

APPELLATE COURT CASE NO. A05-1157
STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

In Re The Marriage Of:

Loydene J. May,

Appellant,

and

Richard John May (deceased),
by Kathryn J. May, Surviving Spouse of
Richard John May,

Respondent.

APPELLANT'S BRIEF

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LEGAL ISSUES

1. **Whether Mr. May's failure to designate before his death a substitute beneficiary of his rights under the Appellant's Annuity portion of her retirement plan caused that future interest to lapse, and the benefits thereof to revert to the Appellant.**

Trial Court: Held that Mr. May's interest in the Appellant's Annuity should be paid to his estate pursuant to a Qualified Domestic Relations Order.

2. **Whether the Respondent's Motion to have Mr. May's share of the Appellant's Annuity paid to Mr. May's estate or to herself, or to convert such annuity payments into a present asset, is barred as an untimely request to modify the property settlement provisions of the dissolution decree.**

Trial Court: Did not rule specifically on this issue, but by implication, found that the Respondent's Motion was not time barred.

3. **Whether the trial court abused its discretion by failing to make Findings of Fact or Legal Conclusions to support its decision granting the Respondent's Motion.**

Trial Court: Determined that "the facts and circumstances of this case" favored granting Respondent's Motion.

STATEMENT OF THE CASE AND THE FACTS

Loydene J. May and Richard J. May were married on December 21, 1978, and had been married for approximately 23 years prior to their separation in 2001. The parties had four sons together, all of whom are now adults. The dissolution of their marriage was granted by the Mille Lacs County District Court on January 23, 2003, and entered on February 3, 2003.

On January 2, 2004, Richard J. May died. He was 54 years of age at the time. He died intestate, and was survived by the Kathryn J. (Baker) May (hereinafter "Respondent"), to whom he had been married for approximately four months, and by his four adult sons.

The Appellant had been a federal postal employee during most of the parties' marriage, and through the time of their divorce. Although previously employed, Mr. May had been injured and had lost his job during the early 1990's. Since that time, and until their separation, the Appellant had taken care of most of the families' financial obligations. (Affidavit of Loydene J. May, hereinafter "L.M.", at Paragraph 3).

After Mr. May lost his job, he became both verbally and physically abusive toward his wife and sons, and also openly had extra-marital affairs with other women. Even before the parties were formally divorced, Mr. May was already living with the Respondent, in a different trailer house on the same property. Mr. May ultimately married the Respondent approximately eight months after his marriage to the Appellant was dissolved. (L.M., Par. 3).

The Appellant continues to work as a federal postal employee, and does not intend to retire for at least another five years. During her employment, the Appellant has acquired an interest in a retirement plan through the Federal Employees Retirement Service (FERS). The

FERS plan consists of three components, a Thrift Savings Plan, a Basic Benefit Plan, and Social Security benefits.

The Appellant was represented by other legal counsel in the divorce proceedings. The Appellant's previous attorney and the Respondent's attorney prepared and approved the Findings of Fact, Conclusions of Law, Order for Judgement and Judgment and Decree dissolving the marriage of the parties. The Findings of Fact and Conclusions of Law reflected the stipulated settlement of the parties, but inaccurately described the Appellant's retirement interests. In Paragraph 15 of the Conclusions of Law, the Appellant is awarded her interests in her retirement plan as follows:

"The Petitioner shall have all right, title, interest and equity free and clear of any claim on the part of the Respondent in and to the Petitioner's federal employee retirement service account by and through her employer with the exception of the following: The Respondent is awarded one-half of the value of Petitioner's 401k pursuant to a qualified domestic relations order.

The Petitioner shall have all right, title, interest and equity free and clear of any claim on the part of the Respondent in and to the Petitioner's Thrift Savings Account. The Account value as of November 8, 2002 was \$106,842." (emphasis added).

Although this description of the Appellant's retirement interests, and of the manner in which they are to be disbursed, is flawed, it is clear that the Appellant was to receive her entire interest in her Thrift Savings Plan ("TSP"), having a stipulated value of \$106,842.00 (Mr. May was awarded the parties' real estate and farm assets, valued at \$143,000.00, which off-set the Appellant's TSP) and that the Court did not address each parties' Social Security benefits. Therefore, since the Appellant did not own a "401k", it is clear that this errant description referred to the Appellant's Basic Benefit Plan, which provides lifetime monthly annuity payments (hereinafter, the "Annuity") to the Appellant after she retires. The parties' stipulated divorce Decree provided that these Annuity payments were to be equally divided between the parties pursuant to a subsequently prepared Qualified Domestic Relations Order (QDRO).

