

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: December 7, 2016)

THE RETIREMENT BOARD OF THE
EMPLOYEES' RETIREMENT SYSTEM
OF THE STATE OF RHODE ISLAND

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v.

C.A. No. PC-2015-0203

FRED L. RANDALL

DECISION

LANPHEAR, J. This matter came on for trial before the Court in July 2016. Thereafter, the parties submitted memoranda in lieu of final statements. This matter is before the Court to determine whether Mr. Randall is entitled to any of his state pension benefits. If not, the Court is called upon to determine whether Diane Randall is entitled to any of his pension benefits as an “innocent spouse.”

The parties agreed to sever the issues so that the Court initially determines whether Mr. or Mrs. Randall is entitled to some or all of the pension payments, reserving their right to present additional evidence on the question of disposition of the pension contributions made if that remains an issue thereafter. Each party has rested on the initial question.

I

Findings of Fact

Mr. Randall, of Warwick, Rhode Island, worked for the State of Rhode Island as a contributing member of the Rhode Island State Employees' Retirement System (ERSRI) continuously for approximately thirty-five years. In 1976, he began state employment as a cook's helper in the Rhode Island Department of Mental Health, Rehabilitation and Hospitals. In

1978, he became a fiscal clerk at the Department of Computer Sciences at the University of Rhode Island (U.R.I.). In 1992 or 1993, he became a fiscal clerk in the Department of Chemistry at U.R.I. where he continued for about two years. He was then transferred to the Providence Extension of U.R.I. working in the Bursar's Office as a fiscal clerk and a senior teller until 2011. He was earning between \$50,000 and \$52,000 per year.

Mr. Randall has been married to Diane Randall since 1975. During their forty-one year marriage, they had two children, now in their thirties and apparently living independently.

In 2012, Mr. Randall was charged with having embezzled monies from the state.¹ In 2014, he pled nolo contendere to embezzlement and was sentenced to twenty years at the Adult Correctional Institutions with thirty months to serve, the remaining time being suspended and running with probation. He was ordered to pay restitution of \$200,000. Mr. Randall completed the incarceration and is now living with Mrs. Randall at their home.

Mr. Randall retired from state service in 2011 and received retirement benefits from March 2011 until March of 2015. The payments to him were about \$4300 per month. In November of 2014 the payments declined to about \$4000 per month and he became eligible for social security benefits. Per Mr. Karpinski, Executive Director of ERSRI's, affidavit, Mr. Randall has already received pension payments totaling \$185,750.46. According to the affidavit of Mr. Karpinski,² if Mr. Randall were still receiving a pension, it would amount to \$2564.27 per month.

Mr. Randall was very specific that he only took money from the state after 2004 until 2011. He did not take money before this time and did not admit to taking any money before this

¹ State v Randall, Providence County Superior Court case number P2/12-2058.

² At hearing, the parties agreed that this affidavit, attached to the Plaintiff's Post-Trial Memorandum of Law, would have the weight of a full exhibit.

time. He was never disciplined at his extensive state employment for anything occurring before 2005 and specifically testified that no embezzlement occurred prior to receiving the new position in 2004. The money which Mr. Randall embezzled was money paid by students for tuition at U.R.I. He acknowledged that he violated the public trust entrusted upon him, and, by doing so, the state was obligated to credit the students with the funds, at a loss to the state.

Mr. Randall now has a significant conviction, is older and has health problems making it difficult to obtain new employment. He is still serving a suspended sentence and probation with about \$200,000 still due in restitution. He has paid \$150 per month since his release from incarceration this year.

Mrs. Randall remains married to Mr. Randall. They live with one another, though she now has separate accounts. Mr. Randall now receives \$1476 per month in social security. Mrs. Randall makes about \$6000 per year for her part time employment. In 2014, Mrs. Randall's father passed away, leaving her a substantial inheritance. This allowed her to pay off the mortgage on their home and their credit card balance. She purchased a new car and renovated some of the home. She continues to have \$180,000 in savings in her name and \$100,000 in a retirement account in her name. She is searching for full-time employment. Mrs. Randall would occasionally gamble with her husband at Foxwoods Casino.

B

Credibility of the Witnesses

In State v Forbes, 925 A.2d 929 (R.I. 2007), our Supreme Court encouraged the trial courts to discuss the credibility of the witnesses. Mr. Randall was well-spoken, answered all questions directly and appeared contrite for his misdoing, particularly for how it harmed his family. He appeared prepared for his direct testimony and warily concerned when new topics

were raised on cross-examination. Obviously, his past wrongs give the Court significant concern for his credibility, though there were no clear inconsistencies in his testimony.

Mrs. Randall is an intelligent woman, anxious to hold her family together. Clearly displeased about what her husband did, she answered questions directly and attempted to be clear. Both spouses testified that Mrs. Randall never knew that Mr. Randall had embezzled or that he had used the significant amounts taken to pay for his chronic gambling. Each of the parties was consistent and firm in their testimony on direct examination and cross-examination. Moreover, each of the witnesses was consistent with one another, and no evidence was introduced which would contradict the testimony of either witness. They were frank about Mrs. Randall's recent receipt of a significant bequest from her father's estate. That being said, their testimony was obviously self-serving: The Court's decision will affect the income to their household. Nevertheless, the Court found them somewhat credible, but anxious to protect their financial interests.

Mr. Randall claimed that the money that he took was used for gambling at the Foxwoods and Mohegan Sun Casinos in Connecticut. Mr. Randall claims that all of the funds were used for gambling and does not dispute the state's calculations that he bet \$250,000 during this time period. He claimed that there were no gifts or extravagant purchases. He testified he misled his wife regarding where he went at night and the source of his rewards card, which he did use for dinner and shows with his wife. If he won on any of his gambling ventures, he would spend it on a meal date or vacation with his wife, or gamble with it. Although he took gambling trips to Foxwoods Casino with his wife on several occasions, he claimed that she would only bet \$20 to \$30 of their own money on these ventures, using his wife's rewards card, and the majority of the gambling was done without her knowledge in private trips to the casinos. Mr. Randall testified

he never informed his wife that he was converting state funds, and she knew nothing about the embezzlement until after his arrest.

Mr. and Mrs. Randall have been married for over forty years. They raised several children in a hard-working household and continued to enjoy each other's company after the children had grown. It is reasonable for Mrs. Randall to have trusted Mr. Randall. Yet, as Mrs. Randall is an intelligent woman, it is difficult to comprehend how she would routinely use her own card for gambling, but never see Mr. Randall use a card when he gambled with her. Then, Mr. Randall would use a card, allegedly from a third party, to accept rewards. He claimed that he told his wife that the card was another woman's card, and Mrs. Randall did not inquire further. Further, Mrs. Randall's rewards card records indicated a loss of \$35,000 over five years, though she earned less than \$14,000 per year. Adding this component to Mr. Randall's version of the shared card, it appears that Mrs. Randall may have been present during periods of significant gambling. On this issue, neither witness has significant credibility. Mrs. Randall appeared to have both intelligence and common sense; hence, it does not seem logical that she would not have inquired further about the source of these rewards. Still, there was no showing that she was complicit in the embezzlement, and it is not out of the norm for couples to gamble frequently. Mrs. Randall was never charged.

Not only was each of the witnesses' testimony consistent with one another, but there was no evidence presented to the contrary. There was no proof, for example, that Mr. Randall took state funds prior to 2004 or that he spent the proceeds on other things. However, the Court recognizes that the state may be hard-pressed to find any proof of such.

