

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD MANLEY PETERSON
Executor of the Estate of
Cornelia Barnett Peterson, Deceased,
RICHARD MANLEY PETERSON,
Individually; and JASON ANDREW PETERSON

APPELLANTS

V.

NO. 2010-CA-01224

THOMAS CALVIN PETERSON and The
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Richard Manley Peterson, Executor of Cornelia Barnette Peterson Estate
And Individually -- Plaintiff/Appellant
Jason Andrew Peterson -- Plaintiff/Appellant

The Logan Law Firm, P.A. -- Attorneys for Appellants
Robert M. Logan -- Attorney for Appellants

Thomas Calvin Peterson -- Defendant/Appellee
The Public Employees' Retirement System of Mississippi -- Defendant/Appellee

Larry Yarbrough -- Attorney for Appellee Peterson
Mary Jo Woods, Special Assistant Attorney General -- Attorney for Appellee PERS

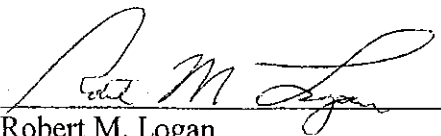

Robert M. Logan
Attorney of Record for Appellant

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STATEMENT OF ISSUES

- I. ARE THE TRIAL COURT'S RULINGS GRANTING SUMMARY JUDGMENT AGAINST THOMAS CALVIN PETERSON BUT NOT AGAINST PERS INCONSISTENT AND CONTRARY TO THE COURT'S FINDINGS?
- II. WAS THE COURT IN ERROR IN FAILING TO APPLY THE PROVISIONS OF SECTION 25-11-117.1, WHICH PROVIDES A REMEDY WHEN BENEFICIARIES ARE DISQUALIFIED?

STATEMENT OF THE CASE

Cornelia Barnett Peterson was a longtime state employee and a member of the PERS system who took disability retirement in 1997. Cornelia's son, Thomas Calvin Peterson (hereafter "Thomas Calvin"), had been appointed as her conservator and guardian in Alabama in 1996. (R.E. 11, Rec. 107)

While acting as Cornelia's guardian, without obtaining court permission and without registering the guardianship in Mississippi, Thomas Calvin made a PERS election on behalf of Cornelia to appoint himself as her sole beneficiary to continue receiving benefits after her death. (R.E. 11, Rec. 107)

When Cornelia died in 2002 PERS began paying death benefits to Thomas Calvin Peterson. (R.E. 12, Rec. 108) In its Findings of Fact And Conclusions of Law the trial court found that, due to illegality and misconduct, Thomas Calvin was not eligible to receive those benefits and that the provisions of Section 25-11-117.1, *Miss. Code Ann. (Supp. 1998)* apply. (R.E. 15, Rec. 111) That statute provides that in cases where a beneficiary is disqualified certain family members or the estate of the retiree shall become eligible to receive those benefits. The trial court, ruling against Thomas Calvin and in accordance with the statute, referred the issue to

the Chancery Court of Newton County, wherein Cornelia's estate remains open. (R.E 15, Rec. 111)

The trial court so ruled regarding Plaintiffs' claim against Thomas Calvin; however, with regard to Plaintiff's claim against PERS, the court did not direct PERS to make future payments pursuant to the statute, instead simply rendering summary judgment in favor of PERS, with no one designated to receive the future benefits or the benefits accruing while the litigation was pending. (R.E. 15, Rec. 111)

Plaintiffs find the rulings of the court inconsistent. If Thomas Calvin is a "disqualified beneficiary" and Code Section 25-11-117.1 applies, then all benefits resulting from Cornelia's death should be paid to the appropriate beneficiaries as determined by the Chancery Court, and PERS should recover from Thomas Calvin Peterson for payments erroneously made by PERS to him.