Unfortunately, the QDRO was not completed prior to Mr. May's death. Shortly after the entry of the divorce Judgment and Decree, the Appellant's previous attorney researched and prepared an initial draft of a proposed QDRO, and submitted the draft QDRO to Mr. May's attorney for review and approval. The Appellant's attorney then submitted the draft QDRO to the plan administrator, and followed that submission with letters concerning the status of its approval. The plan administrator eventually responded that the draft QDRO did not meet the requirements of the regulations for the administration and distribution of such federal retirement plans, and indicated various reference materials to assist in revising such. (See letter from Plan Administrator dated April 23, 2003, attached to Affidavit of L.M.). In light of the fact that it was Mr. May who would actually receive the benefit of the QDRO, the Appellant's attorney then turned over the responsibility for drafting this QDRO to Mr. May's attorney, who acknowledged this by his letter dated June 19, 2003 (See copies of the draft QDRO and these letters, attached to Affidavit of L.M.). Mr. May's attorney did not complete the QDRO, nor prepare a revised draft before Mr. May died six months later. Although Mr. May's attorney did suggest that an expert should be hired to prepare the QDRO, he did not hire such an expert, nor did he bring a Motion to compel the Appellant's assistance in paying for such an expert. (L.M., Par. 3.b.)

During the period of time following the entry of the divorce Judgment and Decree and prior to his death, Mr. May took no steps whatsoever to protect or preserve his right to receive or control his interests in the Appellant's Annuity plan. The draft QDRO prepared by Appellant's previous counsel and submitted to Mr. May's attorney for review, included the following paragraph:

"9. The Alternate Payee shall designate the beneficiary or beneficiaries of the Account on a Designation of Beneficiary form furnished upon the written request of the Alternate Payee to the Office of Personnel Management, Office of Retirement Programs, Court Orders/Benefits Section, P.O. Box 17, Washington, D.C. 20044-0017. or said

benefits shall lapse and revert to the Member *[if]* the Alternate Payee predeceases the Member before such Designation of Beneficiary has been received by the Office of Personnel Management . . .”

Despite being on notice of this provision in the draft order, and of similar such language in the controlling statutes, regulations and model paragraphs, Mr. May failed to assign or designate an alternate beneficiary for the receipt of the Annuity payments in the event that he might die before receiving said benefits.

Mr. May died intestate, leaving his wife and his four sons as his surviving heirs. The Respondent was appointed as Personal Representative of his estate. In this capacity, and in her capacity as Mr. May’s widow and heir, the Respondent brought a Motion on December 23, 2004, (nearly 12 months after Mr. May’s death, and 23 months after the marriage was dissolved) to amend the dissolution decree by correcting the description of the Annuity portion of the Appellant's retirement plan, and to compel the Appellant to cooperate in drafting a QDRO awarding Mr. May's share of the Appellant's Annuity to the Respondent. The Respondent’s Motion came on for hearing on February 4, 2005, before the Mille Lacs County District Court, Seventh Judicial District, The Honorable Michael S. Jesse, presiding. After consideration of the parties evidence and oral arguments, the Court granted the Respondent's Motion, except the provisions thereof requesting fees and costs, by Order dated April 7, 2005. This appeal follows that Order.

STANDARD OF REVIEW

The issues in this case involve the division and award of federal pension benefits, which are considered property rights in the context of a marriage dissolution action. Minn. Stat. Sec. 518.54 subd. 5. The valuation and division of pension rights generally are matters for the trial court's discretion. Taylor v. Taylor, 329 N.W. 2d 795 (Minn. 1983). An appellate court will overturn the decision of a trial court on property issues only upon finding an abuse of discretion. Bogen v. Bogen 261 N.W. 2d 606 (Minn. 1977). If the trial court's property distribution is against logic and the facts on record, the appellate court will find an abuse of discretion, and must reverse. Rutten v. Rutten 347 N.W. 2d 47 (Minn. 1984).

ARGUMENT

I.

Mr. May's failure to designate before his death a substitute beneficiary of his rights under the Appellant's Annuity portion of her retirement plan caused that future interest to lapse, and the benefits thereof to revert to the Appellant.

Pursuant to the parties' negotiated marriage dissolution Judgement and Decree, Mr. May was awarded the right to receive a portion of his wife's future annuity payments from her Federal Employees Retirement Service (FERS) retirement plan. The regulations controlling the distribution of such annuity benefits permit an Alternate Payee, such as Mr. May, to designate another person(s) to receive such payments in the event that he should die before receiving the benefits. However, because Mr. May failed to make such a designation before his death, his rights under the Appellant's Annuity portion of her retirement plan lapsed, and those benefits reverted to the Appellant.

