

STATE OF MICHIGAN
COURT OF APPEALS

In re GLEN W. FORTINBERRY LIVING TRUST.

CHARLES FORTINBERRY, GLEN W.
FORTINBERRY, JR. And RICHARD S.
FORTINBERRY,

UNPUBLISHED
July 8, 1997

Petitioners-Appellees,

v

CHRISTA FORTINBERRY,

No. 192089
Oakland Probate Court
LC No. 95-241196-TI

Respondent-Appellant.

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In this dispute over the construction of a prenuptial agreement, respondent appeals as of right from an order granting petitioners' motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We reverse.

Prior to their wedding, respondent and her future husband, Glen W. Fortinberry (decedent), executed a prenuptial agreement that limited respondent's rights upon decedent's death. Decedent died some eight months later. Respondent, as decedent's spouse, received survivor benefits from his disability and pension plans and a death benefit from his savings and investment plan. Thereafter, the trustee of the Glen W. Fortinberry Living Trust commenced these proceedings to settle a dispute among respondent and petitioners, decedent's sons, over whether the benefits should be considered part of the amount to which respondent was entitled under the prenuptial agreement or a transfer of additional property outside of the agreement.

Respondent contends that the probate court improperly granted petitioners' motion for summary disposition on the basis of an erroneous construction of the prenuptial agreement. We agree. A trial court's grant of summary disposition is reviewed de novo. *Borman v State Farm Fire &*

Casualty Co, 198 Mich App 675, 678; 499 NW2d 419 (1993). A motion pursuant to MCR 2.116(C)(10) tests the factual support for a valid claim. The nonmoving party must be given the benefit of any reasonable doubt and the court must be liberal in finding a genuine issue of material fact. *Buczowski v Allstate Ins Co*, 198 Mich App 276, 278; 502 NW2d 343 (1993). The court must consider all affidavits, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). To grant the motion, the court must find that the record that might be developed will leave open no issues upon which reasonable minds may differ. *Wolfe v Employers Health Ins Co (On Remand)*, 194 Mich App 172, 175; 486 NW2d 319 (1992).

The dispute in this case centers on the meaning of three provisions of the prenuptial agreement. Paragraph 2(a) of the prenuptial agreement sets forth the amount that respondent would receive in the event the parties were still married when decedent died. Paragraph 7 concerns the parties' transfer of other property. Paragraph 9 specifically addresses gifts from one party to the other. Construing these provisions together, the probate court held that decedent could convey property to respondent pursuant to paragraph 7 or 9, but that the property had to be an asset that is not part of the adjusted gross estate in order for respondent to receive it in addition to the amount owed to her under paragraph 2(a). We agree with respondent that this interpretation of the language of the agreement was erroneous.

Under paragraph 2(a), respondent is entitled to, at minimum, "an amount equal to" 25% of the adjusted gross estate or \$1,000,000. The clear language of paragraph 7 does not restrict decedent's ability to add to this amount by limiting the property he could transfer to that which is not part of the adjusted gross estate. The adjusted gross estate is merely used as a means to calculate the amount to which respondent is entitled under paragraph 2(a). Accordingly, the probate court erred in finding that in order to increase the amount of property respondent would receive upon his death, decedent had to transfer property that would not be included in his adjusted gross estate.

Petitioners argue that decedent did not convey or transfer property, as those terms are used in paragraph 7, because he did not have control over who would receive the benefits upon his death. We disagree. All three benefit plans provide for the transfer of money to a beneficiary upon decedent's death. Under decedent's disability policy, a survivor benefit is automatically paid to his spouse. The payment of the death benefit under the savings and investment plan is to the decedent's spouse unless the spouse consented to the naming of another beneficiary. Under the terms of the pension plan, decedent could have selected a distribution that did not include a survivor benefit. However, once he elected the standard retirement benefit, his spouse would receive a survivor benefit unless she consented to his naming of another beneficiary.

The benefit plans are similar to a life insurance policy, whereby the named beneficiary's rights become absolute upon the death of the insured and the beneficiary is entitled to receive the proceeds. See *Aetna Life Ins Co v Owens*, 318 Mich 129, 138-139; 27 NW2d 607 (1947); *Dogariu v Dogariu*, 306 Mich 392, 406-407; 11 NW2d 1 (1943). Under the terms of both the disability and the savings and investment plan, decedent conveyed an interest in the proceeds to respondent when he married her. With respect to the pension plan, decedent took the additional step of electing a distribution that paid a survivor benefit to his spouse. These interests were contingent on respondent

remaining decedent's spouse, because if they divorced, she would no longer be entitled to benefits under the disability and the savings and investment plans and decedent could change the beneficiary of his pension plan without her consent. Because decedent conveyed contingent interests in the benefit plans to respondent by marrying her and selecting a pension distribution that paid her a survivor benefit, we find that the conveyances fall within the scope of paragraph 7. Therefore, respondent is entitled to receive the benefits in addition to the amount owed to her under paragraph 2(a). Accordingly, summary disposition should have been granted in favor of respondent pursuant to MCR 2.116(I)(2).

In light of our determination that the conveyances fall within the scope of paragraph 7, we do not consider whether they would otherwise constitute gifts within the meaning of paragraph 9 of the agreement.

Reversed and remanded for entry of an order granting summary disposition in favor of respondent.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

¹ The order granting summary disposition was a final order affecting an interested person's rights in an estate which may be appealed by right to this Court. MCL 600.861; MSA 27A.861. Contrary to petitioners' assertion, respondent properly filed her claim of appeal within twenty-one days of the January 2, 1996 order denying her timely motion for rehearing of the court's order granting summary disposition. MCR 7.204(A)(1)(b). Thus, the trial court's grant of summary disposition is properly before this Court. *Gavulic v Boyer*, 195 Mich App 20, 23-24; 489 NW2d 124 (1992).