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ATTORNEY GENERAL OPINION NO. 92-141

Meredith Williams
Executive Secretary
Kansas Public Employees Retirement
System
Capitol Tower, Suite 200
400 S.W. 8th Avenue
Topeka, Kansas 66603-3925

Re: State Boards, Commissions and Authorities--Public Employees Retirement Systems; Kansas Public Employees Retirement System--Benefits and Rights Nonassignable and Exempt From Taxes and Legal Process, Exception for Decrees for Support and Maintenance; Effect of Decree for the Division of Property Following Dissolution of Marriage

Synopsis: The whole purpose and policy of Kansas' exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. The spouse of a member of the Kansas public employees retirement system is not to be regarded as one of the parties subject to the anti-alienation provisions set forth in K.S.A. 1991 Supp. 74-4923, as amended by L. 1992, ch. 321, § 10. Therefore, any annuity or benefit earned pursuant to K.S.A. 74-4901 et seq. may be subject to a decree for the division of property following dissolution of marriage. Cited herein: K.S.A. 74-4901; K.S.A. 1991 Supp. 74-4902; 74-4923, as amended by L. 1992, ch. 321, § 10; L. 1961, ch. 427, § 23; L. 1974, ch. 338, § 1; L. 1982, ch. 152, § 24; L. 1990, ch. 282, § 11; L. 1991, ch. 238, § 3.

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Dear Mr. Williams:

As executive secretary for the Kansas public employees retirement system (KPERs), you request our opinion regarding whether any annuity or benefit earned under K.S.A. 74-4901 et seq. is subject to a decree for the division of property following dissolution of marriage. You raise this issue because of the decision of the Kansas Court of Appeals in In re Marriage of Sedbrook, 16 Kan.App.2d 668 (1992).

In Mahone v. Mahone, 213 Kan. 346 (1973), the Kansas Supreme Court "concluded that the statutory exemption contained in K.S.A. 74-4923 is not applicable when in conflict with the enforcement of a decree or claim for child support." Id. at 350.

"In arriving at this conclusion we have applied the principle that a statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deducible from the context. 'It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.' [Citation omitted.] The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. [Citation omitted.] In construing statutory exemptions this court has consistently taken into consideration this purpose and policy. We have by judicial construction excepted from the application of certain statutory exemptions, persons and situations not falling within that purpose." Id. (emphasis added).

"In construing the exemption provision under 74-4923 we should consider the other sections of the statute which created and maintain [KPERs]. The purpose of the act is set forth in K.S.A. 74-4901. One of its purposes is to enable public employees to accumulate reserves for themselves and

their dependents. [Emphasis in original.] Under 74-4902(7) a member's dependent child is specifically included as a beneficiary of the program. In view of these provisions it seems clear to us that [KPERs] is designed to protect the minor dependents of a member as well as the member himself.

"This court as a matter of public policy has always vigorously protected the right of a dependent child to receive support from his father. The denial of relief to the minor children in cases such as this might well cast upon the public the burden of supporting a pensioner's children and relieve him and his property of that obligation. Such a holding in our judgment would be perversive of the true purpose and policy of our exemption laws and the intent of the legislature in providing the exemption contained in K.S.A. 74-4923." Mahone, 213 Kan. at 351-52 (emphasis added).

The Kansas Court of Appeals determined in In re Marriage of Sedbrook, 16 Kan.App.2d 668 (1992) that municipal pension benefits are marital property subject to equitable division upon the dissolution of marriage. The court then addressed the effect of an anti-alienation provision contained within the retirement plan for firefighters of the city of Wichita. City of Wichita, Charter Ordinance No. 131, § 16 provides:

"EXEMPTIONS. The right to a service retirement annuity, disability annuity, death annuity or any annuity or benefit under the provisions of this ordinance by whatsoever name called, or a refund, is personal with the recipient thereof, and the assignment or transfer of any such annuity or benefit or any part thereof shall be void, except as may be provided herein. Any such annuity or benefit shall not answer for debts contracted by the person receiving the same, and it is the intention of this ordinance that they shall not be subject to execution,

attachment, garnishment, or affected by any judicial proceedings."

After acknowledging the purpose of anti-alienation provisions as determined in Mahone, the Court of Appeals stated:

"We believe a spouse must be considered as a dependent to be granted protection under the plan and not treated as a creditor. A spouse is a member of the family unit the retirement plan is designed to protect. We hold the anti-alienation provisions, in particular those relating to exemption from garnishment, attachment, and prohibition of assignment, do not apply to the claims of a spouse at the time of the marital dissolution." Sedbrook, 16 Kan.App.2d at 683-84.

With this in mind, we review the provisions of the anti-alienation clause contained in KPERS. Subsection (b) of K.S.A. 1991 Supp. 74-4923, as amended by L. 1992, ch. 321, § 10 states:

"(b) Any annuity, benefits, funds, property or rights created by, or accruing to any person under the provisions of K.S.A. 74-4901 et seq. or 74-4951 et seq., and any acts amendatory thereof or supplemental thereto, shall be exempt from any tax of the state of Kansas or any political subdivision or taxing body of the state; shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, except such annuity or benefit or any accumulated contributions due and owing from the system to such person are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendment thereto; and shall be unassignable, except that within 30 days after the death of a retirant the lump-sum death benefit payable to a retirant pursuant to the provisions of K.S.A. 74-4989 and amendments thereto may be assignable to a funeral establishment providing funeral services to such

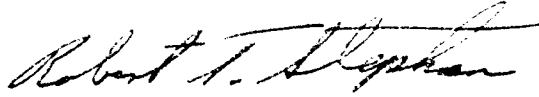
retirant by the beneficiary of such retirant. The Kansas public employees retirement system shall not be a party to any action under article 16 of chapter 60 of the Kansas Statutes Annotated and is subject to orders from such actions issued by the district court of the county where such action was filed. Such orders from such actions shall specify either a specific amount or specific percentage of the amount of the pension or benefit or any accumulated contributions due and owing from the system to be distributed by the system pursuant to this act."
(Emphasis added).

The emphasized portion of the anti-alienation provision has been in existence since enactment of the statute in 1961. L. 1961, ch. 427, § 23. Following the court's decision in Mahone, the legislature amended the anti-alienation provision to provide that KPERS benefits were not subject to "any other process or claim whatsoever, including decrees for support or alimony. . . ." L. 1974, ch. 338, § 1 (emphasis denotes new language). In 1982, the term "maintenance" replaced "alimony." L. 1982, ch. 152, § 24. After amendments in L. 1990, ch. 282, § 11 and L. 1991, ch. 238, § 3, the anti-alienation provision stated that any annuity, benefit, or funds "shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, except such annuity or benefit or any accumulated contribution due and owing from the system to such person are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendments thereto. . . ." At no time has the anti-alienation clause expressly addressed the effect of a decree for the division of property following dissolution of marriage.

As evidenced in Sedbrook, courts have increasingly acknowledged that retirement benefits are essentially deferred compensation and, when earned during marriage, constitute marital property that may be subject to a decree for division of property. See Sedbrook, 16 Kan.App.2d at 679-80. We find no distinguishing feature in KPERS which would permit us to reach a different conclusion regarding any annuity or benefit earned under KPERS. A spouse of the member of KPERS is a part of the unit the retirement plan is designed to protect. The spouse is not to be treated as a creditor of the member. The spouse is not to be regarded as one of the parties subject to

the anti-alienation provision set forth in K.S.A. 1991 Supp. 74-4923, as amended. Therefore, any annuity or benefit earned pursuant to K.S.A. 74-4901 et seq. may be subject to a decree for the division of property following dissolution of marriage.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm