



Legal Opinion L-2006-09
May 10, 2006

U.S. Railroad Retirement Board Phone: (312) 751-7139
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Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO : Ronald Russo
Director of Policy and Systems
Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Priority of Creditor Claims
Representative Payee—Use of Benefit Payments

This is to advise you, in response to a request made by the representative payee for the subject employee annuitant through the Portland, Oregon office of the Board, of my opinion as to whether a representative payee may use the employee's annuity to pay to her former husband contributions under a decree of divorce toward a mortgage note. As the Portland Office was advised by your staff to request this opinion, I am directing my response to you, with a copy to the Portland office. I am also furnishing a copy directly to the representative payee.

The current representative payee, who was appointed by the Board effective December 2005, has provided a copy of a Stipulated Judgment and Decree of Dissolution of Marriage entered April 9, 2001. Numbered paragraph 5 of the Judgment and Decree states:

5. SPOUSAL SUPPORT: In lieu of spousal support, Petitioner [the railroad employee] and Respondent [the employee's former husband] agree as follows: that heretofore Petitioner and Respondent secured a \$35,000 loan from * * * Savings & Loan for Petitioner's property at [street address] * * * Oregon and that Respondent received one-half of the proceeds of such loan. Respondent shall be required to pay the sum of \$511 per month due on such loan, until fully paid, and Petitioner [employee] shall be required to pay directly to Respondent the sum of \$150 per month until Respondent's retirement. Upon Respondent's retirement, Petitioner [employee] shall be required to pay the sum of \$200 to Respondent until the loan with * * * Savings and Loan is fully paid.

The representative payee advises that the employee annuitant resides in the property which secures the \$35,000 loan.

The representative payee also states that doctors advise the employee annuitant requires 24-hour care, either by adult day care or by in-home assistance. The representative payee states that "the cost is extensive and would essentially require the remainder of [annuitant's] funds after the food and utility obligations are met." In order to determine how much of the annuitant's monthly annuity remains to pay for custodial care, the representative payee asks whether the payment required under paragraph 5 of the 2001 Judgment and Decree constitutes a housing cost, a support payment to the husband, or payment of a debt.

As you know, section 12(a) of the Railroad Retirement Act provides that an annuitant is presumed competent "until the date on which the Board receives written notice, in a form acceptable to the Board, that he is an incompetent, or a minor, for whom a guardian or other person legally vested with the care of



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his person or estate has been appointed * * *." That section further authorizes the Board, without regard to the legal competence of the annuitant, to recognize, conduct transactions with, and make payment to, "a relative or some other person" if the Board "finds the interests of such individual to be served thereby". Subject to the Board's authority under section 12(a) to appoint a representative, section 12(b) then grants the representative power to act on the annuitant's behalf as follows:

(b) Every guardian or other person legally vested with the care of the person or estate of an incompetent or minor who is receiving or claiming benefits * * * shall have power everywhere, in the manner and to the extent prescribed by the Board, * * * to take any action necessary or appropriate to perfect any right or exercise any privilege of the incompetent or minor and to conduct all transactions on his behalf under this or any other Act of Congress * * * administered * * * by the Board. * * *

The Board has promulgated regulations which prescribe the powers and duties of a representative payee selected under section 12 of the Act. See 20 CFR Part 266. Section 266.9(a) of those regulations requires that payments made to the payee on behalf of the annuitant shall be applied "only for the use and benefit of such annuitant, and in a manner and for purposes which are in the annuitant's best interests." Section 266.10 establishes three categories of purposes for which the representative payee may use annuities in the interest of the annuitant. The highest use category is the current maintenance of the annuitant, including "costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 CFR 266.10(a). Where the annuitant is in the care of an institution due to physical or mental infirmities, current maintenance also "includes customary charges made by the institution in providing care and maintenance, * * * items which will aid in the annuitant's recovery or release * * * or expenses for personal needs which will improve the annuitant's conditions while in the institution." 20 CFR 266.10(b).

If current maintenance needs are met, the second highest category is support of the annuitant's legally dependant spouse, child or parent. 20 CFR 266.10(c). Only if the first two categories are satisfied, and if the representative payee has provided for the reasonably foreseeable future needs of the annuitant, may the representative payee then use present annuity payments for the lowest-ranked category: to pay debts of the annuitant which arose prior to the month the representative payee is recognized by the Board under RRA section 12(a). 20 CFR 266.10(d). The representative payee must conserve any payments which are not used for current maintenance, dependents' support, or appropriate past debts. 20 CFR 266.11(a).

In the current case, the proposed payment for physical care of the annuitant in her home clearly falls within the highest use category of medical care and personal comfort under section 266.10(a). Payment for adult day care outside her home constitutes the institutional equivalent of medical care and personal comfort under section 266.10(b), and thus also falls within the highest category. Either of these expenses therefore would take priority over the payment to her former husband under the 2001 court order unless that payment is also within the highest use category.

Based on the evidence submitted, it is my opinion that the payment made by the employee under the court order falls within the first and highest use category as well, as long as she resides in that house. First, the facts show that it is not a support payment owed by the employee under section 266.10(c) of the regulations. Though paragraph 5 of the Judgment and Decree is entitled "spousal support" and requires the employee to make payments to her former husband, the operation of the paragraph has the opposite effect from initial appearances. Paragraph 5 requires that the former husband pay a net of \$361 after the employee's \$150 reimbursement before his retirement, and a net of \$311 after her \$200 monthly reimbursement following his retirement. Before and after his retirement, therefore, the former husband remains responsible for the larger portion of the monthly loan payment to the Savings and Loan. Moreover, the employee continues to reside in the mortgaged property, which she evidently owns in her



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name alone. The effect of paragraph 5 is thus to require the employee's former husband to support her by paying the larger portion of the mortgage on her home. The reimbursement the employee is required to make under the Judgment and Decree is not a support obligation owed by her to her former husband.

As a payment obligation of the employee which was established before the current representative payee was appointed in December 2005, the employee's payment under the Judgment and Decree could be classified as a "prior debt" owed to her former husband. Under section 266.10(d), this is the lowest priority category of permitted use. As discussed above, however, in reality the payment is used to meet the mortgage obligation on her residence. Payment of a mortgage against the annuitant's residence is a cost of shelter, since failure to pay may result in foreclosure, sale and consequent loss of the residence. Cost of shelter falls within the highest priority use under section 266.10(a).

Based on the evidence furnished, it is therefore my opinion that as long as the annuitant resides in the house which secures the mortgage obligation, the reimbursement payment she makes to her former husband under paragraph 5 of the April 2001 Judgment and Decree should be included among the current maintenance costs of the employee. The representative payee may use his discretion in allocating payment from the railroad retirement annuity between the cost of in-home care or day care and payment of the mortgage reimbursement to her former husband.

Finally, should circumstances require the annuitant to leave the house for full-time residence in an institution, the payment to the former husband would revert to a "prior debt" owed to her former husband. Under section 266.10(d), this payment would then have a lower priority than the cost of her care. In that eventuality, the husband may only be paid from railroad retirement annuities after costs of the annuitant's institutional care, and any other current maintenance costs, would be satisfied.