STATE OF MICHIGAN

COURT OF APPEALS

JONATHAN GROSSMAN and ELIZABETH GROSSMAN,

Plaintiffs-Appellees,

v

BARBARA BERENT-RUBENSTEIN, individually and as trustee of the LIVING TRUST OF BARBARA BERENT-RUBENSTEIN,

Defendant/Cross-Defendant/Appellant,

and

REASSURE LIFE INSURANCE COMPANY f/k/a VALLEY FORGE LIFE INSURANCE COMPANY,

Defendant/Cross-Plaintiff.

UNPUBLISHED
January 17, 2012

No. 301228
Oakland Circuit Court
LC No. 2009-103059-CB

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Barbara Berent-Rubinstein appeals as of right from the trial court order granting summary disposition in favor of plaintiffs and denying her motion for summary disposition. We affirm.

Plaintiffs are the adult children of James Grossman. In 1985, Grossman applied for a life insurance policy, numbered 82009255, with Reassure Life Insurance Company, naming his then-wife, Berent-Rubenstein, as the beneficiary of 50% of the proceeds of the policy upon his death and plaintiffs the beneficiaries of 25% of the proceeds each. Grossman and Berent-Rubenstein (hereafter "defendant") divorced in 1998. At the time of the divorce, Grossman still had the policy he had applied for in 1985 as well as an additional policy, numbered 84042212, with the company (now known as Valley Forge Life Insurance Company) in which defendant was named the sole beneficiary. Relevant to the instant matter, Grossman and defendant's divorce judgment contained the following provision:

> IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, BARBARA BERENT, is hereby awarded as her sole and separate property, free and clear of any claim, right or interest on the part of the Plaintiff, JAMES F. GROSSMAN, the two whole-life Valley Forge Life Insurance Policies no. 82009255 ($325,000.00) and 84042212 ($300,000.00) which she currently owns on the life of the Plaintiff and that the Defendant shall be solely responsible for the payment of any future premiums that must be paid in order to keep said insurance policies in force should she wish to keep such policies in effect. The Defendant, BARBARA BERENT, shall not change the beneficiary designation for Valley Forge Life Insurance Policy No. 84042212 which currently designates the Defendant and the Plaintiff's two adult children as beneficiaries.

Grossman passed away in 2009. Plaintiffs thereafter learned that prior to his death, defendant had removed them as beneficiaries of Grossman's Valley Forge life insurance policy and that defendant had received a distribution of 100% of the policy proceeds after his death. Plaintiffs thus initiated this action against defendant for breach of contract and unjust enrichment and against Valley Forge for negligence. In the complaint, plaintiffs pointed out that because they had never been designated as beneficiaries on policy no. 84042212, which had been handwritten into the judgment of divorce, but had been named beneficiaries on policy no. 82009255, the wrong policy number had been handwritten into the judgment of divorce.

In lieu of answering plaintiffs' complaint, defendant moved for summary disposition. In its April 7, 2010 order denying the motion for summary disposition, the trial court amended defendant and Grossman's judgment of divorce *nunc pro tunc* to read that defendant "shall not change the beneficiary designation for Valley Forge Life Insurance Policy No. 82009255 which currently designates the Defendant and the Plaintiff's two adult children as beneficiaries." Plaintiffs thereafter moved for partial summary disposition asserting that they had a legal or equitable interest in 50% of the proceeds of policy no. 82009255 and that defendant wrongly kept the entire amount of the policy proceeds upon Grossman's death. Defendant denied that plaintiffs had any interest in the insurance policy and renewed her request for summary disposition in her favor. The trial court found that plaintiffs had an equitable interest in 50% of the insurance policy proceeds and granted plaintiffs' motion, while denying defendant's motion for summary disposition. This appeal followed.

On appeal, defendant first contends that the trial court abused its discretion in rewriting the terms of the consent judgment of divorce under MCR 2.612(A)(1). We disagree.

