COMMONWEALTH OF MASSACHUSETTS

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

Tracy Fay,
Petitioner,

v.

State Board of Retirement,
Respondent.

No. CR-23-0500

Dated: March 21, 2025

ORDER GRANTING SUMMARY DECISION

Petitioner Tracy Fay (Tracy) appeals from a decision of the State Board of Retirement (board) declining to award her a retirement benefit in connection with the death of her ex-husband, Gregory Fay (Gregory). The board has filed a motion for summary decision, which Tracy has not opposed. For the reasons that follow, the motion is meritorious.

I

This appeal implicates the statutes applicable to the case of a public employee who dies without ever retiring. The consequences of that situation depend on whether the employee has nominated an option (d) beneficiary under G.L. c. 32, § 12(2)(d). If the answer is yes, that beneficiary is entitled to a periodic allowance. If not, a refund of the member's accumulated retirement contributions is payable to a beneficiary nominated for that purpose under G.L. c. 32, § 11(2)(c); if there is no such beneficiary, the refund is payable to the member's estate.

A member may nominate one individual as an option (d) beneficiary and one or more other individuals as section 11(2)(c) beneficiaries. The pertinent statutes provide that nominations under both option (d) and section 11(2)(c) must be made on "prescribed forms," which the Public Employee Retirement Administration Commission has published.

The following facts are beyond genuine dispute. *See generally* 801 C.M.R. § 1.01(7)(h); *Caitlin v. Board of Reg. of Architects*, 414 Mass. 1, 5-7 (1992). Gregory was a Massachusetts public employee and a member of the retirement system administered by the board. When he joined that system in 1996, Gregory executed a section 11(2)(c) beneficiary-nomination form, naming three beneficiaries: Tracy, the couple's son, and their daughter. In a column for the beneficiaries' "proportion of benefit," Gregory wrote "100%" next to each name.

Gregory and Tracy underwent divorce proceedings in 2014-2015. As part of that process, they drafted a domestic relations order (DRO), which a board attorney described to them as "acceptable as to form," and which the Probate and Family Court subsequently adopted. The DRO entitled Tracy to a portion of Gregory's benefits in the event of his retirement for superannuation or disability. It also stated:

> [Gregory] hereby agrees to designate [Tracy] as the beneficiary for receipt of a death benefit pursuant to [option (d)] . . . . [Gregory] is further required to designate [Tracy] as the beneficiary on the prescribed form issued by [the board].

Gregory did not subsequently file any option (d) beneficiary-nomination form.

Gregory passed away in 2023. Upon an examination of its records, the board determined that Tracy was not entitled to an option (d) allowance. The board decided further to issue the section 11(2)(c) refund to Gregory's estate. Tracy timely appealed.

II

At the time of the divorce, Gregory, Tracy, and the judge of the Probate and Family Court all clearly intended to arrange for Tracy to be eligible for an option (d) allowance. The Legislature made such an allowance contingent on the beneficiary being nominated on a "prescribed form." The essential question is whether the DRO itself satisfied that requirement.

A binding precedent establishes that the answer is no. The DRO issued in that case went so far as to state that the member "hereby designates" his divorcee as his beneficiary. Even so, the Contributory Retirement Appeal Board wrote:

> [T]he . . . DRO cannot be considered . . . a "prescribed form." . . . [T]he DRO was a court order . . . . The requirement that beneficiaries and option elections be made on prescribed forms is important for the sound administration of a retirement system, which cannot be placed in the position of examining competing orders and documents in various forms, each purporting to be the definitive expression of the member's intent.

Moore v. Boston Ret. Bd., No. CR-12-73, 2016 WL 11956841, at *4 (Contributory Ret. App. Bd. Sept. 30, 2016), *aff'd*, No. 1784CV00244 (Super. Ct. Dec. 13, 2017). It follows that the board was correct as a matter of law that it could not pay Tracy an option (d) allowance.[1]

III

Gregory did use a prescribed form to nominate section 11(2)(c) beneficiaries. The question is whether that form was valid. Minor irregularities on a prescribed form are not necessarily fatal: the test is whether the member has "substantially complied" with the form's instructions. *See Reis v. New Bedford Ret. Bd.*, No. CR-07-391 (Div. Admin. Law App. Mar. 12, 2009, *aff'd in pertinent part*, Contributory Ret. App. Bd. Nov. 3, 2009); *Smith v. Contributory Ret. Appeal Bd.*, No. 05-3364 (Super. Ct. May 7, 2007); *Carlton v. State Bd. of Ret.*, No. CR-13-478, at *9 (Div. Admin. Law App. Jan. 26, 2018).

Gregory obeyed the requirements of his form in most respects. The problem is that he asked the board to allot 100% of his section 11(2)(c) refund to each of three individuals. This

[1] This case demonstrates that parties and attorneys involved in obtaining DROs must take care to ensure that the orders' terms are implemented. A non-member generally should be able to ascertain whether the member has filed the agreed-upon forms through inquiries or record requests to the board. Remedies in the event of a breached DRO generally need to be sought in the Probate and Family Court. *See Early v. State Bd. of Ret.*, 420 Mass. 836, 842 (1995); *Jump v. State Bd. of Ret.*, No. CR-17-1056, at *14 (Div. Admin. Law App. June 14, 2019).

instruction created a critical ambiguity, because it "could be construed as creating either contingent or co-beneficiaries." *Henninger v. Standard Ins. Co.*, 332 F. App'x 557, 559 (11th Cir. 2009). Gregory might have intended to split his refund among his beneficiaries in equal shares; but he also might have meant to create a hierarchy among the beneficiaries, with each one receiving 100% of the refund *if* the beneficiaries named higher on the list are unavailable. *See also Metropolitan Life Ins. Co. v. Epps*, No. 14-cv-1981, 2015 WL 11347595 (N.D. Ga. Oct. 19, 2015); *Reyes v. Chasar*, No. 11-cv-6988, 2013 WL 1809139 (E.D. Pa. Apr. 29, 2013); *Security Mut. Life Ins. Co. of New York v. Amira-Bell*, 995 N.W.2d 139 (Mich. App. 2022).

A retirement board faced with an ambiguous nomination form "should attempt to comply as best as possible with the decedent's apparent wishes." *Blakeslee v. State Bd. of Ret.*, No. CR-19-0409, 2023 WL 3547615, at *3 (Div. Admin. Law App. May 23, 2023). Some members' instructions may become comprehensible and therefore implementable in light of "extrinsic evidence." *Id.* But an attempted nomination cannot be said to have substantially complied with the prescribed form's requirements if ultimately "the decedent's intent cannot be proven." *Id.*

No documentary evidence in the record sheds light on the results that Gregory intended to achieve through his section 11(2)(c) form. Tracy also has outlined no anticipated testimony pertinent to that issue. She therefore possesses no "reasonable expectation" of proving Gregory's intentions at an evidentiary hearing. *See Goudreau v. Nikas*, 98 Mass. App. Ct. 266, 269-70 (2020). With those intentions remaining indiscernible, the board was correct as a matter of law to set aside Gregory's nomination form and pay the refund to his estate.

IV

In view of the foregoing, it is hereby ORDERED that the motion for summary decision is ALLOWED. Summary decision is hereby entered to the effect that the board's decision is AFFIRMED.[2]

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

[2] Tracy expresses confusion in her submissions about the person or address to which the board has been mailing estate-related paperwork. The board is directed to provide Tracy with information about this point to the extent possible and permissible. *See* 801 C.M.R. § 1.01(8)(g).