ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANTS LORI LeBLANC and GLORIA WELCH

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1. ***IRAs should be treated like life insurance policies allowing financial custodians to interplead assets into a court in order to avoid duplicate liability when potential beneficiaries of IRAs dispute how disbursements are to be made thereby waiving compliance by the owner regarding any change-of-beneficiary policies.***

In its decision in *Rindlaub v. Traveler's Ins. Co.,* 175 Ohio St. 303, 305, 194 N.E.2d 577 (1963) this Court engaged in a careful balancing of interests with respect to life insurance proceeds that are payable on death. In *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507, the Ninth District Court of Appeals followed the Ohio Supreme Court's analysis of public policy expressed in *Rindlaub* and applied it to a situation involving IRAs, which were also payable on death. In her Appellee's Brief, Ms. Burchfield fails to give the Court any reason why the Supreme Court's Decision, which has governed contractual, payable-on-death benefits for almost fifty years, should be inapplicable where IRAs are concerned. The Second District's decision below, and the Appellee's position, would, in rejecting the approach of *Rindlaub*, create a hodge-podge of different rules depending upon the kind of payable-on-death benefit at issue. While purporting to stand on the side of "predictability, certainty and reliability," the Appellee's position is actually a recipe for confusion. The law in Ohio has long been established that the terms and conditions relating to change of beneficiary are for the ***sole benefit of the financial institution*** acting as custodian, and the custodian has a right to waive any of those policies as it sees fit. See *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926), syllabus; *Arnold v. Newcomb*, 104 Ohio St. 578, 136 N.E. 206 (1922); see also *Abernathy v. Catholic Mut. Benefit Assn.*, 19 Ohio C.C. (N.s.) 184, 1909 Ohio Misc. LEXIS 440, *6 (8th Cir. 1909) ("The law of the association relating to change of beneficiary is for the benefit of the insurance association. The association had an undoubted right to waive a literal compliance with its terms.") What the Second District's decision accomplishes, and what Ms. Burchfield is advocating, is overturning over a century of caselaw balancing the interests of an owner of a payable-on-death financial instrument and the financial institution. Ms. Burchfield is seeking to interpose the objections of third parties where Ohio has never recognized such privity and to allow third-parties to force a result desired neither by the account owner nor the institution, who are the actual parties to the contract, in favor of the third-parties. Appellants' position has been continually clear and consistent: that IRAs should be treated like life insurance policies when a dispute arises as to proper beneficiaries of the assets—***and proceeds are interpleaded into a court.***

In *Kelly*, the Ninth District Court of Appeals, following the logic of this Court's decision in *Rindlaub,* held that custodians of IRAs waive their change-of-beneficiary procedures when IRA proceeds ***or*** insurance proceeds are interpleaded into a court after a potential dispute arises between beneficiaries. *Kelly*, at ¶ 13. The Ninth District Court of Appeals held:

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

Id. "In such a case, if the insured communicated to the insurer her 'clearly expressed intent' to change beneficiaries, the [IRA] proceeds will be paid to the newly designated beneficiary rather than the originally designated beneficiary even though the insured failed to comply with the process set forth in the policy." *Id.,* citing *Rindlaub*, 175 Ohio St. 303, syllabus paragraph 2. Although *Rindlaub*'s holding applied to life insurance policies, the Ninth District Court of Appeals extended that holding to apply to IRAs. *Kelly*, at ¶ 18. The purpose of the public policy espoused in *Rindlaub*, *Kelly*, and *Atkinson* is the protection of the financial custodians. *Kelly*, at ¶ 13, citing *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson*, 114 Ohio St. at 121, 150 N.E. 748.

Again, Ms. Burchfield advocates that this Court recognize the interests of third-parties over those of both the owner and the financial custodian. (Appellee's Brief, p. 10: "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."). Such a precedent would be an invitation to the unlimited liability of financial custodians to alleged third-party beneficiaries, contrary to *Rindlaub*.

26 U.S.C. Section 408(a), which Appellee relies upon (see Appellee's Brief, pp. 8-9) and which states, "No part of the trust funds will be invested in life insurance contracts," does not require an opposite result and is irrelevant to the issues before this Court. As the *Kelly* court pointed out, "Section 408(a) of the Internal Revenue Code specifically provides that an individual retirement account is a trust only "[f]or purposes of this section." *Kelly*, at ¶ 17. Whatever point Ms. Burchfield was trying to make on this issue, including her incorrect assertion of law that "the United States Congress rejected such an approach…specifically exclud[ing] life insurance policies from the assets that can be included in an IRA," is inapplicable to what occurred in the case at bar. (Appellee's Brief, p. 9). Indeed, the record has no reference to any party trying to invest life insurance proceeds in IRAs or vice versa. Both the Second District in the decision below and the Ninth District in *Kelly* concluded that IRAs are not trusts, a position with which Appellants concur. *LeBlanc*, at ¶ 15; *Kelly*, at ¶ 17. Ms. Burchfield is attempting to muddy the waters, creating wholly unnecessary confusion. Both Ohio's Uniform Act and case law support transfer of IRAs outside of probate. R.C. 1709.01 *et seq.*; *Bielat v. Bielat*, 87 Ohio St.3d 350, 2000-Ohio-451, 721 N.E.2d 28. Ohio law permits life insurance and IRAs to be treated equally when a dispute arises as to newly-designated beneficiaries and when monies are interpleaded into a court to avoid duplicate liability.

2. ***Ohio's Uniform Transfer on Death Security Registration Act simply does not address situations that arise when a financial custodian interpleads IRA monies into a court due to a dispute between potential beneficiaries.***

Ms. Burchfield, in her brief, argues that R.C. 1709.01 *et seq.* expressly governs disputes between beneficiaries when a financial custodian interpleads monies into a court and requires strict adherence to the contractual procedures governing change of beneficiary. (Appellee's Brief, p. 9). She argues that R.C. 1709.01(A) requires the custodian of an IRA to strictly adhere to the contractual policies without exception based on the statute's definition of "beneficiary form" and that custodians must pay out based on "contract." (*Id.*). However, the statute itself does not address, either in the definition of "beneficiary form" or anywhere else, the right of third-parties to insist on compliance by the owner and financial custodian with the IRA contract. The statute also does not require that a beneficiary form be in writing. Nowhere in Appellee's Brief does she cite a statutory provision, or caselaw interpreting such a provision, that mandates any rules regarding beneficiary changes in situations like that occurring in this case, when a financial custodian seeks to avoid duplicate liability by interpleading disputed funds into a court.

Ohio law has customarily protected financial custodians when disputes arise between potential beneficiaries of transfer-on-death vehicles, by permitting a custodian to interplead transfer-on-death proceeds into the trial court, essentially waving the custodian's own policy as to how the owner may designate beneficiaries. *Atkinson v. Metropolitan Life Ins. Co.*, 114 Ohio St. 109, 150 N.E. 748 (1926); *Rindlaub v. Traveler's Ins. Co.*, 175 Ohio St. 303, 305, 194 N.E.2d 577 (1963); *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507. As noted above, such a rule protects financial custodians by eliminating any potential claims against them by alleged third-party beneficiaries, by allowing them the freedom to waive compliance by interpleading the proceeds. Once TOD monies are interpleaded into the court by a custodian, then an "intent of the decedent" analysis is used by the trial court in determining the proper beneficiary. *Id.* The public policy exists to protect the custodian from duplicate liability in competing beneficiary disputes. *Adkinson*, 114 Ohio St.3d at 121, 150 N.E. 748. Ohio's public policy ensures that third-parties may not interfere with the contract between owner and custodian.

In *Atkinson,* the insurance company filed an interpleader, indicating it had no interest in the outcome of the case, which was the key to the Ohio Supreme Court's decision. *Id.*, 114 Ohio St.3d at 119-120, 150 N.E. 748. This Court determined that if any condition in the beneficiary policy was vital to the insurance company, the insurance company would be protected from liability because of the interpleader. *Id.* The Ohio Supreme Court held:

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

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

The Ohio Supreme Court later affirmed the important public policy of protecting financial institutions from duplicate liability in *Rindlaub v. Travelers Ins. Co. Id.*, 175 Ohio St. at 305, 194 N.E.2d 577. The Ohio Supreme Court held:

> Undoubtedly, in any litigation between the insurer and its insured or between the insurer and a single beneficiary…insurance policy provisions relative to change of

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

Rindlaub, 175 Ohio St. at 305, 194 N.E.2d 577. The Ninth District Court of Appeals applied the same logic as *Rindlaub* and *Atkinson*, extending the interpleader option—and option to avoid duplicate liability—to disputes involving IRAs. *Kelly v. May Assoc. Fed. Credit Union*, 9th Dist. No. 23423, 2008-Ohio-1507. The concurring opinion in *Kelly* states:

> The creation of an IRA is flexible under Ohio law and the Ohio legislature has chosen not to impose specific formalities, such as a requirement that initial beneficiary designations or subsequent changes be initiated in writing, upon their creation in this state. Indeed, the only requirement for the proceeds of an IRA to transfer upon death as a nontestamentary asset is that the designation of a beneficiary appear in beneficiary form, or "a registration of a security that indicates the present owner of the security and the intention of the present owner regarding the person who will become the owner of the security upon death of the present owner." See R.C. 1709.01(A). See, generally, *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 (discussing application of R.C. Chapter 1709 to [IRAs]...

