Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00549-CV

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**RAQUEL A. LEVY, INDIVIDUALLY
AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF
JAIME LEVY, DECEASED, Appellant**

V.

**DONALD WAYNE HUNT, DAVID HILDITCH, HILDITCH FINANCIAL SERVICES,
CHUBB LIFE INSURANCE COMPANY OF AMERICA
AND ITS SUCCESSOR IN INTEREST JEFFERSON PILOT FINANCIAL
INSURANCE COMPANY, Appellees**

**On Appeal from the Probate Court Number Four
Harris County, Texas
Trial Court Cause No. 299684-401**

O P I N I O N

Appellant, Raquel A. Levy, individually and as independent executrix of her late husband's estate, appeals from the trial court's take-nothing judgment in favor of appellees, Chubb Life Insurance Company of America, its successor in interest, Jefferson Pilot Financial Insurance Company, and its agents, David Hilditch and Donald Wayne Hunt, d/b/a Hilditch

Financial Services. We affirm.

I. BACKGROUND

In July 1996, Raquel Levy, then age 71, and her late husband, Dr. Jaime Levy, then age 72, sought to purchase a "second-to-die" life insurance policy. This type of policy is generally used as an estate planning tool where the joint insureds are husband and wife who have a large taxable estate and need additional funds to pay estate taxes at the time of the death of the surviving spouse. Mrs. Levy contacted Donald Hunt of Hilditch Financial Services, her long time insurance agent, and asked him to come to her home to discuss a "second-to-die" policy. Several days later, Mr. Hunt went to the Levys' home, bringing with him a brochure describing the "second-to-die" policy, along with an application and other documents.

After discussing the provisions of the policy, the Levys completed an application to purchase a "second-to-die" policy from Chubb. In this application, the Levys listed themselves as the only beneficiaries. Mr. Hunt then forwarded the application to Chubb for underwriting and approval. Chubb refused to issue the policy under the application, as submitted. On August 19, 1996, Mr. Hunt informed the Levys, upon information from Chubb, that (1) the beneficiary designation had to be changed, and an amendment to the application signed, before the policy would become effective; and (2) an incorrect spelling of Mrs. Levy's first name had to be corrected. At that time, Mrs. Levy instructed Mr. Hunt that the Levys' adult daughter, Rebecca Klavan, should be the primary beneficiary on the insurance policy. That same day, Mr. Hunt sent Chubb a fax communication correcting the mispelled name and designating Mrs. Klavan as the beneficiary.

The amendment form is in two parts, a top copy, and a bottom (yellow) copy, attached at the top with a gum adhesive. The form was designed so that the original amendment to the policy application could be separated from the yellow copy for signing by the insureds. The yellow copy is then bound, along with the policy and related forms, into a booklet. In order to

make the necessary changes to the application, Mr. Hunt took the policy, bound with the yellow copy of the application amendment, and the original amendment to the application, to the Levys' home on September 4, 1996. After Mr. Hunt explained the insurance policy and amendment form to her, Mrs. Levy signed the original amendment to the application,[1] which named the Levys' daughter as beneficiary. Mrs. Levy signed the document in Mr. Hunt's presence. Mr. Hunt then told Mrs. Levy that he needed Dr. Levy to sign the amendment to the application. Mrs. Levy took the amendment application form into another room and returned, ostensibly with Dr. Levy's signature on it, and presented the forms to Mr. Hunt. The Levys paid the initial insurance premium that day, and Chubb delivered the "second-to-die" policy to the Levys.[2] Evidence adduced at trial indicates that Mrs. Levy's signature on the amendment application was authentic but that Dr. Levy's signature was not.

Dr. Levy died in July 1998. After his death, Mrs. Levy claimed that Chubb owed her $1,000,000 in death benefits because she was the last surviving beneficiary in the policy. Chubb refused to pay the benefits to her on the grounds that the benefits were payable only to the Levys' daughter, Rebecca Klaven, and only after the deaths of both Dr. and Mrs. Levy as the insured parties in the "second-to-die" policy.

Mrs. Levy filed suit in Harris County Probate Court Number Four, alleging that Chubb breached the insurance contract and that Chubb and Hilditch Financial committed negligence and violations of the Texas Deceptive Trade Practices–Consumer Protection Act ("DTPA") and the Texas Insurance Code. In addition to seeking recovery of the $1,000,000 in death benefits, the petition requested damages for the cost to hire estate planning experts to remedy the negative tax consequences of the policy on the Levys' estates.

