Illinois Official Reports

Appellate Court

In re Marriage of Kelly, 2022 IL App (1st) 220241

Appellate Court Caption	*In re* MARRIAGE OF PATRICK J. KELLY, Petitioner, and CAROL A. KELLY, Respondent-Appellant (Kimellen Chamberlain and the Village of Oak Park, Intervenors-Appellees).
District & No.	First District, Third Division No. 1-22-0241
Filed	December 2, 2022
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 94-D-6109; the Hon. Matthew Link, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	Matthew S. Ryan and John N. Pavletic Jr., of Cotsirilos, Tighe, Streicker, Poulos & Campbell, Ltd., of Chicago, for appellant. Paul L. Stephanides, of Oak Park (Rasheda Jackson, of counsel), for appellee Village of Oak Park. Patrick Martin Ouimet, of Sarles & Ouimet, of Chicago, for other appellee.

Panel PRESIDING JUSTICE McBRIDE delivered the judgment of the court, with opinion.
Justices Gordon and Burke concurred in the judgment and opinion.

OPINION

¶ 1 The question on appeal is whether waiver language in a marital settlement agreement indicating each party was surrendering all rights against the other's property and assets encompassed the former wife's right to receive proceeds from a federal civil rights judgment that was entered during the marriage. Carol A. Kelly obtained clarification in 2021 from the United States District Court for the Northern District of Illinois, Eastern Division, that she is the "present wife" within the meaning of a 1987 federal judgment stating that her then-husband, Patrick J. Kelly, will receive annual disbursements after his fiftieth birthday and, upon his death, "the same payments shall continue to be made *** to his present wife during her lifetime." Patrick received 16 annual payments before his death in 2017. After the federal court clarified the meaning of "present wife," it deferred to the circuit court of Cook County to determine whether language in Carol and Patrick's[1] 1994 dissolution of marriage judgment waived her right to receive any proceeds from the federal action. The circuit court found that Carol did waive those lifetime payments of $30,685 per year from judgment debtor the Village of Oak Park, Illinois (Village). Her appeal from that ruling is opposed by the Village and Patrick's widow, Kimellen A. Chamberlain. The federal court anticipates that, when these state court proceedings conclude, the parties will return for the federal court's direction as to whether the Village should pay Carol or Kimellen.

¶ 2 Carol and Patrick married in 1984, when they were both 32 years old and he was working as a detective for the Oak Park Police Department. In 1987, Patrick and another detective, Ronald Surmin, filed a federal civil rights suit against the Village regarding actions taken against them after they reported corruption within the detective squad. The litigants reached an agreement, which the federal court entered as its final judgment dismissing the lawsuit in 1987 and retaining jurisdiction for purposes of enforcement. Patrick was 36 at the time. The detectives agreed to waive and release all claims, resign from their employment, and relinquish their pension contributions. In return, the Village agreed to make annual distributions, as follows:

> "9. From and after the fiftieth (50th) birthdate [*sic*] of PATRICK KELLY, the VILLAGE OF OAK PARK shall pay him annually during his lifetime an amount equal to sixty percent (60%) of the salary attached to the rank of a top-graded Oak Park patrolman at the time of Plaintiff's fiftieth (50th) birthdate [*sic*], or as of [his resignation on] December 1, 1987, whichever is greater."

¶ 3 In addition:

> "11. On the death of either Plaintiff [(PATRICK KELLY or RONALD SURMIN)], before or after he reaches his fiftieth (50th) birthday, the same payments shall continue

[1]The convention is to refer to individuals by their last names, but because Patrick and Carol have the same last name, we respectfully use only their first names in order to be clear yet brief. We are referring to Kimellen by her first name for the sake of consistency.

to be made by the VILLAGE OF OAK PARK to his present wife during her lifetime to begin on Plaintiff's fiftieth (50th) birthdate [*sic*]."

