



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**IN RE ESTATE OF FRED N. KIRKES
CV-12-0120-PR**

PARTIES:

Petitioner: Joshua Kirkes, son of deceased Fred N. Kirkes.

Respondent: Gail Kirkes, wife of deceased Fred N. Kirkes.

FACTS:

Fred named his wife Gail as sole beneficiary of his will. During their marriage, Fred also created an Individual Retirement Account (“IRA”) in his name, naming Gail as sole beneficiary. Later, Fred modified the beneficiary designation, naming Joshua, his son by a prior marriage, as beneficiary of 83% of the IRA and Gail as beneficiary of 17%. Gail contends, and Joshua concedes, she was unaware Fred had changed the beneficiary designation, and she neither explicitly nor implicitly consented to the change.

After Fred’s death, Gail filed a petition for declaration of rights, asking the court to invalidate the IRA beneficiary designation. Although Joshua opposed her filing, he conceded all IRA assets are community property. The trial judge noted that in Arizona, upon the death of a married person, one half of the “community estate” (the property the couple acquired during marriage that was not kept specifically as sole property by a spouse) belongs to the surviving spouse, and the other half passes to the decedent’s estate. Thus, the surviving spouse takes title to one half of the community property as owner, not as heir.

The law is not clear, however, about how the surviving spouse’s “one-half of the community property” must be calculated. Under an “item” approach, literally one half of each individual asset must be given to the surviving spouse. By contrast, under an “aggregate” approach all of the community assets are combined, and the surviving spouse receives one half of the value of the total assets, thus avoiding having to divide each asset individually.

In this case, the trial judge held the item approach should be used with regard to the IRA. Accordingly, he ruled that Gail had a one-half community interest in the asset upon Fred’s death. Fred was only able to name beneficiaries of the 50% he was deemed to own at death. Therefore, his son Joshua was only entitled to 50% of the IRA.

Joshua appealed. The court of appeals reversed. It recognized Arizona courts have not clearly adopted or rejected the item approach, but it found that in this case employing the item approach would defeat Fred’s intent. It relied in part on the rationale of *Gaethje v. Gaethje*, 7 Ariz. App. 544, 441 P.2d 579 (1968), which involved a life insurance policy, the premiums for which had been paid with community funds. The *Gaethje* court held the designation in the life insurance policy naming

the decedent's son from a prior marriage as the beneficiary was valid to the extent it did not prevent the surviving wife from receiving half of the community estate overall. Finding the *Gaethje* rationale applicable in this context, the court of appeals reversed the trial court's grant of summary judgment in favor of Gail. It then remanded the case to the trial court to allow the parties to present evidence as to whether Gail had received at least half the community estate overall.

Gail now asks this Court to review the Court of Appeals' opinion.

SUMMARY OF ISSUES:

1. Does each spouse have a vested 50% interest in a community- funded Individual Retirement Account ("IRA"), or may a deceased spouse give to a third party, via testamentary devise or non-probate transfer, any portion of the account, including the surviving spouse's 50% share thereof, without the surviving spouse's knowledge or consent?
2. So long as the surviving spouse still ends up with at least 50% of the aggregate community interests, is she barred from asserting her deceased spouse improperly gave away her portion of their community-funded IRA?
3. Are the circumstances, intent, and expectations involved in creating IRAs such that they should be treated as specific "items" of community property in which each spouse has a vested interest, or is it acceptable to treat such accounts as merely an "aggregate" community asset?
4. Does the nature of IRAs merit treating the individual spousal interests therein in the same manner or differently from the way Arizona courts have treated community interests in life insurance policies?
5. Do Arizona statutes sufficiently express legislative intent on applying "aggregate" vs. "item" method to community interests in retirement accounts?
6. Does a deceased spouse's testamentary intent control over his surviving spouse's vested interest in a community funded IRA?

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