Id., at ¶ 34. *Kelly* promotes the position that at the point a custodian chooses to interplead monies into the court, there is absolutely no requirement that the custodian or owner follow any policy or possess any writing. Like in *Kelly*, the decedent expressed his intent to name Appellants as beneficiaries through writings, forms, and oral communications with Wells Fargo. Also like in *Kelly*, there is a dispute about whether a signature of the owner is required.

Ohio would not be alone in treating IRAs like life insurance policies when a beneficiary dispute arises and the financial institution waives compliance with its change-of-beneficiary procedure. See *Anton v. Merrill Lynch*, 36 S.W.3d 251, 253-254 (Tex.App.2001) (holding IRA owner's removal of his spouse as beneficiary in favor of his surviving children was effective, despite owner's failure follow the account custodian's change-of-beneficiary policy). The *Anton*

Court held that the appellant-spouse had no standing to force Merrill Lynch to follow its own policies because policy requirements are for the benefit of the insurer and may be waived. *Id.*, at 255. Further, the court stated:

> When policy requirements for effecting a change of beneficiary have been waived by the insurer and a change of beneficiary in a manner satisfactory to the insurer and the insured has been completed during the lifetime of the insured, the ousted beneficiary has no legal standing after death of the insured to assert that the change was effected without substantial compliance with policy requirements.

Id., at 256 quoting *Fidelity Union Life Ins. Co. v. Methven*, 346 S.W.2d 797, 800 (1961).

It is telling that despite all of Ms. Burchfield's arguments regarding the controlling character of the Uniform Act and how it mandates compliance with the IRA contract by both the owner and the financial custodian, nowhere in her brief does she cite any caselaw construing the Uniform Act in such a fashion, despite the fact that the Act has been adopted in nearly every state. Indeed, rather than following the model proposed by Ms. Burchfield and followed by the Second District, other Uniform Act jurisdictions have followed the logic of protecting financial institutions from duplicate liability regarding IRAs, just as with insurance policies.

For example, in *Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 736 (C.A. 7, 1999), the owner of an IRA initially designated his sister as the beneficiary of his IRA. Years later, the owner made some changes to his IRA account; however, the owner failed to name any beneficiary of the IRA and the custodian failed to pre-print a named beneficiary on the forms that were executed. *Id.* When the owner died, the sister sued the estate and IRA custodian for negligence in failing to recognize her as the proper beneficiary, despite the current change-of-beneficiary form being left blank. *Id.*, at 737. The Seventh Circuit held that the IRA custodian had no duty to ensure the owner completed the IRA application so that it reflected his true intentions regarding designated beneficiaries. *Id.*, at 740. Moreover, the Seventh Circuit held:

> anyone who had at one point been named a beneficiary, or perhaps even only been considered by the designator to be named as one, could sue a broker who knew of the designation or potential designation and did not double-check, or maybe triple-check, that if the designator left the designated beneficiary section of an application blank he or she meant for it to be blank. Taken one step further, this system could force brokers to doubt their clients' statements entirely, requiring them to confirm on a continuing basis each client's intent as to any discretionary choice. While some brokers may elect to engage in this exercise and some clients may ask their brokers for such services, creating a legal duty of this nature is going too far...Thus, because [the sister] was neither in privity nor able to present evidence that [the IRA custodian] knew she relied upon their actions with regard to the completion of the designated beneficiary portion of the American Funds application, [the IRA custodian] owed no duty to [the sister as the owner's] "intended" beneficiary.

Id., at 750-751. The logic is clear that the Seventh Circuit's motive was to protect the IRA custodian from duplicate liability from potential beneficiaries. Applied to the case at bar, no duty would be owed to Ms. Burchfield, as she was not in privity with Wells Fargo. *Id.*; *Johnson v. Wiegers*, 30 Kan. App.2d 672, 673 (2002) (holding that a prospective IRA beneficiary "could not establish that any duty was owed to him personally, and both his claims based on negligence and breach of fiduciary duty failed as a matter of law. In addition, ***the estate suffered no damages."); *Smith v. Marez,* 719 S.E.2d 226, 230 (N.C. App. 2011) (applying New York law) ("We find no New York case that addresses the issue of the validity of a change of beneficiary form for an IRA. However, analogous New York cases which address this same issue of compliance with a life insurance policy's beneficiary change form have stated that '[t]he provisions in a policy of insurance as to the procedure for making a change of beneficiary are for the benefit of the insurer. If the insurer does not choose to require enforcement thereof, and the rights of the respective claimants alone are before the court, the intent of the insured should govern.'"; quoting *Kornacki v. Mutual Life Ins. Co.*, 195 A.D.2d 847, 849, 600 N.Y.S.2d 788, 789 (N.Y. App. Div. 1993).

