Opinion No. 88-27

April 12, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Carlos A. Gallegos, Executive Secretary, Public Employees' Retirement Assoc., P.O. Box 2123, Santa Fe, NM 87504-2123

QUESTIONS

May Mr. Robert E. Copsin change his retirement option from option two, which provides for a refund of member contributions where a retiree dies before receiving annuity payments that equal his contributions, to option three, which provides for a survivor annuity in the same amount as the retiree's annuity?

CONCLUSIONS

No.

FACTS

Effective October 26, 1985, Mr. Copsin retired on duty disability arising out of a 1983 injury. On November 3, 1985, the Public Employees Retirement Association ("PERA") advised Mr. Copsin of the nature and amount of his benefits if paid under options one, two, three or four.[1] By his final application for annuity, signed December 5, 1985, Mr. Copsin elected option two and designated his wife as beneficiary.

In an October 20, 1987 letter to PERA, Mr. Copsin states that, before selecting his option, he consulted with Mr. Larry Ward about option selection, but selected an option that Mr. Ward did not necessarily recommend. Mr. Copsin further states that, after his injury, he became dependent on alcohol; alcohol interfered with his ability to make major decisions; and, having been sober since his treatment at Care Unit in October, 1985, he realizes now that he should have selected option three. In a November 19, 1987 letter to PERA, a neurosurgeon who is treating Mr. Copsin for his spinal injury states that Mr. Copsin had a problem with alcohol and medication abuse; Mr. Copsin underwent detoxification and alcoholism rehabilitation between October 1, 1985 and October 7, 1985; and Mr. Copsin's alcohol abuse affected his ability to make reasonable decisions about his retirement options.

Mr. Copsin was thirty-six years old when he began receiving duty disability retirement benefits and he continues to draw these benefits. If Mr. Copsin had not selected an option when he retired, then, by operation of law, he would have retired under option

two. See Section 10-11-26(A) NMSA 1978 (Repl. 1983) (repealed by 1987 N.M. Laws, ch. 253, § 140).

ANALYSIS

Estate of McGovern v. State Employees' Retirement Bd., 512 Pa. 377, 517 A.2d 523 (1986), illustrates the difficult decisions presented and the type of relief a court may afford where a party alleges that a retiree is or was incompetent to select his retirement option. Mr. McGovern retired on January 9, 1981. His wife died on January 23, 1981, and Mr. McGovern died on January 28, 1981. Doctors diagnosed Mr. McGovern's wife as terminally ill in March of 1980; Mr. McGovern knew this fact, but refused to acknowledge his wife's impending death. Mr. McGovern had a twenty-year history of alcoholism. In the few months before he died, he was emaciated and survived only on peanut butter, cream cheese, crackers, beer and whiskey. Mr. McGovern's son sued to set aside the survivor option selection, which resulted in a loss to the estate of approximately $120,000, contending that his father was incompetent to select the option. The lower court ruled that Mr. McGovern was incompetent. It refused, however, to change the option selection to that requested by the son. The court concluded that it could grant relief only as if Mr. McGovern never made a selection. On appeal, the Pennsylvania Supreme Court reversed, holding that Mr. McGovern was lucid when he met with retirement officials and that he understood the terms of his retirement, evidenced by his purchase of military time. The court stated: "Thus, the claim that is made here in the name of incompetence is in reality a challenge to the wisdom, the desirability, the thoughtfulness and the rationality of the disposition. But such a challenge may not succeed...." Id. at 387, 517 A.2d at 527.

The leading New York case that addresses incompetent option selection is Ortelere v. Teachers' Retirement Bd. of N.Y., 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969). A sixty-year old woman who had taught school for forty years, on leave for mental illness and suffering from cerebral arteriosclerosis, selected maximum retirement benefits that provided no payment to a survivor or to her estate. She died two months after selecting this option. Her surviving husband sued to set aside her retirement application and to obtain a declaration that the application was null and void because of her mental incompetence. The court reasoned:

There is no doubt that any retirement system depends for its soundness on an actuarial experience based on the purely prospective selections of benefits ... and that retrospective or adverse selection after the fact would be destructive of a sound system. It is also true that members of retirement systems are free to make [unwise] choices....

Id. at 198, 303 N.Y.S.2d at 364, 250 N.E.2d at 461. The court nevertheless ruled that the wife's option selection was the result of psychosis, and that the retirement system knew or should have known of her condition. But in remanding the case for trial, the court stated: "Of course, nothing less serious than medically classified psychosis should suffice or else few contracts would be invulnerable to some kind of psychological attack." Id. at 206, 303 N.Y.S.2d at 370, 250 N.E.2d at 466.

Courts have distinguished and interpreted narrowly Ortelere. In Tomasino v. New York State Employees' Retirement System, 87 A.D.2d 675, 448 N.Y.S.2d 819, aff'd, 57 N.Y.2d 753, 454 N.Y.S.2d 983, 440 N.E. 2d 1330 (1982), the court refused to set aside an option that resulted as a matter of law from a deceased retiree's failure to select an option. The retiree had died approximately five months after retirement, and his wife sought to have herself named as survivor beneficiary. In Allaway v. Regan, 133 A.D.2d 962, 520 N.Y.S.2d 882 (1987), the court refused to change a deceased retiree's option selection. The retiree had died almost one year after retirement and, before retirement, was severely depressed and diagnosed as having cancer. The evidence, however, did not establish "psychosis" as required by Ortelere. In McDermott v. Police Pension Fund, 133 Misc. 2d 669, 507 N.Y.S.2d 786 (1986), a retiree selected maximum benefits with no survivor option, contrary to a divorce decree. His former wife sued, contending in part that her former husband suffered from alcoholism and was incompetent to select his option. The court refused to set aside the option and observed that the department had no notice that he was not competent to choose a pension benefit option. See also Pentinen v. New York State Employees' Retirement System, 60 A.D.2d 366, 401 N.Y.S.2d 587, appeal denied, 44 N.Y.2d 647, 407 N.Y.S.2d 1025, 379 N.E.2d 226 (1978) (refusing to allow change of option selection based on alleged incompetence, where retirement system had no knowledge of facts indicating that the person selecting the option was suffering from psychosis); In Re Whalen's Will, 51 A.D.2d 296, 381 N.Y.S.2d 79, aff'd, 41 N.Y.2d 854, 393 N.Y.S.2d 708, 362 N.E.2d 259 (1977) (heir sought to prove that the retiree was incompetent and intended to select another option; court concluded evidence did not approach "medically classified psychosis").

When a court voids an option selection because of incompetence, it will grant relief as if the retiree did not select an option. See Allaway v. Regan, 133 A.D.2d at ___, 520 N.Y.S.2d at 884 ("If decedent were found incompetent and unable to make an election, option 1/2 would be selected by operation of law...."); Morris v. New York State Employees' Retirement System, 6 A.D.2d 937, 175 N.Y.S.2d 681 (1958) (same). Cf. Schwartzberg v. Teachers' Retirement Bd. of N.Y., 298 N.Y. 741, 83 N.E.2d 146 (1948) (holding that an incompetent retiree's selection of maximum benefits and his revocation of an earlier option, providing for a refund to the estate, was invalid, and allowing the estate to recover on the basis of the "revoked" option).

There is no evidence that Mr. Copsin was suffering from "psychosis" when he selected his option or that his use of alcohol rendered him "incompetent" to select an option. He selected his option in December, 1985, after the Care Unit at Lovelace Medical Center discharged him. Further, Mr. Copsin's selection of option two, instead of a survivor annuity option, is not necessarily unreasonable. Mr. Copsin was young when he retired. Section 10-11-33 NMSA 1978 (1983 Repl.) (repealed by 1987 N.M. Laws, ch. 253, § 140) required PERA to reexamine each disability annuitant "once each year during the first five years following the [disability] retirement" to determine whether the annuitant was "physically able and capable of resuming gainful employment."[2] If the annuitant was able and capable, PERA would suspend his disability annuity. This inquiry upon reexamination was far different from the inquiry that PERA made when it initially granted disability benefits: whether the member was "incapacitated for the performance of his

duty in the service of his affiliated public employer." (emphasis supplied). Section 10-11-31 NMSA 1978 (1983 Repl.) (repealed by 1987 N.M. Laws, ch. 253, § 140). Thus, PERA determined initially whether the annuitant could do the same work that he was doing when he was injured. Upon reexamination, the question is whether he can do any gainful work. PERA often suspends disability benefits. Disability benefits, therefore, were not assured for any period beyond one year, and Mr. Copsin's choice of the maximum benefit was reasonable. Finally, by operation of law, Mr. Copsin would have retired under option two had he been incompetent to make a choice. For these three reasons, it is our opinion that Mr. Copsin may not change his retirement option.

We note that Mr. Copsin's file does not reflect that he has ever been reexamined. The Board should direct that Mr. Copsin be reexamined to determine whether he is and has been entitled to receive disability benefits.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 The Public Employees Retirement Act in effect in 1985 provided these option selections. See Section 10-11-26 NMSA 1978 (Repl. 1983). For current provisions, see Section 10-11-117 NMSA 1978 (Repl. 1987).

n2 Current law, Section 10-11-11(A) NMSA 1978 (Repl. 1987), provides: "The association may require a disability retired member to undergo periodic medical or other reevaluation at the association's expense or submit acceptable evidence of continuation of disability if the member has not met an age and service requirement for normal retirement...or is not age sixty-five years or older." Thus, PERA is no longer obliged statutorily to conduct yearly medical reexaminations of its disability retirees. Such retirees, however, must submit earnings statements by July 1 of each year, and, if earnings exceed approximately $8,400, benefits suspend for the months of July through December of that year. See Section 10-11-10(E) NMSA 1978 (Repl. 1987).