

84-LW-2581 (10th)

John J. Shrader, Plaintiff-Appellant

v.

The Equitable Life Assurance Society of The United States et al., Defendants-Appellees.

No. 83AP-868 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 6, 1984.

APPEAL from the Franklin County Court of Common Pleas.

MESSRS. ALBERS AND ALBERS, MR. JAMES S. ALBERS, and MR. JAMES B. ALBERS; MR. STEVEN A. LARSON; and MR. PHILIP R. BRADLEY, for appellant.

MESSRS. VORYS, SATER, SEYMOUR & PEASE, MR. JOHN C. ELAM, MR. JAMES E. PHILLIPS, and MR. F. JAMES FOLEY; MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, and MR. CRAIG D. BARCLAY, for appellees.

OPINION

McCORMAC, P.J.

Plaintiff-appellant, John J. Shrader, filed a complaint in the Court of Common Pleas of Franklin County against the Equitable Life Assurance Society, alleging that Equitable had issued policies insuring the life of his wife; that she had died in October 1981; and that plaintiff was the primary beneficiary under the policies and entitled to payment of the proceeds.

In its answer and counterclaim, Equitable admitted the policies and alleged that the amount due on the policies totaled \$109,484.93, which Equitable had deposited with the trial court; that, while plaintiff was the primary beneficiary under the policies, his wife's father, Dale Wolford, was the secondary beneficiary; and that both plaintiff and Wolford claimed the proceeds of the policies. Equitable asked that plaintiff and Wolford be required to interplead and settle between themselves their rights to the proceeds, and that Equitable be discharged from further liability and dismissed as a party-defendant. The trial court joined Wolford as a party-defendant and dismissed Equitable.

The trial court then granted Wolford's motion that he and Leah Wolford, as trustees of the Jean M. Wolford Charitable Trust, be substituted as parties-defendants for him. The Wolfords filed an answer and counterclaim alleging that plaintiff was not entitled to the proceeds "as the result of his intentional and felonious murder of said Jean M. Wolford Shrader"; that Wolford, as secondary beneficiary, had assigned his right to the proceeds to the trust; and that the trustees were entitled to the proceeds.

Plaintiff filed a motion to dismiss the answer and counterclaim on the basis that the trustees had failed to state a claim upon which relief could be granted, contending that plaintiff could only be barred from taking the proceeds if he had been convicted of or pleaded guilty to a charge of aggravated murder, murder, or voluntary manslaughter, and, as he had not, he was entitled to the proceeds. The trial court overruled the motion. The correctness of that ruling is the primary subject of this appeal. It was not a matter that was ripe for appeal at the time of the prior appeal since it was only an interlocutory order until final judgment was rendered.

Although a transcript of proceedings has not been furnished as a part of the record on appeal, the parties agree that the case proceeded to trial; that plaintiff rested his case after establishing the policies, his status as primary beneficiary, and the death of his wife; that plaintiff testified extensively during defendants' case; that plaintiff called a rebuttal witness out of order during defendants' case whose testimony supported plaintiff's explanation of marks on his hands, which defendants contended were the product of a cord used by plaintiff to strangle his wife; that, several days later, the witness recanted his testimony; that defendants then recalled plaintiff as a witness and attempted to question him concerning his possible perjured testimony but he declined to respond, asserting his privilege against self-incrimination;

that the trial court ruled that he had waived his privilege and ordered him to respond; and that, when plaintiff refused to do so, the trial court found plaintiff in contempt of the court's order and directed him to be confined in the county jail.

Plaintiff appealed the contempt order, and, in that earlier appeal, we held that plaintiff had waived his privilege, but that the trial court had selected the wrong sanction for plaintiff's contempt. Upon remand, when plaintiff persisted in his refusal to testify in response to defendants' questions, defendants filed a motion seeking dismissal of plaintiff's action, citing Civ. R. 41(B)(1) and our opinion in the previous appeal. See Shrader v. Equitable Life Assur. Soc. (1983), 10 Ohio App.3d 277. The trial court granted the motion, dismissed plaintiff's action, and granted judgment to defendants on their counterclaim, for the proceeds of the policies.

Plaintiff has appealed, asserting the following assignments of error:

"1. The trial court erred in granting defendant's motion to dismiss defendant The Equitable Life Assurance Society of the United States as a party to this action without notice, by entry dated May 17, 1982.

