

2005

Kathy Montierth v. Utah State Retirement Board : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Kathy Montierth,

Appellant

v.

Utah State Retirement Board,

Appellee

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Appellate Case No. 20051022

**OPENING BRIEF OF APPELLANT
KATHY MONTIERTH**

**APPEAL FROM THE UTAH STATE RETIREMENT BOARD
DECISION AND ORDER**

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ORAL ARGUMENT REQUESTED

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Appellant

V.

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PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the Administrative Proceedings below that are involved in this Appeal.

Kathy Montierth, Petitioner below, Appellant

Utah State Retirement Board, Respondent below, Appellee

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JURISDICTIONAL STATEMENT

As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings pursuant to Utah Code Ann. § 63-46b-16.

Utah Rules of Appellate Procedure, Rule 14 provides for direct review of a decision or order of an administrative agency.

STATEMENT OF ISSUES ON APPEAL

ISSUE NUMBER 1. Whether the Utah State Retirement Board unconstitutionally deprived Appellant of due process under Article 1, §7 of the Utah Constitution, and under Section 1 of the 14th Amendment of the United States Constitution by stripping her of the survivor annuity of her deceased husband without notice or opportunity to be heard.

ISSUE NUMBER 2. Whether the Utah State Retirement Board unconstitutionally deprived Appellant of due process under Article 1, §7 of the Utah Constitution, and under the 14th Amendment of the United States Constitution by failing to provide notice and an opportunity to be heard, prior to accepting and/or approving of her husband's election of Plan 1 which purportedly divested her of the survivor annuity.

ISSUE NUMBER 3. Whether the Utah State Retirement Board failed to follow its own statutory scheme in Utah Code Ann. § 49-13-405(2), by failing to accord Appellant her request to treat her husband's election as though it had been made under Plan 3.

Statement Of Grounds For Seeking Review Of Constitutional Issues Not Raised

Below (Issue Numbers 1, 2 and 3). See Section VII of this appellate brief which is incorporated in full at this point. Under *State of Utah v. Archambeau*, 820 P.2d 920 (Utah App. 1991), the Court of Appeals may consider a constitutional issue for the first time on appeal in the interests of justice, plain error, or exceptional circumstances.

Appellant meets all three tests.

ISSUE NUMBER 4. Whether the hearing officer failed to make the requisite finding of fact that the deceased Montierth mistakenly elected Plan 1, rather than Plan 3.

Demonstration That Issue Number 4 Was Preserved Below. (See Request for Board Reconsideration, October 27, 2005)

ISSUE NUMBER 5. Whether the Application for Service Retirement, form RTRT-3, signed by Appellant's husband on August 16, 2002, is legally binding given the fact that it is unsigned by a Board representative or the decedent. **Demonstration That Issue**

Number 5 Was Preserved Below. (See Petitioner's Request for Board Action and attachments, March 21, 2005)

STANDARDS OF REVIEW

With regard to Issue Numbers 1, 2 and 3, whether an administrative agency has afforded a party due process is a question of law which is reviewed for correctness. *Color County Management v. Labor Commission*, 38 P.3d 969 (Utah App. 2000).

With respect to findings of fact (Issue Number 4), the reviewing court examines the record to determine if the findings are supported by substantial evidence when viewed in light of the whole record before the court. Utah Code Ann. §63-46b-16(4)(g).

With regard to Issue number 5, the standard of review of agency actions dealing with statutory interpretation is an issue of law, and thus is a “correction-of-error” review; no deference is paid to agency conclusions. *Gottfredson v. Utah State Retirement Board*, 808 P.2d 153, 154 (Utah App. 1991).

With respect to Issue Numbers 1, 2, 3, 4 and 5, regarding challenges based on arbitrary or capricious agency action, the standard of review is reasonableness and rationality. *R.O.A. General, Inc. v. Utah Dept. of Transportation*, 966 P.2d 840, 842 (Utah 1998).

**CONSTITUTIONAL PROVISIONS WHOSE
INTERPRETATION ARE DETERMINATIVE**

Utah Constitution, Article 1, Section 7.

U.S. Constitution, Amendment XIV, Section 1.

STATUTE WHOSE INTERPRETATION IS DETERMINATIVE

Utah Code Ann. §49-13-405(2) provides: “(2) Upon the request of a deceased member’s lawful spouse at the time of the member’s death, the deceased member is considered to have retired under Option Three”

STATEMENT OF THE CASE

Wesley Montierth, the deceased husband of Appellant, was a high school math teacher at Davis High School (R.T. 5), and a member of the Public Employees Noncontributory Retirement System (PERS). On August 16, 2002, he filled out an Application for Service Retirement, form RTRT-3, checking Plan 1 (Addendum 1). Plan 1 ostensibly does not provide a survivor annuity to the non-employee spouse upon the employee's death. Appellant was completely unaware of her husband's choice having never seen the Application for Service Retirement form (R.T. 13). The application was never properly completed; specifically there is no state or employee signature attesting to the requirement that the plans were explained to Mr. Montierth as required on Page 2 of the form (Addendum 1). Mr. Montierth committed suicide on October 20, 2004 (R.T. 7, 8). Upon learning that the Plan refused to provide her with survivor benefits, on February 22, 2005, Appellant formally requested the Board to change her husband's retirement benefit election from Plan 1 to Plan 3, pursuant to Utah Code Ann. §49-13-405(2) (Ltr. of February 15, 2005, Crofts to Newman). The request was denied by Robert V. Newman, Executive Director of the Plan on February 22, 2005 (Ltr. from Newman to Crofts).

On August 22, 2005, a hearing was held before ALJ James L. Barker, Jr. On October 13, 2005, the Utah Retirement Board adopted the findings of fact, conclusions of law and order of denial of the ALJ. A Petition for Review was lodged on October 14, 2005, and a Docketing Statement filed on December 1, 2005. An October 27, 2005

Request for Reconsideration was denied on December 8, 2005. Amended Docketing Statements were filed on December 8, 2005 and January 24, 2006.

SUMMARY OF ARGUMENT

This appears to be a case of first impression. A widow and her four minor children stand to lose over \$800,000 in survivor annuity benefits, their umbilical cord to life support, because of the state's unconstitutional denial of Appellant's due process right to notice, and opportunity to be heard, prior to stripping her of her vested property rights in the survivor annuity.

Errors by the Plan administrators, who, as trustees and fiduciaries, under both state and federal law, owe a fiduciary duty to Appellant, are clear, identifiable and egregious. First, the Board never informed the Appellant of the choices available for retirement benefits even though she legally was an equal "owner" of the benefit. Second, the Application for Service Retirement form is completely lacking in execution, since the required signature of a state representative or Appellant's husband -- attesting to the fact that the six retirement plan options had been explained -- is missing from Page 2 of the document. Third, and assuming, as the Board argued below, that Mr. Montierth knowingly and without mistake, (although the uncontradicted evidence shows otherwise), elected a plan that disenfranchised his spouse and four minor children of a lifetime annuity, the State failed to so notify the Appellant and provide her an opportunity to contest her husband's election at the time it was being made. Not only is this lack of notice unconstitutional, it eviscerates and nullifies a longstanding line of cases in Utah

requiring that a waiver by a spouse to retirement benefits be clear, specific and unmistakable. Finally, it refused to allow her the opportunity to exercise her post-death right to convert the Retirement Election to Plan 3 as provided in §49-13-405(2).

During the hearing, the Administrative Law Judge did not credit Mrs. Montierth's uncontested testimony that her husband's intent was to elect a plan that provided for the survivor annuity based upon his assurances that she would receive one. The ALJ devalued the testimony because of its hearsay character, all in disregard of explicit instructions by Utah courts that the hearsay rule is not to be strictly followed in administrative hearings.

Accordingly, both in its statutory and regulatory architecture, as well as in its administration, PERS is unconstitutional in that it deprives a non-employee spouse of a clear vested property right without due process notice and opportunity to be heard. The Board not only unconstitutionally has deprived Appellant of her lifeline to economic support, it has reaped an unconscionable forfeiture and windfall of some \$800,000. To the extent that the constitutional issues were not raised below, we petition the Court to consider them on appeal in order to correct plain error and manifest injustice as it may do so under *State of Utah v. Archambeau*, 820 P.2d 920 (Utah App. 1991). In this respect, it realistically cannot be argued that the Board, who acts as its own adjudicative tribunal, would have entertained fairly an argument that it had acted unconstitutionally.

ARGUMENT

I. THE PETITIONER HAS A VESTED PROPERTY INTEREST IN THE SURVIVOR ANNUITY OF HER DECEASED HUSBAND.

A logical predicate to advancing a denial of due process claim, whether procedurally or substantively, is a showing that the Appellant has a recognizable interest in the property deprived. In Utah, and in this particular context, that proposition seems unassailable.

In *In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561 (1976), the seminal case in the area, after an exhaustive analysis of what the term “vested” means in a retirement/pension context, the California Supreme Court held: “Pension rights whether or not vested represent a property interest . . . they comprise a community asset subject to division in a dissolution proceeding.” *Id.* at 562-63. Just six years later, in *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), the keystone retirement benefit case in Utah, the Utah court cited and followed *In re Marriage of Brown*, as it specifically considered whether a wife has a vested interest in her husband’s retirement benefits and secondarily, whether the term “vested” has any significance in defining what is a “property interest.” After surveying the status of the law in California and other jurisdictions it held:

In the context of Utah law, we find it unnecessary to consider whether or not the pension benefits are “vested or not vested”.

. . . .

We agree that this concept of vesting is an inappropriate basis for determining what property should be subject to equitable division in a divorce proceeding.

. . . .

If the rights to [retirement benefits] are acquired during the marriage, then the court must at least consider

those benefits in making an equitable distribution of marital assets.

Id. at 432-433.

To the same effect, see *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988); *Estate of Frank Annelo, Jr. v. McQueen, et al.*, 953 P.2d 1143 (Utah 1998); and *Culbertson v. Continental Assurance Co.*, 631 P.2d 906 (Utah 1981). The same is true with government sponsored plans. See *Greene v. Greene*, 751 P.2d 827, 831 (Utah App. 1988): “Military retirement benefits accrued in whole or in part during marriage constitute mutual property under Utah law and are subject to division in a divorce proceeding.”

As we examine the legislative scheme under PERS, the Utah legislature specifically recognized a spouse’s inalienable property interest in her husband’s retirement benefit upon death. First, the statutory architecture contains an expansive definition of “beneficiary” and “member.” Under Section 49-11-102, “Beneficiary” means any person entitled to receive payment through relationship or a person designated by a member. “Member” includes a spouse of retiree. Section 49-11-609. Section 49-13-405 dealing with the death of married members, provides:

- (1) As used in this section, “members full allowance” means Option Three calculated under Utah Code Ann. § 49-13-402 without an actuarial reduction.

- (2) Upon the request of a deceased member's lawful spouse at the time of the member's death, the deceased member is considered to have retired under Option Three.

Section 49-13-405(1)(2). The section then spells out the percentage of retirement benefit a surviving spouse would obtain depending on her husband's age and service years at the time of death. Section 49-13-405 can only be read as the legislature's attempt specifically to protect a surviving spouse in the event of her husband's death. And even more to the point, by this section, the legislature clearly recognized the vested interest a non-employee spouse has in the retirement benefit since she receives it simply by being married to the employee for six months. Utah Code Ann. §49-13-405(2)(b).