Generally, this Court reviews a decision pursuant to MCR 2.612 for an abuse of discretion. *Detroit Free Press, Inc v Department of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.612(A)(1) provides, "Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it." The purpose of this rule is "to make the lower court record and judgment accurately reflect what was done

and decided at the trial level." *McDonald's Corp v Canton Township*, 177 Mich App 153, 159; 441 NW2d 37 (1989), quoting *Stokus v Walled Lake Bd of Ed*, 101 Mich App 431, 433; 300 NW2d 586 (1980).

As previously indicated, when originally entered, Grossman and defendant's divorce judgment precluded defendant from changing the beneficiary designation on life insurance "Policy No. 84042212 which currently designates the Defendant and the Plaintiff's two adult children as beneficiaries." It is undisputed that the identified policy does not and never did name plaintiffs as beneficiaries. As pointed out by plaintiffs, however, a second life insurance policy identified in the same paragraph in the judgment of divorce and issued by the same company, did name plaintiffs as beneficiaries at one point in time, indicating the possibility of a clerical error. Plaintiffs attached several documents to their response to defendant's motion for summary disposition supporting their argument that the reference to policy no. 84042212 was in error and that defendant and Grossman actually meant to reference the Valley Forge life insurance policy no. 82009255. For example, in a January 20, 1998 letter from Grossman's counsel, Mr. Jackman, to defendant's divorce counsel, Jackman states:

> I have discussed the issue of the insurance policy with my client. Mr. Grossman is not seeking any financial advantage whatsoever. His only concern is that the one policy on which the children are beneficiaries be preserved for their benefit in the event of your client's untimely death. Mr. Grossman simply wants some mechanism to ensure that the policy stays in effect so that your client's estate and the children receive the benefits of the policy when Mr. Grossman dies.

Plaintiff also attached the transcript of a February 4, 1998 hearing where defendant moved for entry of the judgment of divorce. At the hearing, defendant's counsel stated, "there's only one area that the parties are in dispute over, and that has to do with the two full life insurance policies." The trial court indicated, "Okay. Two whole life policies. Well, she was to—my understanding, she's not to change the beneficiary designation on both policies." Defendant's counsel acknowledged, "That's correct," to which the trial court stated, "And as I read page seven, it only talks about one policy that she's not to change." The following exchange then took place:

> Mr. Mastrangel (defendant's counsel): That's correct, your honor. She is the sole beneficiary on one and on the second policy, the one that the defendant is –or the plaintiff is concerned about, she is a 50 percent beneficiary and the plaintiff's two adult children are the other 50 percent beneficiary. So that we're only talking about one policy at issue.
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> Mr. Jackman (Grossman's counsel): That is correct, your Honor.

Defendant correctly notes that at the November 12, 1997 hearing where defendant and Grossman's divorce settlement was placed on the record, Mr. Mastrangel simply stated that "[t]he defendant Barbara Berent is awarded as her sole and separate property, the two whole life Valley Forge Life Insurance policies, and she has agreed that she will not change the beneficiary designation from that designation on the policies that exist today." However, what, exactly, the parties understood the designation to be appeared on the record at the February 4, 1998 motion

hearing and in the February 4, 1998 Judgment of Divorce. And, it is important to note, the February 4, 1998 hearing occurred as a result of Grossman's request to include a further provision in the judgment that in the event defendant pre-deceased him that he would be allowed to pay the premiums on the policy at issue. As indicated by Grossman's counsel:

> My client feels that the purpose of this agreement was that the policy remain in effect –it insures his life for his children and the defendant. And he wanted just a provision put in there in the event that the defendant predeceased him, that he would be allowed to pay the premiums to keep the policy in effect, which would benefit the defendant's estate and would also preserve the policy of insurance.

The entire purpose of the motion, and a potential sticking point over entry of the divorce judgment, was Grossman's concern over plaintiffs' ability to collect on the policy—obviously a matter of great importance to him.[1]

More importantly, clearly both parties' counsel and Grossman were operating under the understanding that plaintiffs were the current named beneficiaries on one of the two Valley Forge life insurance policies in Grossman's name and both intended that the judgment of divorce reflect that defendant not be allowed to remove them as designated beneficiaries. Because the judgment contained a specific sentence referencing that two adult children were the current beneficiaries in a Valley Forge life insurance policy and a space was left for the specific policy number to be written in, both parties obviously intended that the policy number corresponding with the policy in which they were named beneficiaries be written in the blank. Based upon the documentation submitted by plaintiffs the trial court could conclude that where the specific policy written in the judgment of divorce was not the one that did or ever had named plaintiffs as the designated beneficiaries, the judgment of divorce should be amended to reflect the policy number corresponding to the policy in which plaintiffs were named as beneficiaries.

