

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY J. BEDDELL	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	Case No. 2008 CA 00292
	:	
VERNON J. BEDDELL, et al.,	:	<u>OPINION</u>
Defendants-Appellees	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 1405
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JUDGMENT:	Reversed and Remanded
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DATE OF JUDGMENT ENTRY:	November 23, 2009
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APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellees

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Edwards, J.

{¶1} Defendant-appellant, Ohio Public Employees Retirement System, appeals from the November 26, 2008, Judgment Entry of the Stark County Court of Common Pleas, Family Court Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee Nancy Beddell and appellee Vernon Beddell were married on August 31, 1969. On November 19, 2007, appellee Nancy Beddell filed a complaint for divorce against appellee Vernon Beddell. Appellee Vernon Beddell filed an answer and counterclaim on January 3, 2008.

{¶3} On April 24, 2008, appellee Nancy Beddell filed a motion asking that appellant Ohio Public Employees Retirement System (PERS) be added as an additional party pursuant to Civ.R. 15(A). Appellee, in her motion, noted that appellee Vernon Beddell had “untapped pension benefits” from PERS, currently worked for PERS and was eligible for PERS retirement benefits. Appellee Nancy Beddell, in her motion, further stated, in relevant part, as follows:

{¶4} “Recently, the Defendant [Vernon Beddell] contacted PERS about receiving retirement benefits. The Defendant could resign from his current job and demand a refund of his contributions from PERS, which would total \$75,000.00. PERS has informed the Plaintiff [Nancy Beddell] that the only way that it can be stopped from releasing the funds to the Defendant is if PERS is named a party to this action.”

{¶5} Pursuant to a Judgment Entry filed on April 29, 2008, appellee Nancy Beddell’s motion to add PERS as a defendant was granted. An Amended Complaint

adding PERS as a defendant was filed on April 29, 2008. The docket indicates that PERS was served with the complaint on May 5, 2008.

{¶6} A pretrial was held on May 14, 2008. No one appeared on behalf of PERS, counsel for which had yet to file a Notice of Appearance. At the pretrial, a trial before a Magistrate was scheduled for July 23, 2008. On May 19, 2008, counsel entered a Notice of Appearance on behalf of PERS. An answer was filed by PERS on May 21, 2008. PERS, in its answer, indicated that, pursuant to R.C. 145.56, PERS member accounts were exempt from execution or garnishment with certain exceptions. PERS, in its answer, further requested that it be served with all pleadings and be given notice of all hearings.

{¶7} A trial before a Magistrate was held in July of 2008. Counsel for PERS did not appear. The Magistrate, in a Decision filed on October 2, 2008, stated as follows in paragraph 4 under "Order":

{¶8} "The marital portion of the Husband's Ohio Public Employees Retirement System pension shall be divided equally (50/50) between the parties pursuant to the requisite Division of Property Order/Domestic Relations Order [DOPO/DRO]. Thus, from the PERS benefits payable to the Husband each month commencing on his date of retirement, the Wife as his former spouse is assigned, as and for her marital property rights, an amount equal to fifty percent (50%) of the marital portion of the Husband's total accrued monthly pension benefit, calculated as of his date of retirement, including any enhanced retirement benefits. Upon retirement, the Husband shall elect his PERS benefits in the form of a joint and survivor annuity with the Wife, Nancy Beddell, named as the primary beneficiary. If the Wife as former spouse is the only designated

beneficiary, then the total monthly benefit above shall be the reduced joint and survivor annuity. However, the Wife's share of the benefits shall not reflect any further reductions caused by other eligible beneficiaries. In addition, when a cost of living adjustment or other economic improvement is applied to the Husband's retirement benefits, the same adjustment or improvement shall apply to the Wife's share. Both parties shall cooperate fully with the execution of any documents necessary to affect the DOPO/DRO."

{¶9} The Magistrate, in paragraph 6 of the order, further stated that "Third Party Defendant Ohio Public Employees Retirement System is hereby restrained from making any lump sum cash disbursement of [appellee Vernon Beddell's] PERS pension."

{¶10} On October 17, 2008, PERS filed an objection to the Magistrate's Decision, specifically objecting to paragraphs 4 and 6 of the Magistrate's Decision "on the basis that these provisions are contrary to R.C. 145.56." As memorialized in a Judgment Entry filed on November 26, 2008, the trial court approved and adopted the Magistrate's Decision with a modification that is not relevant to this appeal.

{¶11} A Judgment Entry Decree of Divorce was filed on December 19, 2008.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING A PERMANENT RESTRAINING ORDER AGAINST THE RETIREMENT SYSTEM FROM ISSUING A LUMP SUM PAYMENT OR REFUND ON APPELLEE VERNON BEDDELL'S OPERS ACCOUNT.

{¶14} “II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE THE SPECIFIED PORTION FOR WHICH APPELLEE VERNON BEDDELL IS TO DESIGNATE APPELLEE NANCY BEDDELL AS THE BENEFICIARY ON A JOINT SURVIVOR ANNUITY AS REQUIRED BY R.C. 145.46(b)(1)(B)(II).”

I

{¶15} Appellant, in its first assignment of error, argues that the trial court erred by imposing a permanent restraining order against PERS prohibiting it from issuing a lump sum payment or refund on appellee Vernon Beddell’s account. Appellant argues that such provision violates R.C. 145.56. We agree.

{¶16} As is stated above, the trial court, in paragraph 6, restrained appellant from making any lump sum cash disbursements from appellee Vernon Beddell’s account.

{¶17} Appellant is an Ohio retirement system. The Ohio retirement systems, as statutorily created entities, have no authority beyond what is conferred to them under their governing statutes. *Hansford v. Ohio Pub. Emp. Ret. Sys*, 170 Ohio App.3d 603, 2007-Ohio-1242, 868 N.E.2d 708 at paragraph 9. “Therefore, unless its governing statutes grant the authority, OPERS is powerless to perform the act.” *Id.*¹

{¶18} R.C. 145.56 states as follows: “The right of an individual to a pension, an annuity, or a retirement allowance itself, the right of an individual to any optional benefit, any other right accrued or accruing to any individual, under this chapter, or under any municipal retirement system established subject to this chapter under the laws of this state or any charter, the various funds created by this chapter, or under such municipal retirement system, and all moneys, investments, and income from moneys or

¹ OPERS is the same as PERS.

investments are exempt from any state tax, except the tax imposed by section 5747.02 of the Revised Code and are exempt from any county, municipal, or other local tax, except taxes imposed pursuant to section 5748.02 or 5748.08 of the Revised Code and, except as provided in sections 145.57, 145.572, 3105.171, 3105.65, and 3115.32 and Chapters 3119., 3121., 3123., and 3125. of the Revised Code, shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or insolvency laws, or other process of law whatsoever, and shall be unassignable except as specifically provided in this chapter and sections 3105.171, 3105.65, and 3115.32 and Chapters 3119., 3121., 3123., and 3125. of the Revised Code.” (Emphasis added).

{¶19} R.C. 3105.80 et seq., enacted in January 2002, allows domestic relations courts to enter a Division of Property Order (“DOPO”) regarding divorced parties’ public retirement plans. *Snyder v. Snyder*, Jefferson App. No. 04 JE 16, 2004-Ohio-7216, at ¶ 19. “A DOPO permits a pension plan to make direct payment of benefits to an alternate payee, such as a former spouse. R.C. 3105.81.” See also, *Romans v. Romans*, Summit App. No. 23181, 2006-Ohio-6554 at paragraph 13.

{¶20} R.C. 3105.83 provides as follows: “Payments under an order described in section 3105.81 of the Revised Code shall commence as provided under section 145.571, 742.462, 3305.21, 3307.371, 3309.671, or 5505.261 of the Revised Code. An alternate payee has no right or privilege under sections 742.01 to 742.61 or Chapter 145., 3305., 3307., 3309., or 5505. of the Revised Code that is not provided in those sections or chapters.”

{¶21} “An order described in section 3105.81 of the Revised Code shall not require a public retirement program to take any action or provide any benefit, allowance,

or payment not authorized under the law governing the public retirement program.”

(Emphasis added).

{¶22} As noted by appellant, pursuant to such section, appellee Nancy Beddell, as an alternate payee, only has the rights and privileges as provided for in R.C. Chapter 145. There is no provision in R.C. Chapter 145 that permits an alternate payee to decide what type of benefit a PERS member must elect or permits a court to order whether a PERS participant must select monthly benefits or a lump sum payment.

{¶23} Moreover, R.C. 3105.81 states as follows: “A court that issues an order under section 3105.171 or 3105.65 of the Revised Code that provides for a division of property that includes a benefit or lump sum payment and requires one or more payments from a public retirement program to an alternate payee shall include in the order a requirement that the payments be made in accordance with and subject to limitations set forth in sections 3105.82 to 3105.90 of the Revised Code.” (Emphasis added).

