

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WCR, JR.,	:	NO. 08 – 21,346
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	Petition to Enforce
JGR,	:	Property Settlement Agreement
Defendant	:	Petition for Contempt

OPINION AND ORDER

Before the court is Defendant's Petition to Enforce Property Settlement Agreement/Petition for Contempt, filed April 7, 2017. Argument and hearing on these matters was heard October 24, 2017.

On October 13, 2015 the parties reached an agreement on the financial issues involved in their divorce. They placed that agreement on the record and a transcript of the agreement was prepared and filed on October 23, 2015. In relevant part, the parties agreed as follows:

The Pennsylvania State Employees Retirement System pension Mr. R has from his employer, which is South Williamsport School District, will be distributed effective with the separation date of December 26, 2007, such that Mrs. R will receive 60 percent of the value of that asset as of that separation date together with any increase in value with regard to her portion of that pension and Mr. R will receive 40 percent of that asset.

N.T., October 13, 2015 at p. 3-4.

In her petition to enforce the agreement/petition for contempt, Defendant contends Plaintiff has failed to prepare and submit an Approved Domestic Relations Order¹ which complies with the above term of the agreement because the proffered ADRO provides as follows:

¹ Although Defendant calls the document a *Qualified* Domestic Relations Order, as is typical practice, PSERS calls the document an *Approved* Domestic Relations Order. The court will therefore use that term.

8. Death of Alternate Payee. If Alternate Payee dies prior to the receipt of all payments potentially payable to the Alternate Payee from PSERS under this Order, then any payment payable to the Alternate Payee by PSERS shall:

Revert to member.

See Exhibit B, at page 3 of “Stipulation and Agreement” attached to Plaintiff’s Answer, filed June 5, 2017 (emphasis added). Plaintiff responds that he *has* prepared a compliant ADRO (and has attached it to his Answer as Exhibit B), but that Defendant refuses to accept the restrictions placed on the ADRO by PSERS, apparently asserting that PSERS requires that upon Defendant’s death, her portion must revert to him. Plaintiff offers in support of his response copies of five letters sent by Plaintiff’s counsel to Defendant’s counsel. A review of those letters is helpful on the issue of enforcement as well as the issue of contempt.

On June 3, 2016, Plaintiff’s counsel sent a proposed ADRO and in the cover letter asked Defendant to “provide the missing information. I will then get the approval of PSERS.” Respondent’s Exhibit 1. The attached proposed ADRO contains blanks for Defendant’s date of birth, social security number and mailing address. It also reads as follows:

8. Death of Alternate Payee. If Alternate Payee dies prior to the receipt of all payments potentially payable to the Alternate Payee from PSERS under this Order, then any payment payable to the Alternate Payee by PSERS shall:

Revert to member.

OR...

Be paid to Alternate Payee's Estate to the extent of the Alternate Payee's equitable distribution portion of the Member's retirement benefit as set forth in Paragraphs Five (5) through (8).

OR...

Be paid to a/each "Contingent Alternate Payee" [include the name(s), address(es), date(s) of birth, social security number(s) and percentages(s) (totaling 100%) payable to each Contingent Alternate Payee].

Plaintiff is thus giving Defendant the option to choose to have the payments paid to her estate or a beneficiary after her death.

Apparently Defendant never responded,² as under cover letter of October 31, 2016, an identical proposed ADRO is transmitted and in the cover letter Plaintiff's counsel states: "Following is another copy of the Domestic Relations Order. I still need your client's DOB, SS# and address. Once I receive the same and if it's acceptable to you, I will forward to PSERS for approval."

Respondent's Exhibit 2. The ADRO is identical to that previously transmitted except the choices to be made by Defendant have been highlighted, including the choices in Paragraph 8. Defendant is still being given the option to choose what happens to her portion after her death.

This time Defendant must have responded as the message on the next cover letter, accompanying a revised version of the ADRO, dated February 14, 2017, states: "Following is a copy of the Revised Stipulation and Agreement I sent to my client to sign. Please make sure all of the "options" are correct. I should have the signed agreements by the end of the week. I will need your client's signature.

² Neither party offered evidence of responses to these letters.

If this Agreement is acceptable I will need the both of you to sign. You may hold onto them until I give you proof I have my client's signature." Respondent's Exhibit 3. The missing date of birth, social security number and address have now been filled-in, and Paragraph 8 reads:

8. Death of Alternate Payee. If Alternate Payee dies prior to the receipt of all payments potentially payable to the Alternate Payee from PSERS under this Order, then any payment payable to the Alternate Payee by PSERS shall:

Be paid to Alternate Payee's Estate to the extent of the Alternate Payee's equitable distribution portion of the Member's retirement benefit as set forth in Paragraphs Five (5) through (8).

The court deduces from this version of the Stipulation and Agreement that Defendant chose option 2 of the three options, and Plaintiff's counsel inserted that choice into the proposed ADRO.

