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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: 85,840

Second District Case No.: 94-03048
L.T. Case No.: 93-06219

SANDRA COOPER, f/k/a
SANDRA PASQUINO

Appellant,

vs.

KARIN MUCCITELLI, f/k/a
KARIN PASQUINO,

Appellee.

Answer Brief of the Appellee

An Appeal upon Certification of Conflict from a Judgment by the Second District Court of Appeal

Brief for the Appellee by:

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Statement of the Case

Appellant's Statement of the Cases is correct and appellee accepts it in full.

Statement of the Facts

Appellant's Statement of the Facts is correct, and appellee supplements it only with the statement of the facts as used by the Second District in its ruling:

> Pasquino and Muccitelli were married in 1984. Pasquino purchased a term life insurance policy in 1987. He was both the owner and the insured of the policy. The life insurance policy named Muccitelli as the primary beneficiary and Cooper as the secondary beneficiary. The marriage between Muccitelli and Pasquino was dissolved on July 10, 1992. The final judgment of dissolution incorporated a separation agreement between Muccitelli and Pasquino. This agreement included a mutual release of all claims either party might have against the other but made no specific mention of life insurance. Pasquino died [by suicide] in 1993 without ever changing the beneficiary on the policy in question.
>
> Slip op. at 2

Summary of Argument

I. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETION NOT TO TAKE JURISDICTION OVER THIS CAUSE BECAUSE THERE EXISTS NO "DIRECT CONFLICT" PURSUANT TO RULE 9.030(a)(2)(A)(vi), Fla.R.App.Pro.

Appellee contends that the Second District was wrong to certify conflict with *Davis v. Davis*, 301 So. 1d 154 (Fla. 3d DCA 1974); *Aetna Life ins. Co. v. White*, 242 So. 2d 771 (Fla. 4th DCA 1970); and *Raggio v. Richardson*, 218 So. 2d 501 (Fla. 3d DCA), *cert. denied*, 225 So. 2d 917 (Fla. 1969), because no "direct conflict" as required by rule 9.030(a)(2)(A)(vi), Fla.R.App.Pro., exists. The courts in those cases generally upheld the primary beneficiary's claim that the settlement agreement in question did not waive their right to claim the insurance proceeds upon the death of the insured, just as the court here did. The conflict is not in result, but in legal reasoning; the court here merely set down a black-letter rule that a settlement agreement must specifically address insurance proceeds if the courts will construe the agreement to reach the proceeds, while the other courts expressed a willingness to delve into the parties' "unexpressed intent" in their review of the agreement. Appellee contends that such differences in legal reasoning does not set forth the necessary "direct conflict" required by the rule, and this Court should exercise discretion not to review this case.

II. WHETHER THE DISTRICT COURT ERRED AFFIRMING THE TRIAL COURT SINCE THERE WERE DISPUTED ISSUES OF FACT REGARDING THE INTENT OF THE PARTIES TO THE SETTLEMENT AGREEMENT

Appellant raises a procedural issue in his first issue on appeal, arguing that disputed issues of fact exist that preclude the entry of summary judgment. Appellee submits that this argument is beside the point: The ruling of

the Second District acknowledges that disputed issues of intent existed, but aligned Florida "with the law in a majority of jurisdictions that have faced this issue" by setting forth a simple, easily-applied, bright-line rule that makes the disputed issues raised by the appellant irrelevant. However, should this Court find appellant's argument not beside the point, appellee responds as follows.

In responding to appellant's argument, appellee makes three points (1) the agreement on its face presents no disputed issues of fact because no reasonable interpretation of the agreement could be made to extend it to cover insurance policy proceeds; (2) no admissible evidence was presented by appellant to the trial court to contradict appellee's clear statement that she had no intent to divest herself of an insurance expectancy interest when the settlement agreement was made; and (3) the agreement's merger clause makes any prior oral understandings or agreements concerning the parties' intent irrelevant, because any such understandings and agreements merged with the final document.

III. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT MUCCITELLI COULD NOT RELEASE HER EXPECTANCY INTEREST IN THE LIFE INSURANCE PROCEEDS BY SIGNING THE SETTLEMENT AGREEMENT.

The rule set forth by the Second District in this case is simple, straight forward, easy to apply, both intuitively fair and fair to both parties, and in line with the law of many other states. It is not a radical departure from existing Florida law, but is a proper evolution in the state's common law. In short, it is precisely the kind of rule this Court should adopt for application throughout the state. This Court should adopt the Second District's ruling and align Florida with "the law in a majority of jurisdictions that have faced this ques-

tion" (slip op. at 4) and rule that an expectancy interest in life insurance proceeds is not extinguished by general releases in a divorce settlement, but can be extinguished only by specific reference in the agreement itself.

Argument

I. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETION NOT TO TAKE JURISDICTION OVER THIS CAUSE BECAUSE THERE EXISTS NO "DIRECT CONFLICT" PURSUANT TO RULE 9.030(a)(2)(A)(vi), Fla.R.App.Pro.

Appellee contends that this Court should deny review of this matter because, despite certification by the Second District Court of Appeal, there is no "direct conflict with decisions of other district courts of appeal" as required by rule 9.030(a)(2)(A)(vi), Fla.R.App.Pro. The cases cited by the district court as being in conflict generally come to the same conclusion as the district court here; the primary beneficiary is not divested of her expectancy interest by the terms of a settlement agreement entered in a dissolution of marriage. Appellee concedes that the courts in the conflict cases got to that conclusion through a somewhat different route as the district court here, but appellee contends that "direct conflict" does not arise through minor changes in legal reasoning. The Second District's opinion in this case is an evolutionary development in the law and is not in "direct conflict" with the cited cases.

The Second District in its opinion acknowledges that parties in a divorce can, through their settlement agreement, waive an expectancy interest in life insurance benefits, and they recognize that disputes of this sort must be resolved by reviewing the terms of the agreement. The Court only, it appears, made explicit the intuitive reaction that most judges and lawyers seem to have when confronted with this question: How can an expectancy, which can be extinguished at the whim of the insured, be a "claim" or a "right" that the beneficiary can be deemed to "give up" in a settlement agreement that does not explicitly say so? What does the beneficiary possess that can be "given up" in the settlement process when the policy owner retains the unfettered discre-

tion to change (or not change) the beneficiary whenever he chooses? Making explicit the recognition of that fact, and requiring parties to say in their settlement agreements how they intend to dispose of life insurance proceeds if they do not intend to rely on insurance company records, is not a departure from existing law and does not express a conflict with the cited cases.

Appellee submits that no direct conflict exists in this case, and the court should refuse to exercise jurisdiction.

II. WHETHER THE DISTRICT COURT ERRED AFFIRMING THE TRIAL COURT SINCE THERE WERE DISPUTED ISSUES OF FACT REGARDING THE INTENT OF THE PARTIES TO THE SETTLEMENT AGREEMENT

Appellant raises a procedural issue in his first issue on appeal, arguing that disputed issues of fact exist that preclude the entry of summary judgment. Appellee submits that this argument is beside the point: The ruling of the Second District acknowledges that disputed issues of intent existed, but aligned Florida "with the law in a majority of jurisdictions that have faced this issue" by setting forth a simple, easily-applied, bright-line rule that makes the disputed issues raised by the appellant irrelevant. However, since appellant raises the issue, Ms. Muccitelli responds as follow.

Ms. Muccitelli contends the trial court was fully and eminently correct in finding no material issues of fact in this cause. Appellant argues that Muccitelli's deposition, the affidavit of appellant Cooper, and the text of the settlement agreement show a disputed issue of fact (that being whether the parties intended by their settlement agreement to waive Ms. Muccitelli's expectancy interest in life insurance) sufficient to preclude the entry of summary judgment. Appellee's position is that, since the settlement agreement is clear on its face, the court need not take parol evidence regarding the parties' intent, and even if the court did take into account such parol evidence, no admissible evidence presented by the documents in the file raised such an issue.

The settlement agreement is clear on its face and does not show any intent by either party to divest the other of a life insurance expectancy. In paragraph 6, the parties relinquish claims against the other's estate, merely restating the provisions of section 732.507, Florida Statutes (1993). In paragraph 7, the parties relinquish claims against the other for all matters arising prior to

the date of the agreement, and Mr. Pasquino's death occurred almost a year and a half after the agreement was signed. Ms. Muccitelli is not making a claim against her former husband's estate, and she is making no claim against him personally. Paragraph 6 by its language applies to claims one party held against the other party at the time of divorce. Ms. Muccitelli had no claim to any life insurance benefits at the time; she makes no claim against Mr. Pasquino or his estate now. Nothing in paragraphs 6 or 7 serves to waive Ms. Muccitelli's claim for life insurance proceeds.

To the extent the court needs to look beyond the settlement document, the former husband's intent as shown by admissible evidence is clear. He changed the beneficiary on one policy, but not the policy in dispute, thereby showing an intent not to divest her of her interest. He added Karin Muccitelli's daughter to his SGLI policy as a primary beneficiary, even though he had no legal responsibility to support her. The language of the separation agreement shows no intent to divest Karin Muccitelli of her entitlement to insurance proceeds. Further, even if the Mr. Pasquino did intend to change the beneficiary of the policy, "A mere intent to change the beneficiary of a life insurance policy is not legally sufficient, absent some affirmative action taken by the insured to effectuate the change." *Davis v. Davis*, 301 So. 2d 154 (Fla. 3d DCA 1974); *O'Brien v. Elder*, 250 F.2d 275 (5th Cir. 1958). The record reflects no affirmative action on his part to change the beneficiary of this policy. Signing the settlement agreement cannot reasonably be construed as an "affirmative action taken by the insured to effectuate the change" where the agreement makes no reference to insurance in any respect.

Karin Muccitelli's deposition indicates no intent on her part at the time of the settlement to waive any rights to life insurance proceeds. During the settlement negotiations, life insurance simply was not discussed in any way.

She indicates that the decedent was concerned about providing for Muccitelli after the divorce and he was concerned about his former step-daughter. The evidence shows an intent on the part of the decedent not to affect any interest Muccitelli may have in the life insurance benefits.

The affidavit filed by Sandra Cooper likewise cannot raise a material issue because no relevant portions of it are properly considered in a motion for summary judgment. The affidavit in paragraphs 3 through 10 contains only hearsay and multiple hearsay not admissible under any exception to the hearsay rule or any other rule of law, and thus the statements are not properly considered in determining whether the motion for summary judgment should be granted. The affidavit relates information not within the personal knowledge of the affiant as required by rule 1.510(e), Fla.R.Civ.Pro., and sets forth facts not admissible in evidence.

All of the attachments to the affidavit are irrelevant to any of the issues presented by the complaint, and with the exception of the letter from Karin Muccitelli to the decedent dated July 6, 1992, contain exclusively inadmissible hearsay, and are not properly considered pursuant to rule 1.510(e), Fla.R.Civ.Pro.

