

2018

**PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,
Plaintiff and Appellee, v. DAWNEEN G. WIRTZ, Defendant and
Appellant. : Reply Brief**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Plaintiff and Appellee,

v.

DAWNEEN G. WIRTZ,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Appellate No.: 20180232-CA

District Court No: 160900031

Appeal from the Judgment of the Honorable Laura Scott,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

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Appellant requests oral argument.

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CURRENT AND FORMER PARTIES

Parties on Appeal

Appellant Dawneen G. Wirtz, represented by Counsel Matthew H. Raty, Law Office of Matthew H. Raty P.C.

Appellee Provident Life and Accident Insurance Company (“Provident”) represented by Counsel Clint R. Hansen, Fabian VanCott.

Former Parties not Parties to the Appeal

Margene Taylor Wirtz

The Estate of Keith T. Wirtz

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REPLY ARGUMENT

POINT I

UTAH CODE §75-2-804(2), BY ITS PLAIN LANGUAGE, DOES NOT APPLY TO DISQUALIFY DAWNEEN WIRTZ.

Provident ignores and fails to dispute that the beneficiary-revocation procedure of Utah Code §75-2-804(2), applies explicitly to appointments of property made from one spouse to another, and not to appointments of property to oneself:

(2) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(a) Revokes any revocable:

(i) *Disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;*

See, Appellant's Principal Brief, Addenda 2. Utah Code §75-2-804(2)(a)(i). (emphasis added).¹ The plain language of the statute accomplishes the policy of preventing unintentional enrichment of ex-spouses. To extend revocation to self appointments of property would be patently absurd. The statute does not do this.

There is no dispute about the material facts. Provident has admitted that Dawneen

¹ Dawneen Wirtz presented this argument of §75-2-804(2) inapplicability, to the trial court on August 3, 2016 in opposition to Provident's Motion for Summary Judgment. R. 401-403.

Wirtz contracted for the subject life insurance, she appointed herself beneficiary, and she paid every single premium over 25 years (including the 24 years that she and Mr. Wirtz were divorced before his death (R. 523, ¶ 4.)). R. 427-428, R. 431, ¶¶ 5-8, 10; R. 524, ¶ 5, R. 416-417, ¶¶ 1-4, 6. Also, Keith Wirtz had no contract with Provident, he never paid a single premium on Dawneen's policy, and he never appointed any beneficiary. *Id.*, R. 431, ¶ 9. Thus, Utah Code §75-2-804(2)(a)(i) does not apply to revoke Dawneen Wirtz's appointment of life insurance benefits to herself.

Provident misstates the holding of *Hertzske v. Snyder*, 2017 UT 4, as revoking the designation of any ex-spouse to life insurance benefits. *Hertzske*, however, makes clear that the revocation statute applies to appointments of property by a divorced individual to a former spouse, and not to self appointments of property. In *Hertzske*, Edward Hertzkske purchased a life insurance policy and named his fiancé, Linda Snyder, primary beneficiary. *Ibid.*, ¶ 2. The couple married and subsequently divorced. *Id.*, ¶ 3. Mr. Hertzske then died and the trial court ruled pursuant to §75-2-804(2), that the divorce revoked Mr. Hertzke's designation of his ex-wife as beneficiary. *Id.*, ¶¶ 4, 6. The Utah Supreme Court affirmed, explaining that §75-2-804(2) "'revokes any revocable . . . disposition or appointment of property *made by a divorced individual to the individual's former spouse* in a governing instrument'" *Id.*, ¶ 8. (emphasis added). The court then stated, "We conclude that section 75-2-804 creates a rebuttable presumption that *beneficiary designations of a former spouse* on a life insurance policy are revoked in a divorce proceeding." *Id.*, ¶ 9. (emphasis added).

As set forth in §75-2-804(2) and restated by the Utah Supreme Court, the statute revokes disposition or appointment of property “*made by a divorced individual to the individual’s former spouse*”. *Id.*, ¶ 8. (emphasis added). It does not revoke appointment of property made by a divorced individual to self. As noted above, taking away one’s own property because of divorce is not the purpose of the statute.²

Nevertheless, Provident suggests that it was led astray by its internal memoranda where it incorrectly listed Keith Wirtz as the policy owner.³ However, a negligent error by Provident cannot trigger revocation of a beneficiary designation. Furthermore, internal memoranda do not constitute a “governing instrument” that bestowed a power of appointment on Keith Wirtz and revoked Dawneen Wirtz’s designation as beneficiary under §75-2-804(2).⁴

Again, Provident knew and has admitted that it contracted with Dawneen Wirtz (not Keith Wirtz), that she paid every premium, and that she appointed herself beneficiary.

2 As a seller of life insurance policies, Provident knew or had every reason to know that §75-2-804(2) prevented unintentional enrichment of ex-spouses, not loss of self-appointed benefits and forfeiture of premiums paid on one’s own policy over 25 years.

