

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shirley L. Kenney	:	
	:	
v.	:	No. 1334 C.D. 2009
	:	Argued: December 8, 2009
City of Wilkes-Barre Police	:	
Pension Fund,	:	
Appellant	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: February 3, 2010

The City of Wilkes-Barre Police Pension Fund (Pension Fund) appeals from the order of the Court of Common Pleas of Luzerne County (trial court), which granted Shirley L. Kenney's (Mrs. Kenney) Motion for Declaratory Judgment and ordered the Pension Fund to reinstate monthly benefit payments. We reverse.

The undisputed facts of this case are as follows. Mrs. Kenney and Bernard J. Kenney (Mr. Kenney) were married on August 5, 1972. Mr. Kenney worked as a police officer for the City of Wilkes-Barre (City) and earned pension benefits subject to the terms and conditions of the City of Wilkes-Barre Pension Ordinance (Pension Ordinance). Mr. Kenney retired from the police force in 1992 and thereafter was entitled to receive monthly benefits from the Pension Fund.

The Kenneys separated on May 10, 1997 and were divorced on August 24, 2000. On December 12, 2003, the divorce court entered a qualified domestic relations order (DRO) stating:

[Mrs. Kenney] is entitled to a portion of [Mr. Kenney's] accumulated deductions under the Plan as of May 10, 1997. ... [Mrs. Kenney] shall receive the sum of \$77,174.49 or 50% of [Mr. Kenney's] monthly benefit up to the sum of \$77,149.49.

Reproduced Record (R.R.) at 11. Based upon the DRO, the Pension Fund began making payments of \$546.43 per month to Mrs. Kenney from Mr. Kenney's pension benefits effective January 4, 2004. When Mr. Kenney died on December 16, 2006, the Pension Fund ceased making these monthly payments to Mrs. Kenney.

On January 29, 2009, Mrs. Kenney filed a Motion for Declaratory Judgment with the trial court requesting a declaration that she is entitled to continue receiving payments from the Pension Fund out of her former husband's pension benefits pursuant to the DRO despite the fact that Mr. Kenney passed away in 2006. Both parties submitted briefs. The trial court found that the DRO contained a clear directive for the Pension Fund to follow and found no basis for the Pension Fund to cease making payments to Mrs. Kenney. By order dated June 9, 2009, the trial court granted Mrs. Kenney's Motion for Declaratory Judgment and ordered the Pension Fund to reinstate monthly benefit payments.

The Pension Fund now appeals to this Court.<sup>1</sup> The Pension Fund raises the issue of whether a DRO requires a municipal employer to pay survivor

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<sup>1</sup> Our scope of review in a declaratory judgment action is limited to determining whether the trial court's findings of fact are supported by substantial evidence, whether an error of law was committed, and whether the trial court abused its discretion. Apollo-Ridge School District

(Continued....)

benefits to an ex-spouse where the pension contract under which the employee-spouse earned pension benefits does not include a promise of survivor rights in favor of an ex-spouse and where, as a result, the DRO would alter the structure of the pension contract to require a form of benefit not otherwise provided by contract.

The Pension Fund contends that once Mr. Kenney died, the Pension Fund was not obligated to pay survivor benefits to his ex-spouse, regardless of the DRO. We agree.

Pennsylvania has long had a policy giving priority to the enforcement of support orders. Young v. Young, 507 Pa. 40, 488 A.2d 264 (1985). As a general rule, a pension may be attached to satisfy an order whose purpose is to enforce an obligation of support, such as a DRO. Id.

In Maloney v. Maloney, 754 A.2d 36 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 678, 775 A.2d 810 (2001), an ex-wife filed suit seeking an order directing the borough to implement a DRO and an order holding the borough in contempt. Pursuant to the terms of the divorce decree, the divorce court entered a DRO, which awarded the ex-wife 50% of her ex-husband's accrued pension under the borough's pension plan. The DRO was sent to the borough, but, the ex-husband died before implementation. Maloney. Following the ex-husband's death, the borough refused to make any payments to the ex-wife, contending that under the terms of the applicable pension fund ordinance an ex-spouse is not entitled to survivor's benefits. Id. The trial court held the borough in contempt and ordered the borough to comply with the DRO. Id. On appeal to this Court, we reversed. Id.

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v. Tax Claim Bureau of Indiana, 595 A.2d 217 (Pa. Cmwlth. 1991).

With regard to the contempt, we determined that the DRO did not direct the borough to do anything, but merely acknowledged the ex-wife's entitlement to 50% of the ex-husband's pension. Id. There was no applicable statutory authority imposing an obligation upon the borough to approve, disapprove or otherwise act upon receipt of a DRO. Id. Without a clear directive in the DRO itself and no statutory authority imposing an obligation upon the Borough to take specific action upon receipt of the DRO, we concluded that the trial court erred in finding the borough in contempt for refusing to comply with the DRO.

We further determined that the trial court erred in ordering the borough to implement the DRO after the ex-husband's death. Id. By ordering the borough to pay survivor benefits to an ex-spouse when such benefits have not been provided for in the ordinance, the trial court unlawfully altered the benefit scheme of a pension plan. Id. We opined that a DRO shall be qualified or approved only if it requires the plan to provide a benefit or option already provided for by the plan and requires the plan to provide no more than the total amount of benefits that the member would otherwise be entitled to receive. Id. A DRO may not alter the benefit structure of a municipal pension plan. Id. Only the specific rights provided by the pension plan may be distributed as marital property in a divorce action. Id.

Here, the Kenney DRO divided the pension benefits that Mrs. Kenney was entitled to receive under the terms of the Pension Ordinance. To the extent that Mr. Kenney received payments from the Pension Fund, the DRO attached a portion of such payments in favor of Mrs. Kenney. For three years the Pension Fund honored the DRO granting a fixed amount of benefits to Mrs. Kenney. Although the DRO in this case awarded Mrs. Kenney a specific amount and was implemented by the Pension Fund before Mr. Kenney's death, Maloney is

nevertheless applicable. Mrs. Kenney's right to receive pension payments from the Pension Fund was completely dependent upon Mr. Kenney's right to receive such payments under the Pension Ordinance. Once Mr. Kenney died, his right to pension payments terminated under the Pension Ordinance and the DRO became a legal nullity because the pension no longer existed. While we sympathize with Mrs. Kenney's predicament, there is no provision in the Pension Ordinance that grants an ex-spouse the right to survivor pension payments. To conclude otherwise would impermissibly alter the benefit structure of the Pension Ordinance. We, therefore, conclude that the trial court erred in ordering the Pension Fund to continue to make payments to Mrs. Kenney.

Accordingly, the order of the trial court is reversed.

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JAMES R. KELLEY, Senior Judge

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**ORDER**

AND NOW, this 3rd day of February, 2010, the order of the Court of Common Pleas of Luzerne County, at Docket No. 1779 of 2009, dated June 9, 2009 is REVERSED.

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JAMES R. KELLEY, Senior Judge