On April 24, 2017, however, Plaintiff's counsel again transmits another version of the ADRO to Defendant's counsel, under a cover letter which states: "Enclosed please find a copy of a fax I tried to send out all afternoon. PSERS made changes to the original Stipulation and Agreement. Please review the entire Stipulation for changes and added language." Respondent's Exhibit 4. In this version of the ADRO, Paragraph 8 reads:

8. Death of Alternate Payee. If Alternate Payee dies prior to the receipt of all payments potentially payable to the Alternate Payee from PSERS under this Order, then any payment payable to the Alternate Payee by PSERS shall:

Revert to member.

A final transmission is sent the following day, April 25, 2017, transmitting what is termed in the cover letter as “a FINAL REVISION of the Stipulation and Agreement.” Respondent’s Exhibit 5. The author advises: “PSERS had me change the wording in paragraph #6.” The change to Paragraph 6 is apparently the reason for the “FINAL REVISION”, as the wording in Paragraph 8 remains the same.

The court is thus asked to decide (1) whether the “revert to member” choice complies with the property settlement agreement and (2) if it does not, whether insertion of that choice in the proposed ADRO is contemptuous.

As noted above, the parties agreed that “Mrs. R *will receive* 60 percent of the value of [Plaintiff’s pension] as of [their] separation date together with any increase in value with regard to her portion of that pension”. The language “will receive” is unequivocal: no contingencies are attached.³ Plaintiff’s assertion that he entered the agreement and approved of the overall distribution scheme based on his understanding that if Defendant dies before he does, the remainder of her share of his pension would revert to him, is of no moment in light of the language used. Had Plaintiff wished to enter the agreement he says he intended to enter, the agreement should have so stated as that scenario is analogous to a “life-estate” in the asset, whereas what is actually stated is analogous to an “estate in fee simple”. One is vastly more valuable than the other.

Therefore, with respect to issue (1), the court finds that the “revert to member” choice does *not* comply with the property settlement agreement.

As for issue (2), whether insertion of that choice in the proposed ADRO is contemptuous, the court believes Defendant has produced insufficient evidence of

³ For example, the agreement could have added “providing Mrs. Reighard survives Mr. Reighard...”.

such mal-intent as would support a finding of contempt. Plaintiff's initial offering of choices to Defendant, followed by the assertion that PSERS is requiring the "revert to member" choice, belies Defendant's contention that Plaintiff is willfully attempting to impose that choice.⁴ While Plaintiff offered no evidence that PSERS (rather than Plaintiff) made the change, other than the self-serving statement in Respondent's Exhibit 4,⁵ it is sufficiently possible that Plaintiff's actions have been the result of misunderstanding rather than intentional that the court cannot find Plaintiff in contempt. And, while not likely in the court's view, it is also possible that PSERS actually did require the change to the "revert to member" choice, in which event, not only is Plaintiff not at fault,

⁴ It also, curiously, belies Plaintiff's assertion that he agreed to the proposed distribution based on an understanding that the "revert to member" choice would be incorporated into the ADRO. The court will not speculate on this inconsistency, however, as it is of no moment to the instant decision.

⁵ Indeed, PSERS' "Divorce Guidelines", do not support Plaintiff's contention, as they provide in pertinent part as follows:

9. Death of Alternate Payee Prior to and After the Member's Retirement – A statement indicating what happens if the Alternate Payee dies before the Member's retirement and a statement indicating what happens if the Alternate Payee dies after the Member's retirement. If the Alternate Payee dies before the Member, the Alternate Payee's right to a share of the benefit (regardless of whether the Alternate Payee is named as Irrevocable Beneficiary) is presumed to end and the interest of the Alternate Payee reverts to the Member. *If the Alternate Payee's share of the benefit is not to revert to the member, the DRO must specifically state that any payments payable to the Alternate Payee shall be payable to the estate of the Alternate Payee, or to a Contingent Alternate Payee(s).*

...

Note: If the Alternate Payee dies prior to the retirement of the Member, then the DRO must state how the Alternate Payee's interest in the marital portion is to be paid.

Respondent's Exhibit 7 at page 7 (emphasis added). Although at the hearing Plaintiff's counsel emphasized to the court the "presumed to end" and "reverts to the Member" language, he completely ignored the next sentence which explains how to rebut the presumption by "specifically stat[ing] that any payments payable to the Alternate Payee shall be payable to the estate of the Alternate Payee, or to a Contingent Alternate Payee(s)."

the agreement itself could be subject to rescission. Therefore, the court will decline to impose liability for Defendant's attorney's fees on Plaintiff.

ORDER

AND NOW, this 27th day of October 2017, for the foregoing reasons, the Petition to Enforce Agreement is hereby GRANTED. Plaintiff shall submit to PSERS the version of the ADRO presented in Respondent's Exhibit 3 but with the language of Paragraph 6 made to conform to the language of Paragraph 6 in Respondent's Exhibit 5. In the event this ADRO is rejected by PSERS because PSERS does actually insist that the "revert to member" choice be set forth in Paragraph 8, Defendant may seek further relief in the form of a petition for special relief.

The Petition for Contempt is DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Robert Cravitz, Esq., 503 North Market Street, Selinsgrove, PA 17870
Richard Callahan, Esq.
Gary Weber, Esq. (Lycoming Reporter)
Hon. Dudley Anderson