

1769.

TEACHERS RETIREMENT SYSTEM—NOMINATION OF BENEFICIARY
MUST BE FILED WITH RETIREMENT BOARD PRIOR TO MEM-
BER'S DEATH.

SYLLABUS:

1. *The nomination of a person by a member of the Teachers' Retirement System to receive his accumulated contributions in the event of his death or retirement, should be by written designation executed by the member and filed with the Retirement Board prior to his death.*

2. *Upon the death of a member of the Teachers' Retirement System prior to his retirement, his accumulated contributions should be paid by the Retirement Board to the person duly nominated by the member by written designation executed and filed with the Retirement Board before his death, and if no such person exists, payment should be made to the estate of the member.*

COLUMBUS, OHIO, October 25, 1933.

Retirement Board, Ohio Teachers Retirement System, Ohio State Savings Bldg., Columbus, Ohio.

GENTLEMEN:—Over the signature of your Secretary, there has been submitted for my consideration the following inquiry:

“Section 7896-41 G. C. provides that in the event of the death of a teacher prior to retirement, his accumulated deductions ‘shall be paid to his estate or to such person as he shall have nominated by written designation, duly executed and filed with the Retirement Board.’

A teacher, upon becoming a member designated a certain beneficiary. After the teacher's death, a new beneficiary was found designated among her papers. If this new designation were mailed or delivered to the office after the teacher's death, would it be valid as against the original designation?

Does the Retirement Board have the right to pay the accumulated deductions of the deceased teacher to his estate rather than to the designated beneficiary, at its option?”

The law providing for a State Teachers Retirement System and its administration is contained in Sections 7896-1 to 7896-63, inclusive, of the General Code of Ohio. The administration and management of this system is reposed in the Teachers' Retirement Board, consisting of five members with power to make necessary rules and regulations not inconsistent with the law, to carry into effect the provisions of law relating to the retirement system. (Sections 7896-3 and 7896-4, General Code.)

The purpose of the law is to provide for the establishment and accumulation of certain funds under the administration of the Retirement Board, from which funds certain allowances are to be made to the members of the system upon their retirement therefrom, in the nature of pensions, annuities and retirement allowances.

Membership in the system is fixed by Sections 7896-22, 7896-22a and 7896-22b, General Code. By the terms of Sections 7896-19, 7896-43 and 7896-52, General

Code, each member of the retirement system is required to contribute to a fund known as the Teachers' Savings Fund four percent of his earnable compensation, not exceeding \$2,000.00 per annum and an individual account is to be kept by the Retirement Board with each member showing the amount of his contributions and the interest accumulated thereon. The total of the member's contributions at any time and the regular interest thereon, is known as the member's "accumulated contributions" as the term is used in the Teachers' Retirement Act. (Section 7896-1, General Code.)

"Retirement" of a member, as the term is used in the law justifying an allowance by the board to the member of a retirement allowance in the nature of a pension, an annuity and other retirement allowances, as provided therein, may be superannuation retirement, commuted superannuation retirement or disability retirement. If a member ceases to be a member or dies before he may lawfully be "retired," or before he makes application for retirement in cases where he might have been retired if application had been made, provision is made for the payment to him or his legal representative of his "accumulated contributions" by Sections 7896-40 and 7896-41, General Code, which read as follows:

Sec. 7896-40. "A contributor who ceases to be a teacher for any cause other than death or retirement, upon demand, within ten years after such cessation of service, shall be paid the accumulated contributions standing to the credit of his individual account in the teachers' savings fund. Ten years after such cessation of service, if no previous demand has been made, any accumulated contributions of a contributor shall be returned to him or to his legal representative. If the contributor or his legal representatives can not then be found, his accumulated contributions shall be forfeited to the retirement system and credited to the guarantee fund."

Sec. 7896-41. "Should a contributor die before retirement, his accumulated contributions shall be paid to his estate or to such person as he shall have nominated by written designation duly executed and filed with the retirement board. If no legal representatives can be found, his accumulated contributions shall be forfeited to the retirement system and credited to the guarantee fund."

There is clearly imported by the above statutes, a legislative intent that payments made by a member and credited to the teachers' savings fund, being compulsory in the first instance, belong to the contributor, and that he may withdraw them upon his ceasing to be a member or nominate some person to whom they shall be paid in the event of his death before his right to a pension and other retirement allowances accrues. By the terms of these statutes, the legislature has created in the contributor a vested interest in his "accumulated contributions" and the board does not have power to pay these accumulated contributions to anyone other than the contributor or his legal representative, either the person nominated by him to receive the contributions or his estate, if no such person has been duly and legally nominated.

These statutes clearly give the member the right to nominate someone to receive the accumulated contributions in the event of his death or retirement. This provision would not have been made, in my opinion, if the board were to be given the option of paying the accumulated contributions to the person so nominated or to the contributor's estate, although the language of the statute is in the alternative wherein it provides that upon the death of a member before retirement his

accumulated contributions shall be paid "to his estate or to such person as he shall have nominated." I do not think it was meant to place in the hands of the board the power to exercise discretion in the matter, especially since no basis is provided for the exercise of that discretion.

