

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

TIMOTHY GRZELY,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-106
MELISSA LUCAS SINGER	:	
f.k.a. GRZELY, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10CV000888.

Judgment: Affirmed.

Russell J. Meraglio and Franklin C. Malemud, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 W. Prospect Avenue, Cleveland, OH 44115-1093 (For Plaintiff-Appellee).

L. Bryan Carr, Carr, Feneli & Carbone Co., L.P.A., 1392 S.O.M. Center Road, Mayfield Heights, OH 44124. (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Melissa Singer appeals from the decision of the Lake County Court of Common Pleas granting summary judgment in favor of Timothy Grzely and finding Mr. Grzely to be entitled to the life insurance proceeds from his brother, Thomas Grzely's ("Decedent"), policy with State Farm Life Insurance Co. ("State Farm"). Ms. Singer argues that the trial court erred in failing to grant summary judgment in her favor, and that, as the named primary beneficiary, she was entitled to the proceeds of the life

insurance policy. Mr. Grzely contends that, although Ms. Singer was once the primary beneficiary of Decedent's life insurance policy, the dissolution of her marriage to his brother in 2007 automatically revoked her status as primary beneficiary by operation of R.C. 5815.33, and thus he, as contingent or successor beneficiary, was rightfully entitled to the proceeds of the policy. He further argues that, even if there was no statutory revocation, Ms. Singer clearly and unambiguously relinquished her rights as beneficiary via the Separation Agreement.

{¶2} We find that the trial court's reliance in whole or even in part on the statute was unnecessary under the facts of this case. The specific provision for a mutual release of any rights each may have had as a beneficiary of the other's life insurance alone extinguished Ms. Singer's beneficial rights. Nothing further was needed to arrive at a determination. The Separation Agreement specifically and unequivocally extinguished Ms. Singer's beneficiary status. There was no need to rely simultaneously on the statutorily created "fail-safe" provision, enacted to revoke a designation by operation of law in cases where the policy owner failed to do so after divorce or dissolution. Therefore, we affirm the judgment of the Lake County Court of Common Pleas.

Substantive Facts and Procedural History

{¶3} In 1994, Thomas Grzely, the Decedent, purchased a life insurance policy from State Farm and named his then girlfriend, Melissa Singer, as successor beneficiary. In November of 1996, the Decedent executed a change of beneficiary; he named Ms. Singer, who was then his fiancé, as primary beneficiary and his brother,

Thomas Grzely, as successor beneficiary. In September of 1997, Ms. Singer and the Decedent were married.

{¶4} In 2007, Ms. Singer and the Decedent ended their marriage through an order of dissolution; both were represented by counsel in the dissolution proceedings. Incorporated into the decree of dissolution was a Separation Agreement executed by Ms. Singer and the Decedent in which the parties, among other provisions, agreed to completely and forever release one another from any rights “as beneficiary in any life or other type of insurance policy issued to the other except as noted above.” No insurance policies were noted above. Despite the dissolution of marriage and a post-decree dog custody dispute, which was eventually settled through an agreed amendment to their Separation Agreement, Ms. Singer and the Decedent appeared to remain close friends.

{¶5} In October of 2009, the Decedent passed away without formally changing the named beneficiaries of his life insurance policy. In the wake of her ex-husband's death, Ms. Singer sought to have the proceeds from the life insurance policy disbursed to her. Mr. Grzely, believing he was entitled to the proceeds, filed a Complaint for Declaratory Judgment against Ms. Singer and State Farm. He sought an order declaring him the rightful owner of the life insurance policy proceeds. Ms. Singer answered the complaint and filed her own counter-claim and cross-claim for declaratory judgment. Ultimately, State Farm, as interpleader, was granted the right to deposit the life insurance policy proceeds with the trial court and was dismissed from the case.

{¶6} After discovery, Mr. Grzely and Ms. Singer filed cross-motions for summary judgment. The trial court issued a detailed decision granting Mr. Grzely's motion for summary judgment, overruling Ms. Singer's motion for summary judgment,

and entered an order finding Mr. Grzely entitled to the proceeds of the life insurance policy.

{¶7} Ms. Singer timely appealed, and brings the following assignments of error:

{¶8} “[1.] The trial court erred in granting the Appellee’s motion for summary judgment.”

{¶9} “[2.] The Trial Court erred in denying Appellant’s motion for summary judgment.”

{¶10} Because both assignments of error implicate the same issues, we will consider them together.

