488 Mass. 801
Supreme Judicial Court of Massachusetts,
Plymouth.

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS
v.
Joann PARKER & another.[1]

SJC-13090
|
Argued September 8, 2021.
|
Decided January 10, 2022.

Synopsis
Background: Insurer filed interpleader action to determine whether Massachusetts Uniform Probate Code terminated insured's ex-wife's primary beneficiary status under life insurance policy by operation of law. The Superior Court entered summary judgment in alternative beneficiary's favor, and ex-wife appealed.

Holdings: The Supreme Judicial Court, Kafker, J., held that:

[1] retroactive application of Massachusetts's automatic-revocation-on-divorce provision did not violate Contracts Clause;

[2] provision was retroactively applicable;

[3] motion judge could take into ex-wife testimony into account in ruling on summary judgment; and

[4] insured's purported oral agreement to keep ex-wife as beneficiary did not fall within scope of provision's contract exception; and

[5] policy's express terms did not provide that ex-wife's beneficiary designation would survive divorce.

Affirmed.

West Headnotes (14)

[1] **Appeal and Error** Key De novo review

Supreme Judicial Court reviews grant of summary judgment de novo.

1 Cases that cite this headnote

[2] **Appeal and Error** Key Statutory or legislative law

Whether motion judge erred in her interpretation of statute and its retroactive effect are questions of statutory construction, and therefore questions of law, to be reviewed de novo.

[3] **Appeal and Error** Key Review using standard applied below

In evaluating grant of summary judgment, Supreme Judicial Court reviews same record as motion judge.

1 Cases that cite this headnote

[4] **Insurance** Key Effect on prior designation of beneficiary

Massachusetts's automatic-revocation-on-divorce provision covers life insurance policies and beneficiary designations. Mass. Gen. Laws Ann. ch. 190B, §§ 1-201(4), 1-201(19), 2-804(b).

1 Cases that cite this headnote

[5] **Constitutional Law** Key Insurance

Insurance Key Effect on prior designation of beneficiary

In determining whether insured's ex-wife had primary beneficiary status under life insurance policy, retroactive application of Massachusetts's automatic-revocation-on-divorce provision did not violate Contracts Clause. U.S. Const. art. 1, § 10, cl. 1; Mass. Gen. Laws Ann. ch. 190B, § 2-804(b).

[6] **Statutes** Language and Intent; Express Provisions

Whether statute applies to events occurring prior to date on which statute takes effect is in first instance question of legislative intent.

[7] **Statutes** Plain language; plain, ordinary, common, or literal meaning

If statute's language is plain and unambiguous, it is conclusive as to legislative intent.

[8] **Insurance** Effect on prior designation of beneficiary

Massachusetts's automatic-revocation-on-divorce provision was retroactively applicable to life insurance policy issued before provision's effective date, where policy was revocable until insured death after effective date. Mass. Gen. Laws Ann. ch. 190B, § 2-804.

[9] **Insurance** Compliance with policy, in general

Mere intention on insured's part to change beneficiary under life insurance policy that is not acted upon in manner required by policy's terms is ineffectual.

[10] **Judgment** Personal knowledge or belief of affiant

Insured's ex-wife's testimony regarding her payment of premiums on his life insurance policy and statements made by him to her about policy were within her personal knowledge, and thus motion judge could take her testimony into account in ruling on summary judgment in interpleader action to determine distribution of policy proceeds following insured's death. Mass. Gen. Laws Ann. ch. 233, § 65; Mass. R. Civ. P. 56(e).

[11] **Evidence** Insurance

Insurance Effect on prior designation of beneficiary

Insured's purported oral agreement to permit his ex-wife to continue paying premiums on life insurance policy in exchange for him maintaining policy naming her as primary beneficiary did not fall within scope of Massachusetts's automatic-revocation-on-divorce provision's contract exception, where parties' integrated separation agreement omitted any discussion of insurance policies even though parties were invited to include them, divided up entire marital estate, and stated that separation agreement included all agreements between parties, and parties did not enter into post-divorce contract. Mass. Gen. Laws Ann. ch. 190B, § 2-804.

[12] **Divorce** Operation and effect

Divorce Property division and distribution

Where separation agreement or judgment addresses division of property, that division is final and there is no longer marital estate to divide.

