

IN RE ESTATE OF KIRKES: NON-SPOUSE BENEFICIARIES AND COMMUNITY PROPERTY RETIREMENT ACCOUNTS

Stuart D. Kottle

The Arizona Supreme Court in *In re Estate of Kirkes* held that a deceased spouse can leave more than one-half of a community-owned retirement account to a non-spouse beneficiary, so long as the surviving spouse receives at least one-half of the community's entire value.¹ In doing so, the Supreme Court affirmed the Court of Appeals decision in *In re Estate of Kirkes*.²

Fred Kirkes designated his son from a prior marriage as the beneficiary of a community-owned individual retirement account.³ Fred's wife, at the time of his death, challenged the beneficiary designation and asked the superior court to award her the entire account or increase her community interest share.⁴

The central issue in *Kirkes* was how to divide community assets: Should a court divide each item individually (the item theory), or aggregate the value of all assets and then divide them as a whole (the aggregate theory)?⁵ This matters because Arizona is a community property state, which means all property acquired during a marriage presumptively belongs to the community.⁶ Unless one spouse consents to a non-spouse beneficiary, there is a strong presumption that "assets acquired by one spouse with community funds are community property."⁷ When a spouse dies, the community dissolves and its assets are divided in half between the deceased and surviving spouse.⁸

The Court held that a spouse may designate a non-spouse beneficiary of more than half of a community property retirement account as long as the other

1. Est. of Kirkes, 231 Ariz. 334, at ¶ 1 (2013).

2. 229 Ariz. 212 (App. 2012).

3. *Kirkes*, 231 Ariz. 334, at ¶ 2.

4. *Id.*

5. *Kirkes*, at ¶ 6. See also Charles E. Zalesky, Comment, *The Modified Item Theory: An Alternative Method of Dividing Community Property upon the Death of a Spouse*, 28 IDAHO L. REV. 1047, 1047-48 (1992).

6. ARIZ. REV. STAT. § 25-211.

7. *Kroloff v. United States*, 487 F.2d 334, 335 (9th Cir. 1973).

8. *Id.* at ¶ 6 (citing *Gaethje v. Gaethje*, 7 Ariz. App. 544, 549 (1968)).

spouse received half of the overall community and other circumstances did not make the distribution fraudulent or unjust. The Court observed that the Arizona Legislature had adopted the aggregate theory in allocating community property upon dissolution of marriage.⁹ The Court also noted its previous holding where it applied the aggregate theory in affirming a life insurance policy-owner's right to designate a non-spouse beneficiary of the policy. But neither the Court nor any Arizona statute had yet addressed whether the aggregate theory applies to retirement accounts.¹⁰ Nonetheless, the Court declined to distinguish retirement accounts from life insurance policies.¹¹ Thus, Fred's designation of a non-spouse beneficiary of a retirement account was appropriate because Fred's wife did not claim the retirement account proceeds were necessary for her to receive half of her community share.

9. *Kirkes*, 231 Ariz. 334, at ¶ 7.

10. *Id.*

11. *Id.* at ¶ 12.