

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM : PT. 6

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3 In the Matter of the Application of
4 ANNE MARIE R. COLON,

Index: 159317/2020

5 Petitioner,
6 -against-

7 TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK,
8 YVONNE DAVALOS, in her capacity as Guardian of Minor
9 Child B.C.B.,

Respondents.

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10 TEAMS MEETING
11 July 8, 2021
12 71 Thomas Street
13 New York, New York 10013

14 B E F O R E:

15 HONORABLE EILEEN RAKOWER
16 Justice of the Supreme Court

17 A P P E A R A N C E S:

18 GABAY & BOWLER
19 Attorneys for the Petitioner
20 48 West 21st Street, Suite 1000
21 New York, NY 10010
22 BY: ANNE MARIE BOWLER, ESQ.

23 SMITH & DOWNERY, P.A.
24 Attorneys for the Petitioner
25 320 E. Towsontown Blvd., Suite 1 East
Baltimore, Maryland 21286
BY: KERSTIN M. MILLER, ESQ.

NEW YORK CITY LAW DEPARTMENT
Attorneys for the Respondent
250 Broadway, 9th Floor
New York, NY 10007
BY: TERESITA MAGSINO, ESQ.

Monica A. Martinez
Senior Court Reporter

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1 THE COURT: Good afternoon.

2 The attorneys who are going to be speaking,
3 please put your notice of appearance on the record.

4 MS. MILLER: This is Kerstin Miller, from Smith
5 & Dowery, on behalf of Petitioner, Anne Marie Colon.

6 MS. BOWLER: This is Anne Marie Bowler, from
7 Gabay & Bowler, also on behalf of Petitioner, Anne Marie
8 Colon.

9 MS. MAGSINO: Good afternoon, Judge. This is
10 Teresita Magsino, from the New York City Law Department,
11 for the City of New York Teachers' Retirement System.

12 THE COURT: Thank you.

13 So, I have an Article 78, which is Ms. Colon
14 was the designated beneficiary of her domestic partner's
15 ordinary death benefits, through the union, and through
16 the City, whatever. And unfortunately, he passed away
17 in April. Upon his death, she contacted whoever she
18 needed to contact about the death benefits.

19 The ordinary death benefits were three times
20 his salary, and roughly \$450,000. Despite acknowledging
21 that they did have a change of address form, things were
22 mis-mailed, addressed to the wrong address, and certain
23 papers did not make it to Ms. Colon until May.

24 In May, she understood that she was the
25 beneficiary and was due this roughly \$450,000, got some

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1 financial advice. And, when she went to put in for the
2 benefit and designate how she wanted it paid, she was
3 told that the account was frozen.

4 And instead, the retirement benefit, pursuant
5 to a law that was enacted, I think, May 30th, um, was
6 that the ordinary death benefit would now be considered
7 an accidental death benefit, which presumably was worth
8 more money, but it went to a statutory beneficiary.
9 And, in this case, it was the deceased's 17-year-old
10 daughter, who lived out of state. And, having been
11 denied the ordinary death benefit, um, this Article 78
12 proceeding was brought.

13 So, I'll hear from the Petitioner.

14 MS. MILLER: Thank you, your Honor. Would you
15 like me to address any questions in particular?

16 THE COURT: No. I found it very interesting,
17 and I do have questions, but I want you to have an
18 opportunity to make your record first. I mean, go
19 ahead, and I'll give you my questions later.

20 MS. MILLER: Sure. Thank you, your Honor.

21 So, your summary of the case was spot on. And
22 Ms. Colon was the loving domestic partner of
23 Mr. Barcello for close to a decade. And our primary
24 arguments are that the decision of TRS should be set
25 aside for two reasons.

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1 And the first reason is: That it was
2 unconstitutional. And it violated the pension
3 impairment clause, which says that the beneficiaries and
4 members of the pension system have a contractual right
5 to benefits at the time they enter the system. And
6 those benefits placed at the time they enter the system
7 cannot be impaired or diminished.

8 And so, our position is that TRS is saying
9 these benefits were not diminished in that the same
10 amount of the benefit was, in fact, a beneficiary was
11 receiving an even greater amount of benefits in the
12 ordinary death benefits. But it is our view that a
13 benefit is impaired because the person, who Mr. Barcello
14 wanted to receive his benefit, did not, in fact, receive
15 that benefit.

16 And so, if you are saying that that is not
17 impairment, in our view, that is one of the most
18 important rights anyone can have as a member of a
19 pension system, is to be able to say and to have
20 authority to say, I want my benefit to go to this
21 particular loved one. And there is plenty of case law
22 that establishes the purpose behind the pension
23 impairment clause, was so that members could plan for
24 the benefits. They would understand that their benefits
25 were fixed. They would understand how to plan for the

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1 future of their loved ones.

2 And so, by saying that we're going to now have
3 the legislature swoop in and change who those benefits
4 are going to, that impaired his ability to plan, to
5 support financially his loved one, his domestic partner.
6 And, as you've seen in the petition, he did plan to
7 support his child through some of those benefits, but he
8 trusted his partner to do that in the way he wanted.

9 And so, by saying that he was not able to then
10 select his beneficiary that he had planned for, that is
11 a very significant impairment. And, if you took TRS'
12 argument all the way out to the extreme, if the
13 designated beneficiary, the right to designate someone
14 as your beneficiary is not an important benefit of
15 membership in a retirement system, then the legislator
16 would be able to step in and designate anyone as a
17 beneficiary.

18 You know, what is to stop the legislature from
19 making a law tomorrow that says from hereon out, all
20 QPP, Qualified Pension Plan benefits are going to be
21 paid into some state lottery, and a lottery winner will
22 receive those benefits?

23 Obviously, if the right to select your own
24 beneficiary is not important, then the legislature can
25 just change at will; that is a very, very important

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1 right to membership.

2 And there is, again, numerous cases,
3 longstanding case law that supports the position that
4 the rights to, you know, a law cannot be applied
5 retroactively to impair vested rights. And so, even to
6 the extent that this Court would decide that he did not
7 have the right, as of the date he entered the pension
8 system, it is still uncontroverted. There is plenty of
9 case law out there that says once the beneficiary dies,
10 those benefits --

11 THE COURT: You misspoke, not the beneficiary
12 that died.

13 MS. MILLER: Sorry. Once the member, I
14 apologize, once the participant dies, then his
15 designated beneficiary is vested with those benefits.

16 So, the case law supports the position that, of
17 course, you cannot impair those already vested benefits,
18 once the member has passed away. So, it is our view
19 that this is unconstitutional, that it violates the
20 pension impairment clause.

21 And then, it is also our position that even if
22 it didn't violate the pension impairment clause, it was
23 still arbitrary and capricious, and it was an error of
24 law. And one of the primary considerations behind that,
25 is that TRS' justification for sending the benefits was,

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1 it said that it had to give priority to an application
2 from the accidental death beneficiary.

3 But there was no application on file at the
4 time. They had no application. And so, their entire
5 justification was proven to be false because they did
6 not have an application in hand at the time. And so,
7 for that reason, we see that as being arbitrary and
8 capricious and lacking any kind of rational basis for
9 their decision in August, when they did not then receive
10 an application for the accidental death benefits until a
11 couple of months later in mid September.

12 And then, finally, the third reason is: That
13 we also see the untimely nature of the provision of the
14 letter to her as being arbitrary and capricious. And we
15 believe that if they had provided that information to
16 her at an earlier time, and if they had just looked on
17 file to see what is the correct address, then none of
18 this would have happened. She would have been able to
19 receive those benefits that TRS admitted were due to her
20 at the time.

21 And, if they had just sent it to the correct
22 address, she would have already had those benefits in
23 hand. And, in fact, at one point, she did speak with
24 the Executive Director of TRS. And she asked the
25 Executive Director if I had already, you know, just

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1 directed you where to send the money, would you now be
2 trying to call it back in accordance with this amended
3 law. And they said no, we wouldn't have called it back,
4 we would have let it just stand, and you would have kept
5 the money, and we never would have tried to make it go
6 to the statutory beneficiary. In our view --

7 THE COURT: There still would have been a
8 benefit for the statutory beneficiary because it would
9 have exceeded the amount of the ordinary death benefits.

10 MS. MILLER: Oh, sure. Yes, that's correct,
11 your Honor. Anything that would have exceeded the
12 ordinary death benefits, of course, still could have
13 been provided to the statutory beneficiary.

14 THE COURT: All right. Thank you.
15 Ms. Magsino.

16 MS. MAGSINO: Good afternoon, your Honor.
17 Thank you.

18 The question is whether TRS' prioritization of
19 the decedent's daughter's statutory beneficiary
20 application was rational. And it was, your Honor. When
21 the statute was enacted on May 30th of 2020, TRS had no
22 option but to prioritize the statutory beneficiary's
23 application.

24 THE COURT: So, was there language that I
25 missed in the statute, where it said they had to

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1 prioritize?

2 MS. MAGSINO: Your Honor, it is on Page 4 of
3 our brief. And it is Subsection A-3.

4 And the end of that language reads: "So, he
5 meets all of the criteria for the statute to be
6 applicable."

7 And the end of that language reads: "Such
8 member's statutory beneficiary shall receive an
9 accidental death benefit unless such statutory
10 beneficiary elects to receive the ordinary death
11 benefit."

12 So, that is how the statute reads, your Honor.

13 THE COURT: Yeah, so, I didn't miss it, there
14 is no prioritization that is stated there, right,
15 because there is also a section that says it will be
16 reduced by the amount already paid, if an ordinary death
17 benefit was paid.

18 MS. MAGSINO: There is language about if
19 payment has already been made to an ordinary death
20 beneficiary, your Honor.

21 THE COURT: So, what I'm saying is, you can all
22 be right. We can read the language of the statute to be
23 that if there is a designated beneficiary, who is
24 entitled to the ordinary death benefit, that that can be
25 paid, and you can still pay the enhanced benefit of

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1 accidental death benefits to the statutory beneficiary.

2 MS. MAGSINO: Well, your Honor, factually, we
3 didn't have a complete application from the ordinary
4 death benefit, as of May 30th of 2020. So, at that
5 point, that application had to be put on hold in order
6 to comply with the law. And we knew, at the time, that
7 there was a minor beneficiary to the decedent. So, we
8 allowed for the statutory beneficiary to come forward.

9 I was going to address the point later, your
10 Honor. So, this issue about not having the statutory
11 beneficiary's application at a certain point in time, it
12 is an unreasonable argument, because the statutory
13 beneficiary was a minor, she had to first establish her
14 guardianship, so that her guardian could help her.

15 THE COURT: No, no, don't confuse the record.
16 That was not something that you knew about, as of May
17 30th. As of May 30th, you knew about Ms. Colon. You
18 knew what her address was. You knew that she was
19 inquiring. You knew that she had the status of a
20 designated beneficiary.

21 And, through your own error, in this mailing
22 the letters, and through your own actions of locking her
23 out of the account, so she could no longer file her
24 application, you took action, prior to the knowledge or
25 and/or application of a statutory beneficiary.

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1 MS. MAGSINO: Your Honor, Ms. Colon is the one
2 who told us about the statutory beneficiary before the
3 May 30th date.

4 THE COURT: Which already acknowledges that you
5 were having conversations with her.

6 MS. MAGSINO: Your Honor, with respect to the
7 alleged mis-mailing.

8 THE COURT: Well, can you show that it is
9 alleged? Are you saying you didn't mis-mail it?

10 MS. MAGSINO: I address it in Footnote 10 of
11 our brief.

12 So, the only address we had on record was the
13 same address that Petitioner was. We were sending
14 information to a particular address, and that was the
15 address that Petitioner was responding to.

16 So, Petitioner can't have it both ways. They
17 can't say we were mis-mailing things, yet respond to
18 mailings that we sent to that particular address.

19 THE COURT: Just so we're clear, she sent you a
20 change of address form, and when she did a FOIL request,
21 you had the change of request form, but you did not use
22 the address in the change of address form?

23 MS. MAGSINO: We used the address that is --

24 THE COURT: You used what was no longer an
25 official address.

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1 MS. MAGSINO: We used the address that was on
2 her record in the TRS.

3 THE COURT: No, no, the record changed with
4 receipt of the change of address form.

5 MS. MAGSINO: Okay.

6 THE COURT: So, you were sending it to an
7 unofficial address.

8 MS. MAGSINO: Your Honor, my point is that
9 whatever address we used, Petitioner was responding to
10 us when we sent documents to that address.

11 MS. MILLER: Your Honor.

12 MS. MAGSINO: So, your Honor.

13 THE COURT: I mean, I know that you also
14 e-mailed her these same documents, and the e-mail
15 address is different from what is on the change of
16 address form. But, let's continue, yes. But then, you
17 locked her out of the account, so she could no longer
18 apply.

19 MS. MAGSINO: We only had to freeze the system,
20 your Honor, because we had to comply with the statute,
21 at that point. As of May 30th, we didn't have complete
22 information from the Petitioner. So, we didn't have a
23 complete -- we didn't have a full completed application
24 for her to consider. And, because the statute was
25 enacted, TRS had to act accordingly. And again, you

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1 know, await whether or not there was a statutory
2 beneficiary.

3 THE COURT: See, I think we can read the
4 statute, so that it is not unconstitutional, which I
5 think is what we're suppose to do, and that would be to
6 acknowledge that a designated beneficiary of the
7 ordinary death benefit could still get their benefit and
8 just reduce the accidental death benefit that then goes
9 to the statutory beneficiary.

10 MS. MAGSINO: Your Honor.

11 THE COURT: I don't see that there is language
12 there that precludes that reading of the statute, so
13 that all rights are protected, because as Counsel points
14 out in her papers, that once the deceased dies, they can
15 no longer provide alternatively for those people they
16 meant to provide for.

17 And we have no way of knowing what was in
18 place. For all we know, there was a million dollar life
19 insurance policy that gave his minor child money, and
20 that is how he took care of that. We don't know that.
21 People take care of the things they think that they need
22 to take care of, and they designate beneficiaries
23 accordingly.

24 So, here, he designates a beneficiary, he dies,
25 he can no longer make alternative arrangements. And

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1 then, you are saying six weeks later, a statute is
2 enacted, which I know Counsel used the word "impaired,"
3 which basically negated the actions that he took.

4 MS. MAGSINO: Your Honor, this kind of
5 legislation isn't new or unusual. For instance, if a
6 member designates a beneficiary, and the member passes
7 away, a spouse has a right of election. You know,
8 notwithstanding the beneficiary who is designated, if
9 that person wasn't the spouse.

10 THE COURT: And the deceased knew that, at the
11 time. The deceased was knowledgeable that that right of
12 election existed.

13 MS. MAGSINO: Well, your Honor, analogously,
14 the WTC legislation, it was similar to this one, where I
15 would say extraordinary circumstances that affect city
16 employees, the legislation was passed, and that too
17 awarded an accidental death benefit to family members,
18 which superseded any ordinary death benefit that was
19 identified in the member's paperwork.

20 THE COURT: I couldn't find a case like this.
21 You think that was 20-something years ago, you would
22 think there would be another case like this, if we were
23 to read it your way.