Standard of Review

{¶11} We review de novo a trial court’s order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.*, 128 Ohio App.3d 546 (7th Dist.1998). “A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.” *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App.3d 826 (9th Dist.1990).

{¶12} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial’. The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [75 Ohio St.3d 280 (1996)], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the

trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶13} Ms. Singer raises four issues in her appeal for our review. She first argues that the trial court erred when it found that R.C. 5815.33 applied to this case and acted to automatically revoke her status as beneficiary. She next argues that the trial court erred in finding that the Separation Agreement terminated her rights to the life insurance proceeds. Third, Ms. Singer suggests that the trial court erred in finding that the Decedent's intent was irrelevant to a determination of whether she was to remain a beneficiary to the life insurance policy. And, finally, she argues that the trial court's decision interferes with the Decedent's right to contract. We find it unnecessary to determine the applicability the statute, given the clear and unambiguous language of the

Separation Agreement. We discuss issues two and three first, as they are dispositive of the case.

The Separation Agreement Extinguished Ms. Singer's Rights as Beneficiary

{¶14} In the second issue presented, Ms. Singer argues that the trial court erred in finding that the Separation Agreement terminated her status as beneficiary of the life insurance policy. She argues that the Separation Agreement purported to address only their rights “to any and all property, real and personal, each may have by virtue of their marriage, past, present and future.” This is an inaccurate representation of the Separation Agreement, and we find that the parties to the agreement specifically addressed the issue of life insurance beneficiary status within the mutual release section.

{¶15} The decree of dissolution was issued on April 3, 2007, dissolving the ten-year marriage between Ms. Singer and the Decedent. Incorporated into that decree was the parties' Separation Agreement. Ms. Singer was represented by counsel throughout the dissolution process, as was the Decedent. The Separation Agreement stated that the parties sought to address their rights “to any and all property, real and personal, each may have by virtue of their marriage, past, present and future.” This was stated as much in subsection (b) of the agreement's preamble. But the parties, under subsection (c), further agreed that they intended to settle and determine “all other benefits and privileges conferred, and all obligations imposed on each by virtue of their marriage relation, *or otherwise*, accruing to either.” (Emphasis added.) This subsection indicates their intention to address and settle issues which may arise from their non-marital relationship as well.

{¶16} Further, and most importantly, Section 18 – “Mutual Releases” – provides that “each party completely and forever releases the other from any and all rights each has, or may have * * * e) As beneficiary in any life, or other type of insurance policy issued to the other except as noted above.” No life insurance policy was identified above, or below for that matter, in the separation agreement.

{¶17} Ms. Singer relies on the argument that the life insurance policy was a pre-marital asset and that the Separation Agreement only affected marital assets to support her contention that she remains the primary beneficiary and is entitled to the proceeds. This reliance is misplaced, however, because the Separation Agreement clearly contemplates disposition of the life insurance policy, whether classified as a pre-marital, separate property or marital property, and specifically extinguishes her right as a beneficiary of any policy held by the Decedent. Although the Decedent failed to change the beneficiary designation with State Farm after the dissolution, this language was sufficient to revoke the designation and extinguish her claim as beneficiary.

{¶18} Where the terms of a Separation Agreement “plainly indicate” the elimination of the named beneficiary from any right to life insurance proceeds, such intent is to be given effect despite a failure to designate a new beneficiary. See, e.g., *Phillips v. Pelton*, 10 Ohio St.3d 52 (1984); *Cannon v. Hamilton*, 174 Ohio St. 268 (1963). Enactment of the automatic revocation statute did not impact the law of contract articulated in these earlier cases.

{¶19} Here, the Separation Agreement referred specifically to life insurance, and the parties’ intent to remove one another as beneficiaries to their “life, or other type of insurance policy” could not be more plain.

{¶20} Therefore, we find the Separation Agreement specifically and unequivocally extinguished Ms. Singer's beneficiary status. There was no need to also rely on the statutorily created "fail-safe" provision, enacted to revoke a life insurance beneficiary designation by operation of law in cases where the policy owner failed to do so after divorce or dissolution and where the agreement may have been silent or ambiguous.

Decedent's Purported Intent Was Irrelevant

{¶21} In the third issue presented, Ms. Singer alleges that it was the Decedent's intent she remain the primary beneficiary of the State Farm policy, and that he said as much on a number of occasions after the decree of dissolution and prior to his death. She argues that the trial court erred when it determined the Decedent's intent was irrelevant to disposition of the case. We agree with the trial court that the Decedent's alleged intent demonstrated or expressed post-decree is irrelevant, as the Separation Agreement controls the understanding of the Decedent's intent.

