

ORIGINAL

IN THE SUPREME COURT OF OHIO

LORI LEBLANC, et al.

*

CASE NOS. 2011-2073 and 2011-2160

Appellants,

*

ON APPEAL FROM THE SECOND
DISTRICT COURT OF APPEALS

v.

*

CASE NO. 24348

*

WELLS FARGO ADVISERS, LLC, et al.

*

Appellees.

MERIT BRIEF OF APPELLEE CYNTHIA BURCHFIELD

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CHAPTER 1709 OF THE OHIO REVISED CODE DOES NOT ALLOW INDIVIDUAL RETIREMENT ACCOUNTS (IRAS) TO BE TREATED AS IF THEY WERE LIFE INSURANCE POLICIES. PURSUANT TO THE PURPOSE AND PROVISIONS OF R.C. CHAPTER 1709, FULL COMPLIANCE WITH THE TERMS AND CONDITIONS OF IRA CONTRACTS GOVERNING REQUESTS TO CHANGE TRANSFER-ON-DEATH BENEFICIARIES IS REQUIRED FOR REQUESTED CHANGES TO BE DEEMED EFFECTIVE.

CERTIFIED ISSUE TO BE ADDRESSED:

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?

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STATEMENT OF THE CASE

This case began in the Montgomery County, Ohio Common Pleas Court in March of 2010 following the December 16, 2009 suicide of Mr. John Burchfield (hereafter “John” or “Mr. Burchfield”). *LeBlanc et al. v. Wells Fargo Advisors, L.L.C.*, 196 Ohio App.3d 213, 2011-Ohio-5553, 962 N.E.2d 872, at ¶¶ 6, 7. In their Complaint, Appellants sought declaratory judgment and an order from the trial court determining that they were entitled to receive every asset in which John Burchfield held an interest at the time of his death including, but not limited to, the proceeds of a life insurance policy, the funds held in a 401(k) account, and John’s interest in a marital residence that was purchased and extensively remodeled, in large part, with his widow Appellee Cynthia Burchfield’s money. (hereafter “Cynthia” or “Mrs. Burchfield”). Appellants’ also sought the funds held in the two Wells Fargo IRA accounts at issue in this appeal (hereafter the “IRAs”). (See Appellee’s Appendix (hereafter “Burchfield Appx.”) at 002.) With respect to the IRAs, Appellants also asserted declaratory judgment claims against Wells Fargo Advisers, L.L.C. (hereafter “Wells Fargo”). In addition, Appellants asserted claims against Mrs. Burchfield for constructive trust and disgorgement, intentional interference with expected inheritance, unjust enrichment, conversion, intentional infliction of emotional distress, and punitive damages. (See Burchfield Appx. at 002.)

On March 30, 2010, Mrs. Burchfield filed her Answer, Counterclaims, and Cross-claims denying Appellants’ allegations and seeking declaratory judgment and a determination from the trial court that she was the sole designated beneficiary or owner of the assets that Appellants sought in their Complaint including, but not limited to, the IRAs, a Wells Fargo payable-on-death money-market checking account that she had opened with Mr. Burchfield, the marital residence which she and Mr. Burchfield had purchased as joint tenants with rights of survivorship, and

certain investment annuities and other assets that she had owned and/or purchased, without contribution from Mr. Burchfield, prior to their marriage. (See Burchfield Appx. at 003.)

In July of 2010, Appellants moved for partial summary judgment solely with respect to their claims to the IRAs. Appellants asserted various theories in support of their motion. Of particular interest, for purposes of the certified question to be addressed in this appeal, is the “substantial compliance” argument that Appellants asserted in support of their summary judgment motion. (See Pls.’ 07/27/10 Mot. for Partial Summ. J. at 16; and Burchfield Appx. at 011.) They based that argument upon Ohio case law regarding substantial compliance with the contractual requirements for changing designated beneficiaries in life insurance policies and cited the dissent in *Kelly v. May Associates Federal Credit Union*, Ninth Dist. No. 23423, 2008-Ohio-1507, the decision in *Benton v. United Insurance Co. of America* (1959), 110 Ohio App. 151, 159, N.E.2d 912, and this Court’s decision in *Rindlaub v. Traveler’s Ins. Co.* (1963), 175 Ohio St. 303, 304-305, 194 N.E.2d 577 in support of their motion. Appellants then argued that the trial court should apply the substantial compliance test to the facts of this case and grant summary judgment in their favor. (See Pls.’ 07/27/10 Mot. for Partial Summ. J. at 16; and Burchfield Appx. at 019-020.)

In August of 2010, Mrs. Burchfield filed her Memorandum in Opposition to Appellants’ Motion for Partial Summary Judgment. Appellants then filed a Reply to Mrs. Burchfield’s Memorandum. In September of 2010, Mrs. Burchfield also moved for summary judgment as to all of the claims asserted by Appellants and her counterclaims and cross-claims for declaratory judgment. (See Burchfield Appx. at 011.)

On November 16, 2010, following the full briefing of the parties’ competing motions as well as oral argument, the trial court issued separate decisions denying Appellants’ Motion for

Partial Summary Judgment and granting Mrs. Burchfield summary judgment as to all of Appellants' claims as well as her counterclaims and cross-claims. (See Burchfield Appx. at 001-030.) In both decisions, the trial court cited R.C. Section 1709.01(A) which defines the term "beneficiary form" as used in R.C. Chapter 1709 as follows: "****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 Burchfield Appx. at 011.) The court further noted that Mr. Burchfield's IRAs were securities registered in beneficiary form, and that the undisputed evidence showed that Mrs. Burchfield was the sole designated beneficiary registered with Wells Fargo when Mr. Burchfield died. On the basis of that undisputed evidence and the terms and conditions of the contracts for the IRAs, the trial court applied R.C. Section 1709.09(A) and ruled that the terms and conditions of Mr. Burchfield's IRA contracts with Wells Fargo governed the transfer of the IRAs, and R.C. Section 1709.09(a) required the conclusion that Mrs. Burchfield was the sole designated transfer-on-death beneficiary of the IRAs when Mr. Burchfield died. (See Burchfield Appx. at 011.)

In response to Appellants' substantial compliance argument, the trial court noted that if Mr. Burchfield had wanted to change his designated beneficiary from Mrs. Burchfield to someone else, his IRA contracts required him to return signed change of beneficiary forms to Wells Fargo to effect that change. (See Burchfield Appx. at 011.) The court then rejected Appellants' substantial compliance argument because the undisputed evidence demonstrated that: (1) Mr. Burchfield was fully aware of the change of beneficiary requirements in his IRA contracts; and (2) he had not done everything possible under the circumstances to effect a change of beneficiary because he had the forms required to do so and had not returned them to Wells Fargo. (See Burchfield Appx. at 011.)

As an additional basis for granting Mrs. Burchfield summary judgment on her claim to one of the IRAs, the trial court also found that the account constituted a joint marital asset between Mr. and Mrs. Burchfield. (See Burchfield Appx. at 010.)

The trial court also granted Mrs. Burchfield summary judgment on Appellants' claims for constructive trust and disgorgement, intentional interference with expected inheritance, unjust enrichment, conversion, intentional infliction of emotional distress, and punitive damages because: (1) Appellants had conceded that those claims were without merit; (2) there was no evidence to support of any of those claims; and (3) pursuant to an agreed judgment entry between Appellants and Mrs. Burchfield in Mercer County, Ohio Probate Court Case No.20091250, the Appellants were collaterally estopped from asserting claims to some of the assets they sought. (See Burchfield Appx. at 011-014.)

On November 18, 2010, Appellants filed their Notice of Appeal in the Second District Court of Appeals for Montgomery County, Ohio. On December 21, 2010, Appellants filed their appellate brief and limited their appeal to the trial court's determination of the issues surrounding ownership of the IRAs. (See Appellants' 12/21/10 Br.) Mrs. Burchfield filed her Appellee's Brief on January 31, 2011. Appellants submitted their Reply Brief on February 8, 2011. Oral argument was conducted on April 26, 2011. On October 28, 2011, the Second District Court of Appeals affirmed the trial court's decisions granting summary judgment to Mrs. Burchfield. *Leblanc Id.*

In its October 28, 2011 Opinion, the Appellate Court found that the trial court's determination that one of the IRAs constituted joint marital property was in error. However, the Appellate Court also determined that that error was not dispositive of the appeal. *LeBlanc Id.* at ¶ 10.

Instead, the Court of Appeals affirmed the trial court's determination that pursuant to R.C. Sections 1709.01(A) and 1709.09(A), the terms and conditions of the contracts between Mr. Burchfield and Wells Fargo were controlling and required a finding that Mrs. Burchfield was the sole designated beneficiary of the IRAs when Mr. Burchfield died. The Court of Appeals also affirmed the trial court's rejection of Appellants' substantial compliance argument and held that even if strict compliance with the IRA contracts' terms and conditions for changing beneficiaries were waived, Mr. Burchfield had not substantially complied with those requirements. For that additional reason, Mrs. Burchfield remained his sole designated beneficiary when John died. In arriving at the decision, the Appellate Court applied this Court's analysis in the *Rindlaub v. Traveler's Ins. Co.* decision. 175 Ohio St. 303, *Leblanc Id.* at ¶¶ 13, 24-27.

This appeal is a result of this Honorable Court's February 22, 2012 acceptance of Appellants' discretionary appeal in Supreme Court Case No. 2011-2073 and the Court's additional determination in Supreme Court Case No. 2011-2160 that a conflict exists between the decision in this case by the Second District Court of Appeals for Montgomery County, Ohio and the decision by the Ninth District Court of Appeals for Summit County, Ohio in *Kelly v. May Associates Federal Credit Union*, 2008-Ohio-1507, 9th Dist. No. 23423. Pursuant to the Court's February 22, 2012 Entry in Case No. 2011-2160, Appellee Cynthia Burchfield has consolidated her Merit Brief and organized it to initially address Appellants' Proposition of Law No. 1 in Case No. 2011-2073 and to thereafter address the Certified Issue in Case No. 2011-2160.

STATEMENT OF FACTS

On January 8, 2004, Cynthia Morris, nka Burchfield, suffered the loss of her first husband, Mr. Charles E. Morris, who died as a result of injuries he sustained in an auto accident. In 2005, Cynthia began dating John Burchfield. She and John became engaged during the Christmas holiday season of 2006. (See Ex. A. 08/17/10 Affidavit of Cynthia Burchfield (hereafter “Burchfield Aff.”), Def.’s 08/18/10 Mem. Contra Pls.’ Mot. for Partial Summ. J. (hereafter “Def.’s Mem. Contra”)) Shortly before their marriage in March of 2007, John designated Cynthia as the sole beneficiary of his IRAs by signing two documents entitled “First Clearing, LLC IRA Enrollment & Change of Beneficiary Form” and faxing them to Wachovia Securities with a cover sheet that read “PLEASE MAKE THIS CHANGE ASAP.”¹ (See Exs. K-11, K-12 and K-13, Def.’s Mem. Contra.) Pursuant to the IRA contracts between Mr. Burchfield and Wells Fargo, Cynthia became the sole transfer-on-death beneficiary of the IRAs when Wells Fargo received that fax. (See Ex. F, Def.’s Mem. Contra; See also 06/24/10 Transcript of Deposition of Mr. Aaron Michael (hereafter “Michael Dep.”) at 41-42.)

Shortly after moving into their newly remodeled marital residence, the couple began to experience marital difficulties. (See Burchfield Aff. at ¶¶. 20-22.) In July of 2009, Mr. Burchfield again took up residence in the home he owned before the marriage and continued to use as his business office. (See Burchfield Aff. at ¶¶. 20-22.)

In October of 2009, Mr. Burchfield sent an e-mail to Mr. Michael at Wells Fargo stating that he and Mrs. Burchfield were getting a divorce and requesting that Mr. Michael provide him with forms to change his IRA accounts. *Leblanc Id.* ¶ 4. Mr. Michael mailed the change of

¹Prior to the commencement of this action in 2010, Wachovia Securities was acquired by Wells Fargo Corporation and is now known as Wells Fargo Advisors, L.L.C.

beneficiary designation forms to Mr. Burchfield. At the same time he also provided a self-addressed, stamped envelope for Mr. Burchfield's use if John decided to return the forms to Wells Fargo. (See Michael Dep. at 14, 30.) It is also undisputed that Mr. Burchfield knew that he was required to return those forms (which Appellants rely upon to assert their claims²) to Wells Fargo if he wished to change his IRA beneficiary designations, and never did so. *Leblanc Id.* at ¶ 6.

On November 5, 2009, Mr. Burchfield was served with a copy of Mrs. Burchfield's complaint for divorce. *Leblanc Id.* at ¶ 4. On December 16, 2009, he committed suicide and left a note at the scene of his death. Among his last recorded thoughts upon this earth, John said "Tell the kids and Cindy I love them so much." (See Ex. E, Def.'s Mem. Contra)

It is undisputed that when Mr. Burchfield died, his signed March 8, 2007 beneficiary registration forms, designating Cynthia as the sole beneficiary of both of his IRAs, were the only signed and completed beneficiary designation forms on file with Wells Fargo. (See Burchfield Appx. at 010.) It is also undisputed that both of John's IRA accounts were governed by contracts with specific terms and conditions that dictate how change of beneficiary designations are made.

The relevant contractual language for the IRAs reads as follows: "The Participant shall designate the person or persons (or entity or entities) to receive any distribution to be made by reason of the Participant's death. Each such designation shall be filed with the Custodian on a form acceptable to the Custodian and may be changed from time to time by the Participant filing a new written designation with the Custodian." (See Ex. F, Def.'s Mem. Contra.)

² An expert forensic examiner evaluated the change of beneficiary documents that Appellants rely upon and concluded that the signatures purporting to be Mr. Burchfield's are actually forgeries. However, that expert's opinion was not relied upon by the Appellate Court or the Trial Court in their decisions.

ARGUMENT

A. APPELLEE'S PROPOSITION OF LAW:

CHAPTER 1709 OF THE OHIO REVISED CODE DOES NOT ALLOW INDIVIDUAL RETIREMENT ACCOUNTS (IRAS) TO BE TREATED AS IF THEY WERE LIFE INSURANCE POLICIES. PURSUANT TO THE PURPOSE AND PROVISIONS OF R.C. CHAPTER 1709, FULL COMPLIANCE WITH THE TERMS AND CONDITIONS OF IRA CONTRACTS GOVERNING REQUESTS TO CHANGE TRANSFER-ON-DEATH BENEFICIARIES IS REQUIRED FOR REQUESTED CHANGES TO BE DEEMED EFFECTIVE.

1. IRA accounts are not analogous to life insurance policies.

Appellants' base their claims to these IRAs upon the decision by the Ninth District Court of Appeals in *Kelly v. May Associates Federal Credit Union*, 2008-Ohio-1507, 9th Dist. No. 23423, which applies case law regarding life insurance beneficiary designations to IRA contracts. The Second District Court of Appeals declined to follow the decision in the *Kelly v. May Associates* case. *Leblanc v. Wells Fargo Advisors, L.L.C.*, 196 Ohio App.3d 213, 2011-Ohio-5553, 962 N.E.2d 872, at ¶¶ 14-16.

Appellants take issue with the Second District Court of Appeals' analysis in part, because the Appellate Court examined the differences between IRAs and life insurance policies. (See Appellants' Merit Br. at 14-15.) However, IRAs and life insurance policies are not analogous items despite Appellants' suggestions to the contrary.

IRAs are tax advantaged retirement savings tools which are specifically defined at 26 U.S.C. Section 408(a) of the federal tax code which, in its pertinent part, reads as follows: "For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements: " ***
(3) No part of the trust funds will be invested in life insurance contracts." 26 U.S.C. 408(a)(3)

(Emphasis added.) On the basis of that statutory language, Mrs. Burchfield respectfully submits that the Court should reject Appellants' arguments that treat IRAs as if they were analogous to life insurance policies because it is clear that the United States Congress rejected such an approach when it enacted 26 U.S.C. Section 408(a)(3) and specifically excluded life insurance policies from the assets that can be included in an IRA.

2. Ohio's Uniform Transfer on Death Security Registration Act, rather than case law regarding life insurance policies, governs transfer-on-death IRA accounts because IRAs are securities registered in beneficiary form.

In R.C. Chapter 1709, the Ohio Legislature enacted this state's version of the Uniform Transfer on Death Security Registration Act which governs IRAs. As stated above, IRAs cannot, as a matter of law, include life insurance policies within the collection of assets that make up an account, and Chapter 1709 does not address or include life insurance policies among the assets regulated by that chapter. Therefore, it is clear that the General Assembly's intent in enacting Chapter 1709 was to provide a specific body of law to address IRAs and other securities registered in beneficiary form, rather than treat them as analogous to life insurance contracts.

As more fully discussed below, Appellants' reliance upon arguments applicable to life insurance policies are misplaced, and application of the relevant statutes in R.C. Chapter 1709 is necessary to correctly analyze the issues presented by this case.

In *Bielat v. Bielat*, 87 Ohio St.3d 350, 355, 2000-Ohio-451, 2721 N.E.2d 28, this Court stated that the purpose of R.C. Chapter 1709 is to recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts, including IRA accounts, to designate their pay-on-death beneficiaries. R.C. Chapter 1709 "promotes the interests of the parties to the securities accounts by validating the beneficiary designation as originally agreed." *Id.* at 355. (Emphasis added.)

Appellants' arguments are in direct conflict with the purpose of Chapter 1709 recognized by this Court in the *Bielat v. Bielat* decision, *Id.*, because they advocate that the terms and conditions of IRA contracts governing beneficiary designations should be ignored, rather than validated, when an IRA custodian interpleads an IRA to the courts in response to competing claims from persons asserting that they are the beneficiary of the IRA following an owner's death. (Appellants' Merit Br. at 8-24.) Appellants' argument that the contract between Mr. Burchfield is no longer binding, as a result of Wells Fargo interpleading the IRAs to the trial court, also conflicts with this Court's decision in *Bielat v. Bielat. Id.*

In the *Bielat v. Bielat* decision, two competing claimants asserted claims to an IRA following the death of its owner. One of those claimants was the specifically designated beneficiary according to the terms and conditions of the IRA Adoption Agreement between the IRA owner and the custodian of the IRA, Merrill Lynch. *Id.* at 357. The other claimant was a third party to the IRA agreement who sought to invalidate the provisions of R.C. Chapter 1709 because it required Merrill Lynch pay the proceeds of the IRA account to the specifically designated beneficiary, according to the terms of the contract.

In its decision, this Court held that Chapter 1709 was constitutionally valid and that "the Adoption Agreement signed by Mr. Bielat and Merrill Lynch placed valid contractual obligations upon them, with Merrill Lynch bound to pay the IRA balance to the beneficiary that Chester designated." *Id.* at 357. That is exactly the case in this instance. Mrs. Burchfield is Mr. Burchfield's specifically designated beneficiary and that designation was made in full compliance with the terms and conditions of his IRA contract with Wells Fargo. That contract placed valid contractual obligations upon Mr. Burchfield and Wells Fargo and Wells Fargo is bound to pay the IRA balance to Mrs. Burchfield.

Appellants' arguments also contradict the plain language of Chapter 1709 beginning with the definitional section of that chapter and continuing through the statutes that implement transfers-on death. For instance, R.C. Section 1709.01(A) governs how a security is registered in "beneficiary form" and reads as follows: "As used in sections 1709.01 to 1709.11 of the Revised Code, unless the context otherwise requires: (A) "Beneficiary form" means 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." *R.C. Section 1709.01(A)*.

Here, Mr. Burchfield indicated his intention that Mrs. Burchfield own his IRAs when he died, by completing, signing, and returning his March 7, 2007 change of beneficiary registration forms to Wells Fargo and thereby registering the securities in his IRAs in "beneficiary form" to the benefit of Mrs. Burchfield.

R.C. Section 1709.04 establishes when certificated securities or accounts like IRAs are deemed to be registered in beneficiary form and reads as follows: "A security, whether evidenced by a certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership of the security at the time of the death of the owner or the deaths of all multiple owners." *R.C. Section 1709.04*.

As of March 8, 2007, John Burchfield's IRAs were securities registered in "beneficiary form" and included a designation of Mrs. Burchfield as the beneficiary of his IRAs when Wells Fargo received his March 7 2007 registration forms that fully complied with his IRA contracts and indicated his intention that Cynthia become the owner of his IRAs upon his death. (See Burchfield Appx. at 005.) The undisputed evidence also shows that no other change of beneficiary was registered with Wells Fargo during Mr. Burchfield's life. (See Burchfield Appx. at 010.)

R.C. Section 1709.07, governs how securities registered in beneficiary form are to be transferred to a designated beneficiary upon the death of the account owner and states that: “Subject to the limitations of section 5731.39³ of the Revised Code, on the death of a sole owner *** ownership of a security registered in beneficiary form shall pass to the beneficiary or beneficiaries who survived all owners.” *R.C. Section 1709.07*. (Emphasis added). Construed together, R.C. Sections 1709.01(A) and 1709.07, require that the “beneficiary” identified according to R.C. Section 1709.01(A) is the person to whom the securities shall pass under R.C. Section 1709.07 following the securities owner’s death. Therefore, as a matter of statutory construction it is mandatory that ownership of the IRAs in this case pass to Mrs. Burchfield because she was the beneficiary designated in Mr. Burchfield’s registration of his IRAs with Wells Fargo in “beneficiary form” at the time of his death. The Legislature’s use of the word “shall” in R.C. Section 1709.07 requires that result because no clear and unequivocal legislative intent to make the word “shall” anything less than mandatory can be found in R.C. Section 1709.07. “A basic rule of statutory construction is that “shall” is “construed as mandatory unless there appears a clear and unequivocal legislative intent otherwise.” *Bergman et al. v. Monarch Construction Company*, 124 Ohio St.3d 534, 2010-Ohio-622, 925 N.E.2d 116, ¶ 26 citing *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus.

Further, R.C. Section 1709.08(B) does not allow an IRA custodian to transfer or reregister an IRA account, following an account owner’s death, in a manner that conflicts with the requirements of Chapter 1709 and reads as follows: “By accepting a request for registration in beneficiary form of a security, a registering entity agrees that the registration will be implemented

³ R.C. 5731.39 simply requires the custodian to obtain the written consent of the Ohio Tax Commission prior to a transfer of securities registered in beneficiary form to the transfer-on-death beneficiary.

as provided in sections 1709.01 to 1709.11 of the Revised Code.” *R.C. Section 1709.08(B)*.

Appellants’ “waiver and clearly expressed intent” argument is also contrary to R.C. Section 1709.08(B), which requires transfers to occur in accordance with R.C. Section 1709.09 and the other provisions of R.C. Chapter 1709, because, as the Court of Appeals recognized in the *Leblanc* decision, “***a transfer according to the “ clearly expressed intent” of the owner is beyond the contract and does not benefit from the nontestamentary characterization of R.C. 1709.09(A).” *Id.* at ¶ 16.

R.C. Section 1709.09(A) governs why securities registered in beneficiary form pass to the designated beneficiary and reads as follows: “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.” (Emphasis added.)

IRA custodians who accept registrations of securities in beneficiary form agree to transfer those securities, following the death of the account owners, pursuant to the requirements of R.C. Sections 1709.01(A), 1709.07 and 1709.09 which construed together, require the transfer of the IRAs to occur by reason of the IRA contract to the designated beneficiary selected by the account owner pursuant to the terms, conditions and procedures provided by that contract.

Appellants ignore those statutory requirements and focus instead on R.C. Section 1709.10 which, among other matters, allows IRA custodians to initially establish the change of beneficiary procedures that IRA owners must comply with to change their designated beneficiaries. (See Appellants’ Merit Br. at 16.) However, contrary to Appellants’ assertion, a plain reading of the text of R.C. Section 1709.10 demonstrates that the statute does not allow an IRA custodian to unilaterally change or waive an IRA contract’s requirements for changing beneficiary designations

after the owner of the IRA has died.

Appellants also attempt to justify their position by arguing that IRA custodians can only protect themselves from duplicate liability to competing claimants if courts impose a complete waiver of the terms and conditions in the IRA contract that the account owner relied upon and complied with to designate their transfer-on-death beneficiary. (See Appellants' Merit Br. at 9-13.) That argument ignores the provisions of R.C. Section 1708(C) which protects IRA custodians from duplicative liability and reads as follows: "A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with Section 1709.07 of the Revised Code and does so in a good faith reliance on the registration, on sections 1709.01 to 1709.11 of the Revised Code, and on information provided to it by an affidavit of the personal representative of the deceased owner or by the surviving beneficiary or the representatives of the surviving beneficiary or on other information available to the registering entity. The protections of sections 1709.01 to 1709.11 of the Revised Code do not extend to a reregistration or payment made after a registering entity has received a written notice from any claimant to any interest in the security that objects to the implementation of a registration in beneficiary form. No other notice or other information available to the registering entity shall affect its right to protection under sections 1709.01 to 1709.11 of the Revised Code." *R.C. Section 1709.08(C)*.

Pursuant to the provisions of R.C. Section 1709.08(C), an IRA custodians is only subject to duplicate liability for reregistering IRA an account or paying out the proceeds of the account, after the death of the account owner has acted in bad faith or if the custodian proceeds to reregister the account or pay out the account proceeds after receiving notice from any claimant that they object to the registration or payment. That is exactly the situation presented by this case, and Wells

Fargo's decision to interplead these IRA accounts to the trial court, upon notice of the Appellants' and Mrs. Burchfield's competing claims to these IRAs, preserved its statutory protection from duplicate liability as intended by the Legislature when it enacted R.C. Section 1709.08(C).

However, nothing in R.C. Section 1709.08(C) can be read to suggest that the Legislature intended that the protections offered to Wells Fargo through interpleader or otherwise, were also intended to nullify or waive the beneficiary designation provisions of the IRA contracts that Mr. Burchfield relied upon and fully complied with to designate Mrs. Burchfield as the transfer-on-death beneficiary of his IRAs.

In light of the purpose of R.C. Chapter 1709, as stated by this Court in the *Bielat v. Bielat* decision, *Id.*, when the statutory provisions of R.C. Sections 1709.01(A), 1709.04, 1709.07, 1709.08, and 1709.09 are applied to the undisputed evidence in this case, R.C. Chapter 1709 requires that account owners' designations of transfer-on-death beneficiaries must be honored when they are made with full knowledge of and in full compliance with the contracts governing those registrations. To do otherwise, and ignore the IRA owners' designations, as Appellants request in this case, would render the provisions of R.C. Chapter 1709 essentially meaningless.

Further, there is no clear and unequivocal indication in R.C. Chapter 1709 that the Legislature intended the courts to ignore the contracts that govern IRAs as requested by Appellants. Nor is there any clear and unequivocal indication that the Legislature intended to substitute substantial compliance, for full compliance, with the terms and provisions of IRA contracts when it enacted R.C. Chapter 1709.

3. Requiring full compliance with the requirements set out in IRA contracts for changing beneficiaries will promote predictability, certainty, and reliability in administering transfer-upon-death IRAs following an account owner's death.

Requiring full compliance with the terms and conditions of IRA contracts that govern

changes of beneficiary designations, pursuant to the requirements of Chapter 1709 will promote predictability, certainty, and reliability in all transfers-on-death of securities registered in beneficiary form. In this case, the Second District Court of Appeals recognized the importance of that goal and chose predictability, certainty, and reliability by applying the contract between Mr. Burchfield and Wells Fargo. *Leblanc Id.* at ¶ 17. In arriving at that decision, the Appellate Court applied this Court's prior decision in *Wright v. Bloom*, 69 Ohio St.3d 596, 1994-Ohio-153, 635 N.E.2d 31 (Ohio 1994), which dealt with transfer on death in a similar context involving payable on death banks accounts. *Leblanc Id.* at ¶ 17.

In the *Wright v. Bloom* decision, this Court rejected what it described as “***efforts to determine survivorship rights by a post-mortem evaluation of extrinsic evidence of depositor intent***”. *Id.* at 604. In doing so, the Court stated that such post-mortem evaluations “***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.” *Id.* at 604. The Court also noted that the need for uniformity is essential. “A depositor who opens such an account ought to be able to know, with some degree of certainty, that certain consequences will arise from the creation of the account in an established manner.” *Id.* at 604.

In the context of transfer-on-death securities registered in beneficiary form, Appellants argument would require courts to conduct post-mortem evaluations of IRA account owners' intentions in order to divine their “clearly expressed intent.” (See Appellants' Merit Br. at 13-17.) Appellants also argue that courts are required to ignore the owner's designation of their beneficiaries according to their IRA contracts, if an IRA custodian interpleads the IRA account in response to competing beneficiary claims. (See Appellants' Merit Br. at 13-21.)

Mrs. Burchfield respectfully submits that Appellants' approach is not only illogical and unsupported by the statutory language and case law cited in their Merit Brief, it is also inherently flawed for the same reasons that this Court rejected "post-mortem evaluations" of the decedents' intent in the *Wright v. Bloom* decision *Id.*

If Appellants' approach were to be adopted by this Court, IRA account owners would never have any assurance that courts or IRA custodians would honor the designations of beneficiaries that the account owners created in compliance with their IRA contracts. That uncertainty might discourage them from purchasing IRAs as retirement planning tools and cause them to lose the tax advantages of an IRA account. That would also be detrimental to financial institutions who have determined that offering IRA accounts to their customers is advantageous to their business interests.

The post-mortem evaluation that Appellants urge this Court to adopt would also create a rule of law that is contrary to Ohio's long standing tradition of protecting the rights of parties to freely enter into contracts with the anticipation that their rights under their contracts will be honored as written. In his concurring opinion in the *Bielat v. Bielat* decision, Justice Andrew Douglas refused to accept "a rule of law which would sanction the renunciation of a bargain purchased in freedom from illegal purpose, deception, duress, or even from misapprehension or unequal advantage*** and lead inexorably to individual irresponsibility, social instability and multifarious litigation." *Id. at 363. Id.* In addition to being inherently flawed and unworkable, Appellants' proposed rule would also lead to the societal ills that Justice Douglas identified in his concurring opinion in the *Bielat v. Bielat* decision. *Id. at 363.*

4. **Requiring full compliance with the requirements set out in IRA contracts for changing beneficiaries will protect IRA account owners' constitutional right to enter into contracts with the expectation that their contracts will endure according to their terms.**

In *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 231 N.E.2d 301, this Court was “****asked by plaintiff to approve the brushing aside of the explicit terms of a contract which, we must assume, in the absence of a showing to the contrary, was executed **** without misunderstanding or imposition.” In response, the Court stated that it was “required to approach that task with no less restraint than in striking down a statute.” *Id.* at 47. When the Court refused the plaintiff’s request, it did so because “the right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint.” *Id.* at 47. (Emphasis added.)