Paragraph 4 of the affidavit is the only portion relevant to the issues at hand. Paragraph 4 states, "My brother indicated to me that Karin had agreed to give up any and all claims she had against my brother's property including any claim for life insurance proceeds if he would sign the divorce papers which were delivered to him by his wife." Rule 1.510(e), Fla.R.Civ.Pro., states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Aside from the inherent unbelieveability of the allegations in para-

graph 4 of the affidavit, that paragraph sets forth only that Karin had told Thomas, who told Sandra, that Karin agreed to give up all claims, "including any claim for life insurance proceeds," if he signed the settlement agreement. Such a statement is simply inadmissible hearsay. Multiple hearsay is admissible under section 90.805, Florida Statutes (1993), so long as each statement is separately admissible. Assuming the statement from Karin to Thomas is admissible as an admission under section 90.803(18), Florida Statutes (1993), the statement from Thomas to Sandra relating Karin's statement falls within no recognized hearsay exception. No predicate for the spontaneous statement exception is laid out, and the only exception that is even arguable is "then existing mental, emotional, or physical condition" under section 90.803(3), Florida Statutes (1993). That exception does not apply because the statement in the affidavit relates *Karin's* "statement of intent, plan, motive," etc., not Thomas'. Ms. Cooper does not indicate that Thomas, at the time the settlement was being negotiated, intended the settlement agreement under negotiation to preclude Karin's entitlement to life insurance benefits, only that she alleges that Karin said to Thomas that the settlement agreement did so. A statement of one layman's interpretation of a legal document made to another cannot fall within the hearsay exception.

Statements of Thomas' intent or understanding after the settlement was negotiated are neither relevant nor admissible. The remaining statements in the affidavit attributed to Thomas (specifically paragraphs 5, 6, 7, and 8) clearly are not admissible under any exception. The statements are at best those of a layman expressing his understanding of a legal document, and the statements are "an after-the fact statement of memory or belief to prove the fact remembered or believed," precluded from admission under section 90.803(3)(b)1., Florida Statutes (1993). The relevant portions of the affidavit

thus do not relate admissible evidence and are not properly considered in determining whether a material issue of fact exists sufficient to preclude the entry of summary judgment.

A final problem with paragraph 4 and its usefulness in determining the parties' intent lies in paragraph 11 of the settlement agreement. That paragraph states, "General provisions. This agreement is entire and complete and embodies all understandings and agreement between the parties. No oral statement or prior written matter outside of this Agreement shall have any force or effect." This merger clause prevents the court from using any parol agreements or statements to interpret the agreement. Paragraph 4 of the affidavit is precisely that; on the off chance that Ms. Muccitelli told Mr. Pasquino that she was waiving entitlement to life insurance, such a statement is an "oral statement ... outside of this agreement" relating to an "understanding" which merges into the contract upon signing. Since the contract by its terms does not waive Ms. Muccitelli's right to the proceeds, her alleged oral statement cannot be used to claim such a waiver.

III. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT MUCCITELLI COULD NOT RELEASE HER EXPECTANCY INTEREST IN THE LIFE INSURANCE PROCEEDS BY SIGNING THE SETTLEMENT AGREEMENT.

The rule set forth by the Second District in this case is simple, straight forward, easy to apply, both intuitively fair and fair to both parties, and in line with the law of many other states. It is not a radical departure from existing Florida law, but is a proper evolution in the state's common law. In short, it is precisely the kind of rule this Court should adopt for application throughout the state.

Expectancies in term life insurance benefits are evanescent, potentially ephemeral things. They clearly are not property rights ("[A]s a beneficiary, appellee had no property rights in Mr. Girard's life insurance policy to settle, she had only an expectancy." *Girard v. Pardun*, 318 N.W. 2d 137 (S.D. 1982)), nor are they claims, causes of action, or other things of value. No bank would use the expectancy as collateral, and only a gambler would risk anything of value on the continued existence of the expectancy, especially in the context of a divorce. Given the shifting tide of personal affections, especially in the context of a divorce, the divorcing spouse/beneficiary certainly can have no illusions that her ex-spouse/policy owner would keep her as beneficiary, and it is equally unlikely to expect, in most cases, that the policy owner would want to keep his ex-wife as beneficiary. But what of the case in which the policy owner does in fact want his former spouse to remain as beneficiary? When the settlement agreement does not mention insurance proceeds, what does the owner have to do to make certain his former wife remains as beneficiary? Mr. Pasquino changed the beneficiaries on one policy immediately before his suicide, but not the policy in question. What does that act show? Does it show an

intent that Ms. Muccitelli receive the proceeds, or does it demonstrate his belief that he need not change the beneficiary because the settlement agreement did it for him? Such questions highlight the wisdom of the proposed rule, and the absolute accuracy of the Second District's statement, "[The proposed rule] is the better approach because it requires an objective decision based on legal principles rather than a case-by-case attempt to determine the unexpressed intent of a deceased person." (Slip op. at 5).