There is no case authority and no provision of the Uniform Act that actually compels the result that Ms. Burchfield is asking this Court to affirm. She offers the court no reason to depart from the rule that is set forth in its decision in *Rindlaub* or why IRAs should be subject to a different set of rules than life insurance policies in interpleader cases.

3. ***Appellee's position that Wells Fargo must pay IRA proceeds per Wells Fargo's written change-of-beneficiary "contract" is unsustainable as a matter of law, because the statute expressly provides that financial custodians have the freedom to maintain its own change-of-beneficiary policies for paying out IRA proceeds.***

Ms. Burchfield's first argument as to the applicability of the statute references *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 (2002). The *Bielat* holding, however, offers nothing in support of Ms. Burchfield's position. In *Bielat*, the wife of a decedent who purchased an IRA in 1983 in which the decedent designated his sister as beneficiary of the IRA, brought suit claiming that based on a subsequent designation of his wife as a sole heir, she was entitled to the IRA proceeds. *Id.*, at 351. The Ohio Supreme Court held that The Uniform Act was retroactively constitutional, while upholding the payment to the decedent's sister. *Id.*, at 362. Appellee argues that per *Bielat*, this court must pay per the "contractual" rights of parties regarding IRAs "as originally agreed." (Appellee's Brief, p. 9). First, *Bielat*'s actual holding analyzed retroactive application of the statute and ensured that assets would transfer outside of probate:

> R.C. 1709.09(A) and 1709.11(D) remedially changed Ohio law, therefore, by resolving a conflict between the relatively informal beneficiary designation found in an IRA and the more rigid formalities required by the Statute of Wills for testamentary dispositions. By avoiding this conflict, the Act promotes the interests of the parties to the securities accounts by validating the beneficiary designation as originally agreed. The statutes do not directly affect the rights of the parties to the securities accounts; rather, as *Weil* and *Rairden* permit, they simply protect what the parties intended to be non-probate investments. Realizing that many pay-on-death beneficiary registrations were made prior to 1993, the General Assembly made the Act retroactive to recognize, protect, and enforce even those beneficiary registrations executed before then. R.C. 1709.11(D).

Id., at 346. The *Bielat* holding addresses the validity of avoiding probate—not determining intended beneficiaries of IRAs. Next, the "contract" at issue is between the owner and the financial custodian, not between the owner and the contingent third-party beneficiary or the contingent third-party beneficiary and the custodian. In this case, the "contract" is the agreement between John Burchfield and Wells Fargo. Indeed the concurring opinion in *Bielat* puts it simply:

> In the case at bar, Chester Bielat entered into a valid contract with Merrill Lynch. The contract designated a beneficiary. Pursuant to the common law, Bielat had an absolute right to pass his personal property by way of contract, naming a third party as beneficiary. So long as the contract between the parties remained unchanged, Merrill Lynch had an obligation to honor Bielat's designation. See, *e.g., Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St.3d 164, 616 N.E.2d 893.

Id., at 363. The decedent's wife in *Bielat* had no argument that the decedent ever intended to name her as beneficiary. She simply argued that the IRA proceeds should have been probated, as she was the sole heir in probate court. In the case at bar, John Burchfield attempted to designate Appellants as beneficiaries and Wells Fargo even agrees, as it interpleaded the monies into the court instead of paying per the change-of-beneficiary designation "on file." In fact, if Wells Fargo wanted to pay the IRA proceeds to Appellee, it simply would have done so. Ohio law has long held that banks and clients should be free to contract with their clients. And no doubt, as a consumer and client to Wells Fargo, John Burchfield would have expected Wells Fargo to take all measures to pay his IRAs per his "clearly expressed intent."

Another flaw in Appellee's "contract" argument is that she is merely looking at one part of the agreement between John Burchfield and Wells Fargo, failing to even consider that Wells Fargo had no agreement with his divorcing wife. Indeed, she only ever had an expectancy interest.