Mr. and Mrs. Randall have established by a preponderance of the evidence that the embezzlement occurred only after 2004, that Mrs. Randall knew nothing about the

embezzlement until the arrest in 2014, and Mrs. Randall did not knowingly benefit from any of the proceeds of the embezzlement. She did benefit from his gambling as he used the rewards card for meals and hotel visits.

III

Analysis

G.L. 1956 § 36-10.1 is the Rhode Island Public Employee Pension Revocation and Reduction Act. Section 36-10.1-3(a) allows for immediate reduction or revocation of a public employee pension if the employee is convicted of a crime related to his public office or employment, as the conviction is “deemed to be a breach of the public officer’s or public employee’s contract with his or her employer.” The Complaint herein requests full revocation pursuant to this section.

Mr. Randall

On March 2, 2015, another Justice of this Court entered an Order revoking Mr. Randall’s pension after providing him with a hearing to show cause why his pension should not be revoked or reduced. As Mr. Randall was unsuccessful, it is inappropriate for this Court to reconsider the identical question. Moreover, Mr. Randall acknowledges the charge, that the state is due restitution of \$200,000, the crime was in the course of his public employment, and he violated the terms of his employment contract.

Assuming, without finding, that the proceedings before the Court constituted supplementary show cause hearings, this Court now finds that the complete revocation of Mr. Randall’s pension was appropriate. Pursuant to § 36-10.1-3(c)(2), the Court considers not only the period of dishonorable service, but whether the applicant was convicted, the severity of the

offense, the amount of the monetary loss suffered, the degree of public trust reposed in the applicant, and other factors.

Here, the only proof of the period of Mr. Randall's dishonorable service is the testimony of Mr. Randall himself:

- He testified that his actions occurred only during the last seven years of his thirty-five year period of state employment.
- The severity of Mr. Randall's acts was considerable. Not only did he take monies from the university, but the money was taken from students' tuition payments. It is unclear whether they were credited with all of the amounts paid, whether it was the learning institution that was shortchanged for years, whether the university lost outside funding because of a shortage of real income, or whether classes were cancelled because of a loss of income. Nevertheless to reach the sum of \$200,000, it is likely that there are numerous victims of Mr. Randall's actions, and the university was substantially affected.
- The amount of the monetary loss, \$200,000, is quite significant and substantial.
- Mr. Randall's position involved the processing and securing of significant cash payments; hence, significant trust was bestowed upon him by his state employment.³ The Court also

³ By statute, the Court is required to consider "[t]he degree of public trust reposed in the subject public official or public employee by virtue of his or her public office or public employment[.]" Sec. 36-10.1-3(c)(2)(iv). The statute does not focus on whether the office is a leadership position, an elected position, or highly paid. While some of those positions may have significant degrees of public trust allotted to them, all positions of public employment have been instilled with some degree of public trust by the government and its citizenry. To use a phrase most commonly credited to President Cleveland's administration: "A public office is a public trust." Mr. Randall's position was not just a public office, but one which a prestigious university depended upon for handling cash payments by its students. Hence, it carried a high degree of public trust. There is no doubt that U.R.I.'s reputation and prestige is important, not only in attracting new students and obtaining additional funding, but for the success of its graduates and in attracting new professors. The need to properly credit tuition payments made by students and their families is of paramount importance to the university's reputation.

considers that Mr. Randall demonstrated remorse, his family was significantly harmed by his arrest and conviction, he pled and cooperated and has already been sentenced.

Before leaving this issue, the Court notes that counsel for Mr. Randall emphasizes that Mr. Randall's criminal conduct occurred only after 2004, and that he had a gambling addiction. The statute does not provide for a simple mathematical divvying up of an employee's good service and bad service to determine the extent of the revocation—it compels this Court to weigh a variety of factors. The Court notes that proof before 2004 may be hard to come by but, of far more importance, is that Mr. Randall embezzled from students' accounts, acknowledged doing so over a period of seven years, and absconded with a considerable amount of money.⁴

