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I. INTRODUCTION

The issue in this case is whether the decedent's Veterans benefits and Social Security benefits lose their statutory immunity against creditor claims when the recipient dies. Does the exemption from creditor claims die with the recipient, or live with the payment itself?

The trial court found that the estate funds deposited with the Court, and any interest accrued on those funds, lost their statutory immunity against creditor's claims when the recipient died. (Court Order Page 3 Number 7) The Respondent argues this was not the central issue of the summary judgment motion. However, it was argued at the trial level and the issue was decided by the trial judge. This decision is not supported by law. There is no law which says that Federal benefits protected by anti-attachment provisions lose their immunity when the beneficiary dies. Disability compensation belongs to the veteran to use in life and will to heirs in death. The character of the funds is not changed

by the death of the recipient.

In both 42 U.S.C. § 407(a) dealing with Social Security benefits and § 5301(a)(1) dealing with Veteran's Disability benefits, the exemption is attached to the payment. The exempt status is a part of payment itself. The Respondent spends a great deal of time arguing the Department of Social and Health Services complied with Washington law. However, A claim on Federal funds protected from collection by statute does not comply with Federal law because the Veteran's Disability payments and Social Security benefits are protected from DSHS collection methods. Article VI, & 2 of the United States Constitution means that the national government in exercising any of the powers enumerated in the Constitution , must prevail over any conflicting or inconsistent state exercise of power.

There is no dispute that the Department of Social and Health Services provided care for the decedent. The cost of that care is not in dispute. However, the Department cannot use collection methods to obtain funds that are protected by federal anti-attachment provisions.

II. ARGUMENT

A. Federal Funds do not lose their immunity when the recipient dies.

1. The Federal Funds in this case remain protected because they are reasonable traceable to their source. In this case the funds at issue were not so commingled that their source cannot be determined.

There is no dispute about the source of the money that was in the decedent's bank account. There is no dispute that the decedent received \$2963.99 total per month. The Respondent's exhibits to the trial court said he received \$2,193.00 from Veterans Disability benefits. The Respondent's exhibits showed he received \$495.00 in Social Security benefits. He also received \$275.99 per month from non-exempt Cook Inland Dividends. No other money went into his account. There were no other sources of money into the account.

Therefore, the source of the funds is traceable. "Reasonably traceable" means we are able to ascertain the source of the funds. The funds have not been commingled to the extent that their origin cannot be determined. If the source of the funds is traceable, then the funds are protected from seizure. Commingling has not made it impossible to trace to the funds in this case.

In NCNB Fin Servs. Shumate, 829 F. Supp. 178, 180 (W.D. Va. 1993) the Social Security recipient put \$100.00 from Social Security into an account with \$500.00 from other sources. Shumate argued that all of the money in the account was protected. The Court only protected from attachment the funds that could be traced to Social Security. "After

careful examination of these records using the first in, first out, accounting method, this Court concludes that Shumate clearly withdrew amounts exceeding the social security benefits, usually within the same month, exhausting the funds that might be traced to social security.”

Shumate

The court only protected the amounts that could be traced to Social Security.

2. Statutory Immunity of Veterans Benefits extends to heirs because of language in the statute.

The Recipient's Veterans Disability payments are protected from attachment because estates are included in the language of the statute.

Section (b) specifically mentions estates : “(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against

(1) any person other than the indebted beneficiary or the beneficiary's estate; or

3. (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the beneficiary's dependents as such.

The Respondent argues “Section 5301(a) clearly exempts only “payments of (Veterans”) benefits due or to become due” from creditor's claims, while section 5301(b) prohibits “collection by setoff or otherwise out of any benefits payable”to a beneficiary.

The law specifically includes includes protection for the veteran's estate.

While there is language suggesting the exempt funds in beneficiary's estate are protected, there is no language that specifically excludes from protection exempt money in the Veteran's estate . §5301. Non assignability and exempt status of benefits

(a)

(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

The Respondent makes a distinction between benefits that are paid and benefits that are payable. The Statute does not say when the benefits lose their protection. It says the payments are exempt from creditors.

The Respondent cites Gossett v. Al Czech, 581 F.3d 891 (9th Cir. 2009) for the idea that the VBA protects veteran's receipt of benefits and

afford security for his or her family during his lifetime. (Respondent's Brief page 15) However, authority which proves the VBA protects security of veterans and their families during the life of the veteran, does not prove the protection is removed when the veteran dies.

The Statute says the payments are exempt from collection. There is no exception that says payments made to a beneficiary shall not be liable to attachment, levy, or seizure or under any legal or equitable process whatever, either before or after receipt by the beneficiary unless the beneficiary dies. The funds belong to the recipient. The benefits are the property of the veteran and the veteran has the right to leave the funds to heirs.

Since Veterans benefits and Social Security benefits are controlled by Federal law, Federal Statutes are controlling. There is no dispute that these funds are controlled by federal law. State and local governments enact no laws regarding the governing of military disability benefits. Federal law controls the area. There is no dispute that the Veterans Disability benefits and Social Security benefits were protected from seizure when they were received by the beneficiary.

The money is the property of the recipient. The power of a recipient of Social Security benefits and Veterans Disability benefits to leave the benefits to their heirs should not be limited because it is not limited in the federal statutes. D.S.H.S. should not be allowed to limit the rights of beneficiaries any more than other creditors.

The United States Supreme Court addressed this issue specifically. In

Philpott v. Essex County Welfare Bd., 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), the United States Supreme Court described the broad protection § 407 affords Social Security benefits. Philpott declared that § 407 barred New Jersey's attempt to reach federal Social Security disability benefits in order to reimburse the state for public assistance expenditures made on behalf of the petitioners. State welfare recipients were made to execute an agreement, as a condition precedent to receiving welfare benefits, to reimburse the county welfare board with any funds that came into their possession. When Philpott refused to turn his SSA disability benefits over to the welfare board the latter sued to enforce the agreement. The Supreme Court held § 407 on its face prohibited New Jersey from reaching the petitioner's federal disability payments, explaining, "We see no reason why a State, performing its statutory duty to take care of the needy, should be in a preferred position as compared with any other creditor." Philpott, 409 U.S. at 416, 93 S.Ct. 590

The Respondent argues "the vast majority of cases suggest that, upon the death of the veteran, the funds do not retain the statutory protection 38 U.S.C. & 5301." (respondent's Brief page 16) Then the Respondent fails to cite a single case that supports this proposition. The cases the Respondent cites do not refer to 38 U.S.C. & 5301. They were decided before the current law was enacted. The authority the Respondent uses to support this contention are cases discussing different statutes.

The Respondent cites a 1929 case Appanoose Cnty. v. Henke, 22 N.W. 876,878 (1929) for the the principle that the interest on the beneficiary's exempt funds is not exempt. That case is discussing “interest derived from investments of pension money.” This case involves interest on disability benefits, not interest derived from investments on disability benefits.

The Respondent uses a 1934 case Pagel v. Pagel, 291 U.S. 473 54 S. Ct 497(1934) to prove the “ statute does not extend the exemption beyond the insured and the beneficiary...” Pagel 291. The Supreme Court is referring to a different statute. It is not referring to 38 U.S.C. & 5301. The Court says, “ the language of the statute limits the exemption to 'any person to whom an award is made.'” In this case the statutory language is different. The exemption is given not just to payments made to the beneficiary, but to payments made “on account of “the beneficiary. These cases discuss different laws and were written before the statute at issue in this case was written. The Pagel case involved insurance not disability benefits.

The Respondent argues, “ the case law is clear that when an individual veteran is deceased and that monies are in a bank account and they are no longer paid or payable to the original beneficiary or to a designated beneficiary, like a family member, then the statutory immunity is no longer in place.” (Verbatim Report of Proceedings page 6) While that may be true in the Pagel case dealing with insurance and a different statute, it is not the case here.

Some state cases may limit the protections of anti-attachment provisions but federal law says the words of the statute are clear:

“We cannot blame the Prison Officials for citing those state cases, but must point out that neither we nor the other federal courts have accepted that approach. In a chimerical search for some kind of purpose, those cases overlook the words of the statutory provision by claiming that Congress could not have meant what it said. But if Congress wanted to create exceptions to the language, it knew how to do so. In fact, it did provide for some in § 5301(a) itself, as well as in § 5301(c) & (d).”

Nelson v. Heiss 271 F3rd 891 (2001)

If congress had intended an exception, it would have written one into the statute.

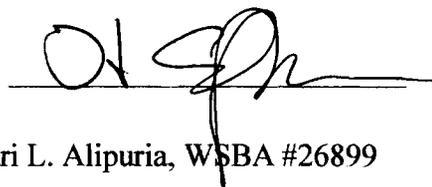
“Section 407(a) unambiguously rules out any attempt to attach Social Security benefits. The Arkansas statute just as unambiguously allows the State to attach those benefits. As we see it, this amounts to a ‘conflict’ under the Supremacy Clause — a conflict that the State cannot win.” Id. at 397, 108 S.Ct. at 1205;

Bennett v. Arkansas, 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988) (per curiam).

Courts have allowed direct payments of benefits to the Department of Social and Health Services but not indirect payments because indirect seizure uses collection methods prohibited in the federal statutes.

In cases where the Department of Health and Human Services is a representative payee for the benefit recipient this state allowed VA benefits to be used to reimburse public medical institutions for veteran care. Gossett v. Czech held that direct payments of VA benefits were not prohibited. However, this case does not involve direct payments. The courts said in footnote 6 “ our holding in Nelson v. Heiss is unaltered. If the reimbursements Czech made to the Hospital with Gossett's benefits had been made pursuant to debt collection activities, they would still be prohibited by section 3501(a)(1).” In this case payment to the hospital would be prohibited because the state is attempting to seize the benefits using debt collection activities. They filed a creditor's claim with the estate, and filed a lawsuit against the personal representative of the estate. This case is distinguished from cases where Courts allowed direct payments to D.S.H.S. because in this case the Department is using collection mechanisms specifically prohibited by Federal law. In those cases, “control over property [did not] pass from one person to another in order to discharge or secure discharge” of that liability. Keffeler II, 537 U.S. at 385, 123 S.Ct. 1017.”

Respectfully Submitted this 26 day of November, 2011

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Hari L. Alipuria, WSBA #26899

Attorney for Diana Call

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 42085-6-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF WAYNE LEROY MCPHERSON

DIANA MARIE CALL Appellant/Defendant

THE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES

Respondent/Plaintiff

PROOF OF SERVICE

I Certify that today I served counsel Justin Farmer by sending
through ABC legal Messenger Service the Following documents:

Appellant's ReplyBrief

This Proof of Service .

November 26, 2011

A handwritten signature in black ink, appearing to read 'Hari Alipuria', is written over a horizontal line.

Hari Alipuria WSBA# 26899
Attorney for DIANA MARIE CALL