**COMMONWEALTH OF MASSACHUSETTS**

**Middlesex, ss.** **Division of Administrative Law Appeals**

**Paula DeForitis**,
Petitioner,

v.

**Taunton Retirement Board**,
Respondent.

No. CR-19-52

Dated: June 16, 2023

**Appearance for Petitioner:**
Peter Farrell, Esq.
Duxbury, MA 02332

**Appearance for Respondent:**
Michael Sacco, Esq.
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**Administrative Magistrate:**
Yakov Malkiel

## SUMMARY OF DECISION

The petitioner was living apart from her public-employee husband at the time of his death. She is not entitled to an "option (d)" allowance under G.L. c. 32, § 12(2), because the couple's separation was not the result of "justifiable cause" within the specialized meaning of the governing statute. The petitioner remains her husband's beneficiary for purposes of any refunds under G.L. c. 32, § 11(2)(c): although the petitioner's husband attempted to appoint new beneficiaries in her place, he did not substantially comply with the demands of the prescribed PERAC form. Nevertheless, the petitioner's entitlement to a § 11(2)(c) refund is superseded by her husband's son's entitlement to a temporary allowance under G.L. c. 32, § 12B.

## DECISION

Petitioner Paula DeForitis appeals from a decision of the Taunton Retirement Board declining to grant her an "option (d)" retirement allowance in connection with her late husband's public employment. An evidentiary hearing took place before Administrative Magistrate Angela McConney on October 19, 2022. The witnesses were Ms. DeForitis and Amanda Greco. Magistrate McConney admitted into evidence exhibits marked 1-19. Thereafter, the parties

submitted hearing briefs, and other potential beneficiaries of the petitioner's husband's funds[1] received an opportunity to be heard. I now adopt Magistrate McConney's evidentiary rulings and further admit stipulations marked 1-25.[2]

**Findings of Fact**

I find the following facts.

1. Christopher DeForitis was a City of Taunton police officer and a member of the retirement system administered by the board. Ms. DeForitis was his second wife. They married in October 2006. (Tr. 91-93; Stipulations 1, 2, 4, 5; Exhibit 3.)

2. In February 2017, Mr. DeForitis executed a preprinted form selecting beneficiaries for the event of his death while not yet retired. He wrote Ms. DeForitis's name into the form's two sections: one concerning any refunded contributions under G.L. c. 32, § 11(2)(c), and one concerning any "option (d)" allowance under G.L. c. 32, § 12(2).[3] Before he filed his form, Mr. DeForitis crossed out the section concerning option (d). (Stipulation 7; Exhibit 7.)

3. Beginning in approximately June 2017, Mr. DeForitis became friendly with Ms. Greco. They began to communicate on Facebook and by text message. Ms. DeForitis became aware of this correspondence. (Tr. 55, 101-107; Stipulations 8-11; Exhibit 18.)

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[1] I.e., the beneficiaries discussed in finding of fact no. 6 *infra*.

[2] Upon Magistrate McConney's appointment to the Civil Service Commission, Ms. DeForitis (through counsel) requested a new evidentiary hearing. *Cf.* 801 C.M.R. § 1.01(11)(e). She then failed without good cause to appear for the new hearing. The appeal is therefore being decided based on the transcript of the original hearing. *See* April 18, 2023 order. A review of that transcript suggests that Ms. DeForitis's counsel either approached or crossed the line between zealous advocacy and indecorous, disruptive conduct. *See* 801 C.M.R. § 1.01(10)(d)(1); Mass. R. Prof. C. 3.5(d).

[3] These and other provisions of the retirement law are discussed *infra*.

4. During January 2018, Ms. DeForitis moved out of the DeForitis home and into an apartment of her own. At some point, the relationship between Mr. DeForitis and Ms. Greco became intimate. Ms. DeForitis maintains that this development predated her departure from the marital home, but a preponderance of the evidence does not support this claim.[4] (Tr. 13-14, 62-63, 101-107, 114-116, 136-139, 160-161; Exhibits 15, 18.)

5. Mr. and Ms. DeForitis did not live together after that. They also did not divorce. At one point, they attempted to submit a separation agreement to the Probate and Family Court, but the agreement was not accepted for filing. (Tr. 165-170; Exhibit 18.)

6. In July 2018, Mr. DeForitis filed a new beneficiary selection form. In the section relating to § 11(2)(c) refunds, Mr. DeForitis named three new beneficiaries: Ms. Greco (50%), and Mr. DeForitis's two children from his first marriage (25% each). Mr. DeForitis left the option (d) section of this form blank. In the line of the form designated for a witness's signature, Mr. DeForitis wrote in the name of another individual without that individual's knowledge. (Tr. 145-146; Stipulations 16, 17; Exhibits 8, 14, 18.)

7. In September 2018, Mr. DeForitis passed away. He had not yet retired. Ms. DeForitis subsequently executed an affidavit in support of an application for an option (d) allowance. She wrote: "At the time of [Mr. DeForitis's] death, we were living in separate

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[4] Ms. DeForitis's evidence on this point boils down to: her observation of messages between Mr. DeForitis and Ms. Greco around October 2017, including a message featuring a "heart-eyes" emoji; her sense around the same time that Mr. DeForitis's behavior had become less caring; a message from Mr. DeForitis to Ms. Greco in August 2018 stating, "I dropped everything for you a year ago . . . ." (Exhibit 15); and a reported remark from Ms. Greco to the effect that she and Mr. DeForitis had been "together for a year and a half" (Tr. 123). These pieces of evidence support the more moderate inference that Mr. DeForitis and Ms. Greco had developed some degree of romantic attachment by late 2017. *Cf. Washington v. Boston Ret. Bd.*, No. CR-06-1100, at *9-11 (CRAB June 12, 2009).

apartments but were not legally separated or divorced. . . . [W]e remained in a marital relationship with each other and remained intimate. Neither of us had filed for divorce, and we had no intentions of divorcing. We had just vacationed together in August of 2018." She repeated elements of this account during her hearing testimony. (Tr. 121-122, 125-126, 129-131; Stipulations 18, 20, 21; Exhibits 9, 10, 12, 18.)

8. In January 2019, the board denied Ms. DeForitis's application for an option (d) allowance. The board determined that Ms. DeForitis remained her late husband's § 11(2)(c) beneficiary; but the board granted Ms. DeForitis no benefits, instead awarding a temporary allowance under G.L. c. 32, § 12B to Mr. DeForitis's son. Ms. DeForitis timely appealed. (Exhibits 1, 2, 13, 18, 19.)

**Analysis**

The retirement law allows members of public retirement systems to choose among three blends of retirement benefits, designated (a), (b), and (c). *See* G.L. c. 32, § 12(2). These options aside, every member must either select or not select option (d). *Id.*

The consequence of this choice materialize if the member dies before ever retiring: If the member has selected option (d), then his or her beneficiary becomes entitled to a periodic allowance for life. If the member hasn't selected option (d), then his or her beneficiary (or estate) is entitled to a refund of the member's accumulated contributions. Such refunds are governed by G.L. c. 32, § 11(2)(c). *See generally Cambridge Ret. Bd. v. PERAC*, No. CR-13-466, at *6 (DALA Feb. 22, 2019); *Coulter-Bennett v. State Bd. of Ret.*, No. CR-20-149, at *2-3 (DALA Aug. 12, 2022). A member may appoint one individual as an option (d) beneficiary and—just in case—other individuals as § 11(2)(c) beneficiaries.

*I*

*A*

The general rule is that, to select option (d), a member must give the retirement board "written notice on a prescribed form . . . prior to his death." G.L. c. 32, § 12(2)(d). Nevertheless, in specified circumstances, the retirement law makes the option (d) allowance available to the spouse of an unretired member who has died without selecting option (d). The fourth paragraph of § 12(2)(d) states:

> If a member dies before being retired without an eligible beneficiary other than the spouse of such member nominated under this option[5] . . . an election may be made by such spouse to receive the member-survivor allowance under [option (d)]; provided, that said spouse and the deceased member were living together at the time of death of such member, or that the board finds that they had been living apart for justifiable cause other than desertion or moral turpitude on the part of the spouse.

It is undisputed that Mr. DeForitis died before retiring, without selecting option (d), and while not "living together" with Ms. DeForitis. Ms. DeForitis's eligibility for the option (d) allowance therefore hinges on whether she and Mr. DeForitis were "living apart for justifiable cause . . . ." § 12(2)(d).

*B*

The notion of "justifiable cause" in this context may be jarring. For competent adults, the choice to live apart from another individual is ordinarily a matter of unfettered discretion. The Appeals Court has explained that the phrase "living apart for justifiable cause" derives from "the law of divorce and separate support." *Dunn v. Contributory Ret. Appeal Bd.*, 46 Mass. App. Ct. 359, 364 (1999). *See Anderson v. Contributory Ret. Appeal Bd.*, 1 Mass. L. Rptr. 217 (Super.

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[5] The statutory language is not a model of clarity. But the parties agree that the demands of this paragraph would not apply to a surviving spouse who *was* the decedent's option (d) beneficiary.