⁴ Counsel's reliance on Retirement Board of Employees' Retirement System v. Azar, 721 A.2d 872 (R.I. 1998), is also misplaced. In Azar, the Superior Court awarded Mr. Azar and his creditors some of his pension, but the Supreme Court stated:

“Consequently, the trial justice was not required, as the board asserts, to revoke defendant's entire pension simply because portions of his thirty-two years of public service were shown to be dishonorable. On the contrary, the trial justice was required to undertake PEPRRA's statutorily prescribed, multi-factored analysis . . . Here, the trial justice did assay such an analysis. However, our review of PEPRRA's five determinative factors—as applied to the circumstances of this case—causes us to conclude that the trial justice abused his discretion in allowing for the eventual reinstatement of defendant's pension benefits. First, nearly all of defendant's service as the city's Director of Public Works was unequivocally dishonorable. The malfeasance in question was not an isolated, one-time transgression, but a multi-year, long-term course of conduct involving the loss of hundreds of thousands of public dollars pursuant to which defendant lined his own pockets with his ill-gotten gains. Second, the nature of defendant's misconduct, namely, criminal racketeering, was very grave in relation to the relatively high degree of discretion and responsibility inherent in his public office. The defendant's admission of his wrongdoing—a factor upon which the trial justice placed great weight—does not mitigate its severity. Third, the city suffered a substantial loss as a result of defendant's conduct—approximately \$435,000—while he personally profited from the bribes and other gratuities that were furnished to him. Fourth, the city and its taxpayers reposed a substantial quantum of trust in defendant. At a minimum, he was in a position to allow construction contractors to overcharge the city hundreds of thousands of dollars.

Considering these factors in total, the Court finds that the continued and permanent revocation of Mr. Randall's pension benefits is appropriate, but allows Mr. Randall to retain the benefits he received prior to his conviction, during which period he was presumed to be not guilty.

Mrs. Randall

In the alternative, Mr. and Mrs. Randall claim Mrs. Randall should be compensated as an innocent spouse. Upon review of § 36-10.1-3(d) and Retirement Board of Employees' Retirement System v. DiPrete, 845 A.2d 270 (R.I. 2004), this Court concludes that the following elements must be demonstrated prior to providing benefits to a spouse:

1. That the guilty spouse was a member of the state retirement system;
2. The spouse is an innocent person, Sec. 36-10.1-3(d).

If so, the Court then considers:

1. The financial needs and resources of the innocent spouse, DiPrete, 845 A.2d at 290, 293;
2. The award of benefits as "justice may require," Sec. 36-10.1-3(d);
3. The spouse should not be penalized for remaining in the marriage, DiPrete, 845 A.2d at 293;

"Finally, notwithstanding the enormity of his wrongdoing, defendant already has received substantial benefits from his pension. Specifically, defendant has received and benefited from pension payments in excess of \$320,000 that were paid to him during the five-year period that the board's unresolved PEPRRA suit has been pending in the courts.

* * *

"It is this windfall—namely, the eventual reinstatement of Azar's pension benefits—that we do reverse because we conclude that, given the egregious circumstances of defendant's violation of his public trust and the hundreds of thousands of dollars worth of benefits he already has received to date and will receive in the future, it was an abuse of the trial justice's discretion under these circumstances to order such a reinstatement." Azar, 721 A.2d at 876-77.

4. Whether the innocent spouse has the ability to liquidate resources to support herself, id. at 294;
5. Any award is not dependent on the revocation or reduction from the guilty spouse, id. at 294, but the pension funds are “marital property,” id. at 290.

Clearly, Mr. Randall, the guilty spouse, was a member of the state retirement system and an employee of the state. That fact is not contested. The second element, that the spouse be “innocent,” is more problematic. While the parties in DiPrete acknowledged that Mrs. DiPrete was innocent, id. at 289, the state made no such concession here. The state demonstrated that Mrs. Randall played a far more active role, not in the actual taking but in the use of the funds for gambling rewards and perhaps for the gambling itself. As the term “innocent spouse” is used in a pension revocation statute, it should be construed in a civil context, rather than a criminal one. That is, it is not necessary that the spouse be charged and found guilty in order to establish her lack of innocence, but that Mrs. Randall, as the moving party, actually establish her innocence; hence, she has the burden of proof to establish her innocence and any other justification for the payment.

To be innocent, the spouse must establish that she is “free from guilt; free from legal fault.” Black’s Law Dictionary 792, (7th ed.). As indicated, she is free from guilt, but not necessarily free from fault as she not only gambled, but received compensation in the form of casino rewards for the large amounts gambled. Mrs. Randall’s receipt of some benefit from the illicit scheme, as minor as it may or may not be, necessarily factors into whatever discretion the Court may have in meting out an award as justice may require. Not only did she receive the benefits of reduced or free hotel rooms and meals, but, according to her version, she never verified that the source of these benefits were from another woman’s card, whose card Mr.

Randall never used to gamble, even when he was next to Mrs. Randall (though he was using the card for the rewards).

The statutory framework clearly establishes that an innocent spouse is not entitled to a set percentage of the pension. The factors which the Court must consider in determining the amount awarded to the spouse are set forth above. They are not necessarily focused on the duration of the wrongdoing as compared to the period of wrongdoing, as Mrs. Randall suggests.

The Court must first consider the financial needs and resources of the innocent spouse. As noted, Mrs. Randall now has significant financial resources. She appears to have paid off all of her debt (not Mr. Randall's debt for the restitution), and has significant funds in savings and retirement accounts. She was even able to set up substantial accounts for her grandchildren. She has modest needs, not only because she has paid off her debt but because her husband now has social security income, she will have social security income, she is working part-time while seeking full-time employment and, apart from the sporadic gambling, she appears to have lived modestly. She is not to be penalized for remaining in the marriage, but it should be noted that Mr. Randall will presumably receive the benefit of his own social security income (see 42 U.S.C. § 407), the home (G.L. 1956 § 9-26-4.1) and other property (Sec. 9-26-4). Mrs. Randall specifically testified concerning her expenses. The home expenses included taxes, utilities, sewer fees, cellphone, gas, groceries, water, health insurance, and home insurance. Those expenses totaled \$1683.33 per month. Some of these bills should be shared by Mr. Randall, but his income is now limited to his social security income. The Court concludes that expenses of \$1600 per month are reasonable and anticipated.

Unlike Mrs. DiPrete in DiPrete, Mrs. Randall is still active in the workplace and receives an income. While the Supreme Court found that Mrs. DiPrete did not retain control over assets

which the trial court said were available to her (DiPrete, 845 A.2d at 295), Mrs. Randall's assets are savings and retirement accounts in her own name. Accordingly, her financial resources are ample and her financial needs are likely to be met.

Next, the Court considers an award of benefits as "justice may require." Sec. 36-10.1-3(d). Two principles of family law are important in considering Mrs. Randall's share. The first, as discussed in DiPrete, 845 A.2d at 291-93, is the economic partnership theory of marriage. In Allard v. Allard, 708 A.2d 554, 557 (R.I. 1998), the Court concluded that a disability pension that effectively functioned as a retirement plan was subject to distribution to each spouse in a divorce as it is, in essence, a forced savings account available to both parties at retirement. Hence, DiPrete noted, the non-employee spouse has a legal interest in the retirement benefits. DiPrete, 845 A.2d at 291.

Another principle of family law is that property received by one spouse through an inheritance is not considered as a joint marital asset to be divided by a divorce. G.L. 1956 § 15-5-16.1(b); Ruffel v. Ruffel, 900 A.2d 1178, 1188 (R.I. 2006). Nevertheless, § 36-10.1-3(d) directs that this Court consider the "financial needs and resources" of the innocent spouse. Hence, the Court will consider that Mrs. Randall has substantial assets and income so that her financial needs may be met, but that is not the only factor.

Recognizing the significant appropriation made from marital funds for retirement contributions over the years (\$73,569.84 according to Mr. Karpinski's affidavit) and that Mrs. Randall continually presumed that state pension money would be available to the couple after retirement, some pension payments should be awarded to Mrs. Randall. The State Retirement Board has argued that an award to her should be capped at 50% of what Mr. Randall would have received. Although this appears somewhat at odds with the directive in DiPrete to avoid

punishing the innocent spouse for staying in the marriage, the award to Mrs. Randall should be limited.

Mr. Randall's income is \$1476 per month. Mrs. Randall's income is \$541 per month now but may go up to \$750 per month as her hours are increased. Therefore, the household income is \$2017 to \$2226 per month. The joint expenses are \$1600 per month, as Mrs. Randall has eliminated most of the marital debt with her own assets. Mr. Randall has a restitution debt which he is paying off at \$150 per month.⁵ His set payment is limited by his income. His ongoing obligation limits the family's income.

His pension check would have been \$2564.27 per month.

If the Court were to focus only on making payments in an attempt to make the victim whole in a reasonable amount of time, Mr. Randall's restitution payments would be spread out over no more than ten years, for a monthly payment of about \$1667. The goal is not to make the Randall family 100% whole, but also not to punish the innocent spouse for the wrongs of the guilty and to reasonably compensate her for her contributions and lost income expectation. Adding the \$1667 obligation to the family cash flow would result in a net loss of \$1200 per month.

While neither the pension statute nor DiPrete focus on the loss to a victim, the present financial condition of Mr. Randall limits the likelihood that U.R.I. will ever be made whole. Not only do Mr. and Mrs. Randall suffer from the loss of income, the victim does too.⁶ Justice

⁵ Although only Mr. Randall is responsible for the restitution payments, it is no doubt coming out of the household income and lessening the net income to the couple.

⁶ The Court is directed to apply its reasonable discretion. In doing so, it notes how unfair the restitution arrangement is: Only Mr. Randall is obligated to pay, based on his income, expenditures and assets, which are now limited. Mrs. Randall's income and assets and family expenditures are calculated into determining her share of his pension. Providing Mrs. Randall

requires that the Court give consideration to restoring the victim, if the felon is to be compensated at all—directly or indirectly. Sec. 36-10.1-3(c)(2)(iii)(v). Hence, while awarding additional funds, the Court will require that the victim be timely compensated as a condition of payments to the innocent spouse.

IV

Conclusion

Considering all of these factors as a whole, Mrs. Randall is awarded ongoing pension payments, retroactive from the date of this trial (July 7, 2016), of \$350 per month. She is awarded ongoing pension payments, commencing on January 1, 2017, in the amount of \$1667 per month, on the condition that all of these payments be forwarded promptly, or assigned in advance, to the victim's restitution debt of her husband. These payments shall continue until December 31, 2026, on the condition that victim restitution payments are timely made (within twenty days of receipt of any pension payment) or assigned. Once the restitution obligations are fully satisfied or no longer outstanding, the pension payments to Mrs. Randall shall be reduced to \$500 per month and paid directly to her.

Previously, the Court left open the issue of whether the contributions should be refunded. Within thirty days of the date of this Decision, Mr. Randall shall inform the Court, in writing, whether he continues to pursue this request. If he fails to do so, final judgment consistent with this Decision may enter upon application of the Plaintiff.

with an increased benefit, which would improve Mr. Randall's quality of life, is unfair unless the victim benefits at least in part.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: The Retirement Board of the Employees' Retirement System of the State of Rhode Island v. Randall

CASE NO: PC-2015-0203

COURT: Providence County Superior Court

DATE DECISION FILED: December 7, 2016

JUSTICE/MAGISTRATE: Lanphear, J.

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