In this case, Appellants ask this Court to brush aside the terms and conditions of the IRA contracts that Mr. Burchfield entered into with Wells Fargo that determine the transfer-on-death beneficiary of his IRA accounts upon his death and how he was required to change his beneficiary designations if he chose to do so. (Appellants Merit Br. at 8-24.)

In the *Blount v. Smith* case, the plaintiff was at least a party to the contract that he unsuccessfully and improperly sought to invalidate. *Id.* at 41-42. By comparison, Appellants are third parties to the IRA contracts at issue. Mrs. Burchfield respectfully submits that Appellants’ proposed rule of law, that would allow them to invalidate contracts to which they are not parties, in a case where there is no evidence that Mr. Burchfield entered into his IRA contracts with any misunderstanding or imposition, is wholly incompatible with and destructive to the constitutional right to freely enter into a contract, “with the expectation that the contract shall endure according to its terms”, that this Court recognized in the *Blount v. Smith* decision. *Id.* at 47.

For all of the reasons set out above, pursuant to the Legislature's intent, and the purpose, and provisions of R.C. Chapter 1709, and the requirements and protections of the right to freely contract provided by Article I, Section 1 of the Ohio Constitution and Article 1, Section 10 of the constitution of United States of America, evidence of full compliance with the terms and conditions of IRA contracts that govern requests to change transfer-on-death beneficiaries, is required for a requested change to be deemed effective following the death of the account owner.

B. CERTIFIED ISSUE TO BE ADDRESSED:

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?

APPELLEE'S POSITION: In light of the purpose of R.C. Chapter 1709, if the Court determines that IRA accounts may be treated comparably to life insurance policies, this Court's holdings and analysis in *Atkinson v. Metropolitan Life Ins. Co.* (1926), 114 Ohio St. 109, 150 N.E. 748, and *Rindlaub v. Traveler's Ins. Co.* (1963), 175 Ohio St. 303, 194 N.E.2d 577 require an alleged clearly intended beneficiary to show that the owner of an IRA account substantially complied with the contractual terms, conditions, and procedures for changes of beneficiaries of their IRA, before the alleged clearly intended beneficiary can recover on their claim to the IRA.

- 1. Substantial compliance with the contractual terms and conditions for changing beneficiaries in IRA contracts is in keeping with the Legislature's intention in enacting Chapter 1709 and consistent with this Court's decisions and analyses in *Atkinson v. Metropolitan Life Ins. Co.* (1926), 114 Ohio St. 109, 150 N.E. 748, and *Rindlaub v. Traveler's Ins. Co.* (1963), 175 Ohio St. 303, 194 N.E.2d 577.**

As this Court noted in the *Bielat v. Bielat* decision, "the purpose of R.C. Chapter 1709 is to recognize, protect, and enforce the contractual rights of parties to certain securities investment accounts to designate a pay-on-death beneficiary." *Id.* at 355. (Emphasis added.) Clearly, preserving the integrity of IRA contracts was central to the General Assembly's intention in

enacting R.C. Chapter 1709. A similar concern with respect to life insurance contracts was also expressed in the Second District Court of Appeals decision in this case when it held that “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.” *Leblanc Id.* at ¶25.

If IRAs are deemed to be analogous with life insurance policies, the Second District Court of Appeals properly applied the substantial compliance test to this case when it held that “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.” *Leblanc Id.* at ¶25 citing *State Mut. Life Assur. Co. of Am. v. Holmes* (Aug. 30, 1988), Franklin App. No. 88AP-377, 1988 WL 92435, and *Benton v. United Ins. Co. of Am.* (1959), 110 Ohio App. 151, 12 O.O.2d 422, 159 N.E.2d 912. The Court of Appeals then correctly applied those requirements to the evidence in this case and found that Mr. Burchfield had not done everything he could under the circumstances to change his designated beneficiary in compliance with his IRA contract. *Leblanc Id.* at ¶25-27, also citing *Rindlaub v. Traveler's Ins. Co.* (1963), 175 Ohio St. 303, 194 N.E.2d 577.

In each of the cases cited by the Court of Appeals, and in this Court's additional decision in *Atkinson v. Metropolitan Life Ins. Co.* (1926), 114 Ohio St. 109, 150 N.E. 748, the insured who intended to change their beneficiary was aware of their obligations under their insurance contract and had made every effort available to them under the circumstances to comply with the requirements of their insurance contracts that controlled changes of beneficiary designations.

In each of those decisions, the appellate courts and this Court determined that those efforts by the insureds were an essential part of the analysis. If this Court determines that IRAs may be

treated comparably to life insurance policies, Mrs. Burchfield respectfully submits that at the very least, the prior decisions of this Court in the *Atkinson*, *Rindlaub*, and *Bielat* decisions cited above, establish that evidence of substantial compliance by an IRA account owner, with the contractually mandated procedures for changing the designated beneficiaries of their IRA, should be required.

That rule of law will protect and foster the integrity of all IRA contracts. It will also prevent situations where, as here, third parties attempt to undermine the integrity of IRA contracts by brushing aside the terms and conditions of the agreements that govern the determination of the designated beneficiaries, when those contracts prohibit their claims to the IRA proceeds at issue.

2. Appellants arguments in opposition to a “substantial compliance” test for changes of beneficiary designations by owners of IRA accounts directly contradicts their prior position with respect to the same issue.

In their Merit Brief Appellants now stringently object to an established rule of law that would, if applied to this case, require them to show that Mr. Burchfield substantially complied with the contractual terms and conditions of his IRA contracts. (See Appellants’ Merit Br. at 8-24.) That is a direct contradiction to Appellants’ position on this issue in the trial court where Appellants argued that the court *should* apply the substantial compliance test to this case and grant them summary judgment based upon the dissent in *Kelly v. May Associates Federal Credit Union*, Ninth Dist. No. 23423, 2008-Ohio-1507, the decision in *Benton v. United Insurance Co. of America* (1959), 110 Ohio App. 151, 159, N.E.2d 912, and this Court’s decision in *Rindlaub v. Traveler’s Ins. Co.* (1963), 175 Ohio St. 303, 304-305, 194 N.E.2d 577 (See Pls.’ 07/27/10 Mot. for Partial Summ. J. at 16.)

Appellants attempt to justify their current opposition with the disingenuous argument that the Second District Court of Appeals created a new and previously unheard of “substantial compliance” test and used that “newly-created” test to affirm the trial court’s decisions. (See

Appellants' Merit Br. at 5, 8, 9, 17, 18, 20, and 21.) In addition, Appellants now argue that despite this Court's analyses and holdings in the *Atkinson v. Metropolitan Life Ins. Co.*, *Rindlaub v. Traveler's Ins. Co.*, and *Wright v. Bloom*, decisions, they are permitted to offer evidence that is extrinsic to Mr. Burchfield's IRA contract, to demonstrate his "clearly expressed intent" to change his IRA beneficiary, without having to show evidence that he had done everything he could under the circumstances to comply with his IRA contract (Appellants Merit Br. at 8-24.) In making that argument, Appellants ignore essential portions of the holdings in the *Atkinson* and *Rindlaub* decisions and completely ignore the *Wright v. Bloom* decision. 69 Ohio St.3d 596. (Appellants Merit Br. at 8-24.)

In the *Atkinson* case the Court stated that "*** the question arises whether enough was done by the insured to effect a change of beneficiary. This question requires us to determine whether the insured had omitted anything which was essential to be done by him to comply with the essential regulations governing the manner of exercising his right to change the beneficiary." *Id.* at 113 (Emphasis added.) The Court further held that "The facts of this case clearly indicate the desire of the insured to change the beneficiary, and the insured has done everything required to be done by him to effect the change." On that basis, the Court awarded the life insurance proceeds to his widow because the insured had clearly indicated his intention to change the beneficiary of his insurance from his mother to his widow, and he had done everything required of him by his contract with Metropolitan Life to effect that change. *Id.* at 121. Appellants' arguments completely ignore that aspect of the *Atkinson v. Metropolitan Life Ins. Co.* decision. (See Appellants' Merit Br. at 10, 11, 13-17, and 20.)

In the *Rindlaub v. Travelers Insurance Co.* decision, the Court also applied a two part substantial compliance analysis and held that the evidence of the insured's intention to change his

beneficiary, by submitting a letter requesting that change in writing to Travelers Insurance, along with two witnessed statements, demonstrated his intention to change his beneficiary. The Court further noted that from the evidence it was reasonable to infer that the insured believed that “he had done all that was necessary to effectuate a change of beneficiary.” *Id.* at 306. Appellants’ arguments also completely ignore that aspect of the *Rindlaub v. Travelers Insurance Co.* decision. (See Appellants’ Merit Br. at 10, 12-18, 20, 22-24.)

In this case, the Court of Appeals construed the facts in the light most favorable to Appellants for summary judgment purposes and assumed that Mr. Burchfield intended to change his beneficiary designations for his IRAs, thereby meeting the first element of the test for substantial compliance. However, the Appellate Court still properly affirmed the trial court’s rejection of Appellants’ substantial compliance argument because the evidence demonstrated, and both courts found, that Mr. Burchfield had not substantially complied with the contractual requirements for changing his beneficiary designations because he had not done everything he could do under the circumstances that was necessary to comply with his IRA contracts. *Leblanc Id.* at ¶¶ 12, 13, and 24-27.

Despite Appellants’ argument to the contrary, the Second District Court of Appeals applied the rule of law that was established by this Court in the *Atkins v. Metropolitan Life Insurance Co.* decision and reaffirmed by its application in the *Rindlaub v. Travelers Ins. Co.* decision.

3. Appellants also misconstrue this Court’s holdings in the *Atkinson* and *Rindlaub* cases regarding the effect of interpleader upon an insured’s obligations under the terms and conditions of their life insurance contracts.

In the *Atkinson v. Metropolitan Life* decision, the life insurance policy in question contained a provision requiring that Metropolitan Life consent to an insured’s requested change of beneficiary before the change could become effective. *Id.* at 121. In the *Rindlaub v. Travelers*

Insurance case, the life insurance contracts included a provision that required written approval from Travelers Insurance, of an insured's requested change of beneficiary, before the requested change would take effect. *Id.* at 305.

In the *Atkinson* case, this Court held that "The provisions in a policy of insurance regulating the mode and manner of making a change of beneficiary are for the benefit of the insurance company and may be waived by it. *Id.* at syllabus paragraph four. The Court also held that "in the event of a controversy between a former named beneficiary and a new beneficiary, if the insurance company interpleads in an action by a claimant to recover the proceeds of the policy it thereby waives any interest in the outcome of the action and thereupon the cause shall proceed between the respective claimants uninfluenced by any rights or interests of the insurance company." *Id.* at syllabus paragraph five. (Emphasis added.)

In the *Rindlaub v. Travelers Insurance* decision, this Court held that "where an insured during his lifetime communicated to the insurer his clearly expressed intent to name certain new beneficiaries and the insurer has interpleaded and deposited the policy proceeds in court, such expressed intention of the insured will be determinative of the right of contesting claimants to the policy proceeds, notwithstanding the absence of the written approval by the insurer required by the provisions of the policy." *Id.* at syllabus paragraph one. (Emphasis added.) In explaining that decision, the Court stated that "the purpose of a provision for the approval of a change of beneficiary, as is involved here, is strictly for the protection of the insurer. It is a means of establishing the fact that the insurer has received notice of the change of beneficiary. Under these policies the insurer has no interest as to whom the insured designates as beneficiary except to protect itself against duplicate liability." (Emphasis added.)

The waiver discussions in the *Atkinson v. Metropolitan Life Insurance* and *Rindlaub v. Travelers Insurance* decisions allow an insurer to interplead the funds from a life insurance policy in situations where two people both claim to be the designated beneficiary of the life insurance policy and a legal action to assert those claims arises. In that case, when the insurer interpleads the funds to the court, it is deemed to have waived any further interest in the outcome of the dispute between the competing claimants because a court will ultimately decide who is entitled to the insurance proceeds and direct the insurance company to pay them accordingly. As a result of that process, in which the insurance company takes no part other than to seek direction from a trial court through interpleader, it is shielded from liability to the unsuccessful claimant.

What that meant in the *Atkinson* case was that a requirement that Metropolitan Life consent to a requested change of beneficiary, as the terms and conditions of the life insurance contract provided, was waived when it interplead the funds to the court. *Id.* at syllabus paragraph one. In the *Rindlaub* decision, the requirement that Travelers Insurance approve in writing, of a requested change in a designated beneficiary, was also waived by interpleader. *Id.* at 305.

Appellants have taken that result and applied it here to propose that the insurer's interest in seeing that its policy procedures are followed, and the insured's obligation to follow those procedures during their lifetime, are both waived by the interpleader of the funds resulting from the insured's death. (See Appellants' Merit Br. at 8-24.) However, the *Atkinson* and *Rindlaub* decisions do not support Appellants' assertion that the interpleader of the funds in a life insurance policy by an insurer, waives the terms and conditions of the contract that the insured was required to follow to change his designated beneficiary prior to his death. As discussed above, the Court's analysis in both the *Atkinson* and *Rindlaub* decisions makes it clear that Appellants' argument is incorrect because both decisions hinged on an analysis of the deceased insureds' efforts to

substantially comply with the contractual requirements to change their designated beneficiaries.

Appellants argue for a waiver of the insured's contractual obligations in their life insurance policy as an additional excuse for their efforts to avoid a substantial compliance analysis of Mr. Burchfield's obligations under his IRA contract. They also suggest that by avoiding that analysis they are entitled to offer evidence that is extrinsic to Mr. Burchfield's IRA contract to prove his "clearly expressed intent" to change his beneficiary designations. (See Appellants' Merit Br. at 8-24.) As previously also discussed above, pursuant to this Court's decision in *Wright v. Bloom*, 69 Ohio St.3d 596 such extrinsic evidence should not be admissible for the purposes that Appellants propose here.

- 4. Appellants misconstrue the basis of the Court of Appeals' decision in this case in order to suggest that the Appellate Court improperly determined an issue of material fact as a basis for affirming summary judgment in favor of Mrs. Burchfield.**

At page 22 of their Merit Brief, Appellants suggest that the Court of Appeals improperly affirmed the trial court's grant of summary judgment to Mrs. Burchfield by making a finding of fact in favor with respect to Mr. Burchfield's intent to change the beneficiary designations in his IRAs. On that basis, they suggest that summary judgment should be reversed because the Appellate Court should have reserved that finding for a jury determination pursuant to the U.S. Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505. The decision from the Court of Appeals clearly refutes that assertion because the Court of Appeals viewed the evidence in the light most favorable to Appellants at every juncture where matters of Mr. Burchfield's intent were in issue. See *Leblanc* Id. ¶¶ 12 and 24.