In *Nunn v. Equitable Life Assurance Society, Inc.*, 272 N.W.2d 780 (N.D. 1979), the court affirmed the trial court's judgment awarding life insurance proceeds to the named beneficiary over a claim that a divorce settlement agreement waived the primary beneficiary's entitlement to the proceeds, and stated, "The plaintiff in this case is arguing that in effect the person entitled to the proceeds of the policy is whoever the decedent intended it to be, even if not the named beneficiary. It requires little imagination to envision the mischief that would be caused by the adoption of such a rule. Disputes among friends, relatives, and heirs of the decedent would be a regular occurrence. Insurance companies presumably would invariably deposit the proceeds in court because they could not rely on their records." *Id.* at 784. In *Girard v. Pardun*, supra, the court wrote, "... Paul Girard knew Vera Pardun was the named beneficiary on his life insurance policy; it was in his power to change that designation. He chose not to do so even though time and opportunity permitted. If this court were to interpret blanket divorce agreement phrases, as we find here, to reach the deceased's life insurance policy, we would find ourselves in the quagmire envisioned in *Nunn*." *Id.* at 140.

Such a quagmire is brewing here. In her deposition, Ms. Muccitelli stated:

> Q. [By the undersigned on cross-examination] Okay. On the last conversation [before his suicide] you said that

[Mr. Pasquino] made some comment about wanting to make sure you were taken care of?

A. Yes.

Q. Try -- I want you to try to be as specific and use as many quotes as you can, try to remember the language as exactly as you can. How did that conversation go?

A. He told me, "Even though you are still married I still love you, I want to make sure that you are okay and I want to continue to take care of you. I want to -- I want to make sure you are taken care of."

(R 132-33)

In her affidavit is opposition to summary judgment, appellant stated:

5. After the divorce, I had conversations with my brother concerning the difficult time he was having dealing with the divorce.

...

7. My brother reminded me that I was the only beneficiary on the Academy Life Insurance policy and was the executor of his will. ...

8. My brother told me that he did not need to take Karin's name off the Academy Life Insurance policy because it was his understanding and intent that the divorce papers terminated Karin's interest in the life insurance. My brother told me that since Karin had agreed to give up everything including the life insurance proceeds, he did not have to change the beneficiary designation because my name was already on the policy.

Perhaps one party is lying, or perhaps Mr. Pasquino was being deceitful. The prospect of a $100,000 windfall, with the emotion sharpened by the fact of suicide, is sufficient to make otherwise honorable people do less-than honorable things. It is unusual that Mr. Pasquino would have wanted to "take care" of his ex-wife, but not unheard of, and his act of making Ms. Muccitelli's daughter (Mr. Pasquino's ex-stepdaughter) a beneficiary of his SGLI policy immediately before his suicide gives Ms. Muccitelli's statement the ring of truth. On the other hand, it seems odd that Mr. Pasquino would have discussed with his sister the alleged fact that Ms. Muccitelli was giving up enti-

tlement to life insurance proceeds in their divorce, but Mr. Pasquino did seem somewhat obsessed with insurance matters.

We relate these factual matters only to demonstrate the quagmire which the court must mine if it is to "determine the unexpressed intent of a deceased person." Ms. Muccitelli contends (correctly, we argue) that Ms. Cooper's affidavit is hearsay that does not fall within any exception. Hearsay rules can impede a beneficiary from showing a decedent's intent, but they also serve to protect a primary beneficiary from a dissembling secondary beneficiary. The entire morass, and certainly even more difficult factual situations that can and do arise under similar cases, is avoided by the rule adopted by the Second District.

