

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARILYN SHOLIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-1947
	)	
DEPARTMENT OF MANAGEMENT SERVICES,	)	
DIVISION OF RETIREMENT,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
ELLEN DOBKIN,	)	
	)	
Intervenor.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 12, 2001, in Fort Lauderdale, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lawrence P. Zolot, Esquire  
3864 Sheridan Street  
Hollywood, Florida 33021

For Respondent: Thomas E. Wright, Esquire  
Division of Retirement  
Post Office Box 3900  
Tallahassee, Florida

For Intervenor: Kenneth Dobkin, Esquire  
Hunton & Williams  
Bank of America Plaza, Suite 4100  
Atlanta, Georgia 30308-2216

STATEMENT OF THE ISSUE

Whether a deceased state employee effectively named  
Petitioner as his retirement beneficiary prior to his death.

PRELIMINARY STATEMENT

Petitioner, Marilyn Sholin (Sholin), requested the Division  
of Retirement (Division), to remit deceased employee Larry  
Baker's (Baker) accumulated Deferred Retirement Option Program  
(DROP) contributions to her after his death. Baker was a  
Florida Retirement System (FRS) member participating in DROP at  
the time of his death. By letter dated March 12, 2001, the  
Division denied her request and this proceeding timely followed.

At the final hearing, Sholin testified on her own behalf  
and offered the testimony of Dorothy Cleveland of the Human  
Resources Department of the Broward County Board of  
Commissioners. Respondent presented without objection the  
deposition testimony of Stanley Colvin, Benefits Administrator,  
Bureau of Retired Payroll and Survivor Benefits. Sholin  
submitted four exhibits, two of which were admitted over  
objection. The Division submitted seven exhibits, all of which  
were admitted without objection.

During the course of the final hearing, Ellen Dobkin was granted intervention per an ore tenus motion to intervene.

No transcript of the proceedings has been filed. Proposed Recommended Orders were timely filed on August 15, 2001, and have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At the time of his death on December 23, 2000, Baker was a member of the FRS participating in DROP.

2. At all times material to this case, Baker's eligibility for FRS and for DROP was predicated upon his employment by the Broward County Board of County Commissioners.

3. At the time of Baker's death, his lawful beneficiary was entitled to receive \$27,561.66 in lump sum DROP benefits.

4. DROP commenced in 1998. Under the program, employees eligible for retirement have the option to retire, while continuing to report for their normal work day for a period of time not to exceed five years from the date of their retirement.

5. Because he did in fact continue to report for duty each day and to perform the same tasks as he had prior to his enrollment in DROP, Baker considered himself to be an "active" employee. However, upon his enrollment in DROP, Baker was carried on the FRS books as a "retiree."

6. One of the differences between active employees and DROP retirees is that the Division provides different forms to be used for designating beneficiaries for state sponsored insurance programs.

7. For example, Form FST-12 is the state-approved form upon which DROP members are supposed to make desired changes in beneficiary designations. A form known as BEN-001 is the state-approved form upon which active employees are supposed to make desired changes in beneficiary designations.

8. The FST-12 form is promulgated by the Bureau of Retirement Calculation while the Enrollment Section of the Bureau of Enrollment and Contributions is responsible for the BEN-001 form. Both bureaus are part of the Division.

9. The FST-12 form is required to be notarized.

10. The BEN-001 form does not require a notarization.

11. The Division's stated reason for requiring that the FST-12 form be notarized is to enable it to verify the identity of the person requesting changes. The Division states that forms from active members are generally received by the Division from the employer, who presumably knows its employees, and therefore it is unnecessary for the Division to require notary verification for active members.

12. Baker enrolled in DROP effective March 1, 1999.

13. At that time, Baker designated his then-girlfriend, Ellen Dobkin (Dobkin) as his DROP beneficiary. Dobkin was also Baker's primary beneficiary under the life insurance policy provided to Baker by Broward County, as well as on the deferred compensation plan in which Baker participated.

14. By October 2000, Baker had a new girlfriend, Sholin.

15. In October 2000 Baker acted to replace Dobkin with Sholin as his beneficiary on all three of the employment-based benefit programs in which he participated.

16. On or about October 24, 2000, Baker contacted Broward County's personnel office for the purpose of obtaining and completing the forms necessary to effect this beneficiary change. He was successful in obtaining the proper documents and effecting the desired beneficiary change as to the life insurance and deferred compensation coverage.

17. With respect to the DROP program, the Broward County personnel office mistakenly provided Baker a BEN-001 form, rather than the approved FST-12.

18. Because the DROP program was so new, it was not uncommon for personnel offices affiliated with FRS throughout the state to make the mistake of providing an incorrect form to persons wishing to make beneficiary changes subsequent to their enrollment in DROP.

19. Baker reasonably relied upon the Broward County personnel office to provide him with the form necessary to effect his wishes with respect to his beneficiary.

20. Baker executed the BEN-001 provided by his employer in good faith and with the intent to remove Dobkin as a beneficiary and to replace her with Sholin.

21. Baker's BEN-001 was received by the Division on October 31, 2000.

22. In the regular course of business, Baker's BEN-001 was thereupon sent to Division staff responsible for processing beneficiary forms for active members.

23. It is the Division's practice, when a form BEN-001 is received, to examine the form to make sure that the correct form has been properly completed. The purpose of this review is to assure that mistakes are caught while the employee is still alive and able to correct the mistake.

24. Upon review of the form submitted by Baker, Division staff recognized that Baker was a DROP participant, thus technically a retiree, but that he had executed the form intended for use by active employees. Therefore, in the regular course of business, his file was forwarded to a supervisor for further action.

25. On approximately 100 prior occasions, the Division had had occasion to notify DROP participants that, like Baker, had

used the BEN-001 form, rather than the approved FST-12 form, to effect a beneficiary change. In each of those cases, the employee was contacted by letter which explained the situation and enclosed the correct FST-12 form. The employee then had the opportunity to re-state his intentions with respect to his DROP beneficiary on the approved form.

26. On December 13, 2000, a Division supervisor wrote to Baker enclosing a Form FST-12 and advising him to execute that form in order to effect the requested beneficiary change.

27. The letter was sent to Baker's address on file at the time when Baker entered the DROP program. However, Baker had since moved, and the letter did not reach Baker, who died on December 23, 2000.

28. Upon consideration of the file, the Division denied Sholin's claim for benefits, solely because Baker had used the incorrect form to document his change of beneficiary.

#### CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.57 (1), Florida Statutes (2000).

30. Petitioner has the burden of proving by a preponderance of the evidence that she is entitled to be Baker's beneficiary. See Section 120.57(1)(j) and (k), Florida Statutes; Florida

Department of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); and Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993).

31. Section 121.091(8)(a), Florida Statutes (2000), provides in relevant part that "[E]ach member (of FRS) may, on a form provided for that purpose, . . . designate a choice of one or more persons, . . . as his or her beneficiary. . . ."

32. Baker reasonably relied upon the BEN-001 form given him by his personnel office as being the proper tool by which to communicate to FRS his desire to change his DROP beneficiary from Dobkin to Sholin. As far as Baker was concerned the form he was given was a form "provided for [that] purpose" within the meaning of Section 121.091(8), Florida Statutes (2000).

33. The Division's reliance upon Harrell v. Department of Management Services, Division of Retirement, DOAH Case No. 99-4056 (2000), is misplaced. As Judge Robert M. Meale noted in the Recommended Order in that case, the overarching purpose of Florida's retirement statutes is to assure the right of the deceased employee ". . . to select a beneficiary of his choice and to be assured that [the Division] will honor that choice."

34. Here, the evidence establishes that Baker chose Sholin as his beneficiary and reasonably relied upon his employer to



provide him with the correct form with which to document that choice. The Division proposes not to honor Baker's choice simply because he did not live long enough to receive and act upon the Division's efforts to assist him to correct the innocent mistake which it correctly suspected that he--like a hundred employees before him--had made. The Division's position places form over substance.

#### RECOMMENDATION

Based upon the foregoing findings of fact, and conclusions of law, it is RECOMMENDED that the Division of Retirement enter a Final Order granting Larry Baker's \$27,561.66 DROP benefits to Marilyn Sholin.

DONE AND ENTERED this 22nd day of August, 2001, in  
Tallahassee, Leon County, Florida.

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FLORENCE SNYDER RIVAS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of August, 2001.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.