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

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner respectfully moves the court pursuant to SCR 44(2) for a rehearing of the denial of her Petition for a Writ of Certiorari, denied by Order of June 18, 2018, based upon the following questions:

QUESTIONS PRESENTED

1. Does the court's decision in Sveen v. Melin, ___ U.S. ____, 201 L.Ed.2d 180 138 S. Ct. 1815 (June 11, 2018) which held that Minnesota's revocation-on-divorce statute did not violate the Contracts Clause retroactive legislation prohibition, apply equally to deferred compensation benefit plans and a divorce occurring in 1990, 21 years before Nevada enacted its revocation-on-divorce statute?

2. Should the Sveen decision be given prospective application only and limited only to divorces which occurred after the enactment of such statutes?

THE PARTIES

The case caption names all of the parties.

STATEMENT IN SUPPORT OF REHEARING

The intervening circumstances of a substantial or controlling effect justifying this Petition for Rehearing is this court's recent decision in Sveen v. Melin, ___ U.S. ____, 201 L.Ed.2d 180 138 S. Ct.

1815 (June 11, 2018). Other substantial grounds not previously presented include the presumption that legislation shall be applied prospectively and not retroactively.

The facts in Stanford are far more extreme than in Sveen and the retroactive application of Nevada's Revocation-on-divorce statute, NRS 111.781, violates the Contracts Clause prohibition against retroactive impairment of contracts.

Sveen involved a garden variety life insurance policy which the husband purchased in 1998 and named his wife as primary beneficiary and named his two children from a prior marriage as contingent beneficiaries. The husband and wife divorced in 2007 and the decree made no mention of the life insurance policy. Mr. Sveen passed away in 2011. He never changed the beneficiary designations.

The Minnesota revocation on divorce statute was passed in 2002. After Mr. Sveen's death, the two children claimed the policy benefits, arguing that the ROD statute nullified the former wife's beneficiary status. The children won at trial, lost at the Eighth Circuit and then won again at the U. S. Supreme Court.

The critical chronology fact was that the statute was enacted in 2002 and the divorce occurred in 2007. Thus, it was in effect at the time of the divorce.

The Stanford time line is vastly different. Mark had two children from a prior marriage. Mark and Trudy were married on December 31, 1976. Both were State of Nevada employees.

Mark enrolled in the state's deferred compensation plan in 1987 and named Trudy as his beneficiary. They divorced in 1990 and Mark got the deferred compensation asset in the divorce albeit in general terms. Nothing was stated about the beneficiary interest.

Mark retired in 1999. At some point, he was in a non-marital relationship with Linda Browne. After retirement, he moved to Texas and passed away in that state in 2013.

Nevada enacted its revocation statute in 2011. A 2015 amendment limited its application solely to deaths occurring after October 1, 2011, the effective date of NRS 111.781. The statute was enacted 21 years after the divorce and well after Mark had moved to Texas. He died 23 years after the divorce.

Not once during these two plus decades did Mark properly change the beneficiary designation on this deferred compensation plan despite many opportunities to do so. He changed the beneficiary designations in other accounts, etc but left this deferred compensation plan beneficiary status unchanged. If he did not change it in the 23 years between divorce and death, we can safely presume he did not intend to remove her as beneficiary.

Trudy lost in the state court litigation solely because of Nevada's revocation-on-divorce statute. If this statute did not exist, Trudy would have received the proceeds. Nevada statutes have explicit provisions regarding non-probate and non-testamentary transfers of certain assets after death. See NRS 111.551-781.

A provision for transfer of certain assets upon death is considered a "contract" under Nevada law. NRS 111.751(1). Upon death, the transferring entity has the lawful authority to transfer the property to the designated beneficiary, NRS 111.753, and will do so to the properly designated beneficiary per NRS 111.757, Transfer to designated beneficiary according to beneficiary designation or other direction:

> When a transferring entity accepts a beneficiary designation or beneficiary assignment or registers in beneficiary form certain property, the acceptance or
> registration constitutes the agreement of the owner and transferring entity that, unless the beneficiary designation is revoked or changed before the death of the owner, on proof of the death of the owner and compliance with the transferring entity's requirements for showing proof of entitlement, the property will be transferred to and placed in the name and control of the beneficiary in accordance with the beneficiary designation or transfer-on-death direction, the agreement of

the parties and the provisions of NRS 111.751 to 111.779, inclusive.

Nevada law explicitly requires proper designations of beneficiaries and proper changes of beneficiaries. NRS 111.769(3): "3. A revocation or change in a beneficiary designation must comply with the terms of the governing instrument, the rules of the transferring entity and the applicable law."

These statutes are part of the "body of law" applicable in Nevada to the entire case involving these parties. While it is true that the Supreme Court only addressed the Contracts Clause issue, determination of that issue should occur only in the context of the entire body of state and federal law. "It has been very truly observed , that all the laws on this subject should be taken together." Reynolds v. M'Arthur, 27 U.S. 417, 430 (1829).

The other "body of law" applicable to these parties includes Nevada Supreme Court decisions which have already ruled that public employment retirement benefits are contracts that cannot be retroactively modified by subsequent legislation because that would violate the Contracts Clause. See Public Employment Retirement Board v. Washoe County, 96 Nev. 718, 615 P.2d 972 (1980) in which it expressly stated:

> "No state may pass a law impairing the obligation of contracts. U.S. Const., Art. 1 & 10;

Nev. Const. Art. 1 §15. Public employment contracts are within the ambit of the contract clause. Singer v City of Topeka, 607 P.2d 467 (Kan. 1980)"

And again in Nicholas v. State, 116 Nev. 40, 992 P.2d 262 (2000):

> Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.

Police Pension and Relief Board of Denver v. Phail, 139 Colo. 330, 338 P.2d 694, 700 (Co/o. 1959) (quoting Retirement Board of Allegheny County v. McGovern, 316 Pa. 161, 174 A. 400 (Pa. 1934)). Respondent Public Employees Retirement Board asserts that the legislature has the authority to alter a person's retirement benefit at any time, even after they retire. This is in direct contradiction to the position previously taken by the Board in Mello v. Woodhouse, 110 Nev. 366, 371. n.10, 872 P.2d 337, 340 (1994).

In Mello the Board acknowledged that legislators who had already completed their term prior to the repeal of A.B. 820 would have

> absolutely vested under A.B. 820. An employee's rights become absolutely vested when he retires and all conditions for his retirement benefits have been met. That right is constitutionally protected against impairment once absolutely vested. "No state may pass a law impairing the obligation of contracts. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. Public employment contracts are within the ambit of the contract clause." Public Emp. Ret., 96 Nev. at 721, 615 P.2d at 974 (citing Singer v. City of Topeka, 227 Kan. 356, 607 P.2d 467 (Kan. 1980)).
>
> Public employees perform their duties, in reliance on the state paying retirement benefits when certain conditions are met. When those rights become absolutely vested, a contract exists between the employee and the state which cannot be modified by unilateral action on the part of the legislature. The repeal of A.B. 820 impaired the obligation of the state to pay the increased pension benefits to these appellants. (Emphasis Supplied)

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.

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)

If the Nevada case law and its own state constitution hold that public employment retirement benefits cannot be retroactively modified by the Legislature after the benefits have vested, that "body of law" supports Trudy's petition and is a forceful argument that it likewise violates the federal Contracts Clause as well.

In Sveen, this court applied a two step test (201 L.Ed.2d at 187-88):

> To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." ...In answering that question, the Court has considered the extent to which the law

undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. ....If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose."

Here, we may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. True enough that in revoking a beneficiary designation, the law makes a significant change. As Melin says, the "whole point" of buying life insurance is to provide the proceeds to the named beneficiary. Brief for Respondent 16. But three aspects of Minnesota's law, taken together, defeat

Melin's argument that the change it effected "severely impaired" her ex-husband's contract. Ibid. First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment.
(Case citations omitted)

The Nevada Supreme Court's decision that refused to even consider the Contracts Clause was a substantial impairment of the contract because Nevada case law and the Nevada Constitution itself said so. Public employee retirement benefits cannot be retroactively modified by the Legislature.

In this case, the ROD statute undermines the entire scheme of operations of the deferred compensation plan beneficiary process and conflicts with the other Nevada statutes, supra, on change of beneficiary procedures.

Trudy's "reasonable expectations" were interfered with by the application of this statute. The statute did not exist when they divorced in 1990. Mark did nothing to change his beneficiary designation in the 21 years from divorce to the enactment of the statute. He did nothing for the subsequent two years after that either.

Because of this severe time lapse, this statute could not have reflected Mark's policy holder intent to change beneficiaries after a divorce because it did not exist at the time of the divorce. Furthermore, Mark lived in Texas and very likely had no idea that the Nevada Legislature enacted NRS 11.781 in 2011. So how was it possible for him to re-designate Trudy as his beneficiary if he had no knowledge of the existence of this statute?

Mark undoubtedly had many opportunities to change the beneficiary designation but did not do so in 23 years and his other beneficiaries were rewarded only because of this statute.

This is why the broad, sweeping legal generalizations in Sveen are troublesome and risky. NRS 111.781 and similar statutes are constitutional only if they are enacted before a divorce and before the death of the plan participant. Application of a ROD statute to a divorce that long preceded the enactment violates the Contracts Clause.

Furthermore, this approach would be more consistent with the long established doctrine that legislation should operate prospectively only. See United States v. The Schooner Peggy, 5 U.S. 103, 110 (1801) ("[I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."); United States v. Heth, 7 U.S. 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."); Billings v. United States, 232 U.S. 261, 282 (1914) ("[S]tatutes should be so construed as to prevent them from operating retroactively . . . ."); Reynolds v. McArthur, 27 U.S. (2 Pet.) 417, 434 (1829) ("It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable.");; see also Benjamin N. Cardozo, The Growth of the Law 3 (1924) ("Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable."); Lon L. Fuller, The Morality of Law 53 (1964) ("[A] retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing . . . today by rules that will be enacted tomorrow is to talk in blank prose.");

See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . [and] must provide explicit standards for those who apply them.").

The facts and the critical time lines in Trudy's case are vastly different than those in Sveen v. Melin. Constitutional rulings may be sound in one case and an illogical disaster in another. That is why Trudy petitions this court for rehearing.

A favorable ruling in this case would be consistent with Sveen's legal points. The huge factual and chronological time differences can and should lead to a different outcome and still be consistent on the underlying constitutional law principles. Consistency of rulings is a reason to grant rehearing. United States.v. Ohio Power Co., 353 U.S. 98 (1957); Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965)

CONCLUSION

The Petition for Rehearing should be granted.

SCR 44(2) CERTIFICATION

Petitioner's counsel hereby certifies that the Motion for Rehearing was based on this court's recent decision in a similar case but that the facts of the petitioner's case herein as dramatically different from the facts of the main case.

The Motion for Rehearing is presented in good faith and not for delay. It is restricted to the grounds stated in this rule.

Respectfully Submitted,

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