The Second District correctly states that its decision "is in conformance with the law in a majority of jurisdictions that have faced this question (slip op. at 4). Where the settlement agreement does not specifically address insurance policies, the courts will not deny the primary beneficiary the proceeds. Couch on Insurance 2d states:

> In consequence of the fact that ordinarily divorce does not affect the right of the named beneficiary, it follows that where the husband does not change the beneficiary on his policy after having been divorced, the divorced wife is entitled to the proceeds of the policy upon the death of the insured.
>
> The divorced wife may, however, have surrendered her rights as beneficiary by a property settlement agreement which may or may not have been incorporated into the divorce decree. For example, a divorce decree specifically awarding the husband all insurance policies on his life divested the wife of any interest she might have had as a beneficiary under a policy conceded to be community property. Likewise, where the property settlement agreement contemplated a disposition of all property rights and other matters and specifically described a life policy in which the wife was beneficiary and stated that the husband was to receive the policies free and clear of any claims by the wife, the wife waived and relin-

> quished all right to the insurance proceeds of the policy in which she was beneficiary ....
>
> Whether a property settlement agreement should be deemed to bar the divorced wife is a question of the construction of the agreement itself. Where there is no provision that the effecting of the settlement agreement should deprive her of her rights as named beneficiary and she in fact remains as named beneficiary, the settlement agreement will not be given broader scope than its express terms specify and she will not be barred from her right as the named beneficiary.
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> 5 Couch on Insurance 2d § 29:4

In *Girard v. Pardun*, 318 N.W. 2d 137 (S.D. 1982), the court stated, in affirming summary judgment for the ex-wife primary beneficiary:

> We agree with the general rule expressed in Couch and applied in Mullenax [v. National Reserve Life Insurance Co., 29 Colo. App. 418, 485 P.2d 137 (1971)] and Lynch [v. Bogenrief, 237 N.W.2d 793 (Iowa 1976)]. The clear import of the Stipulation and Agreement is that the parties settled all their property rights by such agreement. But, as beneficiary, appellee had no property rights in Mr. Girard's life insurance policy to settle, she had only an expectancy. This expectancy could only be contracted away by reference to the life insurance policy in the Stipulation and Agreement and we decline to rewrite divorce stipulation and agreements to contain such a reference.
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> *Id.* at 140.

The same result is reached in *Prudential Ins. Co. v. Weatherford*, 49 Or. App. 835, 621 P.2d 83 (1980). In construing a settlement agreement that released "the other from any and all claims and property demands, each against the other, except as expressly provided in this agreement,' *Id.*, at 621 P.2d 84, the court stated, "Here, [the ex-wife's] interest in the policy was not a property interest, but a mere expectancy, and it was not specifically dealt with by the terms of the property settlement agreement. By the terms of the policy itself that expectancy was subject to termination by the decedent, without the beneficiary's consent, by filing a written notice of change of beneficiary. ... Since

decedent had not changed the beneficiary at the time of his death, the named beneficiary is entitled to the policy proceeds." *Id.* at 87.

In *Bowers v. Bowers*, 637 S.W. 2d 456 (Tenn. 1982), the Tennessee Supreme Court reviewed a claim by the ex-wife to insurance proceeds and construed a divorce settlement agreement that said, "Each party relinquishes to the other any rights or claims not provided for herein." As in the instant case, the wife was represented in the divorce and the husband appeared pro se. The Court of Appeals reasoned that the husband would not have understood the formal requirements for changing a beneficiary and found that a layman reading the property settlement agreement would believe that a spouse had in fact relinquished her right to claim life insurance proceeds. The supreme court, in reversing the court of appeals, stated, "It is our view that the property settlement agreement had no force and effect whatsoever upon the life insurance policy and neither the agreement nor the divorce terminated wife's status as named beneficiary in the policy or her right to receive the proceeds." Id. at 459. See also, to the same end, *Hott v. Warner*, 268 Wis. 264, 67 N.W.2d 370 (1954); *Molfetta v. Connecticut General Life Ins. Co.*, 134 N.Y.Supp. 2d 168 (1954); *John Hancock Mut. Life Ins. Co. v. Heidrick*, 38 A.2d 442 (N.J. 1944); *Wolf v. Wolf*, 147 Ind. App. 240, 259 N.E.2d 93 (1970); *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56 (1931); *Flowers v. Flowers*, 284 Ala. 230, 224 So. 2d 590 (1969); *Rountree v. Frazee*, 282 Ala. 142, 209 So. 2d 424 (1968); *Mullenax v. National Reserve Life Ins. Co.*, 29 Colo. App. 418, 485 P.2d 137 (1971), and cases collected at 31 A.L.R. 4th 53 (1984).

In light of the fact that the trend of authority throughout the country is toward the position set forth by the Second District (and certainly it appears that the more modern cases rule almost exclusively this way), it would fall to the appellant to argue why the trend is wrong and why Florida should not

align itself with the majority view. Appellant argues only, "If Muccitelli wanted to preserve her expectancy interest she would have specified in the agreement that she be maintained as the primary beneficiary. Her failure to do so further evidences Muccitelli's intent to relinquish the expectancy interest." (Appellant's Initial Brief at 7). Appellant does not argue that the rule is unwise, only that it is a departure from current Florida law, a fact readily acknowledged by the court.

Appellee acknowledges that many cases throughout the country support the old rule and attempt perform an exegesis on the settlement agreement to discern the parties' intent. As a practical matter, like in most such contract disputes, the parties in most cases simply did not think about their life insurance policies when they got divorced and the courts, under the guise of legal analysis, make what they believe to be logical extensions of the agreement to cover the policies. It is simply wrong to do that for two reasons. First, a contract should say what it means, and if it does not address some facet of the divorcing couple's life, it is not up to a court to redraft the contract retroactively. See *Mullenax v. National Reserve Life Ins. Co.*, 29 Colo. App. 418, 485 P.2d 137 (1971). Such a rule is particularly appropriate in an area such as insurance beneficiaries, where the owner of the policy retains the unfettered discretion to change the beneficiary as he chooses, and where the law requires the owner to take affirmative, specific steps to change the beneficiary designation. *Davis v. Davis*, 301 So. 2d 154 (Fla. 3d DCA 1974). Second, the courts are frequently simply wrong. The hermeneutics of *O'Brien v. Elder*, 250 F.2d 275 (5th Cir. 1957), upon which appellant relies so firmly, simply cannot be squared with *Aetna Life Insurance Co. v. White*, 242 So. 2d 771, 774 (Fla. 4th DCA 1971) and *Davis v. Davis*, 301 So. 2d 154 (Fla. 3d DCA 1974) and it is wrong for a court to try. Young healthy people getting divorced usually do not

think about their own or their spouse's death (at least not in terms of life insurance), and an after-the-death exploration of "what the parties intended" when it comes to life insurance proceeds is actually little more than guessing about what they *would have done* had they thought of it. The rule proposed in this case supplies some intellectual honesty by acknowledging that fact and taking the courts out of the business of writing (or re-writing) divorce settlement agreements to add things the parties forgot.

The Second District has proposed a simple, easy-to-follow rule that will greatly benefit divorce lawyers and their clients by making them think and agree about their beneficiary designations if such matters concern them. Appellee respectfully requests that this court uphold the ruling of the Second District in full.

Conclusion

Appellee respectfully requests that this court affirm the court of appeal in full.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by hand/U.S. Mail/fax to Lon Worth Crow IV, 14 South Lake Ave., Avon Park, FL 33825, this _____ day of July, 1995.

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