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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

AXA EQUITABLE LIFE INSURANCE COMPANY, Plaintiff, v. RUTH J. EKONG, Defendant and Respondent; EDI M.O. FAAL, as Trustee, etc., Defendant and Appellant.	B271772 (Los Angeles County Super. Ct. No. BC495015)

APPEAL from a judgment of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed.

Schwartz & Asiedu and Kwasi A. Asiedu for Defendant and Appellant.

Ivie, McNeill & Wyatt and Lilia E. Duchrow for Defendant and Respondent.

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Dr. Enobong Ekong changed the beneficiary on a life insurance policy in August 2011, shortly before his death. After his passing, a family law court concluded that Enobong's ex-wife Ruth J. Ekong owned one-half of the policy. (Because of their shared surname we refer to several persons by their first names.) Subsequently, in the appealed from judgment, the probate court awarded Ruth 50 percent of the proceeds of the life insurance policy.

The trustee of Enobong's trust, Edi M.O. Faal, appeals from the judgment of the probate court. On appeal, the trustee demonstrates no error, and we affirm the judgment awarding respondent Ruth 50 percent of the proceeds of Enobong's life insurance policy.

BACKGROUND

Enobong married Ruth in 1964 and divorced Ruth in 2006. Their divorce case continued after 2006 with reserved issues, including ownership of a life insurance policy issued by AXA Equitable Life Insurance Company (AXA policy). The AXA policy was issued in 1989, when Enobong and Ruth were married. It is undisputed that, at that time, the AXA policy was community property. Trustee Faal points out that, as part of the divorce, "[o]ne of the community property assets to be divided was an

insurance policy taken on decedent's life, issued by AXA Equitable Insurance Company."[1]

Under the terms of a 2007 judgment on reserved issues, Ruth had the option to continue her 50 percent ownership in the AXA policy. To exercise the option to continue ownership, Ruth was required to "exercise this option in writing within 20 days after the entry of this Further Judgment." The parties dispute whether Ruth effectively exercised her option, and the probate court determined that dispute was not dispositive. Ruth argues that her attorney's letter timely exercising the option was sufficient. Faal counters that Ruth had to personally provide written notification of her decision to exercise the option to continue her ownership interest in the AXA policy.

In 2008, Enobong married Doris Person-Ekong. Enobong died August 29, 2011. Faal is the trustee of the Enobong A. Ekong Trust, dated August 5, 2011.

On October 7, 2011, the trial court (Hon. Robert E. Willet in case No. BD415464) resolved the issue of whether Ruth exercised her option to remain 50 percent owner of the AXA policy. The court issued the following order: "The Court finds that before the death of Petitioner [Enobong], Respondent [Ruth] exercised her option to become a one-half owner in AXA life insurance policy . . . ."

It appears that in 2012, AXA Equitable Life Insurance Company (AXA) filed a complaint in interpleader in the probate matter involving Enobong's estate. The complaint is not included

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[1] Community property is defined as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state" unless another statute applies. (Fam. Code, § 760.)

in the limited record on appeal. It appears that Ruth, Doris, and Faal in his capacity as trustee, were named as defendants. The personal representative of Enobong's probate estate represented that "the probate estate has no interest in this AXA interpleader action."[2] No reporter's transcript is included in the record, but it appears the only issue was the allocation of the AXA policy among Ruth, Doris, and Enobong's trust.

In its statement of decision, the probate court explained that in November 2010, "without notice to Ruth, Dr. [Enobong] Ekong submitted to AXA a beneficiary change request form naming Doris as primary beneficiary." On August 5, 2011, "without notice to Ruth, Dr. Ekong submitted to AXA a further beneficiary change request form naming Doris as one-half beneficiary and Faal, as trustee, as one-half beneficiary." "On October 7, 2011, after Dr. Ekong had passed, the Family Court, by Judge Robert E. Willett, issued an order on Ruth's motion for transfer of the policy to her, and for sanctions, finding that before Dr. Eking [*sic*] passed, Ruth exercised her option to become a one-half owner of the policy." (Italics omitted.)

The probate court concluded that ". . . Dr. Ekong could not rightfully transfer benefits under the policy of which he was not the sole owner without Ruth's knowledge or consent. Therefore, to the extent Dr. Ekong's changes to beneficiary wrongfully impinged on Ruth's one-half ownership interest, Faal and Doris' rights to the policy are held in constructive trust for Ruth. Accordingly, Ruth retains a one-half interest in the policy."

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[2] Faal's argument that the due process rights of the estate were violated lacks merit because Faal expressly represented that the estate has no interest in this litigation. Moreover, Faal cites no authority supporting his due process argument.

"[W]here Faal and Doris' position, as beneficiaries under the policy, rests on this breach of fiduciary duty, they should not benefit in this Court of equity from Dr. Ekong's wrongful actions. Furthermore, they are also bound by the agreement of Dr. Ekong to the 2007 further judgment—which provides that it is binding on his successors in interest." Ultimately the "Court f[ound] that Ruth is entitled to one-half the proceeds and that the remaining one-half should be divided equally as between Faal and Doris." Judgment indicated that Ruth was half owner of the AXA policy. On appeal, Faal challenges Ruth's ownership.

DISCUSSION

As we shall explain Faal fails to show that the court erred in determining Ruth was entitled to half of the proceeds of the AXA policy.

1. Enobong's Fiduciary Obligation to Ruth Continued Until All of Their Community Property Assets Were Distributed

Either Ruth's ownership interest in the AXA policy was finally resolved in her favor in the court's October 7, 2011 order finding that she owned 50 percent of it or it has not yet been finally resolved. If it was finally resolved in Ruth's favor by the family law judge, then the probate court properly entered judgment awarding Ruth half of the proceeds of the insurance policy. Enobong could not name the beneficiary as to the half Ruth owned.

On the other hand, if the family law court's order is not final and binding, then the distribution of the AXA policy has not been finally resolved. So long as the issue was not resolved, Enobong owed a fiduciary duty to Ruth. The law is clear that notwithstanding a marital dissolution, former spouses have a

fiduciary duty to each other until the date of distribution of community assets. (Fam. Code, § 2102; *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1150.) "The fiduciary relationship and broad disclosure obligation continue postseparation until the marital property is divided." (*Rubenstein, supra*, at p. 1151.) Faal demonstrates no error in the probate court's conclusion that Enobong violated his fiduciary obligation to Ruth when he twice changed the beneficiary of the policy without notifying Ruth.

2. Faal Fails to Show the Probate Court Erred in Applying Probate Code Section 5021

Faal's argument that Probate Code section 5021 (section 5021) cannot apply because at the time of his death Enobong was no longer married to Ruth, but was married to Doris, also lacks merit.

Section 5021, subdivision (a) provides: "In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without the written consent of the person's spouse, the court shall set aside the transfer as to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons." Probate Code section 5020 provides that a "provision for a nonprobate transfer of community property on death executed by a married person without the written consent of the person's spouse . . . is not effective as to the nonconsenting spouse's interest in the property . . . ."

The term "spouse" in section 5021 cannot apply to Doris because the asset at issue was the community property of Enobong and Ruth. Section 5021 concerns the transfer of

community property assets. Doris (in contrast to Ruth) never had any ownership interest in the AXA policy.

Faal's argument that section 5021 cannot apply because Ruth and Enobong were former spouses lacks merit. The 1992 Law Revision Commission comments to section 5021 indicated that the statute was consistent with the rule in *In re Marriage of Stephenson* (1984) 162 Cal.App.3d 1057. In that case, the court made clear that even after dissolution, a nondonor, *former* spouse can void a gift made from community funds "only to the extent of one-half." (*Id*. at p. 1070.) (Whereas if the persons were still married, the nondonor spouse could void the gift made from community funds entirely. (*Ibid*.)) While *Stephenson* involved gifts rather than transfers, the rules respecting gifts and transfers are similar. (Cal. Law Revision Com. com., Deering's Ann. Prob. Code (2004 ed.) foll. § 5020, p. 600.) Thus, Ruth could void half of the transfer of the AXA policy even though she was a former spouse. In short, Faal fails to show the probate court erred in applying section 5021 when considering property once jointly owned by Enobong and Ruth.

3. Faal Fails to Show That Ruth's Exercise of Her Option to Continue Ownership in the AXA Policy Was Ineffective

Finally, Faal does not show that Ruth failed to properly exercise her option to co-own the AXA policy under the terms of the 2007 judgment. Ruth's attorney timely notified Enobong's attorney that Ruth chose to maintain one-half ownership in the AXA policy. Enobong's attorney (who is also the personal representative of the estate) testified that the notification was invalid because Ruth's attorney, rather than Ruth signed the letter expressing Ruth's intent to exercise the option.

The record does not support the conclusion that Ruth, rather than her attorney, was required to provide notification of her decision to exercise the option to continue to own the AXA policy. The further judgment on reserved issues drafted by Enobong's attorney (and now the personal representative of his estate) states: "Respondent [Ruth] is awarded an option to continue as a one-half owner of this policy, on condition that she exercise this option in writing within 20 days after the entry of this Further Judgment. In the event that she does accept ownership, Petitioner [Enobong] shall advance one-half premium payment on her behalf and may deduct that sum from his next due spousal support payment. To support that deduction, Petitioner must forward to Respondent a copy of the billing for the insurance and evidence of payment. If Respondent declines to accept ownership or fails to exercise the option in writing within the 20 days allowed, the policy is awarded to Petitioner at a net cash surrender value of $16,315.61. Petitioner is ordered to equalize this division by payment of $8,157.80 to Respondent." The judgment was signed by Ruth's attorney and by the trial judge. Ruth was not required to personally sign the judgment.

"It is well settled that when the provisions of an option contract prescribe the particular manner in which the option is to be exercised, they must be strictly followed. [Citations.] However, when the option contract merely suggests, but does not positively require, a particular manner of communicating the exercise of the option, another means of communication is not precluded." (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 498.) The judgment requires that the notification be in writing but does not require the writing be signed by Ruth.

Faal relies on inapposite cases—*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396 (*Blanton*), *In re Marriage of Helsel* (1988) 198 Cal.App.3d 332 (*Helsel*), and *In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147 (*Kaufman*).

In *Blanton*, the high court considered the viability of an attorney's stipulation to arbitration *without* the consent of the client. The high court concluded that the attorney had no authority to bind his client to arbitration. (*Blanton, supra*, 38 Cal.3d at p. 407.) *Helsel* applied *Blanton*. (*Helsel, supra*, 198 Cal.App.3d at p. 337.) Here, in contrast to *Blanton* and *Helsel*, it was undisputed that Ruth's attorney acted with Ruth's consent when she sent notice Ruth was exercising the option to continue her ownership interest in the AXA policy. *Kaufman* holds that correspondence after a judgment is entered did not modify the judgment and in no manner assists Faal's argument. (*Kaufman, supra*, 101 Cal.App.3d at p. 150.) In short, Faal's authority is not applicable, and he fails to demonstrate any error on appeal.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.