STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM PRUCHNO and RACHEL PRUCHNO, Plaintiffs-Appellants, v ARLENE PRUCHNO, Defendant-Appellee.	UNPUBLISHED July 8, 2004 No. 245583 Oakland Circuit Court LC No. 02-038434-CK

Before: Owens, P.J., and Kelly and R.S. Gribbs*, JJ.

PER CURIAM.

Plaintiffs commenced this action to enforce a postnuptial agreement under which defendant, the surviving spouse of Albert Pruchno, agreed that plaintiffs, Pruchno's children from a former marriage, would equally share fifty percent of Pruchno's Ford Motor Company pension benefits once defendant reached the age of sixty-five. The circuit court dismissed plaintiffs' case for failure to state a claim, MCR 2.116(C)(8), having concluded that "an antenuptial [sic] agreement cannot override the provisions of an Employee Retirement Income Security Act pension plan." We reverse.

Plaintiffs argue that the circuit court erred in finding that their complaint was preempted by ERISA. We agree.

This Court reviews de novo the circuit court's grant of summary disposition to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.*; *Stopera v DiMarco*, 218 Mich App 565, 567; 554 NW2d 379 (1996). The motion may be granted only where the claims alleged are "'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden*, *supra* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

ERISA's preemption clause, 29 USC 1144(a), provides:

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

For purposes of the preemption provision, ERISA defines "State law" as including "all laws *decisions*, rules, regulations, or other State action having the effect of law, of any State." 29 USC 1144(c)(1) (emphasis added).

A state law "relates to" an ERISA plan "if it has a connection with or reference to such plan." *Egelhoff v Egelhoff*, 532 US 141, 146; 121 S Ct 1322; 149 L Ed 2d 264 (2001), quoting *Shaw v Delta Air Lines, Inc*, 463 US 85, 97; 103 S Ct 2890; 77 L Ed 2d 490 (1983). However, "the term 'relate to' cannot be taken to the furthest stretch of its indeterminacy,' or else for all practical purposes pre-emption would never run its course.'" *Egelhoff*, *supra* at 146, quoting *New York State Conf of Blue Cross & Blue Shield Plans v Travelers Ins Co*, 514 US 645, 655; 115 S Ct 1671; 131 L Ed 2d 695 (1995). Accordingly, "to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *Egelhoff*, *supra* at 147, quoting *California Div of Labor Standards Enforcement v Dillingham Constr, Inc*, 519 US 316, 325; 117 S Ct 832; 136 L Ed 2d 791 (1997), quoting *New York State Conf*, *supra* at 656.

The state law at issue here is ordinary contract law, including judicial decisions governing enforcement of postnuptial agreements. In *MacInnes v MacInnes*, 260 Mich App 280; 677 NW2d 889 (2004), decided during the pendency of this appeal, this Court held that a claim that a beneficiary had waived his right to receive life insurance benefits from his former wife's benefits plan, which was regulated by ERISA, was "most appropriately resolved under principles of waiver rather than preemption." Similarly, this case may be more appropriately resolved under principles of waiver. To the extent that the circuit court's decision was based on ERISA preemption, however, we will consider the issue.

Plaintiffs' complaint seeks to reach half of defendant's share of benefits, which are regulated by ERISA, however, there is no real connection or reference to an ERISA *plan*. The effect of plaintiffs' lawsuit on the plan will be, at best, negligible, because plaintiffs do not challenge their father's beneficiary designation, nor do they seek to compel *the plan* to pay benefits according to the postnuptial agreement. Therefore, we conclude that the circuit court erred in finding that plaintiffs' cause of action was preempted by ERISA.

Plaintiffs also argue that the circuit court erred in finding that the provision in the postnuptial agreement governing the distribution of pension benefits once defendant reached the age of sixty-five is barred by ERISA's anti-alienation provision. We agree.