Defendant repeatedly states that the trial court's conclusion that the judgment required revision to comport with the record was based upon facts it believed to be true but were not--specifically, the fact that it believed that plaintiffs were the designated beneficiaries on policy no. 82009255 at the time of entry of the judgment of divorce when, in fact, defendant had removed them as beneficiaries several years prior to the divorce proceedings. Defendant neatly glosses over the fact, however, that such conclusion was made only because defendant misled Grossman and the divorce court and apparently did not initially make the fact clear to the trial court. Defendant, after all, was the one who changed the beneficiary designations. Yet, she allowed her divorce counsel to use the "continued" designation of plaintiffs as beneficiaries as a negotiating point. Her counsel specifically and expressly stated on the record that plaintiffs were designated beneficiaries on the policy, her counsel drafted a judgment of divorce stating the same, and defendant signed the consent judgment. This Court will not now allow defendant to use her

[1] The trial court denied Grossman's request to add such a provision in the judgment because the parties had already agreed to the judgment terms.

misstatements as a shield. Based upon the record, the trial court did not abuse its discretion in amending the judgment of divorce to reflect the explicit intent expressed by the parties through their counsel.

Defendant next contends that the trial court erred in granting summary disposition to plaintiffs and denying her cross-motion for summary disposition. We disagree.

We review a grant of summary disposition de novo. *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 23; 800 NW2d 93 (2010). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Robinson v Ford Motor Co*, 277 Mich App 146, 150; 744 NW2d 363 (2007). When reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). Summary disposition is appropriate under MCR 2.116(C)(10) when the moving party can demonstrate there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

According to defendant, even if the trial court did not abuse its discretion in amending the judgment of divorce, the trial court went beyond correcting a scrivener's error. Defendant asserts that, even as amended, the judgment of divorce merely precludes her from changing the beneficiaries on policy no. 82009255. Defendant contends, however, that in granting summary disposition in plaintiffs' favor, the trial court essentially rewrote the judgment of divorce to create and then enforce a new agreement between her and Grossman that requires her to share in the proceeds of an insurance policy that she was not even required to maintain.

Defendant correctly points out that this matter is factually dissimilar to certain cases cited by plaintiffs in support of their motion for summary disposition, particularly *Wiltz v John Hancock Mut Life Ins Co*, 58 Mich App 604; 228 NW2d 484 (1975) and *Pernick v Brandt*, 201 Mich App 293; 506 NW2d 243 (1993), in that those cases required one of the parties to maintain an insurance policy. Here, in contrast, the judgment of divorce did not require defendant to maintain the insurance policy at issue. That fact is expressly acknowledged in the judgment of divorce wherein it awarded defendant the policy at issue as her sole and separate policy and made her "solely responsible for the payment of any future premiums that must be paid in order to keep said insurance policies in force *should she wish to keep said policies in effect*." Defendant could have stopped paying the premiums on the policy or let it lapse. In that case, we would not be here. But, she did not, and the judgment of divorce contained an additional provision prohibiting her from changing the beneficiaries on the policy which, as previously indicated, her counsel represented to Grossman and the divorce court were she and plaintiffs, and which was expressly written into the judgment of divorce as being defendant and plaintiffs. Because defendant did, in fact, voluntarily undertake to maintain the policy, she was held to the additional term of the divorce judgment that governed the life insurance policy.

In that vein, this case is similar to *Krueger v Krueger*, 88 Mich App 722; 278 NW2d 514 (1979). In that case, a husband and wife were engaged in a divorce proceeding. During the pendency of the suit, they reached an agreement covering all material matters, which they placed on the record and incorporated into a consent judgment of divorce that was subsequently entered.

