

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP836-FT

Cir. Ct. No. 2006CV214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JEANINE JOHNSON,

PLAINTIFF-RESPONDENT,

V.

ROBYN BLODGETT,

DEFENDANT-APPELLANT,

FARMER'S NEW WORLD LIFE INSURANCE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County:
THOMAS J. SAZAMA, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This is a dispute over the proceeds of a life insurance policy owned by Timothy Johnson at his death.¹ Robyn Blodgett, Timothy's sister, appeals a summary judgment concluding Jeanine Johnson, Timothy's ex-wife, is the rightful beneficiary. Blodgett argues the court erred in excluding her affidavits under the dead man's statute, WIS. STAT. § 885.16, and the affidavits create a material dispute as to whether Timothy intended Jeanine remain beneficiary of the policy when the two divorced. We agree with Blodgett, reverse the judgment, and remand for further proceedings.

BACKGROUND

¶2 Timothy died in September 2005. At the time of his death, he owned a life insurance policy issued by Farmer's New World Life Insurance with a death benefit of \$50,000. Jeanine was listed as primary beneficiary, and Blodgett was listed as contingent beneficiary. The policy was issued in 1989, while Timothy and Jeanine were married. Timothy and Jeanine divorced in March 2000.

¶3 Two circuit court actions were filed to determine the correct beneficiary, one by Jeanine and one by Farmer's Insurance. The two cases were consolidated. Jeanine moved for summary judgment, arguing the available evidence conclusively showed Timothy intended Jeanine remain beneficiary of the policy after the divorce. *See* WIS. STAT. § 854.15(5)(f) (1999-2000).²

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN STAT. § 854.15(5)(f) was revised and renumbered § 854.15(5)(bm) effective April 11, 2006. 2005 Wis. Act 216 § 147. All references to § 854.15(5)(f) are to the 1999-2000 version, the version in effect at the time of the divorce.

¶4 As support for her motion, Jeanine included a May 2004 letter from Timothy to Farmer's Insurance purportedly showing Timothy intended she remain beneficiary. Jeanine also included an affidavit by Timothy's attorney in the divorce. The attorney said Timothy told him he wished to keep Jeanine the beneficiary of the policy as a way of thanking her for taking care of him after the divorce.³ Finally, Jeanine included her own affidavit, in which she said she and Timothy continued to live together after the divorce and agreed to keep their life insurance beneficiaries the same as they had been before the divorce.

¶5 Blodgett filed a response that included four affidavits. The first affidavit was her own, in which she said Timothy told everyone present at a party in 2001 that he was going to take care of her after he died. The second affidavit, by Blodgett's husband Marvin, repeated Blodgett's account of the 2001 party. Marvin also said he and Timothy had been good friends, and Timothy told him numerous other times he intended Blodgett to be beneficiary of the policy. The third affidavit, by one of Timothy's friends, Pamela Ristola, essentially repeated Blodgett's account of the 2001 party. The final affidavit was by Mary Turri, who dated Timothy on and off after his divorce. Turri said during that time Timothy made a number of statements to her indicating he wanted Blodgett to receive the insurance proceeds when he died. She also recalled an incident in 2000 in which Timothy told the group at an Alcoholics Anonymous meeting that the only good thing to come out of his divorce was that he would be able to give money to Blodgett when he died.

³ According to Jeanine's affidavit, Timothy suffered from cirrhosis of the liver and became dependent on her for his care after the divorce.

¶6 The circuit court granted Jeanine’s motion for summary judgment. The court concluded Blodgett’s affidavits were barred under WIS. STAT. § 885.16, the dead man’s statute, and without them no genuine issue of material fact existed as to Timothy’s intent.⁴ The court concluded Jeanine had met her burden of proving Timothy intended her to remain beneficiary after the divorce. *See* WIS. STAT. § 854.15(5)(f).

DISCUSSION

¶7 We review summary judgments without deference to the circuit court, using the same methodology. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; WIS. STAT. § 802.08(2).

¶8 In this case, Timothy is presumed to have revoked the beneficiary designation in favor of Jeanine when the two divorced. *See* WIS. STAT. § 854.15(3)(a). In order to overcome that presumption, Jeanine has the burden of proving Timothy intended her to remain beneficiary after the divorce. *See* WIS. STAT. § 854.15(5)(f). She therefore is entitled to summary judgment only if the summary judgment submissions leave no dispute that Timothy intended she remain beneficiary after the divorce.

¶9 Jeanine argues no dispute exists because Blodgett’s affidavits are barred by the dead man’s statute, WIS. STAT. § 885.16. The dead man’s statute

⁴ The court also held that in the alternative Jeanine was entitled to summary judgment because Blodgett’s affidavits were “not inherently trustworthy or credible.” On appeal, Jeanine does not argue she is entitled to summary judgment on this ground.

disqualifies witnesses from testifying to a “transaction or communication” between themselves and a deceased person under certain circumstances. WIS. STAT. § 885.16. The statute bars only testimony by a witness with a “present, certain, and vested” interest in the outcome of the proceeding. *Gerczak v. Gerczak*, 2005 WI App 168, ¶14, 285 Wis. 2d 397, 702 N.W.2d 72 (citation omitted). A “present, certain, and vested interest” exists only if: (1) the witness will “gain or lose by the direct legal operation and effect of the judgment”; or (2) the record of the case will be evidence for or against the witness in a different proceeding.⁵ *Id.* (citation omitted).

¶10 Under this rule, a child of a party may testify even though the child could potentially receive the proceeds of the suit through gift or inheritance at some future point. *Nale v. O’Dell*, 61 Wis. 2d 654, 659-60, 213 N.W.2d 552 (1974). Similarly, a mother of a party may testify, since any benefit to her from the suit would be indirect. *Vargo v. Buban*, 68 Wis. 2d 473, 228 N.W.2d 681 (1975). Finally, prior to marital property, a spouse could testify in a proceeding in which the other spouse stood to benefit, since the spouse’s potential inheritance or election rights might or might not ultimately result in receipt of some part of the proceeds of the suit. *Bethesda Church v. Menning*, 72 Wis. 2d 8, 13, 239 N.W.2d 528 (1976). However, under marital property both spouses are subject to the statute when one spouse stands to recover back wages, since income

⁵ Jeanine argues the dead man’s statute disqualifies all witnesses except those with an “adverse interest” to the party calling them. She relies on a case in which we held that a party could not invoke the dead man’s statute to avoid testifying when called adversely. See *Bell v. Neugart*, 2002 WI App 180, ¶¶8, 21-22, 256 Wis. 2d 969, 650 N.W.2d 52. However, *Bell* did not hold this was the only situation in which the dead man’s statute would not apply; instead, *Bell* simply described a different limitation on the reach of the statute than the one applicable here. See *id.*, ¶22.

is marital property in which both spouses have an equal undivided share. *Gerczak*, 285 Wis. 2d 397, ¶19.

¶11 In this case, Blodgett is a party who stands to gain the death benefit of the life insurance policy. She therefore will “gain or lose by the direct legal operation and effect of the judgment,” and is subject to the dead man’s statute. *See id.*, ¶14. However, the same cannot be said of Marvin Blodgett, Ristola, or Turri. Marvin does not stand to gain or lose directly in this case, since any recovery by his wife will be her individual property. *See* WIS. STAT. § 766.31(7)(a). The possibility that he may receive some part of the proceeds in the future through election or inheritance is not sufficient to make him subject to the statute. *See Bethesda Church*, 72 Wis.2d at 13. Ristola and Turri are unrelated to Blodgett and, so far as the record indicates, have no connection to the case beyond a friendship with Timothy and perhaps Blodgett. Neither stands to “gain or lose by the direct legal operation and effect of the judgment,” and the dead man’s statute therefore does not apply to them. *See Gerczak*, 285 Wis. 2d 397, ¶14. The testimony of these three witnesses creates a material factual dispute over whether Timothy intended Jeanine to remain beneficiary of the policy after their divorce.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

