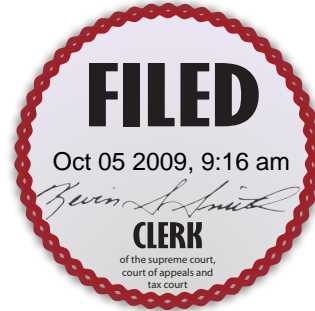


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ESTATE OF)
NATHANIEL KAPPEL,)

Appellant,)

vs.)

No. 32A05-0904-CV-205

WILLIAM, JUDITH, and MARK KAPPEL)

Appellees.)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Robert W. Freese, Judge
Cause No. 32D01-0403-ES-31

October 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Donald Kappel, as co-personal representative of the Estate of Nathaniel Kappel, (the Estate) appeals from the trial court's grant of partial summary judgment in favor of William and Mark Kappel on their claim that they, not the Estate, were entitled to the proceeds of an insurance policy on Nathaniel's life and the trial court's denial of the Estate's earlier motion for summary judgment on the same issue. On appeal, the Estate presents two issues for our review:

1. Did the trial court err in granting summary judgment in favor of William and Mark on the issue of entitlement to the proceeds of the State Life insurance policy?
2. Did the trial court err in denying the Estate's earlier motion for summary judgment on the issue of entitlement to the State Life insurance proceeds?

We reverse.

In April 1973, the deceased, Nathaniel Kappel (Nathaniel), and his brother, William Kappel (William), entered into a partnership agreement, with each owning a fifty-percent interest in the partnership. The brothers were farmers and operated a farming partnership until Nathaniel's death in 2004. The partnership agreement contained a buy-out provision upon the death of one of the partners. Specifically, the partnership agreement provided:

Whereas, said parties desire to provide for the purchase by the surviving party of a deceased party's interest in the business; and

Whereas, the parties desire to provide for a method of evaluating the worth of the said business upon the death of the one of them first to die, to fix the purchase price to be paid for the interest of the party first to die, and the method of payment therefor.

Appellant's Appendix at 22. The partnership agreement further provided:

3. On the death of a party, the surviving party shall purchase the deceased party's entire interest in the partnership business and the deceased party's legal representative shall sell such interest to the surviving party. The purchase price of the partnership interest of the party first to die shall be computed in accordance with Paragraph 4 hereof. [hereinafter referred to as the Buy-Sell Provision]

4. The parties hereto agree and stipulate that the total value of the partnership business as of the date of this Agreement is \$100,000, and the value of each partner's respective interest is: Nathaniel, \$50,000; William, \$50,000. Within 30 days following the end of each fiscal year of the partnership, the parties shall stipulate the value of said partnership business, and shall endorse such value on Schedule A attached hereto. If for any reason the parties shall have failed to stipulate the value for the year preceding the death of a party, the value of the partnership business shall be the higher of either of the following values;

(a) The last previously stipulated value; or

(b) The book value of the partnership as of the date of death. The determination of the accountant servicing the partnership business at the time of the death of a deceased party as to the book value shall be conclusive.

In no event, however, shall the value of the interest of the party first to die be less than the amount of the insurance proceeds of the policy on such deceased party's life and subject to the terms of this agreement.

Id. at 22-23 (emphasis supplied). Contemporaneously with the execution of the partnership agreement, both Nathaniel and William made application for and became owners of respective insurance policies, each with a face amount of \$50,000 and insuring the life of the other.¹ Under the terms of the partnership agreement, Nathaniel and William were to remain equal partners, as they agreed not to "sell, transfer, encumber or assign any part of their respective interests in the partnership." *Id.* at 22.

With regard to the purchase of additional insurance policies, the partnership agreement provided that "the parties may buy additional policies and make the same subject

¹ The face amount of the insurance policies coincides with Nathaniel and William's respective interests in the partnership business as stipulated to by Nathaniel and William in the partnership agreement.

to the terms of this Agreement by listing such policies in Schedule B attached hereto.”² *Id.* at

23. As for termination of the partnership, the partnership agreement set forth that it could be terminated only by death of one or death of both parties simultaneously, bankruptcy, receivership or dissolution of the partnership or bankruptcy of either partner, or by “written agreement” of the parties. *Id.* at 25. The terms of the partnership agreement could also be amended by a writing signed by the parties.

