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1. TEACHERS RETIREMENT SYSTEM — MEMBER HAS REQUISITE AGE AND YEARS OF SERVICE TO QUALIFY FOR RETIREMENT — NOT DISQUALIFIED BY REASON OF MENTAL INCOMPETENCY — GUARDIAN OF MEMBER'S ESTATE MAY APPLY FOR RETIREMENT ALLOWANCE, PAYABLE THROUGH LIFE OF MEMBER.
2. GUARDIAN WITHOUT AUTHORITY TO SELECT OPTION FOR WARD—TO PROVIDE LESSER ALLOWANCE FOR LIFETIME AND PAYMENT AFTER WARD'S DEATH TO BENEFICIARY—BEFORE RETIREMENT BOARD HONORS SELECTION OF OPTION, ADEQUATE PROOF SHOULD BE REQUIRED THAT PROBATE COURT ORDERED OR AUTHORIZED GUARDIAN TO SELECT OPTION — SECTION 3307.50 RC.

SYLLABUS:

1. A member of the state teachers retirement system who has the requisite age and years of service to qualify for superannuation retirement is not disqualified for such form of retirement merely by reason of his mental incompetency, and the guardian of the estate of the member may apply for the retirement allowance which is payable throughout the life of the member.

2. A guardian merely by virtue of his office is without authority to select a superannuation retirement payment option for his ward pursuant to Section 3307.50, Revised Code, which would provide a lesser allowance of equivalent actuarial value to the ward for his lifetime and payments after the ward's death to a beneficiary designated by the guardian. Before the state teachers retirement board honors the selection of such an option, it should require adequate proof that a probate court has ordered or authorized the guardian to select such option.

Columbus, Ohio, May 3, 1956

Hon. L. D. Shuter, Executive Secretary
State Teachers Retirement System, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"Your opinion is requested in answer to the following questions:

1. May a guardian of a member apply for the superannuation retirement of such member?

2. If so, may such guardian elect an optional settlement providing a lesser allowance of equivalent actuarial value to such member for his lifetime and also designate beneficiaries to receive any payment due them as survivors?
3. If a guardian may elect an option, may such guardian designate himself as a beneficiary to receive payments due subsequent to the death of the retirement member?

(The Ohio Supreme Court decision in *Caswell vs. Lenihan*, 163 O.S. 331 may be pertinent to this question.)

“Sections 3307.38 and 3307.40 of the Revised Code provide for application by a member for superannuation retirement as follows:

“Section 3307.38 ‘A *member*, except a new entrant with less than five years of service credit, who has attained sixty years of age or who has thirty-six years of service credit, *may apply* for superannuation retirement . . .’

“Section 3307.40 ‘A *member* who has completed twenty-five years of total service and who has attained fifty-five years of age *may apply* for commuted superannuation retirement . . .’

“Section 3307.50 of the Revised Code provides for the election of an optional plan of payment by the beneficiary as follows:

“Section 3307.50 ‘Until the first payment on account of any benefit is made, the *beneficiary* may elect to receive such benefit in a retirement allowance payable throughout life, or the *beneficiary* may then elect to receive the actuarial equivalent at that time of his annuity, his pension, or his retirement allowance, in a lesser annuity, or a lesser pension, or a lesser retirement allowance, payable throughout life with any one of the following . . .’

“Section 3307.01 of the Revised Code defines ‘beneficiary’ as follows:

“(J) ‘Beneficiary’ means any person in receipt of a retirement allowance or other benefit provided by sections 3307.01 to 3307.72, inclusive of the Revised Code.’

“There is no other provision in the Retirement Act which authorizes any person other than a *member* to apply for superannuation retirement or other than a *beneficiary* to elect an option.”

I am informed that the guardianship referred to arises by reason of the mental incompetency of the ward. The ward is a member of the

retirement system who presently is eligible to apply for a superannuation retirement. In view of the fact that the pertinent statutes (quoted in your letter) make reference only to a "member" applying for retirement, the question is whether a guardian can make application for the incompetent teacher, or whether the member is barred from receiving a superannuation retirement allowance by reason of his incompetency.

