MASSACHUSETTS Lawyers Weekly

Email exchange doesn't divest ex-girlfriend as life insurance beneficiary

But conversion claim proceeds over 401(k)

By: Eric T. Berkman May 29, 2021

An email exchange between an unmarried couple purporting to establish the financial terms of their separation did not divest the ex-girlfriend of her right to proceeds from the boyfriend's life insurance policy, for which she remained the named beneficiary, a U.S. District Court judge has ruled.

The judge also ruled, however, that the email exchange may have divested the ex-girlfriend, defendant Sara Lischynsky, from her interest in funds from boyfriend Patrick McCormick's 401(k), which he transferred into their joint credit union account a year after their breakup, shortly before committing suicide.

In August 2016, several months after the breakup, McCormick agreed to buy out Lischynsky's interest in their condo for $40,000.

He stated in a subsequent email that the $40,000 — to be funded by refinancing the condo — along with $2,000 to be paid by him directly would resolve "virtually all financial matters" between the two. The email made no reference to McCormick's life insurance policy, his 401(k), or their joint DCU credit union account.

Lischynsky responded with an email expressing her assent and subsequently received the $40,000 and $2,000 payments referenced in McCormick's email.

When McCormick's mother, plaintiff Dora McCormick, sued Lischynsky for conversion of estate assets, Lischynsky argued that as named beneficiary of the life insurance policy, she — and not the estate — lawfully owned its proceeds.

Judge F. Dennis Saylor IV agreed.

"Patrick could have changed the beneficiary, but did not," Saylor wrote in granting the defendant's motion for summary judgment in part. "Lischynsky did not waive her right to those proceeds. Therefore, upon Patrick's death,

the proceeds passed to Lischynsky."

However, Saylor denied summary judgment as to Lischynsky's withdrawal of the 401(k) funds, rejecting her contention that because McCormick transferred them into a joint account where she retained survivorship rights, the estate could not claim ownership.

"It is clear from the language of the agreement that Patrick and Lischynsky intended to separate their financial affairs," Saylor said, emphasizing that the couple's agreement was that "financial matters" between the two would be resolved upon Patrick's payment of the $42,000. "A reasonable person would not interpret a 401(k) account to be anything other than a 'financial matter' [and] there is no evidence in the record that Patrick intended to transfer the money … as some kind of gift to Lischynsky."

The 25-page decision is McCormick v. Lischynsky, Lawyers Weekly No. 02-169-21.

Up-to-date plan

Defense counsel Christopher A. Callanan of Norwell declined to comment. Boston lawyers Philip M. Giordano and Russell A. Haverty, who represented the plaintiff, did not respond to interview requests.

But Boston attorney Donna A. Mizrahi, who handles inheritance disputes, said the case highlights the importance of having an up-to-date estate plan, including updated beneficiary designations with respect to non-probate assets.

"The plaintiff in this case contends that her son forgot his ex-girlfriend was a named beneficiary on a life insurance policy, and his failure to remove her as such was an oversight, which is entirely plausible and indeed frequently occurs," Mizrahi said. "Nonetheless, the court was bound by the beneficiary designation in place, with the result that the decedent's ex-girlfriend — with whom he had severed all romantic and financial ties — will receive thousands of dollars after his death even though that outcome is unlikely what he wanted to occur."

Boston attorney Marshall D. Senterfitt predicted that parties in a wide range of situations would look to the ruling for guidance as to its discussion of contract formation by email.

Here, the parties were relatively thorough in their email exchange, and it was clear they intended to reach a formal, binding agreement despite its format and lack of assistance of counsel, he said.

> **"One lesson or takeaway is that not every email is going to form a contract."**

"It is interesting to consider whether the court would have viewed things differently if the parties had been less thorough and/or if the agreement had played out in a more piecemeal manner over a longer course of email exchanges," Senterfitt said. "One lesson or takeaway is that not every email is going to form a contract."

Swansea attorney Eric D. Correira said that while it would have been premature for the court to dismiss the plaintiff's claim regarding the 401(k) funds without more facts, the judge did not find at this point that the email exchange divested Lischynsky of her rights to the joint bank account.

