

SUPREME COURT OF OKLAHOMA

Harjo v. Fox, 193 Okla. 672

146 P.2d 298 (1944) · Decided February 15, 1944

OPINION

HURST, J.

This is a suit to recover one-half the proceeds of a life insurance policy. The principal questions presented are whether, under the terms of the policy, the consent of the Secretary of the Interior was necessary to give validity to an attempted change of beneficiaries, and, if so, whether such consent could be given after the death of the insured.

In 1924, Sandy Fox, a wealthy Creek Indian whose funds are under the control of the Secretary of the Interior, caused an insurance policy in the sum of \$25,000 to issue upon the life of Legus Harjo, his sister's husband. All premiums thereon until the death of Harjo in 1937 were paid by Fox from his restricted funds.

The policy provided that the insured, Legus Harjo, might from time to time "with the consent of the then Secretary of the Interior of the U.S. A., duly evidenced in writing and only with such consent" change the beneficiary by filing a written request therefor with the company.

The policy also provided that the consent of the Secretary was required before the insured could borrow money on the policy, or reinstate, surrender, or assign the same. The original beneficiaries were the wife and son of the insured, but after their deaths the beneficiaries were changed and the policy made payable to "the then Secretary of the Interior of the United States of America for the use and benefit of" plaintiff, Mina Harjo, daughter of Legus Harjo, and defendant, Mary Fox, wife of Sandy Fox.

These latter beneficiaries are also full-blood Creek Indians. In 1937, Sandy Fox became estranged from his wife and brought suit for divorce. On June 29, 1937, while the action was pending, Legus Harjo, joined by Sandy Fox and obviously at his request, wrote a letter to the Superintendent of the Five Civilized Tribes in which he stated that it was his desire to eliminate Mary Fox as a beneficiary, leaving the proceeds of the policy payable solely to Mina Harjo.

The Superintendent, in accordance with his regular practice, referred this request to the Probate Attorney for investigation and recommendation before forwarding it to the Secretary of the Interior for approval. On August 27, 1937, before the investigation was completed and before either the insurance company or the Secretary of the Interior learned that such a request had been made, Legus Harjo died.

On September 11, 1937, Sandy Fox, having become reconciled with his wife, appeared at the agency office and signed an instrument revoking his former request for a change of beneficiary, and thereupon the Superintendent and the Probate Attorney dropped the matter.

The reconciliation, however, was short lived, and on November 8, 1937, Sandy Fox reappeared at the agency and stated that he had signed the revocation of September 11th only to keep peace in the family. He then executed a new instrument wherein he reversed himself once more and requested that Mary Fox be eliminated as a beneficiary under the policy. Acting upon this request the Superintendent made a report to the Commissioner of Indian Affairs recommending that the application of June 29, 1937, for change of beneficiaries be approved, and on January 24, 1938, the same was approved by the Secretary of the Interior.

The insurance company, however, doubting the right of the Secretary of the Interior to consent to the change of beneficiaries after the death of the insured, and fearing double liability, refused to pay the amount due under the *Page 674 policy to Mina Harjo alone, but instead, on November 10, 1938, issued its check for the same to the Secretary of the Interior "for the use and benefit of Mina Harjo and Mary Fox."

The check was cashed and deposited in a special fund pending a decision by the Commissioner of Indian Affairs as to the ownership thereof. On August 12, 1939, the Commissioner of Indian Affairs wrote an opinion, approved by the Secretary of the Interior, holding Mina Harjo alone to be entitled to such fund.

On appeal to the Secretary of the Interior, however, the decision was reconsidered and reversed and an order entered giving one-half of the fund to Mary Fox. Mina Harjo then demanded of the Superintendent that, notwithstanding such departmental ruling, he credit her account with the full amount of the fund, and, upon his refusal to do so, instituted this suit to determine the ownership of that part of the fund remaining in the hands of the Superintendent and to recover judgment against Mary Fox for the amount thereof which she had already received, which at the time of the trial amounted to \$11,163.07.

On trial judgment was for defendant, and plaintiff appeals. 1. Plaintiff first contends that since the proceeds of the policy were payable to the Secretary of the Interior "for the use and benefit" of Mina Harjo and Mary Fox, the Secretary of the Interior, as trustee, was beneficiary, and plaintiff and defendant were only cestuis que trustent. She then argues that the beneficiary was never changed, but only the cestuis que trustent, and that the provisions of the policy requiring the consent of the Secretary of the Interior to a change of beneficiary do not apply to a change of the cestuis que trustent.

We do not agree. Whatever the result might be were the parties ordinary individuals, the mere words "for the use and benefit of" do not, under the circumstances here disclosed, create the

relation of trustee and cestuis que trustent, in a legal sense, between the Secretary of the Interior and full-blood Indians.

The relation of the federal government to members of the Indian race is unique. It is not exactly analogous to any of the ordinary legal relations. It is most closely akin to that of guardian and ward, and Indians and Indian tribes have been referred to by the courts as "wards of the nation," "pupils," and "local dependent communities." Mills, *Oklahoma Indian Land Laws* (2d Ed.) § 5.

Regardless of the nomenclature of the relationship it is now well established that the power of Congress to deal with Indians is plenary, and that it may enact any laws it sees fit for their protection and care. 27 Am. Jur. 568; 31 C. J. 493; Mills, *Oklahoma Indian Land Laws* (2d Ed.) § 8.

In pursuance of the power Congress has vested the Department of the Interior with general control over the affairs of Indians. 27 Am. Jur. 569. In the instant case it is stipulated that the funds of Sandy Fox were subject to the supervision and control of the Secretary of the Interior.

Having such control, the Secretary could, before permitting the expenditure of the funds for premiums thereon, require the policy to contain such clauses for the protection of Sandy Fox and the other Indians as he saw fit. See *United States v. Brown*, 8 F.2d 564; *Sunderland v. United States*, 266 U.S. 226, 235, 45 S.Ct. 64, 69 L.Ed. 259; *Nail v. American Nat.*

Bank of Bristow, 22 F. Supp. 977, aff., *Burgess v. Nail*, 103 F.2d 37. Since the premiums on the policy were to be paid from the funds of Sandy Fox and the beneficiaries were his relatives, the Secretary evidently thought it wise to place some restrictions upon the right of Legus Harjo to change the beneficiaries, and therefore required the insertion of a clause prohibiting any such change without the consent of the Secretary of the Interior.

In the light of these circumstances it is apparent that Mina Harjo and Mary Fox, and not the Secretary of the Interior, were the beneficiaries within the meaning of the policy, and that the proceeds thereof were made payable to him "for their use and *Page 675 benefit," not with the idea of creating any relation of trustee and cestuis que trustent between them, but only because such beneficiaries were full-blood Indians and he desired to make certain that any funds coming into their hands would be placed under his supervision and control.

It follows that Mary Fox could not be eliminated as a beneficiary without the consent of the Secretary of the Interior. 2. Plaintiff urges, however, that the insured had done all in his power to effect the change, and that the consent of the Secretary of the Interior could be given after his death.

The general rule is that where the insured has done all in his power to effect a change of beneficiaries, and after his death only ministerial acts remain to be performed, the courts may

regard that as done which ought to have been done and treat the nonperformance of such ministerial acts as immaterial. 37 C. J. 585; 29 Am. Jur. 985; 78 A. L. R. 947 note; New York Life Ins.

Co. v. Wilson, 181 Okla. 363, 73 P.2d 1133. But this rule does not apply where the acts remaining to be performed after the death of the insured are not merely ministerial, but involve the exercise of discretion. 37 C. J. 586; Ringler v. Ringler, 156 Md. 270, 144 A. 221; Freund v. Freund, 218 Ill. 189, 75 N.E. 925, 109 Am. St. Rep. 283; Sheppard v. Crowley, 61 Fla. 735, 55 So.

841; State Mutual Life Assur. Co. v. Bessett, 41 R.I. 54, 102 A. 727, L.R.A. 1918C, 961. In the case of State Mutual Life Assur. Co. v. Bessett, above, the court said that the question to be decided in such a case is "whether the acts required, but unperformed, were essential parts of the contract or were ministerial and formal details."

In the case of Ringler v. Ringler, above, the insured was a member of a railroad relief department organized for the purpose of providing benefit insurance for its members. By the terms of the policy the insured could change the beneficiaries only with the approval of the superintendent of the relief department.

The insured drew up a written statement purporting to effect a change of beneficiaries, but did not, during his lifetime, obtain the approval of the superintendent. The court in refusing to give effect to the intended change said that in any contest between beneficiaries where the insurance contract provides that the beneficiaries may not be changed unless and until some act involving discretion in respect thereto has been performed by the insurer or its agent, no act on the part of the insured attempting to change the beneficiaries will be regarded as effective unless such discretionary acts "have been performed during the lifetime of the insured," and that this is true "even though the insured has done what he could to effect the change."

There is a sound reason for this distinction between ministerial and nonministerial acts. The rights of a beneficiary under a life insurance contract vest and become fixed upon the death of the insured. Carson v. Carson, 166 Okla. 161, 26 P.2d 738; 37 C. J. 580, 581; 29 Am. Jur. 952; Ringler v. Ringler, above; Freund v. Freund, above.

The nonperformance of a purely ministerial act can have no effect upon such rights. The only person having discretionary power to decide who the beneficiary shall be has already made his choice. The ministerial acts remaining to be performed are a matter of certainty, requiring only time for their completion.

On the other hand, discretionary acts determine who the beneficiary is to be, and if their performance were permitted after the death of the insured, the rule that the rights of the beneficiary are fixed at such time would be destroyed, for the question of who the beneficiary was to be would depend upon a discretionary decision to be made after the death of the insured.

Thus, in the instant case, at the time of the death of Legus Harjo the question of whether the Secretary of the Interior would consent to his request for change of beneficiaries remained entirely undecided. The matter, at such time, had not *Page 676 even been presented to the Secretary, but awaited the outcome of an investigation then being conducted by the Probate Attorney.

Such consent, involving the exercise of discretion and not having been given prior to the death of the insured, could not be given thereafter. 3. Plaintiff finally contends that the provisions of the policy relating to change of beneficiary were for the sole benefit of the company, and that the company waived the same by paying out the proceeds of the policy after the death of the insured.

We are committed to the rule that the rights of a third person, named as beneficiary in an insurance policy such as this, vest upon the death of the insured, and that the insurer may not, after the death of the insured, destroy such vested rights by waiving its rights to insist on the provisions of the policy with reference to a change of beneficiary. *Carson v. Carson*, above.

The judgment is affirmed. CORN, C.J., and RILEY, OSBORN, BAYLESS, DAVISON, and ARNOLD, JJ., concur. GIBSON, V.C.J., and WELCH, J., dissent.