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[1] The yellow copy was not signed because, appellees assert, this copy was to be retained by the Levys for their own files and was not to be sent back to Chubb.

[2] Mrs. Levy paid the premium by endorsing over to Chubb a check payable to the Levys for $33,433.77.

The case proceeded to trial before a jury. The jury found in favor of the defendants on all theories. The probate court entered a take-nothing judgment in favor of the defendants.

II. ISSUES PRESENTED FOR REVIEW

In her first point of error, Mrs. Levy asks that we determine whether the probate court lacked subject matter jurisdiction of this case, as urged by appellee Hunt during trial. Although Mrs. Levy, Mr. Hunt, and Chubb now agree that the probate court had jurisdiction of this case, Mrs. Levy urges us to rule on this issue to preclude it from being raised in a future appeal. In her second point of error, Mrs. Levy asserts that (1) if the policy is ambiguous, the trial court should have submitted the question of the intended beneficiary to the jury; and alternatively, that (2) if the policy is unambiguous, the trial court should have awarded the death benefits to Mrs. Levy as the only surviving beneficiary named in the policy. In addition, Mrs. Levy asserts that because the policy has been "in force" for a period of two years, Chubb cannot contest the policy based on the policy's mandatory incontestability provision.

III. SUBJECT MATTER JURISDICTION IN THE PROBATE COURT

Chubb argues that whether the probate court has subject matter jurisdiction of this cause is not an issue preserved for appellate review because, although Hunt filed a motion to dismiss for lack of subject matter jurisdiction with the probate court, the court never ruled on the motion, and Mrs. Levy never objected to the court's failure to rule. Chubb also asserts that Mrs. Levy has inadequately briefed this point under Texas Rule of Appellate Procedure 38.1.

A trial court's lack of subject matter jurisdiction is fundamental error and must be noted and reviewed by an appellate court any time it appears. *Rogers v. Clinton*, 794 S.W.2d 9, 11 (Tex. 1990). Whether subject matter jurisdiction exists is a question of law subject to *de novo* review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

Appellees urged during trial that the probate court lacked subject matter jurisdiction

under sections 5A(e) or 5A(b) of the Texas Probate Code because this suit is neither "appertaining to" nor "incident to" Dr. Levy's estate. Specifically, appellees argued that Dr. Levy's estate did not own the policy and Mrs. Levy sought no relief on behalf of the estate.

The Texas Probate Code provides that a "statutory probate court has concurrent jurisdiction with the district court in all actions . . . by or against a person in the person's capacity as a personal representative . . . ."[3] TEX. PROB. CODE ANN. § 5A(c)(1) (Vernon Supp. 2000). Mrs. Levy filed this suit individually and in her capacity as independent executrix of her deceased husband's estate. Therefore, according to section 5A(c), the probate court had concurrent jurisdiction with the district court over this case. *See id.* Moreover, under section 5A(b), if jurisdiction is concurrent and involves a matter appertaining to or incident to an estate, the suit "shall be brought in a statutory probate court. . . ." § 5A(b). "In proceedings in the statutory probate courts and district courts, the phrases 'appertaining to estates' and 'incident to an estate' in this Code include . . . all claims by or against an estate. . . ."[4] *Id.*

Dr. Levy's estate, through Mrs. Levy, brought claims for (1) the cost to retain estate planning experts to remedy the negative tax consequences on the estates of Dr. and Mrs. Levy, and (2) rescission and return of out-of-pocket expenses in purchasing the insurance policy. Because Dr. Levy's estate brought these claims, the claims were appertaining or incident to Dr. Levy's estate. Because the jurisdiction of the probate court was concurrent with that of a district court and the claim was appertaining or incident to Dr. Levy's estate, Mrs. Levy was

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[3] "'Personal representative' or 'Representative' includes *executor, independent executor,* administrator, independent administrator, temporary administrator, together with their successors." TEX. PROB. CODE ANN. § 3(aa) (Vernon 1980 & Supp. 2000) (emphasis added).

[4] The Texas Probate Code, section 3(c), defines "claims" in terms of certain enumerated liabilities of a decedent and debts due the estate. *Seay v. Hall*, 677 S.W.2d 19, 23 (Tex. 1984). "'Claims' include . . . *debts due such estates.*" TEX. PROB. CODE ANN. § 3(c) (Vernon 1980 & Supp. 2000). A debt is a "specified sum of money owing to one person from another, including not only [an] obligation of [a] debtor to pay but [the] right of [a] creditor to receive and enforce payment." BLACK'S LAW DICTIONARY 363 (5th ed. 1979).

required to bring the claims on behalf of her husband's estate in the probate court. *See* TEX. PROB. CODE ANN. § 5A (Vernon Supp. 2000). Accordingly, we find the probate court had subject matter jurisdiction.

Mrs. Levy's first point of error is overruled.

IV. INSURANCE POLICY INTERPRETATION

In her second point of error, Mrs. Levy asserts that the probate court erred in awarding a take-nothing judgment in favor of appellees. First, she contends that the "[p]olicy language that says, no death benefits will be paid until the death of both insureds, is ambiguous because the Levys are the only insureds and beneficiaries in the policy." Thus, she contends, because the policy is ambiguous, the probate court should have let the jury decide the identity of the intended beneficiary. Alternatively, Mrs. Levy argues the policy is unambiguous, entitling her to the death benefits as the sole surviving beneficiary. Central to Mrs. Levy's contract interpretation arguments are the erroneous assumptions that (1) the July 16th *application* designating Dr. and Mrs. Levy as beneficiaries constituted the "in force" insurance policy, and that (2) even if the July 16th application were the policy "in force," the benefits are payable to Mrs. Levy as a surviving beneficiary. We disagree with both of Mrs. Levy's interpretations.

General rules of contract interpretation govern our interpretation of an insurance policy. *Tex. Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999). Our primary concern is to ascertain the parties' true intentions as expressed in the written instrument. *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). A written contract is not ambiguous if it is worded so that it can be given a definite or certain meaning. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). If language in an insurance policy is susceptible to two or more interpretations, then the policy language is ambiguous. *Id.*

As a threshold matter, we note that Mrs. Levy did not raise the ambiguity theory prior

to or during trial and did not allege that the Chubb policy was ambiguous in any live trial pleading. Appellees argue that Mrs. Levy has not preserved for appellate review any claim of ambiguity. Absent preservation of this ambiguity claim in the record, Mrs. Levy has waived her complaint on appeal. *See Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 720 (Tex. App.—San Antonio 1994, writ denied). Nevertheless, "[a] court may conclude that a contract is ambiguous even in the absence of such a pleading by either party." *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993). Mrs. Levy's waiver notwithstanding, we find the policy is unambiguous.

A. Lack of Ambiguity in Insurance Policy Language

The Chubb policy, entitled "Joint and Last Survivor Flexible Premium Adjustable Life Insurance Policy - Survivorship Life" is clear and easy to read. It is a "second-to-die" policy. The cover page of the Chubb policy expressly states:

> Chubb Life Insurance Company of America, a Stock Company, will pay the Death Benefits specified on page 10 to the Beneficiary on the death of the surviving Insured on receipt of due proof of both Insureds' deaths while this policy was in force.

The cover page also contains the following information:

> Adjustable Death Benefit Payable On The Death Of The Survivor Of The Insureds.
>
> No Death Benefit Payable On The Death Of The First Insured Unless Provided For By Rider.

There was never any discussion between Mrs. Levy and Mr. Hunt about the inclusion of a rider to the Chubb policy. The policy brochure that Mr. Hunt delivered to Mrs. Levy at their July 1996 meeting, explaining the terms of the policy, clearly states that the Levys were not eligible for a rider that would pay any death benefit on the death of the first insured because the Levys exceeded the maximum age allowed for such a rider.

The term "benefit" is defined on page 5 of the Chubb policy, as follows:

> The amount payable on the death of the surviving Insured while this policy is in force. It is explained fully in the Death Benefit section.

The section entitled "Death Benefit" on page 10, clearly states:

> **Death Benefit** — If the survivor of the Insureds dies while this policy is in force, we will pay the Death Benefit proceeds upon receipt of due proof of the death of both Insureds. No Death Benefit is paid on the first death of the joint Insureds. The Death Benefit proceeds are also subject to all other terms and conditions of this policy.

The Chubb policy is not ambiguous. It is clearly a "second-to-die" policy with benefits payable to the designated beneficiary, Rebecca Klaven, on the death of the second of the named insureds to die. There was no valid, binding insurance contract between the Levys and Chubb until all conditions precedent had been satisfied. Those conditions precedent were satisfied and the policy became effective and "in force" on September 4, 1996, when (1) the policy application amendment (changing the beneficiary to the daughter) was signed; (2) the initial premium was paid; and (3) the policy was delivered to the Levys.