24 I mean, did I miss one? Was there a case I
25 should have found?

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1 MS. MAGSINO: Well, your Honor, maybe it was
2 something that people didn't think should be challenged,
3 because of the extraordinary circumstances. I mean,
4 Mr. Barcello's daughter is exactly the person that the
5 legislation was intended to protect, under the
6 extraordinary circumstances and impact of COVID, on city
7 employees.

8 THE COURT: And it may be that it was meant to
9 protect her, but I don't think it was meant to supplant
10 those designated beneficiaries. That is why they
11 already carve out that exception and say you can reduce
12 it by the amount you are already paying out on ordinary
13 death benefits because they acknowledge that might be a
14 different beneficiary.

15 MS. BOWLER: Your Honor, if I may, there may be
16 a reason why there aren't many cases, because we also
17 looked for that here on this point, is that here it
18 might not be the normal situation where the designated
19 beneficiary, the statutory beneficiary are two different
20 people. They may sometimes be one in the same.

21 THE COURT: I'm just surprised that there has
22 never been. I mean, yes, when the World Trade Center
23 legislation came out, it was prior to gay marriage, I'm
24 sure there were plenty of people with domestic partners
25 that were not statutory beneficiaries, so I'm just

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1 surprised I couldn't find anything, if I were to read it
2 the way that Respondent wants me to read it.

3 I think that we have a responsibility, when we
4 look at legislation, to see if we can read it in a way
5 that is constitutional, if we can read it in a way that
6 does not impair, if it is applied retroactively. And
7 here, because there is the separate acknowledgement that
8 an ordinary death benefit may have already been paid out
9 or may already be owing, and as Counsel points out,
10 vested upon the death, then it is our obligation to read
11 it, so that it all has meaning; so you can pay the
12 ordinary death benefit to the designated beneficiary and
13 pay the enhanced benefit to the statutory beneficiary.

14 MS. MAGSINO: Your Honor, this language about
15 the benefit being vested with Petitioner, that doesn't
16 exist. That is a term that has been used in this
17 litigation.

18 But how has it vested in Petitioner?

19 You know, the idea that she is entitled to the
20 ordinary death benefit, because it somehow vested with
21 her, um, doesn't really exist, and.

22 THE COURT: Well, nobody is contesting that she
23 was the designated beneficiary, at the time of the
24 death, when there was no statute in existence.

25 MS. MAGSINO: Right.

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1 THE COURT: So, she had a right, she was the
2 designated beneficiary, who had the right to those
3 funds.

4 MS. MAGSINO: How did she have the right to the
5 funds, your Honor?

6 There is an identification of the beneficiary,
7 there is a claim that is submitted, and the claim is
8 either approved or denied. So, she had nothing yet,
9 except an expectation.

10 And that expectation, your Honor, isn't
11 protected by the impairment clause, right?

12 The impairment clause goes to the amount, it
13 doesn't go to a beneficiary's expectation of a benefit.

14 THE COURT: All right. I'll turn it back to
15 you, Counsel.

16 MS. MILLER: Sure, your Honor. If I may, your
17 Honor, the question of vesting, while the exact word
18 "vest" is not used, way back to 1984, the Court of
19 Appeals held that it was indisputable, that
20 beneficiaries became entitled to the death benefit, upon
21 the death of the employee.

22 MS. MAGSINO: What case is that?

23 THE COURT: Sorry, she froze. You have to wait
24 a second. Okay. Now, you are unfrozen.

25 What case was that?

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1 MS. MILLER: That was in the Public Employees
2 Federation v. Cuomo, from the Court of Appeals.

3 So, while it is true, the word "vest" was never
4 used, but that is just another way to say invest, upon
5 the death of the member.

6 THE COURT: See, I knew you would have the
7 answer.

8 MS. BOWLER: In the case, McDermott v. Regan,
9 the Court of Appeals -- well, actually, the Third
10 Department also talks about it as an established
11 contractual right.

12 THE COURT: Yeah, it just makes sense to me
13 that these can coexist. And to take the position that
14 the retirement system was somehow mandated to
15 prioritize, I don't see that. I see that -- I see that
16 you had to entertain both the ordinary and the
17 accidental death benefits, but I did not see that you
18 had to prioritize.

19 And I think that under the circumstances, they
20 could coexist, that it should have been the ordinary
21 death benefit should have been paid to the designated
22 beneficiary, and the enhanced benefit should be paid to
23 the statutory beneficiary.

24 MS. MAGSINO: Your Honor, I don't think the
25 statute can exist together. I think the COVID statute

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1 supersedes the statute with respect to -- so
2 essentially, what happened was, before the legislation,
3 there was an ordinary death benefit paid to the
4 designated beneficiary.

5 But, once the legislation took place, the
6 statutory beneficiary supersedes any ordinary
7 beneficiaries, and it's an accidental death benefit.
8 Now, I understand what you are saying, with respect to
9 diminishing the amount of any accidental death benefit,
10 but that only takes place if the ordinary death
11 benefit -- the ordinary death benefit was paid out
12 already, and then there was an accidental death benefit
13 amount. So obviously, the ADB would have to be reduced
14 by the monies that was already paid out.

15 THE COURT: I mean, there aren't going to be a
16 lot of these circumstances because we're really only
17 talking about the time between, I don't know what the
18 date was that it looked back to, and May 30th, because
19 after May 30th, the law, there is a new statute, and
20 people can make their designations accordingly. They
21 can make arrangements accordingly.

22 But here, since the deceased had already passed
23 and could not change any designations, I think this
24 falls into that small category of it, is a short amount
25 of time, and a small amount of people, which is why we

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1 don't find these cases that we were looking for from the
2 WTC because it likely was a similar small timeframe.

3 But I think that here, if you are going to
4 apply it retroactively, there has to be that coexistence
5 of benefits, and we have to acknowledge both benefits in
6 this small number of cases where this is going to apply.

7 And, going forward, people were on notice that
8 this is what the law is, and maybe that you should make
9 other arrangements.

10 MS. MAGSINO: But, your Honor, I think because
11 the legislature made the statute retroactive to March 1,
12 in full force and effect, then at the time of the
13 decedent's passing, it was in full force and effect, so
14 I think that is another important way to read the
15 statute, that it was --

16 THE COURT: Except that the statute also
17 acknowledged that it could encompass those ordinary
18 death benefits that had already been paid. There was
19 this March 1st, to May 30; things happened that could
20 not have envisioned enactment of the statute.

21 And so, in acknowledgement of that, they add
22 that section that says that ordinary death benefits, the
23 accidental benefits will be reduced by the amount of the
24 ordinary death benefits. And yes, they said paid.
25 Here, they should have been paid.

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1 So, for all those reasons, unless somebody, and
2 obviously, I'm not the last to speak on this, I'm sure
3 the Appellate Division will speak on it, too. And I
4 want to thank you for your very good papers because
5 there is no decision I would write that would say it
6 better than you did in your papers.

7 But, just to complete the record here, if I
8 missed anything, because it is my intention to grant the
9 petition, to the extent that I'm directing the
10 retirement system to pay the ordinary death benefit to
11 the designated beneficiary, and adjust your accidental
12 death benefit accordingly.

13 So, is there anything else that we need to put
14 in the record?

15 MS. MILLER: No.

16 THE COURT: All right. Thank you.

17 MS. BOWLER: Thank you, your Honor.

18 MS. MAGSINO: Thank you.

19 I, Monica A. Martinez, do hereby certify the
20 foregoing to be a true and accurate verbatim
21 transcription of the original stenographic record.

22

23 _____
 Monica A. Martinez

24 Senior Court Reporter

25

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