IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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METROPOLITAN LIFE
INSURANCE COMPANY,

OPINION AND ORDER

Plaintiff,

12-cv-298-bbc

v.

BENNIE KENNEDY,
VALERIE KENNEDY and
ALFRED MIDDLETON,

Defendants.

- -

Plaintiff Metropolitan Life Insurance Company initiated this interpleader action pursuant to 28 U.S.C. § 1335 to establish the rights of various parties to proceeds from a life insurance policy plaintiff issued on the life of Gwendolyn Kennedy, who died in 2011. Gwendolyn Kennedy maintained a life insurance policy through plaintiff pursuant to the Federal Employees' Group Life Insurance Act, 5 U.S.C. §§ 8701-16.

Jurisdiction is present under 28 U.S.C. § 1335 because the insurance policy is worth more than $500 (the amount due is approximately $ 26,250), at least two of the claimants are of diverse citizenship (Valerie is a citizen of Wisconsin; Bennie is a citizen of Illinois; Alfred is a citizen of Alabama), and plaintiff deposited the proceeds into the registry of this court. Dkt. #21.

Gwendolyn Kennedy is survived by defendants Valerie Kennedy (her daughter),

Bennie Kennedy (her son) and Alfred Middleton (her ex-husband). Valerie Kennedy is named as the sole beneficiary on the policy under a beneficiary form executed in 2008. However, the original form executed in 1989 divided the proceeds equally among Gwendolyn's three children (Valerie, Bennie, and Brian Kennedy) and her then-spouse Alfred Middleton. Subsequently, Brian Kennedy predeceased his mother and Gwendolyn and Middleton divorced. After Valerie Kennedy submitted a claim for the proceeds, Bennie Kennedy contested the claim, contending that Gwendolyn lacked the mental capacity to change beneficiaries in 2008. Dkt. #28.

Valerie Kennedy has filed a motion for summary judgment. Dkt. #24. To succeed on her motion, Valerie must show that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Parent v. Home Depot U.S.A., Inc., 694 F.3d 919, 922 (7th Cir. 2012). Valerie argues that the change of beneficiary form was properly executed in 2008 and that Gwendolyn was competent to make this change to her policy. Because Bennie Kennedy has submitted sufficient evidence to show that a genuine issue of material fact exists regarding Gwendolyn's mental capacity at the time she changed beneficiaries, I am denying Valerie Kennedy's motion for summary judgment.

OPINION

The Federal Employees' Group Life Insurance Act allows an employee to designate a beneficiary or beneficiaries to receive the proceeds of the life insurance policy at the time

of the employee's death. 5 U.S.C. §8705(a). Policy benefits are paid upon death according to a specific "order of precedence" that privileges "the beneficiary or beneficiaries designated by the employee." Id. To be valid, the beneficiary designation must be "in writing, signed by the insured individual, and witnessed and signed by 2 people, [and] . . . submitted to the appropriate office via appropriate methods approved by the employing office." 5 C.F.R. § 870.802(b).

In this case, Bennie Kennedy is not arguing that Gwendolyn Kennedy's 2008 change of beneficiary form is invalid under the requirements of the Federal Employees' Group Life Insurance Act or its related regulations. Instead, Bennie argues that Gwendolyn Kennedy was mentally incompetent at the time she designated Valerie Kennedy as the life insurance policy's sole beneficiary. Several courts have assumed that state law governs the issue of mental competency in life insurance cases. E.g. Metropolitan Life Ins. Co. v. Bradway, 10 CIV. 0254 JCF, 2011 WL 723579, at *4 (S.D.N.Y. Feb. 24, 2011). The parties in this case also assume that Wisconsin law applies to this issue. If there is no conflict of law, courts apply the law of the forum state. Future-Source LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002). Thus I will apply Wisconsin law to the competency analysis.

Bennie Kennedy must meet a demanding standard to defeat Valerie's motion for summary judgment and ultimately prevail on his claim. In Wisconsin:

> The law presumes that every adult person is fully competent until satisfactory proof to the contrary is presented. The burden of proof is on the person seeking to void the act. The test for determining competency is whether the person involved had sufficient mental ability to know what he or she was doing and the nature and consequences of the transaction.

Hauer v. Union State Bank of Wautoma, 192 Wis. 2d 576, 589-90, 532 N.W.2d 456, 461 (Ct. App. 1995) (citations omitted). In other words, Bennie must prove that Gwendolyn Kennedy was mentally incapacitated at the time she changed the beneficiaries to her life insurance policy. Id. at 591. Lay and expert opinions, prior and subsequent adjudications of incompetency and almost any conduct may be relevant when determining competency. Id. at 590. If the insured is found mentally incompetent, a designation of beneficiary that was executed according to the procedure specified in the Federal Employees' Group Life Insurance Act can be set aside. Metropolitan, 2011 WL 723579, at *4.