> Dorothy [the decedent's wife] cannot claim a vested right to the proceeds of the IRA under the law of contracts, for she was in no way connected to the IRA Adoption Agreement that Mr. Bielat executed with Merrill Lynch. Dorothy was not a party to the 1983 IRA Agreement, nor was she a third-party beneficiary or assignee of Stella's [the decedent's sister] contingent rights as a designated beneficiary of the account balance. 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. Accord *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St.3d 164, 167, 616 N.E.2d 893, 895. The IRA Adoption Agreement created no rights or obligations for

> Dorothy. Dorothy thus had no vested *contractual* right impaired by the retroactive application of the disputed statutes; she had no contractual rights to impair.

Bielat, at 357. In the case at bar, John Burchfield was the contracting party with Wells Fargo, not his estranged wife. Simply because Appellee ***at one point in time*** **was** designated the beneficiary of his IRAs, does not mean that she had a contractual right to receive the proceeds.

The Second District also placed much stock in the "written contract" between Wells Fargo and John Burchfield, as it held that "the beneficiary designation according to the terms of the contract should be controlling." *Leblanc*, at ¶ 16. However, despite the bantering about the plain language of R.C. 1709 *et seq.*, Appellee and the Second District fail to recognize the express language, which states that a financial custodian is free to:

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

R.C. 1709.10. Moreover, *Kelly* and *Rindlaub*, among others, did not require a writing. It is at this point that the Second District's Decision goes awry of the policies set forth in *Rindlaub*, *Atkinson*, and even *Bielat*. But as discussed above, any alleged difference between life insurance and IRAs is irrelevant for what occurs when proceeds are interpleaded into a court. The Second District, in its own rejection of this Supreme Court's support of avoiding duplicate liability, does not permit waiver by a custodian because Wells Fargo was required to pay per its "written contract." Moreover, despite the Second District's hedging in its decision that "[w]e do not interpret R.C. 1709.09 as directly stating that the asset transfers according to the contract…," that is exactly what it held. *LeBlanc*, at ¶ 16. The Second District now requires Wells Fargo to disburse proceeds upon John Burchfield's death "only" by looking at the written beneficiary form ***on file*** at Wells Fargo.

Id. The Second District calls the requirement of paying per the form ***on file*** "predictable." *Id.* at ¶ 17. What should be "predictable" is permitting a financial custodian to avoid liability by permitting interpleader and to permit it to set its own policies consistent with R.C. 1709.10, not subjecting it to claims of strangers to written contract as third-party beneficiaries. Moreover, to protect Wells Fargo in paying per the decedent's intent seems reasonable so that its client's wishes are realized without fear of liability.

The *Kelly* Court correctly rejected any alleged requirement that the owner of an IRA follow the custodian's policy, giving deference to R.C. 1709.09. *Kelly*, at ¶¶ 34-35. Specifically, the *Kelly* Court rejected the appellant's argument that a signature requirement in the custodian's policy was not only in place to protect the custodian, but also to ensure the policy went where the owner intended. *Id.*, at ¶ 34. The *Kelly* Court rightfully recognized that a custodian may interplead proceeds from IRAs, waiving any compliance with its written policy, which exists for the benefit of the custodian ***only***. *Id.*, at ¶ 13; *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson.*, 114 Ohio St. at 121, 150 N.E. 748. The Second District's justification for rejecting the applicability of *Rindlaub* focused on the unpredictability of the "clearly expressed intent" standard. A rule, however, that enforces the rights of third-parties over the rights of the actual participants in a contractual relationship, does not have the advantage of predictability. Neither does a rule that rejects decades of precedent in favor of a new standard, drawing meaningless distinctions between life insurance proceeds and other transfer-on-death vehicles.

4. ***Appellee's emphasis on the statutory language of Ohio's Uniform Transfer on Death Security Registration Act is misplaced and misapplied in this case.***

Ms. Burchfield's brief cites sections of Ohio's Uniform Act and suggests that the language is clear and express in awarding the IRA proceeds in dispute to her. (Appellee's Brief, pp. 10-15). However, Ms. Burchfield misapplies nearly every single pertinent section of the statute, or at a minimum, fails to recognize that the statute's provisions actually assist Appellants' case. Moreover, the Ninth District Court of Appeals already addressed these types of arguments and rejected them. *Kelly*, at ¶¶ 34-35.

