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IN THE SUPREME COURT OF OHIO

LORI LeBLANC, et al.	:	**CASE NOs. 2011-2073 and 2011-2160**
	:	
APPELLANTS,		
	:	
V.		**ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS CASE NO. CA 24348**
	:	
WELLS FARGO ADVISORS, LLC, et al.	:	
APPELLEES.	:	

MERIT BRIEF OF APPELLANTS LORI LeBLANC and GLORIA WELCH

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PROPOSITION OF LAW NO. 1:

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, THE "CLEARLY INTENDED" BENEFICIARY IS NOT REQUIRED TO SHOW THAT THE OWNER OF THE IRA ACCOUNT SUBSTANTIALLY COMPLIED WITH THE CHANGE OF BENEFICIARY PROCEDURE IN ORDER TO RECOVER.

STATEMENT OF THE CASE

This case arises both as an appeal from a certified conflict between the holdings of the Ninth District Court of Appeals' decision in *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507, and the Second District Court of Appeals' decision *LeBlanc v. Wells Fargo Advisors, L.L.C.*, 196 Ohio App.3d 213, 2011-Ohio-5553, 962 N.E.2d 872; and as a discretionary appeal from the latter decision. The appeal ultimately arises from the action of Wells Fargo Advisors, L.L.C., interpleading into the trial court monies held in decedent John Burchfield's traditional and ROTH Individual Retirement Accounts. The dispute between beneficiaries arises from the deceased John Burchfield's attempt to change his IRA beneficiaries from his soon-to-be ex-wife, Cynthia Morris, to his mother and father, shortly before his tragic suicide. Although John communicated his new beneficiary designations to his financial advisor at Wells Fargo in emails, and even signed Wells Fargo's change-of-beneficiary forms with the newly-designated beneficiaries, he failed to mail the newly-designated beneficiaries to Wells Fargo before his death. Gloria Welch, John's mother, and Lori LeBlanc, John's sister, filed suit against Cynthia and Wells Fargo on March 5, 2010, primarily seeking declaratory judgment that John's IRAs should be awarded to them, as Appellants were the newly-designated IRA beneficiaries by John. Wells Fargo, which had been named as a party to the declaratory judgment action, ultimately filed a counterclaim and crossclaim for interpleader. In its pleadings, Wells Fargo asserted no interest in the dispute and offered to hold the IRA funds in trust or turn them over to the court pending resolution of the matter.

On cross-motions for summary judgment, the trial court erred by awarding John's IRAs to Cynthia, because the IRAs were classified by the trial court as "marital property." *LeBlanc*, at ¶ 10. Although the Second District Court of Appeals agreed with Appellants that the IRAs should not have been awarded to Cynthia based on domestic-relations law, it held any error committed by the trial court was not dispositive and thus overruled the Appellants' first assignment of error. *Id.* It is the second assignment of error that Appellants bring before this Court. The appeals court framed the issue as follows: "[Appellants] claim that 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." *Id.* at ¶ 11. The focus of the appeal before this Supreme Court is whether Wells Fargo's action in interpleading monies to the court and, thereby, waiving its change-of-beneficiary policy, then requires a court to apply an "intent of the decedent" analysis in determining how the proceeds of the IRA accounts should be distributed. If so, Appellants have never been given the opportunity to prove to the trial court a fact for which there is an abundance of evidence: that John Burchfield's "intent" was to leave his IRAs to his parents—and not to his spouse who had just filed for divorce from him.

This case arose on May 5, 2007, when Appellants Welch and LeBlanc filed an action in the Montgomery County Common Pleas Court, seeking a declaratory judgment enforcing the change-of-beneficiary forms held by Wells Fargo. *Id.* at ¶ 7. Cynthia filed a counterclaim, seeking to be deemed the proper beneficiary of John's IRAs. *Id.* Wells Fargo, was also named as a party, and ultimately filed for interpleader on May 27, 2010, whereby Wells Fargo asserted no interest in the dispute and offered to hold the IRA accounts in trust or turn them over to the court pending the determination of the proper beneficiary.

LeBlanc and Welch moved for partial summary judgment regarding the IRAs on July 27, 2010. *Id.* at ¶ 8. Cynthia responded with a cross-motion for summary judgment. *Id.* The trial court held that Cynthia was the sole beneficiary of the IRAs. *Id.* The trial court found that John's change-of-beneficiary forms were of no legal consequence because John failed to comply with Wells Fargo's written policy, which required that John return the forms to Wells Fargo. *Id.* Moreover, the trial court determined that the IRAs were marital property, and thus owned by Cynthia. *Id.* Regarding the interpleader, the trial court held that Wells Fargo could not waive compliance with its change-of-beneficiary procedure or change the beneficiary without Cynthia's consent. *Id.* Appellants appealed the matter to the Second District Court of Appeals. *Id.*

The Second District Court of Appeals agreed with Appellant's first assignment of error, that the characterization of the IRA accounts as marital or non-marital property was improper, because John's death terminated the divorce proceeding as well as the ability of a domestic-relations court to make a determination of marital or separate property. *Id.* at ¶ 10. Although Appellants were correct that the trial court erred in its characterization of the IRAs as marital property, the Second District Court of Appeals held that any error made was not dispositive of the appeal, therefore, overruled the first assignment of error. *Id.*

In their second assignment of error, Appellants argued that the trial court erred in refusing to find that Wells Fargo waived compliance with its change-of-beneficiary procedure by interpleading the disputed funds. *Id.* at ¶ 11. Appellants posed the issue as whether John's intent to change beneficiaries had any legal significance, because Wells Fargo interpleaded the IRA monies and voluntarily waived any requirement for John to comply with its change-of-beneficiary policy. *Id.* at ¶ 12.