¶ 4 In 1994, Patrick and Carol divorced by way of a marital settlement agreement, which the circuit court of Cook County approved and expressly incorporated into a judgment for dissolution of marriage. With respect to the payments that the Village would make pursuant to the federal judgment, the 1994 dissolution judgment provided:

> "[8. PERSONAL PROPERTY:] During the course of the marriage, the husband settled a certain lawsuit in reference to his employment with the Village of Oak Park Police Department. *The Husband is to receive payments* in the same manner as the Village of Oak Park pays pension benefits to former employees. *When the Husband receives such payments*, the Wife shall be entitled to TWENTY FIVE PERCENT (25%) of the net payment received by the Husband for the first NINETY-SIX (96) months of the payments." (Emphasis added.)

¶ 5 In the above quote, we italicized the phrases that Carol argues are dispositive. The Village and Kimellen argue that the subsequent paragraphs are controlling:

> "9. FINANCIAL DIVISION: Each party shall keep any pension, retirement, 401(k) or any other retirement benefit from the employer as each party's own, separate property free of any interest of the other party.
>
> * * *
>
> 13. MUTUAL RELEASES: To the fullest extent by law permitted to do so, and except as herein otherwise provided, each of the parties does hereby forever relinquish, release, waive and forever quit-claim and grant to the other, all rights of alimony, dower, inheritance, descent, distribution and community interest and all other rights, title, claim, interest and estate as Husband and Wife, Widow or Widower, or otherwise, by reason of the marital relationship existing between said parties hereto, under any present or future law, or which he or she otherwise has or might have or be entitled to claim in, to or against the property and assets of the other, real, personal or mixed, or his or her estate, whether now owned or hereafter in any manner acquired by the other party, or whether in possession or in expectancy and either vested or contingent[.]"

¶ 6 After the divorce in 1994, Patrick married Kimellen in 1995. He turned 50 years old in 2001 and received annual distributions from the Village until his death at the age of 65 in 2017, survived by both Carol and Kimellen. The Village made the federal judgment's "present wife" distribution to Kimellen in November 2017, 2018, and 2019. The payments stopped when Carol told the Village that she is the "present wife" within the meaning of that order and that the Village's distributions to Kimellen had been a mistake.

¶ 7 In 2021, Carol filed a motion in federal court to clarify and enforce the federal civil rights judgment terms in her favor. We note that, at the time, she was 69 years old and Kimellen was 59. In June 2021, the federal court made a "partial ruling," by finding that Carol was indeed the "present wife" within the meaning of the 1987 judgment. The ruling was "partial" because the federal court found that, although it had jurisdiction to resolve whether terms in the 1994 dissolution judgment relinquished Carol's claim to annual disbursements from the Village, the interpretation was best addressed by an Illinois domestic relations judge. The federal action is currently stayed.

¶ 8 Carol moved the circuit court to clarify and enforce its dissolution judgment by declaring that the waiver language did not affect her right to the 1987 federal judgment. The Village and Kimellen were permitted to intervene in Patrick and Carol's dissolution case. After briefing and oral argument, the circuit court ruled that Carol was a third-party donee beneficiary of the 1984 federal judgment whose rights were contingent upon Patrick's death and not vested when they divorced. The circuit court seemed to view the federal judgment as one asset, rather than distinguishing between Patrick's rights during his lifetime and Carol's right after his death. The court then reasoned that there were multiple indications that Carol had given up any claim to the federal judgment. According to the circuit court, paragraph 8 of the 1987 marital settlement agreement "specifically identified the [federal judgment] as a marital asset" consistent with the statutory presumption to that effect (see 750 ILCS 5/503(b)(1) (West 2020) ("all property acquired by either spouse after the marriage *** is presumed marital property")) and awarded that asset to Patrick, not Carol. The circuit court further reasoned that "Patrick and Carol's intent to award the [federal judgment entirely] to Patrick" could be found in paragraph 8's acknowledgement that Patrick would receive the federal judgment payments "in the same manner as the Village of Oak Park pays pension benefits to former employees" and then, in the [i]mmediately following" paragraph, paragraph 9, the parties had agreed that "[e]ach party shall keep any pension, retirement, 401(k) or any other retirement benefit from the employer as each party's own, separate property free of any interest of the other party." Furthermore, the waiver language in paragraph 13 specifically relinquished Carol's rights in Patrick's property and assets, "whether in possession or in expectancy and either vested or contingent." For these two reasons, the circuit court denied Carol's motion to clarify and enforce the judgment.