[13] **Insurance** Effect on prior designation of beneficiary

In order for former spouse's designation as beneficiary under life insurance policy to survive divorce pursuant to Massachusetts's automatic-revocation-on-divorce provision's express terms exception, policy must expressly provide that beneficiary designation is not revoked by divorce or words to that effect. Mass. Gen. Laws Ann. ch. 190B, § 2-804.

1 Cases that cite this headnote

[14] **Insurance** Effect on prior designation of beneficiary

Fact that terms of life insurance's policy did not mention divorce and required insured to change his beneficiary designation in writing was not enough to show that policy's express terms provided that his ex-wife's beneficiary designation would survive divorce, where policy provided that "[i]f any Beneficiary is disqualified from receiving the Proceeds by operation of law, then the Proceeds will be paid as though the Beneficiary died before the Named Insured." Mass. Gen. Laws Ann. ch. 190B, § 2-804(b).

1 Cases that cite this headnote

****860** Insurance, Life insurance: change of beneficiary. Divorce and Separation, Separation agreement, Agreement respecting life insurance. Uniform Probate Code. Statute, Construction, Retroactive application. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on June 3, 2019.

The case was considered by Debra A. Squires-Lee, J., on motions for summary judgment, and a motion for reconsideration was also considered by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Attorneys and Law Firms

Daniel A. Capodilupo, Norwell, for Dawn Diana-Parker.

Edmund P. Hurley, for Joann Parker.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

KAFKER, J.

****861** ***801** Sean Parker purchased a life insurance policy naming his then wife, Dawn Diana-Parker, as the primary beneficiary, and his mother, Joann Parker, as alternative beneficiary. Sean[2] and Dawn divorced, but Sean did not amend his beneficiary designation. ***802** After Sean's death, his insurer, American Family Life Assurance Company of Columbus (AFLAC), filed this interpleader action in Superior Court to determine whether the Massachusetts Uniform Probate Code's "Revocation of probate and nonprobate transfers by divorce" provision, G. L. c. 190B, § 2-804, terminated Dawn's beneficiary status by operation of law. The motion judge entered summary judgment in favor of Joann. We affirm.

1. Background. We summarize the facts based on the evidence that was before the motion judge. Sean and Dawn were married in 1999. The marriage produced two sons, who are still minors. In late 2010, Sean purchased a twenty-year term life insurance policy with a $100,000 death benefit through his employer. The primary beneficiary was Dawn. Sean's mother, Joann, was the sole alternative beneficiary. The policy also contained a "spouse rider" and a "child rider," essentially sub-policies on Dawn's and the sons' lives with Sean as beneficiary, supported by additional premiums. The policy did not mention the effect of a divorce on Sean's beneficiary designation. According to Dawn, shortly after taking out the policy Sean lost his job, and she began paying the premiums out of her "sole account" at his direction.

Sean and Dawn divorced in 2016. The parties, representing themselves, declared their personal assets and submitted a separation agreement based on a court-provided form to the Probate and Family Court. Sean agreed to pay Dawn $163.50 per week in child support, and both spouses waived alimony. The agreement stated that the "Husband and Wife have already divided between themselves all of their personal property and are satisfied that the division was fair." The agreement specifically referenced the couple's cars and credit card debt, but it did not mention Sean's life insurance policy. It did so even though the form, in its child support section, contained options to include an agreement for the spouses to maintain life insurance in favor of their children rather than their spouse, which were not selected. The separation agreement also contained an integration clause stating, "The parties have included in this Agreement their entire understanding. No spoken or written statement outside this Agreement was relied on by either party in signing the Agreement."

According to Dawn, Sean instructed her to continue making payments on the policy ****862** until he died in 2018. Dawn then filed a "Proof of Death -- Beneficiary's Statement" with AFLAC and a death certificate that listed Sean as divorced and Dawn as his "Last Spouse." Upon learning that the couple had divorced, ***803** AFLAC requested a copy of the divorce decree and any property settlements with Sean so it could review her claim. It informed Dawn, through her counsel, that her rights were extinguished because "AFLAC was not aware of the existence of any express agreement pertaining to the distribution of the life insurance proceeds."

Attempts to settle between the two putative beneficiaries failed. AFLAC directed Joann to file a beneficiary statement through her daughter and attorney-in-fact, Paige F. Staples, so it could file an interpleader action.

AFLAC commenced the action in June 2019. AFLAC subsequently deposited with the court the insurance proceeds, with interest, and was discharged from the case. The remaining parties filed cross motions for summary judgment, focusing primarily on whether G. L. c. 190B, § 2-804, applied retroactively. In support of her arguments, Dawn filed an affidavit and discovery responses indicating that she continued to pay the premiums at Sean's direction and that he intended for the proceeds to be used to support her and their sons.[3] Although both parties requested a hearing, the motion judge decided the matter on the papers.[4] The judge held that § 2-804 applied to Sean's policy, and granted summary judgment for Joann.

Dawn appealed following the entry of judgment. Afterward, Dawn filed a motion for reconsideration, expressly arguing for the first time that she fell into § 2-804's contractual exception, based on an oral contract with Sean. The judge denied the motion for reconsideration, noting that any predivorce oral agreement did not survive the integrated separation agreement, and that a postdivorce oral agreement did not "supersede[ ]" § 2-804. This court granted direct appellate review sua sponte.

***804** **[1]** **[2]** **[3]** 2. Discussion. a. Standard of review. We review a grant of summary judgment de novo. Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 330, 173 N.E.3d 333 (2021). Summary judgment will be granted if there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Whether the motion judge erred in her interpretation of § 2-804 and its retroactive effect are "[q]uestions of statutory construction" and therefore "questions of law, to be reviewed de novo" (citation omitted). Concord v. Water Dep't of Littleton, 487 Mass. 56, 60, 164 N.E.3d 178 (2021). We review "the same record as the motion judge." Meyer v. Veolia Energy N. Am., 482 Mass. 208, 211, 121 N.E.3d 1221 (2019). "Because the parties filed cross motions for summary judgment, ****863** we view the evidence in the light most favorable to the party against whom summary judgment was entered." Conservation Comm'n of Norton, supra.

b. Legal background. At common law, divorce or annulment did not affect posthumous transfers. See Sveen v. Melin, ––– U.S. ––––, 138 S. Ct. 1815, 1819, 201 L.Ed.2d 180 (2018); Hertrais v. Moore, 325 Mass. 57, 61, 88 N.E.2d 909 (1949). See also G. L. (Ter. Ed.) c. 191, § 9 (providing for revocation of previous will upon marriage but not divorce). The onus was on the donor to revoke or amend any instruments in favor of an ex-spouse or ex-spouse's relatives, despite the obvious inference that, in most cases, the divorce would affect the decedent's testamentary plans for these people. See Sveen, supra (describing how maintaining divorced spouse as beneficiary is generally inconsistent with intent of donor). As divorce became increasingly common, State legislatures, following the lead of Uniform Probate Code,[5] enacted automatic revocation-on-divorce provisions. Id. The change came first to wills. See, e.g., G. L. c. 191, § 9, as amended by St. 1976, c. 515, § 6, repealed by St. 2008, c. 521, § 10; Uniform Probate Code § 2-508 (1969).

Thereafter, the Uniform Probate Code and State legislatures chose to address "the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission." Uniform ***805** Probate Code, art. II, prefatory note (2006). See Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1110-1111 (1984). For these nonprobate assets, including life insurance, the rule had until that point remained that "the burden is on the insured to effect a change in beneficiary in accordance with the terms of the policy." Stiles v. Stiles, 21 Mass. App. Ct. 514, 515 n.3, 487 N.E.2d 874 (1986), citing Acacia Mut. Life Ins. Co. v. Feinberg, 318 Mass. 246, 250–251, 61 N.E.2d 122 (1945).

That would change with the passage of § 2-804, a national model provision that would eventually appear in the Massachusetts Uniform Probate Code. It states:

> "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:
>
> "(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument ...."

G. L. c. 190B, § 2-804 (b). See Uniform Probate Code § 2-804(b) (2006).

According to the Uniform Law Commission, the section was intended to "unify the law of probate and nonprobate transfers" and to "cover 'will substitutes' such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions ..." (emphasis added). Uniform Probate Code § 2-804 comment (2006).[6]

****864** The Massachusetts act, like the national model, also contained retroactivity provisions. As relevant here, the Massachusetts version stated:

> "Except as provided elsewhere in this act, on the effective ***806** date of this act [March 31, 2012]:[7]
>
> "1. this act shall apply to pre-existing governing instruments, except that it shall not apply to governing instruments which became irrevocable prior to the effective date of this act ...."

St. 2008, c. 521, § 43 (1). See Uniform Probate Code § 8-101(b)(1). The act also provided in another subsection that

> "any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent, except that it shall not apply to governing instruments which became irrevocable prior to the effective date of this act."

St. 2008, c. 521, § 43 (5). See Uniform Probate Code § 8-101(b)(5) (2006) (equivalent provision of model code).

[4] c. Scope of § 2-804. Dawn argues first that § 2-804 does not cover life insurance policies or beneficiary designations. This is obviously incorrect. Massachusetts's revocation-on-divorce provision applies to any "disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument." G. L. c. 190B, § 2-804 (b) (1). "Governing instrument" is defined as "a deed, will, trust, insurance or annuity policy, ... or a donative, appointive, or nominative instrument of any other type" (emphasis added). G. L. c. 190B, § 1-201 (19). A "beneficiary designation" is defined as "a governing instrument naming a beneficiary of an insurance or annuity policy, ... or other nonprobate transfer at death" (emphasis added). G. L. c. 190B, § 1-201 (4). For the purposes of § 2-804, a " '[d]isposition or appointment of property' includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument" (emphasis added). G. L. c. 190B, § 2-804 (a) (1). As noted above, the Uniform Law Commission expressly intended § 2-804 to "cover ... life-insurance and retirement-plan beneficiary designations." Uniform Probate Code § 2-804 comment (2006). Consequently, there is no merit to Dawn's argument that the provision does not extend to life insurance.

***807** **[5]** d. Retroactivity. Dawn next claims that § 2-804 does not apply retroactively to Sean's policy. Most, if not all, of her argument for why the statute does not apply retroactively is based on her belief that the United States Supreme Court wrongly decided Sveen, and that the dissent in that case is correct. See Sveen, 138 S. Ct. at 1826-1831 (Gorsuch, J., dissenting). In Sveen, the Supreme Court concluded that the retroactive application of Minnesota's version of § 2-804 did not violate the contracts clause of the United States Constitution. Id. at 1818. In concluding that the act was constitutional, the court stressed three reasons:

> "First, [§ 2-804] is designed to reflect a policyholder's intent -- and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to ****865** disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment."

Id. at 1822. As our version of § 2-804 tracks the language of Minnesota's, we certainly cannot reach the opposite conclusion of the United States Supreme Court on Federal constitutional grounds. Retroactive application of § 2-804 is thus constitutional.

[6] **[7]** The next question is whether, and if so how, the Massachusetts version of § 2-804 applies retroactively. "Whether a statute applies to events occurring prior to the date on which the statute takes effect is in the first instance a question of legislative intent." Sliney v. Previte, 473 Mass. 283, 288, 41 N.E.3d 732 (2015). "If the language of a statute is plain and unambiguous, it is conclusive as to legislative intent" (quotation and citation omitted). Id.

The act itself contains two retroactivity provisions that require analysis. The first is plain and unambiguous:

> "[T]his act shall apply to pre-existing governing instruments, except that it shall not apply to governing instruments which became irrevocable prior to the effective date of this act."

St. 2008, c. 521, § 43 (1). On its face, § 43 (1) clearly makes the entire act, including the revocation-on-divorce provision in § 2-804, apply retroactively to Sean's policy, because the policy was revocable until his death in

2018. This comprehensive retroactivity provision appears consistent with the intentions of the drafters of the Uniform Probate Code and the interpretation of all ***808** the courts and commentators that have considered the question of retroactivity. The drafters of the Uniform Probate Code, like the Supreme Court in Sveen, concluded that the new default rule it adopted better reflected the intention of divorced spouses than the old rule it replaced. That intention, as summarized by the Joint Editorial Board for the Uniform Probate Code, was “that when spouses are sufficiently unhappy with each other that they obtain a divorce, neither is likely to want to transfer his or her property to the survivor on death.” Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents, 17 ACTEC Notes 184, 184 (1991) (Joint Editorial Board Statement). This rule, as the drafters and courts have recognized, better reflects the intentions of those who drafted the relevant documents before as well as after the passage of the act, and thus the rule should be applied retroactively.