The Second District Court of Appeals held that the trial court correctly granted summary judgment to Cynthia because the decedent failed to comply with Wells Fargo's policy of requiring John to return the change-of-beneficiary forms to Wells Fargo. *Id.* at ¶ 13. Further, the Second District Court of Appeals bolstered its finding by holding that "even if the contractual method for change of beneficiary is deemed waived, the decedent did not substantially comply with the provision." *Id.* That Court reasoned that substantial compliance with Wells Fargo's contract provisions remains "necessary" as part of an "intent of the decedent" analysis, despite the fact that Wells Fargo waived "actual compliance." *Id.* The judgment of the trial court was affirmed. *Id.*

On November 3, 2011, Appellants filed a Motion for Certification of a Conflict to the Ohio Supreme Court. (Appx. 31). The Second District Court of Appeals recognized that its decision conflicted with the Ninth District Court of Appeals in *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507 (Appx. 1), and certified that conflict to this Supreme Court. (Decision and Entry Sustaining Motion to Certify a Conflict by the Court of Appeals, Appx. 53). This Supreme Court determined that a conflict did exist, and directed the parties to brief the issue. (Entry Determining Conflict Exists, Appx. 104). This Supreme Court also accepted Appellants' appeal based upon their jurisdictional memoranda. (Entry Accepting Appeal Upon Consideration of Jurisdictional Memoranda, Appx. 105).

If the Second District Court of Appeal's Decision is affirmed, then a financial custodian essentially may no longer "waive" compliance with its change-of-beneficiary procedures by merely interpleading monies to a court. The requirement of "substantial compliance" with the custodian's change-of-beneficiary policy *by the owner* in short, requires the custodian's policy be followed—and assets be transferred per the policy designations. The Second District's newly-created "substantial compliance" test will subject the custodian to duplicate liability, which is directly contra to the public policy of permitting a custodian to avoid disbursing awards expressly per its policy via interpleading disputed monies to a court. The duplicate liability concern for custodians would be imposed by the *owner's* inadvertent failure to "substantially comply" with the custodian's change-of-beneficiary procedure thereby subjecting the custodian to liability from third-parties seeking to interfere with the contract between the custodian and the owner. This outcome is contrary to Ohio law.

STATEMENT OF THE FACTS

John married Cynthia on May 5, 2007, which for both of them was a second marriage. *LeBlanc* at ¶ 3. John maintained two IRA accounts which were valued at $250,313.33 and $15,334.98 respectively, just days prior to the marriage. *Id.* Years before, John had designated Gloria Welch, his mother, and Bruce Leland, his stepfather, as beneficiaries of those IRAs. *Id.* Immediately before his marriage to Cynthia, John named Cynthia as the beneficiary on both IRAs. *Id.*

On October 28, 2009, John sent his long-time Wells Fargo financial advisor, Aaron Michael, an email stating that he and Cynthia were divorcing and requesting paperwork to change his IRA beneficiaries. *Id.* at ¶ 4. Michael responded via email telling John to tell him how to designate the new beneficiaries of the IRAs. *Id.* Subsequently, John spoke to Michael and explained how he wanted the new beneficiaries named for the IRAs. *Id.* Michael then pre-populated Wells Fargo's change-of-beneficiary forms for John, with Welch and Leland as primary beneficiaries in the amounts of 75% and 25% respectively. *Id.* LeBlanc, his sister, was then listed as the contingent beneficiary. *Id.* Michel then sent the forms to John for signature. *Id.* Before doing so, Michael predated the completed forms November 2, 2009, because Michael believed John would return them to Wells Fargo by that date. *Id.*

On November 5, 2009, Cynthia served John with a complaint for divorce and a restraining order. *Id.* At approximately the same time, John spoke to Michael and indicated that the change-of-beneficiary forms were "taken care of." *Id.* Michael assumed that John's statement meant that John had mailed the forms back to Wells Fargo. *Id.* On December 16, 2009, John committed suicide. *Id.*

After John's death, a co-worker of John's, Jeff Miller, and Michael discovered Wells Fargo's IRA change-of-beneficiary forms in an envelope among John's business and financial papers. *Id.* at ¶ 6. Those IRA forms, which had been pre-populated with John's newly-designated beneficiaries—Welch and Leland—had been executed by John. *Id.* Michael gave the executed forms to his manager at Wells Fargo. *Id.* Subsequently, a dispute arose between Welch and Cindy regarding the lawful beneficiaries of John's IRAs. *Id.* This led ultimately to the filing of the declaratory judgment action and the interpleading of the account proceeds by Wells Fargo.

ARGUMENT

PROPOSITION OF LAW NO. 1: 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, THE "CLEARLY INTENDED" BENEFICIARY IS NOT REQUIRED TO SHOW THAT THE OWNER OF THE IRA ACCOUNT SUBSTANTIALLY COMPLIED WITH THE CHANGE OF BENEFICIARY PROCEDURE IN ORDER TO RECOVER.

1. ***The Second District Court of Appeals' Decision in LeBlanc runs afoul of the Ohio Supreme Court's long-standing view that public policy should protect a financial institution's ability to contract with its clients and protect the bank from duplicate liability in servicing its clients, especially if proceeds are interpleaded.***

Ohio law has customarily protects financial custodians when disputes arise between potential beneficiaries of IRAs, by permitting a custodian to interplead transfer-on-death proceeds into the trial court, essentially waving the custodian's own policy as to how the owner designates beneficiaries. Once TOD monies are interpleaded into the court by the custodian, then an "intent of the decedent" analysis is used by the trial court in determining the proper beneficiary. The public policy of permitting a financial custodian to look beyond a TOD designation held by a custodian, even if the custodian has a formal contract procedure governing how an owner may designate TOD beneficiaries, exists to protect the custodian from duplicate liability in competing beneficiary disputes. The policy ensures that third-parties may not interfere with the contract between an owner of an asset and his financial custodian.