Except in circumstances not relevant to this case, ERISA provides that "pension plan" benefits "may not be assigned or alienated," whether voluntarily or involuntarily. 29 USC 1056(d)(1); see also *Metropolitan Life Ins Co v Marsh*, 119 F3d 415, 419-420 (CA 6, 1997). However, ERISA only prohibits assignments and alienations that are enforceable against the plan. See *State Treasurer v Abbott*, 468 Mich 143, 150-158; 660 NW2d 714 (2003), relying in part on 26 CFR 1.401(a)-13(c)(1)(ii). In this case, plaintiffs do not allege that the postnuptial

agreement is enforceable against the plan, nor do they seek an order requiring the plan to pay benefits directly to them. Therefore, the circuit court erred in finding that plaintiffs' action was barred by the anti-alienation provision.

Plaintiffs next argue that the postnuptial agreement is effective as a waiver of benefits, both under § 1055 of ERISA, 29 USC 1055, and at common law. We agree in part and disagree in part.

The waiver issue was not addressed by the circuit court and is thus not properly preserved. *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 524; 679 NW2d 106 (2004); see also *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). However, we consider it because it involves a question "of law for which all the necessary facts were presented." *Joe Panian Chevrolet, Inc v Young*, 239 Mich App 227, 233; 608 NW2d 89 (2000).

As part of the Retirement Equity Act (REA) of 1984, ERISA was amended to require that pension plans provide qualified joint and survivor (or qualified preretirement survivor) annuities to the surviving spouses of deceased vested plan participants. See 29 USC 1055(a), (d), (e) and (h)(1). During each election period,[1] "each *participant*" may choose to "waive the qualified joint and survivor form of benefit or the qualified preretirement survivor annuity form of benefit (or both)," provided that "the spouse of the participant *consents* in writing to such an election." 29 USC 1055(c)(1)(A)(i), (c)(2)(A)(i), and (k) (emphasis added). As part of the waiver, the participant must "designate[] a beneficiary (or a form of benefits) that may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse)." 29 USC 1055(c)(2)(A)(ii). Additionally, "the spouse's consent [must] acknowledge[] the effect of such election and [be] witnessed by a plan representative or notary public." 29 USC 1055(c)(2)(A)(iii).

In this case, the postnuptial agreement is signed by the participant, it contains defendant's signed consent, it designates other beneficiaries for half of defendant's share of pension benefits, it acknowledges the effect of that designation, and it is notarized. However, as Department of Treasury regulations make clear, the election and waiver provisions of § 1055 are a mechanism for the participant (and spouse) to instruct *the plan* concerning their wishes. See 26 CFR 1.401(a)-11(c)(1)(i) (elections); 26 CFR 1.411(a)-11(a) and (c) (consent required for distribution of accrued benefits); 26 CFR 1.417(e)-1(b)(1), (2)(i) and (3)(i) (written consent of participant and spouse required); see also 29 USC 1165. In the present case, there is no claim that the postnuptial agreement was executed during a plan election period, or that it was provided to the plan or intended to be binding upon it. Therefore, the agreement is not a waiver or election under § 1055 of ERISA.

This does not end the inquiry, however. Although federal appellate courts are in conflict concerning whether a nonparticipant beneficiary may waive the right to receive benefits from an

[1] See 29 USC 1165.

ERISA plan, in *MacInnes*, *supra* at 286-287, this Court recently adopted the majority view on this issue, and held that such a waiver is possible. To be effective, the waiver must be a "voluntary and intentional relinquishment of a known right." *Id.* at 287. In this case, plaintiffs' complaint alleges that defendant made such a waiver by signing the postnuptial agreement. Because plaintiffs' complaint is not so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the circuit court erred in granting defendant's motion for summary disposition.

Finally, because the question of remedy is premature, and because the circuit court did not reach the question whether a constructive trust or establishment of an escrow account was appropriate, we decline to consider these questions.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Roman S. Gribbs