On December 28, 1993, Nathaniel executed his last will and testament. In his will, Nathaniel references the 1973 partnership agreement in providing that his children were to benefit from the value of his interest in the partnership business. The specific provision in Nathaniel’s will states:

I hereby devise and bequeath the following property to my children, equally, share and share alike:

A. My interest in a certain partnership by and between myself and my brother, William M. Kappel, by Partnership Agreement dated April 1, 1973, including the proceeds of any life insurance provided to purchase my partnership interest pursuant to the terms of such Partnership Agreement.

Id. at 28.

In 1996, Nathaniel and William, respectively, purchased replacement life insurance policies. William was the owner of a State Life Insurance policy on the life of Nathaniel that had a face value of \$750,000. In William’s application for the State Life policy, William indicated that the proposed insured (i.e., Nathaniel) was a “partner.” *Id.* at 95. William further indicated that the State Life policy was replacing three existing Equitable Variable

² No Schedule B has been included in the record before us. William maintains that no Schedule B has ever existed.

Life Insurance Company policies taken out in 1983 and 1986 totaling \$300,000.³ William was identified as the sole beneficiary of the State Life policy. Further, the premiums for the State Life policy were paid out of the “Kappel Brothers” partnership account.

Nathaniel purchased a life insurance policy from First Colony Life Insurance Company (First Colony). Nathaniel was the owner of the First Colony policy and William was the proposed insured. The face value of the First Colony policy was \$750,000. On his application, Nathaniel indicated that the business purpose of the policy was to fund a “Buy-Sell” agreement. *Id.* at 106. Nathaniel also indicated that the First Colony policy replaced two existing policies taken out in 1983 and 1986 totaling \$300,000.⁴ Nathaniel was identified as the sole beneficiary of the First Colony policy.

Nathaniel died in March 2004. On March 29, Nathaniel’s Estate was opened in the trial court and his 1993 will was admitted to probate. Donald Kappel (Nathaniel’s son) and Margaret Kappel (Nathaniel’s widow) were named as co-personal representatives. On July 7, 2004, Mark Kappel, William’s son, filed a claim against the Estate for \$299,000 to recover Nathaniel’s share of partnership liability and wages Mark claimed he was owed by the partnership.⁵ On the same date, William filed a similar claim against the Estate for \$300,000.

On September 23, 2004, the co-personal representatives submitted an inventory of the Estate to the court. As part of the inventory, they identified Nathaniel’s “[i]nterest in a

³ One policy was issued in 1983 and had a face value of \$100,000. Two additional policies issued in 1986 had a face value of \$100,000 each.

⁴ One policy was issued in 1983 and had a face value of \$100,000. Another policy was issued in 1986 and had a face value of \$200,000.

⁵ Mark maintains that he became an equal, 1/3 partner in a partnership with Nathaniel and William in 1992.

partnership which was established April 9, 1973 [sic] between Nathaniel Kappel and William.” *Appellees’ Appendix* at 20. No value, however, was assigned to such interest. In an amended inventory, the Estate claimed a right to the proceeds of the State Life policy on Nathaniel’s life, relying upon the Buy-Sell Provision of the 1973 partnership agreement as the basis therefrom.⁶

On April 20, 2007, the Estate filed a motion for partial summary judgment, challenging the claims filed against the Estate by Mark and William, and further claiming a right to the insurance proceeds of the State Life policy owned by William on Nathaniel’s life. On August 23, 2007, the trial court denied the Estate’s motion for partial summary judgment, finding genuine issues of material fact as to “whether a partnership existed between the Kappel Brothers and whether the partnership provided for the partners to be paid for services provided.” *Appellant’s Appendix* at 59.

On August 15, 2007, William and his wife, Judith, filed a complaint for contribution against the Estate and asked that the action be consolidated with the Estate cause. On December 6, 2007, the Estate responded to the request for contribution and also filed a “counterclaim” against William and Judith. *Id.* at 40. Specifically, the Estate sought enforcement of the Buy-Sell Provision of the 1973 partnership agreement, claiming it was entitled to the insurance proceeds of the State Life policy. The Estate further alleged that William was guilty of commingling partnership funds with personal funds and that William

⁶ The proceeds of the State Life policy were paid to William, as the sole beneficiary of the policy.

converted partnership income and assets to himself by failing to pay Nathaniel's proportionate share of partnership income to the Estate.

