Circuit Court for Frederick County
Case No. C-10-CV-19-000816

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1205

September Term, 2020

KIM HARTLEY-BARTMAN

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL.

Friedman,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: October 18, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Kim Hartley-Bartman, was married to Scott Bartman from 1987 to July 2018 when they were granted an absolute divorce. Mr. Bartman died intestate in 2019. At issue in this case is an Individual Retirement Account ("IRA") Mr. Bartman opened in 2016 with Merrill Lynch, Pierce, Fenner & Smith, Inc., one of the appellees. Prior to the entry of the divorce decree, Mr. Bartman designated appellant and the other appellee, Kathleen Bird, as co-equal beneficiaries of the IRA. After Mr. Bartman's death, Merrill Lynch refused to remit any IRA proceeds to appellant based on provisions in its governing contracts that precluded payments to former spouses absent beneficiary re-designation by the account owner subsequent to the date of divorce. After appellant sued Merrill Lynch and Ms. Bird, the Circuit Court for Frederick County granted Merrill Lynch's motion to dismiss.

We reduce appellant's questions presented to a single question: Did the circuit court err in granting the appellees' motion to dismiss?[1]

[1] Appellant presented the following questions in her brief:

1. Did the [c]ircuit [c]ourt improperly grant the motion to dismiss in favor of Appellee Merrill Lynch when discovery was not allowed to proceed to determine when and if Decedent received from Merrill Lynch the document containing the Re-designation Provision, which would have been Decedent's sole notice that Decedent needed to take additional actions to confirm Decedent's action naming Plaintiff as a 50% beneficiary of his IRA?

2. Did the [c]ircuit [c]ourt improperly grant the motion to dismiss in favor of Appellee Merrill Lynch when the [c]ircuit [c]ourt held that Merrill Lynch's contract with Mr. Bartman was not procedurally and substantively unconscionable?

Perceiving no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because we are reviewing the grant of a motion to dismiss, we rely on the facts stated in appellant's complaint. *Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 680, n.2 (2005). Mr. Bartman and appellant were married in 1987, but they separated in 2011. In 2016, Mr. Bartman opened an IRA with Merrill Lynch, designating appellant as the sole beneficiary.[2] In February 2018, Mr. Bartman changed the IRA's beneficiary designation, naming appellant and Ms. Bird separately as 50% beneficiaries of the IRA. Mr. Bartman and appellant divorced on July 17, 2018. The divorce decree provided that "each party shall retain any and all bank accounts, pension accounts, retirement accounts and debt" in their respective names. Mr. Bartman never changed the beneficiary designation of the IRA after the divorce. He died on September 5, 2019.

On September 30, 2019, Merrill Lynch informed appellant that, despite being named a 50% beneficiary of the account, appellant would not receive any proceeds from the IRA. Appellant alleged that Merrill Lynch advised her that its "Disclosure and

3. Whether the [c]ircuit [c]ourt improperly granted the motion to dismiss when the [c]ircuit [c]ourt ignored Mr. Bartman's affirmatively demonstrated intent to designate Appellant Kim Hartley-Bartman as 50% beneficiary of his IRA?

[2] For purposes of our review of the motion to dismiss, we shall accept appellant's allegation that she was named the sole beneficiary when the account was opened. We note, however, that the designation dated March 16, 2016, shows that appellant and Ms. Bird were each 50% beneficiaries. Likewise, it does not appear that Mr. Bartman changed the beneficiary designation two months prior to the divorce. At oral argument, appellant's counsel conceded this point.

Custodial Agreement" precluded a former spouse from receiving benefits as a beneficiary unless Mr. Bartman, as owner of the account, re-designated appellant as a beneficiary after entry of the divorce decree. In response, appellant contacted Merrill Lynch "to resolve this issue," informing the company that Mr. Bartman's donative intent was demonstrated by a "pattern of activities" between appellant and Mr. Bartman. Specifically, appellant stated:

> Among other activities, Mr. Bartman's changing the IRA beneficiary designation less than two months before he filed for divorce, and more than seven years after living separately from [appellant] demonstrates Mr. Bartman's continued donative intent to have [appellant] as beneficiary. To that end, as a corollary, until Mr. Bartman's death, [appellant] retained Mr. Bartman as sole beneficiary of her 401(k) and Life insurance.

Merrill Lynch persisted in its denial of appellant's beneficiary claim.