In *Kelly*, the owner of the IRA, Barbara Kelly, sought to change the beneficiary of her IRA from her nephew to her daughter by telephoning her bank. A teller filled out the beneficiary form, writing "per member" in the signature line. The daughter later found a copy of the change of beneficiary form and claimed ownership, although the last record on file with the custodian designated the nephew. *Id.*, at ¶ 10. The custodian filed an interpleader action not claiming an interest. *Id.* at ¶ 11. The *Kelly* Court simply ruled in favor of the daughter, despite the owner's failure to sign or comply with the custodian's writing requirements, because the custodian waived the requirement that the owner sign the form or that any changes be in writing. *Id.* at 18. Regarding R.C. 1709, the *Kelly* Court again emphasized that the custodian always has the right to waive enforcement of the formalities it establishes with an interpleader to avoid duplicate liability, which all stems from the contract between the owner and custodian. *Id.*

In the case at bar, Ms. Burchfield cites, R.C. 1709.01, 1709.04, 1709.07, 1709.008(B), and 1709.11, among other sections of the Uniform Act, for propositions that could just as easily be cited by Appellants in their favor. (Appellee's Brief, pp. 11-15). The bottom line, as *Kelly* holds, is that the Ohio legislature has not required specific formalities which must be followed in change-of-beneficiary designations. Ms. Burchfield points to R.C. 1709.08(C) as statutory protection for financial custodians to avoid duplicate liability from competing claims made by beneficiaries; however, the plain language indicates otherwise. (Appellee's Brief, pp. 14-15). R.C. 1709.08(C) specifically states "The protections of sections 1709.01 to 1709.11 of the Revised Code do not extend to a registration 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." This certainly rings of duplicate liability. What is critical regarding the public policy highlighted in *Rindlaub* and *Atkinson* is that banks are given the waiver option. *Rindlaub*, 175 Ohio St. at 305, 194 N.E.2d 577; *Atkinson.*, 114 Ohio St. at 121, 150 N.E. 748.

Finally, Ms. Burchfield's repeated assertion that the "there is no...indication in R.C. Chapter 1709 that the Legislature intended the courts to ignore the contracts that govern IRAs," entirely misses the mark. (Appellee's Brief, p. 15). Ms. Burchfield fails to acknowledge the numerous efforts made by John Burchfield to change his beneficiary designation to Appellants from Appellee, including a change-of-beneficiary form, as well as his "clearly expressed intent" to do so when she initiated divorce proceedings against him. It is evident that Wells Fargo is not only seeking to avoid the requirement that its change-of-beneficiary policy be followed pursuant to R.C. 1709 *et seq.*, but it in fact, voluntarily waived any requirement that the owner follow its policy. That is precisely the purpose of the rules set forth in *Kelly*, *Rindlaub*, *Atkinson*, and their progeny: to permit a custodian to avoid additional liability from competing beneficiaries by interpleading the asset and looking for a determination of the property beneficiary by a court. The Second District's Decision effectively destroys the ability of a custodian to waive its own change-of-beneficiary policy, because the Second District ***now*** requires that an owner "substantially comply" with that policy, regardless of an interpleader. *Id.*, at ¶ 26.

II. WHERE AN IRA ACCOUNT CUSTODIAN FILES AN INTERPLEADER ACTION A "CLEARLY INTENDED" BENEFICIARY IS NOT REQUIRED TO SHOW THAT THE OWNER OF THE IRA ACCOUNT SUBSTANTIALLY COMPLIED WITH THE CHANGE OF BENEFICIARY PROCEDURE IN ORDER TO RECOVER.

In rejecting *Rindlaub* and *Kelly,* thus subjecting financial custodians of IRAs to duplicate liability, the Second District also established a new test by holding that an owner of an IRA owner must "substantially comply" with the custodian's policies before a new beneficiary may be named. *Leblanc*, at ¶ 26. Besides subjecting the custodian to duplicate liability, it deprives the custodian of any flexibility in how it manages its accounts with its own customers, in direct contravention of R.C. 1709.10 which gives custodians the ability to make their own terms and conditions regarding IRAs. Appellants assert (1) that this newly-established test should be rejected, as it makes interpleading monies into the court, and thereby waiving the change-of-beneficiary policy, superfluous under *Rindlaub*, because it essentially denies the custodian the ability to waive its policies; and (2) if the substantial compliance test is deemed to be lawful, that the decedent in this case "substantially complied" with designating Appellants as his IRA beneficiaries.

1. ***By requiring that the owner of an IRA "substantially comply" with a custodian's change-of-beneficiary procedure when a custodian interpleads monies into a court in attempting to waive that procedure, the custodian is bound by what the owner does or fails to do, thus making waiver superfluous, subjecting the custodian to liability based on the owner's action(s).***

The Second District's holding renders the entire notion of waiving the change-of-beneficiary policy by the custodian to avoid duplicate liability superfluous, and indeed endangers custodians by taking away the ability of that custodian to waive its own change-of-beneficiary policies. The Second District's holding not only damages custodians, but also prevents an owner from designating beneficiaries through the owner's "clearly expressed intent." In short, the Second District Court of Appeals ***now*** requires that the owner follow the custodian's policy regarding beneficiary designations, although the controlling law contains no such requirement of substantial compliance regarding an IRA custodian's change-of-beneficiary policy. *Leblanc*, at ¶ 26; *Kelly*, at ¶ 34. Why then, even permit a custodian to waive its change-of-beneficiary policy if its policy must still be followed "substantially"?