CONCLUSION

For all of the reasons discussed above, the Second District Court of Appeals decision in this case should be affirmed by this Honorable Court. Appellee Cynthia Burchfield also respectfully submits that this Court should accept her Proposed Proposition of Law and hold that Chapter 1709 of the Ohio Revised Code requires full compliance with the terms and conditions of IRA contracts governing requests to change transfer-on-death beneficiaries is required for requested changes to be deemed effective.

In the alternative, if the Court determines that IRAs may be treated as analogous to life insurance policies under R.C. Chapter 1709, Mrs. Burchfield respectfully submits that the Certified Issue to be determined in this case should be decided in the affirmative.

Respectfully submitted,


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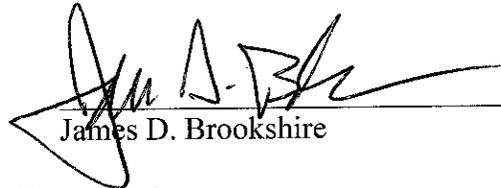
CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of Appellee Cynthia Burchfield's Merit Brief were served upon Appellants' counsel and counsel for Wells Fargo Advisors, LLC and Bruce Leland by ordinary U.S. mail, postage prepaid to the following addresses, on the date same was filed:

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4818-6814-9263, v. 1

APPELLEE’S APPENDIX

Decision Order and Entry Granting Defendant’s Cross Motion for Summary Judgment, *Leblanc v. Wells Fargo*, Montgomery County, Ohio Common Pleas Court Case No. 2010 CV 01926 (11/10/10). 001

Decision Order and Entry Denying Plaintiffs’ Motion for Partial Summary Judgment, *Leblanc v. Wells Fargo*, Montgomery County, Ohio Common Pleas Court Case No. 2010 CV 01926 (11/10/10). 017

R.C. Section 1709.01. 031

R.C. Section 1709.04 032

R.C. Section 1709.07. 033

R.C. Section 1709.08. 034

R.C. Section 1709.09. 035

R.C. Section 1709.10. 036

R.C. Section 5731.39. 037

26 U.S.C. 408(a)(3) 039

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GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LORI LEBLANC INDIVIDUAL et al,

Plaintiff(s),

-vs-

WELLS FARGO ADVISORS LLC et al,

Defendant(s).

CASE NO.: 2010 CV 01926

JUDGE MARY WISEMAN

**DECISION, ORDER AND ENTRY
GRANTING DEFENDANT'S CROSS
MOTION FOR SUMMARY JUDGMENT**

FINAL APPEALABLE ORDER

This matter comes before the Court on Defendant-Counter Claimant and Cross Claimant Cynthia Burchfield's Cross Motion for Summary Judgment ("Motion for Summary Judgment"). For the reasons that follow, Cynthia Burchfield's Motion is GRANTED.

I. FACTUAL AND PROCEDURAL HISTORY

This case arose out of a Complaint filed for disposition of assets following the death of John Burchfield ("Burchfield"). See generally, Compl. On March 9, 2007, Burchfield named his then fiancée, Cynthia (Morris) Burchfield, as a beneficiary of certain death benefits at Wells Fargo (formerly Wachovia Securities). Compl. at ¶15. Burchfield and Cynthia were married on May 5, 2007. Pfs. Mtn. Summ. J. at 18. During the summer of 2009, Burchfield and Cynthia Burchfield began to experience marital difficulties. Compl. at ¶17. On October 28, 2009, Burchfield contacted Aaron Michael, ("Michael") Vice President of Investments at Wells Fargo and asserted that he needed paperwork to change his IRA beneficiaries. Compl. at ¶24. Michael responded and stated that he would change the beneficiaries and take "Cindy off." Compl. at ¶25. On November 2, 2009, Cynthia Burchfield¹ filed for divorce.² Compl. at ¶28. On December 16, 2009, Burchfield took his own life. Compl. at ¶30.

¹ Herein after Cynthia Burchfield will be referred to as Cynthia Morris, as she sought restoration of her maiden name along with the divorce. Compl. at ¶28.

Plaintiffs filed a Complaint seeking declaratory judgment and a finding that Cynthia Morris has no legal right to any of the assets of Burchfield. Compl. at ¶¶36-42. Additionally Plaintiffs seek a finding of: the creation of a constructive trust, pursuant to R.C. § 5815.31 *et seq.*; intentional interference with an expected inheritance against Cynthia Morris; unjust enrichment against Cynthia Morris; conversion against Cynthia Morris; and intentional infliction of emotional distress against Cynthia Morris. See generally, Compl. Plaintiffs further seek an award of punitive damages against Cynthia Morris. Compl. at ¶¶70-71. Cynthia Morris filed an Answer, which contained numerous affirmative defenses, counterclaims, and various cross claims.³ See generally, Ans. Plaintiffs filed a Motion for Partial Summary Judgment arguing they are entitled to the funds in the IRA accounts. See generally, Pfs.' Mtn. Summ. J.

This Court held an oral argument on the issues in this case to determine, among other things, disposition of the assets in the Estate of Burchfield. See, Hearing Tr. The Court has reviewed the transcript of the oral argument in addition to the parties' briefs.

In the instant Motion for Summary Judgment, Cynthia Morris argues that she is entitled to summary judgment on all of Plaintiffs' claims as well as her cross-claims. Mtn. Summ. J. at 1. First, Cynthia Morris asserts that she is entitled to summary judgment on Plaintiffs' claim that she is wrongfully in possession of any assets of the Estate of Burchfield. *Id.* at 3. Cynthia Morris contends that the Ohio Probate Court held a hearing on August 2, 2010, during which Plaintiff Lori LeBlanc stipulated and agreed that Cynthia Morris is not in possession of any assets of the estate and stipulated to Cynthia Morris' statutory right to take against Burchfield's will, pursuant to R.C. § 2106.01 *et seq.*⁴ *Id.* at 4 (citing Ex. H). Cynthia Morris contends that Plaintiff Lori LeBlanc was acting in her personal capacity and as the lawfully authorized representative of the other designated heirs Gloria Welch ("Welch") and Bruce Leland ("Leland").⁵ *Id.* at 5. As such, Cynthia Morris argues that Plaintiffs are collaterally estopped from pursuing any claim of wrongful possession. *Id.*

Next, Cynthia Morris argues that she is entitled to the proceeds of the 401(k) account and life

² Darke County Common Pleas case 09 CIV 0071. Compl. at ¶28.

³ Wells Fargo Advisors, LLC ("Wells Fargo") filed an Answer to the Complaint, as well as an Answer and Counterclaims to Cynthia Morris' cross-claims. See generally, Ans. and Ans. to Cross-Claim. Wells Fargo then filed an Amended Answer and a Counterclaims and Cross-Claim for Interpleader. See, Am. Ans. 5/27/10.

⁴ Mercer County case 2009-1250.

⁵ Plaintiffs filed a Civ. R. 41(A) Notice of Dismissal without Prejudice of Defendant Leland on August 4, 2010. See, Notice of Dismissal at 1.

insurance policy held on behalf of Burchfield. *Id.* Cynthia Morris asserts that the Complaint fails to allege that anyone, other than Cynthia Morris, was ever designated as the beneficiary of his 401(k) plan or life insurance. *Id.* Cynthia Morris asserts that Burchfield's 401(k) plan participant's designation controls and at the time of his death, she was the designated beneficiary for the 401(k) plan. *Id.* Further, Cynthia Morris asserts that she was the sole beneficiary under Burchfield's life insurance policy. *Id.* at 7. As such, Cynthia Morris argues that summary judgment is proper. *Id.*

Next, Cynthia Morris contends that she is entitled to the Wells Fargo money market joint checking account. *Id.* Cynthia Morris asserts that she deposited \$251,955.96 into the account, while Burchfield contributed \$581.31. *Id.* (citing Deposition of Michael ("Michael Depo.") at 36-39, 53; Ex I). Cynthia Morris further contends that the joint checking account was opened as a joint account with rights of survivorship and remained as such until the time of Burchfield's death. *Id.* Thus, Cynthia Morris argues she is entitled to the money in the joint account. *Id.* (citing *In re Hatch's Estate* (1950), 154 Ohio St. 149, 152, 93 N.E.2d 585).

Additionally, Cynthia Morris asserts that she is entitled to summary judgment on Plaintiffs' claims and her counter-claims regarding any interest in the real property located at 9262 Kelch Road, Versailles, Ohio. *Id.* at 8. Cynthia Morris asserts that the deed on the property states that it conveys the property to "John Burchfield and Cynthia A. Burchfield, Husband and Wife, for their joint lives remainder to the survivor of them," *Id.* (quoting Ex. J). As such, Cynthia Morris argues that pursuant to R.C. § 5302.17, the interest in real property vested with her upon the death of Burchfield. *Id.*

Moreover, Cynthia Morris argues that she is entitled to summary judgment on the IRA accounts at issue in this case. *Id.* Cynthia Morris asserts that she was named as the sole beneficiary on Burchfield's IRA accounts on March 8, 2007. *Id.* Cynthia Morris claims that the change of beneficiary forms ("Change of Beneficiary forms") relied on by Plaintiffs were not on file with Wells Fargo and did not act to change the beneficiary of the IRA accounts. *Id.* (citing Michael Depo. at 43). Thus, Cynthia Morris argues that she is the sole beneficiary of the IRA accounts because she was named as a beneficiary as of March 8, 2007 and the Change of Beneficiary forms found amongst Burchfield's belongings were not delivered to Wells Fargo until after Burchfield's death. *Id.* at 10. Furthermore, Cynthia Morris argues that she is entitled to summary judgment on Plaintiffs' claims and her counter-claims for the IRA account ending in 1587 because it was

marital property at the time of Burchfield's death and she did not consent to any alleged change of beneficiary on the account. *Id.* at 11. Cynthia Morris contends that after she and Burchfield were married, Burchfield deposited Seventy-Four Thousand, Sixty-Two Dollars and Forty-Seven Cents (\$74,062.47) into the IRA account. *Id.* (citing Ex. C). As such, pursuant to R.C. § 3105.171(A)(3)(a)(iii), the IRA account became the marital property of Cynthia Morris and Burchfield. *Id.* (citing R.C. § 3105.171(A)(3)(a)(iii)). Cynthia Morris argues that she did not consent to the change in beneficiaries, and thus argues that a change could not have been effected without her signature. *Id.* at 12.

Cynthia Morris also argues that Plaintiffs' claim for creation of a constructive trust and disgorgement fails because R.C. § 5815.33(B)(1) provides that a spouse is deemed to have predeceased the spouse who designated them as a beneficiary after an actual judgment or decree of divorce, dissolution, or annulment has been entered. *Id.* at 14 (citing R.C. § 5815.33(B)(1)). Here, Cynthia Morris contends that there was no final judgment or decree of divorce, dissolution, or annulment in this case. *Id.* Further, Cynthia Morris argues there is no evidence to suggest that she has employed improper means to warrant the creation of a constructive trust. *Id.* at 15.

Cynthia Morris further contends that Plaintiffs' claims for intentional interference with an expected inheritance, unjust enrichment, and conversion must fail on the basis of the September 1, 2010 order from the Mercer County Probate Court, which finds that Cynthia Morris is not in possession of anything that constitutes property of the Estate of Burchfield. *Id.* at 17 (citing Ex. H). Further, the order from the Mercer County Probate Court finds that Cynthia Morris is entitled to receive assets from the Estate of Burchfield by exercising her spousal allowances pursuant to R.C. § 2601.01 *et seq.* *Id.* at 19. Cynthia Morris also argues that summary judgment is proper on Plaintiffs' claims for intentional infliction of emotional distress and for punitive damages as there is no evidence to suggest that she has acted in an extreme and outrageous manner, with malice, or that she has engaged in fraud. *Id.* In fact, Cynthia Morris contends that she is merely asserting her lawful claims to the IRA accounts, joint money market checking account, real property, 401(k) plan, life insurance proceeds, and personal property. *Id.* at 20. As such, Cynthia Morris argues that summary judgment is proper. *Id.*

In response, Plaintiffs contend that the only issue in dispute is who has the legal and equitable right to the IRA accounts.⁶ Memo. in Opp. at 2. Plaintiffs contend that the ROTH IRA and the rollover IRA were in existence prior to Burchfield and Cynthia Morris' marriage, which occurred on May 5, 2007, and as such, amount to premarital assets.⁷ *Id.* at 2.

Plaintiffs do not dispute that Cynthia Morris was named as the sole beneficiary in March 2007. *Id.* at 8. However, Plaintiffs contend that Cynthia Morris was replaced by Welch and Leland as beneficiaries through the communications between Burchfield and Michael. *Id.* at 8 (citing Michael Depo. at 13-14, 18-19). Further, Plaintiffs contend that Michael mailed Burchfield the Change of Beneficiary forms and Michael "assumed that the Change of Beneficiary forms (Exhibits 5 and 6) were taken care of." *Id.* (citing Michael Depo. at 62). Moreover, Plaintiffs assert that Burchfield expressed his intent to change the beneficiary of the IRA accounts because Burchfield changed his will to exclude Cynthia Morris. *Id.* at 9-10. After Michael and Jeff Miller discovered the Change of Beneficiary forms amongst Burchfield's belongings, Michael submitted the forms to his manager. *Id.* at 11 (citing Michael Depo. at 24). Thereafter, Michael believed the beneficiary had changed from Cynthia Morris to Welch and Leland. *Id.* at 12 (citing Michael Depo. at 27).

Plaintiffs contend that the law now holds that upon divorce, the law automatically revokes prior beneficiary designations in IRAs. *Id.* at 14 (citing R.C. § 5815.33). However, Plaintiffs acknowledge that Burchfield and Cynthia Morris were not yet divorced. *Id.* As such, Plaintiffs contend the Court must examine Burchfield's clearly expressed intent regarding the beneficiaries of the IRA accounts. *Id.* Plaintiffs assert that "if the insured communicated to the insurer his 'clearly expressed intent' to change beneficiaries, the proceeds will be paid to the newly designated beneficiary even though the insured failed to comply with the process set forth in the policy." *Id.* at 15 (citing *Rindlaub v. Traveler's Ins. Co.* (1963), 175 Ohio St. 303, 305). Plaintiffs contend that Burchfield clearly expressed his intent to change the beneficiaries of his IRA accounts to Welch and Leland by communicating his desires to Michael, by filling out the Change of

⁶ In their Memorandum in Opposition to Cynthia Morris' Motion for Summary Judgment, Plaintiffs concede that Cynthia Morris is entitled to the joint survivorship bank account at Wells Fargo (ending in 8799) and the real property located at 9262 Kelch Road. See, Memo. in Opp. at 6-7. Plaintiffs further admit that they are not disputing the proceeds of the 401(k) account and the life insurance proceeds, but assert that they have not been provided with discovery regarding proof of beneficiary. *Id.* at 6.

⁷ Plaintiffs assert that the IRAs are not part of the probate proceedings in Mercer County. *Id.* at 3.

Beneficiary forms, and by making the same proportional bequest in his will. *Id.* at 17. Plaintiffs argue that it is inconsequential that Burchfield did not actually return the Change of Beneficiary forms to Wells Fargo. *Id.* (citing Michael Depo. at 27). Additionally, Plaintiffs contend that spousal consent is not required in order to change a beneficiary in Ohio. *Id.* at 18-19 (citing Michael Depo. at 46-47).