{¶24} As noted by appellant, R.C. 3105.81 “expressly recognizes that an OPERS member may be eligible to apply for and receive either a monthly benefit or lump sum payment and provides for a division of that monthly benefit or lump sum payment to an alternative payee in the context of a divorce proceeding.” (Emphasis added). Thus, it appears that a court can not limit appellee Vernon Beddell’s ability to choose whether he receives a lump sum payment or monthly benefits from his pension, but it does appear that a court can, in the context of a divorce proceeding, order that an alternate payee receive a portion of the monthly benefit or the lump sum. A reading of Revised Code Section 3105.82(D) further confirms that conclusion: “An order described

in section 3105.81 of the Revised code shall meet all of the following requirements:...(D) Specify the amount to be paid to the alternate payee as one of the following: (1) As both a monthly dollar amount should the participant elect a benefit and as a one-time payment should the participant elect a lump sum payment; (2) As a percentage of a fraction determined as follows of a monthly benefit or lump sum payment:....” (Emphasis added.)

{¶25} Based on the foregoing, we find that the trial court erred by imposing a permanent restraining order against PERS prohibiting it from issuing a lump sum payment or refund from appellee Vernon Beddell’s account. This matter is remanded so that the trial court may enter an order dividing appellee Vernon Beddell’s PERS account in a manner consistent with the law.

{¶26} Appellant’s first assignment of error is, therefore, sustained.

II

{¶27} Appellant, in its second assignment of error, argues that the trial court erred by failing to provide the specified portion for which appellee Vernon Beddell is to designate appellee Nancy Beddell as the beneficiary on a joint and survivor annuity as required by R.C. 145.46(B)(1)(b)(ii).

{¶28} R.C. 145.46 states, in relevant part, as follows: “(B)(1)(a) Except as provided in divisions (B)(1)(b) and (c) of this section, a member who retires under section 145.32, 145.331, or 145.34 of the Revised Code shall receive a retirement allowance under “plan A,” which shall consist of the actuarial equivalent of the member’s retirement allowance determined under section 145.33, 145.331, or 145.34 of the

Revised Code in a lesser amount payable for life and one-half of such allowance continuing after death to the member's surviving spouse for the life of the spouse.

{¶29} “(b) A member may receive a retirement allowance under a plan of payment other than “plan A” if either of the following is the case:

{¶30} “(i) The member is not married or either the member's spouse consents in writing to the member's election of a plan of payment other than “plan A” or the board waives the requirement that the spouse consent;

{¶31} “(ii) A plan of payment providing for payment in a specified portion of the allowance continuing after the member's death to a former spouse is required by a court order issued under section 3105.171 or 3105.65 of the Revised Code or the laws of another state regarding division of marital property prior to the effective date of the member's retirement.”

{¶32} As is stated above, paragraph 4 of the Magistrate's Decision stated, in relevant part, as follows:

{¶33} “The marital portion of the Husband's Ohio Public Employees Retirement System pension shall be divided equally (50/50) between the parties pursuant to the requisite Division of Property Order/Domestic Relations Order. Thus, from the PERS benefits payable to the Husband each month commencing on his date of retirement, the Wife as his former spouse is assigned, as and for her marital property rights, an amount equal to fifty percent (50%) of the marital portion of the Husband's total accrued monthly pension benefit, calculated as of his date of retirement, including any enhanced retirement benefits. Upon retirement, the Husband shall elect his PERS benefits in the form of a joint and survivor annuity with the Wife, Nancy Beddell, named as the primary

beneficiary. If the Wife as former spouse is the only designated beneficiary, then the total monthly benefit above shall be the reduced joint and survivor annuity. However, the Wife's share of the benefits shall not reflect any further reductions caused by other eligible beneficiaries. In addition, when a cost of living adjustment or other economic improvement is applied to the Husband's retirement benefits, the same adjustment or improvement shall apply to the Wife's share. Both parties shall cooperate fully with the execution of any documents necessary to affect the DOPO/DRO." (Emphasis added).

{¶34} We find that such paragraph does not indicate the specified portion of the retirement allowance for which appellee Nancy Beddell is to be designated as the beneficiary on a joint and survivor annuity. While, from the above underlined language, it appears that the trial court may have intended that appellee Nancy Beddell be named as appellee Vernon Beddell's survivor beneficiary eligible for 50% of the martial portion of his monthly benefit allowance, it is unclear to us and was unclear to PERS. Therefore, we conclude that the trial court's order does not comply with Revised Code Section 145.46(B)(1)(b)(ii).

{¶35} Appellant's second assignment of error is, therefore, sustained.

{¶36} Accordingly, the judgment of the Stark County Court of Common Pleas, Family Court Division, is reversed, and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Farmer, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/d0806