On October 2, 2008, William and Mark filed a motion for partial summary judgment, asserting that there were no genuine issues of material fact regarding the Estate's claim of commingling and conversion and that William was entitled to the proceeds of the State Life policy. The Estate responded to the motion for summary judgment on October 30, 2008. The trial court held a hearing on the summary judgment motion on November 17, 2008 and issued its order granting summary judgment, in part, to William and Mark on November 21, 2008. Specifically, the court found that there was "[n]o issue of material fact . . . as to whether or not the State Life Insurance Company policy is part of the 1973 agreement," ultimately concluding that the proceeds of the State Life policy were not subject to the terms of the 1973 partnership agreement. *Appellant's Appendix* at 79. Therefore, the court determined that William was entitled to the insurance proceeds as sole beneficiary of the State Life policy. The court also found, however, that there were genuine issues of material fact as to whether William converted and commingled partnership funds.⁷

On December 22, 2008, the Estate filed a motion requesting the trial court finalize its August 23, 2007 denial of the Estate's motion for partial summary judgment and also its November 21, 2008 grant of partial summary judgment in favor of William and Mark. The trial court granted the request, expressly finding that no just reason for delay exists. The Estate now appeals both rulings.

⁷ On appeal, William does not challenge the trial court's denial of his motion in this regard.

Our standard of review for a summary judgment order is well settled. Summary judgment is appropriate if the “designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Ind. Trial Rule 56(C). The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Huntington v. Riggs*, 862 N.E.2d 1263 (Ind. Ct. App. 2007), *trans. denied*. If the moving party meets these two requirements, the burden shifts to the non-movant to set forth specifically designated facts showing that there is a genuine issue of material fact for trial. *Id.* “A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.” *Id.* at 1266.

“On appeal, we are bound by the same standard as the trial court, and we consider only those matters which were designated at the summary judgment stage.” *Id.* We do not reweigh the evidence, and we will liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Huntington v. Riggs*, 862 N.E.2d 1263.

1.

The Estate argues that the trial court erred in granting summary judgment in favor of William on the issue of entitlement to the proceeds of the State Life insurance policy. In support of its argument, the Estate directs us to the 1973 partnership agreement between William and Nathaniel, Nathaniel’s 1993 will, and the applications for the 1996 insurance

policies with State Life and First Colony along with the fact that the premiums for such policies were paid out of the partnership account.

In response, William argues that the 1973 partnership agreement is no longer in effect. William maintains that a new partnership between Nathaniel, his son Mark, and himself was created in 1991 and replaced the previous partnership between he and Nathaniel. In support of this claim, William relies predominantly on his and Mark's affidavits in which they both acknowledge existence of an equal partnership between Nathaniel, William, and Mark. William thus argues that the Buy-Sell provision of the 1973 partnership agreement is no longer in effect and therefore the State Life policy is not subject thereto. William also argues that, even if the 1973 partnership agreement is still in effect, the State Life policy is not subject to its terms because it was not made a part of the agreement by being listed in Schedule B as required by the terms of the partnership agreement. Thus, William maintains that the trial court properly determined that the proceeds of the State Life insurance policy were properly awarded to him as the sole beneficiary thereof.

Based on the evidence presented by the parties, the trial court made the following findings of fact and conclusions of law:

8. The 1973 partnership agreement provided that "[t]he parties may buy additional policies and make the same subject to this Agreement by listing such policies in Schedule B attached hereto."
9. It is undisputed that in 1991, the partners to the 1973 agreement ceased to be as these two partners formed a new partnership with William's son.
10. The State Life Insurance Company policy was not in effect until after 1991.

11. The State Life Insurance Company policy was never listed on Schedule B of the 1973 agreement as required to make it “subject to the Agreement”.
12. No issue of material fact exists as to whether or not the State Life Insurance Company policy is part of the 1973 agreement.
13. The State Life Insurance Company policy is not part of the 1973 agreement and therefore William and Mark Kappel are entitled to Judgment on this issue as a matter of Law.

Appellant’s Appendix at 80.