The Ninth District addressed this very issue in *Glen v. Aetna Life Ins. Co.*, 73 Ohio App. 452, 458, 56 N.E.2d 951 (9th Dist. 1943), where it followed established Supreme Court precedent:

> where the unconditional right to change the beneficiary is reserved, additional provisions as to the mode and manner of making the change are deemed solely for the benefit and protection of the insurer, and if it sees fit to waive such provisions,

> no right of the original beneficiary is violated, and the intention of the insured to change the beneficiary given effect, notwithstanding noncompliance with the provisions of the policy as to the mode and manner of expressing such intent.

Id. citing *Union Central Life Ins. Co. v. MacBrair*, 66 Ohio App. 144, 148, 31 N.E.2d 17 (1940). The point that Appellants stress is that by requiring "substantial compliance" by the account owner, the ability of a custodian to waive its own policy is hijacked entirely by the owner's actions. Thus a custodian has absolutely no control as to whether its change-of-beneficiary policy is waived. The court in *Glen* followed the Supreme Court's decision in *Atkinson,* stating:

> 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.

Glen, at 458 citing *Atkinson* at fifth syllabus. In the case at bar, Wells Fargo is being forced by the Second District to follow its change-of-beneficiary policy expressly. Not only that, Wells Fargo's ability to waive its policy, thus avoiding duplicate liability issues, is contingent on what the decedent did. This is exactly contrary to the public policies espoused in *Atkinson*, *Rindlaub*, *Kelly*, *Glen*, and their progeny. Wells Fargo's rationale in attempting to transfer IRA proceeds to the intended beneficiary may be summed up as follows:

> It is hard to believe that the parties to the contract should have intended that each step in the procedure must be literally complied with to effect a change of beneficiary, and it seems much more reasonable to assume that what they had in mind was a compliance sufficient to give assurance of the authenticity of the insured's desire to bring about a change and to provide trustworthy evidence of that desire to the insurer.

Ogle v. Metropolitan Life Ins. Co., 6th Dist. No. L-94-101, 1994 Ohio App. LEXIS 5746 (Dec. 23, 1994). Appellants seek to permit Wells Fargo to establish its own change-of-beneficiary policy as it sees fit, well in line with the statutory authority of R.C. 1709.10.

The *Rindlaub* case is particularly applicable to the instant matter. In *Rindlaub,* the decedent was issued two life insurance policies by Travelers Insurance Company wherein his original designated beneficiary was his first wife. *Rindlaub*, 175 Ohio St.at 303-304, 194 N.E.2d 577. The couple divorced several years later and the decedent remarried. *Id.* The policy contained the following language with regard to effectuating a change of beneficiary:

> Subject to the right of an assignee, if any, the Insured may at any time and from time to time during the continuance of this contract change the Beneficiary, to take effect only when such change shall have been approved in writing by the Company, whereupon all rights of the former Beneficiary shall cease. ***

Id., at 305. The Court recognized that the provision of a policy regulating the "mode and manner effectuating a change of beneficiary are for the benefit of the insurer only" and that despite Travelers' failure to comply with its own requirements, it had no interest as to the outcome of a dispute between the first and second wives, except to protect itself against "duplicate liability." *Id.* The Court reasoned:

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

Id., at 305. Thus, it is appropriate to grant an interpleader where the financial institution does not strictly comply with its own requirements effectuating a change of beneficiary. Also, *Rindlaub* did not require "substantial compliance" by the owner. To have done so would have made the option to waive its policy moot.

The same analysis and conclusion is applicable in *Kelly*. The beneficiary "on file" with the Credit Union had no standing to enforce the Credit Union's rules to invalidate Barbara Kelly's designation, as the agreement between the Credit Union and Kelly was such that the Credit Union has the option to make its own change-of-beneficiary procedures. Kelly, 2008-Ohio-1507. As for any requirement of "substantial compliance," the majority in *Kelly* ignored the dissent advocating "substantial compliance" by the owner. When reviewing *Atkinson*, *Rindlaub*, *Glen*, and even *Kelly*, there is no requirement of "substantial compliance," as it would usurp the ability of the custodian to waive its own policy moot—which is clearly contra to the public policy of protecting the custodians in all of those cases.

Finally, Ms. Burchfield cites *Wright v. Bloom*, 69 Ohio St.3d 596, 635 N.E. 21 (1994). However, *Wright* is completely inapplicable to the case at bar. *Wright* involved joint and survivorship accounts, which created in the other party a joint interest equal to the decedent's interest. *Id.*, at 598-599. In the case at bar, IRAs deal with contingent or expectancy interests—not present interests of ownership. The *Wright* Court held that any account owner of a joint and survivorship account that places another name jointly on the account ought to know that the consequences will result in the survivor receiving the monies. *Id.*, at 604-605. Wells Fargo is attempting to accomplish the decedent's wishes, and Wells Fargo should be protected in facilitating the decedent's efforts.

2. ***To the extent that the decedent did not comply with Wells Fargo's policy, John Burchfield substantially complied with changing the beneficiary designation.***

Substantial compliance is apparently achieved when the following two prongs have been satisfied: "(1) that the insured definitely intended to change the beneficiary; and (2) that he did everything possible under the circumstances to effect that change." *State Mut. Life Assur. Co. of America v. Holmes*, 10th Dist. No. 88AP-377, 1988 Ohio App. LEXIS 3599 (Aug. 30, 1988) citing *Benton v. United Insurance Co. of America*, 110 Ohio App. 151, 159 N.E.2d 912 (1959). An insured does nearly everything possible to effect the change merely by making the changes in writing. *Holmes*, supra (holding it substantial compliance in designating a change of beneficiary to complete the forms and take physical action thus doing everything possible under the circumstances to effectuate change). In this case, overwhelming evidence was presented by the Appellants at every stage of this case that the owner's "clearly expressed intent" was to remove Ms. Burchfield as the primary beneficiary of his IRAs, and indeed he "substantially complied" with Wells Fargo's change-of-beneficiary policy.

First, there is the indisputable email from the decedent to Aaron Michael, his Wells Fargo advisor, on October 28, 2009, stating "I am getting divorced. What paperwork do we need to change?...MY IRA stays with me. Is her name on it?" (Deposition of Aaron Michael, pp. 13-14, filed August 3, 2010). Michael responded in the same email thread stating "So sorry to hear that. Let me know who you want your beneficiaries to be now as we will take Cindy off..." *Id.* Next, the Second District ignored the testimony of Michael stating that after that email correspondence, Burchfield spoke to Michael and explained how he wanted the new beneficiaries named for the IRAs. *LeBlanc*, at ¶ 4. Michael then pre-populated Wells Fargo's change-of-beneficiary forms for John, with Appellants as primary beneficiaries in the amounts of 75% and 25% respectively. *Id.* LeBlanc was then listed as the contingent beneficiary. *Id.* Before sending the IRA change-of-beneficiary forms, Michael predated the forms November 2, 2009, because Michael believed the decedent would return them to him by that date. *Id.* The IRA forms themselves are strongly persuasive of John's "intent" to change beneficiaries to Welch and Leland. Wells Fargo's "policy" at this point was to designate new beneficiaries of John's IRAs. These forms were *signed.*

More evidence as to the decedent's intent was the divorce complaint served on Burchfield just after he expressed his desire to change beneficiaries due to a divorce. *Id.* Michael, the Wells Fargo agent, assumed that Burchfield had mailed the forms back to Wells Fargo. *Id.* Those IRA forms, which had been pre-populated with John's newly-designated beneficiaries, Welch and Leland, had been executed by John. *Id.* at ¶ 6. Michael also gave the executed forms to his manager at Wells Fargo upon his discovery of those forms. *Id.* Further, the decedent made the exact same proportional bequest in his newly-executed will and his IRAs. It is evident from Aaron Michael's testimony and the e-mails that John Burchfield intended for anyone ***but*** Appellee to be designated beneficiary of his IRAs. When asked as to the effects of John's actions, including John's most recent efforts to change his beneficiaries of his IRAs, Aaron Michael testified:

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

(Depo. Aaron Michael, p. 27). It is unfathomable that the Second District could take the position that if *Kelly* and *Rindlaub* apply, then the evidence is such that John's intent and actions favor Appellee. The IRA forms were filled-out and signed.

III. CONCLUSION

For the foregoing reasons, this Court should re-affirm the public policies espoused in *Rindlaub*, *Atkinson*, and *Glen*, by permitting a financial institution to interplead assets in dispute with a court, thereby waiving its change-of-beneficiary policy. The legislature, through the Uniform Act, permits custodians to make their own policies. By requiring "substantial compliance" by the owner of an account, makes waiver a nullity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served upon the following via regular U.S. Mail, postage pre-paid, this 6th day of June, 2012:

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