STATEMENT OF THE FACTS

Cornelia Barnett Peterson was a longtime employee of the State of Mississippi in the Department of Human Services as a Youth Services Counselor II. Her employment ended on or about April 15, 1996. Cornelia suffered from drug and alcohol addictions, which interfered with her daily life and hindered her ability to care for herself. She had three adult sons, Thomas Calvin, Richard Manley Peterson and Jason Andrew Peterson. At all relevant times Cornelia was not married. In 1996, Thomas Calvin filed suit in the Probate Court of Sumter County, Alabama, Cornelia's state of residence, to be appointed her conservator and guardian. An order granting his petition was entered on July 30, 1996, which was three months after Cornelia had terminated her employment with the State of Mississippi. In August 1997, Thomas Calvin made application for Cornelia for disability retirement benefits through the Public Employees'

Retirement System of Mississippi (PERS) (Rec. 53). Thomas Calvin executed a total of three (3) disability applications with PERS, including additional applications on September 18, 1997, and October 10, 1997, both occasions being without his mother's knowledge and both occasions naming himself as her sole beneficiary. (Rec. 53)

In that final application for benefits Thomas Calvin elected "Option 4A" under *Miss. Code Ann.* Section 25-11-115, which provides as follows:

§ 25-11-115. Payment options for retirement allowance

(1) Upon application for superannuation or disability retirement, any member may elect to receive his benefit in a retirement allowance payable throughout life with no further payments to anyone at his death, except that in the event his total retirement payments under this article do not equal his total contributions under this article, his named beneficiary shall receive the difference in cash at his death. Or he may elect upon retirement, or upon becoming eligible for retirement, to receive the actuarial equivalent subject to the provisions of subsection (3) of this section of his retirement allowance in a reduced retirement allowance payable throughout life with the provision that:

Option 1. If he dies before he has received in annuity payment the value of the member's annuity savings account as it was at the time of his retirement, the balance shall be paid to his legal representative or to such person as he shall nominate by written designation duly acknowledged and filed with the board; or

Option 2. Upon his death, his reduced retirement allowance shall be continued throughout the life of, and paid to, such person as he has nominated by written designation duly acknowledged and filed with the board of trustees at the time of his retirement;

Option 3. Upon his death, one-half (1/4) of his reduced retirement allowance shall be continued throughout the life of, and paid to, such person as he shall have nominated by written designation duly acknowledged and filed with the board of trustees at the time of his retirement, and the other one-half (1/2) of his reduced retirement allowance to some other designated beneficiary;

Option 4-A. Upon his death, one-half (1/2) of his reduced retirement allowance, or such other specified amount, shall be continued throughout the life of, and paid to, such person as he shall have nominated by written designation duly acknowledged and filed with the board of trustees at the time of his retirement; or

Option 4-B. A reduced retirement allowance shall be continued throughout the life of the retirant, but with the further guarantee of payments to the named beneficiary, beneficiaries or to the estate for a specified number of years certain. If the retired member or the last designated beneficiary receiving annuity payments dies prior to receiving all guaranteed payments due, the actuarial equivalent of the remaining payments shall be paid pursuant to Section 25-11-117.1(1);

Option 4-C. Such retirement allowance otherwise payable may be converted into a retirement allowance of equivalent actuarial value in such an amount that, with the member's benefit under Title II of the federal Social Security Act, the member will receive, so far as possible, approximately the same amount annually before and after the earliest age at which the member becomes eligible to receive a social security benefit. This option shall not be available to retirees whose retirement is effective on or after July 1, 2004.

Option 6. Any member who has at least twenty-eight (28) years of creditable service at the time of retirement or who is at least sixty-three (63) years of age and eligible to retire, may select the maximum retirement benefit or an optional benefit as provided in this subsection together with a partial lump sum distribution. The amount of the lump sum distribution under this option shall be equal to the maximum monthly benefit multiplied by twelve (12), twenty-four (24) or thirty-six (36) as selected by the member. The maximum retirement benefit shall be actuarially reduced to reflect the amount of the lump sum distribution selected and further reduced for any other optional benefit selected. The annuity and lump sum distribution shall be computed to result in no actuarial loss to the system. The lump sum distribution shall be made as a single payment payable at the time the first monthly annuity payment is paid to the retiree. The amount of the lump sum distribution shall be deducted from the member's annuity savings account in computing what contributions remain at the death of the retiree and/or a beneficiary. The lump sum distribution option may be elected only once by a member upon initial retirement, and may not be elected by a retiree, by members applying for a disability retirement annuity, by survivors or by a member selecting Option 4-C.

(2) No change in the option selected shall be permitted after the member's death or after the member has received his first retirement check except as provided in subsections (3) and (4) of this section and in Section 25-11-127. Members who are pursuing a disability retirement allowance and simultaneously or subsequently elect to begin to receive a service retirement allowance while continuing to pursue a disability retirement allowance, shall not be eligible to select Option 4-C or Option 6 and those options may not be selected at a later time if the application for a disability retirement allowance is voided or denied. However, any retired member who is receiving a retirement allowance under Option 2 or Option 4-A upon July 1, 1992, and whose designated beneficiary predeceased him or whose marriage to a spouse who is his designated beneficiary is terminated by divorce or other dissolution, upon written notification to the retirement system of the death of the designated beneficiary or of the termination of his marriage to his designated beneficiary, the retirement allowance payable to the member after receipt of such notification by the retirement system shall be equal to the retirement allowance which would have been payable had the member not elected the option. In addition, any retired member who is receiving the maximum retirement allowance for life, a retirement allowance under Option 1 or who is receiving a retirement allowance under Option 2 or Option 4-A on July 1, 1992, may elect to provide survivor benefits under Option 2 or Option 4-A to a spouse who was not previously the member's beneficiary and whom the member married before July 1, 1992.

(3) Any retired member who is receiving a reduced retirement allowance under

Option 2 or Option 4-A whose designated beneficiary predeceases him, or whose marriage to a spouse who is his designated beneficiary is terminated by divorce or other dissolution, may elect to cancel his reduced retirement allowance and receive the maximum retirement allowance for life in an amount equal to the amount that would have been payable if the member had not elected Option 2 or Option 4-A. Such election must be made in writing to the office of the executive director of the system on a form prescribed by the board. Any such election shall be effective the first of the month following the date the election is received by the system.

(4) Any retired member who is receiving the maximum retirement allowance for life, or a retirement allowance under Option 1, and who marries after his retirement may elect to cancel his maximum retirement allowance and receive a reduced retirement allowance under Option 2 or Option 4-A to provide continuing lifetime benefits to his spouse. Such election must be made in writing to the office of the executive director of the system on a form prescribed by the board not earlier than the date of the marriage. Any such election shall be effective the first of the month following the date the election is received by the system.

(5) In the event the election of an optional benefit is made after the member has attained the age of sixty-five (65) years, the actuarial equivalent factor shall be used to compute the reduced retirement allowance as if the election had been made on his sixty-fifth birthday; however, from and after January 1, 2003, if there is an election of Option 6 after the member has attained the age of sixty-five (65) years, the actuarial equivalent factor based on the retiree's age at the time of retirement shall be used to compute the reduced maximum monthly retirement allowance. However, if a retiree marries or remarries after retirement and elects either Option 2 or Option 4-A as provided in subsection (2) or (4) of this section, the actuarial equivalent factor used to compute the reduced retirement allowance shall be the factor for the age of the retiree and his or her beneficiary at the time such election for recalculation of benefits is made.

(6) Notwithstanding any provision of Section 25-11-1 et seq., no payments may be made for a retirement allowance on a monthly basis for a period of time in excess of that allowed by federal law.

(7) If a retirant and his eligible beneficiary, if any, both die before they have received in annuity payments a total amount equal to the accumulated contributions standing to the retirant's credit in the annuity savings account at the time of his retirement, the difference between the accumulated contributions and the total amount of annuities received by them shall be paid to such persons as the retirant has nominated by written designation duly executed and filed in the office of the executive director. If no designated person survives the retirant and his beneficiary, the difference, if any, shall be paid pursuant to Section 25-11-117.1(1).