¶ 9 On appeal, Carol argues that paragraph 8 of the marital settlement agreement addressed Patrick's right to funds from the federal judgment but said nothing about Carol's separate right to payments after his death and that the waiver language in paragraph 13 of the marital settlement agreement only waived her expectancy interest in his property and assets. She contends that the circuit court improperly conflated his and her rights to payments from the Village, erroneously referring to them as rights in a single, undivided marital asset. The Village and Kimellen respond that the circuit court should be affirmed because its reasoning was correct.

¶ 10 A spouse may, in a marital settlement agreement, waive an expectancy or beneficial interest in an asset, if the agreement clearly and specifically states the spouse's surrender of that interest. *Leahy v. Leahy Schuett*, 211 Ill. App. 3d 394, 398 (1991). In other words, a general waiver is ineffective. An expectancy differs from an ownership interest (see *In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244 (1984)) and is defined as " 'the interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent *** or of a beneficiary designated by a living insured who has a right to change the beneficiary.' " *Leahy*, 211 Ill. App. 3d at 398 (quoting *Principal Mutual Life Insurance Co. v. Juntunen*, 189 Ill. App. 3d 224, 227 (1989)). For purposes of this appeal, Carol does not dispute that she has or had only an expectancy or beneficial interest in the proceeds of the federal civil rights action because she was not a party to the suit or the resulting judgment, leaving open the possibility that Patrick and the Village could renegotiate and then ask the federal court to modify its 1987 judgment accordingly. While contracting parties may modify their agreement without court approval, modification of a consent decree "always requires court approval due

to [its] quasi-judicial nature." *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983); *Government Employees Retirement System v. Government of the Virgin Islands*, 995 F.3d 66, 84 (3d Cir. 2021) (modification of a consent judgment requires court approval). The record does not indicate that Patrick returned to federal court to request the court's modification of its judgment. After his death, the federal court ruled that Carol is the "present wife" for purposes of that judgment.

¶ 11 To determine the effect of waiver language in this context, a court will consider two factors, the first being "whether the disputed asset was specifically listed as a marital asset and awarded to one spouse." *Estate of Albrecht v. Winter*, 2015 IL App (3d) 130651, ¶ 11. The second factor is whether the waiver language specifically states that the parties are waiving any expectancy or beneficial interest. *Albrecht*, 2015 IL App (3d) 130651, ¶ 11. We review the interpretation of a waiver provision *de novo*. *In re Marriage of Velasquez*, 295 Ill. App. 3d 350, 353 (1998).

¶ 12 The "disputed asset" is Carol's right to continue payments after Patrick's death. Applying the waiver test, to determine whether she waived her expectancy interest in the federal judgment, we first consider whether Carol's interest (the only asset in dispute) was specifically listed as a marital asset and awarded to Patrick. We begin with paragraph 8 of the marital settlement agreement, which concerns personal property. The first sentence of paragraph 8 that we quoted above identifies the federal lawsuit as one that "the husband settled *** in reference to his employment with the Village of Oak Park Police Department." The next two sentences are about the payments that Patrick anticipated receiving after this fiftieth birthday, stating: "*The Husband is to receive payments* in the same manner as the Village of Oak Park pays pension benefits to former employees" and "*When the Husband receives such payments*, the Wife shall be entitled to [part of the first 96 months of payments]." (Emphases added.) None of these clear terms addresses the *other* payments that the Village became legally obligated to tender to the person that Patrick was married to in 1987, if she survived him. Paragraph 8 of Carol and Patrick's marital settlement agreement addresses his right to disbursements from the Village pursuant to paragraph 9 of the federal judgment, and it is silent about her right to disbursements from the Village pursuant to paragraph 11 of the federal judgment.

¶ 13 Analogous circumstances were addressed in *Leahy*, 211 Ill. App. 3d 394, in which the wife was the contingent beneficiary of the husband's land trust. The property in the trust was a building in Chicago commonly known as 4923 North Clark Street. *Leahy*, 211 Ill. App. 3d 394. In the couple's dissolution judgment, the husband was awarded the real property "free and clear of any claim whatsoever" by the wife. (Internal quotation marks omitted.) *Leahy*, 211 Ill. App. 3d at 396. However, the husband did not amend his trust agreement to remove her expectancy, and she remained on the land trust when he died three years later. The circuit court ruled that the wife had not waived her right to the beneficial interest in the land trust, and the appellate court affirmed. *Leahy*, 211 Ill. App. 3d at 400. The appellate court distinguished the arrangement from *Juntunen*, in which the deceased's insurance policies listed his former wife as principal beneficiary and their dissolution of marriage judgment stated that " '[e]ach of the parties hereby releases and/or waives any interest, beneficial or otherwise, which he or she may have acquired in or to life insurance policy(ies) owned by the other.' " *Leahy*, 211 Ill. App. 3d at 398 (quoting *Juntunen*, 189 Ill. App. 3d at 226). The court held that a general waiver of marital property rights upon divorce did not affect the wife's expectancy interest in a life insurance policy but that the quoted language specifically waived any interest, beneficial or otherwise, and therefore covered her expectancy interest. *Leahy*, 211 Ill. App. 3d at 398 (citing

Juntunen, 189 Ill. App. 3d at 227). Another instance in which a marital settlement agreement did not specifically waive a beneficial interest was *O'Toole*, in which the parties agreed, generally, that each was barred from any claims to the other's property of the other but they did not include a specific provision about insurance. *Leahy*, 211 Ill. App. 3d at 399 (citing *O'Toole v. Central Laborers' Pension & Welfare Funds*, 12 Ill. App. 3d 995 (1973)). The former husband did not change the beneficiary designations for his life insurance certificates or pension fund death benefits. The court held that the former wife's interest was not extinguished by the general release. *Leahy*, 211 Ill. App. 3d at 400. A similar scenario played out in *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989), in which the divorce decree stated that the husband " 'shall have as his own, free of any interest of [the wife] ***, his interest in the profit-sharing plan,' " and the husband did not change the beneficiary designation after getting divorced. *Leahy*, 211 Ill. App. 3d at 399 (quoting *Lyman Lumber*, 877 F.2d at 693). The court held that the judgment gave the husband his entire interest in his profit-sharing plan, free of any interest of the wife, but, because it did not specifically refer to and modify the beneficial interest, she retained that right to the profit-sharing plan proceeds. *Leahy*, 211 Ill. App. 3d at 399 (citing *Lyman Lumber*, 877 F.2d at 693-94). *Leahy*'s holding was also based on *Aetna Life Insurance Co. v. Wadsworth*, 689 P.2d 46, 48 (Wash. 1984), in which the dissolution judgment stated that the wife was conveying to the husband " 'as his sole and separate property, free and clear of any right, title, or interest on her part *** [a]ll [his] life insurance policies.' " *Leahy*, 211 Ill. App. 3d at 399-400 (quoting *Aetna*, 689 P.2d at 51). This was another instance, however, in which the divorce decree did not mention the wife's expectancy interest as the named beneficiary of the life insurance and the former husband did not update his beneficiary designation after getting divorced, so the former wife was entitled to the life insurance proceeds. *Leahy*, 211 Ill. App. 3d at 399-400 (citing *Aetna*, 689 P.2d at 53). To these many examples we add *In re Marriage of Myers*, 257 Ill. App. 3d 560, 564 (1993), which restated the "general rule that a spouse named as a beneficiary in a pension fund, profit-sharing plan or insurance policy has an expectancy interest which may be defeated in a dissolution agreement but *** the dissolution agreement must be a clear expression of the spouse's surrender of that interest." These parties executed a marital settlement agreement "waiv[ing] any right to the property in the other's possession" and agreeing "to promptly execute upon demand *** any and all documents necessary to effectuate the terms and conditions contained in this Agreement." (Internal quotation marks omitted.) *Myers*, 257 Ill. App. 3d at 561. The former husband died 13 days later, when the former wife was still listed as his pension fund beneficiary. *Myers*, 257 Ill. App. 3d at 561. The general waiver language did not defeat her right to the pension fund, because it did not clearly express her surrender of that interest. *Myers*, 257 Ill. App. 3d at 564.