3 Provident has admitted that Dawneen Wirtz was the owner of the policy. R. 416, ¶ 3.

4 Utah Code §75-1-201(19) states:

“Governing instrument” means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

Dawneen Wirtz's claim was beyond dispute, indeed, even stronger than that of the prevailing ex-spouse's claim in *Primerica Life Ins. Co. v. Goates*, 2013 WL 6383826 (D.Utah). In *Primerica*, the decedent spouse had appointed benefits, under his policy, to his ex-wife before divorce. *Primerica* at p. 1. However, the court concluded that premium payment alone by the named-beneficiary ex-wife was sufficient to make her the rightful owner of the policy:

The court concludes that [ex-wife] Goates has demonstrated that the [§75-2-804(2)] statutory presumption does not apply in this case. Goates has made all the payments on the policy from her own independent checking account, even since the divorce. As such, Goates was the rightful owner of the policy at the time of her divorce and at the time of Mr. Goates' death. The statute does not apply to cut off Goates as a beneficiary and Goates is a rightfully designated beneficiary to the life insurance proceeds.

Primerica at p. 1. *See*, Addendum. As noted above, in the case at bar, Dawneen Wirtz had not only paid all premiums, but had herself purchased the policy and appointed herself beneficiary. Again, Utah Code §75-2-804(2)(a)(i) does not apply to revoke Dawneen Wirtz's self-appointment to life insurance benefits.

POINT II

GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER PROVIDENT WAS NEGLIGENT AND/OR ACTED IN BAD FAITH.

The trial court summarily dismissed Dawneen Wirtz's counterclaims against Provident for breach of contract, breach of the duty of good faith and fair dealing, negligence, misrepresentation, conversion, and intentional infliction of emotional distress. The trial court stated, "Each of the counterclaims is predicated on Dawneen's allegation

that Provident acted negligently and/or in bad faith when it initially denied her claim”, and that there was no evidence of negligence or bad faith. R. 527-528, ¶¶ 8-11, 13. The trial court also discharged Provident from the interpleader, stating , “Provident reasonably believed that it may be subject to double or multiple liability because the beneficiary designation may have been automatically revoked pursuant to Utah Code §75-2-804(2).” R. 527, ¶ 6. These rulings denied Dawneen Wirtz’s right to seek redress for the delay, costs, and stress of three years of unnecessary litigation and only partial recovery of her contracted benefits.

The trial court’s rulings are clearly erroneous. The facts, admitted by Provident, that Dawneen Wirtz purchased the policy of insurance, appointed herself beneficiary, and paid all premiums, establish, as a matter of law, that §75-2-804(2)’s revocation procedure did not apply and that Provident breached its duties of reasonable care and good faith and fair dealing, including to diligently investigate, fairly evaluate, and act reasonably on Mrs. Wirtz’s claim. *Beck v. Farmer’s Insurance Exchange*, 701 P.2d 795, 798, 801-802 (Utah 1985). They also establish, as a matter of law, that Provident could have no reasonable belief that it might be subjected to double or multiple liability.

In terms of the standard of review applicable to the appeal at bar, Provident has failed to meet its burden of showing there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. *iDrive Logistics v. IntegraCore*, 2018 UT App 40, ¶ 30, *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600. Indeed, as demonstrated by

Dawneen Wirtz, genuine issues of material fact exist as to whether she purchased the subject life insurance policy, appointed herself beneficiary, and paid all premiums, such that §75-2-804(2)'s revocation presumption does not apply and such that Provident was negligent and/or breached its duty of good faith and fair dealing in denying her claim.

POINT III

WHILE UNNECESSARY TO ADDRESS, UTAH LAW MAY HAVE EXEMPTED LIFE INSURANCE BENEFICIARIES FROM §75-2-804(2) REVOCATION.

While unnecessary for the court to address, Dawneen Wirtz notes that at the time Provident denied her claim on July 23, 2015 (R. 417, ¶ 8), it appears that §75-2-804(2)'s revocation presumption did not apply to life insurance beneficiaries. As noted in Dawneen Wirtz's principal brief, the heading to §75-2-804 states, "No revocation of life insurance beneficiary". See, Principal Brief, Addenda 2, R. 715. Also, *Primerica* notes, "The statute was changed in 2013 to effectively exempt life insurance policies." *Primerica*, at footnote 1. See, Addendum. The plain language of Utah Code §31A-22-413, which addresses life insurance policies and beneficiary designations, provides for life insurers to disregard §75-2-804 and pay the properly designated beneficiary:

Notwithstanding Section 75-2-804, the insurer discharges its obligation under the insurance policy or certificate of insurance if it pays the properly designated beneficiary⁵

⁵ The statute goes on to state that an insurer does not have to pay the named beneficiary where it has "actual notice" of an assignment or a change in beneficiary designation, neither of which occurred in the case at bar. See, Utah Code § 31A-22-413.

Utah Code § 31A-22-413(2)(a).

Nevertheless, two years after Provident denied Dawneen Wirtz's claim, the Utah Supreme Court issued *Hertzske v. Snyder*, 2017 UT 4, which appears to create an inconsistency with the authorities cited above, that life insurance beneficiaries are exempted from § 75-2-804(2)'s revocation presumption. This inconsistency may ultimately be resolved as an additional, independent reason that the revocation statute does not apply to life-insurance beneficiary Dawneen Wirtz.

CONCLUSION

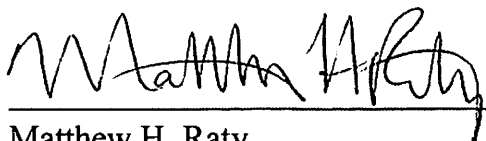
Provident has failed to meet its burden of showing no genuine issue of material fact and that it is entitled to judgment as a matter of law on Dawneen Wirtz's counterclaims. Genuine issues of material fact exist as to whether Dawneen Wirtz purchased the subject life insurance policy, appointed herself beneficiary, and paid all premiums, such that §75-2-804(2)'s revocation presumption does not apply and such that Provident was negligent and/or breached its duty of good faith and fair dealing in denying Mrs. Wirtz's claim.

WHEREFORE, Appellant respectfully requests that the Utah Court of Appeals reverse the trial court's December 19, 2016 Order and restore Dawneen Wirtz's counterclaims against Provident.

CERTIFICATE OF COMPLIANCE

By signature below, Appellant's attorney represents that Appellant's Reply Brief complies with the page or word limitation of Rule 24(g), Utah R. App. P., and with Rule 21(g), Utah R. App. P., regarding non-public information and records.

DATED this 21st day of November, 2018.

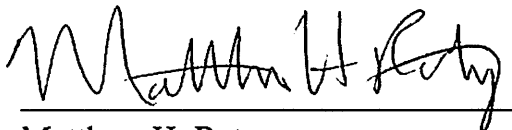


Matthew H. Raty
Attorney for Appellant Dawneen G. Wirtz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served on November 21, 2018 by e-mail upon counsel at the below address, with paper copies to follow via first class U.S. Mail, within seven days.

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ADDENDUM

Primerica Life Ins. Co. v. Goates, 2013 WL 6383826 (D. Utah)

2013 WL 6383826

Only the Westlaw citation is currently available.
United States District Court, D. Utah, Central
Division.

PRIMERICA LIFE INSURANCE COMPANY,
Plaintiff,

v.

Dayna GOATES, et al., Defendants.

No. 2:13CV43DAK.

|
Dec. 5, 2013.

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MEMORANDUM DECISION AND ORDER

DALE A. KIMBALL, District Judge.

*1 This matter is before the court on a Motion for Disposition of insurance policy proceeds that have been interpleaded to this court. The motion was filed on October 1, 2013 by Defendant Dayna Goates, individually and as legal guardian of K.G. and A.G, and joined in by Defendant Alexa Winnie on November 1, 2013. On November 6, 2013, Goates filed a Notice to Submit for Decision. Defendant Jill Hansen has not filed a joinder or an opposition. The court finds that oral argument would not significantly aid in the determination of the motion. Accordingly, the court enters the following order based on the memoranda submitted by the parties and the law and facts relevant to the motion.

BACKGROUND

Goates is the ex-wife of Michael G. Goates, deceased. Goates and the decedent had two children together, K.G. and A.G., both of whom are minors. Decedent's life

insurance policy issued by Primerica named Goates and Defendant Alexa Winnie as primary beneficiaries and Jill Hansen as contingent beneficiary. Alexa Winnie is Goates' daughter and decedent's former stepdaughter. Jill Hansen is Goates' sister.

Since the issuance of the insurance policy on or about September 14, 2000, Goates has made all premium payments from her own independent checking account. Although the decree of divorce provided that each party was to maintain a life insurance policy on their own life in an amount sufficient to cover their child support and alimony obligations, Goates continued to make the premium payments on decedent's policy. Decedent was also in arrears to Goates for approximately \$144,326.07 in child support and alimony at the time of his death.

DISCUSSION

In 1998, the Utah Legislature created a statutory presumption that divorce changes the status of a former spouse's beneficiary status. *See* Utah Code Ann. § 75-2-804(2) (2012).¹ Such statutes are known as "revocation-upon-divorce" statutes. However, the statutory presumption can be rebutted by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate. *Id.*

The court concludes that Goates has demonstrated that the statutory presumption does not apply in this case. Goates has made all the payments on the policy from her own independent checking account, even since the divorce. As such, Goates was the rightful owner of the policy at the time of her divorce and at the time of Mr. Goates' death. The statute does not apply to cut off Goates as a beneficiary and Goates is a rightfully designated beneficiary to the life insurance proceeds. Moreover, Defendant Winnie has joined in Goates' motion and Defendant Hansen has not opposed the motion. Accordingly, the court grants Goates' motion for disbursement.

CONCLUSION

Based on the above reasoning, the court concludes that the proceeds of the life insurance policy should be disbursed to Defendant Dayna Goates. No later than ten days from the date this Order, defendants shall notify the court of the exact wording for the requested disbursement. The Clerk of Court shall then disburse the funds.

Not Reported in F.Supp.2d, 2013 WL 6383826

All Citations

Footnotes

- 1 The statute was changed in 2013 to effectively exempt life insurance policies.

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