Although not briefed or argued by the parties, our retroactivity analysis must also address the purpose and effect of St. 2008, c. 521, § 43 (5), which states that “any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date unless there is a clear indication of contrary intent.” This provision, on its face, appears to be directed at the various provisions in the act that are expressly defined as rules of construction or presumptions with language indicating that they apply absent a clear indication of contrary intent. See G. L. c. 190B, art. II, part 6, §§ 2-601 et seq. (“Rules of Construction Applicable Only to Wills”); G. L. c. 190B, art. II, part 7, §§ 2-701 et seq. (“Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments”); G. L. c. 190B, § 2-507 (c), (d) (expressly setting forth “presumption”). Indeed, § 43 (5) seems just to make clear that these provisions apply retroactively the same way they apply prospectively. Thus, the combination of § 43 ****866** (1) and (5) render the entire act retroactive.

[8] Based on the language and purpose of § 2-804, we therefore conclude that the Legislature intended for § 2-804 to be retroactive and it did so pursuant to § 43 (1). We further conclude that § 43 (5) is limited to those sections expressly defined as rules of construction or presumptions applicable absent contrary intent and thus does not apply to § 2-804, which is not described as a rule of construction or presumption and does not employ the open-ended absence of contrary intent formulation. Rather, § 2-804 ***809** includes its own more specific rules of application and exception, thereby displacing a generalized contrary intent inquiry.

We recognize that some courts and commentators have in other contexts, and in order to provide for the retroactive application of § 2-804, interpreted § 2-804 as a rule of construction. A good example is the United States Court of Appeals for the Tenth Circuit's interpretation of Utah's retroactivity provision in Stillman v. Teachers Ins. & Annuity Ass'n College Retirement Equities Fund, 343 F.3d 1311 (10th Cir. 2003). Notably, Utah's Uniform Probate Code differed from the Massachusetts Uniform Probate Code in that the equivalent of § 43 (1) was limited to “wills.” Utah Code § 75-8-101(2)(a). The only retroactivity provisions applicable to other instruments in Utah were provisions related to rules of construction. See Utah Code §§ 75-8-101(2)(e), 75-2-1301(2). In this context, where § 2-804 would not otherwise be retroactive, the Tenth Circuit interpreted § 2-804 as a rule of construction.

Similarly, in defending the constitutionality of the retroactive application of the Uniform Probate Code prior to the Supreme Court's decision in Sveen, Lawrence Waggoner, the chief reporter for the Uniform Probate Code editorial board, stated,

> “[Section 2-804] merely establishes a rule of construction designed to implement intention. It reflects a legislative judgment that when the insured leaves unaltered a will, trust, or insurance-beneficiary designation in favor of an ex-spouse, the insured's failure to designate substitute takers more likely than not represents inattention rather than intention. The legislative judgment yields to a contrary intention.”

Waggoner, Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code, 26 Real Prop. Prob. & Tr. J. 683, 700 (1992). Although instructive on the importance of applying § 2-804 retroactively, we decline to adopt such an expansive and unnecessary interpretation of rules of construction and presumptions in the context of § 43 (1) and (5) of the Massachusetts act, relying instead on the plain language of our statute. Section 43 (1) clearly encompasses § 2-804, rendering it fully retroactive. Section 43 (5), on its face, applies only to those rules of construction and presumptions so entitled. If § 43 (5) were applicable to § 2-804, it would also limit and not expand the retroactive effect of § 2-804, which cuts against the thrust of the Tenth Circuit and ***810** Waggoner interpretations. For all these reasons, we conclude that § 2-804 is to be applied retroactively, pursuant to § 43 (1), according to the terms of both provisions.

[9] e. Application of the exceptions to § 2-804. We therefore consider the question whether summary judgment should have also been allowed pursuant to § 2-804. Unless one of the statute's express exceptions applies, the beneficiary designation to Dawn, the divorced spouse, would be revoked as a matter of law. As provided by § 2-804, however, disposition made by a divorced individual to a former spouse would not be revoked if "provided by the express terms of a governing instrument, a ****867** court order,[8] or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment." G. L. c. 190B, § 2-804 (b).[9] Importantly, § 2-804 only applies to governing instruments "executed by the divorced individual before the divorce or annulment" (emphasis added). G. L. c. 190B, § 2-804 (a) (4). This means that another method of avoiding application of § 2-804 is redesignating the ex-spouse as beneficiary after the divorce; § 2-804 does not apply to such "beneficiary designations," G. L. c. 190B, § 1-201 (4).[10] See Sveen, 138 S. Ct. at 1823; Joint Editorial Board Statement, 17 ACTEC Notes at 184.

The only two exceptions requiring further consideration are those related to a contract dividing the marital estate, and the express terms of Sean's life insurance policy. We begin with the ***811** contract exception.