In support of his argument, Bennie Kennedy submitted two affidavits. I will not consider the affidavit of Bennie's lawyer Ralph Koopman, dkt. #32, because Koopman cannot provide fact testimony in a case in which he is acting as counsel. Wis. SCR 20:3.7(a); United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir. 1996) ("counsel is barred from acting as both an advocate and a witness in a single proceeding except under special circumstances"). However, I will consider the affidavit of Gwendolyn's live-in caretaker, Tina Russell, dkt. #31, even though Bennie Kennedy did not follow this court's summary judgment procedures regarding proposed findings of fact when he submitted his evidentiary materials. Valerie Kennedy did not object on those grounds and responded to the evidence in her reply brief. Dkt. #37.

Russell swears personal knowledge of the events she describes and averred the following about Gwendolyn Kennedy's mental competence:

- "Gwendolyn was not competent and could not take care of herself in any

way"; dkt. #31, at 3.

- "[Gwendolyn] could not make decisions for herself, cook for herself, and had to be watched almost constantly to make sure she did not wander off"; Id.

Russell also witnessed the execution of the change of beneficiary form and averred that

- "Valerie Kennedy told her mother to 'sign here' on the form. Gwendolyn Kennedy signed the form without question"; Id. at 5
- "No explanation was made or given as to the need for [Gwendolyn's] signature on the form, what the form was for, or what significance [Gwendolyn's] signature had on the form"; Id.
- Russell "has no reason to believe, as [Gwendolyn's] caregiver, that [Gwendolyn] knew what she was doing when told to sign the form." Id.

Although Russell's observations are sparse, a reasonable jury could rely on them to conclude that Gwendolyn Kennedy was not legally capable of forming a binding agreement at the time she made changes to her policy. Russell stated that Gwendolyn signed the change of beneficiary form when Valerie asked, without questioning the significance of the act. According to Russell, no one attempted to explain to Gwendolyn what she was signing or the significance of the signature. Russell saw no indication that Gwendolyn understood what she was doing when she signed the form. Coupled with Russell's observation that Gwendolyn Kennedy was generally incapable of making her own decisions or taking basic care of herself, the affidavit calls into question Gwendolyn's mental capacity at the time she signed the change of beneficiaries form. If Gwendolyn lacked the mental capacity to change

beneficiaries, the change may be void. Hauer, 192 Wis. 2d at 588. See also Commercial Union Ins. Co. v. Schmidt, 967 F.2d 270, 273 (8th Cir. 1992) (affidavits submitted by nurses describing insured as "confused, forgetful, unable to answer questions, mumbling to herself, and even incoherent" in days before executing change of beneficiary form establish genuine issue of material fact regarding competency); Metropolitan Life Ins. Co. v. Wasilewski, 86 C 6638, 1988 WL 31475, at *1 (N.D. Ill. Mar. 28, 1988) (conflicting observations about insured's mental capacity found in affidavits of "friends and associates" were sufficient to establish issue of material fact).

Although Valerie Kennedy argues in her briefs that Gwendolyn Kennedy was competent at the time the form was executed, she submitted no evidence that would call into question the admissibility of Russell's statements. In fact, Valerie Kennedy did not submit any evidence at all about what occurred when the change of beneficiaries form was executed. In addition, the sole case on which Valerie Kennedy relies is distinguishable. In American General Life Insurance Co. v. Schreiber, 563 F. Supp. 2d 947, 948 (W.D. Wis. 2008), the defendants in an interpleader action disagreed over whether Michael Schreiber had the mental capacity to change the beneficiaries of his life insurance policy. Schreiber's widow and sole beneficiary submitted a claim for the proceeds, but Schreiber's daughter from a previous marriage contested it. Id. This court granted the widow's motion for summary judgment because none of the daughter's averments about her father's mental illness were admissible. Id. at 949. Unlike Russell's admissible averments, the daughter's testimony was not based on personal observation and did not shed any light on the insured's mental state

in the moment he changed his policy's beneficiaries. Id.

Viewed in the light most favorable to Bennie Kennedy, the question of Gwendolyn's mental capacity at the time she made changes to her life insurance policy is a genuine dispute of material fact for a jury to decide.

ORDER

IT IS ORDERED that defendant Valerie Kennedy's motion for summary judgement, dkt. #24, is DENIED.

Entered this 12th day of June, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge