

Opinion No. 66-89

July 13, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees' Retirement Board, P. O. Box 2123, Santa Fe, New Mexico

QUESTION

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To whom is money standing to the credit of a disability annuitant to be paid upon the annuitant's death?

CONCLUSION

See analysis.

OPINION

{*119} ANALYSIS

In the ordinary case no problem in this area is encountered. Section 5-5-18, N.M.S.A., 1953 Compilation, Replacement Volume 2, governing this matter, provides in pertinent part as follows:

" . . . In the event the said disability annuitant dies prior to his voluntary retirement date and before he has received in disability annuity payments an aggregate amount equal to his accumulated deductions standing to {*120} his credit in the employees' savings fund at the time of his retirement, the difference between his said accumulated deductions and the said aggregate amount of annuity payments received by him shall be paid to such person or persons as he shall have nominated by written designation duly executed and filed with the retirement board. If there be no such designated person or persons surviving the annuitant, such difference, if any, shall be paid to his legal representative upon the establishment of a valid claim. In the event such difference is less than one thousand dollars (\$ 1,000) and no claim is made by a duly designated beneficiary or legal representative within one (1) year from and after the date of said annuitant's death, payment may be made to such person or persons as the retirement board determines to be legally entitled to same under the laws of descent and distribution of the state of New Mexico, and such payment when made shall be a bar to recovery by any other person. . . ."

The specific facts giving rise to your question are as hereinafter set forth. A member of the Public Employees' Retirement Association had named his nephew as beneficiary. Subsequently, the Retirement Board retired the member on a Non-Duty Disability annuity and at that time the New Mexico Veterans' Service Commission was named guardian for this association member, an incompetent, by court order. In the final application for annuity filed by the Commission as guardian, the beneficiary designated was the estate of the member.

The matter died and under the Retirement Act he had standing to his credit the difference between the annuity payments made to him and the amount contributed by him. This amount was paid to the Veterans' Service Commission to be payable to the estate of the deceased annuitant. The last designated beneficiary now claims the Veterans' Service Commission should pay this amount to him, and he is correct for the following reasons.

The Commission as guardian for the now deceased annuitant should not have changed the beneficiary designated by the annuitant when it, acting as guardian for the annuitant, filed the Final Application for an Annuity unless it had court authority to do so. We have nothing to indicate such court authority in this case. It changed the beneficiary designated by the member, namely his nephew, to the estate of the deceased.

It is generally stated by the courts that a guardian of an incompetent has no power, without court authority, to change the beneficiary in a life insurance policy on the life of his ward. These holdings are based upon the proposition that the right to change a beneficiary in an insurance policy (and we have a comparable situation here) is a right personal to the insured, and thus cannot be exercised by a guardian, unless a court decides that it is in the best interest of the ward. **In Re Sellers' Estate**, 154 Ohio 483, 96 N.E.2d 595; **In Re Wainman's Estate**, 200 N.Y.S. 893.

As the Court said in **Kay v. Erickson**, 209 Wis. 147, 244 N.W. 625:

" . . . In our opinion a guardian has no more authority to designate a beneficiary in a policy of insurance upon the life of a ward than he would to change the will of his ward by executing a codicil thereto or by executing a wholly new will. . . ."

See Annotation in 21 A.L.R.2d 1191.

Such being the case, the Public Employees' Retirement Association should not process any final application or change of beneficiary form by a guardian which purports to change the last designated beneficiary by the member unless accompanied by a specific court order so permitting. By following this procedure, Section 5-5-18, supra, will cover all the situations arising when a disability annuitant dies and has money standing to his credit.