia's consent, which did not exist. (Id. at 8-11). This timely appeal followed.

In their first assignment of error, LeBlanc and Welch contend the trial court erred in declaring the IRAs to be marital property when the smaller one was separate property and

[3]Although the trial court resolved other issues, they are not pertinent to the present appeal, which concerns only the disposition of the IRA funds.

[4]The trial court determined that John's right to change his beneficiary terminated upon his death. Therefore, the trial court found it irrelevant that the change-of-beneficiary forms eventually found their way to Wells Fargo after John committed suicide.

the larger one was, at most, commingled property.

Upon review, we find that characterization of the IRA accounts as marital or non-marital property is applicable only in domestic-relations cases, which the present case is not. First, if a death of either party occurs before a decision is made in a divorce action, the action abates. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 99, and *Porter v. Lerch* (1934), 129 Ohio St. 47, 56. Therefore, there is no active domestic-relations case. Second, the statute that defines what is marital and separate property is limited by its terms to domestic-relations courts and their proceedings. R.C. 3105.171, entitled "Division of marital property; separate property," is prefaced, "(A) As used in this section," thereby limiting applicability to domestic-relations matters. The statute further provides: "(B) In divorce proceedings, the court shall, and in legal separation proceedings * * *, the court may, determine what constitutes marital property and what constitutes separate property." Id. Nothing in the domestic-relations statutory scheme indicates that it would be applicable to determination of marital or separate property outside the domestic-relations context. We, therefore, determine that those statutes are inapplicable to the dispute before us. To the extent that the appellants' first assignment of error asserts that the trial court erred by determining that the IRA accounts were partially marital property, we agree, not because the court should have decided differently that the accounts were separate property, but because R.C. 3105.171 does not apply. Nevertheless, to determine the correct beneficiaries to receive John's property following his death, it is unnecessary to decide whether the IRA funds were his separate or marital property. Therefore, any error made by analyzing the IRAs as marital property is not dispositive of this appeal. The first assignment of error is overruled.

In their second assignment of error, LeBlanc and Welch claim the trial court erred in refusing to find that Wells Fargo waived compliance with its change-of-beneficiary procedure by interpleading the disputed funds to the court.

This argument stems from John's failure to return the two change-of-beneficiary forms to Wells Fargo prior to his death. Under Wells Fargo's written policy, a change-of-beneficiary form is not effective until after it is completed, signed, and delivered to the company. Whether the decedent is the one who signed his name to the forms is a matter of some dispute. But, construed most strongly in favor of LeBlanc and Welch, the evidence could suggest, and for our analysis we will assume, that John completed and signed the forms. There is no dispute, and no genuine issue of fact, that the forms were not returned to Wells Fargo before John died. The unreturned forms were found after his death in an envelope among his personal belongings. The issue before us is whether the unreturned forms, or any expression of intent to change the beneficiary, had any legal significance in light of Wells Fargo's change-of-beneficiary policy, which required the forms to be returned before the beneficiary would be changed.

We believe 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. As we will explain below, substantial compliance with the contract provisions remains necessary, as part of an "intent of the decedent" analysis, even when actual compliance has been waived. Accordingly, we will affirm the judgment of the trial court.

The first step in our analysis is to examine the nature of the IRA accounts to determine what rules apply. The appellants suggest that the case law developed to interpret the change of beneficiaries for life insurance policies should apply to these IRA accounts. They refer to *Kelly v. May Assoc. Fed. Credit Union*, Summit App. No. 23423, 2008-Ohio-1507, in which the Ninth District Court of Appeals applied case law analysis applicable to life insurance policies to an upon-death transfer of an IRA. But a life insurance policy is a contract where, upon the death of the insured, the company pays a death benefit to the beneficiary. Conversely, an IRA is a tax-advantaged present asset of the owner.[5] Ordinarily, the manner in which a decedent directs the transfer of an asset upon death is by his or her last will and testament. The statute of wills, Chapter 2107 of the Revised Code, has specific formalities. Unless there is an exception or exclusion, upon death an asset becomes part of a decedent's estate for intestate or testamentary distribution. It is only by the recognition of certain non-testamentary transfers that assets transfer outside a decedent's estate.

Common methods to "avoid probate" include joint tenants with right of survivorship (JTWROS), payable on death accounts (POD), or trust arrangements. In Ohio, joint and survivorship accounts avoid estate inclusion, and therefore the formalities of the statute of wills, by case law. Joint and survivorship account validity, as a mechanism for an upon-death transfer, was first recognized in *Cleveland Trust Co. v. Scobie* (1926), 114 Ohio St. 241, based upon a contract-law analysis. See, also, *Wright v. Bloom* (1994), 69 Ohio St.3d

---

[5] We recognize that there are now many and varied financial products that come under the heading of "life insurance." There are also varied forms of life insurance policies some of which have a cash value that the owner of the policy can withdraw or borrow against. Nevertheless, we draw a distinction between life insurance and a current asset.

596, 604. Those accounts transfer to the survivor. But an IRA account cannot be held as a joint tenant because that would destroy the "individual" aspect and the tax advantages of the account.[6] A POD account statutorily avoids inclusion of the asset in a decedent's estate, and the account is paid upon death to the designated beneficiary. The POD statute specifically avoids the formalities required by the statute of wills. See R.C. 2131.10 (allowing POD accounts "notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code"). But the POD account statute only applies to a "bank, building and loan or savings and loan association, credit union, or society for savings." Id. Wells Fargo is none of these entities, and John's "account" is not a traditional cash asset. It is a collection of securities. A properly created inter vivos trust can provide for a current owner as beneficiary during life and, upon death, can provide for contingent beneficiaries. But there is debate over whether an IRA account is a trust, as evidenced by the lead and concurring opinions in *Kelly v. May*, supra. Although 26 U.S.C. 408(a) provides that " 'individual retirement account' means a trust," given the divergent opinions on the issue, and the potential for unintended consequences, we are not willing to hold that IRA accounts in Ohio are trusts.