II. UTAH COURTS HISTORICALLY HAVE DEMANDED CLEAR, SPECIFIC WAIVERS OF PROPERTY INTERESTS WHEN A SPOUSE MIGHT BE DIVESTED.

In *Estate of Frank Annelo, Jr. v. McQueen*,² et al., 953 P.2d 1143 (Utah 1998), the Utah Supreme Court, per Justice Stewart, demonstrated the length to which Utah courts will go to protect the vested property interests of spouses. The context was a divorce proceeding and a mutually prepared settlement agreement.

First, the court noted that divorce alone does not terminate a former spouse's rights as a survivor to a retirement benefit. *Id.* at 1145. Second, the court addressed both the nature of the interest a spouse must have in the property to make it a cognizable right, and the clarity of a waiver in said interest, in order to make it effective. "Thus, one who has an expectancy interest in an asset owned by a former spouse retains that interest

unless a property settlement or divorce decree evidences a clear intent to deprive that person of the expectancy interest” (emphasis added) *Id.* at 1145. The court went on to state that it must appear that the document explicitly focuses on survivorship interests or expectancies, that the disclaimer is clear; in effect there must be explicit language. *Id.* at 1145. Similarly, in *Culbertson v. Continental Assurance Co.*, 631 P.2d 906 (Utah 1981) the court held: “Unless there is in addition a specific provision in the decree or property settlement explicitly waiving the expectancy interest the former spouse is entitled to receive the proceeds of the designated beneficiary.” *Id.* at 912-913.

The bottom line is obvious. In a divorce proceeding involving an expectancy interest, for example a retirement plan, of a spouse (usually the wife), wherein a division of property agreement is drafted, she cannot be deprived of her interest in the retirement plan without clear, explicit language to that effect. In contrast, here, neither the legislative scheme establishing the PERS annuity benefit nor in the Board’s own pre-retirement-election papers, particularly Form RTRT-3 (Application for Service Retirement), is there a single caution, or protective device to ensure a knowing waiver or consent by the non-employee spouse. Thus, we have the anomaly, in Utah, that the courts will exercise a sharp-penciled eye for specificity and clear waiver in a divorce proceeding (where both spouses have counsel and are fluent in the property), yet completely ignore that very same spousal right, when the spouse receives absolutely no notice that her property right is being extinguished, is completely unaware of Form RTRT-3, and, of course, authorizes no consent whatsoever.

III. PETITIONER HAS BEEN DEPRIVED OF PROPERTY IN VIOLATION OF THE UTAH AND UNITED STATES CONSTITUTIONS BY FAILING TO PROVIDE NOTICE AND OPPORTUNITY TO OBJECT

The Utah Constitution, Article I, §7 mirrors the language of the 14th Amendment, “No person shall be deprived of life, liberty or property without due process of law.” U.S. Constitution, Amendment XIV, §1. In *McGrew v. Industrial Commission*, 85 P.2d 608, 610 (Utah 1938), recently approved in *Millers v. USAA Casualty Ins. Co., et al.*, 44 P.3d 663, 676 (Utah 2002), the Court stated, referring to Article I, §7: “The term property in this clause embraces all valuable interests which a man may possess outside of himself . . . It is not confined to mere tangible property but extends to every species of a vested right.” The court went on to observe that under Utah’s open courts provision, Utah Constitution, Article I, §11, the courts are expressly open to every person for an injury done to his property. *Id.* at 673. Additionally, and almost without need to citation, “Every person who brings a claim in court or at a hearing held before an administrative agency has a due process right to receive a fair trial.” *Bunnell v. Industrial Commission of Utah*, 740 P.2d 1331, 1333 (Utah 1987).

The due process clauses in the 14th and 5th Amendments guarantee that each person will be accorded a certain process if they are about to be deprived of property. Nowak & Rotunda, Constitutional Law, 6th ed. (2000). The 14th Amendment specifically requires notice before property is taken. *Id.* at 587. The notice requirement runs from statutes to regulations to sales of property. Nowak & Rotunda, Treatise on Constitutional Law, 3d, 1999 . When a “governmental agency . . . considers terminating or impairing an individual’s constitutionally cognizable . . . property interest, notice must be given to

individuals whose interest is at stake . . .” *Id.* at 107. The same guarantee of proper notice also runs to statutes which must be reasonably clear so that individuals have adequate notice as to the type of conduct regulated or prohibited. *Id.* at 104-105. And, when a statute regulates fundamental constitutional rights, the degree of notice provided must possess greater clarity and will be subject to close judicial scrutiny. *Id.* footnote 31 at 105. Case in point: Utah Code Ann. § 49-13-402. It creates the six options here at issue, but does not provide any mechanism to alert the putative widow that she will be divested if her husband elects Plan 1. As we also argue below, any notion that the non-employee spouse can be divested if her employee-husband elects Plan 1, seems internally contradicted by Section 49-13-405(2).

Notice requirements run across the board. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950), whether notice by newspaper of judicial action was sufficient; *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 L.Ed.2d 74 (1988) discussing the proper notice for default judgments. See Rule 23 of the Federal Rules of Civil Procedure regarding notice to class members. In *United States v. James Daniel Good Real Property*, 510 U.S. 43, 126 L.Ed.2d 490 (1993), in the setting of a civil forfeiture case, the court expressly held that the state could not seize real property without granting the owner notice and some type of hearing.