Chubb refused to underwrite the policy based on the application that purported to designate Dr. and Mrs. Levy as both the insureds and the beneficiaries. Mrs. Levy knew of Chubb's refusal before she paid the first insurance premium. Moreover, the sixth page of the insurance agreement explicitly provides that "[t]here is no insurance until the initial premium is paid. . . . The coverage begins on the Policy Date, *provided that the initial premium has been paid* . . . ." Clearly, the original policy application the Levys signed in July 1996 did not form the "in force" insurance policy with Chubb.

The policy was placed "in force" on September 4, 1996. Rebecca Klaven was the only beneficiary under the policy on that date. Mrs. Levy was never a beneficiary of the Chubb policy.

Mrs. Levy requested the trial court to submit a jury question as to whether there was an agreement that the proceeds of the insurance policy would be paid to Mrs. Levy on the death of her husband and whether Chubb breached the insurance contract. The court refused to do so. Mrs. Levy claims she is entitled to a reversal and remand for a new trial because the trial court denied submission of these jury questions. We disagree.

If the contract is unambiguous, the court must enforce the contract as written. *Crown Constr. Co., Inc. v. Huddleston,* 961 S.W.2d 552, 556 (Tex. App.—San Antonio 1997, no pet.) (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)). If a contract is ambiguous, then interpretation of the contract presents a fact issue for the jury. *Id.* A trial court errs when it does not construe an unambiguous provision as a matter of law, and instead, submits the issue to a fact finder. *Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 665 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 290 (Tex. App.—Houston [1st Dist.] 1997, writ denied). The disputed policy language is not reasonably susceptible to more than one meaning and therefore is unambiguous. *See Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000). Because we find that the insurance policy was unambiguous, we hold that the trial court did not err in refusing to submit Mrs. Levy's policy interpretation questions to the jury.

B. Validity of Amendment Application

Mrs. Levy further asserts that the amendment changing the beneficiary designation to her daughter was ineffective because (1) the amendment form states that both insureds must sign both copies of the amendment, yet (a) the amendment was unsigned; (b) a documents expert testified that Dr. Levy's signature was invalid; and (c) Mrs. Levy now claims that she did not change the beneficiary to her daughter; (2) the purported amendment was not included as part of the policy; and (3) the purported amendment is merely parol evidence which cannot modify an agreement encompassing the "entire contract" between the parties. These arguments

have no merit.

"The real inquiry which a court must make in determining whether a party has signed a contract, is to determine whether he, or someone else at his direction, placed a marking thereon with the intention to give vitality to the instrument." *Lebow v. Weiner*, 420 S.W.2d 755, 758 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ). Mr. Hunt testified that after signing the application amendment, Mrs. Levy left the room in order to obtain Dr. Levy's signature on the amendment. When she returned, the amendment appeared to have Dr. Levy's signature on it. Moreover, while Mrs. Levy could neither admit nor deny signing her husband's name to this amendment, she admitted having signed her husband's name on various documents in the past. The jury could have found, for example, that Mrs. Levy signed her husband's name by permission. This finding is consistent with the expert's testimony that the signature was not that of Dr. Levy's. In addition, the record in this case does not support Mrs. Levy's assertion that she did not change the beneficiary to her daughter. The record shows Mrs. Levy's signature on the amendment to the application; Mrs. Levy's own handwriting expert testified this signature was authentic; and Mr. Hunt testified that he saw Mrs. Levy sign the amendment.

Moreover, the amendment to the application provides that "The Proposed Insured . . . must sign *both* copies of this amendment before delivery of this policy. Return first copy, properly signed, to the Home Office." Mrs. Levy cites no authority, nor are we aware of any which would support her proposition that *both* copies of an amendment to the application must be signed before the policy becomes *effective*. The statement on the application amendment appears to be nothing more than a directive for the agent to have both copies signed for some internal record-keeping purpose at the "home office," such as retaining and filing a signed copy of all policies and related documents.

Mrs. Levy points out that the insurance policy provides:

This policy is a legal contract . . . . The entire contract consists of:

(1) this policy form; and
(2) riders, if any, which add benefits to the basic policy; and
(3) endorsements, if any; and
(4) your application, and any amendments or supplemental applications *all of which are added to and made a part of the policy*.[5]

Mrs. Levy interprets this provision as requiring the physical addition, or attachment, of any amendments to the policy. However, we interpret the "added to and made a part of" language of this provision as instead deeming that the application, the policy form, and the amendment comprise the insurance agreement, regardless of their physical attachment to one another. This interpretation is consistent with long standing contract law which provides that a contract may be composed of several documents which must be construed as a single, unified instrument. *Bristol-Myers Squibb Co. v. Barner*, 964 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1998, no pet.); *see, e.g., Bd. of Ins. Comm'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 239 S.W.2d 803, 809 (1951) (holding that multiple insurance policies, endorsements attached to the policies, a pension trust agreement, and a fully executed commitment letter were all part of the same transaction and should be construed together).

In a related assertion, Mrs. Levy argues that the "signed amendment is parol evidence because it was not included as part of the Policy." This argument fails for at least two reasons: (1) as discussed above, amendments *are* part of the policy; and (2) a court may consider the verbal agreements alleged to have been made subsequent to the original written contract without violating the parol evidence rule. *Digby v. Tex. Bank*, 943 S.W.2d 914, 928 (Tex. App.—El Paso 1997, writ denied). In the absence of an integrated written agreement, the rule serves only to exclude evidence of agreements made prior to or contemporaneously with a writing, not subsequent modifications. *Id*. Here, the amendment was dated and signed after the application and policy forms were signed and, therefore, the parol evidence rule would not bar consideration of them. *See id*. Moreover, we find no indication that the July 16th application

[5] Emphasis added.

was intended to represent a final, integrated agreement between the parties. The policy form clearly contemplates that certain other documents may be executed. It states on its face that the "entire contract consists of this policy form; and riders . . . which add benefits to the basic policy; and . . . any amendments or supplemental applications."

C. Incontestability

Mrs. Levy also contends that Chubb cannot contest this policy because of the mandatory incontestability provision[6] in this policy which states:

> We will not contest this policy, except for any increase in the Specified Amount, after it has been in force during the lifetime of each Insured for a period of two years from its Issue Date.

Mrs. Levy has misconstrued the effect of an incontestability clause. "If plaintiff's right to recover upon a policy of life insurance is dependent upon a condition precedent, the insurer's insistence upon its non-liability does not constitute a contest of the policy under the incontestability clause." *Lee v. Universal Life Ins. Co.*, 420 S.W.2d 222, 226 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.). By the incontestability provision the "insurer is prohibited from contesting the validity of the policy, from abrogating it, from avoiding it, from escaping the liability fixed by its terms upon the insurer. . . . The insurer is standing upon the letter and spirit of the contract as written; is seeking to uphold, and not defeat, the contract . . . . In short, the insurer is not 'contesting' the policy at all, but is asserting its validity in both form and substance, and the provision of incontestability is inapplicable." *Id.* (quoting *Howard v. Mo. State Life Ins. Co.*, 289 S.W. 114, 115 (Tex. Civ. App.—San Antonio 1926, writ ref'd)).

There is a distinction between contesting the validity of an insurance contract and contesting its coverage, meaning or application. Here, Chubb is not contesting the validity of

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[6] *See* TEX. INS. CODE ANN. art. 3.44(3) (Vernon 1981 & Supp. 2000).

the policy it issued; rather, it is insisting upon observance of the policy terms. This is not a contest of the policy within the meaning of the incontestable clause. *See Great Am. Reserve Ins. Co. v. Fry*, 418 S.W.2d 716, 719 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

Accordingly, Mrs. Levy's second point of error is overruled.

V. CONCLUSION

The probate court had subject matter jurisdiction over the claims asserted in this case. Moreover, the trial court did not err in any of the rulings Mrs. Levy challenges in her points of error. The amendment to the application for the "second-to-die" insurance policy changing the primary beneficiary designation to the Levys' daughter, Rebecca Klavan was effective and became part of the policy "in force." Under the terms of the policy itself, there was no coverage to *anyone* until Rebecca Klaven was named as the beneficiary, payment of the premium was made, and the policy delivered to Mrs. Levy on September 4, 1996. Once these conditions precedent were satisfied and the policy was "in force," benefits became payable only to Rebecca Klavan and only after the deaths of both Dr. and Mrs. Levy.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Justices Yates, Fowler, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).