

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 REPLY BRIEF

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INTRODUCTION

In her brief, the Respondent misconstrues the legal issues presented to this Court, and misapplies the law. Contrary to the Respondent's claim, the "ultimate issue" in this case is *not* "what method is used to identify successors in interest to property awarded in a dissolution." In the present case that method has already been determined by federal regulation. Rather, the "ultimate issue" in this case is whether the decedent's right to receive a portion of the Appellant's eventual monthly pension payments lapsed upon his death due to his failure to protect that right by naming a successor beneficiary. As further explained herein, clear federal law, sound public policy and the greater weight of the equities dictate that the decedent's rights in the Appellant's pension plan have lapsed, and cannot pass to his estate.

ARGUMENT

I.

We agree with the Respondent's initial assertion that, at the time of the dissolution, the decedent had a "present bundle of rights" in the Appellant's pension plan. This bundle of rights did indeed, include "the right to transfer" the decedent's interests in the Appellant's pension. However, that bundle of rights has now expired because the decedent failed to exercise his right to transfer his interest.

The Respondent asserts that this "is a case to determine and implement 'method of transfer' and is not a request by Respondent to 'create' an award not previously made." (Respondent's Brief, Page 8). However, that statement of this case is simply inaccurate. The "method of transfer" of the decedent's "bundle of rights" has already been clearly established by

the Judgment and Decree of Dissolution in this case, and by federal law. We do not need the Court to “determine” the method of transfer because it is already clear. In the event of the death of a former spouse of an employee, clear provisions of the federal code provide that the decedent’s interests in the employee’s pension terminate upon the former spouse’s 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 rule simply allows for cases where there is already a Domestic Relations Order providing otherwise, and 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 Respondent is not asking this Court to “determine” how the decedent’s bundle of rights should be transferred after his death. She is asking this Court to ignore and override the clear method for doing so, already established by the controlling federal regulations.

Further, this case does not simply involve the implementation of an award previously made. The “bundle of rights” awarded in the Judgment and Decree was granted to Mr. May, not to his estate, nor to his widow. The right to name, or not name, a death beneficiary, was personal to Mr. May. It is not a tangible asset that can simply be transferred to his estate. This also explains why, contrary to the implied conclusion of the Court during oral arguments on these Motions, there was *nothing* for the decedent’s estate to “give back” to the Appellant. The estate never received this right to name a death beneficiary, and never received a tangible asset from the

Appellant's pension. The decedent's interest in the Appellant's pension simply lapsed upon his death, and that interest did not pass to his estate.

The Respondent cites the case of Welter v. Welter 2004 WL 2163149 (Minn. App.) in support of the proposition that a QDRO creates a right transferrable upon the death of the Alternate Payee. Not only is this case unpublished, and of no binding precedent, it may also be distinguished on its facts. Unlike the present case, the parties in Welter had already settled upon and received court approval of a valid QDRO dictating the passing of the husband's pension benefits. Further, in arriving at its holding, the Welter Court distinguished a contradictory federal case (Boggs v. Boggs 520 U.S. 833, 117 S. Ct. 1754 (1997)), on the basis that there was no QDRO in that case that could have preempted the federal law preventing the testamentary passage of retirement benefits to the heirs of the decedent. The dissenting opinion correctly commented that if there *had been* a QDRO, then the retirement benefits could have passed to the decedent's heirs. Here, the pertinent facts are virtually the same as Boggs. Like Boggs, there was no QDRO in place at the time of the Mr. May's death. Under the Boggs holding, the decedent's interest in the Appellant's retirement plan cannot pass through the decedent's estate.

Our case can also be distinguished because Mr. May did not leave a Will. In Welter, the decedent left a will naming one of her two daughters as her sole beneficiary. Even if there had not been a QDRO, and the Court had determined that the retirement plan could somehow still pass through the decedent's estate, the Court could have at least concluded that the decedent's Will provided an indication of her testamentary intent concerning the beneficiaries of her estate. Here, Mr. May left no such expression of his testamentary intent, and the Court cannot substitute its discretion for his.

The Respondent also cites the unpublished case of Fjellanger v. Fjellanger 2002 WL 1163715 (Minn. App.) in support of the proposition that the post-dissolution addition to a QDRO of a protection provision for a former spouse is merely a clarification of a payment mechanism rather than the creation of a new benefit. However, that case is distinguishable from the present one because it involved a post-dissolution dispute between two living former spouses concerning the terms of their own property settlement. Further, the Court was not asked to address what might have happened to the wife's right to argue for the inclusion of this protection provision if the husband had died *before* the QDRO was entered. Under the terms of the husband's retirement plan, the benefits awarded to the former spouse would lapse if the husband died before retirement unless the QDRO included a "Pre-Retirement Spouse Protective Provision" to preserve the former spouse's interests. But, what if the husband had died before the parties or the Court had resolved this issue, or before the QDRO was entered? The issue would likely have been moot, as the former spouse's interests in the husband's retirement plan would have already lapsed upon the husband's death. It is the same situation here. Mr. May had an interest in the Appellant's federal pension plan that he could have preserved for another beneficiary if he had included such a provision in an approved domestic relations order, or if he had designated a death beneficiary in accordance with federal law. Since he failed to preserve this benefit, it lapsed upon his death, and it cannot be resurrected in subsequent legal action.

The Respondent argues that the District Court should have the authority to enter a QDRO that overrides the presumptive lapse of Mr. May's interest in the Appellant's pension plan. Respondent asserts that the "bright line rule" under the controlling federal code is that "unless the Court order acceptable for processing provides otherwise . . ." (Respondent's Brief, Page 10).

But this is not the rule, it is the *exception* to the rule. The “rule” is found in the remainder of that sentence:

“ . . . 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).

Contrary to the Respondent’s assertions, the parties were not required to “bargain for any type of ‘divestment’ or ‘reverter under certain circumstances’” (Respondent’s Brief, Page 10). They did not have to include this provision as part of their “bargain” because it was statutorily presumed. They would have had to bargain and agree - - or to litigate, to include a provision in the “court order acceptable for processing” that would have created an exception to this presumption. In the alternative, if Mr. May had failed to bargain for, or obtain a court order for the inclusion of such an exception (as he did here) he could have still designated a death beneficiary on forms provided by the plan administrator. But, he did neither, and the statutory presumption requiring the termination of his interests must control.

On Page 13 of her Brief, Respondent asks this Court to “establish a ‘default rule’ that in the absence of clear evidence to establish some other result . . . the trial court will include a provision directing the asset to pass as part of decedent/Respondent’s estate”. The Respondent asks the Court to establish this *new* ‘default rule’ because she does not like the *existing* default rule. There is no need for the Court to create a new rule when there is already clear federal code controlling this issue.

Respondent is correct in her claim that Mr. May had “not agreed to” the draft version of the QDRO, and that it is not controlling. However, the Appellant did not cite that draft as a binding or determinative document. Rather, she cited it to show that Mr. May and his counsel

were put on notice by Appellant's prior counsel, almost one year before Mr. May died, that his interests in the Appellant's pension plan would terminate upon his death if he failed to properly designate a successor in interest. This provision was entirely consistent with the controlling federal statutes. There is no evidence whatsoever that Mr. May or his counsel objected to this provision, or made any effort to negotiate concerning its inclusion in the QDRO. Further, Mr. May failed to provide even a rough draft of an alternative QDRO, and aside from suggesting that a third party prepare the QDRO, neither he nor his counsel took any action whatsoever to preserve or protect his interests in the pension.

Respondent also argues that "there is no reason to treat this asset any differently from any other probate asset - it passes to 'estate beneficiaries' if an asset is not a non-probate asset, such as a joint bank account or a life insurance policy" (Respondent's Brief, Page 13). However, this particular interest *must* be treated differently from the decedent's other probate assets. For one thing, interests in pensions and annuities are generally considered non-probate assets. Such interests amount to contractual rights of named beneficiaries to future monthly retirement payments. They are not hard assets or liquid investment accounts that simply pass pursuant to the laws of intestacy. Further, although the marriage dissolution chapter treats pensions as "property" ("marital property" is defined under Minnesota statutes as including "vested public or private pension plan benefits or rights" acquired during marriage. Minn. Stat. §518.54 subd. 5.), this treatment is for the purpose of valuing and distributing the various assets and interests of the parties in their marital estate. It should not be read as converting an otherwise non-probate asset, such as an annuity or pension, into a tangible property asset subject to probate. Finally, treatment of this interest as a probate asset also fails because the interest at issue is the "right" to designate

a death beneficiary. Such a right of designation is also not a tangible asset subject to probate or the laws of intestate succession. Mr. May had a right to designate anyone he might choose as beneficiary of his interest in the Appellant's pension plan. He failed to exercise this right, and we cannot presume that this failure was not intentional. We also cannot presume that, had he elected to exercise this right, he would have designated the Respondent. He might have designated one or all of his adult sons or some other person(s) as his beneficiary(s). Certainly, we cannot pass this right of designation, which was personal to Mr. May, to the representative of his estate so that she can exercise it to designate herself as that beneficiary.

II.

In the second section of her legal argument, the Respondent attempts to clarify the nature of the relief that she had originally requested from the Court. It is obvious that the Respondent's requested relief was not even clear to the Court, as it's Order, by Respondent's acknowledgment, skips a step in awarding this pension interest directly to the Respondent. But, the relief sought by the Respondent, and that which the Court is empowered to award, is still not clear.

The Respondent states that she is seeking an award of "half of the USPS/FERS Pension Plan - distributed as part of Respondent's estate". But, this shows a misunderstanding of the nature of Mr. May's interest in this pension. Mr. May was to be the "Alternate Payee" under the Appellant's federal pension plan. By statutory definition, he qualified as such because he was a "spouse, former spouse, child or other dependent of a participant" (29 U.S.C. 1056 (d)(3)(C)(i) (2000)). But, under this definition, Mr. May's estate would not qualify as an "Alternate Payee". If Respondent is asking the Court to designate the Estate of Richard May as the "Alternate

Payee” under the Appellant’s federal pension plan, a proposed domestic relations order including such designation will likely not be approved by the pension plan administrator.

Further, if the Estate is to become the new “Alternate Payee” then what other rights are to be conferred upon it? Will the Estate then also have its own, independent right to name *another* death beneficiary? Who’s life would the continuing payment of pension benefits be measured by? Clearly, it is not the intent or design of the controlling statutes to allow an estate to be the beneficiary of pension benefits.

In the alternative, perhaps the Respondent is asking the Court to transfer the decedent’s right to designate a death beneficiary to the representative of the decedent’s estate. To do so, the Court would have to resurrect a right that, by statutory presumption, lapsed upon the decedent’s death. What’s more, as argued previously, the Court would have to substitute its own discretion for the discretion specifically granted to, but not exercised by, the decedent. This would be contrary to the expressed agreement and intent of the parties, and contrary to the Appellant’s procedural due process rights.

In truth, the Respondent’s argument that these benefits or this authority should be transferred to the Estate, is merely a transparent, impractical and misguided ruse. She actually is seeking to receive these benefits as the Alternate Payee or designated death beneficiary of the Appellant’s pension. But, there is simply no legal authority to justify such.

III.

The Order of the District Court was not supported by adequate Findings of Fact or Conclusions of Law. However, if this Court, on review of the entire record believes that it has

sufficient evidence to do so, it may conclude, as a matter of law, that the Respondent's Motion must be dismissed because it fails to provide adequate justification to overcome the presumptive lapse of the decedent's pension interests. On the other hand, this Court may remand this matter back to the District Court for further Findings on this issue.

CONCLUSION

In the Respondent's Conclusion to her Brief, she asks this Court to adopt "as a matter of policy and judicious use of court time," a new rule that presumes that "in the absence of clear evidence showing that deceased former spouse preferred a different result, whatever portion of a Pension was awarded to said former spouse will pass to that former spouse's estate should death occur before said order is completed." (Respondent's Brief, Page 16). In essence, the Respondent asks this Court to adopt a new policy that is directly contrary to the existing legal presumption. The controlling provisions of the Code of Federal Regulations provide that a former spouse's interest in an employee's federal pension plan *will terminate* unless he takes specific action to ensure the inclusion of certain provisions in an acceptable domestic relations order. This places an obligation upon the former spouse to take specific, affirmative steps to preserve his interests for his chosen beneficiaries. There is no need for this Court to establish a new policy that is contrary to this clear federal regulation.

The Respondent also asserts that ruling against her would provide a "windfall" to the Appellant, and presumably, that this would not be equitable. This is clearly not the case. The Appellant has not *taken* anything away from her former spouse. Mr. May simply failed to exercise rights available to him, and failed to preserve those rights for his chosen beneficiaries, despite being put on notice of his duty to do so. Further, the pension benefits in question were *earned* by Appellant during her more than 20 years of service in the post office. The Respondent did *nothing* to earn or contribute to these benefits. If anything, she was a contributing cause in the break up of this marriage. Further, she had only been married to the decedent for less than

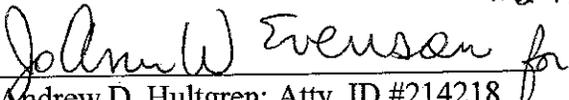
half a year before his death. In weighing the comparative equities in this case, the Respondent has no ground upon which to stand.

It would not be sound public policy for this Court, or the District Court, to step into the shoes of the decedent and presume his intention concerning the designation of a pension beneficiary. Rather, from a policy standpoint, this Court should simply affirm the existing federal code provisions. The Code provides clear guidance, and there is no reason for this Court to muddy that water. If it is not already clear enough in the Code, this Court should hold that marriage dissolution parties designated or to be designated as alternate payees in domestic relations orders have an affirmative duty to name a death beneficiary in that order or on subsequent form, if they wish to preserve pension rights for their successor(s) in interest. Such a holding would be consistent with the federal code, and would put all parties and practitioners on notice that they must not sleep on their rights, and must take affirmative steps to preserve those rights, or risk losing them.

The Appellant respectfully requests that this Court reverse the District Court as a matter of law. In the alternative, we request that these issues be remanded to the District Court for further Findings on the issues presented herein.

Respectfully Submitted,

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