

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1982

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF
JAMES M. McAFEE, Deceased.

JEANETTE L. McAFEE, As Next of Friend
and Custodian of Christopher McAfee,
Michael McAfee, Shawn McAfee, and
Patrick McAfee, Decedent's Children;
and JEANETTE L. McAFEE, as Guardian
and Conservator of Christopher
McAfee, Michael McAfee, Shawn McAfee,
and Patrick McAfee, Decedent's Children,

Plaintiff-Appellee,

vs.

CHERYL McAFEE, as Executrix of
the Estate of James M. McAfee,

Defendant-Appellee;

CHERYL McAFEE, Individually,

Appellant;

CORY McAFEE, Decedent's Child;
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICAN: AETNA LIFE INSURANCE
COMPANY: FIRST NATIONAL BANK OF
MARION, IOWA;

and;

M & S SPECIALIZED SERVICES, INC.,

Appellant,
Defendants.

Filed March 23, 1982

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Appeal from Linn District Court, Clinton E. Shaeffer, Judge.

Cheryl McAfee, the decedent's widow, and M & S Specialized Services, Inc.,
the decedent's employer, appeal from the trial court's declaratory judgment
distributing the proceeds of two life insurance policies. AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED.

Raymond R. Stefani and Richard A. Stefani of Silliman, Gray & Stapleton, Cedar Rapids, for defendant-appellant Cheryl McAfee, individually.

Richard F. Nazette and Ronald W. Wendt of Nazette, Hendrickson, Marner & Good, Cedar Rapids, for defendants-appellees Cheryl McAfee, executrix, and Cory McAfee.

James W. Affeldt and Daniel Den Beste of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for defendant-appellant M & S Specialized Services.

James M. Redmond and Donald L. Carr, Jr., Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

OXBERGER, C.J.

Cheryl McAfee, the decedent's widow, and M & S Specialized Services, Inc., the decedent's employer, appeal from the trial court's declaratory judgment distributing the proceeds of two life insurance policies. We affirm in part, reverse in part, and remand.

James McAfee, the decedent, purchased the first life insurance policy from Aetna Life Insurance Company on January 7, 1975. The policy was for \$100,000, with a double indemnity provision in case of accidental death. At the time of the purchase, James McAfee was married to Jeanette McAfee and was a fifty percent stockholder of M & S Specialized Services, Inc. The other fifty percent stockholder was Patrick Sloan. The beneficiary provision of the Aetna policy provided for the following distribution: (1.) to First National Bank of Marion, creditor of M & S, as their interest may appear; (2.) any remainder to First National Bank of Marion, as trustee under Stock Retirement Agreement dated February 18, 1975, as their interest may appear; (3.) \$20,000 of the balance, or the entire balance if less, to M & S Specialized Services, Inc; (4.) any remainder to the executors of the insured. The Stock Retirement Agreement, which was actually dated February 1, 1975, referred to the Aetna policy, and stated the trustee was to receive sufficient policy proceeds to pay to (1) the First National Bank of Marion, as its interest may appear, as creditor of the company; (2) the D. C. Taylor Company, as their interest may appear, as creditor of the company; (3) the decedent's estate to make up the purchase price (set at \$100/share by the agreement) of decedent's stock; and (4) the decedent's widow, or his estate if his wife predeceased.

On March 30, 1979, Patrick Sloan's stock was redeemed by M & S. Anton Gaimari purchased the stock on the same day.

On August 24, 1979, the marriage of Jeanette McAfee and James McAfee was dissolved. They had four minor children. On September 8, 1979, James McAfee married Cheryl McAfee. They had one child, born June 14, 1980.

On June 30, 1980, Douglas Beed became a one-third shareholder of M & S. On the same date, the three shareholders signed a document entitled "Articles of Agreement for Ownership and Administration of M & S Specialized Services, Inc." The Articles, among other things, provided , "After the \$20,000 is paid to the corporation, the remaining money from the insurance policy shall be paid to the widow."

On July 16, 1980, James McAfee purchased a second life insurance policy from the Prudential Insurance Company. This policy was also for \$100,000, with an accidental death double indemnity provision. The application attached to the policy listed the Aetna policy and stated the Prudential policy was to "replace or change" any existing insurance. The beneficiary provision split the proceeds into two equal parts. The first half was to be paid to: (1) the First National Bank of Marion, creditor of M & S, as its interest may appear; and (2) the balance of this one-half part to M & S. The second half was to be paid to: (1) an amount sufficient determined in accord with the Stock Retirement Agreement dated January 7, 1975, or said share if less, to the First National Bank of Marion, trustee under said Stock Retirement Agreement; (2) the remaining portion of this share, if any, in the following way: (a) \$20,000, or the entire amount if less, to M & S; (b) any remainder to the estate of the insured.

M & S paid all premiums on both policies, both prior to and after June 30, 1980. James McAfee died accidentally on September 17, 1980. Both policies were in effect on the date of his death, and both double indemnity provisions were in effect.

On December 17, 1980, Jeanette McAfee as next friend, guardian, custodian, and conservator of James' four children by his first marriage, filed her petition for declaratory judgment. She alleged that the proceeds of both policies were going to be distributed directly to Cheryl McAfee, widow of the decedent, rather than

becoming a part of the decedent's estate, thus depriving the four children of the first marriage their rightful share of the proceeds. She asked for a construction of the writings and documents relating to the distribution of the insurance proceeds by the court.

After a hearing, the trial judge filed his declaratory judgment on February 10, 1981. The trial judge found the parties had stipulated to a number of facts, among them that \$27,668.59 from the Aetna proceeds had been paid to the First National Bank of Marion as creditor of M & S, and that \$27,225.20 had been paid to D. C. Taylor Company, creditor of M & S, from the Aetna proceeds. The court found that if there had been only one policy, after paying the above two debts, the proceeds would have been paid first \$4500 to buy the decedent's stock, then \$20,000 to M & S, and the balance to the decedent's estate. The court found there was a windfall by reason of there being a second insurance policy in effect and that M & S Company and the creditors should not benefit because of the windfall. Therefore, the trial court decided, all proceeds not used to pay the above debts should be distributed to the estate.

Both M & S and Cheryl McAfee, individually, appeal from this decision. Cheryl as an individual hired new counsel on appeal. She appears both individually as an appellant, and as executor of the estate, as an appellee.

M & S argues that the trial court erred (1) in expanding its findings beyond the stipulation of the facts and conclusions properly drawn; and (2) concerning the contractual provisions and appropriate disposition of the insurance proceeds. Cheryl McAfee, as an individual, argues that (1) the trial court's fact findings went outside the record; (2) she is entitled to \$121,382.66 proceeds from the Aetna policy, because the Stock Retirement Agreement expressly provides that the widow is to receive the remaining balance of proceeds; and (3) she is entitled to receive all of the proceeds to which M & S would be entitled under the Prudential policy because of the June 30, 1980, Agreement.

Cheryl McAfee, as executor of James McAfee's estate, appears as an appellee on appeal. She argues that (1) any mistakes by the trial court in its findings of fact had no bearing on its decision; (2) the trial court's disposition of the insurance proceeds was correct; (3) the trial court was aware that the Aetna proceeds had not been distributed; (4) Cheryl McAfee individually is not entitled to the proceeds from the Aetna policy; and (5) the estate, not Cheryl individually, is entitled to the entire Prudential proceeds.

Jeanette McAfee appears as an appellee on appeal. She makes the following arguments: (1) the case was one at law, and therefore our review is limited; (2) the trial court's alleged factual errors contained in the Declaratory Judgment are either harmless error or not error at all and the judgment should be affirmed; (3) Cheryl McAfee successfully argued to the trial court that the balance of the Aetna proceeds should be distributed to the estate, and she cannot now argue on appeal that she individually should receive the proceeds; (4) the intent of the decedent supports the trial court's judgment that the proceeds of both policies should go to the estate after the payment of certain business debts; (5) the trial court properly construed the Aetna policy by putting the balance of the proceeds into the estate; and (6) the trial court properly construed the Prudential policy by ruling that the entire proceeds should go to the estate.