Further, Plaintiffs contend that the IRA accounts are not marital property. *Id.* at 19. Plaintiffs argue that Cynthia Morris did not contribute to the IRA accounts and as such, the increase in the value of the accounts was passive and the accounts remain separate property. *Id.* at 20 (citing *Walkup v. Walkup*, 31 Ohio App. 3d 248, 511 N.E.2d 119). Moreover, Plaintiffs argue they are entitled to creation of a constructive trust. *Id.* at 21. Plaintiffs contend that the suicide note left by Burchfield is not to be construed as evidence of "clearly expressed intent," as the only reference it made to money is inapplicable to the facts of this case. *Id.* Thus, Plaintiffs argue that Cynthia Morris' Motion for Summary Judgment should be denied. *Id.*

In reply, Cynthia Morris contends that summary judgment is proper with respect to all of Plaintiffs' claims as well as her counter-claims. Reply at 1. First, Cynthia Morris asserts that the order from the Mercer County Probate Court estops Plaintiffs from asserting that Cynthia Morris is unlawfully concealing or retaining assets of the Estate of Burchfield. *Id.* at 3. Further, Cynthia Morris contends that the same order collaterally estops Plaintiffs' claims for intentional interference with an expected inheritance, unjust enrichment, and conversion. *Id.* Cynthia Morris notes, however, that collateral estoppel does not entitle her to the IRA account, as the IRA accounts are not assets of the Estate of Burchfield. *Id.* at 5. Similarly, Cynthia Morris argues that Plaintiffs' argument regarding the designation of beneficiaries in Burchfield's will is irrelevant, based on the fact that the IRA account are not assets of the probate estate. *Id.* at 6.

Cynthia Morris argues that summary judgment is proper with respect to the 401(k) account and life insurance policy maintained by Burchfield's employer. *Id.* at 8. Cynthia Morris asserts that her response to Plaintiffs' Interrogatory Number 41 indicating receipt of the life insurance proceeds and 401(k) funds and Cynthia Morris' affidavit dealing with these funds, is sufficient to satisfy the evidentiary requirements for summary judgment. *Id.* (citing Response to Plfs.' Interrogatory No. 41; Affidavit of Cynthia Morris ("Morris Aff.")). Further, Cynthia Morris contends that spousal consent was required to change the beneficiary of the IRA account (account ending in 1587) which amounted to marital property. *Id.* at 10-11. Cynthia Morris does not contend that she contributed money to the IRA accounts; rather, Cynthia Morris contends that

Burchfield contributed money to the account (ending in 1587) during their marriage, thus making the IRA account marital property pursuant to R.C. § 3105.171(A)(3)(a)(iii). *Id.* Cynthia Morris maintains that she did not sign the Change of Beneficiary forms and as such, she remains the sole beneficiary to the IRA account. *Id.* Therefore, Cynthia Morris argues she is entitled to summary judgment on all claims. *Id.* at 14.

II. LAW AND ANALYSIS

A. Summary Judgment

Summary judgment is appropriately granted when, looking at the evidence as a whole: (1) there exist no genuine issues as to any material facts; (2) reasonable minds could come to but one conclusion and that conclusion is adverse to the non-moving party; and (3) the facts demonstrate that the moving party is entitled to judgment as a matter of law. *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 686-687, 1995-Ohio-286, 653 N.E.2d 1196. The moving party bears the initial burden of demonstrating that no genuine issues of material fact exist for a trier of fact to determine. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. All doubts must be resolved in the favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138. The non-moving party must not rest on mere allegations or its pleadings alone, but must set forth specific facts to show summary judgment is inappropriate. *Id.* If the moving party seeks summary judgment on the basis of an affirmative defense, the moving party must demonstrate no genuine issue of material fact with respect to every element of the defense. *McCoy v. Maxwell*, 2002-Ohio-7157, ¶33, Portage App. No. 2001-P-0132.

Once the moving party has discharged its initial burden, the burden shifts to the non-moving party to prove that issues exist for trial. *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App.3d 421, 424, 629 N.E.2d 513. If the moving party has satisfied its initial burden, the non-moving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. A court cannot weigh credibility when considering evidentiary material presented in favor of, or in opposition to, a summary judgment motion. *Whiteside v. Conroy*, 2005-Ohio-5098, ¶75, Franklin App. No. 05AP-123.

B. R.C. § 3105.171(A)(3)(a)(iii)

In pertinent part, R.C. § 3105.171 states “[m]arital property’ means, subject to division (A)(3)(b) of this section, all of the following: ***Except as otherwise provided in this section, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage***” R.C. § 3105.171(A)(3)(a)(iii). “Marital property” does not include any separate property. R.C. § 3105.171(A)(3)(b). “Pursuant to R.C. § 3105.171(A)(3)(a)(iii), ‘all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurs during the marriage’ is marital property.” *Nine v. Nine* (March 1, 1995), 1995 Ohio App. LEXIS 822, *9, Summit App. No. 16625.

C. R.C. § 5815.31

In pertinent part, R.C. § 5815.31 states

Unless the trust or separation agreement provides otherwise, if, after executing a trust in which the grantor reserves to self a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has the grantor's marriage annulled, or, upon actual separation from the grantor's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor shall be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. If the grantor remarries the grantor's former spouse or if the separation agreement is terminated, the spouse shall not be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall not be revoked.

R.C. § 5815.31.

D. Analysis

Here, the Court finds that Cynthia Morris is entitled to summary judgment on all claims. In their Memorandum in Opposition to Cynthia Morris' Motion for Summary Judgment, Plaintiffs concede that “[t]he only real issue in dispute, is who has the legal and equitable right to two IRA accounts. There are no other issues for this Court.” Plfs.' Memo. in Opp. at 2. Further, the Court notes that the facts are undisputed, with the exception of the authenticity of the signature on the Change of Beneficiary forms.

First, the Court finds that Cynthia Morris is entitled to the Wells Fargo IRAs at issue in this case. On or about March 8, 2007, Burchfield designated Cynthia Morris as the sole beneficiary on his IRA accounts

maintained by Wells Fargo (then Wachovia Securities). Cynthia Morris Memo. in Opp. to Plfs.' Mtn. Summ. J. at Exs. K-11, K-12, K-13; Michael Depo. at 26-27, 41-42. Plaintiffs contend that Burchfield then changed the beneficiary of his IRA account from Cynthia Morris to Welch and Leland. Plaintiffs assert that Burchfield informed Michael of his impending divorce and his desire to remove Cynthia Morris as beneficiary and add Welch and Leland as new beneficiaries. Michael Depo. at 13-14. Michael then prepared the Change of Beneficiary forms and mailed them to Burchfield. Michael Depo. at 13-14, 18-19. Burchfield failed to return these forms to Wells Fargo; rather, the Change of Beneficiary forms were found with Burchfield's purported signature, among his belongings after his death. Michael Depo. at 22-23; Miller Aff. at ¶ 5. On or about January 25, 2010, Michael delivered the Change of Beneficiary forms to his manager, Jamie Phillips. Michael Depo. at 24.

Wells Fargo maintains a policy for changing beneficiaries. Wells Fargo's Change of Beneficiary Designation policy states "[c]lients may make a change to their beneficiary designation at any time (note: certain beneficiary destinations may be subject to certain requirements, e.g. spousal consent in community property states, etc). To make a change, the client must complete the IRA Change of Beneficiary and Indemnification Form []. Once the completed and signed form has been received, update the client's beneficiary designation via Account Maintenance Service Request.****" Plfs.' Mtn. Summ. J. at Ex. 9. Here, Plaintiffs contend that Wells Fargo waived compliance with its change of beneficiary policy. Plaintiffs rely on *May v. Kelly* for the proposition that custodians of IRAs waive compliance with change of beneficiary procedures when competing claims are made and the custodian interpleads the monies to the court. (citing *Kelly v. May*, 2008-Ohio-1507, Summit App. No. 23423).

In *Kelly v. May*, a dispute arose involving the decedent's daughter and nephew, both named, at times, as beneficiaries of the decedent's IRA account. *Kelly*, supra at ¶¶3-4. The *Kelly* court held that because the custodian filed an interpleader action, the custodian waived the requirement that its clients comply with the change of IRA beneficiary procedure. *Id.* at ¶18. Here, Plaintiffs contend that Wells Fargo filed an interpleader action and as such, Burchfield was not required to comply with its change of beneficiary policies. However, as discussed below, this Court finds the instant case distinguishable from the *Kelly* case.

A plain reading of R.C. 3105.171(A)(3)(a)(iii) indicates that all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of *either or both* of the spouses during the

marriage amounts to marital property. Thus, the fact that Burchfield deposited Seventy-Four Thousand Sixty-Two Dollars and Forty-Seven Cents (\$74,062.47) into the IRA account (ending in 1587) during his marriage to Cynthia Morris, necessarily makes the IRA account marital property. See, R.C. 3105.171(A)(3)(a)(iii). R.C. 3105.171(A)(3)(a)(iii) does not contemplate which spouse contributes to the account, only that *either or both* of the spouses make a monetary contribution to the account during the marriage. See, *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 400-401, 1998-Ohio-403, 696 N.E.2d 575. Although Plaintiffs assert that the IRA account was in existence prior to the marriage, the Court finds this fact irrelevant in light of the plain language of the statute.

Unlike in *Kelly*, this Court finds that the IRA account (ending in 1587) amounts to marital property. As such, the Court finds that *Kelly* is inapplicable to the case at hand. The account owner in *Kelly* was a single woman and the parties in dispute over the funds were her daughter and nephew. Here, the account owner was a married man and the parties in dispute over the funds are his spouse, joint owner of the account ending in 1587, and his mother and step-father. As such, the Court finds that an unjust result would occur if Wells Fargo were permitted to waive compliance with its change of beneficiary policy to the detriment of the owner of the account, Cynthia Morris. Further, the Court finds that Burchfield failed to comply with Wells Fargo's policy regarding changing the beneficiaries on the IRA accounts. Although Plaintiffs' contend that submitting the Change of Beneficiary forms after Burchfield's death changed the beneficiary, the Court finds that Burchfield's right to change the beneficiary terminated upon his death. *Finch v. Key Bank Nat'l Ass'n*, 2002-Ohio-3082, ¶20, Franklin App. No. 01AP-884. At the time of Burchfield's death, the only beneficiary on file with Wells Fargo was Cynthia Morris. Burchfield failed to return the Change of Beneficiary forms to Wells Fargo; the Change of Beneficiary forms were found among his belongings on or about January 25, 2010. Michael Depo. at 24. As such, the Court finds that Burchfield failed to comply with Wells Fargo's change of beneficiary policy which states that once the form has been signed and received, a Wells Fargo employee is instructed to update the client's beneficiary designation. Plfs.' Mtn. Summ. J. at Ex. 9. There is no dispute that the Change of Beneficiary forms were not received by Wells Fargo until after Burchfield's

death.⁸ Thus, at the time of Burchfield's death, Cynthia Morris remained the sole beneficiary of the IRA accounts and Burchfield's right to change the beneficiary terminated on December 16, 2009.

Plaintiffs contend that full compliance with Wells Fargo's policy was unnecessary as Burchfield substantially complied with Wells Fargo's policy to change the beneficiary on his IRA accounts. However, the Court finds that Plaintiffs' substantial compliance argument must fail. First, the Court finds that 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 the owner of the security upon the death of the present owner." R.C. § 1709.01(A). Further, R.C. § 1709.09(A) provides that a "transfer-on-death resulting from a registration in beneficiary form is effective by reasons 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." R.C. § 1709.09(A). As such, the IRA beneficiaries are determined based on the contract on hand with Wells Fargo at the time of Burchfield's death, naming Cynthia Morris as sole beneficiary. Moreover, the Court finds that Burchfield was familiar with Wells Fargo's policy in changing beneficiaries, as he successfully completed and returned the change of beneficiary forms in March 2007. Thus, Plaintiffs' argument that Burchfield substantially complied with Wells Fargo's policy and did everything he could to comply must fail.

Further, the Court finds that a finding of a constructive trust is improper and Cynthia Morris is entitled to summary judgment on the issue. "A constructive trust is a 'trust by operation of law that arises contrary to intention and in invitum against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property that he ought not, in equity and good conscience, hold and enjoy.'****" *Fischbach v. Mercuri*, 184 Ohio App.3d 105, 119, 2009-Ohio-4790, ¶58, 919 N.E.2d 804. Here, Plaintiffs argue they are entitled to a constructive trust on the IRA proceeds, as Cynthia Morris would be unjustly enriched if she were allowed to keep the proceeds, pursuant to R.C. § 5815.33. R.C. § 5815.33 instructs that upon divorce,

⁸ Although the parties dispute whether the signature on the Change of Beneficiary form is authentic, the Court finds that this dispute is immaterial, as the form was not returned to Wells Fargo. Thus, Plaintiffs' claim that Burchfield changed the beneficiary on the account prior to his death must fail, regardless of whether Burchfield's signature is authentic.

dissolution of marriage, or annulment of marriage, the designated beneficiary spouse shall be deemed to have predeceased the spouse who made the designation of beneficiary. R.C. § 5815.33(B)(1). Plaintiffs contend that the marriage terminated on November 2, 2009, when Cynthia Morris filed for divorce.

First, the Court finds that there is no evidence in the record to support a finding that there has been conduct to warrant the creation of a constructive trust. Second, the Court finds that Burchfield and Cynthia Morris were still legally married at the time of Burchfield's death, regardless of the state of their marriage, as no divorce decree had been filed. Plaintiffs failed to provide the Court with authority indicating that a marriage terminates on the date a party filed for divorce. Therefore, the provisions of R.C. § 5815.33, which revoke designation of spouse as a beneficiary, are inapplicable to the case at hand as the marriage had not yet terminated. Therefore, summary judgment is proper on the issue.

Further, the Court finds that Cynthia Morris is entitled to summary judgment on Plaintiffs' claim for intentional interference with an expected inheritance. In order to prove intentional interference with an expected inheritance, the plaintiff must show "(1) an existence of an expectancy of inheritance in the plaintiff; (2) an intentional interference by a defendant(s) with that expectancy of inheritance; (3) conduct by the defendant involving the interference which is tortious, such as fraud, duress or undue influence, in nature; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and (5) damage resulting from the interference." *Firestone v. Galbreath*, 67 Ohio St.3d 87, 88, 616 N.E.2d 202. Here, the parties entered into a stipulated agreement regarding inventory of Burchfield's property. See, Cynthia Morris' Mtn. Summ. J. at Ex. H. The Mercer County Probate Court then issued an order in accordance with the parties' stipulations. *Id.* Thus, in light of the order entered by the Mercer County Probate Court on September 1, 2010, the Court finds that there has been no improper interference by Cynthia Morris. Further, Plaintiffs assert that the only issue still in dispute is the lawful beneficiary of the IRA accounts and Plaintiffs' concede that the IRA accounts are not included in the Estate of Burchfield. See Plfs.' Memo. in Opp. at 5. Thus, the Court finds that summary judgment is proper with respect to Plaintiffs' claim for intentional interference with an expected inheritance.

The Court finds that summary judgment is proper with respect to Plaintiffs' claim of unjust enrichment and conversion. "The elements of unjust enrichment include 1) a benefit conferred by a plaintiff upon a defendant; 2) knowledge by the defendant of the benefit; and 3) retention of the benefit by the

defendant under circumstances where it would be unjust to do so without payment.” *Harco Industries v. Elco Textron, Inc.*, 2003-Ohio-2397, ¶14, Montgomery App. No. 19698 (citing *Hubbard v. Dillingham*, 2003-Ohio-1443, ¶25, Butler App. No. 2002-02-045). The elements of conversion are: “(1) plaintiff’s ownership or right to possession of the property at the time of the conversion; (2) defendant’s conversion by a wrongful act or disposition of plaintiff’s property rights; and (3) damages.” *Dice v. White Family Cos.*, 173 Ohio App. 3d 472, 477, 2007-Ohio-5755, ¶17, 878 N.E.2d 1105 (citing *Haul Transport of VA, Inc. v. Morgan* (June 2, 1995), 1995 Ohio App. LEXIS 22409, Montgomery App. No. 1485). Here, the Court finds that Plaintiffs cannot prove the elements of unjust enrichment or conversion because of the September 1, 2010 order from the Mercer County Probate Court, in which the parties stipulated to possession of Burchfield’s property. See, Cynthia Morris’ Mtn. Summ. J. at Ex. H. Further, the Mercer County Probate Court order states that Cynthia Morris is not in possession of any assets in Burchfield’s state. *Id.* Thus, Plaintiffs cannot prove unjust enrichment or conversion and as such, the Court finds that summary judgment is proper.

The Court finds that summary judgment is proper on Plaintiffs’ claim for intentional infliction of emotional distress and for punitive damages. To establish a claim for intentional infliction of emotional distress, the plaintiff must prove (1) the actor either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the plaintiff; (2) the actor’s conduct was so extreme and outrageous as to go “beyond all possible bounds of decency”; (3) the actor’s actions were the proximate cause of plaintiff’s psychic injury; and (4) the mental anguish suffered by plaintiff is serious and of a nature that “no reasonable man could be expected to endure it.” *Parker v. Bank One* (March 30, 2001), 2001 Ohio App. LEXIS 1491, Montgomery App. No. 18573. Punitive damages may be awarded in tort actions which involve fraud, malice or insult. *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174 (citing *Roberts v. Mason* (1859), 10 Ohio St. 277). Actual malice can be categorized by hatred, ill will, or a spirit of revenge, or extremely reckless behavior revealing a conscious disregard for a great and obvious harm. *Id.* at 335. In light of the order entered by the Mercer County Probate Court on September 1, 2010, and agreed to by the parties, and Plaintiffs’ assertion that the only issue still in dispute is the lawful beneficiary of the IRA accounts, the Court finds that there is no evidence to support a finding of

intentional infliction of emotional distress or to warrant a finding of punitive damages. See, Cynthia Morris' Mtn. Summ. J. at Ex. H. As such, the Court finds that summary judgment is proper.

The Court further finds that Cynthia Morris is entitled to summary judgment on her counter-claims. Plaintiffs concede that Cynthia Morris is entitled to the Wells Fargo joint checking account (ending in 8799) and the real property located at 9262 Kelch Road, Versailles, Ohio. Thus, there is no genuine issue of material fact and summary judgment is proper. The Court further finds that Cynthia Morris is entitled to the proceeds of the 401(k) maintained by Burchfield's employer, Robeck Fluid Power Company, and the proceeds of the life insurance policy. Cynthia Morris has presented evidence that she is the sole beneficiary of the 401(k) and the life insurance policy. See, Cynthia Morris' Mtn. Summ. J. at Ex. L. Further, Cynthia Morris testified that she received the fund from the 401(k) plan and the life insurance proceeds in spring 2010. *Id.* at ¶3. Plaintiffs do not dispute these assets, but assert there is a question of fact as to the beneficiary of these funds. See, Plfs.' Memo. in Opp. at 6. However, the Court finds that Cynthia Morris has presented sufficient evidence to establish that she is the sole beneficiary of these funds and Plaintiffs' have failed to provide any evidence to the contrary. Thus, Summary judgment is proper.

III. CONCLUSION

For the reasons stated above, Cynthia Morris' Motion for Summary Judgment is GRANTED.

THIS IS A FINAL APPEALABLE ORDER. PURUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE MARY WISEMAN

To the Clerk of Courts:

Pursuant to Civ. R. 58(B), please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

JUDGE MARY WISEMAN

This document is electronically filed by using the Clerk of Courts' e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

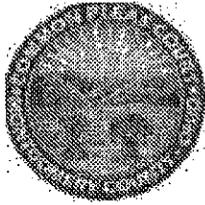
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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: LORI LEBLANC vs WELLS FARGO ADVISORS LLC
Case Number: 2010 CV 01926
Type: Decision

So Ordered

A handwritten signature in black ink that reads "Mary Wiseman". The signature is written in a cursive, flowing style.

Mary Wiseman

Electronically signed by mwiseman on 2/26/10 10:26:47 AM page 16 of 16

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CASE NUMBER: 2010 CV 01926 Docket ID: 15626474
GREGORY A BRUSH
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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LORI LEBLANC INDIVIDUAL et al,

CASE NO.: 2010 CV 01926

Plaintiff(s),

JUDGE MARY WISEMAN

-vs-

**DECISION, ORDER AND ENTRY
DENYING PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

WELLS FARGO ADVISORS LLC et al,

Defendant(s).

This matter comes before the Court on Plaintiffs Lori Leblanc, Executor of the Estate of Jon Burchfield, on behalf of herself individually, and Gloria Welch's (collectively, "Plaintiffs") Motion for Partial Summary Judgment. For the reasons that follow, Plaintiffs' Motion for Partial Summary Judgment is DENIED.

I. FACTUAL AND PROCEDURAL HISTORY

This case arose out of a Complaint filed for disposition of assets following the death of John Burchfield ("Burchfield"). See generally, Compl. On March 9, 2007, Burchfield named his then fiancée, Cynthia (Morris) Burchfield, as a beneficiary of certain death benefits at Wells Fargo (formerly Wachovia Securities). Compl. at ¶15. Burchfield and Cynthia were married on May 5, 2007. Mtn. Summ. J. at 18. During the summer of 2009, Burchfield and Cynthia Burchfield began to experience marital difficulties. Compl. at ¶17. On October 28, 2009, Burchfield contacted Aaron Michael, ("Michael") Vice President of Investments at Wells Fargo and asserted that he needed paperwork to change his IRA beneficiaries. Compl. at ¶24. Michael responded and stated that he would change the beneficiaries and take "Cindy off." Compl.

at ¶25. On November 2, 2009, Cynthia Burchfield¹ filed for divorce.² Compl. at ¶28. On December 16, 2009, Burchfield took his own life. Compl. at ¶30.

Plaintiffs filed a Complaint seeking declaratory judgment and a finding that Cynthia Morris has no legal right to any of the assets of Burchfield. Compl. at ¶¶36-42. Additionally Plaintiffs seek a finding of: the creation of a constructive trust, pursuant to R.C. § 5815.31 *et seq.*; intentional interference with an expected inheritance against Cynthia Morris; unjust enrichment against Cynthia Morris; conversion against Cynthia Morris; and intentional infliction of emotional distress against Cynthia Morris. See generally, Compl. Plaintiffs further seek an award of punitive damages against Cynthia Morris. Compl. at ¶¶70-71. Cynthia Morris filed an Answer, which contained numerous affirmative defenses, counterclaims, and various cross claims.³ See generally, Ans. Cynthia Morris filed a Cross Motion for Summary Judgment. See generally, Cynthia Morris Cross Mtn. Summ. J.

This Court held an oral argument in this case to determine disposition of the assets in the Estate of Burchfield. See, Hearing Tr. The Court has reviewed the transcript of the oral argument, in addition to the parties' briefs.

In the instant Motion for Partial Summary Judgment, Plaintiffs assert that Burchfield maintained certain IRA accounts. Mtn. Summ. J. at 3. Specifically, Plaintiffs allege the existence of a rollover IRA prior to Burchfield and Cynthia Morris' marriage. *Id.* Next, Plaintiffs allege the existence of a ROTH IRA, also in existence prior to Burchfield and Cynthia Morris' marriage.⁴ *Id.* at 4. Plaintiffs contend that on October 28, 2009, Burchfield contacted Michael to inform him of the impending divorce and to remove Cynthia Morris as a beneficiary. *Id.* (citing Deposition of Aaron Michael ("Michael Depo. at 13-14). Additionally, Plaintiffs contend that Burchfield expressed intent to establish Bruce Leland ("Leland") and Gloria Welch ("Welch") as the primary beneficiaries of the IRA accounts. *Id.* Plaintiffs argue that Burchfield expressed his intent to name Leland and Welch beneficiaries, as Burchfield executed a new will

¹ Herein after Cynthia Burchfield will be referred to as Cynthia Morris, as she sought restoration of her maiden name along with the divorce. Compl. at ¶28.

² Darke County Common Pleas case 09 CIV 0071. Compl. at ¶28.

³ Wells Fargo Advisors, LLC ("Wells Fargo") filed an Answer to the Complaint, as well as an Answer and Counterclaims to Cynthia Morris' cross-claims. See generally, Ans. and Ans. to Cross-Claim. Wells Fargo then filed an Amended Answer and a Counterclaims and Cross-Claim for Interpleader. See, Am. Ans. 5/27/10.

⁴ Burchfield and Cynthia Morris were married on May 5, 2007. Mtn. Summ. J. at 18.

on December 4, 2009. *Id.* (citing Ex. 5). Additionally, Michael testified that he prepared the IRA change of beneficiary forms (“Change of Beneficiary forms”) and sent them to Burchfield. *Id.* (citing Michael Depo. at 13-14; 18-19).

Following Burchfield’s death, Plaintiffs Lori Leblanc and Leland sought assistance from Michael in identifying and collecting Burchfield’s financial documents relevant to winding up Burchfield’s affairs. *Id.* at 6. Thereafter, Michael and Jeff Miller, Burchfield’s co-worker, discovered the Wells Fargo change of Beneficiary forms for the two (2) IRA accounts. *Id.* at 7 (citing Michael Depo. at 22-23; Affidavit of Jeff Miller (“Miller Aff.”) at ¶5). The Change of Beneficiary forms designated Leland (25%) and Welch (75%) as beneficiaries. *Id.*

Plaintiffs make several arguments asserting that they are entitled to Burchfield’s assets. *Id.* at 11-20. First, Plaintiffs argue that Wells Fargo waived any requirement that Burchfield comply with its written policy to change his beneficiaries and that Burchfield’s “clearly expressed content” was sufficient. *Id.* Plaintiffs contend that “if the insurer interpleads [those] proceeds, it waives any interest in the resolution of the claims, including enforcement of the procedures set forth in its policy for designating and changing beneficiaries.” *Id.* at 11 (citing *Rindlaub v. Traveler’s Ins. Co.* (1963), 175 Ohio St. 303, 305; *Atkinson v. Metropolitan Life Ins. Co.* (1926), 114 Ohio St. 109, 150 N.E. 748, syllabus paragraph 5). As such, Plaintiffs assert that the proceeds will be paid to the newly-designated beneficiary even though the insured failed to comply with the process set forth in the policy. *Id.* (citing *Rindlaug*, *supra* at syllabus paragraph 2). Thus, Plaintiffs argue that Burchfield changed the beneficiaries of the IRA’s to Leland and Welch, by expressing his intent to Michael and by changing his will. *Id.* at 13-14; Ex. 5.

Second, Plaintiffs contend that Burchfield fully complied with Wells Fargo’s procedures in changing the beneficiaries of his IRAs. *Id.* at 14. Plaintiffs argue that Burchfield successfully changed the beneficiaries of the IRAs to Leland and Welch by completing the Change of Beneficiary forms in compliance with Ohio’s Uniform Transfer-On-Death Security Registration Act and Wells Fargo’s policy. *Id.* (citing Exs. 8, 9; R.C. § 1709 *et seq.*). Alternatively, Plaintiffs assert that if Burchfield did not completely comply with Wells Fargo’s policy, Burchfield’s substantial compliance is sufficient under Ohio law to change the beneficiaries. *Id.* at 16 (citing *Keily v. May Associates Federal Credit Union*, 200-8-Ohio-1507, Summit App. No. 23423). Plaintiffs contend that Burchfield substantially complied with Wells Fargo’s

policy by expressing his intent to change the beneficiaries of the IRA accounts and by making the changes in writing on the Change of Beneficiary forms. *Id.* (citing *State Mut. Life Assur. Co. of Am. v. Holmes* (Aug. 30, 1988), 1988 Ohio App. LEXIS 3599, Franklin App. No. 88AP-377).

Third, Plaintiffs assert that Burchfield's IRA accounts are separate property under R.C. § 3105.171 and as such, pass safely outside any claim by Cynthia Morris. *Id.* at 17. Plaintiffs assert that Burchfield's IRA accounts were in existence prior to his marriage to Cynthia Morris. *Id.* at 18. As such, Plaintiffs contend that the IRA accounts are separate assets traceable by clear and convincing evidence. *Id.* Thus, Plaintiffs argue that Burchfield was free to designate the beneficiaries. *Id.*

Finally, in the event that the Court fails to find that Burchfield changed his beneficiary from Cynthia Morris to Leland and Welch, Plaintiffs argue that the Court should impose a constructive trust over the IRA accounts. *Id.* at 18. Plaintiffs contend that a constructive trust is proper here as Cynthia Morris would be unjustly enriched if she were permitted to keep the property. *Id.* at 19 (citing *University Hosp. Cleveland, Inc. v. Lynch* (2002), 96 Ohio St.3d 188, 130 772 N.E.2d 105 (internal citation omitted)). Plaintiffs contend that when a marriage ends, the former spouse has no right to the spouse's separate property; Plaintiffs assert that Burchfield and Cynthia Morris' marriage ended on November 6, 2009, when Cynthia Morris filed for divorce from Burchfield. *Id.* (citing R.C. § 5815.33). As such, Plaintiffs contend that the IRA accounts should be paid to Leland and Welch, as intended beneficiaries. *Id.* at 20.

In response, Cynthia Morris argues that Plaintiffs are not entitled to summary judgment.⁵ Memo. in Opp. at 1. First, Cynthia Morris argues that she is the sole beneficiary of the IRA accounts. *Id.* at 8. Cynthia Morris contends that as of March 9, 2007, she was the sole beneficiary of the accounts. *Id.* at 9. Further, Cynthia Morris argues that the Change of Beneficiary forms, allegedly signed by Burchfield, do not affect her designation as beneficiary. *Id.* Cynthia Morris contends that the Change of Beneficiary forms needed to be received by Wells Fargo, prior to Burchfield's death, in order to take effect. *Id.* at 9-10, 12-13. Cynthia Morris argues that the forms were not delivered to Wells Fargo and Burchfield's right to designate

⁵ Montgomery County Loc. R. 2.05(E)(1) states "[m]emoranda in support or in opposition to any motion or application to the Court shall not exceed twenty (20) pages and otherwise shall comply with Mont. Co. C.P.R. 1.15(I)(B). The page limitation may be modified by the Court for good cause shown and upon such conditions as set by the Court." Loc. R. 2.05(E)(1). Cynthia Morris' Memorandum in Opposition is twenty-five (25) pages in length; although Cynthia Morris requested an extension of time to file her response due to the length of Plaintiffs' Motion for Summary Judgment, the Court notes that Cynthia Morris failed to request an extension of the page limit imposed by the Local Rules.

beneficiaries terminated on death. *Id.* at 13 (citing *Finch v. Key Bank Natl. Assn.*, 2002-Ohio-3082, Franklin App. No. 01AP-884). Regardless, Cynthia Morris asserts that the Change of Beneficiary forms are not valid as the signature on the forms is forged. *Id.* at 10. Cynthia Morris discredits Jeff Miller's opinion that the signature on the Change of Beneficiary forms is that of Burchfield as Jeff Miller is not a handwriting expert and presents evidence of Harold F. Rodin, a certified document examiner, who opined that the signature on the forms is not that of Burchfield. *Id.* at 10-11; Affidavit of Harold F. Rodin ("Rodin Aff.") at ¶10. Thus, Cynthia Morris argues that Burchfield never executed the Change of Beneficiary forms and she remains the beneficiary of the IRA accounts. *Id.* at 12.

Next, Cynthia Morris argues that the IRA accounts constitute marital property. *Id.* Cynthia Morris contends that R.C. § 3105.171 states that "when either spouse makes a labor, money, or in-kind contribution that causes an increase in the value of separate property, that increase in value is deemed marital property." *Id.* at 14 (citing R.C. § 3105.171(A)(3)(a)(iii)). Cynthia Morris asserts that Burchfield deposited Seventy Four Thousand, Sixty-Two Dollars and Forty-Seven Cents (\$74,062.47) into his IRA account (1930-1587) in May 2008, after Cynthia Morris and Burchfield were married. *Id.* at 14. As a result of this deposit, Cynthia Morris argues that the IRA account is marital property. *Id.* As such, Cynthia Morris asserts that the Change of Beneficiary forms are invalid, as she never consented to the change of beneficiary and never signed the Change of Beneficiary forms. *Id.* at 14-15, Ex. 8, Affidavit of Cynthia Morris at ¶28. Thus, Cynthia Morris argues that Plaintiffs' cannot unilaterally waive Cynthia Morris' rights to the marital property. *Id.* at 15.

Cynthia Morris asserts that regardless of whether Burchfield actually signed the Change of Beneficiary forms and regardless of whether the forms were actually delivered to Wells Fargo, Burchfield was prohibited from changing the beneficiaries on the IRA accounts pursuant to the temporary restraining order ("TRO") issued by the Darke County, Ohio Domestic Relations Court. *Id.* Cynthia Morris asserts that she sought and was granted the TRO against Burchfield when she filed for divorce on November 2, 2009, thus prohibiting Burchfield from transferring any present or later acquired interest of either party in any asset. *Id.* at 15-16 (citing Ex. D). As such, Cynthia Morris argues that any change after Burchfield was served with notice of the TRO on November 5, 2009, is prohibited by Ohio law. *Id.* at 16.

Next, Cynthia Morris contends that Wells Fargo did not waive the beneficiary designation procedures for the IRA accounts. *Id.* Cynthia Morris asserts that IRA accounts are governed by R.C. §

1709.09 and contends that R.C. § 1709.09(A) required Wells Fargo to transfer the accounts to the transfer-on-death beneficiary. *Id.* at 17 (citing R.C. § 1709.09(A)). In order to have changed the beneficiary, Cynthia Morris argues that Burchfield would have had to (1) sign the Change of Beneficiary form; (2) deliver the form to Wells Fargo; and (3) with respect to the IRA account 1930-1587, Cynthia Morris would have needed to sign the form as well. *Id.* Cynthia Morris asserts that none of these requirements occurred. *Id.*

Cynthia Morris further asserts that Burchfield failed to comply with Wells Fargo's written policies and that substantial compliance with Wells Fargo's policies is insufficient to change the beneficiaries. *Id.* at 19, 21. In support, Cynthia Morris contends that Burchfield was aware of the proper policies required to change beneficiaries, as he successfully changed his beneficiary on March 8, 2007. *Id.* at 21. However, in this instance, Cynthia Morris argues that Burchfield neither signed nor returned the forms to Wells Fargo. *Id.* at 22. Lastly, Cynthia Morris argues that a constructive trust is not proper. *Id.* Cynthia Morris argues that Plaintiffs have failed to identify any evidence suggesting that it is unjust and inequitable for Cynthia Morris to be the beneficiary of the IRA accounts. *Id.* Therefore, Cynthia Morris argues that summary judgment is not proper. *Id.* at 24.

Wells Fargo filed a response to Plaintiffs' Motion for Partial Summary Judgment asserting that it has no claim to the funds at issue in this case and it will abide by the Court's decision regarding the disposition of the property. See, Wells' Fargo Response to Plaintiffs' Mtn. Summ. J.

In reply, Plaintiffs contend that partial summary judgment is proper. Reply at 1. Plaintiffs argue that even if the signature on the Change of Beneficiary form is forged, Plaintiffs still prevail as a matter of law. *Id.* at 3. First, Plaintiffs assert a party attempting to authenticate handwriting need not be an expert. *Id.* (citing Evid. R. 901(B)(2)). Plaintiffs submit the testimony of Michael and Jeff Miller to establish the signature on the Change of Beneficiary forms is that of Burchfield. *Id.* at 4. Regardless, Plaintiffs assert that Burchfield's clearly expressed intent to change the beneficiaries establishes the newly-designated beneficiaries, even though the insured failed to comply with Wells Fargo's policy.⁶ *Id.* at 5 (citing *Rindlaub*, supra).

⁶ Plaintiffs contend that like insurance carriers, custodians of IRAs waive compliance with change of beneficiary procedures when competing claims are made and the custodian interpleads the money to the court. *Id.* at 5 (citing *Kelly*, supra at ¶¶16, 18).

Further, Plaintiffs assert that Burchfield clearly expressed his intent to make Leland and Welch the beneficiaries through calls and emails to Michael, as well as by completing the Change of Beneficiary forms. *Id.* at 6-7. Moreover, Plaintiffs assert that Burchfield expressed his intent through his will, executed December 4, 2009, which left the residual of his property to Welch (75%) and Leland (25%). *Id.* at 7. Plaintiffs discredit Cynthia Morris' argument that Burchfield's clearly expressed intent was expressed in his suicide note, which referenced Burchfield's love for Cynthia Morris and her children. *Id.* at 8.

Further, Plaintiffs discredit Cynthia Morris' argument that Burchfield changed his beneficiaries after having been served with a TRO from the Darke County Domestic Relations Court. *Id.* at 9. Plaintiffs contend that Burchfield "was not served with any restraining orders prior to making any changes to *his* non-marital property." *Id.* Moreover, Plaintiffs argue that Cynthia Morris' argument that the IRA accounts were marital property must fail because the accounts were in existence prior to the marriage and there is no evidence to suggest that Cynthia Morris contributed to either of the IRA accounts. *Id.* at 10. As such, Plaintiffs argue that appreciation of separate property that is not due to the input of the spouse's labor, money, or in-kind contributions is passive appreciation and remains separate property. *Id.* Thus, Plaintiffs argue that the IRA accounts are separate from the marital property. *Id.* at 11.

Next, Plaintiffs argue that Wells Fargo did not employ a clear policy regarding the change of beneficiary forms. *Id.* at 13. As such, Plaintiffs contend that there is no "spousal consent" requirement prior to changing a beneficiary. *Id.* at 16 (citing Michael Depo. at 46-47). Further, Plaintiffs contend that the Change of Beneficiary forms were received by Wells Fargo and effectively changed the beneficiary of the IRA accounts from Cynthia Morris to Leland and Welch. *Id.* at 17-19 (citing Michael Depo. at 27). Thus, Plaintiffs contend that partial summary judgment is proper and that the IRA accounts should be paid to Leland and Welch, in accordance with the clearly expressed intent exhibited by Burchfield. *Id.* at 20.

II. LAW AND ANALYSIS

A. Summary Judgment

Summary judgment is appropriately granted when, looking at the evidence as a whole: (1) there exist no genuine issues as to any material facts; (2) reasonable minds could come to but one conclusion and that conclusion is adverse to the non-moving party; and (3) the facts demonstrate that the moving party is entitled to judgment as a matter of law. *Horton v. Harwick Chemical Corp.*, 73 Ohio St.3d 679, 686-687, 1995-

Ohio-286, 653 N.E.2d 1196. The moving party bears the initial burden of demonstrating that no genuine issues of material fact exist for a trier of fact to determine. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. All doubts must be resolved in the favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138. The non-moving party must not rest on mere allegations or its pleadings alone, but must set forth specific facts to show summary judgment is inappropriate. *Id.* If the moving party seeks summary judgment on the basis of an affirmative defense, the moving party must demonstrate no genuine issue of material fact with respect to every element of the defense. *McCoy v. Maxwell*, 2002-Ohio-7157, ¶33, Portage App. No. 2001-P-0132.

Once the moving party has discharged its initial burden, the burden shifts to the non-moving party to prove that issues exist for trial. *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App.3d 421, 424, 629 N.E.2d 513. If the moving party has satisfied its initial burden, the non-moving party then has a reciprocal burden outlined in Civ. R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. A court cannot weigh credibility when considering evidentiary material presented in favor of, or in opposition to, a summary judgment motion. *Whiteside v. Conroy*, 2005-Ohio-5098, ¶75, Franklin App. No. 05AP-123.

B. Analysis

Here, the Court finds that Plaintiffs' Motion for Partial Summary Judgment is not well-taken. First, Plaintiffs contend that Burchfield fully complied with Wells Fargo's procedures in changing his beneficiaries or, alternatively, substantially complied with Wells Fargo's policy. The Court notes that Wells Fargo's change of beneficiary policy states "[c]lients may make a change to their beneficiary designation at any time (note: certain beneficiary destinations may be subject to certain requirements, e.g. spousal consent in community property states, etc). To make a change, the client must complete the IRA Change of Beneficiary and Indemnification Form []. Once the completed and signed form has been received, update the client's beneficiary designation via Account Maintenance Service Request.***" Plfs.' Mtn. Summ. J. at Ex. 9. On or about March 8, 2007, Burchfield designated Cynthia Morris as the sole beneficiary of the IRA accounts. Cynthia Morris Memo. in Opp. to Plfs.' Mtn. Summ. J. at Exs. K-11, K-12, K-13; Michael Depo. at 26-27,

41-42. Plaintiffs contend that Burchfield then changed the beneficiary of his IRA account from Cynthia Morris to Welch and Leland. Plaintiffs assert that Burchfield informed Michael of his impending divorce and his desire to remove Cynthia Morris as beneficiary and add Welch and Leland as new beneficiaries. Michael Depo. at 13-14. Michael then prepared the Change of Beneficiary forms and mailed them to Burchfield. Michael Depo. at 13-14, 18-19. Burchfield failed to return these forms to Wells Fargo; rather, the Change of Beneficiary forms were found with Burchfield's purported signature, amongst his belongings after his death. Michael Depo. at 22-23; Miller Aff, at ¶ 5. On or about January 25, 2010, Michael delivered the Change of Beneficiary forms to his manager, Jamie Phillips. Michael Depo. at 24.

Here, the Court finds that Burchfield failed to comply with Wells Fargo's policy regarding changing the beneficiaries on the IRA accounts. Although Plaintiffs' contend that submitting the Change of Beneficiary forms after Burchfield's death changed the beneficiary, the Court finds that Burchfield's right to change the beneficiary terminated upon his death. *Finch v. Key Bank Nat'l Ass'n*, 2002-Ohio-3082, ¶20, Franklin App. No. 01AP-884. At the time of Burchfield's death, the only beneficiary on file with Wells Fargo was Cynthia Morris. Burchfield failed to return the Change of Beneficiary forms to Wells Fargo; the Change of Beneficiary forms were found among his belongings on or about January 25, 2010. Michael Depo. at 24. As such, the Court finds that Burchfield failed to comply with Wells Fargo's change of beneficiary policy which states that once the form has been signed and received, a Wells Fargo employee is instructed to update the client's beneficiary designation. Pifs.' Mtn. Summ. J. at Ex. 9. There is no dispute that the Change of Beneficiary forms were not received by Wells Fargo until after Burchfield's death.⁷ Thus, at the time of Burchfield's death, Cynthia Morris remained the sole beneficiary of the IRA accounts and Burchfield's right to change the beneficiary terminated on his death, on December 16, 2009.

Alternatively, Plaintiffs assert full compliance with Wells Fargo's policy is unnecessary, as Burchfield substantially complied with Wells Fargo's change of beneficiary policy. First, the Court finds that 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 the owner

⁷ Although the parties dispute whether the signature on the Change of Beneficiary form is authentic, the Court finds that this dispute is immaterial, as the form was not returned to Wells Fargo. Thus, Plaintiffs' claim that Burchfield changed the beneficiary on the account prior to his death must fail, regardless of whether Burchfield's signature is authentic.

of the security upon the death of the present owner.” R.C. § 1709.01(A). Further, R.C. § 1709.09(A) provides that a “transfer-on-death resulting from a registration in beneficiary form is effective by reasons 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.” R.C. § 1709.09(A). As such, the IRA beneficiaries are determined based on the contract on file with Wells Fargo at the time of Burchfield’s death, naming Cynthia Morris as sole beneficiary. Moreover, the Court finds that Burchfield was familiar with Wells Fargo’s policy in changing beneficiaries, as he successfully completed and returned the change of beneficiary forms in March 2007. Thus, Plaintiffs’ argument that Burchfield substantially complied with Wells Fargo’s policy by expressing his intent must fail.

Plaintiffs further argue that Wells Fargo waived any requirement that Burchfield was required to comply with its written policy to change his beneficiaries. Plaintiffs’ contend that if the insurer interpleads proceeds, it waives any interest in resolving the claims, including the enforcement of the policies and procedures for changing beneficiaries. However, the Court finds that Plaintiffs’ argument is misplaced. Plaintiffs cite *Kelly v. May* as non-binding authority for the proposition that a custodian may waive compliance with its change in beneficiary policy when the custodian files an interpleader action. *Kelly*, supra. In *Kelly*, the owner of the IRA was a single woman and her daughter and nephew both claimed to be the beneficiary of the account. *Id.* The appellant in *Kelly* argued the law of insurance policies was not applicable to IRA accounts. *Id.* at ¶14. Appellant argued that the IRA account was a trust, and as the originally designated beneficiary, he had a vested interest in the money in the account. *Id.* The *Kelly* court held that the determination of whether an IRA account was a trust, other than for tax purposes, depends on whether it satisfied the definition of a trust under Ohio law. *Id.* at ¶17. The *Kelly* court held that to constitute a trust, the legal title must immediately pass to the trustee. *Id.* The court found that the legal title to the money in the account remained with the account holder and thus the IRA account was not a trust. *Id.*

Here, the Court finds that the IRA account (ending in 1587) was a marital asset (discussed *infra*) that belonged to both Burchfield and Cynthia Morris. Thus, the Court finds that the legal right to the funds in the

IRA account (ending in 1587) remained with Cynthia Morris. As such, Burchfield was not free to designate beneficiaries without Cynthia Morris' consent.⁸

Moreover, R.C. § 1709.09 states that transfer-on-death resulting from registration in beneficiary form is effective based on *contract*, and is not testamentary. R.C. § 1709.09(A) (emphasis added). Thus, the fact that Burchfield changed his will to leave his residual property with Leland and Welch does not affect the beneficiary of the IRA accounts. Although Plaintiffs contend this shows Burchfield's clearly expressed intent, the Court finds that Burchfield's intent is irrelevant, as Burchfield failed to comply with Wells Fargo's policy (discussed above).