"2. The trial court erred in overruling plaintiff's motion to dismiss defendants Dale E. Wolford and Jean M. Wolford Charitable Trust answer and counter-claim by entry dated October 14, 1982.

"3. The trial court erred in dismissing plaintiff's action and awarding insurance proceeds as set forth in judgment entry dated August 26, 1983."

In his second assignment of error, plaintiff argues that the trial court erred in overruling his motion to dismiss defendants' answer and counterclaim because the exclusive basis for disqualifying a beneficiary, who it is claimed killed the insured, from taking the proceeds of the policy is found in R.C. 2105.19. It follows, then, he contends, that because it is undisputed that he had never been charged with, convicted of, or pleaded guilty to aggravated murder, murder, or voluntary manslaughter, the proceeds were his, as a matter of law.

R.C. 2105.19 reads, in pertinent part, as follows:

"(A) No person who is convicted of or pleads guilty to a violation of or complicity in the violation of section 2903.01 [aggravated murder], 2903.02 [murder], or 2903.03 [voluntary manslaughter] of the Revised Code * * * shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the guilty person had predeceased the decedent."

Defendants, on the other hand, contend that the rule at common law was that a beneficiary who intentionally and feloniously killed the insured was barred from taking the proceeds of the insurance policy; that a conviction for the killing was not a necessary precondition for the disqualification at common law; and that, in adopting R.C. 2105.19 in its present form, the General Assembly did not abrogate or limit the common-law rule, but, instead, intended only to make the fact of conviction conclusive evidence that the beneficiary is disqualified. It is defendants' position that the trial court properly held that, even in the absence of a conviction for one of the three crimes listed in the statute, defendants could prove civilly that plaintiff had intentionally and feloniously killed his wife.

The first issue is what was the common-law rule in Ohio concerning civil disqualification of the beneficiary of an insurance policy who allegedly caused the death of the insured.

In Filmore v. Metropolitan Life Ins. Co. (1910), 82 Ohio St. 208, the first syllabus to the Ohio Supreme Court's opinion reads as follows:

"The beneficiary in a life insurance policy cannot recover thereon where the death of the assured is caused by the intentional and felonious act of such beneficiary."

In that case, Filmore, the beneficiary under his wife's life insurance policy, sued the insurance company to recover the policy's proceeds. The insurance company's answer included as a defense the allegation that Filmore had "murdered his said wife, * * * was indicted * * * for manslaughter * * * and * * * was convicted of said crime * * *." To this

defense, Filmore interposed a demurrer on the ground that the insurance company had failed to allege that the killing was intentional. The Supreme Court rejected Filmore's argument, saying that the allegation that Filmore had murdered his wife was tantamount to an allegation that he had intentionally killed her, and that the act was unlawful and felonious. The defense as pleaded was sufficient against the demurrer.

Filmore addresses only the pleading aspects of the case. It does not address the effect of the criminal conviction or whether the manslaughter conviction in itself may have constituted proof of disqualification or what was the burden of proof. Additionally, Filmore does not discuss how it is proved that conduct is felonious. The ordinary method is proof of conviction of a felony. Finally, Filmore preceded the enactment of R.C. 2105.19.

It is important to note that, in Filmore, as in every other case we could find in Ohio or elsewhere, addressing the civil qualification of a beneficiary of a life insurance contract by the alleged intentional killing of the insured, the fact that the insured caused the death was never the issue, his identity having been established by a conviction or an admission. The only civil issue was the state of mind of the killer. In stark contrast, this case is one where the identity of the murderer is the only issue, there being no doubt that the murder was intentional and felonious. Also in this case, contrary to most other cases, the criminal courts were fully available to determine the guilt of the person civilly claimed to be the killer, but no attempt has been made to bring plaintiff to account criminally.

The Ohio and out-of-state cases dealing civilly with disqualification of the beneficiary who killed the insured fall primarily into two categories, none of which involved the proof of the identity of the insured as the killer. The first category involved beneficiaries who had already been convicted of murder or manslaughter in the criminal courts. See Filmore v. Metropolitan Life Ins. Co., *supra*; Travelers Ins. Co. v. Gary (1973), 37 Ohio Misc. 27; National Benefit Life Ins. Co. v. Davis (1929), 38 Ohio App. 454; McClain v. All States Life Ins. Co. (1948), 82 Ohio App. 354; Neff v. Massachusetts Mutual Life Ins. Co. (1952), 158 Ohio St. 45; Franklin Life Ins. Co. v. Strickland (1974), 376 F.Supp. 280; Dowdell v. Bell (1970), 477 P.2d 170; Moore v. Moore (1971), 186 S.E. 2d 531; Chase v. Jenifer (1959), 150 A.2d 251; Bounds v. Caudle (1978), 560 S.W. 2d 925; and Hennigh v. Neff (1938), 27 Ohio Law Abs. 364.