Part of their agreement required the husband to change the beneficiary on his life insurance policy from his former wife to the parties' son, until the son reached 21 years of age or graduated from college. *Id*. at 724. This obligation was not tied to child support or otherwise conditioned. The husband initially made the change, but thereafter changed the beneficiary on the policy to his own mother. When the parties' son was 18 years of age, the husband passed away. Both the son and the husband's mother attempted to claim the proceeds of the life insurance policy. *Id*. at 724. A panel of this Court held that because the judgment of divorce obligated the husband to name the parties' son as the beneficiary on the life insurance policy, the son was entitled to the insurance proceeds. The Court noted, "parties in a divorce case may make a settlement of their interests which the court could confirm even if it could not make such a disposition if the case were not contested." *Id*. at 725. The *Krueger* Court's finding turned upon and is consistent with the long held principle that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake. See, e.g., *Lentz v Lentz*, 271 Mich App 465, 474; 721 NW2d 861 (2006).

Again, defendant elected to have the provision regarding a prohibition against a change of beneficiaries (which are specifically identified as plaintiffs' adult children) included in the consent judgment of divorce. This was not a provision compelled or drafted by the divorce court, but rather a point negotiated and agreed upon by the parties. Grossman likely conceded certain of the parties' property in settlement, as did defendant. She accepted the benefits of the judgment in her favor and must also accept the obligations imposed upon her in the same.

Defendant contends that the terms of the divorce judgment do not translate into the agreement that the trial court enforced–that she would share in the proceeds of the insurance policy. She bases this argument on the fact that she had already changed the beneficiary prior to the divorce action and extends this argument to conclude that because the beneficiary designation had long been changed, she did not breach any contract, as alleged in plaintiffs' complaint, nor could plaintiff claim of unjust enrichment succeed such that she was entitled her to summary disposition on plaintiffs' complaint.

We note, however, that the trial court granted plaintiffs' action based upon equity. Plaintiffs did assert claims of breach of contract and unjust enrichment against defendant but additionally asked in their request for relief for "any other relief that is equitable and proper under the circumstances." A reasonable interpretation of defendant's actions in maintaining throughout the divorce proceedings that plaintiffs were beneficiaries on one of Grossman's Valley Forge life insurance policies and agreeing that she would not change the designation of them as beneficiaries represents an implicit agreement that so long as she had the policy, plaintiffs were and would be entitled to a share in the insurance proceeds. That defendant may have been less than honest in her statements to the divorce court and Grossman does not absolve her of obligation to comply with the essence and terms of her agreement.

Moreover, given the specific circumstances of this case, it was not unreasonable for the court to view plaintiffs as having an equitable interest in the proceeds of the life insurance policy. In its sound discretion, a court may grant equitable relief if no legal remedy is available or if an available remedy at law is doubtful or uncertain. *King v State*, 488 Mich 208, 219; 793 NW2d 673 (2010). A court's discretionary use of equity allows "complete justice" to be done. *Id*. at 221.

Though not precisely on point, we find *Ovaitt v Ovaitt*, 43 Mich App 628; 204 NW2d 753 (1972) particularly relevant. In *Ovaitt*, the parties included in their consent judgment of divorce a provision which required the husband to provide a set amount of monthly support to the parties children while the children were attending college, to cover college expenses. The parties both agreed that at the time the judgment was entered, they were both aware that the children would be over the age of 21 by the time they complete four years of college. *Id*. at 631. When the eldest child reached the age of 21, however, the husband refused to pay the agreed upon college expense amount set forth in the judgment. While the trial court terminated the husband's obligation to pay the expenses, this Court reversed:

> Under the facts of this case, where the parties entered into an agreement that was incorporated by the court in its judgment, and the parties concede they knew at the time that the terms were not subject to performance fully within the minority of the children, it would be an invitation to chaos to hold that such provision was not enforceable. It would permit parties to divorce actions to play fast and loose with the court and with the other parties to the action by entering into agreements which they had no intention of performing.
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> Plaintiff's conduct indicates a deliberate and willful misrepresentation to the court and opposing party at time of agreement and entry of judgment with respect to post-minority expenses of the children. As a matter of public policy, this should not be permitted and the parties should be required to live up to the terms of their voluntary agreement.

The same holds true here.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto