

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

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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.

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**RESPONDENT'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: Determine that "the facts and circumstances of this case" favored granting Respondent's Motion.

## STATEMENT OF THE CASE AND THE FACTS

Richard J. May ('Respondent') and Loydene J. May ('Appellant') were married on September 21, 1978 and separated in October, 2000 when Richard began to live with his eventual wife Kathy (Baker) May ('Estate Representative'). Richard died unexpectedly while drinking his morning coffee with Kathy on January 2, 2004. Kathy is now the Representative of the Richard J. May Estate ('Estate') and as such has become the court appointed substituted party in this marital dissolution proceeding to pursue assets on behalf of the Estate. In that capacity she brought on this proceeding to compel Appellant to comply with certain provisions in the Richard - Loydene dissolution Judgment and Decree entered pursuant to stipulation on February 3, 2003, specifically, to cooperate in finishing a Domestic Relations Order for submission to the federal Office of Personnel Management (OPM) per the stipulated court Judgment which awarded half of Appellant's pension to Respondent.

Both Respondent and Appellant contributed substantially to their marital assets. Respondent had been injured at work but received \$1,468.00 income monthly from Workers Compensation benefits. He had invested much of his Worker's Compensation settlement in buying land and equipment which he was always trading, buying and selling to earn income and increase family assets. Appellant worked as a federal postal employee beginning March 10, 1984 and is apparently still so employed. In the dissolution

proceeding, neither party asked for nor received any asset division intended to be other than 'equal'. Before arriving at their stipulation, they did certainly disagree over values of assets which are not at issue here.

Appellant had an interest in an United States Postal Service/Federal Employee Retirement Service (USPS/FERS Pension Plan or 'Pension') which is at issue here and a Thrift Savings Plan (TSP). Respondent and Appellant stipulated to an equal division of their real estate and farm assets totaling \$143,000 and the TSP valued at \$106,842. Respondent paid Appellant \$18,079 to equalize that division. [Appellant's Appendix, p. A29]. Appellant asked to receive the TSP because it represented available cash she could use to buy herself a new place to live. Respondent thought that made sense and agreed to it so Appellant would have financial liquidity. Interestingly enough, Appellant's request to receive the TSP cash eliminated sufficient liquidity for the parties to be able to use what Appellant cites as the generally preferred method for pension division, to wit, the 'present valuation - equalize with other assets' method. Had the 'generally preferred' method been agreed to by the parties at that time, it is likely that Appellant would have had to transfer cash to Respondent, something she did not want to do.

The parties agreed the Pension would be equally divided. There was no need to 'value' the Pension because it was being divided equally and value was irrelevant for that purpose. Appellant did not want to reduce cash available to her by 'valuing and buying out' Respondent's part of the Pension. It is also noted that 'valuation' then would have

been difficult unless Appellant could pinpoint her time of retirement. If she could not, the court would have divided by 'formula' anyway. See Rask v. Rask, 445 N.W.2d 849 (Minn.App.1989) pp. 852, 853.

Appellant's attorney drafted the Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, and, after review and input from counsel for both parties, the same was submitted to the Court which signed on January 23, 2003. Neither parties' attorney caught the misnomer of the Pension as a 401(K) before Judgment was entered. Respondent's attorney noticed it during discussions about the eventual Court Order Acceptable for Processing (COAP) - the federal term for the Qualified Domestic Relations Order (QDRO) or Domestic Relations Order (DRO) - and since both attorneys and parties knew what the reference was, everyone agreed to correct the reference when any proposed Order was presented to the Court for approval.

No COAP was ever agreed to by the parties. Counsel for both parties were still trying to obtain cooperation from Appellant to a mutual hiring of a third party to draft the COAP in December, 2003. Appellant's then attorney was recommending that approach but, if the attorney had received any response from Appellant about it, she had not communicated that response to Respondent's attorney before Respondent died on January 2, 2004. (It is Respondent's position that attributing 'fault' to the lack of a COAP before Richard's death is not a dispositive issue here nor is failure of the Estate Representative to bring a 'Motion to Compel' earlier than she did. If either is an issue, remand for factual

presentation and determination would be appropriate. See Janet Irene Kauppi, f/k/a Janet Irene Gish, petitioner, Respondent, v. Ellwood Wesley Gish, Appellant, A03-1868 (2004 Unpublished Opinion) in which court not concerned that no QDRO had been entered in 1985 divorce prior to 2004 appeal.) Respondent does ask that this court decide as a matter of law that the matter is 'timely' before the court.

Respondent died without a will. His widow Kathy was appointed estate representative over the objections of Respondent's children. On May 10, 2004 the children petitioned the Probate Court to remove Respondent's widow as estate representative. By law, that motion restricts the estate representative from performing significant administrative functions. On May 18, 2004, the Estate Representative obtained an order from the Probate Court finally allowing her to petition to become substituted party in Respondent's dissolution. However, even that permission was colored by Appellant's sons' continuing request for removal of the Estate Representative, an issue which was not finally resolved until Appellant's sons withdrew that objection in May, 2005.

In February, 2004 Appellant apparently terminated her representation with her prior divorce attorney and obtained a letter from her present attorney which letter Appellant mailed to Respondent's attorney who received it on March 19, 2004. [Appellant's Appendix p. A30]. Respondent believes said letter misreads the relevant federal provisions.

Respondent brought on her motion to correct the specific 'identification' name of

the retirement benefit divided between the parties and to require Appellant to cooperate in drafting the appropriate court order. The parties presented oral arguments on February 4, 2005. Neither party offered any evidence. Although not argued in Appellant's Brief, Respondent recognizes that the trial court decision may have exceeded Respondent's request for relief in her motion. At oral argument counsel for Respondent asked that the Court order that the Pension pass as part of the Respondent May Estate and that an order be entered accordingly. [Transcript, p.8 and p.25]. Respondent surmises that the trial court Memorandum language which states "Respondent's surviving spouse is entitled to the proceeds of the dissolution including the awarded retirement account" [Appellant's Appendix, p.67] resulted from Appellant's counsel telling the Judge at the hearing that Respondent's widow is the primary beneficiary of Respondent's estate which somehow led the Judge to 'skip' the middle step of ordering that the Pension pass through Respondent's estate. [Transcript, p. 25]. By tacit agreement of the parties, the Court actually considered and decided the ultimate issue here, to-wit: Should the Court allow Appellant to collaterally attack a final property disposition and Judgment to which she had stipulated by (subsequently) claiming after Respondent's (ex-husband's) death that since he hadn't lived long enough to personally enjoy the asset he received as the benefit of his bargain, he is deprived of ownership of that asset and is not allowed to have the court determine how to implement the divorce Judgment.

The trial court, Honorable Michael S. Jesse, entered an order requiring Appellant

to cooperate with Respondent to draft an appropriate order. In the accompanying Memorandum the trial court stated that "... Respondent's surviving spouse is entitled to the proceeds of the dissolution including the awarded retirement account." [Appellant's Appendix pp. A65, A67].

Respondent's position is that decedent Richard May's share of the Pension should pass to his estate pursuant to an appropriate court order. The position is very straightforward: *one-half of the USPS/FERS Pension Plan was awarded to Respondent; the Trial Court has jurisdiction to determine and approve terms of an appropriate domestic relations order; the dissolution asset award carries with it certain rights, including the right of the holder to determine to whom said asset passes on death; under Minnesota law, lack of a will creates intestacy and assets devolve pursuant to very specific statutory provisions governing the same; and there is no reason to treat this Pension asset any differently.*

Respondent's position provides an equitable result in this case, is consistent with and supported by earlier case law and provides a clear, logical method to handle similar matters in the future.

## STANDARD OF REVIEW

The ultimate issue in this case is what method is used to identify successors in interest to property awarded in a dissolution. At issue is a pension plan which is considered property under Minnesota marriage dissolution statutes. See Minn. Stat. Sec. 518.54, subd. 5. Issues regarding pension rights are within the scope of trial court discretion. Taylor v. Taylor, 329 N.W. 2d 795 (Minn. 1983). If the determination of the trial court is reasonable and finds an acceptable basis in fact and principle, the reviewing court will, and must, affirm. Bollenbach v. Bollenbach, 285 Minn. 418, 425, 175 N.W. 2d 148, 154 (1970).

In making its decision at the trial court level "full effect must be given to that which is necessarily implied in the judgment, as well as to that actually expressed therein." Stieler v. Stieler, 244 Minn. 312, 318, 70 N.W. 2d 127, 131 (1955). See also, In re the Marriage of Donna Rae Aiken-Johnson, n/k/a Donna Rae Aiken, Respondent, v. Thomas Edward Johnson, Appellant, CX-00-1502, Minnesota Court of Appeals (2001 Unpublished Opinion), attached to Respondent's Appendix.

## ARGUMENT

### I

**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.**

Respondent answers in the negative.

First, this was not a 'future interest'. It is a present 'bundle of rights' awarded in the dissolution Judgment. Certainly the right to transfer the right to own an asset is a key element of 'ownership'. This court recognized this right to transfer in In re Barbara Welter, n/k/a Barbara Koepf, now deceased, petitioner, Respondent v. Gary Welter, Appellant, A04-710, Minnesota Court of Appeals (Unpublished Opinion 2004). In that case a QDRO had "irrevocably" assigned to wife as a former spouse 50% of the value of husband's pension benefit as of a certain date. Wife died naming one of two daughters as sole heir of wife's estate. Husband opposed that daughter's motion to amend the QDRO to name her as a new alternate payee. The district court concluded the benefit should pass to that sole heir because it was a property settlement and the daughter was named as sole beneficiary. To achieve that result the trial court clearly had to have determined that the Judgment and subsequent QDRO using the 'irrevocable assignment of 50% of the value' language carried with it the right to pass on that asset to the next owner. As in that case, 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.

There was no Judgment language divesting Respondent of his share of the Pension if he died. To allow that result now would be to sanction an impermissible collateral attack on a final property settlement. The trial Judge recognized that this should not be allowed when, at the hearing, he asked Appellant's counsel how to distinguish asking Respondent's estate to 'give back' this property from other property he was awarded in the decree. [Transcript, p.13]. Appellant's counsel was unable to come up with any distinction because there is none.

In the similar case of Deborah Jean Schmidt, f/k/a Deborah Jean Fjellanger, petitioner, Respondent v. John Lien Fjellanger, Appellant, C3-01-2047, Minnesota Court of Appeals (Unpublished Opinion 2002), this court upheld a trial court determination creating a QDRO which included a provision to protect a former spouse's rights in a retirement plan. The Judgment had said "fifty percent... shall be and is irrevocably assigned to [former spouse]." Former spouse asked for a protective provision in the QDRO to safeguard against possibility that husband would die before she started to collect on his retirement. This court upheld the trial court's determination that the protective provision was a payment mechanism rather than a benefit not awarded by the Judgment and that the Judgment's failure to include it in the Judgment did not preclude it from inclusion in the QDRO.

Appellant's primary argument is simply that dying before designating a beneficiary

on a specific form somehow divests the prior court award. That result ignores the 'bright line rule' Appellant herself cites: *Unless the court order acceptable for processing expressly provides otherwise ...*" (Italic added), the interest terminates. [Appellant Brief, p.8. See Appellant's Appendix, p.A53 citing 5 CFR 838.237]. In this case the trial court will be entering such an order to implement the Court's earlier Judgment which was stipulated by the parties. Appellant's position would have a former spouse's death end rights to an asset previously awarded outright and with no strings attached if the decedent had not affirmatively identified a successor in interest using specific Pension forms before death. There is no support in law for such a proposition. Remember, the parties here did not bargain for any type of 'divestment' or 'reverter under certain circumstances'. Their stipulated Judgment clearly equally divided the Pension. The trial court likely stands ready to implement that Judgment and should be instructed to do so on remand.

Appellant is correct that these parties bargained for and agreed to a 'fixed percentage' method to divide the Pension. Appellant discusses the Pension's 'cash value'. That is a meaningless concept in this context. The only meaningful Pension value would be calculated 'actuarially' but there still is no need to presently calculate actuarial value of an asset which is equally divided. Surely Appellant does not expect Respondent to believe that she has gone to all her effort in this matter merely to contest disposition of 'cash value' which Appellant says was 'minimal' [Transcript, p.14] and "around \$6,800." [Transcript pp.18 and 19]. The Judgment itself uses the term 'value' without restriction

and Appellant's divorce counsel recognized this in the first proposed QDRO draft which has no reference whatever to 'cash value'. [See paragraph 5 of proposed QDRO at Appellant's Appendix, pp. A43 and A44.] Discussion of 'cash value' is misplaced unless Appellant wants to extend an offer to the Respondent to transfer the Pension to the Estate in its entirety upon payment of \$6,800 to her. The Court cannot read anything into language contained in Appellant's 'draft QDRO' as somehow binding on Respondent. Respondent clearly had not agreed to that proposal and the court had not approved it. [Appellant's Appendix, Responsive Affidavit of Kathryn J. May, paragraph 12, p. A59].

Appellant argues at page 9 that lack of a COAP prior to Richard's death negates the previous Court Judgment. In the absence of a 'reserved right' to such a result in the Judgment, the Court should not create any such restriction or reversion. Rather, the Court can and should take steps necessary to implement the parties agreement embodied in the Judgment. As this court has previously said in In re the Marriage of: Carolyn Beth Steger, petitioner, Respondent, v. Daniel Stephen Steger, Appellant, CX-01-814, Minnesota Court of Appeals (Unpublished Opinion 2002), while a district court may not modify a final property division, it may issue orders to implement, enforce, or clarify the provisions of a decree as long as it does not change the parties' substantive rights. [Citing] Redmond v. Redmond, 594 N.W.2d 272, 275 (Minn.App.1999) (citing Potter v. Potter, 471 N.W.2d 113, 114 (Minn.App. 1991).

Appellant correctly recognizes at p.10 of her Brief that Respondent, the former

spouse, may "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". (Appellant's Brief, p.10) That is what the Respondent is now doing - seeking the court order to implement the court Judgment.

To hinge any decision here on the fact there was no COAP prior to Respondent's death is to create a result which would both rely on 'vagaries' and would not be tied to either the Judgment or to logic. Remember, in this case Respondent's case is being presented by his Estate Representative in her role as Substituted Party, all part of a system which allows the court to complete and implement what was begun pre-death. Clearly the legislature, rules of this court and prior court decision all recognize the parties' need and ability to complete these matters following death of a party. Eliminating continued access to the court to fashion an appropriate method to implement this particular Judgment would be a wrong result.

To accept Appellant's position would be to create a 'windfall' for Appellant at the expense of Respondent's estate and in direct contravention of the parties' stipulation and dissolution Judgment. The lesson of this case should not be that 'death ends the value of an unspent asset if decedent did not designate a successor in interest such as for a joint bank account or life insurance policy'. Rather, it should be that in this instance, as in all others regarding intestate assets, the court can implement the Judgment by recognizing that, in the absence of a clear intent to the contrary, the State of Minnesota has created

laws of intestacy which will be applied to control passage of such assets. (Respondent does not waive the right to present evidence to the trial court in furtherance of a request for a provision in any COAP directing the Pension to Respondent's surviving spouse, a provision which appears allowable under C.F.R. 838.237(a). Respondent does ask this Court to establish the 'default rule' that in the absence of clear evidence to establish some other result to embed in the COAP, the trial court will include a provision directing the asset to pass as part of decedent/Respondent's estate.)

Appellant argues essentially that Respondent's failure to have used a specific method to identify a successor to this asset before he died somehow divests Respondent/Estate of an asset he had been awarded pursuant to stipulation. The fact is 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. The intestacy process is not generally one in which individuals who 'might have been named' can contest to whom assets go under a will or the laws of intestacy.

The legislative provisions of intestacy pass the first \$150,000 of assets and one-half of any balance to the surviving widow and the balance to children of the decedent [Minn. Stat. 524.2-102 (2)]. If there is 'only' \$150,000 or so in an estate, that seems like scant consolation to or for a widow, even one who has only lived together with a decedent for a few years prior to his death. If there is more, at least a part of it would go to Respondent's children. In this particular case, to rule otherwise is to take this asset to the

one person to whom we know Respondent would not want it to go, his ex-wife.

This is a case of 'method of transfer', not of a request by Respondent to 'create' a prior non-existent award.

## II

**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.**

Respondent is unable to answer the issue as framed.

Respondent asks to have the awarded pension asset - half of the USPS/FERS Pension Plan - distributed as part of Respondent's estate. This is not a request to have the court create new rights in Respondent but only to have the court order the method to be used to determine how the asset devolves. The Judgment awarded it. No Judgment language divested it upon Respondent's death. It is simple. As payments come in, they go to the Estate. The Estate is not asking to be paid cash now. Respondent agrees that was not bargained for and has no idea why Appellant discusses it. Respondent's request is that the court implement the Judgment through an appropriate COAP.

Appellant should not be allowed to dictate to whom her former spouse should leave his awarded portion of the Pension.

### III

**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.**

Respondent answers in the negative.

Respondent also asserts that this issue was not identified as an Issue in the Appellant's Statement of the Case.

Appellant asks that the trial court decision be reversed for failure to make Findings of Fact or a more comprehensive Memorandum of Law. While providing such may have proven more helpful to the Appeal Court, reversal for failure to do so is not the correct remedy.

If this court believes it has sufficient facts before it, it can clearly proceed. The relevant issue(s) appear(s) to be one(s) of law.

## CONCLUSION

Respondent strongly believes that the better procedure in this case is to decide the case as a matter of law and remand for lower court action accordingly. As a matter of policy and judicious use of court time, it seems that the better approach is to adopt a rule which says that, in the absence of a completed order, whether QDRO, DRO or COAP, or a completed alternate method for designation of a beneficiary (in effect creating a non-probate asset), and 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. Certainly the spouse whose Pension was (partially) awarded to the former spouse can have no expectation that the Pension so awarded might come back to her. In fact, such a result would seem inequitable and, in almost every conceivable set of circumstances, the one result which would be absolutely last on anyone's list of what is expected or fair. This is a set of facts on which the court by ruling for Respondent herein can both reach the correct result and simultaneously announce a general rule which is both simple, elegant and straightforward in application.

Respondent respectfully requests that this court determine that, under the facts of this case, the matter be remanded to the trial court with instructions to complete the order to include both a specific provision which states that the former spouse's share of the

Pension in any form, as it now exists or to which it may eventually be annuitized, does not terminate on the spouse's death and a provision which directs OPM to pay the former spouse's share of the Pension, as it now exists or to which it may eventually be annuitized, to Respondent's estate.

Dated this 25<sup>th</sup> day of August, 2005

Respectfully Submitted,

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