[10] i. Contract relating to the division of marital property. As a preliminary matter, we address the issue whether the contract argument was waived. It was certainly not the focus of the summary judgment proceedings. Rather, counsel for Dawn directed most, if not all, of his argument toward his contention that § 2-804 did not apply retroactively. It was not until he filed a motion for reconsideration that he included argument specifically addressing the contract exception. Dawn's counsel did, however, submit admissible evidence supporting her contention that she and Sean entered into an oral contract requiring Dawn to continue paying the premiums on the life insurance policy in exchange for Sean maintaining the policy.[11]

****868** The language of § 2-804, including its exceptions, was also presented to the motion judge. Her analysis considered and applied § 2-804, and she specifically addressed the contract exception in response to the motion for reconsideration. Although a close question, we conclude that the contract issue was not waived in these circumstances; therefore, we address it here as well.

[11] The motion judge concluded that Dawn's evidence did not meet the requirements of the contract exception because the ***812** separation agreement was fully integrated and did not include the insurance policies. We agree. The integrated separation agreement omitted any discussion of insurance policies even though the parties were invited to include them, divided up the entire marital estate, and stated that the separation agreement included all agreements between the parties. It should therefore be enforced according to its terms. See Ames v. Perry, 406 Mass. 236, 240-241, 547 N.E.2d 309 (1989) (specific enforcement of separation agreements "supports finality and predictability, allows the parties to engage in future planning, and avoids recurrent litigation in the highly charged emotional area of divorce law"); Matter of the Estate of DeWitt, 54 P.3d 849, 858 (Colo. 2002) (recognizing purpose of § 2-804 as providing finality to divorce).

More specifically, the separation agreement states in unequivocal terms, "The parties have included in this Agreement their entire understanding. No spoken or written statement outside this Agreement was relied on by either party in signing this Agreement." It also states that "[t]he Husband and Wife ... already divided between themselves all of their personal property and they are satisfied that the division was fair." Following that statement, they provided further information about their mutual responsibilities regarding the transfer of title and payments for automobiles and their joint obligation to pay the wife's credit card debt. In so doing, the separation agreement defined and delimited their residual responsibilities regarding marital property. There was no mention of the insurance policy, which was marital property at the time of divorce. If Dawn's attestations are to be credited, the continuation of the insurance policy with her as the beneficiary would require the same type of mutual exchange of actions as described for the cars and credit card debt. Sean also expressly declined to check a box that would have changed the beneficiary designation to his children.

[12] The contemporaneous written documentation therefore establishes that at the time of the divorce there was no contractual agreement to continue Dawn as the beneficiary of Sean's insurance policy. Rather, Sean retained an insurance policy in his name and was free to change the beneficiary of it at any time. Finally, following the divorce agreement the insurance policy was no longer a part of the marital estate, as the marital estate had been fully divided. Divorcing couples may choose not to address the division of the marital estate in their separation agreement or divorce judgment. See ***813** Brash v. Brash, 407 **Mass**. 101, 104, 551 N.E.2d 523 (1990); ****869** Hay v. Cloutier, 389 **Mass**. 248, 252, 449 N.E.2d 361 (1983); G. L. c. 208, § 34 (allowing action to divide marital estate "at any time after a divorce"). In such cases, application of § 2-804 can be avoided if the parties agree to maintain the ex-spouse's beneficiary status in a postdivorce contract. However, where, as here, the separation agreement or judgment addresses the division of property, that division is final and there is no longer a marital estate to divide. See Sahin v. Sahin, 435 **Mass**. 396, 404 n.10, 758 N.E.2d 132 (2001), quoting Heins v. Ledis, 422 **Mass**. 477, 483, 664 N.E.2d 10 (1996) ("Property settlements are designed largely to effectuate a final and complete settlement of obligations between the divorcing spouses"); Taverna v. Pizzi, 430 **Mass**. 882, 886, 724 N.E.2d 704 (2000). After the division, the policy was Sean's to manage as he saw fit. In these circumstances, there could be no "contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment" despite Dawn's statements to the contrary.[12] The motion judge therefore properly rejected an argument that the contract exception in § 2-804 applied.