At the same time, he said, the case shows the danger of making someone a joint owner on a bank account for one purpose, such as paying bills — as McCormick did in this case — without considering that at death the joint owner will then be the presumed sole owner of the account.

"In many instances, joint ownership is perfectly fine. But it should always be done with an understanding that one joint owner will be entitled to all of the assets at the other's death," he said.

Email exchange

Lischynsky was in a relationship with McCormick for several years before it ended in 2016.

At some point during the relationship, they jointly purchased a condo in Dorchester.

On Nov. 21, 2010, while McCormick and Lischynsky were dating, McCormick opened a joint checking account and joint savings account with DCU listing Lischynsky as a joint account holder. He opened them in connection with obtaining a loan to purchase a jointly owned car.

The terms of the account included right of survivorship. At no time did Lischynsky ever make a deposit into or access the account until July 2017.

McCormick also purchased two life insurance policies with MassMutual, one naming his estate as beneficiary and the other naming Lischynsky, who also purchased a policy naming McCormick as beneficiary, which she changed after their breakup.

When the relationship ended in February 2016, the two executed a buy-out agreement in which she sold him her interest in their condo for $40,000.

In a September 2016 email exchange, McCormick clarified that the $40,000 would be funded by refinancing the condo, and, in addition, he would pay Lischynsky $2,000 to resolve "virtually all financial matters" between them. The email, to which Lischynsky responded with her assent, did not reference the joint DCU accounts, either person's life insurance policies, or funds from McCormick's 401(k).

At some point in the next few months, Lischynsky received the payments mentioned in the exchange.

On Feb. 6, 2017, McCormick transferred into the DCU checking account $24,999 from his Fidelity 401(k) account for which his estate was designated the beneficiary. Sometime between 8 p.m. that day and 10:42 a.m. the next day, he committed suicide.

On July 3, 2017, apparently after the plaintiff, who had been appointed personal representative of her son's estate, brought the DCU account to Lischynsky's attention, Lischynsky withdrew all the funds and closed the account, apparently without informing the estate.

A week later, in response to a letter from MassMutual informing her she was the beneficiary of McCormick's life insurance policy, Lischynsky completed a claim form and received the benefits.

The plaintiff sued Lischynsky in Superior Court in June 2018 alleging conversion and intentional infliction of emotional distress. Lischynsky removed the case to U.S. District Court on diversity grounds and moved for summary judgment.

Ownership interests

McCormick v. Lischynsky

THE ISSUE: Did an email exchange between an unmarried couple purporting to establish the financial terms of their separation divest the ex-girlfriend of her right to proceeds from the boyfriend's life insurance policy, for which she remained the named beneficiary?

DECISION: No (U.S. District Court)

LAWYERS: Philip M. Giordano and Russell A. Haverty, of Reed & Giordano, Boston (plaintiff)[1] Christopher A. Callanan of Callanan Law, Norwell (defense)

Saylor first found that the September 2016 email exchange indeed constituted an enforceable contract.

He then denied summary judgment with respect to the 401(k) funds in the DCU account. Specifically, he found that under the terms of the September 2016 contract, McCormick retained ownership of the 401(k) account and that absent evidence of donative intent, it remained McCormick's property when he transferred it into the DCU account.

Here, Saylor continued, there was insufficient evidence of such donative intent to find in the defendant's favor as a matter of law.

"If Patrick had transferred money from his 401(k) account into the DCU account for one day and then transferred it back out, the money would not cease to be his," the judge said. "The fact that Patrick died immediately after the funds were deposited into the DCU account should not alter the analysis, at least absent some evidence that he intended to give Lischynsky the rights to the money."

Regarding the insurance policy, however, Saylor found that because McCormick could have changed the beneficiary but didn't, Lischynsky retained her ownership interest in the proceeds.

Finally, the judge granted summary judgment on the intentional infliction claim, concluding that no reasonable jury could find that Lischynsky engaged in intentional acts "sufficiently extreme and outrageous" to meet the standard for such a claim.

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