

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Deborah Tierney,
Petitioner

v.

Docket No. CR-21-0495

State Board of Retirement,
Respondent

Danielle Barbosa and Joseph Chaput,
Party-Respondents¹

Appearance for Petitioner:

Deborah Tierney, *pro se*

Appearance for Respondent:

Brendan E. McGough, Esq.
State Board of Retirement
One Winter Street, 8th Floor
Boston MA 02108

Appearances for Party-Respondents:

Danielle Barbosa, *pro se*
Joseph Chaput, *pro se*

Administrative Magistrate:

Timothy M. Pomarole, Esq.

¹ Ms. Barbosa and Mr. Chaput were joined pursuant to 801 CMR (6)(f) in response to a motion to join necessary parties filed by the Board. As discussed in greater detail below, Ms. Tierney's late husband nominated a minor, S. (a pseudonym), as the beneficiary of his funds on account with the Massachusetts State Employees' Retirement System. Ms. Barbosa is S.'s mother. Mr. Chaput is S.'s grandfather and witnessed the late Mr. Tierney's signature on Mr. Tierney's beneficiary selection form.

SUMMARY OF DECISION

The petitioner is not entitled to claim benefits as a surviving spouse under G.L. c. 32, § 12(2)(d) because she was not living with her husband at the time of his death and has not established “that they had been living apart for justifiable cause” attributable a marital wrong by her late husband.

DECISION

The petitioner, Deborah Tierney, appeals the decision of the State Board of Retirement (“the Board”) that she is not entitled to retirement benefits as a surviving spouse of her late husband, John Tierney, under G.L. c. 32, § 12(2)(d) and that instead his accrued contributions must be paid to his duly nominated G.L. c. 32, § 11(2)(c) beneficiary.

On August 30, 2023, I conducted an in-person hearing at the offices of the Division of Administrative Law Appeals (“DALA”), in Malden, Massachusetts. The hearing was recorded. In addition to Ms. Tierney, three witnesses testified on her behalf: Janice Cowen, Cynthia Connolly, and John Cowen (Ms. Tierney’s mother, sister, and brother, respectively). Mr. Chaput testified on behalf of the respondents. I admitted into evidence Petitioner’s Exhibits 1-9 and Respondents’ Exhibits 1-14.²

A transcript of the hearing was prepared. On December 4, 2023, the Board submitted a post-hearing brief, whereupon the record was closed. No other post-hearing submissions were filed.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

² The Respondents’ Exhibits were submitted by the Board. The other Respondents did not file separate exhibits.

1. Mr. Tierney and Ms. Tierney were married on October 18, 1998. They remained married until his death. (Petitioner's Exhibits 1 & 2).

2. Mr. Tierney was employed at the Massachusetts Department of Transportation ("Mass DOT") beginning on or about August 2, 1999. (Respondents' Exhibit 3).

3. Mr. Tierney developed alcohol problems after he and Ms. Tierney got married. These problems worsened when he began his employment at Mass DOT. Mr. Tierney would drink at home and, although he was by all accounts an amiable person while sober, it appears that he could be belligerent while intoxicated. Ms. Tierney suffered physical and verbal abuse by Mr. Tierney. (Tierney Test.; Connolly Test.; John Cowan Test.).

4. On August 2, 1999, John Tierney completed a "Nomination of Beneficiary" form. On that form, he designated his stepson, Jason Webster ("Mr. Webster"), as his sole beneficiary.³ Mr. Webster is Ms. Tierney's son. (Tierney Test.; Petitioner's Exhibit 4).⁴

5. In September 2009, Mr. Tierney, Ms. Tierney, and Mr. Webster all lived together in Hopedale, Massachusetts. They lived in a duplex owned by Ms. Tierney's parents. The Tierney/Webster home was attached to the parents' home via a common

³ Mr. Webster was a minor in 1999. During the timeframes most relevant to this appeal, 2009 and 2010, Mr. Webster was an adult. (*See* Tierney Test. (stating that Mr. Webster was born in 1986)).

⁴ Mr. Tierney was originally a member of the Mass. Turnpike Authority Retirement System. Members in that system were transferred to the Massachusetts State Employees' Retirement System ("MSERS") in 2010.

wall. (Tierney Test.).

6. On September 3, 2009, Mr. Webster stabbed Mr. Tierney in the abdomen.⁵ According to the police report, Mr. Tierney told the police that he and Mr. Webster had had an argument about beers in the refrigerator. When the responding police officer arrived at the scene, he saw Mr. Tierney bleeding from his head and abdomen and lying in a pool of blood. Mr. Tierney was transported to Milford Regional Medical Center and then transferred to UMass Memorial due to the seriousness of his injuries. (Respondents' Exhibit 13).

