

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LADONNA PARTLOW, Personal Representative  
of the Estate of FARRELL PARTLOW,

Plaintiff/Counter Defendant-  
Appellee,

v

JULIE ANN PERSON,

Defendant/Counter Plaintiff-  
Appellant.

UNPUBLISHED  
November 27, 2012

No. 308001  
Wayne Circuit Court  
LC No. 10-014490-CK

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Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant, the decedent's ex-wife, appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff, the decedent's daughter and the personal representative of the decedent's estate. Because the trial court properly determined that plaintiff is entitled to the decedent's life insurance benefits as a matter of law, we affirm.

Defendant and the decedent were married on June 10, 2000. During their marriage, the decedent completed a beneficiary designation form designating defendant as the primary beneficiary of a MetLife life insurance policy. Defendant and the decedent divorced on May 30, 2003, pursuant to a consent judgment for divorce, signed by both parties and entered in the Wayne Circuit Court. On September 27, 2010, the decedent died without having changed the beneficiary designation on the life insurance policy. Both plaintiff and defendant made claims for the life insurance benefits. In a letter dated October 18, 2010, MetLife determined that the proceeds of the life insurance policy were payable to defendant because she was the last named beneficiary and disbursed the proceeds to defendant.

On December 14, 2010, plaintiff filed this action against defendant alleging breach of contract and seeking a declaratory judgment ordering that the life insurance benefits were payable to the decedent's estate pursuant to a waiver provision in the consent judgment of divorce. The waiver provision stated that "any right either party has to the proceeds or other benefits of policies or cont[r]acts of life insurance . . . upon the life of the other as a named beneficiary . . . are extinguished unless provided for elsewhere in this judgment." In response, defendant asserted that she and the decedent still loved and cared for each other despite their

divorce and that the decedent had told her on more than one occasion that he wanted her to remain the beneficiary of his life insurance proceeds. Thus, defendant argued that the decedent effectively waived the waiver in the consent judgment of divorce and that his intent “could not be clearer” that he wanted defendant to receive the proceeds. In support of her argument, defendant relied on her own affidavit and on an undated, typewritten love letter that the decedent had purportedly given her after their divorce. The trial court granted summary disposition in plaintiff’s favor pursuant to MCR 2.116(C)(10) on the basis that the waiver provision in the consent judgment of divorce was controlling as a matter of law and the decedent and defendant had taken no action to render the provision unenforceable.

We review de novo a trial court’s ruling on a motion for summary disposition. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion brought under MCR 2.116(C)(10) “tests the factual support of a plaintiff’s claim.” *Id.* Summary disposition under subrule (C)(10) is appropriate “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.*

Defendant first argues that a consent judgment of divorce is a contract and that after executing the consent judgment she and the decedent modified its terms through their words and deeds. Defendant asserts that it was not necessary for the trial court to codify the modification in a subsequent order in order for the modification to be effective. Plaintiff, on the other hand, argues that the waiver provision in the consent judgment of divorce is controlling and that a court order cannot be modified or voided without court approval. The consent judgment of divorce provided, in pertinent part:

BENEFICIARY RIGHTS

IT IS FURTHER ORDERED AND ADJUDGED that any right either party has to the proceeds or other benefits of policies or cont[r]acts of life insurance, endowments, or annuity upon the life of the other as a named beneficiary or by assignment during or in anticipation of marriage are extinguished unless provided for elsewhere in this judgment.

\* \* \*

EFFECTIVE DATE OF JUDGMENT

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment is effective on the date of entry.

In signing this Consent Judgment of Divorce, I verify that I have read and understand its provisions and approve its substance and form. It correctly and completely states the terms of our settlement agreement. To the best of my knowledge, I have fully disclosed to my spouse all assets in which I have ownership interest, and this Judgment distributes all the assets that we have disclosed to each other. I consent to entry of this Judgment in its entirety.

“[A] waiver is a voluntary and intentional abandonment of a known right.” *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). Consistent with “general contract interpretation principles, a court must examine the language of the waiver provision to determine the intent of the parties and if there was a valid waiver of the rights in question.” *Sweebe v Sweebe*, 474 Mich 151, 157; 712 NW2d 708 (2006). “There is no magic language that must be included to effectively waive a person’s interest in plan proceeds. Rather, courts that have examined what constitutes a waiver have consistently stated that a waiver must simply be explicit, voluntary, and made in good faith.” *Id.* “In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question.” *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284 (2011). “The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.” *Id.* (quotation marks and citation omitted.)

This case is nearly identical to the scenario presented in *Sweebe* and compels the same result. In *Sweebe*, the decedent named the plaintiff, his ex-wife, the beneficiary of a life insurance policy that his employer provided in 1963 while they were married. In 1986, the couple divorced, and the decedent died in 2001 without having changed his beneficiary designation. *Sweebe*, 474 Mich at 153. The parties’ judgment of divorce contained a waiver provision, similar to the instant case, whereby the parties agreed to relinquish any interest either had in an insurance contract or policy of the other. The provision stated:

IT IS FURTHER ORDERED AND ADJUDGED that any interest which either of the parties may now have or may have had in any insurance contract or policy, and any other interest in any insurance contract or policy of the other party, shall be extinguished, and that the parties shall in the future hold all such insurance free and clear from any right or interest which the other party now has or may have had therein, by virtue of being the beneficiary, contingent beneficiary or otherwise. [*Id.*]

After the decedent’s death, the insurance plan administrator paid the plan proceeds to the plaintiff as the named beneficiary, and she maintained that she should be permitted to retain the proceeds rather than turning them over to the decedent’s surviving spouse. *Id.* Relying on the waiver provision, our Supreme Court held that the plaintiff waived the right to retain the proceeds. The Court reasoned as follows:

In this case, plaintiff signed a provision in her judgment of divorce in which she extinguished any interest she had or may have had in any insurance contract or policy of the decedent. The provision she signed stated “that any interest which either of the parties may now have or may have had in any *insurance* contract or policy, and any other interest in any *insurance* contract or policy of the other party, shall be *extinguished . . .*” (Emphasis added.) It also stated that “the parties shall in the *future* hold all such insurance free and clear from any right or interest which the other party now has or may have had therein, by virtue of being the beneficiary, contingent beneficiary or otherwise.” (Emphasis added.) Our review of this provision indicates that plaintiff clearly and unequivocally waived her right to the plan proceeds. Plaintiff and the decedent

freely reached an agreement about how to divide property and insurance proceeds. Therefore, plaintiff consented to the waiver of her right to receive proceeds from the decedent's insurance plan. Under Michigan law, plaintiff validly waived the right to retain the proceeds under the binding judgment of divorce. [*Id.*, at 157-158 (internal footnote omitted).]<sup>1</sup>

Likewise, in the instant case, defendant clearly and unequivocally waived her right to the decedent's life insurance benefits when she signed the consent judgment of divorce containing the waiver provision. By executing the consent judgment, defendant acknowledged and agreed that any right she had to the benefits was "extinguished." Accordingly, pursuant to the language of the provision, she was not entitled to retain the life insurance proceeds.

Defendant does not challenge the waiver provision or argue that it did not validly waive her right to the decedent's life insurance benefits at the time that the consent judgment of divorce was executed. Rather, she contends that she and the decedent, through their words and deeds, modified the consent judgment in the years following their divorce. Defendant's argument lacks merit. In *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008), this Court observed:

A consent judgment is in the nature of a contract, and is to be construed and applied as such. If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. [Citations omitted.]

Here, there is no allegation of fraud, mistake, or unconscionable advantage. In addition, as recognized in *Laffin*, the consent judgment was binding not only on the parties, but also on the court. If defendant and the decedent intended to modify the consent judgment, they could have sought a modification of the consent judgment in the trial court following their divorce. It is undisputed that they failed to do so. Moreover, defendant and the decedent failed to take any other concrete, post-divorce affirmative action to designate defendant as the beneficiary. For example, the decedent could have simply redesignated her as the beneficiary. Absent any proactive, affirmative action in this regard, the trial court properly enforced the waiver provision in the consent judgment of divorce.

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<sup>1</sup> See also *Reed Estate*, 293 Mich App at 178-181 (divorce judgment entered pursuant to a default waived ex-wife's right to the decedent's retirement benefits); *Moore v Moore*, 266 Mich App 96, 101-104; 700 NW2d 414 (2005) (ex-wife waived her rights to the decedent's life insurance proceeds and pension death benefits by executing consent judgment of divorce that contained provisions waiving such rights); *MacInnes v MacInnes*, 260 Mich App 280, 287-290; 677 NW2d 889 (2004) (ex-husband waived his right to his ex-wife's life insurance proceeds by signing a consent judgment of divorce that contained a waiver provision).

Defendant also argues that the trial court ignored material issues of fact, established by the parties' affidavits, that precluded summary disposition. Again, defendant's argument lacks merit. As the trial court acknowledged, it did not decide this case based on defendant's credibility, but rather, on a straightforward legal issue. The trial court properly determined that defendant waived her right to the life insurance benefits by executing the consent judgment of divorce, and the documentary evidence that the parties submitted was not relevant to that legal determination. Thus, because there was no genuine issue regarding any fact material to the trial court's determination, and plaintiff was entitled to judgment as a matter of law, it properly granted summary disposition in plaintiff's favor pursuant to MCR 2.116(C)(10). See *West*, 469 Mich at 183.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio