

ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: ARTICLE: CASE COMMENTARY: A CURIOUS CASE OF ELECTRONIC EVIDENCE (AND PERHAPS AN ELECTRONIC SIGNATURE)

Winter, 2014

Reporter

12 Ave Maria L. Rev. 103 *

Length: 4630 words

Author: Stephen Mason+

+ Stephen Mason (www.stephenmason.eu) is a barrister and a member of the IT Panel of the General Council of the Bar of England. He is the general editor of *Electronic Evidence* (3d ed., LexisNexis Butterworths 2012) and *International Electronic Evidence* (British Institute of International and Comparative Law 2008). He is the author of *Electronic Signatures in Law* (3d ed., Cambridge University Press 2012) and *Electronic Banking: Protecting Your Rights* (PP Publishing 2012). The author thanks Nicholas Bohm and Timothy S. Reiniger, Esq., for their valuable comments on this paper. This Article has been jointly published by the Ave Maria Law Review and the Computer and Telecommunications Law Review.

Text

[*103]

A recent appeal before the Court of Appeals of Michigan, *Julie Ann Zulkiewski v. American General Life Insurance Company*,¹ is of interest for a number of questions relating to evidence that it fails to reveal. The facts are that Dr. Ronald J. Zulkiewski took out a life insurance policy on March 19, 1999, with The Old Line Insurance Company, a predecessor company to American General.² He named his first wife as the primary beneficiary, and his parents, Ronald S. Zulkiewski and Sharon Zulkiewski, as the contingent beneficiaries.³ The insurance policy provided that \$ 250,000 would be "paid to the beneficiary immediately upon receipt of due proof of death of the insured if death occurs prior to the [expiration] date." The policy also provided that the beneficiary or beneficiaries would be "as shown in the application unless changed."⁴ The policy further provided that the insured could change the beneficiaries by means of a written notice.⁵

"On July 14, 2006, American General received a written change of beneficiary request,"⁶ presumably from Dr. Zulkiewski (but the opinion does not reveal this information), on a form supplied by them, to change the primary

¹ [Zulkiewski v. Am. Gen. Life Ins. Co., No. 299025 2012 WL 2126068 \(Mich. Ct. App. June 12, 2012\)](#).

² *Id.* at 1.

³ *Id.*

⁴ *Id.* (alteration in original).

⁵ *Id.*

⁶ *Id.*

beneficiary of the policy to his mother, Sharon Zulkiewski, and the **[*104]** contingent beneficiary to his father. ⁷ American General subsequently confirmed the change by letter to Dr. Zulkiewski. ⁸

For the purpose of the legal proceedings reported in this case, it was agreed that someone purporting to be Dr. Zulkiewski subsequently enrolled in the online account services offered by American General at 10:45 a.m. on December 17, 2008. ⁹ "This service allows customers to obtain certain policy information and perform online transactions, one of which" enabled a policy holder to register changes to the beneficiary of the policy. ¹⁰ To use the service, the applicant was required to enter the policy number, social security number, mother's maiden name, and an e-mail address. ¹¹ The applicant was required to choose and type in a password, and to re-type it a second time. ¹² This requirement now appears to be standard practice with many commercial websites. The purpose of requiring a person to re-type the password a second time is to verify that the password is the one they meant to enter, and that there is no error. The same purpose is served when requiring a person to enter their e-mail address twice. The typing in of a password twice has no evidential value. ¹³

American General sent a notification by e-mail to the person that duly registered as Dr. Zulkiewski, advising the recipient that he had enrolled in the "eService," with a warning that he should contact the company immediately if he had no intention of enrolling. ¹⁴ It was not disputed that at 10:51 a.m. on December 17, 2008, someone purporting to be Dr. Zulkiewski used the eService account to execute an online change of beneficiary request, changing the primary beneficiary to Julie Ann Zulkiewski. ¹⁵ The contingent beneficiary remained in the name of Sharon Zulkiewski. ¹⁶ On the same date, American General sent an e-mail to the registered e-mail address, confirming the change of beneficiary. ¹⁷ American General also sent a letter by post on December 23, 2008, to the same effect. ¹⁸

[*105] Dr. Zulkiewski committed suicide on June 23, 2009. ¹⁹ His second wife, Julie Zulkiewski, subsequently submitted a claim under the policy on July 13, 2009. ²⁰ The deceased's parents submitted a competing claim. ²¹ The trial court granted summary disposition in favor of American General Life concerning the appellants' claim of breach of contract against the company, finding that the evidence indicated that the decedent made the electronic change, which in turn meant the claim for breach of contract "failed as a matter of law because they failed to

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ See id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id. at 2.

²⁰ Id.

²¹ Id.

present any evidence that anyone other than decedent executed the ... beneficiary change." ²² American General was ordered to pay the plaintiff \$ 250,000 in full. ²³

In essence, Ronald S. Zulkiewski and Sharon Zulkiewski argued that American General "failed to present sufficient evidence concerning the security of the system used to process the beneficiary designation change request," and it was not proven that the decedent actually made the request. ²⁴ Julie Ann Zulkiewski submitted an affidavit to the court in which "she asserted that she had no knowledge or information in respect to the circumstances or process in which she was made the primary beneficiary of the policy"; ²⁵ had not entered the eService under her husband's name, nor forged his electronic signature; and indicated that she was the beneficiary of other insurance policies. ²⁶ She also pointed out that her late husband was "extremely computer literate" and that he managed all of his financial affairs electronically. ²⁷ This evidence was not challenged.

The Court of Appeals of Michigan affirmed the summary judgment, noting the precise nature of the appellants' case:

At the outset, we note that appellants do not argue that the beneficiary designation change did not actually occur, was a mistake, or occurred as the result of a computer glitch. What appellants assert is that American General's security process, or lack thereof, allowed plaintiff to forge decedent's signature. ²⁸

[*106] This case appears to have been argued on the basis of a forged electronic signature, and the Court of Appeals duly discussed the law ²⁹ in relation to electronic signatures in Michigan. ³⁰ However, this case was a dispute about the entire submission being forged which - by implication - means the electronic signature was also forged, ³¹ as noted by the court:

While appellants appear to argue that the trial court should have had a broad distrust of American General's processes in general, they have specifically limited their arguments in such a way as to limit the evidence necessary to support a finding that the signature was genuine. Appellants do not claim, for example, that the change was made erroneously or randomly, which might require an affidavit from an expert witness familiar with appellant's processes and error-correcting protocols so as to refute such a claim. Instead, while they try to couch it in general terms, they essentially maintain that someone perpetrated a fraud on the company by illicitly opening up an eService account and making the beneficiary change in decedent's policy. However, the extent of the personal information required to do so would limit the number of possible suspects - either an unknown computer "hacker" who presumably would perpetrate such a fraud randomly, or the only person who could actually benefit, namely plaintiff. ³²

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. at 4.

²⁷ Id. at 2 (internal quotation marks omitted).

²⁸ Id. at 3.

²⁹ See Uniform Electronic Transactions Act 305 of 2000, § 450.837 (regarding electronic records and signatures).

³⁰ [Zulkiewski, 2012 WL 2126068, at 3-4.](#)

³¹ It is not clear what form of electronic signature was involved.

³² [Zulkiewski, 2012 WL 2126068, at 5.](#)

The appellants merely asserted, apparently without any evidence, that the security process employed by American General was such that it enabled the plaintiff to submit a forged document electronically, including the forged electronic signature of the decedent, as further noted by the court:

Appellants have presented nothing more than conjecture to support their alternate claim that decedent did not set up the eService account and change the designated beneficiary. Appellants argue that the trial court placed them, as well as any party finding themselves in appellants' position, in the impossible situation of having to prove a negative. We disagree. Under the facts of the instant case, appellants have failed to provide any substantively admissible evidence that decedent did not execute the beneficiary change.³³

There are three puzzling aspects about this case as reported. First, American General would have to prove the instructions had been received **[*107]** from the late Dr. Zulkiewski. This is where the evidential problems relating to the eService conspire to make it difficult for American General to satisfy this evidential burden. Consider the method by which a person enrolls in the eService: it was necessary to enter the policy number, Social Security number, and mother's maiden name, all of which could easily have been obtained by Dr. Zulkiewski's second wife. The e-mail address that was given could have been a new e-mail address especially created for the purpose. There is no indication to suggest that American General took steps to authenticate whether it was Dr. Zulkiewski's bona fide e-mail address, and there is no mention of such technical evidence as the internet protocol address of the computer that connected with American General's computers, and whether the address was linked to Dr. Zulkiewski's internet service provider or his computer.

The purpose of the password was to provide sufficient evidence to American General so that the next time the password was used, it confirmed that the person that set up the account was the same person that entered the account on subsequent occasions. All of this is flimsy evidence indeed and on the outline of the evidence provided in the opinion, American General could not be certain that Dr. Zulkiewski created the account in the first place.

Next, compare the electronic service set up by American General with the physical method of submitting a change of beneficiary. The first change in beneficiary was made in 2006, on a paper form issued by the insurance company.³⁴ Upon receipt, the insurance company duly altered the name of the beneficiary, and sent a letter on paper to the policy holder, confirming the change.³⁵ There did not appear to be any security mechanism associated with the submission of the piece of paper to identify the veracity of the instruction, nor proof that Dr. Zulkiewski signed the form, nor that he sent it - unless, that is, the insurance company required the policy holder to add their manuscript signature to the paper form. If a signature was required, then the signature written on the form could have been compared to the signature on the original application. It would not have been easy for somebody to forge the signature, partly because the forger would not know whether the insurance company compared the two signatures to be certain of the authenticity of the request. Both the paper form issued by the insurance company and the eService were open to forgery, yet no complaint was made with respect to the paper submission. Changing the name of the beneficiary was as easy to do on paper as it was electronically.

[*108] Finally, it appears that the affidavit sworn by Julie Ann Zulkiewski played a significant part in the decision that was reached in this case. Each of the various assertions made could have been robustly tested: that she had no knowledge or information in respect to the circumstances or process in which she was made the primary beneficiary of the policy; she had not entered the eService under her husband's name, nor forged his electronic signature; and that her late husband was extremely computer literate and that he managed all of his financial affairs electronically. She could have been aware of how to effect a change in beneficiary; she could have created the electronic account - by creating a new e-mail address, and subsequently intercepting the postal confirmation when it arrived through the mail; and her late husband's computer literacy did not act to testify as to her dexterity when using a computer.

³³ Id.

³⁴ Id. at 1.

³⁵ Id.

From the evidential point of view, it is not clear whether Dr. Zulkiewski was married to his second wife before or after the first change in beneficiary in 2006. If the marriage took place before the first change in beneficiary, it is possible that Julie Ann Zulkiewski had a motive for altering the name of the beneficiary on the policy. However, if the marriage took place after the first change in beneficiary, then it might be right to infer that Dr. Zulkiewski was responsible for making the second change on the basis that it is a natural action to take upon getting married, even for a second time. That Julie Ann Zulkiewski asserted that she was the beneficiary of other insurance policies is significant, although it is not certain whether any evidence was put before the court to prove this assertion. If there was evidence that she was the beneficiary of other insurance policies, it would have been of interest to know how the change of beneficiary was accomplished in each case.

The judges were content that the evidence did not indicate that the electronic submission was forged. It was not a question of the appellants' having to prove a negative. The issue in this case was the authenticity of the document - regardless of the form it took - not the electronic signature. It was not a matter of what security procedures were used by American General, but what evidence American General had to establish that the person creating the account was Dr. Zulkiewski, and whether he caused the instructions to be uploaded. If it is deemed to be necessary to authenticate the content of the document, including the signature, then consideration should be given to the nature of the process for both paper documents and electronic submissions. In this respect, if disputes of this nature increase in number, perhaps insurers should look to having paper forms and electronic submissions notarized; e-notarization is neither difficult nor expensive. In this way, such disputes are less likely to occur, and there would be less confusion about such basic concepts.

Ave Maria Law Review
Copyright (c) 2014 Ave Maria Law Review
Ave Maria Law Review

End of Document