To say that the board might in its discretion, pay these accumulated contributions to a member's estate or to a person nominated by him to receive them, would be inconsistent, in my opinion, with the idea that the money belongs to the member to do with as he sees fit, so far as the Retirement Board and the Retirement System are concerned, which is clearly evinced by the terms of Sections 7896-40 and 7896-41, General Code, *supra*, when considered with the other provisions of the Teachers' Retirement Act. The duties of the Retirement Board are purely administrative in character. It possesses no power except such as is expressly granted to it by statute or such as is necessarily implied to carry out the express powers granted. (See Opinion No. 1246 rendered under date of July 31, 1933.) Although the board is granted the power to make necessary rules and regulations to properly administer the retirement system, its powers with respect thereto are expressly limited to the making of rules and regulations consistent with the terms of the law. Had it been intended to grant to the board the power to fix by rule when these accumulated contributions should be paid to a member's estate and when to a person nominated by him to receive them, it would not have been necessary to expressly provide in the law that payments should be made to the member's estate or to someone nominated by him. If such a course of action had been intended there would, in my opinion, have been some basis stated in the law upon which the board could or should formulate its judgment in determining which of the two alternative courses should be pursued.

The word "or" as used in Section 7896-41 *supra*, in the sentence directing the payment of a member's accumulated contributions upon his death or retirement "to his estate or to such person as he shall have nominated" while clearly used as connoting an alternative includes something more. It is used in my opinion, as a word of substitution meaning thereby that if no person is nominated, payment shall be made to the member's estate. This construction has frequently been applied to the word in the construction of wills and in the designation of beneficiaries by members of beneficial associations. *Kerrigan vs. Tabb* (N. J.) 39 Atl. 701, 702; *In re Patton*, 111 N. Y. 480; *Addison vs. New England Commercial Travelers Association*, 144 Mass., 591.

It has been held in numerous cases that the word "or" as used in a bequest to persons "or their heirs" is a word of substitution. *Bartine vs. Davis*, 16 N. J. Eq. 202; *Defrees vs. Bryden*, 275 Ill. 530; *Johnston vs. Preston*, 226 Ill. 447.

In *Addison vs. New England Commercial Travelers Association*, *supra*, it appeared that a member of the New England Commercial Travelers Association, an association which paid death benefits upon the decease of its members had designated as his beneficiary his "wife or daughters." A controversy having arisen involving the proper construction of the phrase "wife or daughters" it was held that the word "or" should not be construed as "and," but that it meant that payment should be made to the widow or if he left no widow, to his surviving daughters.

Upon consideration of the terms of Section 7896-41, *supra*, it appears that a person to whom the Retirement Board may pay the accumulated contributions of a member upon his death, other than the executor or administrator of his estate, must be such a person as the member "shall have nominated by written designation duly executed and filed with the Retirement Board." It seems clear from the language of the statute that a nomination made in pursuance of this

statute, is not complete until the written designation is not only executed but also filed with the Retirement Board. Clearly, the nomination can not be made after the member's death, and if both execution of the written designation and the filing of it is necessary to complete the nomination, both must be done before the member's death. It appears to me that the legislature, by the use of the verb "shall have" clearly indicated that the nomination must be completed both by executed writing and the filing of the same before the death of the member. I can not see that the language of the statute is susceptible of any other interpretation. Were it otherwise, the board could never be sure, upon the death of a member, whether payment could safely be made to the person who, according to their then existing records, had been nominated. If a change could be effected by filing the written designation of a nomination one hour after the member's death it could just as effectively be done one year thereafter, and if one change could be made there would be no way to tell that another might not be filed later.

Difficult questions may sometimes be presented as to just what constitutes "filing." No such questions are presented however by your inquiry. I am satisfied that when the facts simply show that a written designation had been executed before the death of the member and is later found among his papers after his death, it can not then be effectively filed. Under those circumstances a serious question would always arise as to whether the member ever intended it to be filed. He may have changed his mind after executing the nomination. Extrinsic evidence could not be well taken as conclusive of the matter even if the board were empowered to hear testimony and pass upon the question, which it is not. There must at least be some affirmative action of the member looking to the filing of the written nomination before his death, either by posting in the mails or by delivery in escrow. I do not wish to be understood as passing upon the question as to whether or not either one of these acts would constitute "filing," so as to make a nomination effective. The board does its full duty when it makes payment in accordance with the statute. Nor do I wish to be understood as passing on the relative rights of a person nominated to receive a payment of this kind and the creditors of a member who was insolvent during any or all the time the contributions were accumulating.

In specific answer to your questions, I am of the opinion:

1. The nomination of a person by a member of the Teachers' Retirement System to receive his accumulated contributions in the event of his death or retirement, should be by written designation executed by the member and filed with the Retirement Board prior to his death.

2. Upon the death of a member of the Teachers' Retirement System prior to his retirement, his accumulated contributions should be paid by the Retirement Board to the person duly nominated by the member by written designation executed and filed with the Retirement Board before his death and if no such person exists, payment should be made to the estate of the member.

Respectfully,

JOHN W. BRICKER,
Attorney General.