(8) Any retired member who retired on Option 2(5) or 4-A(5) prior to July 1, 1992, who is still receiving a retirement allowance on July 1, 1994, shall receive an increase in the annual retirement allowance effective July 1, 1994, equal to the amount they would have received under Option 2 or Option 4-A without a reduction for Option 5 based on the ages at retirement of the retiree and beneficiary and option factors in effect on July 1, 1992. Such increase shall be prospective only.

In 1998 Cornelia filed a Petition for Removal of Conservator and Guardian in the Alabama court to have Thomas Calvin removed for failing to make annual accountings, for conversion of estate funds to his personal use, for criminal conduct and for physical abuse committed by Thomas Calvin upon her. (Rec. 53, 54) At the time of the 1998 filing, Cornelia was living in Union, Newton County, Mississippi. An order was entered July 10, 1998, by the Alabama court, which removed Thomas Calvin as Cornelia's conservator and ward for the grounds stated in her Petition. The order also canceled the power of attorney granted to Thomas Calvin as his mother's attorney-in-fact. A final order was entered on October 22, 1998, finding that Thomas Calvin had made improper expenditures in the estate totaling \$28,504.20. The conservatorship recovered said amount against Thomas Calvin's conservators' bond. (Rec. 54)

No Mississippi court ever authorized Thomas Calvin to act on Cornelia Peterson's behalf with regard to any asset in Mississippi. (Rec. 54)

In 1999, Cornelia demonstrated her recovery from her addictions and successfully petitioned the Probate Court of Sumter County, Alabama, to terminate the conservatorship and guardianship. Cornelia died on February 21, 2002, in Mississippi. At all times relevant herein, the 1996 Alabama conservatorship order was never registered in Mississippi for recognition under this state's full faith and credit clause. Immediately upon Thomas Calvin's removal as her conservator/guardian for breach of fiduciary duties, and upon her successful petition for termination of the conservatorship, Cornelia began notifying PERS in writing and by telephone that she desired an immediate change of beneficiary concerning her disability benefits. It was Cornelia's desire to remove Thomas Calvin as beneficiary due to the unlawful acts he committed as her fiduciary in the conservatorship, and further that his act of naming himself beneficiary was not in the best interest of Cornelia at the time she was his ward. PERS denied Cornelia's repeated requests to change her beneficiary and ignored the documentation showing the findings

of the Alabama court of Thomas Calvin's wrongdoings in the conservatorship. Thomas Calvin began receiving Cornelia's benefits as the sole beneficiary immediately after her death. (Rec. 54, 55)

Richard Manley Peterson, as executor of the estate, petitioned the Chancery Court of Newton County, Mississippi, Cause No. 2002-N0110, for authority to file this litigation against Thomas Calvin Peterson and PERS for the wrongful payment of Cornelia's benefits to Thomas Calvin Peterson. The Complaint was filed February 18, 2004, in the Chancery Court of Hinds County, First Judicial District. PERS, through the office of the Attorney General, filed its answer and affirmative defenses in March 2004. The proceedings were transferred to the Circuit Court of Hinds County, First Judicial District, by agreed order on June 14, 2004. (Rec. 55)

The operative facts were never in issue, and all parties agreed to disposition in Circuit Court by summary judgment. The trial court made separate findings of fact as to Thomas Calvin (R.E. 5, Rec. 105) and PERS. (R.E. 4, Rec. 116) In the findings of fact and conclusions of law relative to Thomas Calvin the court essentially adopted the facts set forth above, found that Thomas Calvin was disqualified to be a beneficiary, and held that Section 25-11-117.1 of the *Miss. Code* is applicable, referring the matter to the Newton County Chancery Court to determine how the benefits should be distributed. (R.E. 5, Rec. 105) Section 25-11-117.1 is as follows:

§ 25-11-117.1. Recipients of additional benefits payable and checks not yet cashed
when beneficiary dies or is disqualified

(1) Except as otherwise provided in subsection (2) of this section, where benefits are payable to a designated beneficiary or beneficiaries under this article and the designated beneficiary or beneficiaries as provided by the member on the most recent form filed with the system is deceased or otherwise disqualified at the time such benefits become payable, the following persons, in descending order of precedence, shall be eligible to receive such benefits:

- (a) The surviving spouse of the member or retiree;
- (b) The children of the member or retiree or their descendants, per stirpes;
- (c) The brothers and sisters of the member or retiree or their descendants, per stirpes;
- (d) The parents of the member or retiree;

- (e) The executor or administrator on behalf of the member or retiree's estate;
- (f) The persons entitled by law to distribution of the member or retiree's estate.
- (2) Any monthly benefits payable to a beneficiary who dies prior to cashing his or her final check(s) and/or any additional benefits payable pursuant to Section 25-11-112 still payable at the death of a beneficiary receiving monthly benefits shall be paid as follows:
 - (a) The surviving spouse of the beneficiary;
 - (b) The children of the beneficiary or their descendants, per stirpes;
 - (c) The brothers and sisters of the beneficiary or their descendants, per stirpes;
 - (d) The parents of the beneficiary;
 - (e) The executor or administrator on behalf of the beneficiary's estate;
 - (f) The persons entitled by law to distribution of the beneficiary's estate.
- (3) In the event no claim is made by any individual listed in subsection (2) of this section, a distribution may be made pursuant to the provisions of subsection (1) of this section.
- (4) Payment under the provisions of this section shall bar recovery by any other person of the benefits distributed. Payment of benefits made to one or more members of a class of individuals are made on behalf of all members of the class. Any members of the class coming forward after payment is made must look to those who received the payment.

In separate findings of fact and conclusions of law, the court stated that it “recognizes the unfortunate circumstances of this case” but found in favor of PERS, stating that Plaintiffs are not entitled to a judgment against PERS.

The court made no explicit ruling concerning the payment of future benefits on those accrued while litigation was pending in that ruling or in the Order (R.E. 4, Rec.116). (R.E. 8, 9, Rec. 114, 115)

ARGUMENT

Since this case was decided on motions for summary judgment there are no factual issues. No one denies that Thomas Calvin, the guardian, was guilty of self-dealing. As a result of that, and other factors, the court found he was not entitled to receive any payments from PERS, and that he had been unjustly enriched in the amount of \$56,399.97 (R.E. 15, Rec. 111).

What we seek here is consistency. With regard to Thomas Calvin, the trial court finds he is a “disqualified” beneficiary and therefore Code Section 25-11-117.1 applies. BUT, the trial

court does not apply Section 25-11-117.1 to PERS itself, adopting the PERS argument that Cornelia made no election at all and no one is entitled to benefits upon her death.

PERS never questioned Thomas Calvin's actions prior to suit being filed against it – in fact PERS agreed in the lower court that “Defendant PERS acted properly when it was presented with the Order Granting Petition for Conservatorship and Guardianship and the Letters of Conservatorship and Guardianship. These gave Defendant Peterson the authority to file the Application for Disability Retirement on Mrs. Peterson's behalf.” (Rec. 67) Aren't they estopped now to argue that no election was made? As stated in the case of *In Re Municipal Boundaries v. City of Southaven*, 864 So.2d 912 (Miss. 2003), “judicial estoppels is a doctrine of law applied by a trial court to a situation where a party asserts one position in a prior action or pleading but then seeks to take a contrary position to the detriment of the party opposite.” *Id.* at 918. *Southaven* was appealed from an annexation proceeding in which two municipalities were parties. Judicial estoppel was held not applicable in that case, but not on the basis that government entities are not subject to the doctrine.

Cornelia tried to correct the wrongs after being restored to reason and the guardianship having been dismissed. Her letters to PERS are evidence that she wanted the “4A” election, just not with Thomas Calvin as beneficiary. Yet PERS argues she could not make a correction because she had already cashed her first check (Rec. 68,69). The obvious flaw in the argument is that Cornelia was under a legal disability when her first check was received in 1997 and PERS was on notice of that fact. We need only to look at the law of agency to understand what happened. Thomas Calvin acted without authority when making elections for Cornelia. After being restored to reason and no longer being under conservatorship, Cornelia realized Thomas Calvin had made the “4A” election, albeit improperly naming himself as beneficiary. By accepting her retirement checks and by expressly directing PERS to change the beneficiary

disability.¹ Through the agencies of next friends, guardians *ad litem*, masters, and the like, the court acts with all care and solicitude to the preservation and protection of the rights of infants and persons *non compos mentis*. It will not permit them to be proceeded against except upon due legal process actually served in the manner provided by law; will take nothing as confessed against them; will make for them every valuable election; will rescue them from faithless guardians, designing strangers, and even from unnatural parents; and will, in general, take all necessary steps to conserve the best interest of these wards of the court.²

PERS has always recognized and never questioned Cornelia's "4A" election. This is confirmed by the fact they paid only 50% of her maximum monthly benefit during her lifetime and then paid Thomas Calvin after her death. PERS now knows, and the court has ruled, that Thomas Calvin is a disqualified beneficiary. There is a specific statutory provision, Section 25-11-117.1, covering that situation, and it must be followed.

PERS proposes, after recognizing the "4A" election and paying Cornelia a reduced payment until her death, that we go back and pretend those things did not happen, and allow PERS to retain funds intended for the member's beneficiaries. By law PERS exists "for officers and employees in the state service and their beneficiaries" and not for itself. Section 25-11-101, *Miss. Code Ann. (1972)*.

What in fact happened is that Cornelia's agent made an improper and unwanted designation of beneficiary at a time when she was powerless to object. When she regained the ability to object she did two things: she ratified the "4A" election and disavowed the designation of Thomas Calvin as beneficiary.

PERS has a remedy to recover funds erroneously paid to Thomas Calvin by its own action against him. MCA §25-11-131 (1972) provides for the collection of funds not lawfully due the payee after a member's death.

¹ *Mitchell v. Film Transit Co.*, 13 So.2d 154 (Miss. 1943); *Chevrolet Co. v. Arrington*, 138 So. 593 (Miss. 1932); *Wheeler v. Shoemaker*, 57 So.2d 267 (Miss. 1952), citing the text (a full discussion of chancery court as protector of minors).

² *Baker by Williams v. Williams*, 503 So. 2d 249 (Miss. 1987).

Cornelia has no remedy. She received reduced benefits during her lifetime and those cannot be restored to her. However, this Court can see that those she intended to benefit receive the funds to which they are entitled.

CONCLUSION

Appellants humbly request this Court to closely examine what happened in this case, to recognize the injustice and to right the wrong. This honorable Court can do so without causing any harm to the state retirement system, in light of this unique set of facts.

Appellants pray that this Court will extend the trial court's judgment against Thomas Calvin to PERS, ordering PERS to pay over to the Chancery Court of Newton County the payments that should have been made after payments to Thomas Calvin ceased, and to follow the directions of the Chancery Court as to the proper parties to receive the future benefits.

Respectfully submitted,

RICHARD MANLEY PETERSON, ET AL,
Appellants

BY: 
ROBERT M. LOGAN
Attorney for Appellants

CERTIFICATE OF SERVICE

I, ROBERT M. LOGAN, attorney for Plaintiff/Appellants, do hereby certify that I have this date caused to be delivered, via U. S. Mail, a true and correct copy of the above and foregoing *Brief of Appellant* to the following:

Honorable Swan Yerger
Circuit Judge
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Honorable Larry Yarbrough
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Honorable Mary Jo Woods
Special Assistant Attorney General
P. O. Box 220
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THIS the 21 day of December, 2010.



ROBERT M. LOGAN