{¶22} "[A] separation agreement is subject to the same rules of construction as any other type of contract." *Brown v. Brown*, 90 Ohio App.3d 781, 784 (11th Dist.1993), citing *Forstner v. Forstner*, 68 Ohio App.3d 367 (1990). "Accordingly, the terms of a separation agreement may be modified or waived by a subsequent verbal contract or by the conduct or language of the parties." *Winebrenner v. Winebrenner*, 11th Dist. No. 96-L-033, 1996 Ohio App. LEXIS 5511, *11 (Dec. 6, 1996), citing *Forstner, supra*, and *Uram v. Uram*, 65 Ohio App.3d 96, 99 (1989). However, where a contract or separation agreement prohibits oral modifications, requiring any changes to be made in writing, a trial court correctly disregards the alleged modification and looks to the four corners of

the Separation Agreement for guidance on the parties' intent. See, e.g., *Garofalo v. Garofalo*, 5th Dist. 95-CA-00395, 1996 Ohio App. LEXIS 2888 (May 28, 1996).

{¶23} The Separation Agreement between Ms. Singer and the Decedent contains a specific provision stating that “[t]his agreement shall not be altered, changed or modified unless done so in writing, and signed by both parties.” No written modification appears in the record evincing the Decedent’s intention that Ms. Singer remain beneficiary of his life insurance policy. The only evidence Ms. Singer submits to support these allegations is her own self-serving affidavit. Therefore, the trial court did not err in determining that the Decedent’s alleged intent, separate from that which was plainly expressed in the Separation Agreement, was irrelevant to a determination of Ms. Singer’s status as beneficiary to the life insurance policy.

Applicability of R.C. 5815.33 to These Facts

{¶24} Ms. Singer also argues that the trial court erred when it found that R.C. 5815.33 operated to automatically revoke her status as beneficiary of Decedent’s life insurance policy upon the dissolution of their marriage. She argues the statute does not apply in this case because she was not married to the Decedent at the time he named her primary beneficiary. Mr. Grzely contends that the trial court correctly applied R.C. 5815.33, and that Ms. Singer was automatically revoked as primary beneficiary by operation of law; the proceeds of the policy then belonged to him as the named successor beneficiary.

{¶25} R.C. 5815.33, in pertinent part, states that “[u]nless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section,

if a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.” R.C. 5815.33(B)(1).¹

{¶26} Because the language contained within the Separation Agreement is dispositive of this appeal, we decline to determine the applicability of the statute to the set of facts before us. The trial court’s reliance on the statute and *Ohio State Life Ins. Co. v. Garcia*, 10th Dist. No. 02AP-274, 2002-Ohio-7194, was unnecessary for disposition of the case.

The Trial Court’s Decision Does Not Interfere With Decedent’s Right to Contract

{¶27} In the final issue raised, Ms. Singer argues that R.C. 5815.33 impedes the Decedent’s right to contract. This issue is moot, as we have declined to interpret R.C. 5815.33. Therefore, we also decline to engage in an analysis and determination of its constitutionality. We will note, however, the Supreme Court of Ohio has consistently held R.C. 5815.33 (and its predecessor R.C. 1339.63) to be constitutional, because it

1. We note that R.C. 5915.33 was previously numbered R.C. 1339.63, which was enacted in 1990. It was renumbered in 2007, but no other changes were made. Therefore, any case law related to R.C. 1339.63 is still good law, unless otherwise indicated, and may provide useful guidance as to the application of R.C. 5915.33 to this appeal.

provides a means by which an individual may retain their former spouse as beneficiary. The spouse simply needs to set forth such a desire within the Separation Agreement, or Divorce/Dissolution Decree. See, e.g., *In re Estate of Holycross*, 112 Ohio St.3d 203, 2007-Ohio-1.

Summary Judgment Properly Granted to Mr. Grzely

{¶28} Having reviewed and determined the legal issues and arguments presented by Ms. Singer, along with the evidence submitted in support of summary judgment by both parties, we find that the trial court did not err in granting summary judgment in Mr. Grzely's favor and denying Ms. Singer's motion for summary judgment. Ms. Singer was unable to demonstrate that genuine issues of material fact exist, thus summary judgment in favor of Mr. Grzely was warranted. We affirm the judgment of the Lake County Court of Common Pleas.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.