The second main category are cases where it was not possible to use the criminal courts. [Cook v. Western & Southern Life Ins. Co. (1932), 30 Ohio N.P. (N.S.) 247: murder-suicide; Estate of Draper (1976), 536 F.2d 944: murder-suicide; and Huff v. Union Fidelity Life Ins. Co. (1984), 14 Ohio App. 3d 135: minor not subject to adult criminal court]; and cases where the judgment in the criminal court was not guilty by reason of insanity. See California-Western States Life Ins. Co. v. Sanford (1981), 515 F.Supp. 524; Winters Natl. Bank & Trust Co. v. Shields (1939), 29 Ohio Law Abs. 193; Hair v. Pa. (1961), 533 S.W. 2d 387.

In State Farm Life Ins. Co. v. Smith (1977), 363 N.E. 2d 785, the Supreme Court of Illinois held that the secondary beneficiary could prove in a civil action that the primary beneficiary intentionally killed the insured despite the fact that the grand jury voted a no true bill to a murder complaint and there was no criminal prosecution. However, self-defense, not identity, was the only issue. Additionally, the Supreme Court rendered final judgment for the primary beneficiary based upon a failure of proof that the killing was unjustified, a decision which indicated that the grand jury acted properly in "no billing" the criminal charge.

In the annotation entitled Killing of Insured by Beneficiary as Affecting Life Insurance or its Proceeds, 27 ALR 3d 794, it is stated therein that "the annotation assumes that the beneficiary did kill the insured and would have been entitled to the proceeds of the policy except for the fact that he caused the insured's death", at 797-798. This annotation adds support for the proposition that it was never intended to use a civil case to prove the identity of the killer of an insured in lieu of the available criminal process. None of the common-law cases express the proposition that the identity of the killer can be proved in a civil case without resort to the available criminal process.

In summary, neither in Ohio nor elsewhere do we find any indication that the common law permitted a secondary beneficiary of an insurance contract to disqualify the primary beneficiary by proving civilly the disputed fact that the primary beneficiary committed the homicide.

We agree wholeheartedly with the general principle of law espoused in Filmore, supra, that a person should not profit from his intentional and felonious wrongdoing [a principle not absolute at common law in matters of inheritance; i.e., see Oleff v. Hodapp (1935), 129 Ohio St. 432; Tyack v. Tipton (1951), 65 Ohio Law Abs. 397; National Benefit Life Ins. Co. v. Davis (1929), 38 Ohio App. 454]. However, it is an unwarranted step to conclude from Filmore, based upon that general principle of law, that the available criminal process for determining the identity of a person who has

committed an intentional and felonious act of murder or manslaughter can be ignored and that guilt can be decided in a civil case. The only issue litigated in Filmore was the pleading issue. The beneficiary conceded that a beneficiary under a policy of life insurance is without right to recover thereon where he has intentionally caused the death of the insured. (Filmore, supra, at 212-213.) As the Ohio Supreme Court has stated, "[a] reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication." State, ex rel. Gordon, v. Rhodes (1952), 158 Ohio St. 129, paragraph one of the syllabus.

There is a strong policy reason why the common law should be held to preclude determination of the identity of a killer or murderer by civil rather than criminal process. If there is enough evidence to permit a finding civilly that the beneficiary intentionally and feloniously caused the death of the insured, there is enough evidence to obtain a grand jury indictment of the defendant so that he may stand trial for the appropriate charge of murder or manslaughter. Civilly, there must be proof at least by a preponderance of the evidence of an issue. Even assuming that the burden of proof civilly is only by the preponderance of the evidence, there, of necessity, is sufficient evidence to obtain an indictment by the grand jury. There is also sufficient evidence for the state to prevail in a preliminary hearing should that be accorded after the filing of the complaint to commence criminal proceedings. The test in a preliminary hearing is whether there is probable cause to believe that the defendant committed the crime in question.

