ADVANCE SHEET HEADNOTE
April 11, 2022

2022 CO 17

No. 21SC62, *In re Marriage of Mack*—Public Employment Retirement Benefits—Dissolution of Marriage—Equitable Division of Assets.

Members of Colorado's Public Employees' Retirement Association ("PERA") are allowed three option choices for distribution of their retirement benefits. Option 1 allows for monthly payments to the retiree, and when the retiree dies, the payments cease. Options 2 and 3 similarly allow for monthly payments to the retiree. Under options 2 and 3, however, the retiree names a cobeneficiary, and when the retiree dies, the named cobeneficiary continues to receive monthly benefit payments for life. Option choices are generally final, but section 24-51-802(3.8), C.R.S. (2021), provides that if the retiree chose either option 2 or 3 and the retiree's spouse was named cobeneficiary at retirement, the court presiding over the retiree's dissolution of marriage action "shall have the jurisdiction to order or allow" the retiree to remove the spouse as named cobeneficiary and prompt a conversion to option 1 benefits.

In this case, the supreme court considers whether section 24-51-802(3.8) empowers the divorcing retiree to unilaterally remove the former spouse as named cobeneficiary and convert to option 1 or whether that power lies with the trial court.

The court concludes that section 24-51-802(3.8) vests the trial court, not the retiree, with the authority to remove the former spouse as cobeneficiary and facilitate a conversion to option 1. Accordingly, the court affirms the judgment of the court of appeals, albeit on different grounds.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 17

Supreme Court Case No. 21SC62
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1816

In re the Marriage of

Petitioner:

Robert J. Mack,

and

Respondent:

Deborah B. Mack.

Judgment Affirmed
en banc
April 11, 2022

Petitioner Robert J. Mack, pro se
Colorado Springs, Colorado

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ**, **JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART, JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 When members of the Public Employees' Retirement Association ("PERA") apply for retirement, they can choose between three options for benefit distribution. *See* § 24-51-801(1)(a)–(c), C.R.S. (2021). Option 1 results in a higher monthly benefit payment, but when the retiree dies, the monthly payments cease. § 24-51-801(1)(a). Options 2 and 3 result in a lower monthly benefit payment during the retiree's life, but when the retiree dies, the retiree's named cobeneficiary continues to receive monthly payments. § 24-51-801(1)(b), (c).

¶2 Generally, a retiree's option choice is final. *See* § 24-51-802(1), C.R.S. (2021). However, retirees who are party to a dissolution of marriage action are afforded a narrow exception to this rule. *See* § 24-51-802(3.8). Pursuant to section 24-51-802(3.8), if a retiree chose either option 2 or 3 at retirement and the retiree's then-spouse was named cobeneficiary, "the court shall have the jurisdiction to order or allow [the] retiree . . . to remove the spouse that was named cobeneficiary . . . in which case an option 1 benefit shall become payable."

¶3 In this case, we consider whether section 24-51-802(3.8) empowers a divorcing retiree to unilaterally remove a former spouse as named cobeneficiary

and convert[1] to option 1 retirement benefits. Assuming without deciding that this issue is adequately preserved for appeal, we answer this question in the negative. Instead, applying the statute's plain language, we hold that section 24-51-802(3.8) vests the trial court, not the retiree, with the authority to remove the former spouse as cobeneficiary and facilitate a conversion to option 1. Therefore, we affirm the judgment of the court of appeals, albeit on different grounds.[2]

I. Facts and Procedural History

¶4 Robert Mack ("Husband") and Deborah Mack ("Wife") were married in 1987. Shortly after the two married, Husband began working for the City of Colorado Springs. Throughout the marriage, Husband contributed to his retirement account through his PERA plan.

¶5 When Husband retired in 2012, the parties were still married. At that time Husband was able to choose between three retirement benefit option plans. *See* § 24-51-801(1)(a)–(c). Option 1 pays the retiree a monthly benefit for the retiree's

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[1] Although the issues that we granted certiorari to review are framed using the terms "revert" and "reversion," we find that "convert" and "conversion" are more apropos when referring to the shift to option 1 benefits because such a shift results in an entirely new benefit option choice, not one to which the retiree is returning.