The foregoing leads us to examine the transfer-on-death provision in R.C. 1709.09. In *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, the Ohio Supreme Court upheld the validity of the beneficiary clause in an IRA agreement. The *Bielat* court specifically referred to R.C. 1709.09(A), which states: "(A) Any transfer-on-death resulting from a registration in

---

[6] We note that in *Kelly v. May*, supra, Barbara Kelly apparently decided that upon death she wanted her assets to transfer to her nephew Richard. She changed all of her accounts, except her IRA, to joint accounts with Richard, with right of survivorship. We presume the precise reason she did not similarly change her IRA is that placing an IRA in joint holding would destroy the tax-advantaged status of the account.

beneficiary form is effective by reason of the contract regarding the registration between the owner of the security and the registering entity and by reason of sections 1709.01 to 1709.11 of the Revised Code and is not testamentary." The *Bielat* court held: "[W]e affirm the judgment of the court of appeals and uphold the validity of the beneficiary clause in the IRA Adoption Agreement executed between Mr. Bielat and Merrill Lynch." *Bielat*, at 352. By indicating that an asset "held in beneficiary form" acquires its effectiveness by reason of the contract, and is not testamentary, R.C. 1709.09(A) and *Bielat* exclude the transfer from the decedent's estate (unless the estate is the designated or default beneficiary). As a consequence, the asset transfers outside the estate, and the formalities of the statute of wills are not required. We do not interpret R.C. 1709.09 as directly stating that the asset transfers according to the contract, only that the transfer derives its effectiveness from the contract. But if this non-testamentary transfer derives its effectiveness from the contract, a transfer according to the "clearly expressed intent" of the owner is beyond the contract and does not benefit from the non-testamentary characterization of R.C. 1709.09(A). In other words, if a transfer upon death is effective by reason of the "clearly expressed intent" of the insured, as appellant argues we should hold, R.C. 1709.09(A) does not save it from being included in the estate, subject to the formalities of the statute of wills, and subject to the statutory benefits and elections that a surviving spouse may choose to receive.

The Ohio Supreme Court has wrestled with transfers upon death, in the context of joint and survivorship accounts, trying to provide predictability, certainty, and reliability: "[O]ur efforts to determine survivorship rights by a post-mortem evaluation of extrinsic evidence of depositor intent are flawed to the point of offering no predictability * * *. Only when the depositor knows that the terms of the contract will be conclusive of his or her intent to transfer a survivorship interest will the depositor be able to make an informed choice as to whether to utilize the joint and survivorship account." *Wright v. Bloom*, supra, at 604. The Court recognized that "[t]he need for uniformity is essential." Id. In this related context, the Court chose predictability and so do we. It is our determination that the beneficiary designation according to the terms of the contract should be controlling.

We return now to *Kelly v. May Assoc. Fed. Credit Union*, Summit App. No. 23423, 2008-Ohio-1507, which appellants cite for the proposition that a financial custodian waives compliance with its change-of-beneficiary policy by interpleading disputed funds to the court and disclaiming any interest in the outcome. There, Barbara Kelly had an IRA with the May Credit Union and designated her nephew as beneficiary. Kelly later telephoned the company and told a teller to make her daughter the beneficiary. The teller completed the necessary form and sent it to Kelly with "per member" written on the signature line. Kelly failed to sign the form before her death. The terms of Kelly's IRA provided that she could change beneficiaries only by completing and signing the form. Kelly's daughter found a copy of the form following her mother's death. The daughter filed a declaratory judgment action, the nephew counterclaimed, and the credit union interpleaded the funds to the court.

Upon review, the Ninth District held that, by filing an interpleader action, the credit union waived its requirement that a change-of-beneficiary form must be signed. The court determined that the account should be transferred to the daughter based on the clearly expressed intent of the decedent. In reaching this conclusion, the Ninth District drew an analogy to cases involving disputes over the proper beneficiary of life insurance proceeds. The lead opinion states:

"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."

Kelly at ¶13. "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." Id. at ¶18. The concurring opinion agreed with that aspect of the decision. Id. at ¶34-35.

The dissenting opinion in *Kelly v. May* declined "to extend the law regarding beneficiaries under insurance contracts to an IRA account." Id. at ¶37. Even applying the insurance-law analysis, however, the dissent disagreed that May Credit Union's signature requirement on a change-of-beneficiary form operated solely to protect the company.

Therefore, the credit union could not waive the contract requirements simply by interpleading the funds to the court. Id. The dissent factually distinguished *Rindlaub*, supra, upon which the other judges relied.[7] And, although the dissent recognized that Ohio law regarding life insurance has moved toward only requiring substantial compliance with policy provisions for a change of beneficiary, it concluded that Kelly did not even meet a substantial-compliance standard. Id. at ¶ 44

The decision in *Kelly v. May* does not deal with the distinction between a life insurance policy and an existing asset. Absent, too, is any analysis of R.C. 1709.09 and its implication. Moreover, with its varying opinions on the bases for the decision, we decline to apply *Kelly*'s holding here. We find that Wells Fargo's change-of-beneficiary requirements control; and because John did not comply with them, he did not change the beneficiary before his death. Accordingly, the trial court was correct in granting summary judgment in favor of Cynthia Burchfield.

Even if we were to apply the life insurance line of cases, including *Rindlaub*, we would still conclude that the trial court correctly granted summary judgment. The record reflects that John called and e-mailed his financial advisor about changing beneficiaries. He

---

[7]Cynthia contends the Ohio Supreme Court effectively overruled *Rindlaub* in *Phillips v. Pelton*, (1980), 10 Ohio St.3d 52. We disagree. In *Phillips*, the Ohio Supreme Court recognized that "to effectuate a change of beneficiary the insured must ordinarily follow the procedure directed in the policy." Id. at 53. *Rindlaub* does not hold otherwise. It merely recognizes that an insurer *may* waive compliance with the procedure set forth in the policy. The actual issue in *Phillips* was "whether the terms of the separation agreement executed between appellant and her former spouse and incorporated into their dissolution decree preclude appellant's participation in the proceeds of the former spouse's life insurance notwithstanding the fact that appellant is the named beneficiary under the policy." Id. at 53. The *Phillips* court concluded that the parties could agree to eliminate each other as beneficiaries, and this agreement would be given effect, even though no specific change of beneficiary was made in the insurance policies. Id. at 54. If anything, this reasoning supports the argument made by LeBlanc and Welch.

also signed the change-of-beneficiary forms. Both of these actions demonstrate that, at some time, John did intend to change the beneficiary. However, on the other hand, as Cynthia notes, he never returned the forms, which reasonably could support an inference that he changed his mind about naming new beneficiaries. Such an inference is strengthened, at least somewhat, by a suicide note John left. Therein, he expressed deep and continuing love for Cynthia. It appears that a genuine issue of material fact exists with regard to John's intent. Consequently, for present purposes, we must conclude that he intended to change the beneficiary. But that conclusion does not end the analysis.

The uncertainty that can surround a decedent's intent with regard to a life insurance beneficiary is precisely why "substantial compliance" with a policy's terms is required if the precise terms are not followed. Substantial compliance requires evidence "(1) that the insured definitely intended to change the beneficiary; and (2) that he did everything possible under the circumstances to effect that change." *State Mut. Life Assur. Co. of America v. Holmes* (Aug. 30, 1988), Franklin App. No. 88AP-377, citing *Benton v. United Ins.Co. of America* (1959), 110 Ohio App. 151. The second part of the test has been expressed as an "attempt to effectuate the change by taking positive action that is equivalent to the action required by the policy provision, and amounts to doing everything the insured can do to make the change in accordance with the policy provision." *Life Ins. Co. of North America v. Leeson* (S.D. Ohio 2002), Case No. 00-CV-1394, citing *Aetna Life Ins. Co. v. Weatherford* (C.A. 6, 1991), 924 F.2d 1057.

We determine that our decision here is not contrary to *Rindlaub*, which is distinguishable on its facts. That decision did not specifically apply the substantial compliance test. However, the court's reasoning was consistent with a substantial compliance requirement. The insured in *Rindlaub* sent the insurer witnessed statements on July 2, 1946, clearly indicating his intention to cancel all previous designations of beneficiaries under the specified life insurance policy, and named a new principal and renamed the contingent beneficiary. Approximately five months later, the insured married the newly designated principal beneficiary and they were married at the time of his death. The court reasoned that because there was "no proof of record that the insured received the insurer's letter of July 16, 1946, * * * it is entirely reasonable to infer that he believed he had done all that was necessary to effectuate a change of beneficiary." *Rindlaub*, at 306. Although the *Rindlaub* court gave effect to the intent of the insured, it first determined that the insured had done everything he reasonably could do to effectuate the change of beneficiary. The court then proceeded to find that insured clearly expressed his intent to change his beneficiary from his former to his current wife. Thus, substantial compliance with the rules for a change of beneficiary was a part of the *Rindlaub* result.

In a case applying Tennessee's rule of substantial compliance, and federal common law on the subject, the U.S. Sixth Circuit Court of Appeals held, similar to the case at bar, that the failure to return a change-of-beneficiary form does not satisfy the substantial compliance requirement. See *Magruder v. Northwestern Mutual Life Ins.* (C.A. 6,1975), 512 F.2d 507. In *Magruder*, the insured properly completed a change-of-beneficiary form but did not mail it to the insurance company before he died more than six months later. Id. at 509. The court indicated he did not substantially comply with the policy, as there was "no question that he had ample opportunity to return the forms, or that he had the requisite physical and mental capacity to do so." Id. Likewise, John Burchfield did not return the form and did not substantially comply with the contract. The result is that there is no basis to effectuate his intent, regardless of how clearly expressed it may be. After examining the facts, we find the trial court accurately concluded that Burchfield did not change the beneficiary and that Cynthia Burchfield was entitled to judgment in her favor.

Finally, Cynthia raises an argument that John violated a TRO by changing the beneficiary of his IRAs. This issue cannot be resolved in the context of summary judgment. John's financial advisor, Aaron Michael, sent him the change-of-beneficiary forms after the two men spoke in late October 2009. Michael testified that he dated the forms November 2, 2009, before sending them because he believed John would sign and return them by that time. Thereafter, on November 5, 2009, Cynthia served John with a divorce complaint and a TRO that prohibited him from, inter alia, transferring any accounts or any other interest in any asset. Because John very well may have signed the change-of-beneficiary forms *before* being served with the TRO, it cannot be determined, as a matter of law, that he necessarily violated the TRO. Nevertheless, our preceding determination that the trial court was correct in granting summary judgment renders this issue moot.

Judgment affirmed.

. . . .

GRADY, P.J., and FROELICH, J., concur.

Copies mailed to:

David D. Brannon
James D. Brookshire
Pamela K. Ginsburg
Paul Courtney
Hon. Mary L. Wiseman

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

LORI LeBLANC, et al.	
Plaintiff-Appellants	Appellate Case No. 24348
v.	Trial Court Case No. 10-CV-1926
WELLS FARGO ADVISORS, LLC, et al.	(Civil Appeal from Common Pleas Court)
Defendant-Appellees	**FINAL ENTRY**

. . . .

Pursuant to the opinion of this court rendered on the 28th day of October, 2011, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Thomas J. Grady

THOMAS J. GRADY, Presiding Judge

Jeffrey E. Froelich

JEFFREY E. FROELICH, Judge

Michael T. Hall

MICHAEL T. HALL, Judge

Copies mailed to:

David D. Brannon
Brannon & Associates
130 W. Second Street, Suite 900
Dayton, OH 45402

James D. Brookshire
Dungan & Lefevre Co., LPA
210 West Main Street
Troy, Ohio 45373

Pamela K. Ginsburg
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

Paul Courtney
575 S. Dixie Drive
Vandalia, OH 45414

Hon. Mary L. Wiseman
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422

FILED
COURT OF APPEALS

2011 DEC 19 AM 11:31

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39

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

LORI LeBLANC, et al.	
Plaintiff-Appellants	Appellate Case No. 24348
v.	Trial Court Case No. 10-CV-1926
WELLS FARGO ADVISORS, LLC, et al.	(Civil Appeal from Common Pleas Court)
Defendant-Appellees	

. . . .

DECISION AND ENTRY

Rendered on the 19th day of December, 2011

. . . .

PER CURIAM:

This matter comes before the court upon an App.R. 25(A) motion to certify a conflict filed by appellants Lori LeBlanc and Gloria Welch. They argue that our October 28, 2010 opinion in this case conflicts with the Ninth District Court of Appeals' ruling in *Kelly v. May Assoc. Fed. Credit Union*, Summit App. No. 23423, 2008-Ohio-1507.

In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 1993-Ohio-223, the Ohio Supreme Court identified three requirements that must be met for certification. "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law–not facts. Third, the journal entry or opinion of the

EXHIBIT
tabbies
2

certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. " Id. at 596.

The present case and *Kelly* both involved an account-holder's efforts to change the beneficiary of IRA accounts prior to death. In the Ninth District case, Barbara Kelly telephoned the credit union that served as custodian of her IRA account and asked to change her beneficiary. The credit union completed a necessary form and sent it to Kelly, who failed to sign the form before dying. The terms of Kelly's IRA provided that she could change beneficiaries only by completing and signing the form. After potential beneficiaries filed competing claims to the money, the credit union interpleaded the funds to the trial court. Upon review, the Ninth District held that, by interpleading the funds, the credit union had waived compliance with its requirement that a change-of-beneficiary form must be signed. It held that the beneficiary of the IRA should be changed based on the clearly expressed intent of the decedent. In support, the Ninth District drew an analogy to cases involving disputes over the proper beneficiary of life-insurance proceeds.

In our recent opinion, we rejected the majority's analysis in *Kelly*. Prior to his death, John Burchfield had contacted Wells Fargo, the custodian of his IRAs, about changing his beneficiary. Wells Fargo sent Burchfield completed, pre-dated change-of-beneficiary forms. Burchfield committed suicide after signing the forms but before returning them to Wells Fargo. Under Wells Fargo's written policy, the forms were required to be signed and returned to the company to be effective. As in *Kelly*, potential beneficiaries filed competing claims to the money, which Wells Fargo interpleaded to the trial court. Upon review, we concluded that Wells Fargo's interpleader did not waive the written requirement that Burchfield return the forms to the company to be effective. In reaching this conclusion, we declined to extend the law regarding beneficiaries under insurance contracts to IRA accounts, as the *Kelly* majority had done. Finally, even assuming, arguendo, that waiver did apply, we proceeded to find that substantial compliance with the written change-of-beneficiary procedure still was required, and did not exist, "regardless of how clearly expressed" Burchfield's intent may have been.

Upon review, we agree with LeBlanc and Welch that our recent opinion conflicts with *Kelly* on at least one rule of law. As we stated in our *LeBlanc* decision, "we decline to apply *Kelly's* holding here." *LeBlanc*, supra, ¶ 23. We hereby certify to the Ohio Supreme Court the following question of law:

In a dispute between (1) a specifically designated and (2) a clearly intended beneficiary of an individual retirement account (IRA), where the account custodian files an interpleader action and purportedly waives compliance with its change of beneficiary procedure, is the "clearly intended" beneficiary required to show that the owner of the IRA account substantially complied with the change of beneficiary procedure in order to recover?

The conflicting case is *Kelly v. May Assoc. Fed. Credit Union*, Summit App. No. 23423, 2008-Ohio-1507.

The pending App.R. 25(A) motion to certify a conflict is hereby sustained.

IT IS SO ORDERED.

THOMAS J. GRADY, Presiding Judge

JEFFREY E. FROELICH, Judge

Michael T. Hall

MICHAEL T. HALL, Judge

Copies mailed to:

David D. Brannon
Brannon & Associates
130 W. Second Street, Suite 900
Dayton, OH 45402

James D. Brookshire
Dungan & Lefevre Co., LPA
210 West Main Street
Troy, Ohio 45373

Pamela K. Ginsburg
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

Paul Courtney
575 S. Dixie Drive
Vandalia, OH 45414

Hon. Mary L. Wiseman
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, OH 45422

:df

COPY

STATE OF OHIO	))ss:	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

COURT OF APPEALS
DANIEL M. HORRIGAN
2008 MAR 31 PM 2:09
SUMMIT COUNTY
CLERK OF COURTS

JANICE L. KELLY

Appellee

v.

MAY ASSOCIATES FEDERAL CREDIT UNION, et al.

Appellants

C. A. No. 23423

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2005-08-4665

DECISION AND JOURNAL ENTRY

Dated: March 31, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

INTRODUCTION

{¶1} This is a fight over a dead woman's money. When Barbara Kelly opened an individual retirement account at May Associates Federal Credit Union, she designated her nephew, Richard Wachter, as the account's beneficiary. When her daughter, Janice Kelly, returned to Ohio after having lived out of state, Barbara telephoned May Associates and told a teller to make Janice the beneficiary. The teller completed a change of beneficiary form, but Barbara never signed it. Barbara is now dead, and the account is worth approximately $130,000.

EXHIBIT
3
tabbies

{¶2} The trial court determined that Janice is entitled to the money in the account. Richard has argued that the trial court: (1) incorrectly determined that May Associates properly waived its requirement that Barbara sign the change of beneficiary form; (2) incorrectly considered the teller's testimony about her conversation with Barbara and the unsigned change of beneficiary form in ruling on Janice's motion for summary judgment because, according to him, both were inadmissible hearsay; (3) incorrectly determined that Barbara's intent that Janice be the beneficiary of the individual retirement account was clear; and (4) incorrectly determined that May Associates was not liable to him for breach of contract, breach of fiduciary duty, interference with expectancy of inheritance, and attorney fees. This Court affirms the trial court's judgment because: (1) by filing a request for interpleader, May Associates waived the requirement that Barbara sign the change of beneficiary form; (2) the teller's testimony and the change of beneficiary form had independent legal significance and, therefore, were not hearsay; (3) Barbara communicated to May Associates her "clearly expressed intent" that Janice be the beneficiary of her individual retirement account; and (4) Richard's breach of contract, breach of fiduciary duty, interference with expectancy of inheritance, and attorney fee claims are all based on the incorrect premise that Barbara's individual retirement account is a trust and, therefore, fail.

BACKGROUND

{¶3} Barbara Kelly's sister was Richard Wachter's mother. After Barbara's sister died, Barbara grew closer to Richard. He described their relationship as having become more like that between a mother and son than that between an aunt and nephew.

{¶4} In 1992, Barbara opened an individual retirement account at May Associates. At that time, Barbara's daughter, Janice Kelly, was living out-of-state, and Barbara named Richard as the beneficiary of the account. She also granted him a general power of attorney and named him co-owner of a number of certificates of deposit she had at May Associates.

{¶5} The form Barbara completed when she opened her individual retirement account provided that she could change the beneficiary in writing: "You have the right to change this designation of beneficiary at any time by writing to the Custodian." In 1995, May Associates amended the terms of Barbara's individual retirement account to provide that she could only change the beneficiary by completing and signing a form that it would provide her for that purpose:

> You may name one or more beneficiaries to receive your IRA after your death. You may thereafter change your beneficiaries at any time. Your original designation and any subsequent changes of your beneficiaries can only be made by completing and signing an IRA beneficiary designation form that we will provide to you upon request; and we will not be responsible for following instructions on signature cards or on any other documents. A beneficiary

COPY

designation remains effective after the amendment of the terms of this agreement.

{¶6} Sometime after 1992, Janice returned to Ohio, and Barbara gave her a power of attorney, revoking the one she had given Richard. Barbara also named Janice co-owner of her certificates of deposit and told Richard that she was going to make Janice the beneficiary of her individual retirement account.

{¶7} On November 19, 1998, Barbara telephoned May Associates for the purpose of making Janice the beneficiary of her individual retirement account. The teller with whom she spoke filled in information on a change of beneficiary form. The teller did not tell Barbara that the form needed to be signed. Instead, she wrote "per member" on the signature line. She sent a copy of the form to Barbara and placed a copy in the file May Associates kept regarding Barbara's accounts. Someone at May Associates apparently sent a third copy to the company that was then the outside administrator of individual retirement accounts for May Associates.

{¶8} In June 2003, Barbara again gave Richard her power of attorney, revoking the one she had given Janice. The following month, July 2003, Barbara and Richard signed an "Account Ownership" form. Although the form did not designate the accounts to which it was to apply or indicate the type of ownership desired, May Associates apparently treated it as changing all of Barbara's accounts, except her individual retirement account, to joint accounts with Richard having a right of survivorship.

{¶9} Barbara died on August 17, 2003. By that time, May Associates was using a different outside administrator for its individual retirement accounts than it had been using in 1998 when Barbara had told the teller she wanted to change the beneficiary to Janice. The new administrator apparently had information regarding Barbara's original designation of Richard as the account's beneficiary, but no information regarding the form the teller completed in 1998. The administrator told Richard he was the beneficiary of the account and provided him a form for use in claiming the funds in the account. Richard completed and submitted the form.

{¶10} Janice found a copy of the 1998 change of beneficiary form among Barbara's papers. Accordingly, she also claimed the funds in the account.

{¶11} May Associates filed an interpleader action against Richard and Janice, which it eventually dismissed without prejudice. Janice than filed the complaint in this case against May Associates and Richard. She sought a declaratory judgment that she was entitled to the funds in the account and alleged breach of contract and negligence claims against May Associates. Richard filed a counterclaim, alleging that Janice had interfered with his lawful possession of the funds in the account. He also filed a cross-claim against May Associates by which he alleged that it had breached a contractual duty to convey the funds to him. May Associates filed a counterclaim against Janice and cross-claim against Richard, interpleading the funds in the account.

{¶12} Janice, Richard, and May Associates all moved for summary judgment. The trial court determined that Janice was entitled to the money in Barbara's account. It denied Richard summary judgment and granted summary judgment to Janice and May Associates. Richard appealed.

MAY ASSOCIATES' WAIVER OF THE SIGNATURE REQUIREMENT

{¶13} 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 (1963); *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 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; *Atkinson*, 114 Ohio St. 109, 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, at syllabus paragraph two.

{¶14} Richard has argued that the law applicable to insurance policies is not applicable to individual retirement accounts. His first assignment of error is that the trial court incorrectly determined that May Associates, by interpleading the funds in the individual retirement account, properly waived its requirement that Barbara sign the change of beneficiary form. According to him, the individual retirement account is a trust and, as the originally designated beneficiary, he had a vested interest in the money in the account that prevented May Associates from waiving its change of beneficiary procedure. Since this assignment of error presents a legal question, this Court's standard of review is *de novo*. *Akron-Canton Waste Oil Inc. v. Safety-Kleen Oil Serv. Inc.*, 81 Ohio App. 3d 591, 602 (1992).

{¶15} Section 408(a) of the Internal Revenue Code provides that "the term 'individual retirement account' means a trust. . . ." 26 U.S.C. 408(a). Further, as noted by Richard, in *First Nat'l Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, syllabus paragraph two (1956), the Ohio Supreme Court held that an *inter vivos* trust "creates in the remainderman a vested interest subject to defeasance by the exercise of the power to revoke."

{¶16} Richard has also pointed out that, in *McDonald & Co. Sec. Inc. v. Alzheimer's Disease and Related Disorders Ass'n Inc.*, 140 Ohio App. 3d 358, 363 (2000), the First District Court of Appeals cited Section 408(a) of the Internal Revenue Code for the proposition that an individual retirement account is a trust.

The issue before the court in that case, however, was not whether, by filing an interpleader action, the custodian of an individual retirement account waives compliance with its change of beneficiary procedure. Rather, the court had to determine who should receive funds in an account when no entity existed with the name the account owner had designated as the beneficiary. It is true that the court cited Section 408(a) and wrote that the individual retirement account was a trust, but it only did so as a prelude to the unremarkable holding that, when there is an ambiguity regarding the intended beneficiary, "a court must ascertain, within the bounds of the law, the settlor's intent." *Id.* In this case, Richard has not argued that Barbara's intent should control. Rather, he has argued that, even though May Associates wishes to waive application of its change of beneficiary procedure in order that Barbara's stated desire to change beneficiaries can be accomplished, her stated desire should be frustrated.

{¶17} Section 408(a) of the Internal Revenue Code specifically provides that an individual retirement account is a trust only "[f]or purposes of this section." The determination of whether an individual retirement account is a trust for other than tax purposes depends on whether it satisfies the definition of a trust under Ohio law. See *In re Haney*, 316 B.R. 827, 829-830 (E.D. PA. 2004). As noted by the Ohio Supreme Court in *First Nat'l Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 518 (1956), the very case relied upon by Richard, "[i]n order for a trust to be a trust, the legal title of the *res* must immediately pass to the trustee . . .

." May Associates was not a trustee and legal title to the money in Barbara's account remained in her. The account, therefore, is not a trust under Ohio law, and Richard's argument collapses. To the extent *McDonald & Co. Sec. Inc. v. Alzheimer's Disease and Related Disorders Ass'n Inc.*, 140 Ohio App. 3d 358 (2000), held otherwise, this Court declines to follow it.

{¶18} In *Matter of Estate of Trigoboff*, 669 N.Y.S.2d 185 (Sur. Ct. 1998), the New York Surrogate's Court recognized that, just as change of beneficiary procedures in insurance policies are for protection of insurers, change of beneficiary procedures applicable to individual retirement accounts are for protection of the custodians of those accounts. 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. By filing its counterclaim and cross-claim for interpleader, May Associates waived the requirement that Barbara sign the change of beneficiary form. Richard's first assignment of error is overruled.

THE HEARSAY RULE

{¶19} Richard's second assignment of error is that the trial court incorrectly considered the teller's testimony regarding her conversation with Barbara and the unsigned change of beneficiary form in ruling on Janice's motion for summary judgment because, according to him, both were inadmissible hearsay.

Again, since this assignment of error presents a legal question, this Court's standard of review is *de novo*. *Akron-Canton Waste Oil Inc. v. Safety-Kleen Oil Serv. Inc.*, 81 Ohio App. 3d 591, 602 (1992).

{¶20} The trial court determined that the teller's testimony and the form were hearsay, but were admissible as exceptions to the hearsay rule under Rules 803(3) and 803(6) of the Ohio Rules of Evidence. Although the trial court's conclusion that the teller's testimony and the form were admissible was correct, its reliance on 803(3) and 803(6) was misplaced. In fact, neither the teller's testimony nor the form is hearsay. The trial court's incorrect analysis, however, does not mean that its judgment must be reversed. When a trial court reaches a correct conclusion, even when it does so for incorrect reasons, its judgment must be affirmed. See, e.g., *State v. Campbell*, 90 Ohio St. 3d 320, 329 (2000).

{¶21} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ohio Rule of Evidence 801(C). A familiar refrain of proponents of out of court statements is that those statements are not offered for the truth of the matter asserted, but only to show that the statements were made. Usually just the opposite is true. In this case, however, the teller's testimony and the form were not offered to prove that Barbara actually wanted to change the beneficiary of her individual retirement account to Janice, but to show that she told May Associates she wanted to change the beneficiary to Janice.

{¶22} Words that have independent legal significance, sometimes referred to as verbal acts, are relevant without regard to their truth. 1 Glen Weissenberger, Ohio Evidence, Section 801.6 (1995). As explained by the Tenth District Court of Appeals in *Wade v. Communications Workers of Am.*, 10th Dist. No. 84AP-57, 1985 WL 10178 at *4 (Sept. 24, 1985), spoken words that form a contract are admissible, not for the truth of what they assert, but because they have independent legal significance:

> [S]ome utterances do not constitute assertions but, instead, constitute what has been referred to as verbal acts, being the uttering of words which have independent legal significance under substantive law, such as words constituting the offer and acceptance of a contract. Thus, evidence of the utterance of the words is admissible not to show the truth of any matter asserted but, instead, that the words were uttered and, thus, carry with them the legal significance under substantive law, such as the entering into of a contract.

In *Rindlaub v. Travelers Ins. Co.*, 175 Ohio St. 303, syllabus paragraph two (1963), the Ohio Supreme Court held that, when an insured "communicated to the insurer his clearly expressed intent" to change beneficiaries and the insurer filed an interpleader action, the insured's "expressed intent" would be determinative. Barbara's statement to the teller is admissible in this case, not for the purpose of proving that she, in fact, wanted to make Janice the beneficiary of the account, but rather, to show that she had "communicated to [May Associates] [her] clearly expressed intent" to do so. It was not, therefore, hearsay and was properly considered by the trial court.

{¶23} Similarly, the change of beneficiary form was not important for the truth of what it contained, but rather as evidence that May Associates treated Barbara's telephone conversation with the teller as her "clearly expressed intent" to change beneficiaries. The fact that Janice found a copy of the form among Barbara's papers tended to prove that Barbara believed she had done all that was necessary to change the beneficiary from Richard to Janice.

{¶24} In fact, for purposes of the hearsay rule, the teller's testimony and the form were no different from the original beneficiary designation upon which Richard has based his claim in this case. Just as that designation has independent legal significance as part of Barbara's agreement with May Associates, so do her statements to the teller and the form completed by the teller based on those statements. Richard's second assignment of error is overruled.

THE TRIAL COURT'S SUMMARY JUDGMENT

{¶25} Richard's third assignment of error is that the trial court incorrectly determined that Barbara's intent to make Janice the beneficiary of her individual retirement account was clear. In reviewing a trial court's order ruling on a motion for summary judgment, this Court applies the same standard that the trial court was required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶26} Most of Richard's argument in support of this assignment of error is an attack on the credibility of the teller's testimony that May Associates' procedure permitted Barbara to change her beneficiary over the telephone and did not require her signature on the change of beneficiary form. As discussed previously, however, May Associates' change of beneficiary procedure, whatever that procedure was, was for its benefit, and it waived that procedure by filing its interpleader counterclaim and cross-claim. To the extent that there was a genuine issue regarding May Associates' change of beneficiary procedure, therefore, that issue was not material.

{¶27} Richard has not pointed to any evidence that tended to prove that Barbara had not, in fact, telephoned the teller and told her she wanted Janice to be the beneficiary of her individual retirement account. In the absence of such evidence, there is not a genuine issue of fact regarding whether Barbara made that telephone call. Further, the teller testified at her deposition that Barbara told her that her daughter had come back to take care of her and that she wanted her to be the beneficiary of her individual retirement account. Based on that testimony, coupled with the change of beneficiary form completed by the teller, there is no genuine issue of fact regarding whether Barbara communicated to May Associates her "clearly expressed intent" to change beneficiaries.

{¶28} Richard has also argued that, shortly before her death, Barbara again changed the beneficiary of her individual retirement account, this time back to him. As support for this argument, he has pointed to the Account Ownership form he and Barbara signed in July 2003, along with a September 2003 list of Barbara's accounts on May Associates letterhead. The list, which included Barbara's individual retirement account, was captioned with both Barbara's and Richard's names.

{¶29} As noted previously, the Account Ownership form did not designate the accounts to which it was to apply and failed to provide the type of ownership desired. May Associates apparently treated it as changing all of Barbara's accounts, except the individual retirement account, to joint accounts with Richard having a right of survivorship. Richard failed to present any evidence that, at the time Barbara signed the Account Ownership form, she communicated to May Associates her "clearly expressed intent" to change the beneficiary of her individual retirement account back to him.

{¶30} According to Richard, the inclusion of his name on the list that included the individual retirement account permits an inference that May Associates thought Richard was the beneficiary. Even if May Associates had thought he was the beneficiary, however, without evidence that Barbara had communicated to it her "clearly expressed intent" to change the beneficiary of her individual retirement account back to Richard, he would not be entitled to the money in that account. Richard's third assignment of error is overruled.

RICHARD'S OTHER CLAIMS

{¶31} Richard's final assignment of error is that the trial court incorrectly determined that May Associates is not liable to him for breach of contract, breach of fiduciary duty, interference with expectancy of inheritance, and attorney fees. Richard's cross-claim against May Associates did not include causes of action for breach of fiduciary duty or interference with expectancy of inheritance. He only alleged a breach of contract claim. Further, all of his arguments in support of this assignment of error are based on the premise that Barbara's individual retirement account was a trust and that he, as the original beneficiary, had a vested interest that prevented May Associates from waiving its change of beneficiary procedure. Inasmuch as this Court has concluded that the individual retirement account was not a trust under Ohio law and that Richard did not have a vested interest that prevented May Associates from waiving its change of beneficiary procedure, his arguments in support of this assignment of error fail. Richard's fourth assignment of error is overruled.

CONCLUSION

{¶32} Richard's assignments of error are overruled. The trial court's judgment is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Clair E. Dickinson

CLAIR E. DICKINSON
FOR THE COURT

SLABY, P. J.
CONCURS, SAYING:

{¶33} I concur in the majority opinion, but write separately because I do not believe that it is necessary to reach the sweeping conclusion that an individual retirement account is not a trust for purposes of Ohio law. Our analysis must begin, as the majority notes, with Section 408(a) of the Internal Revenue Code, which defines an individual retirement account as a trust. A review of the federal and state caselaw applying this definition in different contexts demonstrates that the true nature of an individual retirement account is not as simple as it may appear at first blush. An IRA may be a trust for some purposes but not others, depending on the context and the circumstances attending its creation. See, e.g., 26 U.S.C. §408(a) (specifying the items that must be included in the trust instrument in order to qualify it as an individual retirement account). See, also, *Walsh v. Benson* (W.D.Pa., Aug. 16, 2006), C.A. No. Civ.A. 05-290J, at *3 (noting that, in the context of a bankruptcy estate, some non-trust assets – such as custodial accounts – are treated as trusts for purposes of Section 408(a).) "The clarity of [Section 408(a)] is convincing, if not compelling. One must recognize that IRAs are not regular savings accounts. They clearly are special deposits that constitute a trust relationship wherein the Bank owes a fiduciary duty to the depositor." *Masi v. Ford City Bank and Trust Co.* (C.A.8, 1985), 779 F.2d 397, 401.

{¶34} The lynchpin of Mr. Wachter's argument in support of his second assignment of error[1] is that "the signature requirement was not only in place to protect the Credit Union, it protected Barbara Kelly and it protected Richard Wachter." The creation of an IRA is flexible under federal law and the Ohio

---

[1] Mr. Wachter's second assignment of error is addressed first by the majority.

legislature has chosen not to impose specific formalities, such as a requirement that initial beneficiary designations or subsequent changes be initiated in writing, upon their creation in this state. Indeed, the only requirement for the proceeds of an IRA to transfer upon death as a nontestamentary asset is that the designation of a beneficiary appear "in beneficiary form," or "a registration of a security that indicates the present owner of the security and the intention of the present owner regarding the person who will become the owner of the security upon the death of the present owner." See R.C. 1709.01(A). See, generally, *Bielat v. Bielat* (2000), 87 Ohio St.3d 350 (discussing application of R.C. Chapter 1709 to individual retirement accounts in existence prior to the effective date of the Uniform Transfer-On-Death Security Registration Act).

{¶35} The signature requirement at issue in this case was a matter of contract between Barbara Kelly and May Associates. Thus, while I am sympathetic to the reservations expressed in my colleague's dissenting opinion, the policy concerns related to creation of an IRA are best addressed by the legislature. In this case, considering the current state of Ohio law regarding the creation of IRAs, I would also conclude that the by asserting a counterclaim and crossclaim for interpleader, May Associates waived enforcement of the formalities created as a result of its contract with Barbara Kelly. I agree that summary judgment was properly granted in favor of May Associates on its counter- and cross-claims, and would also overrule Mr. Wachter's second assignment of error on that basis.

{¶36} With the exceptions noted above, I concur in the majority opinion.

CARR, J.
<u>DISSENTS, SAYING</u>:

{¶37} I am unwilling to extend the law regarding beneficiaries under insurance contracts to an IRA account. Even under that analysis, however, I do not believe that the signature requirement for a change of beneficiary operated solely for the protection of May Associates and, consequently, that May Associates waived compliance by interpleading the funds in Mrs. Kelly's IRA. I would sustain Mr. Wachter's second assignment of error on this basis, and I respectfully dissent.

{¶38} In support of its conclusion, the majority relies on *Rindlaub v. The Traveler's Ins. Co.* (1963), 175 Ohio St. 303. In *Rindlaub*, the provision at issue read as follows:

> "[T]he Insured may at any time and from time to time during the continuance of this contract change the Beneficiary, to take effect only when such change shall have been approved in writing by the Company, whereupon all rights of the former Beneficiary shall [cease.]" (Emphasis in original) Id. at 305.

{¶39} The Court then went on to hold that the emphasized language was inserted solely to benefit the insurance company and therefore could be waived by that company. Even assuming that the law regarding insurance contracts is applicable to an IRA, the facts herein are distinguishable from *Rindlaub*.

{¶40} In the instant matter, Mrs. Kelly was required to submit her change of beneficiary in writing. Unlike *Rindlaub*, the writing requirement was placed on Mrs. Kelly, not the bank. Specifically, in *Rindlaub* the insurance company waived *its duty* under the contract to provide a writing. Here, the majority extends that rule, permitting the bank to waive *Mrs. Kelly's duty* to provide a writing. On that basis alone, I find *Rindlaub* distinguishable and inapplicable.

{¶41} Furthermore, it cannot be said that the requirement herein offered no benefit to Mrs. Kelly. To demonstrate this benefit, one need only take a simple example. Suppose for a moment that someone other than Mrs. Kelly called the bank and fraudulently requested that the beneficiary be changed. The requirement of a writing, along with Mrs. Kelly's signature card at the bank, would eliminate this fraud. In stark contrast, under the majority's theory, Mrs. Kelly would have no recourse against the bank for permitting this fraud to occur. Rather, the bank could simply state that it had waived the writing requirement and thus no breach of the contract had occurred.

{¶42} Moreover, the majority's approach makes the writing requirement provision of the agreement illusory. A contract is illusory when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance. See *Century 21 American Landmark Inc. v. McIntyre* (1980), 68

Ohio App.2d 126. Under the majority's rationale, the bank was free to require a writing to change the beneficiary or waive that requirement at its leisure. As we are required to give contractual provisions meaning whenever possible, I cannot subscribe to a view that creates illusory provisions.

{¶43} Additionally, I believe the majority's decision conflicts with the rationale used by this Court in a matter directly related to these parties. In *Kelly v. Wachter*, 9th Dist. No. 23516, 2007-Ohio-3061, this Court was asked to determine the ownership of Mrs. Kelly's non-IRA accounts. In reversing the trial court's grant of summary judgment, we found it important that the bank's rules and regulations governing the accounts were not a part of the record. Without those rules and regulations, we could not determine the legal owner of the accounts. Id. at ¶17-21. Under the majority's approach, these rules and regulations are meaningless because they may be waived at the whim of the bank.

{¶44} Finally, to the extent that Ohio law has moved toward requiring only substantial compliance for change of beneficiaries under insurance contracts, I would find that even that standard was not met here. In this context, substantial compliance is achieved when the following two prongs have been satisfied: "(1) that the insured definitely intended to change the beneficiary; and (2) that [s]he did everything possible under the circumstances to effect that change." *State Mut. Life Assur. Co. of America v. Holmes* (Aug. 30, 1988), 10th Dist. No. 88AP-377, citing *Benton v. United Insurance Co. of America* (1959), 110 Ohio App. 151.

{¶45} Unlike the insured in *Rindlaub* or the insured in *Holmes*, Mrs. Kelly did not do everything possible under the circumstances to change her beneficiary. While she placed a call to the bank, she made no attempt to comply with the writing requirement contained in the agreement. In contrast, the insureds in both *Rindlaub* and *Holmes* complied with their obligations under their insurance contracts to the extent possible. In those cases, it was failure by the insurer to act promptly that caused incomplete compliance. Such is not the case herein. Therefore, I would find that substantial compliance has not been met.

{¶46} In summary, bank fraud and identity theft are an ever-growing problem in our society. As my colleague observes in his concurring opinion, it is regrettable that Ohio law does not impose uniform requirements for the designation of beneficiaries under IRAs. The absence of a statute relating to beneficiary designations, however, does not mean that the parties to an IRA agreement cannot bind themselves to requirements for their mutual protection. One manner in which to reduce the risk of these crimes is to require that financial decisions be confirmed in writing – as the parties agreed in this case. Both banks and their customers are then protected through the use of signature cards. As this protection is offered to both parties, I do not believe that one party may unilaterally strip that protection from the other. Consequently, I would find that the writing requirement contained in the IRA agreement was valid and went unfulfilled. I, therefore, would reverse.

APPEARANCES:

ROBERT W. HEYDORN, and JOHN M. HERRNSTEIN, Attorneys at Law, for appellant.

JOEL R. ABERTH, Attorney at Law, for appellee.

DANIEL M. WALPOLE, Attorney at Law, for appellee.

COLLEEN R. DELBALSO, Attorney at Law, for appellee.