[13] ii. Express terms of a governing instrument. Section 2-804 applies "[e]xcept as provided by the express terms of a governing instrument" (emphasis added). G. L. c. 190B, § 2-804 (b). We adopt the plain meaning of the exception. The policy must expressly provide that the beneficiary designation is not revoked by divorce or words to that effect. See, e.g., Buchholz v. Storsve, 2007 S.D. 101, ¶ 15, 740 N.W.2d 107 ("We hereby interpret the statute to require that the governing instrument contain express terms referring to divorce, specifically stating that the beneficiary will remain as the designated beneficiary despite divorce."); Hertzske v. Snyder, 2017 UT 4, ¶¶ 14-15, 390 P.3d 307 ("The generic language found in almost every **life** insurance policy regarding the standard method to change a beneficiary does not constitute 'express terms' enabling the beneficiary designation to survive revocation under ***814** [§ 2-804].... We therefore hold that a **life** insurance policy must contain language specifically stating that the beneficiary designation will remain in effect despite divorce to invoke the express terms exception"). It does not do so here.

[14] Dawn argues nonetheless that this exception applies because the terms of Sean's policy did not mention divorce and required Sean to change his beneficiary designation in writing. But this is not enough to show that the "express terms of" the policy provide that her designation would survive divorce. G. L. c. 190B, § 2-804 (b). This type of argument by implication also ignores a provision in the policy which states that "[i]f any Beneficiary is disqualified from receiving the Proceeds by operation of law, then the Proceeds will be paid as though the Beneficiary died before the Named Insured," in this case meaning to the contingent beneficiary. By expressly incorporating the disqualification by operation of law provision, the policy does not even imply what Dawn contends.

****870** Even if the policy did not contain such language, Dawn's argument would still fail. Section 2-804 is designed, at least in part, to protect donors who made predivorce dispositions in favor of their ex-spouse and failed to follow the procedural requirements to change them. Joint Editorial Board Statement, 17 ACTEC Notes at 184. A requirement that the insurer receive written notice of a change of beneficiary for it to be effective is "customary" for **life** insurance policies, meaning revocation would be precluded in almost every case. See S. Plitt, D. Maldonado, & J.D. Rogers, Couch on Insurance 3d § 60:20 (rev. ed. 2011). Adopting Dawn's interpretation would essentially restore the pre-Uniform Probate Code rule that "the burden is on the insured to effect a change in beneficiary in accordance with the terms of the policy ... [and d]ivorce does not revoke a designation of beneficiary unless ... the insurance contract so provides." Stiles, 21 **Mass**. App. Ct. at 515 n.3, 487 N.E.2d 874.

Because Dawn has not shown that the insurance policy expressly provided that her designation would survive divorce, the first exception does not apply.

***815** 3. Conclusion. Our de novo review of the record before the motion judge reveals that summary judgment was properly allowed.[13]

Judgment affirmed.

All Citations

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Footnotes

1 Dawn Diana-Parker.

2 Because the parties all share a last name, we refer to them by their first names.

3 Joann moved to strike these statements and certain other evidence that Dawn filed because they were hearsay or irrelevant. Simultaneous to ruling on the motions for summary judgment, the motion judge denied the motion to strike as moot, noting that she did not consider any inadmissible evidence in her ruling.

4 There is a presumption in favor of holding hearings on summary judgment motions. Rule 9A(c)(3) of the Rules of the Superior Court (2018). However, we note the motions were filed on March 18, 2020, the day after this court issued an emergency order severely restricting access to court houses for in-person proceedings due to the COVID-19 pandemic. See Supreme Judicial Court, Order Limiting In-Person Appearances in State Courthouses to Emergency Matters That Cannot be Resolved Through a Videoconference or Telephonic Hearing, No. OE-144 (Mar. 17, 2020).

5 The Uniform Probate Code is published by the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), a State-supported, national organization that proposes uniform codes for State legislatures to encourage uniformity and clarity in important areas of State law. Uniform Law Commission, About Us, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/QRB6-A4Q9].

6 Because the Legislature adopted § 2-804 essentially as proposed by the Uniform Law Commission at the time, we consider its comment an instructive source for interpreting the statute. Although there have been updates to the Uniform Probate Code as recently as 2019, we will consider the model provisions and commentary as they existed when the code was enacted in Massachusetts in 2009.

7 The original effective date, July 1, 2011, was extended to March 31, 2012. See St. 2008, c. 521, § 44 (original effective date); St. 2010, c. 409, § 23 (extending effective date to January 2, 2012); St. 2011, c. 224 (extending effective date to March 31, 2012).