More is involved in answering your question than a mere interpretation of the provisions of the retirement law. Chapter 2111., Revised Code, deals with the appointment of guardians, their duties, and their powers. Section 2111.01, Revised Code, contains the following definitions:

"(A) 'Guardian,' other than a guardian under sections 5905.01 to 5905.19, inclusive, of the Revised Code, means any person, association, or corporation *appointed by the probate court to have the care and management of the person, the estate, or both of a minor, incompetent, habitual drunkard, idiot, imbecile, or lunatic, or of the estate of a confined person.*

* * *

"(D) 'Incompetent' means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, *is incapable of taking proper care of himself or his property or fails to provide for his family or for other persons for whom he is charged by law to provide.*" (Emphasis added.)

Section 2111.02, Revised Code, vests the power in the probate court to appoint a guardian of the person, the estate, or both, of a minor, incompetent, imbecile, or other person therein specified. Section 2111.06, Revised Code, provides that if the powers of the person appointed as guardian are not limited by the order of appointment, such person shall be guardian both of the person and estate of the ward.

Section 2111.13, Revised Code, sets forth the duties of a guardian of the person, and Section 2111.14, Revised Code, lists the duties of a guardian of the estate. In general, the guardian of the person has the duty of providing suitable maintenance for his ward when necessary as well as the duty of protecting and controlling the person of his ward. The guardian of the estate is required to manage the estate for the best interests of his ward.

It is the duty of a guardian to obey all the orders and judgments of the probate court touching the guardianship.

Since the guardian of the estate of an incompetent is under a duty to manage the estate of his ward for the best interests of the ward, it would follow that the guardian might make application to the retirement system to place his ward on superannuation retirement, where the ward-member is otherwise eligible for a retirement allowance. The right existing in a member to receive a retirement allowance is a property right, often of substantial value, and once the allowance is granted, the former member has a vested right to receive such allowance at the rate fixed at the time it was granted.

Although the retirement statutes speak in terms of a "member" making the application for retirement, it does not follow that a mentally incompetent member is to be denied the right to retire merely because he is no longer capable of managing his affairs or property. The very purpose of guardianship is to protect the ward, to provide for his care and maintenance, and to manage his property. By the same token, the retirement law was enacted to make it possible for members to retire with the assurance of income protection.

In order for a member to be eligible for retirement his services with the public employer must have terminated. A member who is *eligible* to retire and who has terminated his employment, does not have to retire upon a pension. If he wishes he can withdraw the accumulated contributions standing to his credit in the system. The guardian could apply for such withdrawal of contributions or he could apply for the retirement allowance. From the guardian's standpoint it would seem advisable to seek instructions from the probate court on this point, although in the ordinary case a member will take the retirement benefits, which in the long run will be of greater benefit and value than the taking of a refund of his own money.

Assuming that a guardian can make application for his ward's retirement, it is asked whether the guardian may elect an optional settlement providing a lesser allowance of equivalent actuarial value to such member for his lifetime and also designate beneficiaries to receive any payment due such beneficiaries as survivors of the member.

With respect to retirement allowance payment options, Section 3307.50, Revised Code, provides in part as follows:

"Until the first payment on account of any benefit is made, the beneficiary may elect to receive such benefit in a retirement allowance payable throughout life, or the beneficiary may then

elect to receive the actuarial equivalent at this time of his annuity, his pension, or his retirement allowance, in a lesser annuity, or a lesser pension, or a lesser retirement allowance, payable throughout life with any one of the following: * * *

There follows three options all of which would reduce payments to the retired member in order that some duly designated beneficiary or survivor might receive payments after the death of the retired member.

By answering your first question in the affirmative, I am, in effect, saying that the guardian could make application for a retirement allowance which is payable at full actuarial value throughout the life of the member. The options of payment which a member may elect to take in lieu of the full-payment-to-member plan, all involve the reduction of the member's allowance in order to benefit a designated survivor.

It should be borne in mind that the primary duty of the guardian is to provide for the maintenance of the *ward* and to manage and conserve the estate of the *ward*. To allow the guardian to select a payment option which reduces the ward's share, and to allow the guardian at the same time to designate a beneficiary-payee to receive payments after the death of the ward might carry guardianship beyond its intended purpose.

Undoubtedly, however, there are instances where it would be wise to choose a retirement payment plan of lesser value to the ward-member, but of substantial value to the member's spouse and family after the member's death. It will be recalled that the statutory definition of an "incompetent" includes a person who by reason of mental infirmity fails to provide for his family or for other persons for whom he is charged by law to provide. The duty of the guardian to provide for the care of the ward and to manage his estate cannot be completely divorced from the necessity of providing for the family of the ward. Section 2111.02, Revised Code, provides that the guardian of an incompetent, by virtue of his appointment, shall be guardian of the minor children of his ward, unless the court appoints some other person as their guardian.

In the case of *Re Sellers' Estate*, 154 Ohio St., 483 (1951), the Supreme Court of Ohio held that a guardian of an incompetent is unauthorized, *without court authority*, to change the beneficiary in an insurance policy of his ward, even though such purported change makes the executor, administrator, or assignee of the ward, the beneficiary.

The authoritative statements of text writers and court decisions are generally that a guardian merely by virtue of his office is without authority to designate a change of beneficiary on a policy of life insurance upon the life of his ward. See 2 Appleman on Insurance Law and Practice, 594, paragraph 1128; 2 Couch on Insurance, 927, paragraph 326; Kay v. Erickson, Ex'x., 209 Wis., 147.

The authorities seem to say that facts and circumstances alter cases, and that under the protection of a court order, the guardian might under the circumstances change the beneficiary in an insurance policy on the life of his ward.

I have turned to the field of insurance because I have found no statement or case touching upon the retirement problem which you have presented. It would seem that the right or power of a guardian to select a retirement option of lesser value to the ward, and to *name* a beneficiary, as opposed to changing one already designated, is subject to even greater doubt than that which has been raised in the area of insurance policies.

It is a bit difficult to pass upon your question in the abstract. The whole subject of guardianship is so peculiarly within the jurisdiction, instruction and guidance of the probate court that it would be neither proper nor feasible for this office to pass upon your question, other than to state, as your legal adviser, that the retirement board should require adequate proof of court authority before it recognizes an election of a guardian in favor of an allowance to the ward of lesser value than that to which the ward would otherwise be entitled. There is some doubt whether a probate court would authorize the guardian to select one of the options set forth in Section 3307.50, Revised Code. Nevertheless, if a probate court *does* order a guardian to select one of the options, it would seem proper for the retirement board to accept the application for retirement of the ward based upon the payment option voted upon such application. Any party who challenges the validity or justice of such a court order would have to pursue the usual appellate proceedings and seek a reversal.

Your third question presents a situation in which the guardian attempts to name himself as survivor-beneficiary under one of the payment options. What I have said with respect to your second question applies here also.

Accordingly, it is my opinion that :

1. A member of the state teachers retirement system who has the requisite age and years of service to qualify for superannuation retirement is not disqualified for such form of retirement merely by reason of his mental incompetency, and the guardian of the estate of the member may apply for the retirement allowance which is payable throughout the life of the member.

2. A guardian merely by virtue of his office is without authority to select a superannuation retirement payment option for his ward pursuant to Section 3307.50, Revised Code, which would provide a lesser allowance of equivalent actuarial value to the ward for his lifetime and payments after the ward's death to a beneficiary designated by the guardian. Before the state teachers retirement board honors the selection of such an option, it should require adequate proof that a probate court has ordered or authorized the guardian to select such option.

Respectfully,

C. WILLIAM O'NEILL
Attorney General