The twin sister of notice, itself a fundamental prerequisite of due process, is the opportunity to be heard, a right which has little reality or value unless one is informed that the matter is pending and one can choose for himself whether to contest. Additionally, the notice must be of such a nature as reasonably to convey the required

information. *Worrall v. Ogden City Fire Department*, 616 P.2d 598, 601 (Utah 1990). In *T.H. v. State of Utah* 86 P.3d 745, 748, the court held that for purposes of due process, the parties must receive notice reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections. See, *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 391 (Utah App. 1987) (issued in the background of claim preclusion) reaching the same conclusion; and *3D Construction and Development v. Old Standard*, 117 P.3d 1082, 1087 (Utah 2005).

In *Mathews v. Eldredge*, 424 U.S. 319, 47 L.Ed.2d 18, 32, 41 (1976), in the context of termination of social security benefits, the Court observed: This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest . . . “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner” . . . (citations omitted) . . . The essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the [event] and an opportunity to meet it.”

Here, Appellant Montierth received nothing. She was completely unaware that the incorrect option had been selected in 2002, and she was never given an opportunity to contest, object or be heard on the subject. She simply lost her entire \$800,000 without so much as a postcard. This abject failure of notice, which inherently is misleading, is not tolerated well by Utah courts. The courts have been specifically exacting on the Retirement Board to ensure that it does not mislead members, and diligently protects their interests. In *Eldredge v. Utah State Retirement Board*, 795 P.2d 671, 676 (Utah App.

1990), the court held that the Board “bears a stringent duty to abstain from giving inaccurate or misleading advice.” Finally, the United States Supreme Court has strictly enforced the constitutional prerequisite of agency impartiality, particularly if the decision-maker has an interest in the outcome of the case. See, Nowak & Rotunda, Treatise on Constitutional Law, 3d, 1999 §17.8 at 100-101. While we do not suggest that the Board ruled against Appellant simply in order to save \$800,000 from distribution, nevertheless given the pecuniary interest at stake, it makes the Board’s fiduciary duty, and its handling of claims, more susceptible to close scrutiny by this Court and decidedly tips the balance of equities strongly in Montierth’s favor.

IV. THE BOARD FAILED TO FOLLOW THE SPIRIT AND LETTER OF SECTION 49-13-405(2)

As argued previously in Section I, the Utah Legislature specifically granted a surviving spouse the right unilaterally to select option three. “Upon the request of a deceased member’s lawful spouse at the time of the member’s death, the deceased member is considered to have retired under option three.” Utah Code Ann. §49-13-405(2). On its face section (2) has no qualifications or limitations. It does not limit the option to cases in which a Form RTRT-3 has not been executed; nor does it disqualify a member’s spouse from so electing simply because the employee previously has retired.

The primary rule of statutory interpretation is to give effect to the intent of the Legislature in light of the purpose the statute was meant to achieve. *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877, (Utah 1993). To discover intent, the court looks first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1355, (Utah 1993). In

construing a statute the court assumes that “each term in the statute was used advisedly; thus statutory words are read literally.” *Savage Indus., Inc. v. Utah State Tax Commission*, 811 P.2d 664, (Utah 1991). Applying these historical rules of construction, the Appellant’s 2005 “election” to treat her annuity as one under Plan 3 should have been honored forthwith.

Undoubtedly, the State will argue that §49-13-405(2) was designed only for employees who died before they actually retired. Perhaps, but the statute is not so limiting. A better, equally realistic construction is that option one, under §49-13-402, was for bachelors or widowers who had no need for a survivor benefit. But assuming arguendo that §49-13-405(2) is only available to pre-retirees, we are faced with yet another anomaly: Non-employee spouses whose husbands have never exercised the RTRT-3 option are fully protected, yet wives of employees who have mistakenly, or deliberately, disenfranchised them, without notice or knowledge, are left impecunious.

V. THE UTAH STATE RETIREMENT BOARD OWES A FIDUCIARY DUTY TO APPELLANT

A fiduciary is one who not only occupies a position of trust, but, because of superior knowledge, position or power, must exercise a higher level of care and diligence. BLACK’S LAW DICTIONARY, 7th ed. (1999). In essence, a fiduciary is a person with a duty to act primarily for the benefit of another. *Russell, et al. v. Lundberg, et al.*, 120 P.2d 541, (Utah App. 2005) . In *First Security Bank of Utah N.A. v. Banberry Dev. Corp.*, 786 P.2d 1326, 1333 (Utah 1990), the Court phrased it this way: “A fiduciary

relationship imparts a position of peculiar confidence placed by one individual in another.”

There is little doubt that the Board is a fiduciary as respects all plan recipients including non-employee spouses. Utah Code Ann. §49-13-104 establishes the Public Employee Non Contributory Retirement Trust Fund. Section 49-11-203(1)(f) defines the Board as an investment trustee of the Investment Fund. It is charged to maintain systems, plans and programs on an actuarial basis. Section 49-11-203(1)(g). Section 49-11-103(2) states: “This title shall be liberally construed to provide maximum benefits and protection consistent with sound fiduciary and actuarial principals.” Under § 49-11-203(1)(p) (Board Powers and Duties), the Board is mandated not to take any action in conflict with the Board’s trust and fiduciary duties.

The courts have made the Board’s fiduciary role unwaivering. In *Eldredge v. Utah State Retirement Board*, 795 P.2d 671, 676 (Utah App. 1990), in an action for estoppel, where a significant misrepresentation had been made by a Board staff employee, the court elaborated on the importance of the fiduciary duty when conveying information.

The critical nature of the irrevocable, once-in-a-lifetime retirement decision of a public employee imposes a strict duty of certitude upon those charged with the supervision and implementation of the system. A governmental body, charged with as important a function as the administration of public employees retirement system bears a stringent duty to abstain from giving inaccurate or misleading advice.

While the *Eldredge* admonition is in the affirmative – what not to say or represent, equally unjustifiable, equally damaging and equally irreversible, is the failure to warn, or

withhold, critical information to a class of putative widows when they are the most vulnerable. In contrast to operating at a “stringent duty” level to ensure that an employee is completely armed with all the facts during his “irrevocable once-in-a-lifetime” retirement decision, the chief administrator of the program, Judy Lund, seems nonchalant and completely passive. She testified at the hearing: “Well, basically once we have the application and if everything’s valid we presume the member has selected the plan he or she wishes and that’s it. I mean we’re not going to contact them again to confirm what the member has already selected.” (Tr. pp. 32-33) (emphasis added).

VI. THE BOARD ERRED IN NOT CREDITING THE UNCONTRADICTED TESTIMONY THAT APPELLANT’S HUSBAND INTENDED TO PROVIDE FOR A SURVIVOR BENEFIT.

With respect to the evidentiary record, the Utah State Retirement Board failed to decide a critical issue, or silently assumed it adversely to Appellant, in that it made no finding regarding the deceased retiree’s actual belief as to whether the selection of Plan 1 would deprive Appellant of retirement benefits upon his death. The uncontradicted evidence before the Board was that prior to his death the decedent unequivocally told his wife that his retirement plan option provided for her substantially in the event of his death (R.T. 9). At the hearing, this testimony was received without objection when offered into evidence. Second, even if a timely objection had been lodged, it would not have been inadmissible hearsay because it was not offered to prove the truth of the matter asserted (i.e. that he really had selected a different benefit plan), but rather to prove what he thought he had done: i.e. selected a plan that protected his family. By failing to object to

said testimony, Mrs. Montierth's statements are conclusive and binding upon all parties and serve to undercut the conclusion reached by the Board on this issue.

The findings in Paragraph No. 11 read: "Petitioner failed to provide any evidence outside of her testimony that Mr. Montierth mistakenly selected retirement Plan 1 and meant to select another retirement plan on his Application." As support, the Board cites mistakenly Utah Code §63-46b-10(3) ("A finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence"). The problem, of course, is that there was no "contested evidence" and thus §63-46b-10(3) is not applicable. Had there been an objection, Petitioner could have produced a plethora of evidence (insurance documents, car titles, real estate titles, general lifestyle orientation) demonstrating the manner in which she and her husband held all property and the decedent's lifelong devotion to his family's care and future as a High Priest in the LDS Church.

In essence, the ALJ and the Board ignored the "hearsay" evidence in direct contravention of Utah's Administrative Procedures Act. Utah Code Ann., § 63-46b-8(1)(c) states "The Presiding Officer may not exclude evidence solely because of hearsay". The Utah Supreme Court has "repeatedly held that the hearsay rule does not apply in administrative hearings." *Schmidt v. Industrial Commission*, 617 P.2d 693, 696 (Utah 1980).

The failure to consider hearsay rises to the level of constitutional denial.

The manner in which the judge conducted the hearing was unacceptable. First, the administrative law judge inserted

a strict application of the hearsay rule, although that rule does not apply in administrative hearings.

....

This error contributed to constitutional denial of a fair hearing.

Bunnell v. Industrial Commission of Utah, 740 P.2d 1331, 1333 (Utah 1987).

On a separate and distinct basis, the “Application For Service Retirement,” the key document in issue, is clearly misleading and was never completed, rendering its legal efficacy in serious doubt. “Plan 1” is referred to as the “unmodified plan,” which the average person would assume to be the normal-survivorship-rights-to-spouse retirement product. It is true that the plans are described on the reverse side of the document, with a signature line to certify that a counselor has reviewed (and presumably explained) the plans. This line remains unsigned, however, leaving the record in serious doubt that the application was ever completed legally. Accordingly, neither a contract nor a legally binding “election” between the State and Petitioner’s spouse was ever made, rendering the purported “election” null and void.

VII. THE APPELLANT HAS NOT WAIVED HER RIGHT TO BRING THESE ISSUES BEFORE THE COURT

It is likely that the Appellee, or the court sua sponte, will raise the issue of waiver as regards the constitutional issues brought before it here. In Utah, as in other jurisdictions, the general rule is that waiver is applicable when an issue was not raised below. *State v. Webb*, 790 P.2d 65, (Utah App. 1990). It is equally clear, however, that well recognized exceptions easily provide a platform for review at this appellate stage. *Espinal v. Salt Lake City Board of Education*, 797 P.2d 412, 413 (Utah 1990) (limited

exceptions are available). Two exceptions are frequently identified in Utah: (1) if the trial court committed “plain error” or (2) exceptional circumstances. *State of Utah v. Archambeau*, 820 P.2d 920 (Utah App. 1991); *State v. Gibbons*, 740 P.2d 1309, (Utah 1987). It also has been suggested that the error below must be obvious and “harmful”. *State v. Anderson*, 789 P.2d 27, (Utah 1990). Another court, *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989), held that manifest injustice was the same as “plain error.” In *State of Utah v. Archambeau*, *supra* at 926, after reviewing the history of the waiver exception the court advanced an overarching principle: “We conclude that the ‘plain error’ and ‘exceptional circumstances are sufficiently broad to encompass any situation requiring Utah’s appellate courts to consider a constitutional issue for the first time on appeal in the interest of justice.”

An expansive collection of judicial exceptions to the general waiver rule is cataloged in an excellent article entitled The Thirteenth Review of Criminal Procedure: Introduction and Guide for Users, 89 Georgetown L.J. 1783 (2001). Matters not raised below, and routinely barred, are failures to object to evidence, to jury instructions, to perceived jury bias, motions to suppress evidence, requests for discovery and motions to exclude prior convictions. *Id.* at 1797, and cases cited therein. Significantly, errors of a constitutional nature are more likely to be considered plain error. *Id.* at 1807. Commonly applied judicial exceptions would include futility, plain error affecting a substantial right, the need to prevent grave injustice or a miscarriage of justice, and error seriously affecting the fairness, integrity or public reputation of judicial proceedings. *Id.* text at pp. 1803-1807, and footnotes, 2431-2435, with the supporting decisions.

And with respect to the futility exception, in one of the few appellate cases to deal with Utah's Retirement Board, the appellate court made it known that it pays little attention to the Retirement Board's legal conclusions. "The standard of review on appeal from final agency action dealing with statutory interpretation presents an issue of law, and we therefore apply a correction-of-error standard where we extend no deference to the agency's conclusions." *Gottfredson v. Utah State Retirement Board*, 808 P.2d 153, 154 (Utah App. 1991) (emphasis added). See also, *Horton v. Utah State Retirement Board*, 842 P.2d 928, 931 (Utah App. 1992) to the same effect (no deference to the agency's decision).

Conversely, if a statutory or constitutional issue is not raised below, and if the court believes there is some value in having the Board deal with it initially, the court will remand, not dismiss. *Johnson v. Utah State Retirement Office*, 621 P.2d 1234, 1238 (Utah 1980), "We reverse and remand the case to the lower court for reference to the retirement board." Adding to the futility argument, *Johnson* sanguinely observed that "administrative agencies do not generally determine the constitutionality of their organic legislation." *Id.* at 1237.

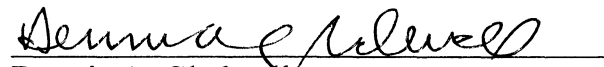
In the special context before this Honorable Court, we advance four reasons to invoke the exception: (1) there is great harm to a widow and four children who received no notice that their right to the annuity had been extinguished whether mistakenly, or deliberately, by Appellant's suicide-bound husband; (2) the futility of arguing before the Board that its "election scheme," and administration, was unconstitutional; (3) the importance to all putative widows in the State of Utah that their constitutional right to

notice and opportunity to be heard fastens inextricably to any decision that may effect their vested property interest in retirement benefits; and (4) to correct this manifest injustice.

CONCLUSION

For all of the foregoing reasons, Appellant requests either: (1) that the Application for Service Retirement be disregarded as incomplete and legally ineffective, and that her 2005 request to receive the annuity be granted under §49-13-405(2); or alternatively, (2) that the legislative and administrative scheme here discussed be declared unconstitutional, that the Board be reversed, and that the ALJ be ordered to grant Appellant her annuity; or in the event the Court seeks the Board's view of the constitutional issues raised in this proceeding, (3) that a remand to the Administrative Law Judge be made pursuant to *Johnson v. Utah State Retirement Office*, 621 P.2d 1234 (Utah 1980).

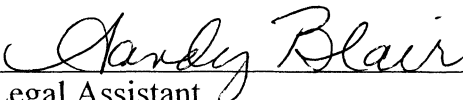
RESPECTFULLY SUBMITTED this 26 day of January, 2006.


Dennis A. Gladwell
David L. Knowles
Attorneys for Appellant, Kathy Montierth

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing OPENING BRIEF OF APPELLANT KATHY MONTIERTH and of the Addenda that follow this page, were mailed by first-class mail with postage fully prepaid this 26th day of January, 2006, to each of the following:

David B. Hansen
Howard, Phillips & Andersen
560 East 200 South, Suite 300
Salt Lake City, Utah 84102
Attorneys for Utah State Retirement Board



Legal Assistant

ADDENDUM NO. 1



Utah Retirement Systems
560 East 200 South, Suite 240
PO Box 1590
Salt Lake City, Utah 84110-1590
(801) 366-7770 or (800) 695-4877
FAX (801) 366-7733

POOR COPY

APPLICATION FOR SERVICE RETIREMENT

Public Employees' Retirement Systems

URS

COPY

- INSTRUCTIONS:**
1. Before completing the application, read the information on the reverse side.
 2. All blanks must be completed to process your application.
 3. Please type or print clearly in black ink. Whited out or crossed out areas may invalidate this application.
 4. Return both copies (2) of completed form to the Retirement Office.
 5. Section C must be completed to indicate either selection of life insurance or waiver of coverage.

SECTION A - PERSONAL INFORMATION

Name (as it is to be shown on the retirement check) WESLEY V. MONTERTH		Birth Date (yyyy/mm/dd) 1950/02/19	Social Security Number 528 76 7745
Mailing Address 5201 S. RIDGEWAY DR.		Home Phone 801-477-3439	Marital Status <input type="checkbox"/> Single <input type="checkbox"/> Divorced <input checked="" type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Legally Separated
City OGDEN	State UTAH	Zip 84403	Daytime Phone 801-390-9389
Effective Retirement Date (1st or 16th day of month) See reverse side. <input type="checkbox"/> 1st or <input checked="" type="checkbox"/> 16th Month JULY Year 2002		Anticipated Last Day of Work (yyyy/mm/dd) 2002/05/30	
Position HIGH SCHOOL TEACHER		Employer/Department/Division DAVIS SCHOOL DISTRICT	
Spouse's Name (First, Middle, Last) KATHRYN THOMAS MONTERTH		Birth Date (yyyy/mm/dd) 1956/12/30	Social Security Number 529
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Are you in the process of purchasing or redepositing service?		COMPLETED	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Do you intend to make a purchase or redeposit of service at the time of your retirement?			
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No Have you taken a leave of absence during your career, such as a sabbatical leave?			
If you intend to make a purchase or redeposit, it must be completed before your effective retirement date.			

SECTION B - RETIREMENT PLAN

I want to receive my retirement allowance under the provisions of the plan selected below.
(See plan description on the back of this form.)

☒ Plan 1 (Unmodified) ☐ Plan 2 ☐ Plan 3 Joint Life ☐ Plan 4 Joint Life ☐ Plan 5 Joint Life ☐ Plan 6 Joint Life

If Plan 2 is selected, the retiree must designate primary and contingent beneficiaries on Form RTCF-1.

SECTION C - RETIREE AND SPOUSE LIFE INSURANCE

I agree to the conditions of enrollment as set forth by the Utah State Retirement Board and authorize deduction of the required premiums.

Retiree Coverage	<input type="checkbox"/> \$3,000	<input type="checkbox"/> \$5,000	<input type="checkbox"/> \$10,000
Spouse Coverage	<input type="checkbox"/> \$3,000	<input type="checkbox"/> \$5,000	<input type="checkbox"/> \$10,000

WAIVER OF COVERAGE OF RETIREE OR SPOUSE LIFE INSURANCE

- ☒ I do not elect to enroll in the retiree coverage.
☒ I do not elect to enroll in spouse coverage.

SECTION D - SIGNATURE

In accordance with the statutes governing the Utah Retirement Systems, I make application for retirement benefits. I understand the limitations as described on the reverse side of this form. I hereby certify that the information provided on this form and any of the attached forms is true, correct, and complete to the best of my knowledge. I hereby authorize representatives of the Utah Retirement Systems to verify any or all of the information submitted. I hereby acknowledge and agree that any false or misleading information submitted on this form or on any attached forms may subject me to personal liability and the Utah Retirement Systems may exercise its rights against me if damaged by false or misleading information submitted by me.

Member's Signature Wesley V. Monerth Date 16 Aug. 2002

NOTARIZATION

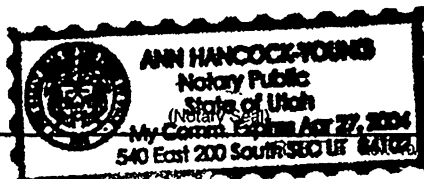
STATE OF Utah COUNTY OF Salt Lake

On the 16th day of August, 2002, the above-named applicant known to be the individual herein, personally appeared before me and acknowledged to me that he/she read, understood, and executed the same of his/her own free will and choice without any undue influence. My commission expires April 27, 2004

Ann Hancock Young
(Notary Public)

RETIREMENT OFFICE USE

Fund <u>16</u>	Employer No. <u>010</u>
Life Insurance Cost: Retiree <u>---</u>	
<input type="checkbox"/> EFT	Spouse <u>---</u>
<input type="checkbox"/> Birth Certificate(s)	<input type="checkbox"/> Marriage Certificate
<u>10 file</u>	



RETURN BOTH COPIES (2) TO THE RETIREMENT OFFICE

Explanation Of Retirement Plans

Any member who qualifies for service retirement may retire by applying in writing to the Retirement Office stating the proposed effective date of retirement, which may not be more than 90 days before or after the date of application and which shall be effective on the 1st or 16th day of the month as selected by the member, but must be after the last day of actual work. The member must actually terminate employment on or before the retirement date.

NOTE: No alteration, addition, or cancellation of a benefit may be made after the date of retirement as set by the member in this application. However, there is a three-day rescission period from the date the application is signed during which period the member may elect to make a change.

1. **PLAN 1 UNMODIFIED MONTHLY RETIREMENT BENEFIT** - Provides an unmodified retirement benefit to the retiree for the remainder of the retiree's lifetime. No continuing spouse or other death benefits are paid under this plan. Upon the retiree's death only the check covering the month in which the retiree dies is paid to the retiree's estate.
2. **PLAN 2 RETIREMENT BENEFIT** - Provides for a slightly reduced allowance (about 5%) to the retiree. Upon the retiree's death, any balance in the retiree's own contribution account is paid to the designated beneficiary. The beneficiary may be changed at any time on Form RTCF-1.
3. **PLAN 3 RETIREMENT BENEFIT** - Provides a reduced benefit payable to the retiree during the retiree's lifetime, and upon the retiree's death, provides the same benefit to the lawful spouse designated at the time of retirement. The beneficiary cannot be changed after the retirement date.
4. **PLAN 4 RETIREMENT BENEFIT** - Provides a reduced benefit payable to the retiree during the retiree's lifetime, and upon the retiree's death, provides one half the same benefit to the lawful spouse designated at the time of retirement. The beneficiary cannot be changed after the retirement date.
5. **PLAN 5 RETIREMENT BENEFIT** - Provides a reduced benefit payable to the retiree during the retiree's lifetime, and upon the retiree's death, provides the same benefit to the lawful spouse designated at the time of retirement. Should the spouse die first, the retiree's plan will revert to the maximum monthly retirement benefit under Plan 1. Plan 5 provides a slightly lower benefit than Plan 3. A member retiring under Plan 5 who subsequently divorces may elect to convert the present value of the remaining benefit at the time of divorce to an actuarially equivalent benefit under Plan 1 if there is no court order to the contrary.
6. **PLAN 6 RETIREMENT BENEFIT** - Provides a reduced benefit payable to the retiree during the retiree's lifetime, and upon the retiree's death, provides one half the same benefit to the lawful spouse designated at retirement. Should the spouse die first, the retiree's plan will revert to the maximum monthly retirement benefit under Plan 1. Plan 6 provides a slightly lower benefit than Plan 4. A member retiring under Plan 6 who subsequently divorces may elect to convert the present value of the remaining benefit at the time of divorce to an actuarially equivalent benefit under Plan 1 if there is no court order to the contrary.