8 Dawn admits that the couple failed to provide for life insurance in their separation agreement. As a result, the divorce judgment, which incorporated the separation agreement, contains no terms on the insurance policy. Therefore, this exception does not apply.

9 There is also an exception, not applicable here, for when the divorced parties remarry or the divorce or annulment is nullified. G. L. c. 190B, § 2-804 (e).

10 Like most life insurance policies, Sean's policy required that requests to change the beneficiary be in writing. It is undisputed that Sean did not file a written redesignation after divorce. In certain cases, we have recognized that even if an insured fails to meet the formal requirements of his or her policy, “a change of beneficiary is effected when the insured has done everything within [his or her] power to comply with the provisions for such change in the policy.” Alfama v. Rose, 323 Mass. 643, 644, 83 N.E.2d 868 (1949), and cases cited. However, “[a] mere intention on the part of an insured to change the beneficiary not acted upon in the manner required by the terms of the policy is ineffectual.” Henderson v. Adams, 308 Mass. 333, 338, 32 N.E.2d 295 (1941). See Acacia Mut. Life Ins. Co., 318 Mass. at 250-251, 61 N.E.2d 122. Therefore, even if we were to credit fully Dawn's evidence of Sean's intent, there is no evidence that he made any effort to comply with the terms of his policy to redesignate Dawn as beneficiary, and therefore there are no grounds to argue that he substantially complied.

11 We disagree with the motion judge's characterization of this evidence as inadmissible. On summary judgment, affidavit evidence must be “made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence.” Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974). Dawn's testimony regarding her payment of the premiums and statements made by Sean to her about the policy are within her personal knowledge and would apparently be admissible at trial if Dawn were so to testify. General Laws c. 233, § 65, provides:

> "In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant."

Furthermore, statements of intent, including those by a deceased donor, would appear to fall within the hearsay exception for then-existing state of mind, **Mass**. G. Evid. § 803(3) (2021), or as verbal acts, Shimer v. Foley, Hoag & Eliot LLP, 59 **Mass**. App. Ct. 302, 310-311, 795 N.E.2d 599 (2003), citing Jamaica Pond Garage, Inc. v. Woodside Motor Livery, Inc., 236 **Mass**. 541, 542, 128 N.E. 881 (1920) (terms of offer not hearsay because they are legally operative facts, not offered to prove intent of offeror); **Mass**. G. Evid. § **801**(c) note (2021). More particularly, these statements would be introduced to show whether Sean contracted to maintain Dawn as his beneficiary.

12 We recognize that a divorced spouse would not ordinarily be expected to continue to make payments for an insurance plan for which neither she nor her children, but rather her mother-in-law, was the beneficiary. See Uniform Probate Code § 2-804 comment (2006) ("Given that, during divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives, seldom would the transferor have favored such a result"). The reasons for such a payment in the instant case, however, are more complicated. Dawn's spouse rider and her sons' child riders essentially made them coinsureds on the policy. Thus, Dawn had other reasons for continuing to make such payments.

13 We deny Joann's motion for fees and costs. Although Dawn's arguments were mostly frivolous, the retroactive application of § 2-804 was a novel issue of law, the exact details of which this court and courts from other Uniform Probate Code jurisdictions have disagreed upon. Therefore, the appeal was not frivolous.

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Cited	**3. Ames v. Perry** 547 N.E.2d 309, Mass., 1989 Mother petitioned to have support provisions of separation agreement modified. The Probate and Family Court, Norfolk Division, John V. Harvey, J., dismissed the complaint. ...	Case		”	868
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Cited	**5. Buchholz v. Storsve** 740 N.W.2d 107, S.D., 2007 ESTATE PLANNING AND PROBATE - Beneficiaries. Retroactive application of general rule that divorce automatically revokes ex-spouse's beneficiary designation did not violate state...	Case		”	869
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Cited	**13. Jamaica Pond Garage v. Woodside Motor Livery** 128 N.E. 881, Mass., 1920 Appeal from Municipal Court of Boston, Appellate Division. Action by the Jamaica Pond Garage, Incorporated, against the Woodside Motor Livery, Incorporated, resulting in finding...	Case			867
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Cited	**22. Town of Concord v. Water Department of Littleton** 164 N.E.3d 178, Mass., 2021 ENERGY AND UTILITIES — Water and Sewer. Water Management Act impliedly repealed special act that gave towns priority to take pond's water supply, which was repugnant to WMA's...	Case		”	862