"Marital property" is defined under Minnesota statutes as including "vested public or private pension plan benefits or rights" acquired during marriage. Minn. Stat. Sec. 518.54 subd. 5. When exercising its discretion to facilitate an equitable division of marital property rights, a trial court will generally employ one of two means of distributing pension benefits. The first is the "present cash value" method, by which the pension plan is valued and then divided equitably between the parties by awarding comparably valued property to the party who does not receive the pension. This method "treats the pension as an indivisible asset and awards it, including the right to all future pension benefits, to the employee spouse." Johnson v. Johnson 627 N.W. 2d 359 (Minn. App. 2001). The "present value" has been defined as the amount which "a person

would take now in return for giving up the right to receive an unknown number of monthly checks in the future.” Dubuis v. DuBuis 335 N.W. 2d 503 (Minn. 1983).

A second method of distributing pension benefits is to defer distribution until the pensioned spouse, or her beneficiaries are entitled to receive payments. This is sometimes called the “reserved jurisdiction” method, because the trial court may “reserve jurisdiction over the division of the pension until retirement and divide the actual monetary benefit at that time.” Dubuis at 505. It may also be characterized as a “fixed percentage” method, which “requires the determination of a fixed percentage for the non-employee spouse of any future payments the employee receives under the plan, payable when paid to the employee.” Taylor at 798 - 799. A Qualified Domestic Relations Order (“QDRO”) is “merely a refined version of the ‘fixed percentage’ method of dividing a pension.” Fastner v. Fastner 427 N.W. 2d 691 (Minn. App. 1988).

When the parties cannot agree upon a method for distributing their rights in a pension plan, the trial court will consider the facts and circumstances of the case in order to determine which of the foregoing methods to employ. When “there are sufficient assets available at the time of the divorce to divide the present value of the retirement benefits without causing an undue hardship to either spouse and where testimony on valuation is not unduly speculative,” the court should prefer to use the “present value” method. Taylor at 798 - 799. But, when “the present value determinations are unacceptably speculative or there are not enough assets to equitably require that benefits due in the future be split presently,” the “fixed percentage method” should be used. Id.

In the present case, the parties to the dissolution agreed to divide their interests in the Appellant’s Annuity by means of the “fixed percentage” method, through the use of a QDRO.

We may speculate as to why Mr. May elected to receive future monthly annuity benefits instead of a present value cash settlement. Certainly there were enough available assets to compensate Mr. May for the present cash value of the Appellant's fairly small Annuity plan. Indeed, Mr. May paid a property settlement of \$18,079.00 to the Appellant, and this settlement payment could have been reduced in exchange for his interest in the Annuity. But, Mr. May might have calculated that monthly payments over his expected remaining lifetime would be worth more to him than half of the present value of the Annuity plan. One may fairly assume that he expected to live long enough to enjoy these benefits. Regardless of his reasons for doing so, it is clear that Mr. May knowingly and willingly gave up his right to receive a present cash settlement in favor of receiving regular, future payments from the Annuity plan. As coarse as it may seem to say so, this was a gamble that did not pay off for Mr. May.

The Appellant's federal postal employee FERS retirement plan is controlled by various provisions of the Code of Federal Regulations (C.F.R.). These regulations provide a means for non-employee former spouses to preserve for their own chosen beneficiaries their right to collect future pension benefits. However, if the former spouse fails to take advantage of this process, his interest in the pension plan of his former spouse will lapse upon his death. "A former spouse portion of an employee annuity stops accruing at the earliest of . . . except as provided in Sec. 838.237, the date on which the former spouse dies." 5 C.F.R. 838.233 (e). The referenced exception to this bright line rule simply reiterates the policy as follows: "Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree." 5 C.F.R. 838.237 (a). The "court order acceptable for processing" referenced in this section is an approved and

executed domestic relations order or QDRO. In the present case, there is no such QDRO, and there is no such provision for the alternate distribution of Mr. May's interest in the Appellant's Annuity benefits. As such, the distribution of these benefits is controlled by the default provisions of the C.F.R. Mr. May's right to receive Annuity payments expired upon his death, and those retirement interests reverted to the Appellant.

Even if a QDRO had been timely prepared and entered in this case, we cannot presume that it would have included a provision for the designation of an alternate beneficiary in the event of the former spouse's early death. The initial draft of the QDRO prepared by the Appellant's former counsel and reviewed by Mr. May's counsel did not include any such provisions, and instead specifically provided that Mr. May was required to designate an alternate beneficiary on a form that he was to obtain from the Plan administrator. Further, the model paragraphs included in the C.F.R. do not default to the inclusion of provisions for an alternate beneficiary. The model paragraphs include examples of paragraphs that parties might elect to use for assigning such benefits to the court, a trustee, the estate of the former spouse or children of the former spouse. However, the regulations specifically state that no such special paragraph is needed to allow the former spouse's annuity entitlements to terminate and revert to the retiree. "No special provision is necessary to restore the entire annuity to the retiree upon the death of the former spouse. Unless the court order expressly provides otherwise, [the Office of Personnel Management] will pay the former spouse's share to the retiree after the death of the former spouse." Par. 501, Appendix A to Subpart F, 5 C.F.R. 838. This is the default provision for the distribution of a former spouse's interests in the annuity benefits of an employee's retirement plan. Absent specific, affirmative provisions in an agreed upon, approved and executed QDRO to the contrary, the interests of the deceased former spouse terminate upon his death and revert to the retiree.

The loss of a property interest upon one's death, without this interest being automatically passed to one's heirs, might initially seem harsh. However, this is the risk that a non-employee spouse assumes when he elects to trade a present cash asset for a future monthly payment of unknown duration. If that party lives long and receives numerous annuity payments, his decision might be considered wise, and he might even receive the "windfall" of greater total payments than the cash value of the plan as estimated at the time of the divorce. If on the other hand, the party dies prematurely, and does not receive the expected annuity payments, then his decision might be considered unwise and unfortunate. The non-employee spouse's actual life span is a factor that is always unknown at the time when this decision is made. However, the controlling regulations provide a means for the former spouse to "hedge his bet". The former spouse may either insist upon the inclusion in the QDRO of provisions designating an alternate beneficiary of the former spouse's annuity payments in the event of his untimely death, or the former spouse may prepare and submit forms specifically designating his chosen beneficiary.

In the present case, Mr. May knowingly elected to receive annuity payments in the future rather than a present cash value settlement. He failed to negotiate for or request the inclusion of provisions in the dissolution Judgment and Decree or in the QDRO for the designation of an alternate payee in the event of his death. He reviewed the initial draft of the QDRO that did not include any such provisions, and failed to object to such. He was put on notice of his obligation to designate a death beneficiary, and he failed to so designate. And, he failed to prepare a QDRO or to take any affirmative steps to preserve his interests, or those of his heirs, in his former wife's retirement plan for nearly one full year following the entry of his divorce decree. Clearly, Mr. May had several opportunities to protect and preserve his interests in the Appellant's Annuity plan, but he failed to take advantage of these opportunities. As a result of Mr. May's neglect of

his own interests, his right to receive a portion of the Appellant's Annuity terminated upon his death, and these benefits reverted to the Appellant.

II.

The Respondent's Motion to have Mr. May's share of the Appellant's Annuity paid to Mr. May's estate or to herself, or to convert such annuity payments into a present asset, is barred as an untimely request to modify the property settlement provisions of the dissolution decree.

The Respondent seeks to have Mr. May's interests in the Appellant's Annuity treated as part of his estate, to be distributed according to the laws of intestate succession. However, these future annuity payments are not present assets that may be divided among Mr. May's heirs. Instead, this Motion essentially seeks to turn back the clock and change Mr. May's election from a "fixed percentage" to a "present cash value" means of receiving his interests in the Annuity. This requested change amounts to more than a mere clarification, and would constitute a modification of the parties' property settlement, which is now barred by time.

The second method of dividing pension rights is often referred to as the "reserved jurisdiction" method because the decree will often contain specific provisions reserving the court's jurisdiction over the pension plan until the employee retires, and then dividing the benefits at that time. Johnson at 362. However, in the present case, the court did not reserve jurisdiction over the Appellant's retirement plan. The sparse provisions of the Conclusions of Law simply state in paragraph 15 that one-half of the value of the Appellant's "401k" will be awarded to Mr. May pursuant to a QDRO. It does not say that the Court will reserve jurisdiction

to modify or change this award, nor to determine its value at a later date, nor to designate alternate beneficiaries in the event that Mr. May might die before receiving his annuity payments. Further, paragraph 26 of the Conclusions of Law specifically states that the parties' stipulated settlement constitutes "a full, final and complete property settlement between the parties."

In the absence of specific provisions reserving the jurisdiction of the court, property settlement provisions of dissolution Judgments are considered final, and cannot be modified, except under specific circumstances. "All divisions of real and personal property . . . shall be final, and may be revoked or modified only where the court finds the existence of conditions that justify reopening a Judgment under the laws of this State." Minn Stat. Sec. 518.64 subd. 2(e).

"While a trial court may not modify a final property division, it may issue orders to implement, enforce, or clarify the provisions of a decree, so long as it does not change the parties' substantive rights." Johnson at 363. But, in the present case, the inherent change in the property settlement sought by Respondent is more than a mere clarification or attempted implementation of the previous division. It would constitute a fundamental change in the substantive character of the property interests awarded to the parties.

The Appellant and Mr. May negotiated the settlement of their dissolution. The Appellant agreed to allow her annuity payments to be split with her former husband upon her retirement. She did not agree to divide her annuity payments with Mr. May's second wife. The provision for this was not included in the parties' stipulated Judgment and Decree, and Appellant would not have consented to its inclusion in a subsequent QDRO. While it is true that Mr. May might have elected to designate the Respondent as his alternate beneficiary, it cannot be presumed that he intended to do so, and the provision for this was not included in the parties' actual property

settlement. Adding this provision now would do nothing to “implement” the stated intentions of the parties. Further, since this provision is entirely optional and not mandatory, it cannot be said that adding this provision now would constitute a “clarification” of the existing property settlement. Rather, this would constitute a fundamental and substantive change to the property settlement, and one that the Appellant would not have consented to as part of the dissolution settlement, and does not consent to now.

Further, since the award to Mr. May was in the form of an annuity, payable to him upon the Appellant’s retirement, it is not a present asset that can be immediately distributed to Mr. May’s estate. At best, the Respondent might hope to have the annuity payments paid into a trust when they come due. But, she cannot expect these payments to be converted to cash and paid immediately to her, as it is too late for her to seek modification of this property division. And, as already stated herein, Mr. May failed to take the steps necessary to have the annuity paid to any trust or to anyone other than himself.

III.

The trial court abused its discretion by failing to make Findings of Fact or Legal Conclusions to support its decision granting the Respondent’s Motion.

If the trial court’s property distribution is against logic and the facts on record, the appellate court will find an abuse of discretion, and must reverse. Rutten v. Rutten 347 N.W. 2d 47 (Minn. 1984).

The trial court issued its Order granting the Respondent’s Motion on April 7, 2005. Despite the fact that both parties and present counsel appeared at the hearing on February 4,

2005, and presented oral argument, the first recital in the Order indicates that the matter had come before the Court “by telephone”. The remainder of the Order simply states the relief granted or denied, without any supporting Findings of Fact or Conclusions of Law. The Order then refers to, and incorporates by reference an attached Memorandum. However, the Memorandum simply recites some of the facts of the case, and then concludes with the sentence, “under the facts and circumstances of this case, Respondent’s surviving spouse is entitled to the proceeds of the dissolution including the awarded retirement account.”

The parties’ counsel presented extensive arguments to the trial court, and attempted to explain the complexities of this case, and the unique nature of these facts, which appear to present an issue of first impression in this state. To reach a reasonable decision in this case, the court should have considered the property settlement of the parties and the language of the controlling federal regulations. There is nothing in the Order to indicate that it did so. There are also competing equities and interests of justice that the court may have wanted to consider in exercising its discretion. However, the simple statement that the “facts and circumstances of this case” justify granting the Respondent’s Motion yields no assurance that the court fairly considered all of the facts and controlling law, or that it soundly exercised its discretion in arriving at this decision. Rather, under the facts and circumstances of this case, and in light of the sparse findings and conclusions stated in the Court’s Order, it is clear that the trial court abused its discretion in granting the Respondent’s Motion.

CONCLUSION

In the settlement of the underlying marriage dissolution, the Appellant's deceased former spouse negotiated to receive a portion of the Appellant's federal pension annuity payments upon her retirement. He was afforded the right under federal regulations to designate an alternate beneficiary of his annuity interest in the event that he might die before receiving these payments. He failed to exercise his rights, and he died without taking any action to assure that his interests would be preserved for his estate. Under clear federal regulations, the annuity interests that would have been paid to the Appellant's former spouse terminated upon his death, and reverted back to the Appellant. It is now too late for the representative of the deceased former spouse to preserve rights that the former spouse failed to preserve during his lifetime, and it is too late for said representative to seek modification of the property settlement in the dissolution. As such, the Appellant's full annuity interests must be restored to her, and the trial court's Order granting the Respondent's Motion must be reversed.

Dated this 28th day of July, 2005

Respectfully Submitted,

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