No. 17-970

In The Supreme Court Of The United States

TRUDY STANFORD,

Petitioner,

v.

LINDA BROWNE; JULIE ANN STANFORD, and JAMES STANFORD

Respondents.

On Petition for a Writ of Certiorari to the Nevada Supreme Court

PETITIONER'S REPLY BRIEF

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Some legal arguments are based on well grounded legal authorities and reasoning; others are not so well supported. The Respondent's Opposition filed on May 11, 2018 has much more in common with the latter than the former. That is not a commentary on the lawyer; it is, rather, a commentary on the paucity of support for a legal position. Even the best of lawyers can only do so much with so little.

The main thrust of the Opposition is that the Nevada Supreme Court's unpublished Order of Affirmance is based on an "adequate and independent state ground." Unfortunately, that cannot be the case because Nevada law is exactly the opposite in many ways and applicable federal law was intentionally ignored. Inadequacy can come about when there is a lack of fair and substantial support in the facts. Ward v. Board of County Commissioners, 253 U.S. 17, 22-24 (1920).

We start with the state constitution. Nevada, like many states, looked to the United States Constitution when drafting its own constitution. Article 1 – Declaration of Rights – includes Nevada's version of the contracts clause:

> §15. Bill of attainder; ex post facto law; obligation of contract. No bill of attainder, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed. (Emphasis added)

The Nevada Constitution was approved in 1864 and Nevada became a state in time to join in the civil war on behalf of the union states. Both the federal and state constitutional provisions have been cited by the Nevada Supreme Court for decades as authority that a state pension benefit cannot be retroactively modified by the Nevada Legislature once the employee has retired. The existing benefits are then considered "vested" and not subject to retroactive legislation. Public Employment Retirement Board v. Washoe County, 96 Nev. 718, 721, 615 P.2d 972, 974 (1980); Mello v. Woodhouse, 110 Nev. 366, 371, 872 P.2d 337, 340 (1994) and Nicholas v. State, 116 Nev. 40, 992 P.2d 262 (2000). See also State Employees Ass'n v. State, 102 Nev. 356, 359, 724 P.2d 732 (1986):

> The state may not pass a law which impairs the obligation of contracts. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. As we held in Public Emp. Ret. v. Washoe County, 96 Nev. 718, 615 P.2d 972 (1980), employment contracts are within the ambit of the contract clause. Simply put, the duty to maintain sound fiscal control of the state's budget cannot supplant the state's concomitant duty to honor its contracts with state workers.

The Opposition also cites Redd v. Brooke, 96 Nev. 9, 604 P.2d 360 (1980) as providing the "adequate and independent state ground" because the Nevada Supreme Court cited it in its unpublished Order. This argument was readily disposed of in the Petition for a Writ of Certiorari by pointing out that while the deferred compensation plan was awarded to petitioner's former husband in their 1990 divorce, the decree said nothing about the beneficial interest in that asset. The Redd decision required that the beneficial interest has to be specifically addressed in a divorce decree in order to divest the beneficiary spouse. That did not happen in the instant case. Redd cannot be reconciled with the other published state cases.

Respondent also contends the Nevada Supreme Court did not address the Contracts Clause issue since its misplaced reliance on the Redd decision rendered that point moot. That contention conflicts with a century and a half of U.S. Supreme Court precedent holding that state courts do not have the option of disregarding federal constitutional rights, federal penal laws and other federal statutes. Calfin v. Houseman, 93 U.S. 130 (1876) (concurrent jurisdiction with state courts and one integrated legal system); Mondou v. New York, N.H. & H.R. Co., (Second Employers Liability Cases) 223 US. 1 (1912) (Connecticut state courts could not refuse to use applicable federal law and use only state law); Testa v. Katt, 330 U.S. 386 (1947) (Rhode Island state courts could not refuse to enforce a valid penal law of the United States).

Closer on point is Howlett v. Rose, 496 U.S. 356 (1990) which reversed a Florida Court of Appeals decision that applied a state law claim of civil rights immunity when no such immunity existed under federal civil rights law. It was this claim of state law superiority over federal law that compelled this court to grant certiorari and reverse:

> That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action. The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo. (Citations omitted) The Inadequate State Ground, 65 Colum. L. Rev. 943, 954-957 (1965). Whether the constitutional rights asserted by petitioner were " `given due recognition by the [Court of Appeal] is a question as to which the [petitioner is] entitled to invoke our judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.' " Staub v. City of Baxley, 355 U. S. 313, 318-319 (1958) (quoting Ward v. Love County Board of Comm'rs, 253 U. S. 17, 22 (1920)).[14]
>
> (496 U.S. at 365-66)

The key phrase comes at the end: "nonfederal grounds of decision that were without any fair or substantial support." That is our point. The Nevada Supreme Court disregarded its own published opinions and pretzel-twisted the holding of an earlier case to "justify" its ruling that Trudy had no beneficiary interest in Mark's plan and thus no Contracts Clause constitutional issue. That decision is not entitled to deference.

The opinion further noted that the state and federal laws are truly parts of one national legal system, that the Supremacy Clause makes federal statutes and cases the "supreme law of the land" and that state courts are duty bound to consider and apply federal law as part of their regular procedure. 496 U.S. at 367. State courts may not deny a federal right and an excuse that is inconsistent with or violates federal law is not a valid excuse. 496 U.S. at 371.

In short, state courts are not free to ignore federal law claims and pretend there is an "adequate and independent state ground" to support an appellate decision such that the federal law can be safely ignored. The Supremacy Clause does not permit state courts to disregard federal law on any legal basis including jurisdiction. 496 U.S. at 381-3.

What is rather shocking is that the Nevada Supreme Court itself has recognized its appellate responsibility to fully consider federal law in its decisions, Edwards v. Direct Access, LLC, 121 Nev. 930, 124 P.3d 1158, 1159-60 (2005):

> The United States Supreme Court has unanimously held that state courts are not only empowered to hear cases based on federal law but are bound to do so under the United States Constitution and the laws passed pursuant to it.

> [Citing Testa v. Katt, 330 U.S. 386, 391, 67 S. Ct. 810, 91 L. Ed. 967 (1947) in Footnote 11].

Despite this constitutional pedigree, some state courts still attempt to evade or avoid federal law by changing state laws or state court jurisdictional bases. When that happens, this court has not hesitated to grant certiorari and reverse. See Haywood v. Brown, 556 U.S. 729 (2009) (New York state statute barring Section 1983 claims against state corrections officers violated the Supremacy Clause).

If history and legal precedent are reliable guides, this court should treat the Nevada Supreme Court's Order in the same manner.

I. A FEDERAL TAX STATUTE CANNOT BE SUBJECT TO "ADEQUATE AND INDEPENDENT STATE GROUNDS"

Mark Stanford's deferred compensation plan existed solely because of the authority granted to state and local governments to create deferred compensation plans in 26 U.S.C. §457. It is a federal tax statute that should be uniformly applied throughout the United State and why a Uniformity Clause argument was included in the Petition for a Writ of Certiorari.

The concept of uniformity in the application of federal law was an important point in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 347-8 (1816):

> This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Federal tax statutes and/or ERISA statutes are at the core of every significant decision this court has issued in recent years involving the interplay of revocation-on-divorce statutes or community property law and plan benefits distributions. See, e.g. Boggs v.

Boggs, 520 U.S. 833 (1997) (ERISA pre-emption and anti-alienation); Egelhoff v. Egelhoff, 532 U.S.141 (2001) (ERISA pre-emption); and Kennedy v. Plan Administrator, 555 U.S. 285 (2009) (ERISA anti-alienation statute). The Lazar case pending before this court, case no. 17-521, involves an Individual Retirement Account (26 U.S.C. 408). Sveen v. Melin, case no. 16-1432, presently under submission and pending issuance of an opinion, is an outlier in that it involves an ordinary life insurance beneficiary designation.

This court might decide that Minnesota's Revocation on Divorce (hereinafter referred to as "ROD") statute can be applied to an ordinary life insurance beneficiary designation. However, any legal logic on that point cannot and should not be extrapolated to cases involving federal tax or ERISA statutes because of the requirement for national uniformity of federal law and the Supremacy Clause.

As this court explained in Boggs v. Boggs, 520 U.S. 833, 841 (1997):

> Our ruling must be consistent with the congressional scheme to assure the security of plan participants and their families in every State. In enacting ERISA, Congress noted the importance of pension plans in its findings and declaration of policy, explaining:
>
>> "The growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . the

> continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . they are affected with a national public interest [and] they have become an important factor affecting the stability of employment and [*841] the successful development of industrial relations . . . ." 29 U.S.C. § 1001(a).

ERISA is an intricate, comprehensive statute. Its federal regulatory scheme governs employee benefit plans, which include both pension and welfare plans. All employee benefit plans must conform to various reporting, disclosure and fiduciary requirements, see §§ 1021-1031, 1101-1114, while pension plans must also comply with participation, vesting, and funding requirements, see §§ 1051-1086. The surviving spouse annuity and QDRO provisions, central to the dispute here, are part of the statute's mandatory participation and vesting requirements. These provisions provide detailed protections to spouses of plan participants which, in some cases, exceed what their rights would be were community property law the sole measure.

The deferred compensation system under Section 457 may not be as comprehensive or as intricate as ERISA statutes and the massive pension and benefit financial industry but it should get the same treatment by this court. The "ROD" statutes now in 28 states impermissibly disrupts this national system in non-ERISA benefit programs.

II. A NARROW REVOCATION IS STILL A REVOCATION

The Opposition also argues that the Nevada revocation-on-divorce statute, NRS 111.781, is valid since a 2015 legislative amendment provided that it applied only to deaths occurring after October 1, 2011, the effective date of the original statute:

> "10. This section applies only to nonprobate transfers which become effective because of the death of a person on or after October 1, 2011, regardless of when the divorce or annulment occurred."

That slight amendment does not "save" the statute from illegal retroactivity. It only narrows the field of possible claimants. The time line in this case is critical and more extreme than in either Sveen v. Melin, case no. 16-1432, or in Lazar v. Kroncke, case no. 17-521. Mark and Trudy Stanford were married in 1976, both were State of Nevada employees, and Mark's deferred compensation plan was created in 1987. He named Trudy as beneficiary.

They divorced in 1990 and Mark was awarded this plan benefit in the divorce in general terms only. The Nevada ROD statute was enacted in 2011 and Mark passed away in 2013 while living in Texas with respondent Linda Browne. This time line has significance because of the questions asked at the oral argument on March 19, 2018 in Sveen v. Melin, particularly by Justice Kagan:

> "JUSTICE KAGAN: — on the retroactivity point, here, the statute precedes both the divorce and the death. But what would happen if the divorce happened first and then the enactment of the statute and then the death? Would the statute have applied? (Transcript p. 13, lines 7-12)

Justice Kagan reiterated the same point later in the argument at page 44, lines 6-14. The sequence important to Justice Kagan's thinking is the exact pattern in this petition: 1990 divorce, 2011 statute, and 2013 death of plan participant.

III. THE "KISS" PRINCIPLE

In every term, the petitions and briefs filed with this court from litigant and amicus parties generally exhibit superb legal research and well crafted arguments, work products befitting of the highest court in the land. Good briefs assist this court with its normal load of difficult cases and pressing national issues.

Over the past several decades, our legal system has become increasingly complex and difficult even for the best of lawyers and clients. The rule of law is being replaced by the interminable law of rules. Sometimes, navigating the complexities of the legal process consumes time and resources and the substantive merits of the cases are subordinated to the procedures.

State and federal statute books are comprised of dozens of volumes and thousands of pages. Westlaw and LexisNexis have data bases containing millions of cases. Add to this all of the published state and federal regulations and thousands of court rules and you get a complex legal system daunting even for lawyers.

If it is difficult for lawyers, it is even more daunting for proper person litigants who may not be able to afford much for legal fees but are in need of legal processes to get divorced, etc. In many states, the percentage of proper person litigants in family law cases is substantial. In the Family Court in Las Vegas, Nevada, the pro se percentage is regularly determined to be more than half of all cases. Pro se litigants face considerable difficulties in grasping legal principles and procedures. ROD statutes are generally so obscure that even full time practicing lawyers are likely to never have heard of them.

These are good arguments for imposing some simplicity on our multitudinous legal systems. This is not an esoteric argument because this court adopted this point of view in Kennedy v. Plan Administrator, 555 U.S. 285 at 300-301, and in prior cases:

The KISS principle: Keep It Simple and Safe. The thousands of employee benefit plans in the United States are not all that complicated and are administered by ordinary working clerical staff, not by a small army of lawyers. Every plan has easy methods for designating and changing beneficiaries and every employee gets a copy of plan documents and forms. Beneficiary designations are normally simple fill-in the-blank forms and many plans likely have online forms for these purposes. All the plan participant has to do is follow the procedures for beneficiary designations and changes. No need for lawyers.

ROD statutes do not implicate any important public policy or practice. The harsh reality is that the only small segment of the public that benefits from ROD statutes are those plan participants who forget or neglect to change their beneficiary designations after a divorce and possible estate beneficiaries who might otherwise inherit after the death of the member.

ROD statutes may also unknowingly harm plan participants who do not want to change their beneficiary designations. Some may want to keep the same named beneficiaries because of concern for that person's future financial well-being. Others may keep the beneficiary designation as security for the future payment of child support or alimony. These are private, valid reasons for not changing beneficiary status in benefit plans. A legislature passing a ROD statutes disrupts those intentional plans.

Whether plan participants are pro se litigants or represented by counsel, they are far more likely to be aware of benefit plan procedures from mail notices, brochures, required documents and plan administrator internet websites. It is the responsibility of plan participants to manage their own fiscal affairs. Being human, some may fail to competently handle their own fiscal affairs but that alone in small numbers does not justify remedial legislation for the inept and neglectful.

CONCLUSION

The Petition for the Writ of Certiorari should be granted.

Respectfully Submitted,

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