UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 23

Docket No. DC-0843-12-0529-I-2

Junior F. Whetzel III,
Appellant,
v.
Office of Personnel Management,
Agency,
and
Christopher M. Cross,
Sean D. Cross,
Intervenors.

April 1, 2014

Ian R.D. Williams, Winchester, Virginia, for the appellant.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of the initial decision, which reversed its final decision denying the appellant's application on behalf of his mother's estate for a lump-sum credit of his stepfather's retirement deductions and contributions. For the reasons discussed

below, we GRANT the petition, REVERSE the initial decision, and AFFIRM OPM's final decision denying the application.

BACKGROUND

¶2 Michael Cross was a federal employee covered under the Federal Employees' Retirement System (FERS). He designated his wife, Susan Orndorff, as his only beneficiary for any contributions to his retirement account that were payable at his death. MSPB Docket No. DC-0843-12-0529-I-1, Initial Appeal File (IAF), Tab 5 at 14; *see* 5 U.S.C. § 8424(c). On October 15, 2011, Mr. Cross killed Ms. Orndorff and then apparently took his own life. It is undisputed that Ms. Orndorff temporally predeceased Mr. Cross. IAF, Tab 5 at 16-18.

¶3 Mr. Cross and Ms. Orndorff did not have children together, but they each had adult children from previous relationships. On behalf of Ms. Orndorff's estate, her son, the appellant, applied for a lump-sum credit based on Mr. Cross's service. *See* 5 U.S.C. §§ 8401(19), 8424; 5 C.F.R. § 843.203(a). OPM denied the application. IAF, Tab 5 at 9-12. OPM found that Ms. Orndorff predeceased Mr. Cross. Therefore, under the applicable statutory order of precedence, Mr. Cross's two adult sons, the intervenors in this appeal, were the beneficiaries of the lump-sum benefit based on Mr. Cross's service. IAF, Tab 5 at 6-7; *see* 5 U.S.C. § 8424(d); 5 C.F.R. § 843.203(b).

¶4 The appellant appealed OPM's decision to the Board, arguing that the guidance provided by Virginia's "Slayer Statute" should determine who receives Mr. Cross's lump-sum credit.[1] IAF, Tab 1. The Virginia Slayer Statute provides in relevant part that "[n]either the slayer nor any person claiming through him shall in any way acquire any property or receive any benefits as the result of the

[1] Both Mr. Cross and Ms. Orndorff were residents of Virginia. IAF, Tab 5 at 15-18.

death of the decedent." VA CODE ANN. § 55-402 (2011);[2] MSPB Docket No. DC-0843-12-0529-I-2, Refiled Appeal File, Tab 7, Initial Decision (ID) at 5. The administrative judge agreed. She found that the Virginia Slayer Statute creates the presumption that the slayer, Mr. Cross, predeceased the decedent, Ms. Orndorff. ID at 6. She found that, applying this presumption, the appellant was entitled to the lump-sum benefit based on Mr. Cross's service. ID at 8.

¶5 OPM has petitioned for review, arguing that the administrative judge improperly interpreted the Virginia Slayer Statute. Petition for Review (PFR) File, Tab 1. The appellant has filed a response. PFR File, Tab 3.

ANALYSIS

¶6 The provisions of 5 U.S.C. chapter 84 and the regulations implementing the payment of FERS lump-sum death benefits do not address whether such a benefit can be paid to a person who became entitled to the benefit through a person who intentionally killed another person. Under such circumstances, the Board can rely on principles in the law of the state where the presumed felony occurred to determine eligibility for federal benefits. *See Clark v. Office of Personnel Management*, 256 F.3d 1360, 1363 (Fed. Cir. 2001); *see also Rogers v. Office of Personnel Management*, 87 F.3d 471, 473 (Fed. Cir. 1996) (relying in part on the presumption of validity under Texas state law in favor of the latest marriage to determine which of two "wives" was married to the deceased federal employee at the time of his death and thus which "wife" was entitled to his survivor annuity); *Money v. Office of Personnel Management*, 811 F.2d 1474, 1479 (Fed. Cir. 1987) (affirming the Board's determination that eligibility for federal benefits should be decided based upon which one of two marriages would be recognized as valid by

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[2] After the events underlying this appeal took place, VA CODE ANN. § 55-402 was repealed and replaced with VA CODE ANN. § 64.2-2501. Although we cite to the statute that was in effect at the time, we agree with the appellant that the relevant provisions of the new statute are materially identical for purposes of this appeal. Petition for Review File, Tab 3 at 2-4.

California state courts). The administrative judge therefore properly looked to the law of the state of Virginia to decide this appeal. However, we agree with OPM that Virginia case law supports its theory of the case, rather than the appellant's.

¶7 Specifically, Virginia courts have examined the Slayer Statute in relationship to the common law principle by which a felon forfeited his estate. The United States Supreme Court has observed that, at common law, "attainder generally carried with it a 'corruption of blood,' which meant that the attainted party's heirs could not inherit his property." *United States v. Brown*, 381 U.S. 437, 441 (1965). Corruption of blood and forfeiture of estate on conviction of felony as at common law has been expressly abolished by Virginia statute. VA CODE ANN. § 55–4 (2011) provides that "[n]o suicide, nor attainder of felony, shall work a corruption of blood or forfeiture of estate." So, in Virginia, the right of a person to take, hold, and dispose of his property, real and personal, is not affected by his attainder of felony. *See Haynes v. Peterson*, 100 S.E. 471, 472 (Va. 1919) (citation omitted).

¶8 Accordingly, Virginia courts have held that section 55–402, the Slayer Statute, does not work a corruption of blood because it does not deprive a slayer's heirs of the right to inherit property properly belonging to him. *Sundin v. Klein*, 269 S.E.2d 787, 791 (Va. 1980). Neither does it work a forfeiture of estate because it does not require a slayer to forfeit his property. *Lightner v. Ferguson*, 58 Va. Cir. 76, 2001 WL 1590464, at *3 (Va. Cir. Ct. Nov. 30, 2001). Rather, section 55–402 merely prohibits a slayer from acquiring additional property rights as a result of his wrongdoing, which his heirs could subsequently claim through him. *Peoples Security Life Insurance Co. v. Arrington*, 412 S.E.2d 705, 707 (Va. 1992). The Slayer Statute does not deprive the murderer of any property rights but prevents his acquisition of additional rights by unlawful and unauthorized means. *See Sundin*, 269 S.E.2d at 792.

¶9 In this case, Mr. Cross did not acquire any property right in his FERS contributions by virtue of killing Ms. Orndorff. They were already his. He continued to own them at his death, and they passed to whomever he had named as his beneficiary and, if he had not named a beneficiary or if his named beneficiaries predeceased him, to his heirs under the order of precedence at 5 U.S.C. § 8424(d). Because Ms. Orndorff, in fact, predeceased Mr. Cross, and because she was the only beneficiary he named, the lump-sum credit passes to Mr. Cross's heirs. OPM correctly found that the credit does not belong to Ms. Orndorff's estate or to the appellant. *See Lightner*, 58 Va. Cir. 76.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT AND INTERVENORS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.