The Second District Court of Appeals, much to the detriment of financial custodians in avoiding duplicate liability, and depriving them of any flexibility in how they deal with their customers, effectively did away with the right of a custodian to waive its own change-of-beneficiary procedures by creating a "substantial compliance" test regarding the "intent of the decedent" analysis. Essentially the Second District Court of Appeals ignored precedent on the subject, thereby establishing a new "test," holding that the owner of an IRA must "substantially comply" with a custodian's change-of-beneficiary procedure before an "intent of the decedent" analysis occurs—"even when actual compliance has been waived [by the custodian]". *LeBlanc* at ¶ 13.

The Second District's holding renders the entire idea of waiving the change-of-beneficiary policy *by the custodian* to avoid duplicate liability superfluous, and indeed endangers custodians by taking away the ability to waive their own change-of-beneficiary policies. The Second District Court of Appeals' holding not only damages custodians, but also prevents an owner from designating beneficiaries through the owner's "clearly expressed intent." Thus an owner on his or her deathbed cannot effectuate beneficiary changes regarding TOD assets without "substantially complying" with the custodian's change-of-beneficiary procedure, even if, as in this case, Wells Fargo expressly waived its TOD policy by interpleading monies to the court so that the trial court could make a determination as to John's "clearly expressed intent." In short, the Second District Court of Appeals *now* requires that the owner follow the custodian's policy regarding beneficiary designations, although the controlling law contains no such requirement of substantial compliance with a custodian's change-of-beneficiary policy. Why then, even permit a custodian to waive its TOD policy if its policy must still be followed "substantially"?

Ohio law has long held that banks and clients should be free to contract with their clients. Freedom of contract is a principle long recognized in Ohio. Indeed, the United States Constitution prohibits states from enacting any law that retroactively impairs contract rights. U.S. Constitution, Article I, Section 10, cl. 1. Narrowing the issues to the matter at hand, the public policy of protecting financial institutions from duplicate liability regarding beneficiary designations was clarified by the Ohio Supreme Court in regard to life insurance policies long ago. *See Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926); *Rindlaub v. Traveler's Ins. Co.*, 175 Ohio St. 303, 305, 194 N.E.2d 577 (1963).

In *Atkinson*, Eliza Atkinson, wife of the insured, was the original beneficiary of a life insurance policy of Joseph Atkinson, maintained by the Metropolitan Life Insurance Company of New York. *Atkinson*, 114 Ohio St. 109, syllabus. Due to marital troubles, Joseph designated his mother, Elizabeth Atkinson, as the new beneficiary of the policy. *Id.* Thereafter, due to a reconciliation between Joseph and his wife, the husband agreed to again effect a change-of-beneficiary and have the policy made payable to his wife. *Id.* To accomplish the change back to his wife, an agent of the insurance company was called to the Atkinson home, and was told by the insured he desired to designate his wife as his beneficiary. *Id.* The insurance agent indicated it would be necessary to send the insurance company a written endorsement of the change. *Id.* Thereafter, the agent mailed a request for the proper form of endorsement to be prepared to bring about the desired change of beneficiary, and the endorsement was mailed to the agent. *Id.* For an unexplained reason, the Mr. Atkinson's signature was never secured before he died. *Id.* No endorsement of change of beneficiary was accomplished. *Id.* No written notice was ever provided to the financial custodian of the insured's desire to change beneficiaries, except the agent's written request for an endorsement. *Id.*

In *Atkinson* and other disputes arising between potential beneficiaries of life insurance proceeds after the death of an owner, the Ohio Supreme Court initially struggled with the issue by looking to the strict interpretation of the provisions of the life insurance policy and the requirements therein to designate beneficiaries. *Atkinson.*, 114 Ohio St.3d at 119-120, 150 N.E. 748. However, this Supreme Court noted that some life insurance policies are more strict as to procedures in designating beneficiaries than other life insurance policies. *Id.* at 120. This Court stated that the rule in any case "should be the same, and not different from the rule of interpretation of any other contract." *Id.* The facts in *Atkinson* were such that the insurance company filed an interpleader, indicating it had no interest in the outcome of the case. *Id.* The interpleader greatly assisted the Ohio Supreme Court's adjudication in *Atkinson*, because the Court determined that if any condition in the policy was vital to the insurance company, the insurance company would be protected from liability because of the interpleader. *Id.* The Ohio Supreme Court held that:

> The Code of Ohio...requires that suits be maintained and defended by the real party in interest, and by the filing of an interpleader, disclaiming any interest in the outcome of the controversy, the rights of the company in the provisions of its policy must be held to be waived. As the case now stands, therefore, it is purely a question of the respective rights of the two claimants, uninfluenced by any alleged interests of the insurance company....This has been declared in a long line of cases, many of which have construed fraternal insurance policies similar in all essential respects to the policy in the case at bar. (Citations omitted).

Id., 114 Ohio St.3d at 120-121, 150 N.E. 748. The financial institution's requirement for the insured to provide the insurance carrier written notice, as well as the requirement that it be forwarded to the home office, were "solely for the benefit of the company and could therefore be waived by it." *Id.* 114 Ohio St.3d at 121, 150 N.E. 748. The writing requirement and notice requirement of the policy were merely to keep the company in contact with the insured and to provide a means for the insured to designate beneficiaries so that litigation could be avoided if a dispute arose. *Id.* The lynchpin in *Atkinson* was that by disclaiming any interest in the outcome by interpleading the proceeds, the insurance company left the controversy to the determination of the courts. *Id.* The Supreme Court then found that because the husband *intended* that the wife receive the insurance proceeds, the Court would effectuate that intent by awarding the wife the proceeds. *Id.*

The Ohio Supreme Court later affirmed the important public policy of protecting financial institutions from duplicate liability in *Rindlaub v. Travelers Ins. Co. Id.*, 175 Ohio St. at 305, 194 N.E.2d 577. In that case, an insured failed to comply with the insurance company's change-of-beneficiary procedure requiring that the insured obtain a release from his former spouse in order to designate a subsequent spouse as primary beneficiary of his life insurance policy. *Id.*, 175 Ohio St. at 303-304, 194 N.E.2d 577. The insurance carrier filed an interpleader and deposited the policy proceeds with the court. *Id.* In affirming the public policy of protecting custodians when proceeds are interpleaded, the Ohio Supreme Court held:

> Undoubtedly, in any litigation between the insurer and its insured or between the insurer and a single beneficiary...insurance policy provisions relative to change of beneficiary may be determinative of their respective rights, but not so where the insurer "washes its hands" by interpleader in an action by one claiming to be a beneficiary, and another claiming to be a beneficiary is substituted as a party defendant, thereby presenting a controversy only between the two persons claiming to be beneficiaries of funds deposited with the court. In such case the relative rights of the litigants should depend upon the expressed intention of the insured. If he has clearly indicated to the insurer his intention to change beneficiaries, his intention must be given effect.

Rindlaub, 175 Ohio St. at 305, 194 N.E.2d 577. The *Rindlaub* Court awarded the insured's subsequent spouse the proceeds because the insurance carrier voluntarily waived the requirement that any changes to beneficiary designations be made with the consent of the prior beneficiary, thus the intent of the insured controlled at the point the proceeds were interpleaded by the custodian. *Id.*, 175 Ohio St. at 306, 194 N.E.2d 577.

Although the public policy behind insurance companies interpleading monies in dispute is express and clear in the State of Ohio, the Second District Court of Appeals, regardless of its position that its decision was "not contrary to *Rindlaub*," was directly contrary to *Rindlaub*. *LeBlanc*, at ¶ 26. Before making that analysis of the Second District's refusal to follow the Ohio Supreme Court's public policy, it must be determined whether IRA proceeds interpleaded into a court by a financial custodian are treated identically to insurance proceeds interpleaded by a custodian. It is clear that the Ninth District Court of Appeals agrees with consistent treatment of life insurance policies and IRAs when interpleader occurs by the custodian, whereas the Second District Court of Appeals disagrees, thus creating a conflict of law. (Entry Determining Conflict Exists, p. 3; Appx. 55).

2. ***The Ninth District Court of Appeals expanded upon* Rindlaub *and* Atkinson *to permit financial institutions to interplead monies from Individual Retirement Accounts when disputes arise as to lawful beneficiaries, whereas the Second District declined to do so.***

In the trial court and in the appeal below, Appellants relied upon the Ninth District's decision *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507, for the proposition that a financial custodian of an IRA waives compliance with its change-of-beneficiary policy by interpleading disputed funds to the court and disclaiming any interest in the outcome. *LeBlanc*, 196 Ohio App.3d 213, 2011-Ohio-213, 962 N.E.2d 872, at ¶ 18. In *Kelly*, the Ninth District Court of Appeals expanded the Ohio Supreme Court's logic from *Rindlaub* and held that custodians of IRAs waive their change-of-beneficiary procedures when IRA proceeds *or* insurance proceeds are interpleaded to a court after a potential dispute arises between beneficiaries. *Kelly*, at ¶ 13. The Ninth District Court of Appeals held:

> 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.

Id. "In such a case, if the insured communicated to the insurer her 'clearly expressed intent' to change beneficiaries, the [IRA] 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." *Kelly*, at ¶ 13 citing *Rindlaub*, 175 Ohio St. 303, at paragraph 2 of the syllabus. Although *Rindlaub*'s holding applied to life insurance companies, the Ninth District Court of Appeals extended that holding to apply to IRAs as well. *Kelly*, at ¶ 18. The purpose of the policies espoused in *Rindlaub*, *Kelly*, and *Atkinson* is strictly for the protection of the financial custodians. *Kelly*, at ¶ 13 citing *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson.*, 114 Ohio St. at 121, 150 N.E. 748. Unfortunately, the Second District refuses to recognize *Kelly* in its district by holding:

> The decision in *Kelly v. May Assocs.* 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.

Leblanc, at ¶ 23. In certifying the conflict, the Second District Court of Appeals later wrote that it concluded "Wells Fargo's interpleader did not waive the written requirement that Burchfield return the forms to the company to be effective." (Decision and Entry Sustaining Motion to Certify a Conflict by the Court of Appeals, pp. 2-3; Appx. 54-55).

It is evident in the case at bar that the Second District Court of Appeals tacitly rejects the public policy espoused by the Supreme Court in *Rindlaub* and outright rejects *Kelly*. *LeBlanc*, at ¶ 26. The Second District Court of Appeals alluded to a distinction between a life insurance policy and an existing asset, which is simply perplexing. A life insurance policy's beneficiary, whether the beneficiary be specifically-designated or the estate of the insured, is only an expectancy interest during the life of the insured. *Stone v. Stephens*, 92 Ohio App. 53, 57, 110 N.E.2d 18 (2 Dist. 1950). That interest vests at the time of the insured's death. *Id.* The Ninth District in *Kelly* likened IRA accounts to life insurance policies, because an owner may designate and change beneficiaries of each investment vehicle. *Kelly*, at ¶ 13. Just like life insurance, the beneficiary of an IRA only has an expectancy interest during the life of the owner. The owner of both insurance policies and IRAs is free to designate beneficiaries and change them, just as were the owners in all of the relevant cases including *Rindlaub*, *Atkinson*, *Kelly*, and *LeBlanc*. The *LeBlanc* Court's taking issue with the difference between IRAs and life insurance policies because of "existing" assets is simply immaterial. In fact, R.C. 1709.01(J) expressly defines a "security account" as:

> (1) A reinvestment account associated with a security; a securities account with a financial institution or a securities dealer or broker…whether or not credited to the account before the owner's death;
> (2) A cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

Even the legislature recognizes that its immaterial whether physical monies are in an account. Thus it is unclear why the Second District Court of Appeals attempted to distinguish between "existing assets" versus an expectancy interest. Both life insurance proceeds and IRA proceeds pass outside of probate so long as beneficiaries are designated; otherwise, they pass to the estate. R.C. 2107 *et seq.* and R.C. 1709 *et seq*. The Second District, in its Decision rejecting *Kelly*, then launched into an analysis of R.C. 1709 *et seq.* and whether IRAs should be considered trusts under Ohio law. Both courts in *LeBlanc* and *Kelly* concluded that IRAs are not to be considered trusts, with which Appellants concur. *LeBlanc*, at ¶ 15; *Kelly*, at ¶ 17.