Appellant filed a three-count complaint in the Circuit Court for Frederick County alleging a breach of contract in the first count, and seeking a declaratory judgment regarding the rights of the parties and injunctive relief in the second and third counts, respectively. In her breach of contract claim, appellant alleged that Merrill Lynch's "Disclosure and Custodial Agreement," the terms of which expressly invalidated Mr. Bartman's beneficiary designation as to appellant, was unenforceable as a contract of adhesion. She further alleged that "[s]uch agreement is unconscionable under Maryland law because it violates public policy" in that Mr. Bartman "had the right to change the IRA beneficiary at any time, and chose not to exercise that right." The counts for declaratory judgment and injunctive relief did not assert any facts or legal theories substantively different from those alleged in appellant's breach of contract claim.

Appellant attached to her complaint the Judgment of Absolute Divorce and her own

affidavit. In her affidavit, after recounting the 2016 and 2018 IRA beneficiary designations described above, appellant stated that she and Mr. Bartman "remained friends" after their separation and divorce. She further stated that "[a]s part of [her] understanding with Mr. Bartman until Mr. Bartman's death, [appellant] retained Mr. Bartman as 100% beneficiary of [her] life insurance and 401(k)."

Merrill Lynch filed a motion to dismiss the complaint under Rule 2-322(b)(2) for failure to state a claim upon which relief could be granted. Attached to the motion to dismiss was a copy of the Disclosure Statement and Custodial Agreement referred to in appellant's complaint. Merrill Lynch subsequently attached a copy of a "Client Relationship Agreement Form" signed by Mr. Bartman to its reply to appellant's opposition to the motion to dismiss.

The circuit court held a hearing on the motion to dismiss on September 14, 2020. At the hearing, Ms. Bird joined in Merrill Lynch's motion to dismiss. On December 1, 2020, the court granted the motion to dismiss as to all claims. This timely appeal ensued.

DISCUSSION

We review *de novo* the circuit court's decision to grant appellees' motion to dismiss. *Greater Towson Council of Cmty. Ass'ns v. DMS Dev., LLC*, 234 Md. App. 388, 408 (2017). A dismissal for failure to state a claim is proper where, after assuming all factual allegations in the complaint and permissible inferences from those allegations as true, those facts fail to afford relief to the plaintiff. *Id.* (quoting *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012)). The facts should be viewed in the light most favorable to the non-moving party. *Id.* (quoting *Gomez*, 427 Md. at 142).

Because our standard of review requires that we view all facts alleged in the complaint in a light most favorable to appellant, we shall consider the allegations supporting appellant's three causes of action. However, because the declaratory judgment and injunctive relief counts of the complaint are based on the facts alleged in the breach of contract count, we shall focus our examination on appellant's breach of contract claim.

The essence of appellant's breach of contract claim is found in Paragraph 23 of the complaint:

> Merrill Lynch argues that a clause in the 44-page Merrill Lynch's Disclosure and Custodial Agreement, voids Mr. Bartman's beneficiary designation of Plaintiff. Under Maryland law, the clause in the Merrill Lynch's Disclosure and Custodial Agreement is unenforceable as the Agreement is a contract of adhesion. Such agreement is unconscionable under Maryland law because it violates public policy: under the circumstances where a former spouse can be named as a beneficiary before the divorce and remain beneficiary after a divorce if the decedent had the power to change the beneficiary at any time before decedent's death. *See PaineWebber Inc. v. East*, 363 Md. 408 (2001) and *Cassiday v. Cassiday*, 256 Md. 5 (1969).

The provision at issue—the "Re-designation Provision"—is found in both the Disclosure Statement and Custodial Agreement referenced in appellant's complaint. The Disclosure Statement provides:

> If you are married and designate your spouse as beneficiary but later divorce or annul your marriage, your designation will be void, unless:
>
> - The decree of divorce or annulment designates your spouse as beneficiary,
> - You re-designate your spouse as beneficiary, or
> - Such spouse is re-designated to receive proceeds or benefits in trust for, on behalf of, or for the benefit of your child or

dependent.[3]

We begin our analysis with some basic contract principles.

> Courts in Maryland apply the law of objective contract interpretation, which provides that "[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding." As such, "[a] contract's unambiguous language will not give way to what the parties thought the contract meant or intended it to mean at the time of execution." Instead, "[i]f a written contract is susceptible of a clear, unambiguous and definite understanding . . . its construction is for the court to determine." Our task, therefore, when interpreting a contract, is not to discern the actual mindset of the parties at the time of the agreement, but rather, to "determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated."

Dumbarton Improvement Ass'n, Inc. v. Druid Ridge Cemetery Co., 434 Md. 37, 51–52 (2013) (alterations in original) (internal citations removed).

Additionally, "we will give effect to the plain meaning of an unambiguous term, and will evaluate a specific provision in light of the language of the entire contract." *Weichert Co. of Md., Inc. v. Faust*, 419 Md. 306, 324 (2011) (citing *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 447–48 (2008)). "Finally, absent 'fraud, duress, mistake, or some countervailing public policy, courts should enforce the terms of unambiguous written contracts without regard to the consequences of that enforcement.'" *Id.* at 325 (quoting *Calomiris v. Woods*, 353 Md. 425, 445 (1999)).

We initially note that appellant does not claim that the Re-designation Provision is

[3] The provision found in the Custodial Agreement is worded slightly differently, but is substantially identical: "If you designate your spouse as beneficiary and you divorce or annul your marriage, your designation will be void unless: . . . ." The wording of the bullet points is identical to the Disclosure Statement.

ambiguous. Instead, she argues that the Re-designation Provision is unenforceable because it is unconscionable. To be void and unenforceable, a contract provision must be both procedurally and substantively unconscionable. *Freedman v. Comcast Corp*., 190 Md. App. 179, 207–08 (2010). In *Walther v. Sovereign Bank*, 386 Md. 412 (2005), the Court of Appeals endorsed Williston's description of procedural and substantive unconscionability:

> The concept of unconscionability was meant to counteract two generic forms of abuses: the first of which related to procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter the transaction; and the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having nothing to do with price or other central aspects of the transaction.

Id. at 426 (quoting 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 1998)). We conclude that Merrill Lynch's Re-designation Provision is neither procedurally nor substantively unconscionable.

I. *PROCEDURAL UNCONSCIONABILITY*

Appellant argues that the Re-designation Provision is procedurally unconscionable in two ways: first, she argues that it constitutes a contract of adhesion, and second, she argues that the provision was not "conspicuously distinct."

A contract of adhesion is one that is "drafted unilaterally by the dominant party and

then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms." *Freedman*, 190 Md. App. at 209 (quoting *Walther*, 386 Md. at 430). Construing all reasonable inferences in appellant's favor, the Merrill Lynch contract could be viewed as a contract of adhesion. The documents were drafted by Merrill Lynch, and Mr. Bartman apparently was not given an opportunity to negotiate the terms. On the other hand, Mr. Bartman did not lack a "meaningful choice" concerning his IRA account as myriad financial institutions provide IRA account services. Furthermore, the contract contained a fourteen-day cancellation provision that permitted unilateral cancellation of the agreement. Moreover, "a contract of adhesion is not void per se," but rather is only void if the contract is unconscionable. *Barrie Sch. v. Patch*, 401 Md. 497, 517 (2007) (citing *Walther*, 386 Md. at 430) (holding that the agreement there "was neither a contract of adhesion nor unconscionable"). As we shall discuss below, we do not find this contract to be unconscionable.

The Re-designation Provision is not, as appellant appears to argue, inconspicuously hidden within dozens of pages of fine print. On the whole, the contract documents are presented in a format that is easy to read, and the contractual language is not littered with overly complicated sentences or unnecessary "legalese." The Re-designation Provision appears twice in the contract documents—once in the Traditional IRA Disclosure Statement and once in the Traditional IRA Custodial Agreement. Both of these documents have clear, easily comprehensible tables of contents spanning only a single page. In the Disclosure Statement, the Re-designation Provision is found under a main heading titled "DESIGNATING BENEFICIARIES," which has only four sub-categories. The sub-

category containing the Re-designation Provision is titled "Changes in family status affecting designations," and is found on page four. In the Custodial Agreement, the Re-designation Provision is found under a main heading titled "INFORMATION YOU PROVIDE," which has five sub-categories. The category containing the Re-designation Provision is titled "Spousal beneficiaries after divorce or annulment," located three pages after the table of contents. We reject appellant's assertion that the Re-designation Provision is not "conspicuously distinct," and conclude that the operative agreements are not procedurally unconscionable.

II. *SUBSTANTIVE UNCONSCIONABILITY*

As noted above, a contract provision must be both procedurally and substantively unconscionable for it to be void and unenforceable. Even if we were to assume *arguendo* that the contractual provisions here were procedurally unconscionable, we confidently conclude that they were not substantively unconscionable. Appellant argues that the Re-designation Provision is substantively unconscionable as violative of public policy because it infringes on "an individual's right to decide on the individual's estate planning" and "negates the reasonable expectations of the nondrafting party."

A contract may be substantively unconscionable when it contains terms that are

> unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise *contravene the public interest or public policy*; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to *negate the reasonable expectations of the nondrafting party*, or unreasonably and unexpectedly harsh terms having nothing to do with price or other central aspects of the transaction.

Walther, 386 Md. at 426 (emphasis added) (quoting *Williston on Contracts* § 18:10).

In her complaint, appellant described the public policy at issue as "allowing individuals to dispose of their own assets by beneficiary designation."[4] According to appellant, the Re-designation Provision violates this public policy by not implementing Mr. Bartman's "affirmatively demonstrate[d]" desire to have 50% of his IRA distributed to appellant upon his death.

Appellant argues that this public policy was recognized by the Court of Appeals in *PaineWebber, Inc. v. East*, 363 Md. 408 (2001). There, Carol and Dewey East were married in 1985. *Id.* at 411. In April 1986, Dewey opened an IRA account with PaineWebber, naming Carol as the beneficiary. *Id.* In March 1990, Carol and Dewey entered into a separation agreement, and in May 1991 they were divorced. *Id.* at 411–12. Dewey remarried in 1993 and died in 1996. *Id.* at 412. After Dewey's death, Carol sued PaineWebber, claiming that she was the named beneficiary of Dewey's IRA. *Id.* PaineWebber interpleaded Dewey's Estate and his second wife. *Id.* The circuit court granted summary judgment against Carol, concluding that, in the separation agreement, she had waived any claim to the proceeds of Dewey's IRA. *Id.*

The Court of Appeals disagreed that Carol had effectively waived any claim to Dewey's IRA by signing the separation agreement, and reversed the trial court's grant of

[4] In appellant's brief, she raised a secondary public policy consideration—that re-designation provisions would have a disproportionate negative effect on women. This argument was not raised below, and we therefore decline to consider it.

summary judgment on those grounds.[5] *Id.* at 421. Relevant to the case at bar, the Court held that the "Property Division" provision in the separation agreement, in which Carol and Dewey mutually waived any interest in the other's personal property, did not encompass Carol's "expectancy" interest as a named beneficiary in Dewey's IRA. *Id.* at 420. ("Therefore, since Carol had no property interest in the East IRA when she executed the Agreement, she could not have quit claimed her property interest in the East IRA because she had none, she had only an expectancy." (quoting *PaineWebber, Inc. v. East*, 131 Md. App. 302, 314–15 (2000))).

In our view, *PaineWebber* is inapposite. First, contrary to appellant's assertion, there is no discussion in the Court's opinion concerning the public policy of "allowing individuals to dispose of their own assets by beneficiary designation." Second, the first paragraph of the Court's opinion unequivocally states that the issue presented was limited to the interpretation of Carol and Dewey's separation agreement:

> This interpleader action involves the interpretation of a separation agreement. The issue is whether, by the separation agreement, the former wife waived her right as the named beneficiary to the proceeds of an individual retirement account (IRA) maintained by her ex-husband, now deceased.

Id. at 411. Thus, while the Court employed well-recognized principles of contract law to interpret the parties' separation agreement, it is pellucid that the Court offered no opinion whether any of the provisions of the PaineWebber IRA contract were unconscionable. We therefore fail to see how *PaineWebber* informs whether Merrill Lynch's Re-designation

[5] The Court declined to consider an alternative ground for summary judgment based on whether Dewey had changed the IRA beneficiary. 363 Md. at 422–23.

Provision is substantively unconscionable.

Appellant further notes that a provision in the Uniform Probate Code ("UPC"), adopted by twenty-six states, provides for automatic revocation of spousal beneficiary designations upon divorce. *See* UPC § 2-804; *Sveen v. Melin*, ___ U.S. ___, 138 S. Ct. 1815, 1819 (2018). Appellant argues that Maryland's failure to adopt this or a similar scheme indicates that the existence of such automatic revocation in a private contract would be contrary to Maryland public policy.

The legislature's failure to adopt the UPC provision for automatic revocation of spousal beneficiary designations does not mean that the Re-designation Provision here is contrary to public policy. Indeed, appellant acknowledges that similar automatic revocation schemes in other areas have existed in Maryland statutes "since at least 1973." Maryland Code (1974, 2017 Repl. Vol., 2019 Supp.), § 4-105(b)(4) of the Estates and Trusts Article ("ET") provides that "all provisions in the will relating to the spouse, and only those provisions, shall be revoked unless otherwise provided in the will or decree" upon the divorce of the testator or the annulment of the testator's marriage. Similarly, ET § 14.5-604(b)(1) revokes all terms of a revocable trust relating to the settlor's spouse upon divorce or annulment. The General Assembly's adoption of spousal revocation provisions in these statutes suggests that the concept does not inherently offend public policy.

Appellant attempts to differentiate these statutory provisions by asserting that there is a "key difference" between wills and trusts as probate property, and life insurance and retirement accounts as non-probate property. From that premise, appellant asserts that "in the twenty years since *PaineWebber* was decided, no proposal to revoke a former spouse

beneficiary designation for non-probate assets has even been introduced in the Maryland General Assembly." We find appellant's argument unpersuasive because assets held in a revocable trust—governed by ET § 14.5-604(b)(1)—are considered non-probate property, just like retirement accounts. *Karsenty v. Schoukroun*, 406 Md. 469, 488 n.13 (2008) (quoting Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 Cath. U. L. Rev. 519, 536 (2003)).

Appellant also argues that the Re-designation Provision "negates the reasonable expectations of the non-drafting party" because "a reasonable person would not expect the person[']s beneficiary designation could be undone by a provision buried in a massive multipart form contract." In *Sveen*, the United States Supreme Court, in upholding Minnesota's revocation-on-divorce statute, expressed a view contrary to appellant's: "Legislative presumptions about divorce are now especially prevalent—probably because they accurately reflect the intent of most divorcing parties. Although there are exceptions, most divorcees do not aspire to enrich their former partners." 138 S. Ct. at 1822. Thus, Merrill Lynch's Re-designation Provision reflects the prevailing view that a "reasonable divorcee" would not expect a former spouse to benefit from a will, trust, or retirement beneficiary designation made prior to the divorce. That Mr. Bartman may have actually intended that appellant receive 50% of his IRA is irrelevant—appellant makes no allegation that the Re-designation Provision is ambiguous and therefore "the court must give effect to its plain meaning and not contemplate what the parties may have subjectively intended." *Nova Research*, 405 Md. at 448 (citing *Diamond Point v. Wells Fargo*, 400 Md. 718, 751 (2007)). Consequently, we reject appellant's contention that she should have been allowed

to present evidence or pursue discovery related to Mr. Bartman's subjective intent.

Finally, the Re-designation provision is not "grossly favorable" to Merrill Lynch. Whether Merrill Lynch disburses the IRA funds to a former spouse or a default beneficiary matters not to Merrill Lynch. We are persuaded by Merrill Lynch's analogy to *Sveen* that the Re-designation Provision, like the Minnesota revocation-on-divorce statute, creates "a mere default rule, which the policyholder can undo in a moment." *Sveen*, 138 S. Ct. at 1822.

In summary, Merrill Lynch's Re-designation Provision is not "unreasonably favorable to the more powerful party" (Merrill Lynch); it does not "contravene the public interest or public policy;" and it does not "attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law" or "negate the reasonable expectations of the nondrafting party." *Walther*, 386 Md. at 426 (quoting *Williston on Contracts* § 18:10). We therefore conclude that the Re-designation Provision is not substantively unconscionable and affirm the circuit court's granting of the motion to dismiss.[6]

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[6] In her brief, appellant argues that Merrill Lynch did not prove that Mr. Bartman actually received the Re-designation Provision contained in the "Disclosure and Custodial Agreement." We have carefully reviewed appellant's complaint and see no factual allegation in the complaint that would support appellant's appellate argument that there was no mutual assent because Mr. Bartman never received the relevant contract. Indeed, appellant's principal claim was that Merrill Lynch breached its contract with Mr. Bartman. Although this issue was raised in appellant's opposition to the motion to dismiss, an opposition to a motion to dismiss is not a pleading. *Hansen v. City of Laurel*, 420 Md. 670, 696 n.16 (2011). We also note that appellant never sought leave to amend her complaint. Accordingly, the circuit court, in ruling on the motion to dismiss, properly limited its consideration to the allegations contained in the complaint.