

No. 1-11-2754

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOANNE CANO FRITTS, JOSEPH CANO,)	Appeal from the
LUCY CANO SHARP, SUSAN CANO)	Circuit Court of
O'CONNOR, DEBORAH CANO, and)	Cook County.
FLORENCE CANO,)	
)	
Plaintiffs-Appellants,)	
v.)	08 CH 43803
)	
JO ANNE YBARRA CANO,)	
)	
Defendant-Appellee.)	The Honorable
)	LeRoy Martin,
)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Epstein and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly concluded that defendant was the rightful beneficiary of decedent's pension death benefits and IRA account. Plaintiff was entitled to solely the life insurance policy. Affirmed.

¶ 2 The center of this dispute involves the contention of plaintiffs-appellants Florence Cano ("Cano") and her children, Joanne Cano Fritts, Joseph Cano, Lucy Cano Sharp, Susan Cano O'Connor and Deborah Cano ("plaintiffs"), that they are entitled to Joseph Cano's ("decedent") pension death benefits and Individual Retirement Account ("IRA"). Cano and decedent were

married until September, 1992, and, thereafter he married defendant, Jo Anne Ybarra Cano ("defendant"). Following a bench trial, the trial court ruled that according to the marital settlement agreement ("MSA") between decedent and his first wife, Cano, Cano was entitled only to his life insurance policy and she was not entitled to his death benefits. Plaintiffs now challenge that determination on appeal, arguing they are entitled to all benefits. They also contend that the IRA did not substantially comply with bank policy requirements, and thus the change in beneficiary is legally invalid. Finally, plaintiffs contend that the trial court incorrectly entered a directed finding on the conversion count. We affirm.

¶ 3

BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. Central to the parties' dispute in the trial court was Cano and decedent's MSA, entered as part of their September 15, 1992, divorce decree judgment. Cano and decedent agreed that Cano would receive decedent's life insurance policy from his former employer Alcatel Lucent (formerly known as AT&T). In addition, both waived all claims against any pension or profit-sharing credits. Subsequently, decedent married defendant in 1998 and died in 2008. Following his death, defendant signed and completed for Alcatel Lucent an affidavit for the death-benefit-spouse. On July 28, 2008, the Metropolitan Life Insurance Company issued a check to Cano in the amount of \$13,572.18, in payment for the Basic Group Life Insurance Policy provided by Alcatel Lucent, which was reduced in value by 10% per year at the time of decedent's death. Also, on October 6, 2008, defendant was paid a pension death benefit of \$26,301.49, from the Lucent Technologies, Inc. Pension Plan.

¶ 5 The facts underlying these policies are as follows. On January 20, 2000, decedent and defendant signed two beneficiary election forms, one for decedent's 401(k) account and the other

for his profit-sharing plan designating his children as beneficiaries. The accounts were maintained at A.J. Smith Federal Saving's Bank ("A.J. Smith Bank"), where both defendant and decedent were employed. On January 18, 2002, decedent executed a traditional IRA application, which designated defendant as the primary beneficiary of decedent's IRA and his daughter, Deborah Cano, as the contingent beneficiary. Defendant and the president of A.J. Smith Bank, Julie Landry, both countersigned the IRA application. Decedent also signed in a section entitled, "Spousal Consent," instead of on the line entitled, "IRA Owner's Signature." As a result, an arrow was drawn on the IRA application starting at where decedent signed and pointing to the "IRA Owner's Signature" line, which was approximately one inch directly below. The IRA was also maintained at A.J. Smith Bank, and the 401(k) and profit-sharing accounts rolled over into the IRA account. Following decedent's death, the IRA contained \$113,785.24, and defendant used the money to pay for decedent's bills, medical expenses and funeral expenses. On July 14, 2008, defendant rolled over the remaining funds into her own IRA account.

¶ 6 On November 20, 2008, plaintiffs filed their first-amended complaint alleging, in pertinent part, that defendant wrongfully took possession of the proceeds from the Alcatel Lucent life insurance policy and the IRA. The complaint also alleged conversion. The trial court conducted a three-day bench trial with witness testimony, although the trial transcript is not included in the record on appeal. On May 11, 2011, the trial court granted a directed finding in favor of defendant on the conversion claim. On May 20, 2011, the trial court also granted judgment in favor of defendant on the remaining claims in the complaint. Subsequently, plaintiffs filed a motion to reconsider, which was denied. Plaintiffs filed a timely notice of appeal.

¶ 7

ANALYSIS

¶ 8 Although defendant contends the record on appeal is insufficient because plaintiffs failed to include the trial transcript in the record, we observe that plaintiffs' principle contention relates to the MSA and related documents, all of which are in the record before us. The record therefore is sufficient to allow for our effective review, and we proceed in addressing the merits of plaintiffs' appeal. *See People v. Bolton*, 382 Ill. App. 3d 714, 725 (2008).

¶ 9 Plaintiffs first contend that the MSA required all life insurance policies to be awarded to Cano, including all death benefits. The terms of an MSA are interpreted in the same manner as a contract with the court's main objective being to give effect to the purpose and intent of the parties at the time they entered into the agreement. *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). Similar to a contract, the MSA should be given a fair and reasonable interpretation based upon all of its language and provisions. *In re Marriage of Kehoe and Farkas*, 2012 IL App (1st) 110644 ¶18. Although the parties dispute the standard of review, we review the MSA *de novo* as a question of law. *In re Estate of Trevino*, 381 Ill. App. 3d 553, 556 (2008). We apply the same standard of review throughout this order.

¶ 10 In this case, the trial court determined that the unambiguous language of the MSA required only that the Alcatel Lucent insurance policy was to be provided to Cano upon decedent's death. Therefore, Cano was not entitled to decedent's pension death benefit. The MSA provided, in pertinent part, as follows:

- "(a) That all of the respective property in the names of the parties hereto shall be retained by such parties as their sole and separate property, except as otherwise provided therein and each party releases claims and interest in the property of the other.
- (g) The husband shall make the wife the irrevocable beneficiary of an approximate

\$57,000.00 life insurance policy that he was awarded upon his retirement, and this obligation shall remain for the rest of his life, even if he remarries.

- (h) Each party waives all claims against any pension or profit sharing credits each may have."

The reasonable interpretation based on these provisions is that Cano is entitled to decedent's "life insurance policy," but waived "all claims against pension or profit sharing credits." The trial court, here, correctly concluded that Cano is only entitled to the primary life insurance policy and not decedent's pension death benefits.

¶ 11 Contrary to plaintiffs' assertion, their situation is not analogous to *Trevino*. In *Trevino*, the reviewing court determined that the MSA provision at issue spoke to the parties' intent to make their children the beneficiaries of "any and all retirement plan[s], pension plans and death benefits." *Trevino*, 381 Ill. App. 3d at 556. Therefore, since the phrase "death benefits" was commonly used to describe the proceeds of a life-insurance policy, the agreement explicitly covered such proceeds. *Id.* at 554. It is true that both life insurance and pension death benefits are issued at the time of the decedent's death; that, however, does not make them one and the same policy. In this case, according to the clear and unambiguous language of the MSA, the life insurance policy did not include death benefits, and Cano specifically contracted herself out of any right to decedent's pension. See *Robson v. Electrical Contractors Ass'n Local 134 IBEW Joint Pension Trust of Chicago, Pension Plan No. 5*, 312 Ill. App. 3d 374, 381-82 (1999) (where the court found that the plaintiff was not entitled to the decedent's pension because the plain language of the marriage dissolution judgment did not contain a clause indicating that the plaintiff was to receive decedent's pension survivorship benefits).

¶ 12 Plaintiffs nevertheless contend that the trial court improperly considered the life insurance

policy from Alcatel Lucent when ruling in defendant's favor. Plaintiffs argue this document was outside the four corners of the MSA. The MSA specifically referenced this document, and it was the central purpose of the MSA. The trial court acted appropriately by examining the document to understand the parties intent and grounding its ruling in the express language of the MSA. See *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678, 685 (2009) (where the court noted when a contract incorporates another document by reference, its terms become part of the contract).

¶ 13 Plaintiffs also contend the amount of the life insurance is substantially less than the amount stated in the MSA. Aside from the fact that the MSA provides for an "approximate" amount for the life insurance policy, plaintiffs have not cited any relevant legal authority for their argument, as required by Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006); and this court need not consider this matter further. Accordingly, this issue is forfeited. See *TruServ Corp. v. Ernest & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007). We reach the same conclusion regarding plaintiffs' argument that defendant lied when filling out her affidavit to receive decedent's pension. Plaintiffs contend defendant incorrectly stated there was no court decree. Aside from the fact that the referenced court decree was between Cano and decedent, not defendant and decedent, thus eviscerating plaintiffs' argument, plaintiffs cite no law or available remedy in support of their argument. We decline to consider further.

¶ 14 Plaintiffs next contend that the IRA application was completed without substantially complying with bank policy requirements because the forms were completed by defendant, who was an officer of the bank, as well as the sole beneficiary of the IRA. In order to substantially comply with Illinois law when designating a beneficiary of a retirement account (1) there must be a clear expression of the insured's intent to change beneficiaries (2) coupled with a concrete

attempt to carry out his intention as far as was reasonably within his power. *Dooley v. James A. Dooley Associates Employees Retirement Plan*, 92 Ill. 2d 476, 484 (1982). In this case, while the execution of the IRA may be untoward, we see no evidence to suggest decedent's intentions were unclear or he failed to take appropriate steps to execute the IRA.

¶ 15 We therefore find *Dooley*, upon which plaintiffs rely, distinguishable. In *Dooley*, the supreme court examined whether a change in beneficiary was completed in regards to the decedent's trust account when the decedent made handwritten notations designating new beneficiaries, but never effectively signed a formal agreement with his signature. *Dooley*, 92 Ill. 2d at 478. The supreme court determined that the decedent did not effectuate a change in beneficiary because while he expressed a desire to make changes, he did not adequately do so and intend for it to take effect at the time. *Id.* at 483. In contrast, in the case *sub judice*, decedent effectively executed his IRA account at the bank where he was employed and signed the document, himself. The trial court noted, although a conflict of interest apparently existed because defendant, acting as an officer of the bank, made herself the sole beneficiary, which was against the bank's policy, we decline to consider this issue further. Plaintiffs again cite no law supporting the proposition that a document filed against bank policy is legally invalid or that the conflict of interest somehow undermines, decedent's intent is clear. Therefore, this argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *TruServ. Corp.*, 376 Ill. App. 3d at 227.

¶ 16 Additionally, plaintiffs assert that decedent failed to do "all he could" to change his beneficiary designations; however, his efforts were in accordance with *Dooley*. As stated, there was a clear intent to designate defendant as the beneficiary of decedent's IRA, and decedent effectively filed an application with A.J. Smith Bank, thus terminating his 401(k) account and profit-sharing plan. *cf. Hoopingarner v. Stenzel*, 329 Ill. App. 3d 271, 276 (2002) (the appellate

court determined that the decedent did not substantially comply with the requirements for changing the beneficiary of her annuity because she did not personally send the change of beneficiary to New York Life or furnish any information regarding a desire to change the beneficiary of the annuity). Further, we see no reason to consider other tortious conduct, such as fraud, duress or undue influence, as plaintiffs would have us do. There is nothing in the record to suggest decedent's signature was forged or his intentions were not fulfilled in accordance of his own free will.

¶ 17 Finally, plaintiffs assert a claim for conversion, arguing they have an absolute right to the possession of decedent's pension death benefits and IRA. To assert a claim for conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion or ownership over the property. *Kovitz Shifrin Nesbit, P.C., v. Rossiello*, 392 Ill. App. 3d 1059, 1185 (2009). As stated, plaintiffs have no right to the possession of the death pension benefits or IRA, their claim fails as a matter of law, and therefore the trial court correctly dismissed the conversion count.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, we affirm the order of the trial court.

¶ 20 Affirmed.