1993). To some extent, the realm of family law continues to reflect centuries-old terminology and attitudes. *See* Maureen McBrien & Patricia A. Kindregan, *Family Law and Practice* § 1:1 (4th ed. 2013).

One traditional presumption of family law is that individuals who wish to be supported financially by their spouses must continue to live with those spouses. *See Burlen v. Shannon*, 80 Mass. 433, 434 (1860). A statute dating back to 1874 made certain exceptions to this rule: one of them is where "a married person has justifiable cause for living apart from his spouse." G.L. c. 209, § 32. *See Bigelow v. Bigelow*, 120 Mass. 320, 322 (1876).

The fourth paragraph of § 12(2)(d) draws on this doctrinal background. Its mission is to determine when a surviving spouse may receive an option (d) allowance even without the member's consent. The gist of the paragraph's answer is: only if the member could have been ordered to pay for his or her spouse's support. In the case of separated spouses, this rule imports and applies the "justifiable cause" test.[6]

The cases defining the term "justifiable cause for living apart" call for a showing of "ill treatment, misconduct, or failure of marital duty." *Goldberg v. Goldberg*, 237 Mass. 279, 280-81 (1921). *See Dunn*, 46 Mass. App. Ct. at 364; Richard W. Bishop, *Prima Facie Case* § 57.5 (5th ed. 2005). "These . . . cases . . . must be read and applied with care in the light of a more contemporary understanding of marital realities." *Family Law and Practice*, *supra*, § 81:4 n.9.

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[6] A 1989 statute authorizes various trial court departments to adjudicate actions by "a married person . . . if living apart from his spouse, for his own support." G.L. c. 209, § 32F. This statute has been interpreted as authorizing awards of separate support "simply on a showing that the married persons live apart from each other." *Family Law and Practice*, *supra*, § 81:4 (quotation marks omitted). *Cf. Balistreri v. Balistreri*, 93 Mass. App. Ct. 515, 516 n.3 (2018). But the more traditional rule and its exceptions have not been repealed; and it is the still-on-the-books doctrine of "justifiable cause for living apart" that the retirement law draws into § 12(2)(d).

Still, both ancient and modern authorities agree that a spouse's infidelity satisfies the "justifiable cause" requirement. *See Alley v. Winn*, 134 Mass. 77, 79 (1883); Kimberly A. Yox, *Family Law Advocacy for Low and Moderate Income Litigants* 106 (3d ed. 2018).

*C*

It is undisputed that, at some point in time, Mr. DeForitis entered into a sexual relationship with Ms. Greco. Contrast *Dunn*, 46 Mass. App. Ct. at 362, 365. At first blush, it might appear that this course of conduct sufficed to provide the requisite "justifiable cause": The statute focuses on the "time of death," asking whether the couple "had been living apart for justifiable cause" as of that time. *See Marhoffer v. State Bd. of Ret.*, No. CR-92-24, at *6 (DALA May 15, 1993). Irrespective of Mr. DeForitis's fidelity when he and Ms. DeForitis separated, "subsequent adultery . . . would have justified the wife in refusing to live with him." *DiClavio's Case*, 293 Mass. 259, 263 (1936).

The board demurs, and on close examination, its position is meritorious. The theory of the board's case is that Mr. and Ms. DeForitis lived apart by consent, driven by their own dissatisfaction with the marriage rather than by Mr. DeForitis's new romance. Implicit in this theory is a particular construction of the phrase "justifiable cause": the board reads the word "cause" in this phrase as the kin of "proximate cause" or "cause of death"; i.e., as denoting a condition that resulted in the couple's separation. *See Black's Law Dictionary* 265 (2004); *Merriam Webster's Collegiate Dictionary* 182 (10th ed. 1994).

Considered in its own context, the word "cause" in § 12(2)(d) might have been read otherwise: as signifying a proper basis for an action, as in the phrases "probable cause" or "cause of war." *See Black's Law Dictionary*, *supra*, at 266; *Merriam Webster's Collegiate Dictionary*, *supra*, at 182. On that reading, it would have been sufficient for the statute's purposes that Ms. DeForitis possessed a legally valid reason to live apart from her husband; it

would not matter whether that reason subjectively motivated her. *Cf. Meyer v. Meyer*, 335 Mass. 293, 297 (1957).