[2] The matter need not be remanded because Husband conceded during oral argument that, regardless of this court's ruling regarding benefit option choice, the monthly benefit payments were to be divided equally between Husband and Wife.

lifetime and, upon the retiree's death, the payments cease. § 24-51-801(1)(a). Option 2 pays the retiree a monthly benefit for the retiree's lifetime and, upon the retiree's death, half of the monthly benefit payment then becomes payable to the retiree's named cobeneficiary for life. § 24-51-801(1)(b). Option 3 is similar to option 2, but upon the retiree's death, the entire monthly benefit payment becomes payable to the named cobeneficiary for life. § 24-51-801(1)(c). Because options 2 and 3 provide for the cobeneficiary to receive benefits in the event of the retiree's death, a retiree who chooses option 2 or 3 receives less money each month than a retiree who chooses option 1. *See* § 24-51-801(2) ("Options 2 and 3 shall be the actuarial equivalent of option 1."). Husband chose an option 3 benefit plan and named Wife as his cobeneficiary.

¶6 In 2018, Wife petitioned for dissolution of the marriage. The case proceeded to a permanent orders hearing, wherein Husband and Wife contested, inter alia, how to divide the PERA retirement benefits. Although he cited no supporting statutory authority, Husband requested that Wife be removed as cobeneficiary and that his plan convert to an option 1 benefit plan.

¶7 The district court rejected Husband's request. Instead, the court determined that Husband's PERA account was marital property and that it must be equitably divided between Husband and Wife. In so doing, the court ordered that Wife remain an option 3 beneficiary on the account. Then, complying with the court's

order and pursuant to section 14-10-113(6)(f), C.R.S. (2021)—which requires that the parties in a dissolution of marriage action execute a "written agreement" to authorize the court's division of public employment benefits—Husband and Wife executed a document specifying that Husband was not allowed to remove Wife as cobeneficiary on the account and that they would split Husband's monthly benefit payments equally.

¶8 Husband subsequently moved for post-trial relief, asserting that the court's decision was unfair because his monthly benefit payments under option 3 were hundreds of dollars less than they would be under option 1. After Wife responded, Husband replied with a new argument. Specifically, Husband cited section 24-51-802(3.8), which provides that, in a dissolution of marriage action, "the court shall have the jurisdiction to order or allow [the] retiree . . . to remove the spouse that was named cobeneficiary by the retiree at retirement, in which case an option 1 benefit shall become payable." Husband argued that this statute gave him an "absolute right" to unilaterally remove Wife as his cobeneficiary and to convert his benefit plan to option 1. The district court denied the motion, finding that Husband "fail[ed] to state any basis to amend the Court's judgement other than his disagreement with the result," and that it had "already considered these arguments."

¶9 Husband appealed, and a unanimous division of the court of appeals affirmed in an unpublished opinion. *In re Marriage of Mack*, No. 19CA1816, ¶ 1 (Dec. 10, 2020). The division held that Husband had failed to preserve his "absolute right" argument under section 24-51-802(3.8) because he had not raised it until his reply in support of his post-trial motion. *Id.* at ¶¶ 27–28. Thus, the division declined to interpret the statute. *Id.* at ¶ 28.

¶10 We granted certiorari[3] and now affirm the division on different grounds.

II. Analysis

¶11 We begin by assuming, without deciding, that the issue of statutory interpretation is preserved. We then discuss the applicable standard of review and rules of statutory construction. Finally, we analyze section 24-51-802(3.8), and, applying the statute's plain language, we hold that it vests the trial court, not the

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[3] Specifically, we granted certiorari to review the following issues:

1. [REFRAMED] Whether the court of appeals division below erred in concluding that a PERA member waived his argument that he had a right to remove his spouse as a cobeneficiary from his PERA retirement plan and to have the plan revert to a single life benefit option pursuant to section 24-51-802(3.8), C.R.S. (2020).
2. [REFRAMED] Whether the district court erred in denying a PERA member the right to remove a cobeneficiary spouse from his PERA retirement plan and in thereby preventing the plan's reversion to a single life benefit option pursuant to section 24-51-802(3.8), C.R.S. (2020).

retiree, with the authority to remove the former spouse as cobeneficiary and facilitate a conversion to option 1.

A. Issue Preservation

¶12 Usually, "issues not raised in or decided by a lower court will not be addressed for the first time on appeal." *Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 26, 498 P.3d 1106, 1114 (quoting *United Water & Sanitation Dist. ex rel. United Water Acquisition Project Water Activity Enter. v. Burlington Ditch Reservoir & Land Co.*, 2020 CO 80, ¶ 37, 476 P.3d 341, 350). But because we conclude that Husband's statutory argument is unavailing, we need not decide whether he preserved the issue for appeal.[4] Therefore, we simply assume that Husband preserved his argument and now address its merits.

B. Interpreting Section 24-51-802(3.8)

1. Standard of Review and Rules of Statutory Construction

¶13 We review questions of statutory interpretation de novo. *Justus v. State*, 2014 CO 75, ¶ 17, 336 P.3d 202, 208. In construing a statute, our goal "is to give effect to legislative intent." *Johnson v. Sch. Dist. No. 1*, 2018 CO 17, ¶ 11, 413 P.3d 711, 715. Therefore, we examine "the entire statutory scheme to give consistent,

[4] Because we assume without deciding that the issue is preserved, we neither reject nor endorse the division's rationale.

harmonious, and sensible effect to all parts[,]" and we apply "words and phrases according to their plain and ordinary meaning." *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.*, 2017 CO 69, ¶ 16, 395 P.3d 788, 792 (quoting *Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶ 24, 382 P.3d 821, 826).

¶14 When the statutory language is clear, we must enforce it as written. *Id.* Only if the language is ambiguous may we resort to other tools of statutory construction. *Munoz v. Am. Fam. Mut. Ins. Co.*, 2018 CO 68, ¶ 9, 425 P.3d 1128, 1130.

2. Section 24-51-802(3.8) Vests Power in the Court, Not in the Retiree

¶15 Under section 24-51-802(1), when a retiree chooses a benefit option and designates a cobeneficiary, those choices are final absent some statutory exception. The provision at issue in this case, section 24-51-802(3.8), affords such an exception to section 24-51-802(1)'s general rule. As relevant here, section 24-51-802(3.8) provides that, in any dissolution action where the retiree chose either option 2 or 3 benefits and the retiree's then-spouse was named cobeneficiary, "the court shall have the jurisdiction to order or allow [the] retiree . . . to remove the spouse that was named cobeneficiary by the retiree at retirement, in which case an option 1 benefit shall become payable."

¶16 The question here is whether a divorcing retiree can trigger the statute's removal-and-conversion mechanism, or whether that power lies only with the presiding court. Husband contends that the language "the court shall have the

jurisdiction to order or allow [the] retiree" to remove the cobeneficiary spouse, *id.*, does not simply enable the court to remove the cobeneficiary but in fact *requires* the court to do so upon the retiree's request. There are four components to Husband's interpretation, none of which we find persuasive.

¶17 First, Husband reads the verbs to "order" and to "allow" as ministerial. He relies on two subsections of Colorado's equitable distribution statute, section 14-10-113. The first, subsection (6)(f), mandates that "[a] court shall have no jurisdiction to enter an order dividing a public employee retirement benefit *except upon written agreement of the parties*." (Emphasis added.) The second, subsection (6)(c)(II)(G), requires that such a written agreement "provide that the alternate payee's rights to payments terminate upon the involuntary termination of benefits payable to the participant,[5] or upon the death of the alternate payee,[6] . . . unless the parties *agree to elect, or have already elected*," an option "that provides for a cobeneficiary benefit to the alternate payee." (Emphasis added.)

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5 Per section 14-10-113(6)(b)(IV), "'[p]articipant' means the person who is an active, inactive, or retired member of the public employee retirement plan."

6 Per section 14-10-113(6)(b)(I), an "[a]lternate payee" is:

> [A] party to a dissolution of marriage, legal separation, or declaration of invalidity action who is not the participant of the public employee retirement plan divided or to be divided but who is married to or was married to the participant and who is to receive, is receiving, or has received all or a portion of the participant's retirement benefit by

¶18 To our understanding, Husband views subsection (6)(c)(II)(G)'s language as confirmation that the retiree can designate, maintain, or remove the spouse as the cobeneficiary in a dissolution action—as long as the parties fulfill the written agreement requirement of subsection (6)(f). In Husband's view, section 24-51-802(3.8) embraces this scenario when it specifies that a court has the jurisdiction to "allow [the] retiree to remove" the named cobeneficiary. But according to Husband, the word "order" in section 24-51-802(3.8) serves a separate purpose. He argues that "order" addresses the scenario where the parties *cannot* agree. That is, in his view, the word "order" provides the court with the necessary jurisdiction to remove the spouse as cobeneficiary (over the spouse's objection) where the parties do not come to a written agreement as required by subsection (6)(f). And so, under Husband's interpretation, section 24-51-802(3.8) requires the court to carry out the retiree's wishes if the retiree wants to remove the spouse as cobeneficiary, even if the spouse does not agree to the arrangement.

¶19 Second, Husband contends that section 24-51-802(3.8) must vest absolute power in the retiree to remove a cobeneficiary spouse because it does not vest any power in the spouse. According to Husband, if the General Assembly did not

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> means of a written agreement as described in paragraph (c) of this subsection (6).

intend for the statute to confer unilateral decision-making power upon the retiree, it would feature limiting language (i.e., language requiring spousal consent or otherwise enshrining the spouse's triggering ability).

¶20 Third, at oral argument, Husband asserted that section 24-51-802(3.8)'s use of the word "shall" indicates that the court has only "limited jurisdiction" to either order or allow a change in the cobeneficiary status upon the request of the retiree. In other words, he contended that because "shall" precedes the court's jurisdictional grant—"the court *shall* have the jurisdiction to order or allow," *id.* (emphasis added)—the power to decide the retiree's cobeneficiary status in a dissolution action ultimately lies with the retiree, not with the court. Essentially, Husband envisions section 24-51-802(3.8)'s jurisdictional language as compulsory: If the retiree asks the court to order or allow a conversion to option 1, the court must—that is, has jurisdiction to—oblige.

¶21 Finally, Husband draws on the legislative history behind section 24-51-802(3.8)'s passage. Husband argues that certain testimony before the Senate Finance Committee reveals that the General Assembly intended for the statute to vest the retiree with the right to remove the spouse as cobeneficiary in a dissolution of marriage action.

¶22 To answer the question of whether the retiree has the final authority to remove the spouse as cobeneficiary, we first turn to the plain language of the

statute at issue: section 24-51-802(3.8). To begin, section 24-51-802(3.8) provides that "the court shall have the jurisdiction to order or allow" the retiree to remove the cobeneficiary and convert to option 1. "Order" and "allow" are both verbs, each with a distinct definition. According to Merriam-Webster, to "order" means to "command," https://www.merriam-webster.com/dictionary/*order* [https://perma.cc/TR99-7DKB], whereas to "allow" means to "permit," https://www.merriam-webster.com/dictionary/*allow* [https://perma.cc/BGL9-P988]. And, importantly, both verbs describe the court's jurisdiction. Thus, contrary to Husband's first contention, section 24-51-802(3.8) provides *the court* with two discrete powers. The first verb—to "order"—ensures that the court can *command* a change in the cobeneficiary designation over a retiree's objection. *See* § 24-51-802(3.8) ("[T]he court shall have the jurisdiction to order . . . a retiree . . . to remove the [cobeneficiary] spouse."). The second verb—to "allow"—ensures that the court can *permit* a retiree to change the cobeneficiary designation and convert to option 1 upon the retiree's request, as long as the court has determined that course of action to be appropriate under the circumstances. *See id.* ("[T]he court shall have the jurisdiction to . . . allow a retiree . . . to remove the [cobeneficiary] spouse."). In both scenarios, the authority to trigger a shift in cobeneficiary status unambiguously lies with the court, not with the retiree.