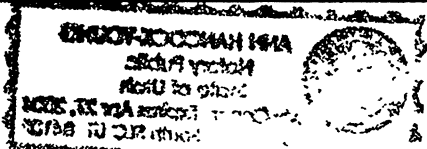
NOTE: If the member chooses Plan 1 and dies within 90 days after the effective date of retirement, the member's retirement will be canceled and the account settled as a death before retirement.

The following Retiree Life Insurance is a term life insurance and may be taken in addition to the regular retirement plan selected:

Life insurance for the retiree and spouse is available in the amounts of \$3,000, \$5,000, or \$10,000. The premiums will be deducted from the retiree's retirement benefit. If life insurance for a spouse has been selected and the retiree dies, no further premium is due for the spouse's life insurance. Election to participate in this program is irrevocable. If the retiree or spouse dies in the first three years after retirement, a reduced life insurance payment will be paid to the designated beneficiary(ies).

The above statements and options have been reviewed with me by a counselor.

Member's Signature _____ Date _____



ADDENDUM NO. 2

KATHY MONTIERTH on Behalf of	:	
Wesley Montierth (Deceased),	:	
	:	
Petitioner,	:	
	:	
v.	:	FINDINGS OF FACTS AND
	:	CONCLUSIONS OF LAW AND
	:	ORDER
	:	
UTAH STATE RETIREMENT BOARD,	:	File #: 05-06R
	:	
	:	
Respondent.	:	Hearing Officer: Barker
	:	

FINDINGS OF FACT

- 1

2. PERS is administered by the Utah State Retirement Office (“Office”).
3. Prior to his retirement, Mr. Montierth requested and received three Retirement Benefit Estimates (“Estimates”).
4. On August 16, 2002, Mr. Montierth filed an Application for Service Retirement (“Application”) with the Office for a July 16, 2002, retirement date.
5. On his Application, Petitioner selected retirement “Plan 1.”
6. On August 16, 2002, Mr. Montierth had his signature on his completed Application notarized by Ms. Ann Hancock Young, a retirement counselor.
7. Mr. Montierth’s signed Application states in part:

In accordance with the statutes governing the Utah Retirement Systems, I make application for retirement benefits. I understand the limitations as described on the reverse side of this form. I hereby certify that the information provided on this form and any of the attached forms is true correct, and complete to the best of my knowledge.

8. For 27 months, Mr. Montierth and Kathy Montierth (“Petitioner”) received and benefited from a Plan 1 retirement benefit, which provided substantially more in retirement benefits than any other retirement plan benefit.
9. Mr. Montierth passed away on October 20, 2004.
10. Petitioner is the surviving spouse of Mr. Montierth.
11. Petitioner failed to provide any evidence outside of her testimony that Mr. Montierth mistakenly selected retirement Plan 1 and meant to select another retirement plan on his Application.

CONCLUSIONS OF LAW

1. Utah Code Ann. § 49-11-613(4) provides that Petitioner bears the burden of proof in this matter.
2. Utah Code Ann. § 49-11-607(1), states, “After the retirement date, which shall be set by a member in the member’s application for retirement, no alteration, addition, or cancellation of a benefit may be made except as provided in Subsections (2), (3), and (4) or other law.”
3. Petitioner failed to provide documentation or testimony which would allow her to change Mr. Montierth’s retirement plan after his retirement date.

ORDER

IT IS HEREBY ORDERED that Petitioner’s request to change Mr. Monthierth’s retirement plan is hereby denied.

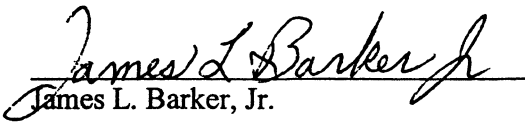
BOARD RECONSIDERATION

Within ten (10) days of a Board order, any party may file a written request for reconsideration stating the specific grounds upon which relief is requested as set forth in Utah Code Ann. §49-11-613. This filing for reconsideration is not a prerequisite for seeking judicial review of the order on review. The request for reconsideration shall be filed with the Board and one copy sent by mail to each person making the request. The Board chairman or executive director shall issue a written order granting or denying the request within twenty (20) days of receipt. If no order is issued within twenty (20) days, the request is denied.

JUDICIAL REVIEW

If Petitioner is aggrieved with the final Board order, she may seek a judicial review within thirty (30) days after the date that the order constituting final Board action is issued. Petitioner shall name the Board and all other appropriate parties as respondents. The Utah Court of Appeals has jurisdiction to review all final Board actions resulting from formal proceedings. All petitioners shall follow the procedures established in Utah Code Ann. § 63-46b-16.

DATED this 13 day of August, 2005.


James L. Barker, Jr.
Adjudicative Hearing Officer

The foregoing Findings of Fact, Conclusions of Law, and Order of Denial of the Adjudicative Hearing Officer is hereby adopted as the order of the Utah State Retirement Board.

Dated this 13 day of ^{October}~~September~~, 2005.

UTAH STATE RETIREMENT BOARD

BY 
John Lunt, Board President

APPROVED AS TO FORM

A handwritten signature in black ink, consisting of several loops and flourishes, positioned over the text 'Rocky Crofts'.

Rocky Crofts

CERTIFICATE OF MAILING

I hereby certify that on this the 14 day of ^{October}~~August~~, 2005, I mailed a true and correct copy of the above **Order**, postage pre-paid, to the following:

Rocky Crofts, Esq.
Smith Knowles
4723 Harrison Blvd., Suite 200
Ogden, UT 84403

David B. Hansen
Howard, Phillips & Andersen
560 East 200 South, Suite 300
Salt Lake City, Utah 84102

Debbie Buck