Vanishingly few appellate decisions have construed the pertinent portion of § 12(2)(d). In the very first among them, after discussing the law of separate support, the Appeals Court wrote: "We may also turn to cases decided under the Workmen's Compensation Act for guidance." *Donnelly v. Contributory Ret. Appeal Bd.*, 15 Mass. App. Ct. 19, 23 (1982). The court specifically cited G.L. c. 152, § 32 as a guiding authority. That provision deems a deceased employee's wife "dependent" on the employee if, "at the time of [the employee's] death . . . the wife was living apart for justifiable cause."

The case law interpreting G.L. c. 152, § 32 takes the board's view of the phrase "justifiable cause." In a key opinion quoted briefly *supra*, the Supreme Judicial Court wrote:

> The separation of the parties had begun in mutual consent. This was neither desertion nor a living apart for justifiable cause. The subsequent adultery of the husband would have justified the wife in refusing to live with him, but it did not require the [Industrial Accidents Board] to find that it was in fact the cause of the continued separation. . . .

*DiClavio's Case*, 293 Mass. at 262-63. Other decisions offer similar analyses. *See Cellurale's Case*, 333 Mass. 37, 39 (1955); *Craddock's Case*, 310 Mass. 116, 125 (1941); *Newman's Case*, 222 Mass. 563, 566 (1916). Their teaching is that a separated spouse seeking workers' compensation on a theory of "living apart for justifiable cause" must show that the couple's continued separation resulted from the specified "justifiable cause," not from mutual consent. Under *Donnelly*'s guidance, the same requirement governs a separated spouse seeking an option (d) allowance. *See* 15 Mass. App. Ct. at 23.[7]

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[7] The option (d) allowance and other retirement benefits differ from workers' compensation under G.L. c. 152, § 32 in that they often are payable to non-dependents of the deceased member. Nevertheless, an implication of *Donnelly* is that the phrases "living apart for

*D*

As of the time of Mr. DeForitis's death, his relationship with Ms. Greco was not the cause of Mr. and Ms. DeForitis's separation. Ms. DeForitis indicated as much in her sworn affidavit to the board, where she wrote that she and Mr. DeForitis "were living in separate apartments but . . . not legally separated," "remained in a marital relationship with each other," "remained intimate," "had no intentions of divorcing," and "had just vacationed together." The clear implication of these statements was that, by the time of Mr. DeForitis's death, the couple simply preferred their separate living arrangement. They were living apart by mutual consent. *See DiClavio's Case*, 293 Mass. at 262.

The same statements from Ms. DeForitis also undercut her claim to the option (d) allowance for another, related reason. As a matter of family law, infidelity and other "marital wrongs" cease to warrant legal relief once the aggrieved spouse has forgiven the wrong and recommenced the marital relationship. *See Zildjian v. Zildjian*, 8 Mass. App. Ct. 1, 5-8 (1979); *Coan v. Coan*, 264 Mass. 291, 295 (1928); *Family Law and Practice*, *supra*, § 35:2 & n.28. Ms. DeForitis communicated unambiguously in her affidavit that her relationship with Mr. DeForitis was in good repair by the time of his death. The necessary inference is that any "justifiable cause for living apart" had dissolved by that time.

*II*

The parties' remaining arguments address Mr. DeForitis's two forms appointing beneficiaries for purposes of refunds under G.L. c. 32, § 11(2)(c).

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justifiable cause" in G.L. c. 152, § 32 and "justifiable cause for living apart" in G.L. c. 32, § 12(2)(d) seek to cover the same universes of people.

In his February 2017 form, Mr. DeForitis named Ms. DeForitis as his sole beneficiary. His July 2018 form named three new beneficiaries instead; but Mr. DeForitis executed that form without a witness present, writing in a witness's name without the witness's knowledge. The board now contends—contrary to its written decision—that the later form is the effective one.

No statute or regulation requires a witness to endorse a member's appointment of beneficiaries. But § 11(2)(c) does provide that beneficiary appointments must be made on a "prescribed form." And the PERAC-promulgated form that Mr. DeForitis executed and filed demands a witness's signature.

A member's failure to obey every jot of a prescribed form is not automatically fatal. A doctrine with deep roots in insurance law provides that an insured's "substantial compliance" with a policy's requirements suffices to effect a change of beneficiary. *See* 4 *Couch on Insurance* § 60:29 (3d ed. 2022); Mark S. Coven & James F. Comerford, *Insurance Law* § 5:20 (2013). DALA, CRAB, and the Superior Court have imported this doctrine into the context of members' efforts to change their retirement-law beneficiaries. *Reis v. New Bedford Ret. Bd.*, No. CR-07-391 (DALA Mar. 12, 2009, *aff'd in pertinent part*, CRAB Nov. 3, 2009); *Smith v. Contributory Ret. Appeal Bd.*, No. 05-3364 (Suffolk Super. May 7, 2007).

Substantial compliance does not mean indifference or defiance. In the insurance context, the rule is that the insured "must have done all in his power to effect the change . . . ." *Acacia Mut. Life Ins. Co. v. Feinberg*, 318 Mass. 246, 250 (1945). *See American Fam. Life Assurance Co. of Columbus v. Parker*, 488 Mass. 801, 810 n.10 (2022); *Strauss v. Teacher. Ins. & Annuity Ass'n of Am.*, 37 Mass. App. Ct. 357, 362-63 (1994). In the retirement context, the Superior Court has described the requisite showing as "positive action which is, for all practical purposes, similar to the action required by the . . . policy." *Smith*, *supra*, at *6 (quoting *Prudential Ins. Co.*

*of Am. v. Schmid*, 337 F. Supp. 2d 325, 330 (D. Mass. 2004)). *See also Carlton v. State Bd. of Ret.*, No. CR-13-478, at *9 (DALA Jan. 26, 2018) (citing an "everything in his power" test).

It is not necessary to dwell on the borderlines of the substantial compliance doctrine.[8] A member's falsification of a witness's signature obviously cannot be considered an adequate effort to comply with the prescribed form. The enforcement of a document tainted by such a falsehood would be antithetical to the equity-oriented concerns that animate the substantial compliance doctrine. *Cf. Equitable Life Assur. Soc. of U.S. v. Arnold*, 27 F. Supp. 360, 363-64 (D. Mass. 1939). The result is that Mr. DeForitis's July 2018 beneficiary selection form is ineffective, and his February 2017 appointment of Ms. DeForitis as his § 11(2)(c) beneficiary remains in force.

*III*

The final element of the board's decision was its determination that Mr. DeForitis's son is entitled to a temporary allowance under G.L. c. 32, § 12B. Section 12B adds additional twists and turns to the analysis prompted by the death of an unretired member.

The first paragraph of § 12B creates a modest extra allowance for the benefit of the member's surviving children. Eligible children are those under age eighteen, or under age twenty-two while in school full-time, or incapacitated from earning a living. The paragraph is triggered only if the member's surviving spouse is entitled to an option (d) allowance under the same conditions stated in § 12(2)(d)'s fourth paragraph—i.e., the spouse was living with the

[8] It also is not necessary to analyze the suggestion in several DALA decisions that the prescribed form's demand for a witness's signature may be impervious to the substantial compliance doctrine. *See Robbins v. State Bd. of Ret.*, No. CR-20-344, 2023 WL 2806503, at *2 (DALA Mar. 31, 2023) (collecting cases). *See generally Davis v. Combes*, 294 F.3d 931, 940-42 (7th Cir. 2002).

member at the time of his death, or was living apart from him for justifiable cause. That condition is not met here, for the reasons discussed *supra*.

The second paragraph of § 12B begins, "If there is no surviving spouse . . . ." In context, this condition's meaning appears to be, "If there is no [such] surviving spouse," i.e., no surviving spouse who satisfies § 12(2)(d)'s fourth paragraph. That condition *is* present here. Its consequence is that an option (d)-type allowance "shall be paid for the benefit of [the] surviving children to a legally appointed guardian, together with the allowances provided in [§ 12B's first paragraph]."

The fourth paragraph of § 12B provides that § 12B allowances to surviving children are more short-term than ordinary option (d) allowances. For the most part, such allowances terminate when the children reach adulthood: age eighteen, or age twenty-two for full-time students, or marriage, whichever is earliest.

Additional consequences arise from the interplay between § 12B and § 11(2)(c). In essence, if the guardian accepts the § 12B allowance on the children's behalf, then the member's § 11(2)(c) beneficiaries are not entitled to the usual § 11(2)(c) refunds. On the other hand, if a guardian declines the § 12B allowance, then the standard § 11(2)(c) refunds remain payable. *See* § 11(2)(c), last sentence; § 12B, sixth paragraph (concerning "additional deductions"); *Horgan v. Boston Ret. Bd.*, No. CR-00-073 (CRAB Jan. 14, 2022); *Scichilone v. Brookline Ret. Bd.*, No. CR-07-728 (DALA Feb. 11, 2010).

Mr. DeForitis's son was born in July 2001. He was approaching age eighteen at the time of the board's decision, and is now nearly twenty-two. Neither party presents any challenge to the portion of the board's decision granting him a temporary allowance under § 12B. It will be for the board to finalize and implement the practical consequences of that entitlement.

**Conclusion and Order**

For the foregoing reasons, the board's January 2019 decision is AFFIRMED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate