IN THE UTAH COURT OF APPEALS

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Kathy Montierth, Petitioner, v. Utah State Retirement Board, Respondent.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20051022-CA F I L E D (September 21, 2006) 2006 UT App 389

Original Proceeding in this Court

Attorneys: David L. Knowles and Dennis A. Gladwell, Ogden, for Petitioner
David B. Hansen, Salt Lake City, for Respondent

Before Judges Davis, Orme, and Thorne.

THORNE, Judge:

Petitioner Kathy Montierth appeals from the Utah State Retirement Board's (the Board) order denying her Request for Board Action that sought to alter the retirement plan that her deceased husband had elected prior to his retirement.[1]

Petitioner makes several claims for the first time on appeal. She alleges that the Board unconstitutionally deprived her of due process under Article 1, Section 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution by accepting her husband's retirement application without giving her notice that he had elected a retirement plan that divested her of a survivor annuity, and then again upon her husband's death by denying her the survivor annuity. Petitioner also asserts for the first time on appeal issues pertaining to statutory construction and the Board's allegedly improper application of Utah Code section 49-13-405(2). See Utah Code Ann. § 49-13-405(2) (Supp. 2006).

"'[W]e will review issues raised for the first time on appeal only if exceptional circumstances or "plain error"

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1. The plan elected by Petitioner's husband provided a substantially greater monthly retirement benefit than other available plans, but did not include a survivor annuity. Thus, benefits terminated upon her husband's death.

exists.'" Timm v. Dewsnup, 2003 UT 47,¶39, 86 P.3d 699 (quoting Salt Lake City v. Ohms, 881 P.2d 844, 847 (Utah 1994)).[2] We have reviewed the record and find no plain error on the part of the Board or the Administrative Hearing Officer, or exceptional circumstances that would compel us to examine these issues.[3] See State v. Dean, 2004 UT 63,¶15, 95 P.3d 276 ("To demonstrate plain error, [the appellant] must establish that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful . . . ." (quotations and citation omitted)); see also State v. Holgate, 2000 UT 74,¶12, 10 P.3d 346 (stating that exceptional circumstances exception applies primarily to rare procedural anomalies).

Although we decline to address Petitioner's constitutional or statutory issues, we note that Petitioner does not have an individual property right in her deceased husband's retirement interest.[4] At the most, Petitioner had a contingent interest in her husband's retirement that would be recognized in the event of divorce. See Woodward v. Woodward, 656 P.2d 431, 432-33 (Utah 1982) (stating that to the extent a right to a pension or retirement benefit has accrued in whole or in part during the marriage it is subject to equitable distribution). When a

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2. This preservation rule applies equally to both Petitioner's statutory and constitutional challenges not raised in the administrative proceeding before the Board. "Generally, a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal. Utah's appellate courts have applied this rule to constitutional questions advanced for the first time on appeal." State v. Archambeau, 820 P.2d 920, 922 (Utah Ct. App. 1991) (footnotes omitted); see also id. at 922 n.3. In addition, "issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." Brown & Root Indus. Serv. v. Industrial Comm'n of Utah, 947 P.2d 671, 677 (Utah 1997).

3. Petitioner also asserts that it would be futile to argue before the Board that its "election scheme" and administration was unconstitutional because of its unlikely independence as a trier of fact. Although it may be difficult for an agency to assess the constitutionality of its own procedures, this in and of itself does not render the raising of such claims futile.

4. The retirement interest belonged to Petitioner's husband, and as such he had the right to manage his interest as he saw fit. As the owner of the retirement interest, her husband had the sole discretion to make such decisions as terminating employment, taking early retirement, authorizing deduction of life insurance premiums from retirement benefits, and electing the monthly retirement benefit to be received.

divorce is granted, the parties can obtain a Qualified Domestic Relations Order (QDRO) from the trial court, the purpose of which is to furnish instructions to the trustee of a retirement plan and specify how distributions are to be made. See Bailey v. Bailey, 745 P.2d 830, 832-33 (Utah Ct. App. 1987). In the absence of a QDRO or other order, the retirement benefits are considered the property of the employee and distributed according to the employee's directions.

Petitioner next contends that the Board failed to make the requisite findings of fact that her deceased husband mistakenly elected the particular retirement plan chosen. We disagree. The Board considered Petitioner's testimony and addressed the issue in its findings of fact, which stated that "Petitioner failed to provide any evidence outside of her testimony that [her husband] mistakenly selected retirement Plan 1 and meant to select another retirement plan on his [a]pplication." Even if the Board had found that Petitioner's husband had in fact intended to select another retirement plan, the result would be the same. See Utah Code Ann. § 49-11-607(1) (Supp. 2006) (stating that after the retirement date, which shall be set by a member in the application for retirement, no alteration, addition, or cancellation of a benefit may be made except errors in the records or in the calculations of the office or participating employer). The Board found that Petitioner failed to provide documentation or testimony that would allow her to change the retirement plan after her husband's retirement date. Indeed, even if Petitioner's husband had discovered that he had unintentionally elected the wrong plan, he could not have changed the election on his application after his retirement date.[5]

Lastly, Petitioner asserts that the retirement application is not legally binding because the reverse side of the application, which provides an explanation of the various retirement plans, was not signed by her husband. Therefore, Petitioner contends the election made by her husband is null and void. We disagree. Even accepting Petitioner's assertions that the absence of her husband's signature on the back of the application provides evidence that the application was filled out

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5. Petitioner raises several related arguments. Petitioner asserts that her uncontroverted testimony is binding on all of the parties and that it serves to undercut the conclusion reached by the Board. Also, Petitioner asserts that her testimony was not hearsay and that the Board devalued her testimony because it concluded that it was hearsay evidence. We do not address these arguments because we hold that Petitioner under Utah Code section 49-11-607(1), would not be able to alter the plan even if she could show that her husband intended to select a different plan. See Utah Code Ann. § 49-11-607(1).

quickly, leading him to select a plan in error, this does not change the result. First, neither Petitioner nor her husband could alter the application after his retirement date. Second, her husband signed and notarized the first page of the retirement application stating that he had reviewed and understood "the limitations as described on the reverse side of the form." Moreover, the first page of the application instructs applicants to read the information on the reverse side before completing the application. Applicants are again instructed, in the retirement plan selection section, to refer to the back page of the application when selecting a retirement plan. Although a signature on both the front and back side of this particular application is the ideal, it is not necessary. Thus, the application is complete and valid.

In sum, Petitioner has not demonstrated either of the two recognized exceptions to the preservation rule--plain error or exceptional circumstances. Therefore, we do not consider her constitutional and statutory construction issues. Petitioner's arguments pertaining to the remaining issues, although preserved, fail. The Board properly considered Petitioner's testimony and made the requisite findings of fact. In addition, we find that Petitioner's husband signed and notarized the application, and it is therefore valid. The front page instructed applicants multiple times to review the information on the reverse side of the application, and the notarized signature of Petitioner's husband demonstrates that he reviewed and understood the explanation of retirement plans prior to making a plan selection.

We affirm the Board's order denying Petitioner's Request for Board Action.

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William A. Thorne Jr., Judge

I CONCUR:

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James Z. Davis, Judge

I CONCUR IN THE RESULT:

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Gregory K. Orme, Judge