¶23 For this reason, Husband's second contention also fails. Husband asserts that because section 24-51-802(3.8) does not give the cobeneficiary spouse the power to unilaterally maintain cobeneficiary status, it must therefore provide the retiree with the unfettered right to remove the spouse as cobeneficiary. Yet, as we have already explained, the statute vests such power in the court, not in the parties. Thus, the absence of language limiting the retiree's power is insignificant.

¶24 Husband's third contention fares no better. The word "shall" usually signals a statutory mandate, *see Riley v. People*, 104 P.3d 218, 221 (Colo. 2004), and in this context, the word simply directs that the trial court must, in fact, have the jurisdiction to effect a change in the cobeneficiary status (either by ordering something or allowing something). If, as Husband urges, section 24-51-802(3.8)'s use of "shall" indicated that the court was obligated to do the retiree's bidding, the statute would more naturally read, "Upon the retiree's request, the court shall enter an order allowing the retiree to remove the former spouse as cobeneficiary and convert to option 1 benefits." That, of course, is not how the statute reads. Therefore, contrary to Husband's argument, the use of the word "shall" in section 24-51-802(3.8) does not compel the court to carry out the wishes of the

retiree. Under the plain language of the statute, while the court has the jurisdiction to grant such a request, it is not required to do so.[7]

¶25 Finally, because the language of section 24-51-802(3.8) is unambiguous, we need not address Husband's final contention regarding legislative history. *See Munoz*, ¶ 9, 425 P.3d at 1130 ("Only if the language is ambiguous do we then resort to other interpretive rules of statutory construction; if the language is clear, we apply it as written.").[8]

¶26 Thus, while a retiree may request that the court remove the former spouse as cobeneficiary and facilitate a conversion to option 1 benefits,

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[7] Husband contends that our interpretation renders the last portion of section 24-51-802(3.8)—which provides that "[t]he retiree may elect option 2 or 3 upon remarriage and designate the spouse as cobeneficiary"—meaningless. Based on the statute's plain language, however, the last portion of the subsection is not an independent right, but rather, a contingent one. Indeed, a remarrying retiree may elect option 2 or 3 and designate the new spouse as cobeneficiary, but only if the trial court *previously* ordered or allowed the retiree to remove the former spouse as cobeneficiary and prompted a conversion to option 1 benefits. *See* § 24-51-802(3.8).

[8] We note that our reading of section 24-51-802(3.8) is consistent with the legislature's directive that the trial court has "great latitude" to equitably divide marital property. *In re Marriage of Hunt*, 909 P.2d 525, 537 (Colo. 1995); *see also* § 14-10-113(1) ("[T]he court . . . shall divide the marital property . . . in such proportions as the court deems just[.]"). Husband's reading of section 24-51-802(3.8)—one that allows a retiree to unilaterally remove the cobeneficiary designee during a dissolution action—would significantly impact the trial court's power to equitably divide assets.

section 24-51-802(3.8) does not obligate the court to carry out the retiree's wishes. Instead, applying the plain language of the statute, we hold that section 24-51-802(3.8) vests the trial court, not the retiree, with the authority to remove the former spouse as cobeneficiary and facilitate a conversion to option 1.

III. Conclusion

¶27 For the foregoing reasons, we affirm the judgment of the court of appeals, albeit on other grounds.