STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Presiding Judge: Patrick M. Meter

MARILYN VIRGINIA MASON,
f/k/a MARILYN VIRGINIA SWEEBE,

Plaintiff/Appellant,

vs.

HERBERT ORVILLE SWEEBE,

Defendant/Appellee.
_____/

Supreme Court File No.: 126913
Court of Appeals No.: 253520
Lower File No.: 85-003517-DM-C

BRIEF ON APPEAL - APPELLEE

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CONCURRENCE TO STATEMENT OF BASIS OF JURISDICTION

Defendant/Appellee states that Plaintiff/Appellant's Basis of Jurisdiction is complete and correct.

COUNTER STATEMENT OF QUESTIONS INVOLVED

ISSUE I WHETHER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 USC §1001 et seq, PREEMPTION PROVISION PRECLUDES ENFORCEMENT OF A JUDGMENT OF DIVORCE CLAUSE REGARDING WAIVER OF ENTITLEMENT TO PROCEEDS FROM A LIFE INSURANCE POLICY WHERE THE EX-SPOUSE CONTINUED TO BE LISTED AS THE BENEFICIARY AFTER THE JUDGMENT OF DIVORCE WAS ENTERED.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

Trial Court Answers: Yes.

Court of Appeals Answers: No.

ISSUE II WHETHER THE ESTATE OF A DECEASED SPOUSE CAN SEEK A RECOVERY OF LIFE INSURANCE BENEFITS THROUGH THE STATE COURT WHICH HAD JURISDICTION OF THE INITIAL DIVORCE PROCEEDING.

Plaintiff/Appellant Answers: No.

Defendant/Appellee Answers: Yes.

Trial Court Answers: No.

Court of Appeals Answers: Did not answer.

ISSUE III WHETHER THE TRIAL COURT SHALL RETAIN JURISDICTION TO REVIEW THE PROPRIETY OF PLAINTIFF/APPELLANT'S DESIGNATION AS THE BENEFICIARY OF THE ERISA COVERED LIFE INSURANCE PLAN IF THE ERISA PREEMPTION PROVISION IS FOUND INAPPLICABLE.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellant Answers: No.

Trial Court Answers: Did not address.

Court of Appeals Answers: Did not address.

COUNTER STATEMENT OF FACTS

Defendant/Appellee provides this Counter Statement of Facts due to the inaccuracies and deficiencies in Plaintiff/Appellant's Statement of Facts. Specifically, certain facts have been provided without support as required under MCR 7.212(c)(6). These include facts relating to how decedent died and the number of times decedent was married. There were no findings made by the Trial Court of these facts and neither was there any evidence provided to support them.

Defendant/Appellee's deceased husband, Herbert Orville Sweebe, and the Plaintiff/Appellant, Marilyn Virginia Mason (f/k/a Marilyn Virginia Sweebe) consented to entry of a Divorce Judgment signed by the Honorable Paul J. Clulo on September 30, 1986 (19a). Thereafter, Herbert Orville Sweebe married Defendant/Appellee who remained married to Defendant/Appellee until his death on September 17, 2001 (6a, 20a). After the death of Herbert Sweebe, Defendant/Appellee was appointed Personal Representative of the Estate of Herbert Orville Sweebe (6a, 20a).

Herbert Sweebe never changed the named beneficiary on his group life insurance policy he had through General Motors and at the time of his death, Plaintiff/Appellant Marilyn Sweebe (now Mason) was still the named beneficiary of this policy (20a). The life insurance proceeds were paid to Plaintiff/Appellant by MetLife on January 16, 2002, according to a beneficiary designation dated May 23, 1963, pursuant to ERISA mandates (20a, 26a). Thereafter, Defendant/Appellee filed a Motion with the Midland County Circuit Court (Judge Clulo still presiding) and moved specifically for the enforcement of the insurance provision of the Divorce Judgment against Plaintiff/Appellant's requesting that she pay over the life insurance proceeds from Plaintiff/Appellant's ex-husband (Herbert Sweebe) life insurance policy to his estate (8a).

The September 30, 1986, Sweebe Consent Divorce Judgment provision for insurance

provided as follows:

> **INSURANCE**
>
> **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 other wise. (19a-20a)**

Plaintiff/Appellant answered Defendant/Appellee's Motion and the Trial Court heard oral arguments on September 26, 2003. The Trial Court granted both sides the opportunity to file Briefs after review of the Court of Appeals Briefs filed in the action of the Estate of Cheryl A. Rowley a/k/a Cheryl A. MacInnes v Joe Dee MacInnes, 260 Mich App 280; 677 NW2d 889 (2004), [1] since the MacInnes case had not been decided as of the date of the motion hearing (16a).

The Trial Court rendered its Opinion on November 20, 2003 (19a-22a), denying Defendant/Appellee's Motion, thus allowing Plaintiff/Appellant to retain life insurance proceeds paid by Metropolitan Life despite the insurance termination/waiver clause contained within the Divorce Judgment. Judge Clulo found the preemption language of ERISA (Employee Retirement Income Security Act of 1974)[2] and the cases interpreting it made it clear that this was an area of federal preemption at its most inclusive level. Judge Clulo further found that Plaintiff's federal preemption argument carried the day and an Order denying

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[1] The MacInnes case supra is identical in facts to this case with exception the lower court, Genesee County Circuit, ordered that life insurance proceeds be paid over to the Estate. This decision was affirmed by the Michigan Court of Appeals, on January 8, 2004.

[2] Although not specifically cited in Judge Clulo's opinion, it is believed, as cited in the case law following, reference is made to Employee Retirement Income Security Act of 1974, § 2 et seq., 514(a), 29USC §1000 et seq., 1144(a).

Defendant/Appellee's Petition should be entered (22a). On December 10, 2003, Judge Clulo entered an Order denying Defendant/Appellee's Motion (23a, 24a).

Defendant/Appellee filed a Claim of Appeal on December 18, 2003. On January 6, 2004, Defendant/Appellee's Appeal of Right was dismissed *sua sponte* by the Court's Chief Clerk for want of jurisdiction, citing in particular that the December 10, 2003, Order is a post-judgment order that does not affect the custody of a minor, citing MCR 7.202(7)(a)(i), MCR 7.202(7)(a)(iii), and MCR 7.203(A)(1). Defendant/Appellee previously cited MCR 7.203(A)(1) as authority to file a Right of Appeal being of the position that this was a new case and new final order since the case had not arisen until after the death of Defendant Herbert Sweebe and life insurance proceeds in his name were paid over to Plaintiff/Appellant, in violation of the Divorce Judgment.[3]

Defendant/Appellee filed a Delayed Application for Leave to Appeal under MCR 7.205.[4] On July 19, 2004, the Michigan Court of Appeals entered an Order in lieu of granting Leave to Appeal which reversed the December 10, 2003, Order of the 42nd Circuit Court for the County of Midland (25a). The Order further set forth that Plaintiff/Appellant cannot retain life insurance proceeds where she expressly waived any entitlement in the Consent Divorce Judgment, citing Estate of Cheryl A. Rowley a/k/a Cheryl A. MacInnes v Joe Dee MacInnes, supra. Furthermore, the Court of Appeals remanded the matter back to Midland County Circuit Court for entry of an order directly Plaintiff to pay decedent's estate in an amount equal to the insurance proceeds (25a).

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[3] As set forth in Defendant/Appellee's Court of Appeal's Application, the action was brought under the domestic case merely to facilitate bringing the action before the same Court since it is this circuit court which entered the Divorce Judgment which contained the life insurance waiver.

[4] The Court of Appeals Order of January 6, 2004, sets forth Defendant/Appellant may challenge the Order in question by filing a Delayed Application for Leave to Appeal under MCR 7.205.

ISSUE I

WHETHER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 USC §1001 et seq, PREEMPTION PROVISION PRECLUDES ENFORCEMENT OF A JUDGMENT OF DIVORCE CLAUSE REGARDING WAIVER OF ENTITLEMENT TO PROCEEDS FROM A LIFE INSURANCE POLICY WHERE THE EX-SPOUSE CONTINUED TO BE LISTED AS THE BENEFICIARY AFTER THE JUDGMENT OF DIVORCE WAS ENTERED.

ARGUMENT

This Honorable Court is called upon to determine who is entitled to the proceeds of a life insurance policy, the Decedent's estate or Decedent's former wife. This question has been answered in two similar, if not exact, factual situations by the Michigan Court of Appeals. Namely the case of Estate of Cheryl A. Rowley a/k/a Cheryl A. MacInnes v Joe Dee MacInnes, 260 Mich App 280; 677 NW2d 889 (2004), and Moore v Moore, Michigan Court of Appeals, Published Opinion 42805, Docket No. 251822 (decided April 28, 2005). In the most recent case, Moore, supra, the Court of Appeals ruled that the issue involved was a question of waiver and not a question of ERISA preemption. The Michigan Court of Appeals specifically set forth:

> "Though the United States Supreme Court has held that ERISA preempts State statutes that relate to benefits plans governed by ERISA, the instant case involves a question of waiver of the rights to retain funds, and not the question of ERISA preemption. Here, the question is not whether a plan administrator should be required to determine whether someone other than the named beneficiary is entitled to the proceeds of ERISA plans, but rather, whether ERISA mandates that a named beneficiary who has expressly waived her rights to those proceeds in a consent judgment of divorce should be allowed to retain those funds." (Moore, supra, at pg 1)

Like Moore, supra, the question in this case is not whether a Plan Administrator made a mistake in determining whether someone other than Plaintiff/Appellant is entitled to life insurance proceeds of an ERISA plan. Instead, the question is whether Plaintiff/Appellant should be allowed to retain those funds. Like MacInnes, supra, the analysis of the application of the

preemption provision of ERISA as set forth in Egelhoff v Egelhoff, 532 US 141; 121 S Ct 1322; 149 L Ed 2d 264 (2001), is not applicable for the simple reason that the ERISA preemption mandates have been carried out, i.e., Plaintiff/Appellant has been paid.

The Moore, supra, Court held "where a named beneficiary to an ERISA benefits plan has expressly waived her interest in that plan in a consent judgment of divorce, he or she is not entitled to retain those benefits." Moore, supra, page 1, emphasis added.

Like the MacInnes, supra, and Moore, supra, cases, the Divorce Judgment in the instant case contained similar, if not stronger, waiver language wherein the parties extinguished and waived the rights to any life insurance proceeds they may have had in any policy or contract of life insurance. In addition, Plaintiff/Appellant further agreed that in the future, e.g., after divorce, to hold all such insurance free and clear from any right. The life insurance provision in the Divorce Judgment in this case provided as follows:

> INSURANCE
>
> 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 other wise. (19a-20a)

Defendant/Appellee's position is that this case simply involves a question of the Michigan Courts interpreting a provision in a Consent Divorce Judgment involving the waiver of the right to retain life insurance funds by an ex-spouse. This Court's decision does not require a consideration of Federal jurisprudence as asserted by Plaintiff/Appellant for proper resolution. Similar to arguments presented in MacInnes, supra, Plaintiff/Appellant in this case has argued that since the Divorce Judgment provision regarding life insurance is similar in purpose and

language to the statutory provision in Egelhoff, supra, 532 US 141; 121 S Ct 1322; 149 L Ed2d 264 (2001), this would connect the ERISA's preemptive powers over the Divorce Judgment in question. However, this is not a situation where the beneficiary was chosen by operation of the Michigan Statute, namely MCL 552.101; MSA 25.131, and thereby not a vehicle to determine whether this statute's efforts at designating beneficiaries conflict with ERISA. Instead, Defendant/Appellee seeks enforcement of a private Consent Judgment of Divorce between the parties.

Similar to Moore, supra, the Trial Court in this case issued its ruling on November 20, 2003, approximately one month and a half prior to the Court of Appeals release of MacInnes, supra, on January 8, 2004. As set forth in Moore, supra, the MacInnes, supra, Court of Appeals adopted the majority view which held that a person can waive her or his rights to ERISA plan benefits even where she or he may be named beneficiary. MacInnes at 286, citing Melton v Melton, 324 F3d 941 (CA 7, 2003). The Court of Appeals in Moore, supra, explained their Court was bound by precedent from Federal Courts only if there was no conflict among the various appellate courts. However, where there is a conflict, and where the United States Supreme Court has not resolved this conflict, a State Court may choose, as the Moore Court of Appeals Court did, to adopt the rule it determines to be most appropriate. MacInnes, supra, at 286 n 3, citing Schueler v Weintrob, 360 Mich 621, 634; 105 NW2d 42 (1960).

Plaintiff/Appellant relies upon the case of Egelhoff, supra, 532 US 141; 121 S Ct 1322; 149 L Ed2d 264 (2001) claiming that the life insurance provision in the divorce judgment is preempted by ERISA. The MacInnes Court found Egelhoff to be inappropriate to the ultimate issue in the case. The Court in the MacInnes decision provided the following reasoning:

> We find the Egelhoff analysis inapposite because in this case the ultimate issue is not whether a state statute is preempted. To the

> extent that defendant contends that the provision in the divorce judgment is indirectly preempted because MCL 552.101 requires that all divorce judgments contain a provision determining the rights of the divorcing spouse to the proceeds of any life insurance policy owned by the other spouse, **we disagree**. (Emphasis added, see MacInnes, supra, at pp 285-286).

The MacInnes Court of Appeals decided the case under the principles of waiver rather than preemption. The Court, in its Opinion, set forth other federal cases which have determined "ERISA does not preempt an explicit waiver of interest by a non-participant beneficiary of such a plan". See MacInnes at p 286, Melton v Melton, 324 F 3rd 941, 945 (CA 7, 2003); see also Silber v Silber, 99 NY2d 395, 402, 404; 786 NE2d 1263 (2003), Metropolitan Life Insurance Co v Pressley, 82 F3rd 126 (6th Cir 1996). The Court of Appeals in MacInnes concurred with the majority view and resolved the MacInnes case accordingly.[5]

The MacInnes Court provided the following reasoning in it's decision to rule that waiver controlled under these facts and circumstances:

> "A majority of federal circuit courts of appeal have concluded that waivers of beneficiary rights are possible under ERISA-Governed Plans." Silber, supra at 403. The majority view reasons that because "ERISA is silent on the issue of what constitutes a valid waiver of interest" the courts must turn to federal common law and state law to fill the gap. Melton, supra at 945; see also Silber, supra at 404. Circuits following the majority view have looked to whether there is proof of a specific termination of the rights in question, or stated differently, whether a waiver by designated beneficiary of an ERISA-regulated benefits plan was explicit, voluntary, and made in good faith. Melton, supra at 945. "Essentially, when we are evaluating whether the waiver is

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[5] The MacInnes Court of Appeals Opinion provided the following footnote in its interpretation of these federal cases, "State courts are bound by the holdings of federal courts on a federal question where there no conflict among federal appellate courts. Etefia v Credit Technologies, Inc, 245 Mich App 466, 470; 626 NW2d 577 (2001). However, if there is no United States Supreme Court decision concerning the interpretation at issue, and a conflict exists among the federal circuit courts of appeal, the state court is free to choose the view it determines most appropriate. Schueler v Weintrob, 360 Mich 621, 634; 105 NW2d 42 (1960).

> effective in a given case, we are more concerned with whether a reasonable person would have understood that she was waiving her interest in the proceeds or benefits in question than with any magic language contained in the waiver itself." Id. at 945-946, citing, e.g., Clift v Clift, 210 F3d 268, 271 (CA 5, 2000). Michigan courts have defined "waiver" as the voluntary and intentional relinquishment of a known right. Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 69; 642 NW2d 663, 670 (2002); People v Carines, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999)." (See MacInnes at pp 286-287).[6]

As with the MacInnes case, Plaintiff/Appellant in this case did not argue that she did not knowingly and voluntarily agree to the insurance waiver contained in her Consent Judgment of Divorce. Rather, Plaintiff/Appellant argues ERISA's preemption somehow links to the Divorce Judgment and thus controls. The Court of Appeals in MacInnes, supra, and Moore, supra, disagreed with that argument. Furthermore, the Court of Appeals has concurred with the majority view in the federal circuits and concluded that giving affect to the provisions of the insurance waiver of a divorce judgment does not compromise the purpose and goals of ERISA, Melton, supra at 945, and thus held that the defendant in MacInnes (like the Plaintiff/Appellant here) waived his rights to the life insurance proceeds at issue and thus is not entitled to retain them.

Therefore, there is no place for federal preemption here, simply because there is nothing to preempt. ERISA's mandates have been carried out by the insurer (Metropolitan Life), and all that remains is for the parties to be bound by a valid Divorce Judgment of which terms they have negotiated and consented to.

Analyzing the language in the insurance waiver of the Divorce Judgment in this case as

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[6] The footnote provided by the Court of Appeals provides: "[t]he Sixth Circuit is not among the majority and instead has adopted the minority "plan document" approach, which does not permit an alteration of beneficiaries, and, consequently, under the minority view, common-law doctrines such as waiver may not be used to override a beneficiary designation. Silber, supra at 403."

compared to that in the MacInnes case, the language is explicit in its intent to divest Plaintiff/Appellant of her interest in life insurance proceeds from the policies owned by Defendant/Appellee's deceased husband. The insurance provisions provides, "Any interest which either of the parties may now have or may have had in insurance contract or policy". The clause encompasses both previous and existing interest in policies of insurance. Furthermore, the insurance provision provided termination of any other interest of any insurance contract or policy of the other party. Thus each of the parties waived their rights to any interest they may have had in any insurance policy, which would include the rights Plaintiff/Appellant had to the Metropolitan Life Insurance Policy which Defendant/Appellee's Decedent had named her as a beneficiary back in 1963, previous to the Divorce Judgment of September 30, 1986.

The insurance clause takes one step further in this case (as compared to MacInnes, supra) and provides each party was to hold all insurance free and clear of any right or interest which that party may have now or in the future. Thus, the Plaintiff/Appellant also waived any future rights she may have in life insurance of Defendant/Decedent and was to hold the insurance company free of any such rights. Plaintiff/Appellant opposition to Defendant/Appellee's motion is in direct violation of this portion of the Divorce Decree.

As set forth by the Court of Appeals in the MacInnes decision, giving effect to the waiver as set forth in the insurance waiver of the party's divorce judgment, best serves the ends of justice where a divorce in a couple's interest is clear. Silber, supra at 403-404, MacInnes at p 5. A Divorce Judgment has been construed as a contract. See Massachusetts Indemnity & Life Ins Co v Thomas, 260 Mich App 265, 268; 520 NW2d 708, 710 (1994), and Thomas v City of Detroit Retirement System, 246 Mich App 155; 631 NW2d 349 (2001). In Thomas, supra, the ex-spouse was still the named plan beneficiary and the Court of Appeals held that the Judgment

provisions extinguishing the ex-spouse's rights to the benefits controlled for the simplest reason:

> "To hold otherwise would be to contravene the clear language of the decree and thereby frustrate the intent of the parties who signed it. Id., at 160; 631 NW2d at 352."

The same rationale, of course, speaks justice here as it did in the Court of Appeals in Thomas, supra, in 2001. To allow Federal preemption though ERISA of a Consent Judgment of Divorce essentially permits unjust enrichment to ex-spouses, interferes with the parties rights to contact and would create havoc to the estate plans of divorced individuals who rely upon such terms in their divorce judgments as it pertains to life insurance in their planning and future benefits for their families. One can imagine the required amendments to divorce judgments if preemption through ERISA is allowed.

ISSUE II

WHETHER THE ESTATE OF A DECEASED SPOUSE CAN SEEK A RECOVERY OF LIFE INSURANCE BENEFITS THROUGH THE STATE COURT WHICH HAD JURISDICTION OF THE INITIAL DIVORCE PROCEEDING.

ARGUMENT

Defendant/Appellee objects to Plaintiff/Appellant's presentation of this argument as it was not preserved. Plaintiff/Appellant now raises, for the first time, a jurisdictional issue regarding whether Defendant/Appellee's action should be heard at the federal court level as opposed to State Court. This issue was not raised in or ruled on by the lower court. This argument was never presented to the Michigan Court of Appeals in any form of argument or cross appeal. Essentially, this is a request for change in venue which must be filed before or at the time Plaintiff/Appellant filed her Answer to Defendant/Appellee's original Motion. See MCR 2.221.(A).

As a general rule, an Appellate Court will not consider any issue not raised in and ruled on by the Lower Court. See Napier v Jacobs, 429 Mich 222, 414 NW 2d 862 (1987). See also Badiee v Brighton Area Schools, 265 Mich App 343, 695 NW 2d 521 (2005), citing 46th Circuit Trial Court v Crawford Co., 261 Mich App 477, 504, 682 NW 2d 519 (2004).

Thus, according to case law, this argument has been waived since it has not been brought up at the trial court level and was first addressed in the Application for Leave to Appeal. Burns v City of Detroit (on remand), 253 Mich App 608; 660 NW2d 85 (2002); Booth Newspaper, Inc v Univ of MI Bd of Regents, 444 Mich 211; 507 NW2d 442 (1993).

However, if this Honorable Court decides to review this issue, it is important to note Defendant/Appellee is not seeking enforcement or any claim against the ERISA Plan Administrator, i.e., Metropolitan Life. Defendant/Appellee conceded that Metropolitan Life's

payment was directed under ERISA. In this case, it is Defendant/Appellee's position that ERISA no longer operates to control the disposition of the insurance proceeds, rather, the Divorce Judgment does. ERISA mandates have been carried out and there is no preemption as there is nothing to preempt. Thus, there is no federal question of law to be addressed in the Federal Court system. All that remains is a valid Divorce Judgment and its parties to be bound.

The only avenue to which Defendant/Appellee could seek Enforcement was through the court which issued the Divorce Judgment Order, i.e., the Midland County Circuit Court. A Federal Court cannot enforce a State Court Divorce Judgment. Plaintiff/Appellant admitted in her original Response Brief at the Trial Court level that "There is no question this Court (Trial Court) has the right to review compliance with Divorce Judgments and to take action to address circumstances where the Judgment of Divorce was not properly followed by the parties." (Page 2, Plaintiff/ Appellant's original Brief in Opposition to Motion for Enforcement of Divorce Judgment Against Plaintiff).

Once paid, ERISA controlled life insurance benefits do not retain any protection as seen in the recent case of Whitwood, Inc v South Boulevard Property Management Co, Michigan Court of Appeals, Docket No. 251391, decided April 12, 2005. The Whitwood, supra, case is significant for the reason the Michigan Court of Appeals followed our Supreme Court in finding that the antialienation language in ERISA at 29 USC 1056(d)(1) did not preclude the State from ordering the distribution of the Decedent's pension funds after they were deposited in his account. See Whitwood, supra, p 3. Thus, a State Court is not precluded from ordering further distribution of ERISA payments (here life insurance) once they have been paid from Plan Administrator. Thus, it is Defendant/Appellee's position that once ERISA payments are made by the ERISA Plan Administrator, they do not retain preemption protection and a State Court may

order further distribution of those proceeds pursuant to a Consent Judgment of Divorce.

Therefore, since Defendant/Appellee is not making a direct claim against the ERISA Plan Administrator and for the reason ERISA benefits have been paid and do not retain preemption protection, there is no issue to support Federal jurisdiction. The Midland County Circuit Court retains jurisdiction because it issued the Divorce Judgment which Defendant/Appellee seeks to enforce.

ISSUE III

WHETHER THE TRIAL COURT SHALL RETAIN JURISDICTION TO REVIEW THE PROPRIETY OF PLAINTIFF/ APPELLANT'S DESIGNATION AS THE BENEFICIARY OF THE ERISA COVERED LIFE INSURANCE PLAN IF THE ERISA PREEMPTION PROVISION IS FOUND INAPPLICABLE.

ARGUMENT

Defendant/Appellee objects to Plaintiff/Appellant's third Argument requesting remand for further factual consideration as any and all facts and issues have been addressed at the Trial Court level. Plaintiff/Appellant made no specific factual allegation or issue regarding the issue of whether the Deceased Herbert Sweebe intended to retain the beneficiary designation as Plaintiff/Appellant. In Plaintiff/Appellant's original Response Brief, Plaintiff/Appellant generally referred to the fact that the Decedent had not changed his beneficiary designation in fifteen years after the Divorce Judgment was entered. No specific facts were presented in the Brief or at Oral Argument by Plaintiff/Appellant as to whether there was any specific evidence relating to Herbert Sweebe's retention of his ex-wife as a beneficiary of his life insurance.

Again, since this issue was not preserved at the Trial Court level, this issue cannot be heard or decided upon by this Court. Plaintiff/Appellant was provided time and opportunity at the Trial Court level to provide such evidence but failed to do so. Plaintiff/Appellant is thereby precluded from seeking leave to appeal relating to such issues and determination of facts. See Napier v Jacobs, 429 Mich 222, 414 NW 2d 862 (1987). See also Badiee v Brighton Area Schools, 265 Mich App 343, 695 NW 2d 521 (2005), citing 46th Circuit Trial Court v Crawford Co., 261 Mich App 477, 504, 682 NW 2d 519 (2004).

Plaintiff/Appellant again seeks removal of this action to the United States District Court under this argument. Essentially, Plaintiff/Appellant is again requesting a change in venue which

she failed to do at the time of her responsive pleadings as required under Court Rule. See MCR 2.221 (A). Since this is a similar issue presented in Issue II, Defendant/Appellee incorporates all her Argument presented in Issue II as opposed to repeating them here.

RELIEF REQUESTED

WHEREFORE, Defendant/Appellee respectfully requested that the Michigan Supreme Court affirm the Michigan Court of Appeals Order issued on July 19, 2004, reversing the Midland County Circuit Court December 10, 2003, Order Denying Defendant/Appellee Gail Sweebe's motion for enforcement of the insurance waiver provision in her deceased husband's 1986 Divorce Judgment and further affirming the Michigan Court of Appeals Remand for entry of an order directing Plaintiff/Appellant to pay decedent's estate an amount equal to the insurance proceeds. Furthermore, Defendant/Appellee respectfully requests this Court to deny Plaintiff/Appellant's further request for removal of this action to Federal District Court and request for remand to the Trial Court level for further factual consideration regarding Plaintiff/Appellant's designation as to the beneficiary of Herbert Sweebe's life insurance policy.

Respectfully Submitted:

PURCELL, TUNISON & BOARDMAN, P.C.

Date: 6-21-05

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