It is assumed for the purposes of this appeal that there was sufficient evidence presented to prove by at least a preponderance of the evidence that plaintiff intentionally and feloniously murdered the insured and that a directed verdict would not be returned on that issue. In that event, as in any instance where there is sufficient evidence to find civil guilt of a crime, there is sufficient evidence to obtain a grand jury indictment or to support a complaint charging the crime in question at a preliminary hearing. A private citizen having knowledge of the facts may initiate the prosecution pursuant to R.C. 2935.09 and Crim. R. 3.

Public policy supports the proposition that the identity of a murderer be proved beyond a reasonable doubt in available criminal proceedings rather than by a lesser degree of proof in a civil proceeding. John J. Shrader should be charged with murder in a criminal court if there is sufficient evidence to civilly prove that he committed murder, at least if his alleged guilt is to disqualify him from recovering the insurance proceeds to which he was otherwise entitled as the primary beneficiary.

If criminal charges are promptly commenced, it would be appropriate for the trial court to stay payment of the insurance proceeds pending final resolution of the criminal matter, since R.C. 2105.19(B) provides that a person prohibited from benefiting by virtue of his conviction pursuant to R.C. 2105.19(A) is a constructive trustee for the benefit of those otherwise entitled to the property.

An additional reason exists for holding that the beneficiary's guilt of murder or voluntary manslaughter of the insured under the policy of which he is the beneficiary should not be independently determined in criminal and civil proceedings. If the beneficiary is found not guilty of the murder in the civil proceeding, he would apparently be entitled to the insurance proceeds even though he was later convicted of murder in a criminal case. The intent of R.C. 2105.19, which requires disqualification, would then be frustrated.

Defendants argue that only killers would benefit from a holding that R.C. 2105.19 requires a conviction in a criminal court of murder or voluntary manslaughter, at least where possible and where the identity of the killer is in doubt, in order to deprive the beneficiary of the insurance proceeds. We disagree strongly with that analysis. Occasionally, albeit rarely, mistakes are made in the identity of a killer even in a criminal proceeding where the burden of proof is beyond a reasonable doubt. If the burden of proving the identity of the beneficiary as the killer is reduced to a preponderance of the evidence, all that is required is that it is slightly more probable than not that plaintiff was the killer. In that event, the margin for error increases greatly. A beneficiary, by definition, has an economic motive to commit the crime. The beneficiary is invariably closely connected to the insured and is frequently a person against whom the finger of suspicion initially points. There is a fertile field for error, particularly where a spouse is involved and there is some evidence of marital problems. If a mistake is made, not only is the beneficiary deprived of an economic benefit to which he was entitled but he is, for life, faced with the stigma of having been found to have murdered his spouse and to have escaped with only a civil penalty. On the other hand, if he is guilty, he should face the full criminal penalty rather than only a civil penalty.

For these reasons, public policy supports the determination that the identity of the killer be established in a criminal proceeding, if available, rather than in a civil proceeding. Prior to the adoption of R.C. 2105.19, in its present form, there

was no express common-law rule determination that the identity of the killer could be established in a civil proceeding by the civil burden of proof where a criminal determination was possible, as in this case. We conclude that the remedy was not available at common law.

Evid. R. 803(21) provides that evidence of a final judgment entered after a trial upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, is admissible in subsequent civil cases to prove a fact essential to sustaining the judgment. Facts applicable to recovery of insurance proceeds by the beneficiary include the findings that the beneficiary was the killer and that he had the requisite intent to commit the requisite crime. Whether or not Evid. R. 803(21) represents a departure from former Ohio law in civil proceedings is debatable. In Filmore v. Metropolitan Life Ins. Co., *supra*, a criminal conviction of manslaughter was pleaded as apparently a fact that could be proved in the later civil proceeding. The Supreme Court did not comment on this aspect of the case; however, a fact in a criminal case is found by proof beyond a reasonable doubt. A fact established beyond a reasonable doubt establishes the same fact by a lesser degree of proof.

State v. Schwartz (1940), 137 Ohio St. 371, is distinguishable. That case held that an adjudication in a civil bastardy proceeding under a lesser standard of proof was not admissible as evidence in a criminal prosecution for nonsupport of such child which required a higher standard of proof.

There is no statutory disqualification of the use of a criminal conviction in a civil action to determine the fact that the beneficiary killed the insured. R.C. 1.16 provides as follows:

"Any one injured in person or property by a criminal act may recover full damages in a civil action, unless specifically excepted by law. No record of a conviction, unless obtained by confession in open court, shall be used as evidence in a civil action brought for such purpose."

R.C. 1:16 does not apply herein. The evidence of the criminal conviction is used in the civil disqualification case, not to recover damages for a criminal act, but to prove a fact.

Even though evidence of a criminal conviction could properly be used as evidence in a civil action to disqualify the beneficiary based upon his intentional and felonious killing of the insured, the criminal judgment was not binding in an insurance proceeds' case until the General Assembly amended R.C. 2105.19 in 1975 to provide that no one finally adjudged guilty of murder or voluntary manslaughter shall be entitled to insurance proceeds payable or distributable in respect of the decedent's death. In the 1975 amendment to R.C. 2105.19, conviction of voluntary manslaughter was added as a disqualifying crime. The language "property * * * distributable in respect of the decedent's death" was also added, as was the language "insurance proceeds". It seems apparent that the General Assembly not only wanted to disqualify a beneficiary who committed voluntary manslaughter but also to place all proceeds, probate or insurance, emanating from and distributable as a result of the death in the same status, which was that the beneficiary's conviction of murder or voluntary manslaughter of the insured conclusively disqualified him rather than it being only evidence of disqualification. No other common-law rule was replaced by that amendment of R.C. 2105.19 so far as insurance proceeds were concerned.

At least nine other states currently have statutes similar to R.C. 2105.19 which disqualifies the beneficiary in the event of his conviction of the killing of the insured in a criminal proceeding. Those states include Connecticut, Kentucky, Louisiana, North Carolina, Oklahoma, South Carolina, Virginia, New Mexico and West Virginia. The weight of authority in those states supports a holding that the disqualifying statute limits disqualification only to those convicted as specified under the statute (at least where a criminal conviction was possible and the identity of the killer was in doubt). See Rose v. Rose (S.Ct. New Mexico 1968), 444 P.2d 762; United Trust Co. v. Pyke (S.Ct. Kan. 1967), 427 P.2d 67; Blanks v. Jiggets (S.Ct. of App. Va. 1951), 64 S.E. 809; Bird v. Plunkett (S.Ct. Conn. 1953), 95 A.2d 71.

R.C. 2105.19 states the exclusive method for disqualifying a beneficiary who is claimed to have caused the insured's death by murder or voluntary manslaughter, at least where the identity of the killer is factually in issue and criminal process is available for that determination.

Plaintiff's second assignment of error is sustained. The judgment of the trial court is reversed and the case is remanded to the trial court with instructions to grant final judgment to plaintiff. The trial court may in its discretion stay payment of the proceeds to plaintiff if a criminal action of aggravated murder, murder, or voluntary manslaughter against plaintiff is commenced and pending prior to the time that judgment is entered.

In his third assignment of error, plaintiff asserts that the trial court, upon remand following the previous appeal, erred in both dismissing his action and granting judgment to the trustees upon their counterclaim. Insofar as the dismissal of plaintiff's action was concerned, the trial court's judgment in this regard was clearly within the scope of the discussion of appropriate sanctions in our opinion of August 23, 1983. A decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. Nolan v. Nolan (1984), 11 Ohio St. 3d 1, at 3.

We also noted in our earlier opinion that the trial court would be warranted in granting judgment for defendants against plaintiff on defendants' counterclaim since his refusal to answer questions could amount to a failure to defend the counterclaim [see Civ. R. 55(A)], as well as failure to comply with the court's order that he testify [see Civ. R. 41(B) (1)]. Although it is clear from the judgment entry that the trial court entered judgment on the counterclaim upon the merits, it is unclear whether it also rendered judgment on the alternative basis of failure to defend, pursuant to Civ. R. 55(A).

In the absence of a transcript, we are unable to say that the trial court's finding "from the evidence and from the entire record before it that there is sufficient basis therein to justify or warrant the finding by the Court that judgment should be * * * granted in favor of * * * [the] Trustees' Counterclaim" was not supported by evidence in the record. Accordingly, the third assignment of error is overruled.

Plaintiff's first assignment of error is not well taken. Contrary to defendants' assertion, the trial court's entry of May 17, 1982 was not a final appealable order since the entry did not include an express determination that there was no just reason for delay. However, even if plaintiff was correct in his contention that the trial court erred by granting Equitable's motion to be dismissed as a party-defendant without notice or opportunity to be heard, he has not demonstrated how the dismissal prejudiced his cause. No persuasive argument is made that the trial court was in error on the merits of Equitable's motion-in other words, plaintiff does not tell us how the outcome would have differed had there been notice. The naked assertion, that plaintiff did not have an opportunity to dispute the amount Equitable deposited into the court, is not sufficient in view of his failure to even attempt to demonstrate how the amount of that deposit was in error. In addition, he has not demonstrated how the absence of Equitable adversely affected his cause.

The first assignment of error is overruled.

Plaintiff's second assignment of error is sustained. Plaintiff's first and third assignments of error are overruled. The judgment of the trial court is reversed. The case is remanded to the trial court for further procedure consistent with this opinion.

Judgment reversed and case remanded.

WHITESIDE, J., concurs.

NORRIS, J., concurs in part, dissents in part.

NORRIS, J., concurring in part, dissenting in part.

Although I agree that the first and third assignments of error should be overruled, I am unable to concur in the majority's disposition of the second assignment of error.

Recognition by Ohio courts of the principle that a person should not profit from his wrongdoing, has enjoyed mixed success.

That the principle was applied to disqualify a beneficiary of an insurance policy who intentionally killed the insured, is evidenced by the leading case of Filmore v. Metropolitan Life Ins. Co. (1910), 82 Ohio St. 208. As noted by the majority, that opinion begins with this syllabus:

"The beneficiary in a life insurance policy cannot recover thereon where the death of the assured is caused by the intentional and felonious act of such beneficiary."

It is readily apparent from a reading of the opinion that the Supreme Court, in viewing the universal common-law rule stated in the syllabus, contemplated that the intentional and felonious killing would be established in the civil trial, and that a conviction in a criminal case of a crime involving the element of intentionally killing the victim was not a necessary predicate to the disqualification being proved in the civil case. In other words, the requirement that the killing be "felonious" was regarded as meaning that the killing must be unlawful and without legal justification—the kind of killing which could lead to a criminal conviction. In this sense, then, the essential element that the killing be felonious would not be made out where the killing was in self-defense.

Other Ohio cases are instructive. In those cases, disqualification of the killer-beneficiary was sought by the insurance company, by the heirs of the insured to whose estate the policy's proceeds would inure if the beneficiary were barred, or, as in this case, by a contingent beneficiary. For example, in Hennigh v. Neff (1938-Ct.App), 27 Ohio Law Abs. 364, this court reversed a directed verdict granted defendant at the close of plaintiff's case. Defendant was the beneficiary of his deceased wife's insurance policy and plaintiff was the administrator of the wife's estate, who brought the action to recover the proceeds of the policy which had been paid to defendant, alleging that defendant had intentionally and feloniously killed his wife and had been convicted of second degree murder. Upon motion by defendant, and by agreement of the parties, the allegation concerning defendant's conviction was stricken, and the case proceeded to trial. Plaintiff's evidence included an admission by defendant, made as upon cross-examination, that he had killed his wife with a shotgun. This court held that that evidence alone was sufficient to send the case to the jury to determine whether the killing was intentional. Obviously, we did not then contemplate that proof of a conviction was a necessary predicate to disqualification.

In McClain v. All States Life Ins. Co. (1948), 82 Ohio App. 354, at 356, the Court of Appeals for Hamilton County upheld the trial court's determination that the beneficiary of a life insurance policy was barred from taking the policy proceeds, concluding that evidence at trial of the nature of wounds inflicted by the beneficiary upon the insured in an affray, was by itself sufficient, in the absence of evidence of the beneficiary having pleaded guilty to manslaughter, to support the trial court's holding that the killing was intentional and felonious. See, also, Travelers Ins. Co. v. Gray (1973), 37 Ohio Misc. 27; Cook v. Western & Southern Life Ins. Co. (1932), 30 Ohio N.P.(N.S.) 247.

The question of whether or not, in view of the former Ohio Rule of Evidence forbidding the use of a criminal conviction in a subsequent civil action (except as an admission of a party-opponent in the instance of a guilty plea),^{®1} evidence of a conviction for the killing was admissible in a civil action to prove the identity of the killer and his state of mind, was never specifically addressed by Ohio courts; although one court held that evidence of a guilty plea should be admissible in an action brought by the insured's estate against the insurance company, since it would be admissible in an action involving the beneficiary as a party. McClain v. All States Life Ins. Co., *supra*, at 357. The question has been resolved, for the future, of course, by implication with the adoption of the 1975 amendment to R.C. 2109.19, and manifestly by adoption of Evid. R. 803(21) which changed the former rule. See staff notes to Evid. R. 803(21).

Footnote 1 See State v. Schwartz (1940), 137 Ohio St. 371, at 373: "It is the general rule that a judgment of conviction or acquittal in a criminal case cannot be used in a civil case as evidence of the facts or matters upon which such judgment is founded * * *; and this is so even if the same questions of fact are in issue in both cases." Gianelli, Ohio Evidence Manual (1982), Sections 801.11(b), 803.25.

A reading of the cases can lead to but one conclusion: that the common-law rule in Ohio, prior to the adoption of R.C. 2105.19 in its present form, was that a beneficiary of a life insurance policy could not recover on the policy where the death of the insured was caused by the intentional and felonious act of the beneficiary, and that the act of the beneficiary could be established in a civil action by the preponderance of the evidence without the necessity of proving that the act had resulted in a criminal conviction for intentionally killing the insured.

The majority, however, has parsed this same case law and divines an aspect of the common-law rule—that the identity of the killer could only be established by resorting to the criminal process—which has never been declared in any previous Ohio court opinion, and has remained undetected all these years by legal commentators. Is it not curious that such a criminal conviction requirement has never once been verbalized by the Supreme Court, the Courts of Appeals, or the trial courts on the many occasions they have restated the rule of Filmore v. Metropolitan Life Ins. Co., *supra*? In short, the idea that the common-law rule included the requirement that the identity of the killer could only be established by proof of a criminal conviction, appears to have originated with the majority. Actually, the first formulation of a disqualification rule containing reference to a beneficiary who had been "convicted", appeared in the 1975 version of R.C. 2105.19.

Accordingly, the question presented for our resolution is the effect of the statute on the preexisting common-law rule. That requires further examination of case law and legislative history.

The principle that a person should not profit from his wrong-doing was not always applied in other areas in order to bar a killer from profiting through the death of his victim. For example, the principle was held not to apply to survivorship accounts [*Oleff v. Hodapp* (1935), 129 Ohio St. 432], or to property exempt from administration set off for a surviving spouse under the Probate Code. *Tyack v. Tipton* (1951-Ct.App), 65 Ohio Law Abs. 397. Most importantly, the principle did not apply to disqualify the killer from taking his intestate share of his victim's estate, the rationale being that the courts were not at liberty to create exceptions to the statutes of descent and distribution. *Deem v. Milliken* (1895), 53 Ohio St. 668, "Judgment affirmed on reasoning of *Deem v. Milliken et al.*" (1892), 6 O.C.C. 357; *Demos v. Freemas* (1938-Ct.App.), 26 Ohio Law Abs. 601; *Hodapp v. Oleff* (1934-Ct.App.), 17 Ohio Law Abs. 543. In fact, the killer was entitled to his intestate share even if the estate consisted of the insurance benefits he was denied under the insurance rule discussed above. *National Benefit Life Ins. Co. v. Davis* (1929), 38 Ohio App. 454.

Perhaps, in reaction to the refusal of courts to apply the principle to intestacy situations, the General Assembly amended the statutes of descent and distribution to recognize the principle, and to apply it also to testate succession:

"No person finally adjudged guilty, either as principal or accessory, of murder in the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, whether under the provisions of this act relating to intestate succession, or as devisee or legatee, or otherwise under the will of such person; nor shall such person inherit or take any real or personal estate of any other person as to which such homicide terminated an intermediate estate, or hastened the time of enjoyment. * * *" [General Laws, Sec. 10503-17.]

That same provision, with some minor changes, was carried forward in 1953 as R.C. 2105.19, and was then repealed in 1975 and replaced by R.C. 2105.19 in its present form.

The new statute represents a notable expansion over the former, and makes these noteworthy changes:

1. Conviction of voluntary manslaughter, defined by the new Criminal Code as "knowingly" causing the death of another, was added to aggravated murder (formerly first degree murder) and murder (formerly second degree murder) as a disqualifying event;
2. The broad language, "[a]ll property * * * distributable in respect of the decedent's death", was added. This may have the effect of reversing previously cited case law regarding joint and survivorship accounts and property exempt from administration, and could conceivably affect "vested" survivorship interests such as those held by a killer in real property pursuant to joint tenancy and tenancy by the entireties; and
3. The words "insurance proceeds" were inserted.

It is the effect of the last amendment upon the preexisting common law, then, which is central to our inquiry.

Did the General Assembly, as urged by plaintiff and the majority, intend to enact into law a comprehensive adoption of the principle, thereby abrogating and replacing all existing common law on the subject and providing the exclusive means of enforcing the disqualification? Or, as contended by defendants, at least in the case of insurance proceeds, did the General Assembly, instead, intend only to expand upon the preexisting common-law rule, thereby providing a conclusive rule of evidence which would assist in establishing the bar at trial?

For numerous reasons, I conclude that the latter construction is the proper one. I cannot believe that the General Assembly intended to enhance the opportunity for a killer to take the proceeds of his victim's insurance policy, by restricting the bar of the common-law rule to instances where it can be proved that the killer has been convicted of the killing under one of three statutes. The mischief such a result would work is readily apparent. For example, the burden of proof on the killer's state of mind, as well as his identity, would, in effect, be increased from a preponderance to proof beyond a reasonable doubt. The heirs of the victim, or a contingent beneficiary, would be powerless to prevent payment of the benefits to the killer while prosecuting authorities collected evidence and pondered whether or not to charge the killer. And, where the heirs of the victim and of the killer are not identical, and there is no secondary beneficiary, the victim's heirs would be denied a remedy should the killer take his own life prior to standing trial on a criminal charge. A

killer would not be barred, even if adjudged guilty of conduct that amounts to intentional and felonious homicide, if the killer were a juvenile who was not tried as an adult. Orderly charging of the proper degree of crime and sensible plea bargaining would be the subject of pressures from those seeking the killer's disqualification; and, conversely, those persons could lose their right to the proceeds of the policy in the event of inept prosecution resulting in acquittal or conviction on a lesser charge, of unwarranted plea bargaining at the hands of overburdened prosecutors, or of acquittal or reversal of a conviction solely on procedural grounds (such as "Miranda Rule" violations) as opposed to failure on the merits of the prosecution's case.

One must, of course, assume that the General Assembly was aware of the existing common law when it inserted the words "insurance proceeds", and it follows that it could not have intended the result suggested by plaintiff and the majority, since only killers would benefit from such a result. The insurance proceeds' amendment must be read in the context of the common-law rule. Certainly, the effect of the amendment was not to reverse the common-law rule, since both the amended statute and the common-law rule operate to the detriment of killers. Other amendments to the statute did reverse the survivorship account and property exempt from administration common-law rules which had benefited killers. And, the insurance proceeds' amendment did not write on a clean slate, as was the case with other amendments to the statute which might affect joint tenancy and tenancy by the entireties (which again would work to the detriment of killers). Nor do I believe the effect of the insurance proceeds' amendment was to replace the common-law rule on insurance proceeds, thereby being the only change in the statute which would actually benefit killers. The General Assembly is not presumed to have repealed a long-settled rule of the common law unless it employs language which clearly expresses or imports such an intention. State, ex rel. Morris, v. Sullivan (1909), 81 Ohio St. 79, third paragraph of the syllabus. Certainly, we should not regard the General Assembly as having discarded important aspects of so salutary a rule of the common law, in the absence of clear language evidencing such a purpose.

Instead, insofar as insurance proceeds are concerned, I conclude that the General Assembly simply intended to grant to those seeking to impose the disqualification against a killer the benefit of an evidentiary rule which results in the automatic disqualification of the killer. To this extent, the General Assembly intended to extend or supplement the common-law rule, not abrogate it. By making the fact of conviction conclusive, the amendment relieves a party from the burden of proving that the killing was intentional and felonious, but it does not make a conviction a necessary prerequisite to the beneficiary's disqualification; the record of conviction is only one means, but not the sole means, of barring the killer. In addition, in those instances where those seeking the benefit of the disqualification take advantage of the conclusiveness of the conviction record, the killer will be precluded from taking advantage of a result presumably available under the common-law rule—that in spite of his criminal conviction he might still be able to convince the trier of facts in the civil action that his killing was not intentional or felonious.

This conclusion, that the disqualification should be the subject of proof in a civil action by a preponderance of the evidence, and that a record of the killer's criminal conviction should be admissible as one means of proving the civil case and when utilized is conclusive, comports with the recent opinion of Judge Richard Markus in Huff v. Union Fidelity Life Ins. Co. (1984), 14 Ohio App.3d 135, and recommendations of the drafters of the Uniform Probate Code and of legal scholars who have suggested legislation in this area. See Sec. 2-803, The Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws (1969); Maki and Kaplan, "Elmer's Case Revisited: The Problem of the Murdering Heir" (1980), 41 Ohio State Law Journal 905.

The second assignment of error should be overruled.