Turning to the Second District's discussion of Ohio's transfer-on-death ("TOD") provisions, R.C. 1709 *et seq.* is known as Ohio's Uniform Transfer-On-Death Security Registration Act. This section of the Ohio Revised Code allows for the transfer of assets such as IRAs outside of probate. *See Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 (2002) (holding that a sister's designation as a beneficiary in an IRA trumped the spouse's claim to the proceeds through the estate). Interestingly, and counter to its ultimate holding, the Second District Court of Appeals, referenced *Bielat* and stated, "We do not interpret R.C. 1709 as directly stating that the asset transfers according to the contract, only that the transfer derives its effectiveness from the contract." *LeBlanc*, at ¶ 16. The significance of that statement is that the Second District Court of Appeals impliedly agrees that assets in IRAs may pass to a beneficiary in ways other than per the "contract" or "policy" between the custodian and the owner of the IRA. In other words, simply because a custodian has a written beneficiary designation on file, the custodian does not require payment to that specifically-designated beneficiary. In fact, R.C. 1709.10 is clear in permitting a custodian to:

> [E]stablish the terms and conditions under which it will receive and implement requests for registration in that form, including requests for cancellation of previously registered transfer-on-death beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting descendants of a named beneficiary to take in place of the named beneficiary when he dies.

With those statutory powers, a custodian may waive the custodian's change-of-beneficiary policy by interpleading monies to a court, just as was done by custodians in *Rindlaub*, *Kelly*, and *Atkinson*, among other cases. It is at this juncture that the Second District Court of Appeals' Decision goes awry of the policies set forth in *Rindlaub*, *Atkinson*, and even *Bielat*. The Second District clearly does not agree with *Kelly* that IRA proceeds may be interpleaded into a court because supposedly IRAs are distinguishable from life insurance policies. *LeBlanc*, at ¶ 23. But as discussed *supra*, any alleged difference between life insurance and IRAs is irrelevant for what occurs when proceeds are interpleaded into a court. This policy exists so that the custodian may avoid duplicate liability from potential beneficiaries. The Second District Court of Appeals, in its own rejection of this Supreme Court's support of that policy, does not permit waiver by a custodian. Moreover, despite the Second District's statement that "We do not interpret R.C.

1709.09 as directly stating that the asset transfers according to the contract...," that's exactly what it tacitly held. *LeBlanc*, at ¶ 16. The Second District would require Wells Fargo to disburse proceeds upon John's death "only" by looking at the beneficiary form on file at Wells Fargo. *Id. Kelly* also rejects the requirement that the owner follow the custodian's policy, giving deference to R.C. 1709.09 *et seq*. *Kelly*, at ¶¶ 34-35. Specifically, the *Kelly* Court rejected the appellant's argument that a signature requirement in the custodian's policy was not only in place to protect the custodian, but also to ensure the policy went where the owner intended. *Id.*, at ¶ 34. The *Kelly* Court rightfully recognized a custodian may interplead monies from IRAs or insurance companies, waiving any compliance with its policy, for the benefit of the custodian *only*. *Id.*, at ¶ 13; *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson.*, 114 Ohio St. at 121, 150 N.E. 748. Looking to the ultimate result in *LeBlanc*, it appears that the only candid rationale for ruling against Appellants was because that Court feared that upon interpleader, an analysis of the decedent's "clearly expressed intent" necessarily ensues. *Kelly*, at ¶ 13.

It is evident that Wells Fargo is not only seeking to avoid the requirement that its policy be followed pursuant to R.C. 1709 *et seq.*, but it in fact, voluntarily waived any requirement that the owner follow its policy. That is precisely the purpose of the rules set forth in *Kelly*, *Rindlaub*, *Atkinson*, and their progeny: to permit a custodian to avoid additional liability from competing beneficiaries by interpleading the asset and looking for a determination of the property beneficiary by a court. The Second District Court of Appeals' Decision effectively destroys the ability of a custodian to waive its own change-of-beneficiary policy, because the Second District *now* requires that an owner "substantially comply" with that policy, regardless of an interpleader. *Id.*, at ¶ 26.

The Second District's decision effectively establishes "substantial compliance" as the controlling test regardless of whether the custodian interpleads and regardless of even the most clear evidence of the account-owner's intent. This new test completely undermines the *Rindlaub* holding and renders interpleader essentially meaningless. Besides subjecting the custodian to duplicate liability, it deprives the custodian of any flexibility in how it manages its accounts with its own customers. There are any number of valid business reasons why a custodian may opt not to choose to enforce its own policies, so as to accommodate the intent of its clients. The Second District's Decision eliminates that flexibility when it effectively eliminates the power of the custodian to waive compliance. Furthermore, the Second District's Decision allows a non-party to a contract —a designated beneficiary—to enforce an insurance contract's policies contrary to the intentions of the actual contracting parties. All of these effects are contrary to the rationale that this Court adopted and made law in *Rindlaub*.

3. ***The Second District Court of Appeals' new requirement that the owner of an IRA or life insurance policy "substantially comply" with the custodian's change-of-beneficiary policy destroys the ability of a custodian to waive that policy by interpleading funds.***

The Second District Court of Appeals states that even if it were to apply the life insurance line of cases including *Rindlaub*, it still would conclude that the trial court correctly granted summary judgment because John failed to "substantially comply" with Wells Fargo's change-of-beneficiary policy. *LeBlanc*, at ¶ 25. This new test that the Second District Court of Appeals summarily applied to IRAs is not the correct test, because it directly contravenes R.C. 1709.10 and the public policy espoused in *Rindlaub*. Moreover, The Uniform Transfer-on-death Security Registration Act is to be liberally construed to promote its underlying purposes and policy. R.C. 1709.11. The *Kelly* decision of the Ninth District properly declined to impose a substantial compliance test where compliance had been waived by the IRA custodian.

In *Kelly*, Barbara Kelly opened an IRA account, making her nephew Richard beneficiary in 1992. *Id.*, at ¶ 4. One of the forms Barbara Kelly signed provided that she could only change the beneficiary by completing and signing a form that the custodian would provide for that purpose. *Id.*, at ¶ 5. In 1998, Barbara *telephoned* the custodian and informed a teller that she wanted to make her daughter the beneficiary of her IRA. *Id.*, at ¶ 7. The teller did not tell Barbara that the form needed to be signed; however, the teller wrote "per member" on the signature line and sent a copy of the form to Barbara and placed a copy on file. *Id.* The custodian outsourced the administration of the IRA account, and then lost the form that the teller completed "per member." *Id.*, at ¶ 9. Barbara died in 2003. *Id.* The daughter found a copy of the change of beneficiary form and claimed ownership, although the last record on file with the custodian designated the nephew. *Id.*, at ¶ 10. The custodian filed an interpleader action not claiming an interest. *Id.* at ¶ 11. The *Kelly* Court simply ruled in favor of the daughter, despite the owner's failure to sign or comply with the custodian's writing requirement, because the custodian waived the requirement that the owner sign the form. *Id.* at 18. The concurring opinion in *Kelly* states:

> The creation of an IRA is flexible under Ohio law and the Ohio 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 death of the present owner." See R.C. 1709.01(A). See, generally, *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 (discussing application of R.C. Chapter 1709 to [IRAs]…

Id., at ¶ 34. *Kelly* promotes the position that at the point a custodian chooses to interplead monies into the court, there is absolutely no requirement that the owner follow the change-of-beneficiary policy, substantially or otherwise.

The Second District Court of Appeals' holding in *LeBlanc* necessarily interferes with the custodian's right to create its own policy as per R.C. 1709.10. That interference also tinkers with the ability of a custodian to contract with its client without interference from third-parties, thus subjecting the custodian to potential duplicate liability. The Uniform Transfer-On-Death Security Registration Act itself provides ample legal authority and framework to determine John's lawfully-intended beneficiaries without the need to create more tests. R.C. 1709 *et seq.* The Act defines a "registering entity" as a "person who originates or transfers a security title by registration and includes, but is not limited to, a financial institution maintaining security accounts for customers." R.C. 1709.01(H). Wells Fargo is indeed a registering entity. Wells Fargo, as such, has the freedom to contract with its client as to how a beneficiary is designated. Moreover, R.C. 1709.01(A) defines a "beneficiary form [as 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 owner of the security upon the death of the present owner." The legislature expressly mentions the "intention of the present owner" regarding beneficiary designations by owners. Finally, and perhaps most significantly, the Act permits a custodian to avail itself of the custodian's statutory rights under R.C. 1709.10 to "establish the terms and conditions under…to effect a change of beneficiary." Thus Wells Fargo can and did establish its own policy. Whether Wells Fargo choses to interplead funds and/or voluntarily waive its own policy is clearly a right that the legislature intended to give to the custodian.

Moreover, a "substantial compliance" requirement *by the owner* to follow the custodian's policy simply means the owner must follow the custodian's policy, and may be forced to do so by third-parties to the contractual relationship. The policies set forth in *Rindlaub* and *Atkinson* are meant to protect the custodian, not the owner, thus the decision to waive the policy must remain with the *custodian* and not depend on the owner's actions. Depending on the owner to comply substantially with its policy necessarily means a custodian will be forced to follow policies and ignore the intent of its customers despite precedent that it may waive its own policy with an interpleader. The position of the Second District Court of Appeals in this case is untenable on this point. It appears that the Second District Court of Appeals was concerned about "[t]he uncertainty that can surround a decedent's intent…" *LeBlanc*, at ¶ 25. However, that uncertainty is ameliorated because the fallback is the owner's "clearly expressed intent."

The Second District Court of Appeals' requirement that the account owner follow that strict policy via "substantial compliance," despite the option of the custodian to waive its policy, has damaged both the custodian and account owner. The unprecedented interpretation by the Second District Court of Appeals has now made transfer-on-death beneficiaries, including IRAs, a designation that may only be made by the government—not the owner and not the custodian. By requiring "substantial compliance" with a custodian's change-of-beneficiary policy, that arrangement and expectation of a custodian and IRA account owner has been curtailed. An IRA account owner would expect his or her custodian to make all efforts possible to effectuate transfer-on-death gifts based on the owner's "clearly expressed intent." In either case, the Second District Court of Appeals has interfered with the relationship between the custodian and IRA account owner, which now subjects the custodian to duplicate liability as well as increasing the uncertainty that a custodian will not be able to pay benefits based on the owner's intent. For those reasons, substantial compliance should not be imposed upon the custodian or the owner.

4. ***Should this Supreme Court agree with Appellants that an interpleader of IRA monies to a court voluntarily waives compliance with a custodian's change-of-beneficiary policy, Appellants have presented overwhelming evidence as to John's "clearly expressed intent" in naming Welch and Leland as beneficiaries.***

The Second District Court of Appeals states that even if it were to apply the life insurance line of cases including *Rindlaub*, it still would conclude that the trial court correctly granted summary judgment because there were factual issues that could reasonably support an inference that John changed his mind and intended Cynthia to receive IRA proceeds. *LeBlanc*, at ¶ 24. However, upon the interpleading of IRA funds, waiver triggers an analysis of the decedent's "clearly expressed intent" to determine the lawful beneficiary. *Kelly*, at ¶ 13. To the degree that there may be factual issues as to John's "clearly expressed intent," the Second District Court of Appeals had no basis to make a finding of fact. Indeed, those issues are expressly reserved for a jury, and are not to be made on summary judgment motions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Even the *LeBlanc* Court admits "that a genuine issue of material fact exists with regard to Jon's intent." *Id.*, at ¶ 24. More to the point, overwhelming evidence was presented by the Appellants at every state of this case that John's "clearly expressed intent" was to remove Cynthia as the primary beneficiary of his IRAs.

First, there is the indisputable email from John to Aaron Michael, his Wells Fargo advisor, on October 28, 2009, stating "I am getting divorce. What paperwork do we need to change?...MY IRA stays with me. Is her name on it?" (Deposition of Aaron Michael, pp. 13-14, filed August 3, 2010). Michael responded in the same email thread stating "So sorry to hear that. Let me know who you want your beneficiaries to be now as we will take Cindy off…" *Id.*

Next, the Second District Court of Appeals ignored the testimony of Michael stating that after that email correspondence, John spoke to Michael and explained how he wanted the new beneficiaries named for the IRAs. *LeBlanc*, at ¶ 4. Michael then pre-populated Wells Fargo's change-of-beneficiary forms for John, with Welch and Leland as primary beneficiaries in the amounts of 75% and 25% respectively. *Id.* LeBlanc was then listed as the contingent beneficiary. *Id.* Before sending John the IRA change-of-beneficiary forms, Michael predated the forms November 2, 2009, because Michael believed John would return them to him by that date. *Id.* The IRA forms themselves are strongly persuasive of John's "intent" to change beneficiaries to Welch and Leland.

More evidence as to John's intent was the divorce complaint Cynthia served on John just after John expressed his desire to change beneficiaries due to a divorce. *Id.* John spoke to Michael and indicated that the change-of-beneficiary forms were "taken care of." *Id.* Michael assumed that John's statement meant that John had mailed the forms back to Wells Fargo. *Id.* Those IRA forms, which had been pre-populated with John's newly-designated beneficiaries, Welch and Leland, had been executed by John. *Id.* at ¶ 6. Michael also gave the executed forms to his manager at Wells Fargo upon his discovery of those forms. *Id.* Further, John made the exact same proportional bequest in his newly-executed will and his IRAs as had existed before his marriage to Cynthia: a Seventy-five (75%) percent share to his mother (Welch), and Twenty-five (25%) percent share to his step-father (Leland). It is evident from Aaron Michael's testimony and John's e-mails that anyone but Cynthia Burchfield should be designated beneficiary of his IRAs. When asked as to the effects of John's actions, including John's most recent efforts to change his beneficiaries of his IRAs, Aaron Michael testified:

> Well, I mean, my understanding would be it would show the client's wishes or intentions were, to change the beneficiary back to Bruce Leland and Gloria Jean Welch.

(Depo. Aaron Michael, p. 27). It is unfathomable that the Second District Court of Appeals could take the position that if *Kelly* and *Rindlaub* apply, then the evidence is such that John's intent favors Cynthia. At the very least, this Court should reverse the findings of fact by the Second District Court of Appeals and remand the matter to trial for a determination as to John's "clearly expressed intent."

CONCLUSION

The decision of the Second District Court of Appeals holding that Cynthia was entitled to the proceeds from John's IRAs should be reversed for all of the reasons set forth above. First, when a custodian interpleads IRA proceeds into a court as with insurance proceeds, the custodian has voluntarily waived the requirement of the owner to comply with the custodian's change-of-beneficiary policy. Second, this Court should reject the Second District Court of Appeals' holding that establishes a "substantial compliance" test on the part of the owner of the policy in making new beneficiary designations, because it runs contrary to the Ohio Supreme Court's precedent in *Rindlaub* and contrary to Ohio's Uniform Transfer-On-Death Security Registration Act, such that a custodian would no longer be free to waive its own policy by interpleading funds and would then be subject to duplicate liability. A custodian's right to waive its own policy upon interpleader, as it stands in the Second District, depends on the owner's "substantial compliance" with the custodian's policy. Thus the Second District Court of Appeals' holding essentially does away with the right of a custodian to waive its own policies, which runs afoul of long-standing precedent that the a custodian shall be protected from competing beneficiary claims. For a custodian to depend on an owner's actions in order to avoid duplicate liability is absurd, as the custodian has no control over an owner's actions. Accordingly, the Second District Court's decision in this case should be reversed and this cause of action remanded to the trial court for further proceedings consistent with this Court's decision and precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served upon the following via regular U.S. Mail, postage pre-paid, this 18th day of April, 2012:

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APPENDIX

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Ninth District, Summit County.
Janice L. KELLY, Appellee,
v.
MAY ASSOCIATES FEDERAL CREDIT UNION, et al., Appellants.
No. 23423.

Decided March 31, 2008.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV 2005-08-4665.
Robert W. Heydorn, and John M. Herrnstein, Attorneys at Law, for appellant.

Joel R. Aberth, Daniel M. Walpole, Colleen R. Delbalso, Attorneys at Law, for appellee.

DECISION AND JOURNAL ENTRY

DICKINSON, Judge.

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

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.

{¶ 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 **IRAbeneficiary** 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** 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.

***3** {¶ 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, 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.

{¶ 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, 611 N.E.2d 955 (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, 138 N.E.2d 15, 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, 747 N.E.2d 843 (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.

*4 {¶ 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, 138 N.E.2d 15 (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, 747 N.E.2d 843 (2000), held otherwise, this Court declines to follow it.

{¶ 18} In *Matter of Estate of Trigoboff,* 175 Misc.2d 370, 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, 611 N.E.2d 955 (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, 738 N.E.2d 1178 (2000).

*5 {¶ 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, 194 N.E.2d 577, 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

***6** {¶ 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, 586 N.E.2d 1121 (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.

*7 {¶ 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.

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. 18, 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.

*8 {¶ 34} The lynchpin of Mr. Wachter's argument in support of his second assignment of error [FN1] 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 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 non-testamentary 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, 721 N.E.2d 28 (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).

FN1. Mr. Wachter's second assignment of error is addressed first by the majority.

{¶ 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-claims 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., dissents, saying.
{¶ 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, 194 N.E.2d 577. 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, 194 N.E.2d 577.

*9 {¶ 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, 427 N.E.2d 534. 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, 159 N.E.2d 912.

***10** {¶ 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.

Ohio App. 9 Dist.,2008.
Kelly v. May Assoc. Fed. Credit Union
Not Reported in N.E.2d, 2008 WL 836014 (Ohio App. 9 Dist.), 2008 -Ohio- 1507

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

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

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<u>OPINION</u>

Rendered on the 28th day of October, 2011.

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. . . .

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.

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[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

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[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

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[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.

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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
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Case: CA 024348

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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL

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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 hereby give notice of their appeal of the Judgment Entry and Opinion entered by the Second District Court of Appeals in the case at bar on October 28, 2011 to the Ohio Supreme Court. Pursuant to S.Ct. Prac. R. 2.2(B)(3), Appellants moved to certify a conflict under App. R. 25. A copy of the motion to certify is attached as Exhibit 1. This case is also one of public or great general interest. Copies of the Opinion and of the Judgment Entry being appealed are attached hereto as Exhibits 2 and 3 respectively.

Respectfully submitted,

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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.

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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.

EXHIBIT
1

Respectfully submitted,

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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.

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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:

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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.

. . . .

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. . . .

EXHIBIT 2

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.

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[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

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[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

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[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

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[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

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[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.

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Paul Courtney
Hon. Mary L. Wiseman

[redacted]

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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, Presiding Judge

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

EXHIBIT
3

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Case: CA 024348

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

LORI LeBLANC, et al.

Plaintiff-Appellants

v.

WELLS FARGO ADVISORS, LLC, et al.

Defendant-Appellees

Appellate Case No. 24348

Trial Court Case No. 10-CV-1926

(Civil Appeal from Common Pleas Court)

. . . .

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 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

THOMAS J. GRADY, Presiding Judge

Jeffrey E. Froelich

JEFFREY E. FROELICH, Judge

Michael T. Hall

MICHAEL T. HALL, Judge

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Case: CA 024348
ON: CRENE

IN THE SUPREME COURT OF OHIO

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

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

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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,

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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.

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Case: CA 024348
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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.

. . . .

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EXHIBIT
1

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

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[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.

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[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

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[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.

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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, Presiding Judge

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

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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
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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

THOMAS J. GRADY, Presiding Judge

Jeffrey E. Froelich

JEFFREY E. FROELICH, Judge

MICHAEL T. HALL, Judge

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:df

COPY

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

JANICE L. KELLY C. A. No. 23423

Appellee

v.

MAY ASSOCIATES FEDERAL CREDIT UNION, et al.

Appellants

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2[redacted]

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.

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{¶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

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.
DISSENTS, SAYING:

{¶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.

FILED

FEB 22 2012

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Lori Leblanc et al.		Case No. 2011-2160
v.		ENTRY
Wells Fargo Advisors, LLC, et al.		

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Montgomery County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 3 of the court of appeals' Decision and Journal Entry filed December 19, 2011, as follows:

"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?"

It is ordered by the court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County.

It is ordered by the court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2011-2073, *Lori Leblanc et al. v. Wells Fargo Advisors, LLC, et al.*, and that the briefing in Case Nos. 2011-2160 and 2011-2073 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct. Prac. R. 6.2-6.4 and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct. Prac. R. 6.1-6.4.

(Montgomery County Court of Appeals; No. 24348)

Maureen O'Connor

Maureen O'Connor
Chief Justice

FILED

FEB 22 2012

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Lori Leblanc et al. v. Wells Fargo Advisors, LLC, et al.		Case No. 2011-2073 ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal. The clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

It is ordered by the court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2011-2160, *Lori Leblanc et al. v. Wells Fargo Advisors, LLC, et al.*, and that the briefing in Case Nos. 2011-2073 and 2011-2160 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct. Prac. R. 6.2-6.4 and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct. Prac. R. 6.1-6.4.

(Montgomery County Court of Appeals; No. 24348)

Maureen O'Connor
Chief Justice

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1709. Uniform Transfer-On-Death Security Registration Act (Refs & Annos)
→→ **1709.09 Transfers not testamentary; rights of creditors**

(A) Any transfer-on-death resulting from a registration in 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.

(B) Sections 1709.01 to 1709.11 of the Revised Code do not limit the rights of creditors of the owners of securities against beneficiaries and other transferees under other laws of this state.

CREDIT(S)

(1993 H 62, eff. 10-1-93)

Current through all 2011 laws and statewide issues and 2012 File 80 of the 129th GA (2011-2012).

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1709. Uniform Transfer-On-Death Security Registration Act (Refs & Annos)
→→ **1709.10 Terms and conditions of registration**

(A) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive and implement requests for registration in that form, including requests for cancellation of previously registered transfer-on-death beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting descendants of a named beneficiary to take in place of the named beneficiary when he dies.

(B) Substitution may be indicated by appending to the name of the primary beneficiary the letters "LDPS," standing for lineal descendants per stirpes. This designation substitutes the descendants of a deceased beneficiary who survive the owner of a security for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the domicile of the beneficiary, at the time of the death of the owner, governing inheritance by descendants of an intestate.

(C) Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in the terms and conditions of a registering entity.

CREDIT(S)

(1993 H 62, eff. 10-1-93)

Current through all 2011 laws and statewide issues and 2012 File 80 of the 129th GA (2011-2012).

END OF DOCUMENT