

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANIS CARMONA, A/K/A JANIS
KESTER,
Appellant,

vs.

JUDY CARMONA, AS SUCCESSOR
REPRESENTATIVE OF LUPE N.
CARMONA, DECEASED,
Respondent.

JANIS CARMONA, A/K/A JANIS
KESTER,
Appellant,

vs.

JUDY CARMONA, AS SUCCESSOR
REPRESENTATIVE OF LUPE N.
CARMONA, DECEASED,
Respondent.

No. 35851

FILED

OCT 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

No. 36220

ORDER OF AFFIRMANCE

These are two consolidated appeals from several district court orders in the same district court case. The orders appealed from impose a constructive trust on survivor benefits, designate a successor representative, and award attorney fees.

Lupe Carmona was formerly married to appellant Janis Carmona. Before marrying Janis, Lupe worked for the International Alliance of Theatrical Stage Employees (IATSE). During marriage, both Lupe and Janis worked for the Hilton Hotel Corporation. Lupe was eligible for pension benefits with IATSE and the Hilton Hotel Corporation and elected the qualified joint and survivor annuity (QJSA) option for married couples on his pensions. Janis was listed as his survivor beneficiary for both plans. Lupe retired in 1992 and began receiving payments from his pensions.

In November 1997, Lupe and Janis divorced. In the divorce decree, Lupe was awarded his pensions as his separate property, but was ordered to pay Janis \$1,500 for her marital portion of his pension.

After Lupe married respondent Judy Walkington shortly after his divorce from Janis, he tried to change the designation of his survivor beneficiary from Janis to Judy. However, representatives of both Hilton Hotel and IATSE informed Lupe that a change of beneficiary after commencement of retirement is prohibited. The Hilton Hotel representative added that the Employee Retirement Income Security Act (ERISA) prohibits such a change, unless a Qualified Domestic Relations Order (QDRO) "which waives the spouse's right to survivor benefits is served on the Plan." Accordingly, Lupe requested the district court to enter a QDRO ordering his pension plan administrators to grant his election of a new survivor beneficiary.

At first, the district court refused to issue a QDRO that changed the beneficiary. But subsequently, after Lupe's death, the district court found that the parties had agreed that Lupe's retirement benefits, including the survivor benefits, were his sole and separate property. The district court ordered the plan administrators to change the survivor beneficiary in accordance with Lupe's request, and if they did not, the district court stated that it "will Order the establishment of a Constructive Trust for the benefit of Lupe's designated beneficiary wherein the survivorship funds, if received by Janis, will be held in trust for receipt by Lupe's designated beneficiary." The district court subsequently issued an order directing Janis to establish a constructive trust of the survivorship

funds from Lupe's retirement plans for the benefit of Judy. Janis appeals.¹

Janis's argument that the district court's first order refusing to impose a QDRO is res judicata has no merit. In the first order, the district court refused to issue the QDRO, but with additional information and arguments, the court could and did issue a QDRO. The first order was not final as is required for res judicata to apply. There was nothing inconsistent between the two orders, either in law or fact.

Janis's argument that the constructive trust unlawfully modifies the divorce decree is also without merit. The constructive trust does not modify the divorce decree since the district court concluded that in the divorce decree, Lupe's pension rights, including the survivor benefits, were awarded as his sole and separate property.

Janis argues that all district court orders entered during the period in which there was no designated successor representative for Lupe are void. Before a judgment may affect a deceased party's estate, the personal representative of the deceased party must be substituted as a party.² Without such substitution, a judgment is voidable.³ However, in this case, two months after Judy was substituted, the district court

¹Judy argues that Janis's appeal of the district court's April 16, 1999 order and constructive trust order of June 22, 1999, should be dismissed because Janis's notice of appeal of March 21, 2000, was untimely pursuant to NRAP 4. Judy's argument is without merit as Janis's motions were tolling motions under NRCP 52(b) and NRCP 59. See NRAP 4(a)(2).

²Koester v. Estate of Koester, 101 Nev. 68, 72, 693 P.2d 569, 572 (1985).

³Id.

reconsidered all the orders issued during the time there was no successor representative. Therefore, the district court's orders are not void.

Janis's most important argument is that ERISA preempts the district court's orders and the constructive trust relating to ERISA-regulated benefits. Both of Lupe's pensions are regulated by ERISA, and interplay between ERISA and state law is not always clear. ERISA specifically provides that it "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."⁴ ERISA also prohibits alienation of benefits other than to the designated participant or survivor beneficiary.⁵ The Retirement Equity Act of 1984 provides an exception to the anti-alienation provisions of ERISA by allowing designation of an alternate payee through the issuance of a QDRO.⁶ The statute defines a QDRO, in relevant part, as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan."⁷

⁴29 U.S.C.S. § 1144(a) (Lexis 1998); see also Villescas v. CNS Ins. Co., 109 Nev. 1075, 1080, 864 P.2d 288, 292 (1993); Marcoz v. Summa Corporation, 106 Nev. 737, 743, 801 P.2d 1346, 1350 (1990).

⁵29 U.S.C.S. § 1056(d)(1) (Lexis 1998).

⁶29 U.S.C.S. § 1056(d)(3).

⁷29 U.S.C.S. § 1056(d)(3)(B)(i)(I).

The pension plans offered by Lupe's employers were required by ERISA to offer married employees survivor benefits.⁸ One of ERISA's provides that the joint and survivor annuity form of benefit can be waived by the participant, Lupe, with the spouse's written consent in the 90-day period prior to the retirement date.⁹ Here, Lupe retired and began receiving payments from his pensions in 1992, at which time he was still married to Janis. Therefore, it is Janis's contention that the survivor benefits irrevocably vested in her as Lupe's named beneficiary upon the date of his retirement.

Judy responds that Janis waived her survivor beneficiary benefits in the divorce decree. Federal courts disagree as to whether ERISA authorizes a claim of waiver, but a majority of federal circuits have concluded that "ERISA does not preempt an explicit waiver of interest by a nonparticipant beneficiary" of ERISA-regulated benefits.¹⁰ Common law is employed to effectuate the clear intent of the parties as to who is the beneficiary.¹¹ "[W]ho is entitled to the proceeds of an ERISA plan . . . may depend upon more than merely the plan documents, and may be properly defined by reference to . . . the particular facts of the case."¹²

⁸29 U.S.C.S. § 1055(a)(1) & (b)(1) (Lexis 1998); see also Ronald J. Cooke, ERISA Practice and Procedure § 4:44, 4-174 (2d ed. 2002).

⁹29 U.S.C. § 1055(c).

¹⁰Melton v. Melton, 324 F.3d 941, 945 (7th Cir. 2003); see also Manning v. Hayes, 212 F.3d 866, 871 (5th Cir. 2000), cert. denied, 532 U.S. 941 (2001).

¹¹Manning, 212 F.3d at 871; Silber v. Silber, 786 N.E.2d 1263, 1268 (N.Y. 2003).

¹²Id.

In this case, the district court found that Janis agreed in the divorce action that Lupe would receive the entirety of his retirement plans upon paying her \$1,500. Once Lupe paid Janis the \$1,500, she had no more interest in his retirement plans, including the survivor benefits. The district court found that the survivor benefits were not an omitted asset in the divorce decree, but were contemplated by the parties and that each received the total benefit package of their respective pension plans. The district court's findings are supported by substantial evidence. Since the pension plan administrators would not recognize Lupe's change of beneficiary and payments were being made to Janis, the district court ordered that Janis hold the proceeds received in constructive trust for Judy.

Janis also argues that the imposition of a constructive trust relating to an employee benefit plan is preempted by ERISA. However, ERISA does not preclude the imposition of a constructive trust after benefits are distributed to a beneficiary according to the pension plan.¹³ Additionally, we agree with the Hawaii Supreme Court that ERISA does not govern our interpretation of the divorce decree:

The resolution of competing claims involving such matters as alimony, child support, and property (including pension interests) accrued during a

¹³Central States, SE & SW Areas Pension v. Howell, 227 F.3d 672, 678-79 (6th Cir. 2000) (holding that a constructive trust could be imposed on employee welfare plan benefits after distribution to beneficiary). The anti-alienation clause does "not . . . protect private pension benefits once paid to and received by the beneficiary." Guidry v. Sheet Metal Workers Nat. Pension Fund, 39 F.3d 1078, 1081 (10th Cir. 1994); see also Emard v. Hughes Aircraft Co., 153 F.3d 949, 955 (9th Cir. 1998), overruled on other grounds by Egelhoff v. Egelhoff, 532 U.S. 141, 146, 151-52 (2001).

marriage is entirely with the province of state domestic relations law . . . ERISA's 'qualification' of such domestic relations orders is concerned solely with enabling the plan to fulfill its fiduciary duties by ensuring that its obligations are clear and its liabilities are kept within the bounds of its contract and federal law.¹⁴

A constructive trust may be imposed if: "(1) a confidential relationship exists between the parties; (2) retention of legal title by the holder thereof against another would be inequitable; and (3) the existence of such a trust is essential to the effectuation of justice."¹⁵ In this case, there was a confidential relationship between Janis and Lupe, as they were previously married and Janis was designated as Lupe's survivor beneficiary. The district court found that Janis's retention of the pension benefits would be inequitable since Lupe was no longer married to Janis at the time of his death, and he specifically requested that Judy be named beneficiary of his survivor benefits. The pension plan administrators would not change the beneficiary because of formal plan requirements. A constructive trust is essential to effectuate the wishes of the plan participant. The district court's imposition of a constructive trust was proper.

Janis disputes the district court's award of attorney fees of \$15,000 to Judy as arbitrary and lacking a statutory basis. Pursuant to NRS 125.150(3), a district court has wide discretion in awarding attorney fees in an action for divorce when such fees are raised in the pleadings,


¹⁴Torres v. Torres, 60 P.3d 798, 817 (Haw. 2002).

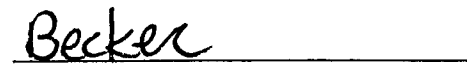
¹⁵Locken v. Locken, 98 Nev. 369, 372, 650 P.2d 803, 805 (1982).

and its determination will not be disturbed upon appeal absent abuse.¹⁶ We have previously concluded that the district court has discretion to award attorney fees in post-divorce proceedings.¹⁷ Upon a review of the various and extensive proceedings, we determine that the district court did not abuse its discretion in granting attorney fees.

We ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Robert E. Gaston, District Judge,
Family Court Division
William E. Freedman, Chtd.
Marshal S. Willick
Clark County Clerk

¹⁶Burr v. Burr, 96 Nev. 480, 482, 611 P.2d 623, 624 (1980).

¹⁷Halbrook v. Halbrook, 114 Nev. 1455, 1460-61, 971 P.2d 1262, 1266 (1998).