Next, Plaintiffs assert that the IRA accounts were separate property under R.C. § 3105.171 and as such, Burchfield was free to designate the beneficiaries. However, a plain reading of R.C. 3105.171(A)(3)(a)(iii) indicates that all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of *either or both* of the spouses during the marriage amounts to marital property. Thus, the fact that Burchfield deposited Seventy-Four Thousand Sixty-Two Dollars and Forty-Seven Cents (\$74,062.47) into the IRA account (ending in 1587) during his marriage to Cynthia Morris, necessarily makes the IRA account marital property. See, R.C. 3105.171(A)(3)(a)(iii). R.C. 3105.171(A)(3)(a)(iii) does not contemplate which spouse contributes to the account, only that *either or both* of the spouses make a monetary contribution to the account during the marriage. See, *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 400-401, 1998-Ohio-403, 696 N.E.2d 575. Although Plaintiffs assert that the IRA account was in existence prior to the marriage, the Court finds this fact irrelevant in light of the plain language of the statute. As such, Burchfield was not free to designate Leland and Welch as beneficiaries, as the account was marital property shared between Burchfield and Cynthia Morris. Further, the Court finds, as discussed above, that Burchfield failed to properly change the beneficiary of either IRA account. Thus, Cynthia Morris is the sole beneficiary of both IRA accounts.

Last, Plaintiffs assert that the Court should impose a constructive trust over the IRA accounts, as Cynthia Morris would be unjustly enriched by receiving the accounts. "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Hummel v.*

⁸ Cynthia Morris testified that she neither agreed to sign a change of beneficiary form nor consent to being removed as the beneficiary. Morris Aff. at ¶28.

Hummel, 133 Ohio St. 520, 529, 14 N.E.2d 923. "A constructive trust is a 'trust by operation of law that arises contrary to intention and in invitum against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property that he ought not, in equity and good conscience, hold and enjoy'***." *Fischbach v. Mercuri*, 184 Ohio App.3d 105, 119, 2009-Ohio-4790, ¶58, 919 N.E.2d 804. Here, Plaintiffs argue they are entitled to a constructive trust on the IRA proceeds, as Cynthia Morris would be unjustly enriched if she were allowed to keep the proceeds, pursuant to R.C. § 5815.33. R.C. § 5815.33 instructs that upon divorce, dissolution of marriage, or annulment of marriage, the designated beneficiary spouse shall be deemed to have predeceased the spouse who made the designation of beneficiary. R.C. § 5815.33(B)(1). Plaintiffs assert that "if a spouse accidentally leaves a spouse on an IRA, the non-married and living spouse does not receive a benefit upon the death of the other." Plfs.' Mtn. Summ. J. at 19. Plaintiffs contend that the marriage terminated on November 2, 2009, when Cynthia Morris filed for divorce.

First, the Court finds that there is no evidence in the record to support a finding that there has been conduct to warrant the creation of a constructive trust. Second, the Court finds that Burchfield and Cynthia Morris were still legally married at the time of Burchfield's death, regardless of the state of their marriage, as no divorce decree had been filed. Thus, Plaintiffs' argument that the "non-married and living spouse does not receive a benefit upon the death of another" must fail, as Burchfield and Cynthia Morris were still married at the time of Burchfield's death. Plaintiffs failed to provide the Court with authority indicating that a marriage terminates on the date a party filed for divorce. Therefore, the provisions of R.C. § 5815.33, which revoke designation of spouse as a beneficiary, are inapplicable to the case at hand as the marriage had not yet terminated.

III. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment is DENIED.

SO ORDERED:

JUDGE MARY WISEMAN

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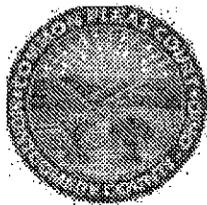
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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: LORILEBLANC vs WELLS FARGO ADVISORS LLC
Case Number: 2010 CV 01926
Type: Decision

So Ordered

A handwritten signature in black ink that reads "Mary Wiseman". The signature is written in a cursive style with a large, looped "M" and "W".

Mary Wiseman

Electronically signed by mwiseman on 2/24/10 10:24:58 AM page 14 of 14

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

Chapter 1709. UNIFORM TRANSFER-ON-DEATH SECURITY REGISTRATION ACT

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 1709.01. Uniform transfer-on-death security registration act definitions

As used in sections 1709.01 to 1709.11 of the Revised Code, unless the context otherwise requires:

(A) "Beneficiary form" means 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.

(B) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(C) "Heirs" means those persons, including the surviving spouse of a decedent, who are entitled under the statutes of intestate succession to the property of an intestate decedent, including, when applicable, section 2105.06 of the Revised Code.

(D) "Person" means an individual, a corporation, an organization, or other legal entity.

(E) "Personal representative" includes an executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(F) "Property" means anything that may be the subject of ownership, including, but not limited to, real and personal property and any interest in real or personal property.

(G) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of that security.

(H) "Registering entity" means 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, a securities dealer or broker maintaining security accounts for customers, and a transfer agent or other person acting for or as an issuer of securities.

(I) "Security" has the same meaning as in division (B) of section 1707.01 of the Revised Code and includes, but is not limited to, a certificated security, an uncertificated security, and a security account.

(J) "Security account" means either of the following:

(1) A reinvestment account associated with a security; a securities account with a financial institution or a securities dealer or broker and any cash balance in a brokerage account with a financial institution or a securities dealer or broker; or cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, 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.

History. Effective Date: 06-23-1994

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

Chapter 1709. UNIFORM TRANSFER-ON-DEATH
SECURITY REGISTRATION ACT

*Includes all legislation filed with the Secretary of State's
Office through 3/9/2012*

§ 1709.04. When security is registered in beneficiary
form

A security, whether evidenced by a certificate or account,
is registered in beneficiary form when the registration
includes a designation of a beneficiary to take the
ownership of the security at the time of the death of the
owner or the deaths of all multiple owners.

History. Effective Date: 10-01-1993

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

**Chapter 1709. UNIFORM TRANSFER-ON-DEATH
SECURITY REGISTRATION ACT**

*Includes legislation filed in the Secretary of State's office
through 10/21/2011*

**§ 1709.07. Death of sole owner or last to die of all
multiple owners**

Subject to the limitations of section 5731.39 of the Revised Code, on the death of a sole owner or the last to die of all multiple owners, ownership of a security registered in beneficiary form shall pass to the beneficiary or beneficiaries who survived all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, but subject to the limitations of section 5731.39 of the Revised Code, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security shall be included in the estate of the deceased sole owner of it or the estate of the last to die of all multiple owners of it.

History. Effective Date: 10-01-1993

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

**Chapter 1709. UNIFORM TRANSFER-ON-DEATH
SECURITY REGISTRATION ACT**

*Includes legislation filed in the Secretary of State's office
through 10/21/2011*

§ 1709.08. Registering entity

(A) A registering entity is not required to offer or to accept requests for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by sections 1709.01 to 1709.11 of the Revised Code.

(B) By accepting a request for registration in beneficiary form of a security, a registering entity agrees that the registration will be implemented as provided in sections 1709.01 to 1709.11 of the Revised Code.

(C) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with Section 1709.07 of the Revised Code and does so in a good faith reliance on the registration, on sections 1709.01 to 1709.11 of the Revised Code, and on information provided to it by an affidavit of the personal representative of the deceased owner or by the surviving beneficiary or the representatives of the surviving beneficiary or on other information available to the registering entity. The protections of sections 1709.01 to 1709.11 of the Revised Code do not extend to a reregistration or payment made after a registering entity has received a written notice from any claimant to any interest in the security that objects to the implementation of a registration in beneficiary form. No other notice or other information available to the registering entity shall affect its right to protection under sections 1709.01 to 1709.11 of the Revised Code.

(D) The protection provided by sections 1709.01 to 1709.11 of the Revised Code to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

History, Effective Date: 10-01-1993

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

Chapter 1709. UNIFORM TRANSFER-ON-DEATH
SECURITY REGISTRATION ACT

*Includes legislation filed in the Secretary of State's office
through 10/21/2011*

§ 1709.09. Transfer-on-death is not testamentary

(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.

History. Effective Date: 10-01-1993

Ohio Statutes

Title 17. CORPORATIONS - PARTNERSHIPS

**Chapter 1709. UNIFORM TRANSFER-ON-DEATH
SECURITY REGISTRATION ACT**

*Includes legislation filed in the Secretary of State's office
through 10/21/2011*

§ 1709.10. Establish terms and conditions

(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.

History. Effective Date: 10-01-1993

Ohio Statutes

Title 57. TAXATION

Chapter 5731. ESTATE TAX

Includes all legislation filed with the Secretary of State's Office through 3/9/2012

§ 5731.39. Written consent of tax commissioner to transfer of assets

(A) No corporation organized or existing under the laws of this state shall transfer on its books or issue a new certificate for any share of its capital stock registered in the name of a decedent, or in trust for a decedent, or in the name of a decedent and another person or persons, without the written consent of the tax commissioner.

(B) No safe deposit company, trust company, financial institution as defined in division (A) of section 5725.01 of the Revised Code or other corporation or person, having in possession, control, or custody a deposit standing in the name of a decedent, or in trust for a decedent, or in the name of a decedent and another person or persons, shall deliver or transfer an amount in excess of three-fourths of the total value of such deposit, including accrued interest and dividends, as of the date of decedent's death, without the written consent of the tax commissioner. The written consent of the tax commissioner need not be obtained prior to the delivery or transfer of amounts having a value of three-fourths or less of said total value.

(C) No life insurance company shall pay the proceeds of an annuity or matured endowment contract, or of a life insurance contract payable to the estate of a decedent, or of any other insurance contract taxable under Chapter 5731, of the Revised Code, without the written consent of the tax commissioner. Any life insurance company may pay the proceeds of any insurance contract not specified in this division (C) without the written consent of the tax commissioner.

(D) No trust company or other corporation or person shall pay the proceeds of any death benefit, retirement, pension or profit sharing plan in excess of two thousand dollars, without the written consent of the tax commissioner. Such trust company or other corporation or person, however, may pay the proceeds of any death benefit, retirement, pension, or profit-sharing plan which consists of insurance on the life of the decedent payable to a beneficiary other than the estate of the insured without the written consent of the tax commissioner.

(E) No safe deposit company, trust company, financial

institution as defined in division (A) of section 5725.01 of the Revised Code, or other corporation or person, having in possession, control, or custody securities, assets, or other property (including the shares of the capital stock of, or other interest in, such safe deposit company, trust company, financial institution as defined in division (A) of section 5725.01 of the Revised Code, or other corporation), standing in the name of a decedent, or in trust for a decedent, or in the name of a decedent and another person or persons, and the transfer of which is taxable under Chapter 5731, of the Revised Code, shall deliver or transfer any such securities, assets, or other property which have a value as of the date of decedent's death in excess of three-fourths of the total value thereof, without the written consent of the tax commissioner. The written consent of the tax commissioner need not be obtained prior to the delivery or transfer of any such securities, assets, or other property having a value of three-fourths or less of said total value.

(F) No safe deposit company, financial institution as defined in division (A) of section 5725.01 of the Revised Code, or other corporation or person having possession or control of a safe deposit box or similar receptacle standing in the name of a decedent or in the name of the decedent and another person or persons, or to which the decedent had a right of access, except when such safe deposit box or other receptacle stands in the name of a corporation or partnership, or in the name of the decedent as guardian or executor, shall deliver any of the contents thereof unless the safe deposit box or similar receptacle has been opened and inventoried in the presence of the tax commissioner or the commissioner's agent, and a written consent to transfer issued; provided, however, that a safe deposit company, financial institution, or other corporation or person having possession or control of a safe deposit box may deliver wills, deeds to burial lots, and insurance policies to a representative of the decedent, but that a representative of the safe deposit company, financial institution, or other corporation or person must supervise the opening of the box and make a written record of the wills, deeds, and policies removed. Such written record shall be included in the tax commissioner's inventory records.

(G) Notwithstanding any provision of this section:

(1) The tax commissioner may authorize any delivery or transfer or waive any of the foregoing requirements under such terms and conditions as the commissioner may prescribe;

(2) An adult care facility, as defined in section 5119.70 of the Revised Code, or a home, as defined in section 3721.10 of the Revised Code, may transfer or use the money in a personal needs allowance account in accordance with section 5111.113 of the Revised Code

without the written consent of the tax commissioner, and without the account having been opened and inventoried in the presence of the commissioner or the commissioner's agent.

Failure to comply with this section shall render such safe deposit company, trust company, life insurance company, financial institution as defined in division (A) of section 5725.01 of the Revised Code, or other corporation or person liable for the amount of the taxes and interest due under the provisions of Chapter 5731. of the Revised Code on the transfer of such stock, deposit, proceeds of an annuity or matured endowment contract or of a life insurance contract payable to the estate of a decedent, or other insurance contract taxable under Chapter 5731. of the Revised Code, proceeds of any death benefit, retirement, pension, or profit sharing plan in excess of two thousand dollars, or securities, assets, or other property of any resident decedent, and in addition thereto, to a penalty of not less than five hundred or more than five thousand dollars.

History. Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 7/1/2011.

Effective Date: 11-15-1995; 06-30-2005

United States Statutes

Title 26. Internal Revenue Code

Subtitle A. Income Taxes

Chapter 1. NORMAL TAXES AND SURTAXES

Subchapter D. Deferred Compensation, Etc

Part 1. PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC

Subpart A. General Rule

Current through P.L. 383

§ 408. Individual retirement accounts

(a)

Individual retirement account

For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1)

Except in the case of a rollover contribution described in subsection (d)(3) in [1] section 402 (c), 403 (a)(4), 403 (b)(8), or 457 (e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219 (b)(1)(A).

(2)

The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3)

No part of the trust funds will be invested in life insurance contracts.

(4)

The interest of an individual in the balance in his account is nonforfeitable.

(5)

The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6)

Under regulations prescribed by the Secretary, rules similar to the rules of section 401 (a)(9) and the incidental death benefit requirements of section 401 (a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(b)

Individual retirement annuity

For purposes of this section, the term "individual retirement annuity" means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1)

The contract is not transferable by the owner.

(2)

Under the contract-

(A)

the premiums are not fixed,

(B)

the annual premium on behalf of any individual will not exceed the dollar amount in effect under section 219 (b)(1)(A), and

(C)

any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3)

Under regulations prescribed by the Secretary, rules similar to the rules of section 401 (a)(9) and the incidental death benefit requirements of section 401 (a) shall apply to the distribution of the entire interest of the owner.

(4)

The entire interest of the owner is nonforfeitable.