

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Jean Hipp

Court of Appeals No. H-08-027

Appellant

Trial Court No. CVH 20071048

v.

Daniel Hipp, Administrator of the
Estate of David Hipp

DECISION AND JUDGMENT

Appellee

Decided: June 30, 2009

* * * * *

Michael B. Jackson, for appellant.

Warren W. Ruggles and West M. Ruggles, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the August 4, 2008 judgment of the Huron County Court of Common Pleas, which denied appellant, Jean Hipp, recovery against the estate of David Hipp, deceased. Upon consideration of the assignments of error, we affirm the

decision of the lower court. Appellant, Jean Hipp, asserts the following single assignment of error on appeal:

{¶ 2} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT/APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF/APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND CONCLUDING THAT NO CONTRACT CLAIM EXISTED WHEREBY PLAINTIFF COULD COLLECT THE FUNDS OWED HER FROM THE DECEDENT/APPELLEE'S ESTATE."

{¶ 3} Appellant, Jean Hipp, filed an action pursuant to R.C. 2117.12 against appellee, Daniel Hipp, Administrator of the Estate of David Hipp, appellant's former husband. The parties were divorced in 2004. Pursuant to the divorce decree, David Hipp was required to assign to appellant one-half of his public employee retirement ("PERS") account, valued at that time at \$80,000. However, David Hipp committed suicide in 2005, which was prior to the time when he would have been eligible to receive retirement benefits.

{¶ 4} When appellant made her claim against David Hipp's PERS account, she was informed that, pursuant to R.C. 145.45(C)(1), the funds were required to be distributed to the minor children. Appellant filed a claim against the Hipp Estate in February 2006, which was rejected in August 2007. Appellant then filed this action on September 28, 2007, to recover half of the retirement benefits. Both parties sought

summary judgment. In an order journalized on August 4, 2008, the common pleas court granted summary judgment to appellee. Appellant then sought an appeal to this court.

{¶ 5} It is undisputed in this case that the decedent had been ordered by the 2004 divorce decree to assign to appellant one-half of the value of his Ohio PERS retirement account. The decree further provided that: "The court shall retain jurisdiction over spousal support with respect to the division of [the decedent's] PERS account until retirement benefits commence; [the decedent] shall obtain and maintain a \$40,000.00 term life insurance policy and shall name [appellant] as beneficiary of the policy and shall maintain the policy in full force and effect until retirement and/or commencement of benefits; each party shall pay one-half the premium for the term life insurance policy, and if the law changes to allow extrication of [appellant's] share of [the decedent's] PERS account, the court may revise the order.

{¶ 6} "Otherwise, the parties agree that the property settlement reached in this Agreement constitutes full and complete settlement of all property rights arising out of the marital relationship including inchoate rights each may have in the pensions of the other. Except as otherwise provided herein, each of the parties waives any interest he or she may have in the rights to the pension income or rights of the other."

{¶ 7} The trial court held that appellant does not have a contract claim against the estate based upon the language of the divorce decree. The court noted that the divorce decree set forth an alternative method of payment to appellant in the event of the decedent's death prior to attaining the age of eligibility for retirement benefits. The

parties did not obtain the life insurance policy as directed by the divorce decree.

Unfortunately, the parties did not contemplate the decedent's suicide. Therefore, the trial court granted summary judgment in favor of appellee and dismissed the complaint.

{¶ 8} Appellant does not dispute the fact that the funds in the account must be distributed to her children. Rather, she argues that it is only under Ohio's PERS that appellant was unable to obtain the property that had been awarded to her under the divorce decree because of R.C. 145.45(C)(1), which requires that the benefits be distributed to the minor children upon the premature death of the employee. She argues that R.C. 145.45(C)(1) created an anomaly and altered a privately-negotiated contract, as well as the intention of R.C. 3105.171 and the outcome of the decedent's will. Rather, she argues that the divorce decree created a contract between her and her former husband and that she is entitled to recover against the estate as a creditor. She also argues that it is inequitable to ignore the fact that this statute interfered with the equitable distribution of marital property.

{¶ 9} Appellee argues that the divorce decree created only a contingent contractual right to share in a future portion of the decedent's PERS retirement benefits because Ohio law did not permit a former spouse to preserve survivorship benefits in the account. But, because David Hipp died prior to becoming eligible to receive retirement benefits and the assignment expired pursuant to R.C. 3105.86, appellant lost the right to have the contract fulfilled. Furthermore, since the divorce decree stated that this was the final settlement of the property rights and a trial court cannot retain jurisdiction over

property distributions, appellant cannot now seek to recover additional funds from the estate simply because the assignment of the Ohio PERS account did not come to fruition. Finally, appellee argues that the divorce decree did not award a money judgment which can be enforced against the estate.

{¶ 10} Summary judgment is reviewed de novo. *Advanced Analytics Labs., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 33. Therefore, applying the requirements of Civ.R. 56(C), summary judgment is appropriate only when it is clear " * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 11} We find that the trial court did not err in rendering summary judgment to appellee in this case. Clearly, the divorce decree awarded appellant an assignment of a portion of the future benefits in the decedent's retirement account. The parties recognized the danger of such an award based upon the law governing Ohio PERS retirement benefits. The parties sought to counterbalance this danger with a term insurance policy covering the life of the decedent. However, that strategy was not successful in this case. There is no equitable remedy available to enable appellant to recover the property she lost.

{¶ 12} Appellant attempts to separate the term life insurance provision from the remainder of the paragraph regarding the division of pension benefits. When the paragraph is read in its entirety, however, it is clear that it is part of the division of pension benefits. We also reject appellant's analysis that if the life insurance policy is part of the division of the pension benefits, then appellant could have collected double by collecting a portion of the pension benefits and on the life insurance policy. Had the decedent lived long enough to retire, the clause further provided that decedent would then be relieved of his obligation to continue to pay one-half of the premiums for the term life insurance and it would have expired. Appellant's sole assignment of error is not well-taken.

{¶ 13} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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