¶ 14 Although these cases primarily concern waiver language and we have not yet reached the waiver paragraph in Patrick and Carol's agreement, we cite these examples of the clarity required in a marital settlement agreement. The question we are addressing is "whether the disputed asset was specifically listed as a marital asset and awarded to one spouse" (*Albrecht*, 2015 IL App (3d) 130651, ¶ 11), and we are answering that question in the negative. Paragraph 8 of the marital settlement agreement speaks only of the payments that Patrick anticipated receiving from the Village, but those payments have not been disputed. Paragraph 8 does not, in any terms, address the payments that Carol has anticipated receiving later in life if she

survived Patrick. These other payments—Carol's payments—are the asset that is in dispute. They are the only asset that was put at issue by her 2021 filings in the federal and state courts.

¶ 15 We reject the Village and Kimellen's contention that paragraph 8 of the marital settlement agreement specifically identifies the entire federal judgment as one marital asset that is awarded to Patrick. As we discussed above, paragraph 8 references "a certain lawsuit" that Patrick settled during the marriage and indicates that "[w]hen the Husband receives such payments [from the Village], the Wife shall be entitled to TWENTY-FIVE PERCENT (25%) of the net payment received by the Husband for the first NINETY-SIX (96) months of the payments." Paragraph 8 is, thus, limited to the payments that are to flow from the Village to Patrick during his lifetime. Paragraph 8 does not address the subsequent payments that are to flow from the Village directly to the person to whom Patrick was married in 1987.

¶ 16 The appellees are "analyzing the relevant property interests at the wrong level of abstraction." *In re Marriage of Burwell*, 164 Cal. Rptr. 3d 702, 713 (Ct. App. 2013). In *Burwell*, a California court addressed a term life insurance policy and a split in authority regarding the characterization of term life insurance proceeds as community (marital) property or separate (individual) property. *Burwell*, 164 Cal. Rptr. 3d 702. Although California marital law differs from Illinois marital law in some respects, the California court's reasoning is directly on point. As it contemplated the term life insurance policy, the court reasoned that it was inappropriate to "generally identify the property interest as the entire insurance policy." *Burwell*, 164 Cal. Rptr. 3d at 713. Instead, the court continued, "the proper unit of analysis is the individual contractual rights conferred by the policy" because the alternative "analysis rests on the erroneous legal assumption that the asset was *** unitary and indivisible." (Internal quotation marks omitted.) *Burwell*, 164 Cal. Rptr. 3d at 713. As in *Burwell*, the federal judgment at issue "is not a unitary and indivisible asset giving rise to a unitary and indivisible property interest. Rather, the relevant property interests are the individual enforceable contractual rights derived from the [federal judgment]." *Burwell*, 164 Cal. Rptr. 3d at 713; *In re Marriage of Sonne*, 225 P.3d 546, 552 (Cal. 2010) (remarking upon the "erroneous legal assumption that Husband's retirement benefit was a unitary and indivisible asset" when it "consists of two distinct components: an annuity and a pension").

¶ 17 In addition, the Village relies on irrelevant facts when arguing that the federal judgment is one marital asset that was awarded solely to Patrick. The Village points out that Carol's right to disbursements was contingent upon Patrick's death and that Carol and Patrick never reached an agreement giving her a vested contingent right to those payments. The fact that Carol's right to disbursements could have been eliminated with the federal court's approval is an irrelevant fact because Patrick died without returning to federal court to request modification of the judgment. Furthermore, Carol did not need to reach an agreement with Patrick in order for her unaltered payment right to vest when Patrick died in 2017.

¶ 18 Kimellen also relies on irrelevant details, such as that the lawsuit identified in paragraph 8 of the marital settlement agreement was Patrick's lawsuit against his employer and that the federal judgment was based on a settlement agreement that Patrick reached with his employer. The origin of the federal lawsuit does not alter the fact that paragraph 11 of the resulting judgment expressly requires that upon Patrick's death "the same payments shall continue to be made by the [Village] to his present wife during her lifetime." Kimellen also misdirects our attention to the presumption under Illinois law that all property acquired by either spouse during the marriage is marital property. See 750 ILCS 5/503(a) (West 2020) (defining marital

property); 750 5/503(b)(2) (West 2020) (stating the presumption). The general presumption does not affect the fact that first a federal judgment was entered with paragraphs expressly giving separate rights to Patrick and his "present wife" and then there was a dissolution judgment that clearly disposed of Patrick's payment right against the Village but was silent about the "present wife['s]" separate payment right against the Village. The statutory presumption that Kimellen cites would not authorize a court to inject a new provision into Carol and Patrick's marital settlement agreement. If Carol and Patrick intended for her to relinquish her right to the "present wife" payments, then the divorcing couple would have—and easily could have—included such a provision in their marital settlement agreement. See *e.g.*, *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 922 (1998) ("A strong presumption exists against provisions that could easily have been included in the [marital settlement] agreement but were not."); *Thompson v. Gordon*, 241 Ill. 2d 428, 449 (2011) (there is a presumption against provisions that easily could have been included in a contract but were not); *In re Marriage of Reicher*, 2021 IL App (2d) 200454, ¶ 47 ("We conclude that the [marital settlement agreement's] silence concerning any equity award Michael would have earned in 2016 evidences the parties' intent not to include such an award in the property division."). Our role is to read Carol and Patrick's marital settlement agreement as it was executed, not to revise or add terms to it. *Thompson*, 241 Ill. 2d at 449 ("a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented").

¶ 19 The appellees cite authority that is factually distinguishable. For instance, *Robson v. Robson*, 514 F. Supp. 99, 104 (N.D. Ill. 1981), states the unremarkable conclusion that contracting parties are free to modify their agreement to the detriment of a donee beneficiary of the contract, prior to the time that the beneficiary's rights vest. "A donee beneficiary is a third[ ]party to whom the promised beneficial performance comes without cost as a donation or gift." *Robson*, 514 F. Supp. at 102; *Swavely v. Freeway Ford Truck Sales, Inc.*, 298 Ill. App. 3d 969, 974 (1998). "[W]here the contract rights of a donee beneficiary have not yet vested and where the beneficiary has not detrimentally relied upon a promise contained in the contract, [a court] will not subvert the intent of the contracting parties when it is clear that they desired to alter the terms of their contract." *Robson*, 514 F. Supp. at 104. Patrick and the Village entered into a settlement agreement from which Patrick's "present wife," a nonparty to the contract, would gratuitously benefit. Carol was a donee beneficiary of the settlement agreement. However, *Robson* is not on point because Patrick's settlement was transformed from a contract into a federal judgment in 1987, which remained undisturbed by judicial modification before his death and the vesting of Carol's payment right in 2017. *Robson*, 514 F. Supp. 99. Another irrelevant case is *In re Marriage of Centioli*, 335 Ill. App. 3d 650 (2002), in which a husband removed his wife as the beneficiary of his *inter vivos* revocable trust while in the midst of dissolution of marriage proceedings. Because the wife had a mere expectancy of the trust, rather than a vested property right, the husband was at liberty to revise his estate plan. *Centioli*, 335 Ill. App. 3d at 656. Despite citing this case, the Village concedes, "During his lifetime, Patrick could have entered into an amendment with the Village to change how payments were to be made—but he did not."

¶ 20 The appellees' arguments regarding the specificity of the marital settlement agreement are unpersuasive. The marital settlement agreement specifically listed Patrick's right to payments as a marital asset and ultimately awarded that asset to Patrick, but the marital settlement

agreement did not specifically list Carol's right to payments as a marital asset and did not award Carol's right to Patrick. Thus, the marital settlement agreement fails the first part of the waiver test.

¶ 21 The second question is whether the waiver language "specifically states that the parties are waiving any expectancy or beneficial interest." *Albrecht*, 2015 IL App (3d) 130651, ¶ 11.

¶ 22 Reading further in the marital settlement agreement, we find that Carol did not waive her right to payments from the Village when she agreed to paragraph 9, which states "FINANCIAL DIVISION: Each party shall keep any pension, retirement, 401(k) or any other retirement benefit from the employer as each party's own separate property free of any interest of the other party." Patrick was never a pensioner, and he did not receive retirement benefits from an employer, even though the marital settlement agreement describes the federal judgment proceeds as "payments *in the same manner as* the Village of Oak Park pays *pension benefits* to former employees." (Emphases added.) To the contrary, paragraph 8 of the federal judgment required Patrick "to resign his position as an Oak Park police officer effective November 15, 1987," and paragraph 12 specified that "[a]ll funds in the Oak Park Pension Fund paid by and to the credit of Plaintiffs [Patrick Kelly and Ronald Surmin] shall be withdrawn by Plaintiffs and paid to the Village of Oak Park within thirty (30) days after entry of this judgment." Even paragraphs 9 and 11 of the federal judgment, which are the paragraphs that obligate the Village to make payments to Patrick and his "present wife," do not characterize those later-in-life payments as pension or retirement benefits. Patrick resigned instead of retiring, and he secured a settlement from the Village instead of a retirement package. Carol's relinquishment in paragraph 9 of Patrick's pension and retirement benefits did not affect her right to the federal judgment.

¶ 23 Next is paragraph 13, the marital settlement agreement's mutual release language, which we set out fully above. According to this portion of the 1994 agreement Carol was releasing a broad range of rights or claims that existed "by reason of the marital relationship" or that "she otherwise has or might have or be entitled to claim in, to or against the property and assets of the other [party, Patrick]."

¶ 24 The appellees cite *Hebert v. Cunningham*, 2018 IL App (1st) 172135, ¶ 46, for the proposition that it is unnecessary to use "the exact terms 'expectancy' or 'beneficial' " in order to waive any expectancy or beneficial interest in a disputed asset. The waiver provision in that case stated:

> "[E]ach of the parties hereto does hereby forever relinquish, release, waive, and quitclaim to the other party hereto all property rights and claims which he or she now has or may hereafter have *** in or to or against the property of the other party or his or her estate, whether now owned or hereafter acquired by such other party." (Emphasis and internal quotation marks omitted.) *Hebert*, 2018 IL App (1st) 172135, ¶ 46.

This "unambiguously broad and prospective" language communicated the parties' intent to waive "all types of property rights that may come into existence." *Hebert*, 2018 IL App (1st) 172135, ¶¶ 46, 52. Kimellen contends that "Carol's expectancy interest *** exists only by reason of her marriage to Patrick" and "[a]bsent Carol's marriage to Patrick, Carol possessed no interest in the [federal judgment], contingent, expectancy, beneficial, or otherwise."

¶ 25 In *Hebert*, the former wife claimed that she was entitled to the former husband's 401(k) account at Fidelity Management Trust Company, because he died without removing her as the beneficiary of his account, despite a dissolution of marriage judgment that not only specified

he "shall retain sole ownership of his *** 401(k) account at Fidelity" but also included the mutual release we quoted above. *Hebert*, 2018 IL App (1st) 172135, ¶¶ 3-10. *Hebert* is not on point because it involved a different type of asset—a marital asset that came within the scope of the parties' mutual release. In our opinion, Carol and Patrick's mutual release does not encompass her expectation of annual disbursements from the Village.

¶ 26 Carol's payment expectation from the Village was not a right that she had "by reason of the marital relationship" when she divorced in 1994, as those payments had become an entitlement of Patrick's "present wife" when the federal court entered judgment in 1987. The "present wife" paragraph was undoubtedly included in the 1987 federal judgment because of Patrick and Carol's relationship *at the time*. But "present wife" was only an identifying term when the federal judgment was entered, and being Patrick's "present wife" was not a stated condition of vesting or payment. When Carol expressly and broadly relinquished all her rights against Patrick's property and assets in the marital settlement agreement, she was not relinquishing any of her rights to her own property and assets, such as her right to receive payments from the Village after Patrick's death. The "present wife" payments were not his property or assets, as he never had a right to receive payments from the Village after his death. The marital settlement agreement and its mutual release were matters between Carol and Patrick, and they did not affect the Village's obligation to perform its separate duties to Carol and Patrick under the federal judgment. The marital settlement agreement fails the second step of the waiver test. Carol's right to annual payments from the Village as Patrick's "present wife" and survivor under the 1987 federal judgment persists.

¶ 27 For these reasons, the circuit court erred by denying Carol's motion to clarify and enforce its 1994 dissolution of marriage judgment, in which Carol sought a declaration that her marital settlement agreement with Patrick did not relinquish her right to receive the "present wife" payments that are stated in the federal court's 1987 judgment. The circuit court's denial of Carol's motion was in error and is reversed.

¶ 28 Reversed.