I. Application to Correct the Record and Motions to Strike.

As part of the appeal, we must rule on four similar motions submitted by Jeanette McAfee and M & S Specialized Services. Jeanette's first motion was submitted to, and denied by, the trial court. She made application to correct the record to include Cheryl McAfee's trial brief and flow chart submitted to the trial court, which showed the distribution of the proceeds Cheryl proposed. According to the application, these documents show that Cheryl successfully argued to the trial court that the remaining \$121,000 of the Aetna proceeds should be distributed

to the estate, rather than to Cheryl individually. After the trial court denied the application, Jeanette filed a similar application in this court which was ordered to be decided with the appeal. Jeanette also submitted a motion to strike the portions of Cheryl as an individual's brief dealing with the distribution of the Aetna proceeds because of her change in position from the trial court to this court. This motion was also ordered to be decided with the appeal. M & S submitted two motions, both urging that certain portions of the briefs of Cheryl individually and Cheryl as executor be struck because of her change in position. In addition, M & S resisted Jeanette's application to correct the record as to the flow chart but not as to Cheryl's trial brief.

Cheryl McAfee, individually, resisted the application to correct the record, and the motions to strike. Cheryl as executor did not resist.

Iowa R. App. P. 10(d) provides that "If anything material to either party is omitted from the record by error or accident. . . the appropriate appellate court on proper suggestion or on its own initiative, may direct that the omission. . . be corrected. . . ." This case was submitted to the trial court on stipulated facts, briefs filed by the parties other than Cheryl, and argument. There is no trial transcript to show what occurred. Jeanette and M & S state that Cheryl argued at trial that the proceeds of the Aetna policy should go to the estate rather than to herself individually. Since there is no trial transcript, they argue Cheryl's trial brief, although not filed with the clerk, should be considered part of the record to show her argument as made to the trial court.

If Cheryl did argue that the remaining Aetna proceeds should go to the estate at trial, she cannot argue on appeal that they should go to her individually, because contentions not made at trial cannot be urged on appeal for the first time. Gordon v. Pfab, 246 N.W.2d 283, 289 (Iowa 1976). Cheryl's trial brief should be a part of the record so that we may see what position she took at the trial

level, since there is no reported transcript to show us her position. Therefore, we order that such trial brief should be a part of the record. The same considerations apply to the flow chart used in argument by Cheryl's counsel at trial, and therefore the flow chart is also made part of the record.

In her trial brief, Cheryl McAfee stated, "The parties agree that under the terms of the Aetna policy. . . the balance of \$121,382.66 is to go to the decedent's estate." The flow chart reflects the same distribution scheme. Therefore, any argument made by Cheryl that she should receive such proceeds individually cannot be considered by us on appeal. Gordon, supra at 289.

In addition, in her trial brief and flow chart, Cheryl argued that M & S should be required to pay all Prudential proceeds to which it was entitled (\$120,000) to the decedent's widow. In its motion to strike, M & S argues that Cheryl as executor on appeal cannot now argue that the proceeds should go to the estate rather than to the widow. We disagree. The trial judge ruled the estate was to receive the entire Prudential policy proceeds which in effect was a ruling in favor of Cheryl as executor of the estate. Therefore, Cheryl as executor on appeal may argue to preserve the favorable ruling that the proceeds should go to the estate.

II. The Aetna Policy Proceeds.

The First National Bank of Marion has already been paid \$27,668.59 as creditor of M & S out of the proceeds. Also, the D. C. Taylor Company has been paid \$27,225.20 as creditor of M & S. The remainder is being held pending distribution by the court.

Our duty in interpreting the beneficiary provision is to attempt "to give effect to the language of the entire contract [emphasis in original] in accordance with its commonly accepted and ordinary meaning." Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (Iowa 1976). We are trying to ascertain the intent of the parties as expressed in the language used. Id. at 138. Extrinsic evidence may be

admitted to aid interpretation when it "throws light on the situation of the parties,. . . the attendant circumstances and the objects they were striving to attain." Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 25 (Iowa 1978).

The beneficiary provision states that after payment to the bank as creditor of M & S, the remainder is to be paid to the bank "as trustee under Stock Retirement Agreement dated February 18, 1975, as their interest may appear." Although the Stock Retirement Agreement (hereafter SRA) is actually dated February 1, 1975, we will assume that it is the agreement referred to. Under the SRA, first the bank is paid as creditor of M & S, then payment is made to D. C. Taylor company. This has already been done. Our interpretation is to give a reasonable, effective meaning to all terms. Fashion Fabrics, 266 N.W.2d at 26. Such an interpretation is preferred over one which would make part of the contract unreasonable or of no effect. Id. Therefore, when we interpret the beneficiary provision and the SRA together, it would be unreasonable to assume that the bank, as creditor of M & S, is to be paid twice, even though the provision is repeated in both documents. The SRA next provides that the trustee is to pay the estate of the decedent stockholder to make up the purchase price of his stock, which in this case is \$4500. After that, the SRA provides that the trustee pay the widow of the decedent, or the estate if the wife is predeceased. If that were done, there would be no money left of the Aetna proceeds. The next provision of the beneficiary clause, to pay \$20,000 of the balance, or the entire balance, if less, to M & S, would be of no effect if the fourth provision of the SRA were followed. Also, the beneficiary clause leaves any remainder to the executor of the insured, not to the widow. Since the language of the contract itself is ambiguous, we will resort to rules of construction to determine the contracting parties' intent. See Mopper v. Circle Key Life Insurance Co., 172 N.W.2d 118, 124 (Iowa 1969). We are to construe the policy according to the intention of the

parties at the time the contract was entered. Iowa-Des Moines National Bank v. Insurance Company of North America, 459 F.2d 650, 654 (8th Cir. 1972). At the time the contract was entered, we conclude that it was the parties' intent to provide M & S with a \$20,000 payment first or that provision would not have been placed in the beneficiary clause. Further, in light of our determination in Division I, that Cheryl is precluded from arguing that the remaining Aetna proceeds should go other than to decedent's estate, we conclude the balance of the Aetna proceeds does in fact go to the estate.

III. The Prudential policy proceeds.

The beneficiary provision of the Prudential policy divides the proceeds into two equal shares. The language of the contract is clear in providing that the first one-half share of the proceeds goes to the bank as creditor of M & S, and the balance to M & S. Since the bank as creditor has already been paid from the Aetna proceeds, this entire one-half share goes to M & S, by the clear terms of the beneficiary provision. According to the policy language, the second one-half share is to be divided as follows: (1) to the bank as trustee under the SRA dated January 7, 1975; (2) \$20,000 to M & S; and (3) the remainder to the estate of the insured. The provision for disposition of this second one-half share is identical to the Aetna beneficiary provision, except that the bank as creditor is not mentioned in the beneficiary clause itself, but only in the SRA. Further, given the relevant dates, we find that the June 30 Agreement amended the SRA. (We are again assuming that the SRA "dated January 7, 1975" is in fact the SRA dated February 1, 1975). Since the June 30 Agreement amended the SRA, and since the beneficiary provision regarding the first one-half of the proceeds does not mention the SRA, the June 30 Agreement does not affect the distribution of the first one-half of the Prudential proceeds. The June 30 Agreement provides for (1) \$20,000 payable to M & S, and (2) the remainder payable to the widow.

Because there is the same ambiguity in this contract language as in the Aetna policy, we will follow the same rules of interpretation and construction. We further note that Cheryl individually argues at page 29 of her appellant's brief, and we agree, that she is entitled to receive \$20,000 out of the second half of the Prudential proceeds. Therefore, the disposition of this second one-half of the proceeds is as follows: since the SRA has already been funded, and since M & S has already received its \$20,000 from the proceeds of the Aetna policy, Cheryl shall receive \$20,000 from these proceeds; the remaining \$80,000 goes to the estate of the insured.

In summary, the policy proceeds shall be distributed as follows:

Aetna

1. First National Bank of Marion	\$ 27,668.59
2. D. C. Taylor Company	\$ 27,225.22
3. Stock Retirement Agreement	\$ 4,500.00
4. M & S Specialized Services, Inc.	\$ 20,000.00
5. Estate	Remainder of policy proceeds

Prudential

1. M & S Specialized Services, Inc.	\$100,000.00
2. Cheryl McAfee	\$ 20,000.00
3. Estate	\$ 80,000.00

We remand this case to the trial court to enter a judgment in conformity with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.