Viewing the evidence in the light most favorable to the Estate, we must conclude that genuine issues of material fact preclude the trial court’s grant of summary judgment in favor of William and Mark on the issue of entitlement to the proceeds of the State Life policy. Contrary to the court’s finding, whether the 1973 partnership agreement ceased to exist as of 1991 and whether a new partnership with William’s son was formed are issues that are highly disputed. Moreover, the undisputed material facts are capable of supporting conflicting inferences on this issue.

We begin with the affidavits of William and Mark, in which they both assert that a new, equal partnership was created between Nathaniel, William, and Mark in 1991 and that such partnership cancelled and replaced the former partnership between Nathaniel and William created by the 1973 partnership agreement. During the summary judgment hearing, the Estate objected to such affidavits as incompetent because they violate what is referred to as the Dead Man’s Statute. *See* Ind. Code Ann. § 34-45-2-4 (West, PREMISE through Public Laws approved and effective through 4/20/2009). Under the Dead Man’s Statute, a person who is a necessary party to the issue and whose interest is adverse to the estate is not a competent witness as to matters against the estate. I.C. § 34-45-2-4(e). That is, when an

executor or administrator of an estate is one party, the adverse parties are not competent to testify about transactions that took place during the lifetime of the decedent. *J.M. Corp. v. Roberson*, 749 N.E.2d 567 (Ind. Ct. App. 2001).

Furthermore, the purpose of this statute is to protect decedents' estates from spurious claims. *In re Estate of Lambert*, 785 N.E.2d 1132 (Ind. Ct. App. 2003), *trans. denied*. The Dead Man's Statute guards against false testimony by a survivor by establishing a rule of mutuality, wherein the lips of the surviving party are closed by law when the lips of the other party are closed by death. *Id.* The Dead Man's Statute applies to all cases in which a judgment may result for or against the estate, notwithstanding the parties' positions as plaintiff or defendant. *Id.* In addition, neither the express language of the statute nor accepted concepts of fairness should preclude application of the statute so long as no statements made by the decedent are admitted through depositions or public records made during his life. *Id.*

Clearly, William and Mark's interests are adverse to the Estate's. They are therefore incompetent to provide evidence through their affidavits as to the existence and terms of the claimed three-person partnership, the effect of the new partnership on the 1973 partnership between Nathaniel and William, and Nathaniel's intent with respect to the proceeds of the 1996 State Life policy. Nathaniel's lips were sealed at his death. Nathaniel must therefore

speak through the written documents that exist.⁸ We now turn to the written documents that were designated for summary judgment purposes.

With regard to the 1973 partnership agreement, the agreement expressly provided that it could only be terminated (as pertinent here) by written agreement or amended in writing. There is, however, no writing terminating or otherwise altering its terms. Here, we further observe that there is no writing establishing or setting forth the terms of the new partnership allegedly formed between Nathaniel, William, and Mark. Although perhaps not required, without a writing setting forth the terms of the alleged three-way partnership, we are left only with the declarations of the surviving partners as to what those terms may have been with regard to the proceeds of the State Life policy (and other matters such as wages or Nathaniel's interest therein). As noted above, William and Mark's declarations in this regard violate the Dead Man's Statute. Thus, their affidavits cannot serve as the basis for finding that the 1973 partnership agreement was cancelled and replaced in 1991 by the new three-way partnership and that the State Life policy was not subject to the terms of the 1973 agreement.

We turn now to tax returns in the record that William and Mark rely on in support of their claim that a new three-way partnership was created in 1991. Mark's tax returns, which

⁸ Although the Estate raised the issue of the competency of the affidavits as part of its argument at the summary judgment hearing, the trial court did not make a ruling thereon. In its order on summary judgment, the court's findings do not expressly indicate that the court considered William and Mark's affidavits in concluding that partial summary judgment should be granted in favor of William and Mark on the issue of entitlement to insurance proceeds. In its appellant's brief, the Estate does not present the issue of the incompetency of such affidavits because of a violation of the Dead Man's Statute. In the Estate's reply brief, the Estate responds to William and Mark's arguments in their appellee's brief that rely on such affidavits, arguing that such affidavits are in violation of the Dead Man's Statute and therefore incompetent.

were submitted as evidence of his involvement in a partnership with Nathaniel and William, show that he received profits/losses from a farming enterprise, but do not indicate from what enterprise. Rather, Mark identified his business as a “farming contractor.” *See, e.g., Appellees’ Appendix* at 187. Moreover, Mark’s tax returns do not coincide with tax returns submitted for William and Nathaniel, and thus, a comparison of profit/loss statements between the three men do not conclusively establish that a partnership existed between the three men. We further note that Mark’s claimed profits/losses in 1998, the year closest in time to the tax returns contained in the record for Nathaniel and Mark, are a fraction of the gross income and profits/losses declared by Nathaniel and William. For example, in 1998, Mark reported on his Schedule F, Profit or Loss for Farming, a gross income of \$18,000. Taking into account depreciation and expenses, Mark claimed a profit from farming of \$3,288. On their 1999 tax returns, Nathaniel and William reported on their respective Schedule F forms a gross income from farming operations of \$241,298. After taking into account depreciation and expenses, Nathaniel and William each reported a net loss from farming of around \$146,000. In summary, the tax returns designated for summary judgment purposes do not establish that the partnership between Nathaniel and William ceased to exist as of 1991 when, as claimed by William and Mark, a new, three-person, equal partnership was created.

We also consider Nathaniel’s will. In his 1993 will, nearly two years after the claimed three-person partnership was allegedly created, Nathaniel referenced the 1973 partnership agreement, thereby indicating his belief that the agreement was still in full force and effect.

Nathaniel left to his children his interest in the partnership created by the 1973 agreement, “including the proceeds of any life insurance provided to purchase my partnership interest pursuant to the terms of such Partnership Agreement.” *Appellant’s Appendix* at 28.

This leads us to consider the language of the 1973 partnership agreement that alluded to the purchase of additional insurance policies and specifically set forth that additional insurance policies purchased on behalf of the partnership would have to be listed in Schedule B, attached to the partnership agreement, to be subject to the terms thereof. No Schedule B document was designated as evidence for summary judgment purposes and there is no other writing expressly making the State Life policy subject to the terms of the 1973 partnership agreement. William argues that the fact that the State Life policy is not listed on Schedule B is determinative of the issue of entitlement to the proceeds of the State Life policy. While this contention is not without merit, we note that there is a pattern of conduct between Nathaniel and William from which an inference contrary to William’s argument can be drawn.

Specifically, we note that when the 1973 partnership agreement was executed, Nathaniel and William obtained life insurance policies in equal amounts on each other’s lives in accordance with the Buy-Sell Provision of the agreement. The designated evidence further demonstrates that in 1983 and 1986, Nathaniel and William secured life insurance policies on each other’s lives in equal amounts, i.e., a total of \$300,000. In 1996 Nathaniel and William obtained the State Life and First Colony policies and expressly provided on the applications therefore that they replaced the 1983 and 1986 policies. The face amount of both the State

Life and First Colony policies was \$750,000. In William’s application for the State Life policy, he indicated that Nathaniel, as the proposed insured, was a “partner.” *Appellant’s Appendix* at 95. In Nathaniel’s application for the First Colony policy, he indicated that the policy was to fund a “Buy-Sell” agreement. *Id.* at 106. Further, the premiums for these policies were paid out of the “Kappel Brothers” partnership account, that being the partnership of Nathaniel and William whose names appear on the check. There is no indication in the record that there was a similar life insurance policy for Mark to protect his claimed interest in the partnership.

Construing the designated evidentiary material in the light most favorable to the Estate, we conclude that there remain genuine issues of material fact as to the entitlement of the proceeds of the State Life policy. As set forth above in detail, there are numerous facts in dispute and the undisputed material facts are capable of supporting conflicting inferences with regard to the issue of who is entitled to the proceeds of the State Life policy. We therefore conclude that the trial court erred in granting summary judgment in favor of William and Mark.

II.

The Estate argues that the trial court erred in denying its motion for summary judgment on the issue of entitlement to the proceeds of the State Life policy. Taking the above evidence and viewing it in the light most favorable to William and Mark, the non-movants, we conclude that the trial court properly denied the Estate’s motion for summary judgment as there remain genuine issues of material fact.

Judgment reversed.

BAKER, C.J., and RILEY, J., concur.