7. In the immediate aftermath of the stabbing incident, Ms. Tierney's primary concern was her gravely injured husband rather than her son. (Tierney Test.).

8. Mr. Webster was arrested and charged with: (1) assault to murder, in violation of G.L. c. 265, § 15; (2) armed assault to murder, in violation of G.L. c. 265, § 18(b); (3) assault and battery with a dangerous weapon, in violation of G.L. c. 265, § 15A(b); and (4) assault and battery, in violation of G.L. c. 265, § 13A(a). He was placed in pre-trial custody. (Respondents' Exhibit 13).

9. On April 2, 2010, Mr. Webster pleaded guilty to: (1) assault and battery with a dangerous weapon, in violation of G.L. c. 265, § 15A(b); and (2) assault and battery, in violation of G.L. c. 265, § 13A(a). Later that month, Mr. Webster was sentenced to a two-year term of probation, whereupon he was released from pre-trial custody. (Respondents' Exhibit 13).

10. Following his April 2010 release from custody, Mr. Webster returned to

⁵ The police report states that Mr. Tierney was also stabbed in the head. (Respondents' Exhibit 13). Mr. Chaput testified that Mr. Tierney was kicked in the head by a steel toe boot. (Chaput Test.).

live again with his mother and stepfather at the Hopedale residence. (Tierney Test.).

11. Mr. Tierney felt that Ms. Tierney took her son's side following the stabbing incident and that she blamed Mr. Tierney for what had happened. (Chaput Test.). Based on Ms. Tierney's own testimony, I find that Mr. Tierney's assessment was understandable:

- Ms. Tierney testified that she did not know if her son stabbed Mr. Tierney, adding that no weapon was ever found and that the police did not find any bloody clothing.⁶
- Ms. Tierney testified that she did not know if Mr. Tierney was found lying in a pool of his own blood.
- When Ms. Tierney eventually acknowledged that Mr. Webster "probably did" stab Mr. Tierney, she quickly added: "from the bottom of my heart, John also abused him very badly. John attacked him."⁷
- When asked about her relationship with Mr. Tierney in the aftermath of this incident, Ms. Tierney testified: "[T]here were some things that he said to me, but I didn't want to bring all this stuff up."
- Ms. Tierney characterized her response to the incident as follows: "I was not sticking up for John and I was not sticking up for Jason." Instead, she "blamed the both of them, and it had to do with alcohol."⁸
- When addressing the aftermath of a *subsequent* incident, in which Mr. Webster threatened Mr. Tierney with a knife (discussed in paragraph 14, below), Ms. Tierney

⁶ The police reports, which Ms. Tierney has read (Tierney Testimony), indicate that Mr. Webster had changed his clothes at a friend's home. When police initially sought to search that home, they were not granted full access. The police later obtained a search warrant and searched the dwelling, but they did not find any bloody clothing. (Respondents' Exhibit 13). The most plausible inference to be drawn from the police reports is that Mr. Webster's friend disposed of the incriminating clothing.

⁷ Janice Cowan had a striking assessment of the incident: "I know John Tierney well enough that he probably scratched himself just to give a reason." (Janice Cowan Test.).

⁸ I do not credit Ms. Tierney's testimony that Mr. Tierney "more or less" admitted that he "provoked" a stabbing that left him in a pool of his own blood.

testified that “there was no way Jason, my son, was going to go back [to the home],” because Mr. Webster “was petrified” of Mr. Tierney.

(Tierney Test.).

Although Ms. Tierney indicated that she had staked out a position of neutrality, Mr. Tierney would have been justified in concluding that her expressions of even-handedness were, under the circumstances, tantamount to shielding and supporting Mr. Webster at his expense. Indeed, Ms. Tierney’s testimony that “John also abused him very badly. John attacked him” suggests that Ms. Tierney’s avowals of neutrality were at best equivocal.

12. In the aftermath of the assault, Mr. Tierney expressed fear of Mr. Webster and stated that he needed to move out. Mr. Tierney did not move out, however. Mr. Chaput credibly testified that Mr. Tierney sometimes had difficulty following through on things. Mr. Tierney did not think making Mr. Webster move out was a viable option because he thought Ms. Tierney was taking Mr. Webster’s side. (Chaput Test.).

13. Mr. Tierney, Ms. Tierney, and Mr. Webster subsequently moved to a residence in Milford, Massachusetts. (Tierney Test.).

14. On November 3, 2010, another incident occurred between Mr. Webster and Mr. Tierney. Mr. Tierney told police that Mr. Webster had threatened him with a knife. As a result of this incident, Mr. Webster was charged with (1) intimidation of a witness, in violation of G.L. c. 268, § 138; (2) making a threat to commit a crime, in violation of G.L. c. 275, § 2; and (3) assault with a dangerous weapon in violation of G.L. c. 265, § 158. Mr. Webster was ultimately placed on pre-trial probation and ordered to stay away from Mr. Tierney and the Milford residence. (Respondents’ Exhibit 13).

15. Ms. Tierney acknowledged that she and Mr. Tierney experienced marital

difficulties after this incident. (Tierney Test.).

16. A few weeks after the incident, Ms. Tierney moved out and went to live with her mother. (Tierney Test.).

17. Mr. Tierney was relieved to not have to deal with Mr. Webster or Ms. Tierney anymore. (Chaput Test.).

18. On or about February 18, 2011, the Board received a "Change of Beneficiary Form" from Mr. Tierney in which he names S. as his beneficiary. Mr. Tierney's signature was witnessed by Mr. Chaput, S.'s grandfather. (Petitioner's Exhibit 4).

19. S. was four years old at the time. Mr. Tierney and Mr. Chaput were close friends and enjoyed an almost fraternal relationship. Mr. Chaput visited several times a week for approximately ten years after Mr. Tierney became sick from leukemia. Mr. Tierney also had a close relationship with Mr. Chaput's family and spent the holidays with them. (Chaput Test.).

20. From the time of their separation up to Mr. Tierney's death, Mr. Tierney and Ms. Tierney had some communications, but the communications were infrequent. (Tierney Test.). I do not credit Ms. Tierney's vague suggestion that "there were hopes we definitely would possibly get back together." (Respondents' Exhibit 2).

21. On April 22, 2021, Mr. Tierney died while still a member in service with MSERS. (Petitioner's Exhibit 2).

22. On or about May 27, 2021, Ms. Tierney applied for benefits pursuant to G.L. c. 32, § 12(2)(d). (Petitioner's Exhibit 1).

23. Ms. Tierney completed a beneficiary claim form. The form asks whether

the claimant and the member were living together on the date of the member's death and, if they were not, to provide a statement explaining why. Ms. Tierney responded that they had not been living together and provided, in relevant part, the following statement: "The reason why John and I were not living together was because he was an alcoholic. He was verbally abusive and physically abusive to me and my son." (Petitioner's Exhibit 1).

24. On October 28, 2021, the Board reviewed Ms. Tierney's application for benefits pursuant to G.L. c. 32, § 12(2)(d) and voted to deny that request, instead awarding the funds in Mr. Tierney's annuity savings account to S., Mr. Tierney's named beneficiary. (Respondents' Exhibit 1).

25. The Board notified the parties of its decision in a letter dated November 1, 2021. (Petitioner's Exhibit 5).

26. On or about November 4, 2021, Ms. Tierney filed a timely appeal to DALA. (Petitioner's Exhibit 6).

CONCLUSION AND ORDER

In this appeal, Ms. Tierney challenges (1) the Board's conclusion that S. is entitled to a lump sum payment of Mr. Tierney's funds on account with the MSERS; and (2) the Board's determination that she is not entitled to claim benefits as Mr. Tierney's surviving spouse.

As to the first issue, it is not clear that Ms. Tierney has standing to challenge Mr. Tierney's beneficiary designation. Disallowance of Mr. Tierney's designation would have no impact on her surviving spouse claim. Nor would disallowance of the designation allow her to claim benefits under § 11 because Mr. Tierney did not name her as a beneficiary.

Even assuming for the sake of this decision that Ms. Tierney has standing, her argument fails on the merits. Under G.L. c. 32, § 11(2)(c), a member of the MSERS “upon his written notice on a prescribed form filed with the board prior to his death, may nominate, and from time to time change, one or more beneficiaries to receive ... any sum becoming payable under the provisions of this subdivision on his death.” G.L. c. 32, § 11(2)(c) (emphasis added). The *gravamen* of Ms. Tierney’s argument is that Mr. Tierney did not follow the instructions on the “prescribed form.” First, Ms. Tierney asserts that the form states that only minors who are “kindred” may be designated as beneficiaries. This is not correct. The form states: “A beneficiary nominated *by* a minor must be of his kindred.” (Petitioner’s Exhibit 4 (emphasis supplied)).⁹ Her next contention, that the form requires the beneficiary to be a relative, is also incorrect. The form states that only certain individuals may be named as beneficiaries of a monthly survivor allowance pursuant to G.L. c. 32, § 12(2)(d). (*Id.*). This limitation does not apply to lump sum payments under G.L. c. 32, § 11(2)(c). Finally, Ms. Tierney takes issue with the fact that Mr. Chaput witnessed Mr. Tierney’s signature. The form provides that beneficiaries may not witness the member’s signature, but Mr. Chaput is not a beneficiary.

Turning to Ms. Tierney’s claim as a surviving spouse, G.L. c. 32, § 12(2)(d) gives a surviving spouse the right to claim as a retirement beneficiary “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

⁹ Attentive readers may be surprised by the suggestion that a minor could be a member of the MSERS. This instruction is drawn from the following language in G.L. c. 32, § 11(2)(c): “Any member [may nominate a beneficiary or beneficiaries] provided, that any such beneficiary or beneficiaries nominated by a minor shall be of his kindred.” This is evidently a vestige from an earlier era predating more robust child labor standards.

than desertion or moral turpitude on the part of the spouse.” A surviving spouse who did not reside with the deceased member at the time of his or death has the burden of establishing justifiable cause. *See Hill v. State Bd. of Ret.*, CR-07-605, 2009 WL 5908128, at *6 (DALA June 18, 2009) (“The Petitioner has the burden of proof on each element necessary to establish entitlement to a benefit under Chapter 32.”).

The meaning of “justifiable cause” in this context is drawn from “the law of divorce and separate support.” *Dunn v. CRAB*, 46 Mass. App. Ct. 359, 364 (1999) (citations omitted). It requires “proof of actual marital misconduct” on the part of the deceased spouse. *Id.* (citations omitted). Marital misconduct includes “ill treatment, misconduct, or failure of marital duty.” *Goldberg v. Goldberg*, 237 Mass. 279, 280 (1921). It also encompasses “habits of intoxication, so gross and confirmed as to render a continuance of cohabitation intolerable.” *Lyster v. Luster*, 111 Mass. 327, 330 (1873).

To establish justifiable cause for the separation, the surviving spouse must not only establish a marital wrong by his or her late spouse, but also that this marital wrong was the cause of the separation. *Defortitis v. Taunton Ret. Bd.*, CR-19-52, 2023 WL 4118705, at *4-5 (DALA June 16, 2023) (citations omitted).

In this case, Mr. Tierney was an alcoholic and was physically and verbally abusive. If Mr. Tierney’s conduct was the reason he and his wife came to live apart, his conduct would constitute justifiable cause for the separation. The resolution of this case thus turns on causation: has Ms. Tierney met her burden of proving, by a preponderance of the evidence, that Mr. Tierney’s intoxication and abuse were the cause of the separation? In brief, the answer is “no.” Although I have found that Ms. Tierney suffered from abuse by Mr. Tierney while he was under the influence of alcohol and do

not wish to minimize what she experienced, Ms. Tierney has not met her burden of proving that the separation occurred because of that abuse. Rather, I find it more likely that the separation was instead precipitated by Mr. Webster's assaultive behavior and Ms. Tierney's responses to this fraught and challenging situation.

As noted above, I credit Mr. Chaput's testimony that Mr. Tierney feared Mr. Webster and that Ms. Tierney's reaction to Mr. Webster's conduct created an untenable marital environment for Mr. Tierney. Moreover, the separation took place only a few weeks after the November 2010 incident between Mr. Webster and Mr. Tierney. This temporal proximity constitutes at least some circumstantial evidence that it was precipitated by the November 2010 incident.

As for Ms. Tierney's proffered explanation for the separation, although I credit her testimony that she experienced verbal and physical abuse, the account she provides of her relationship with her husband in the wake of the September 2009 and November 2010 incidents is less convincing. For example, when asked about their relationship in the aftermath of the September 2009 stabbing incident, she responded: "It was fine after that." (Tierney Test.). She then stated that the incident "had nothing to do with our relationship." (Tierney Test.). I find it difficult to credit the suggestion that the deadly assault perpetrated by her son would have no effect on the marital relationship --- particularly in light of her apparent "bothsidesism" in response, which may have been understandable as a maternal reaction, but would, I imagine, strain or break her victimized husband's attachment to the marriage.

On balance, I find it more likely that the couple separated because of the 2009 and 2010 incidents than because of Mr. Tierney's intoxication and abusive behavior. That

being the case, the preponderance of the evidence does not establish that the spouses' separation was caused by a marital wrong by Mr. Tierney.¹⁰

My conclusion that the separation was not caused by a marital wrong on the part of Mr. Tierney should not be construed to imply that I find that Ms. Tierney engaged in a marital wrong herself or is otherwise blameworthy. I need not and do not make any such finding.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS,

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: April 12, 2024

¹⁰ One point of clarification: I have found here that the version of events proffered by the Board is more likely than that advanced by Ms. Tierney. As a *legal* matter, however, a determination that a surviving spouse has failed to meet his or her burden of establishing justifiable cause is not contingent on the acceptance (or even the identification) of an alternative explanation for the separation. A claimant spouse's theory may fail to persuade even if no convincing rival explanation emerges.