

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

KELLY D. GLOSSIP)

Plaintiff,)

v.)

MISSOURI DEPARTMENT OF)
TRANSPORTATION AND HIGHWAY)
PATROL EMPLOYEES' RETIREMENT)
SYSTEM,)

Defendant)

Case No. 10AC-CC00434

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

Defendant, the Missouri Department of Transportation and Highway Patrol Employees' Retirement System (hereinafter "MPERS"), by and through counsel, submits the following suggestions in support of its motion to dismiss Plaintiff's Petition for failure to state a claim for which relief may be granted, pursuant to Mo. R. Civ. P. 55.27(a)(6). Because the issues presented are purely legal, Defendant respectfully suggests that its motion is suitable for determination on the parties' written briefs, without hearing, pursuant to Rule 55.30(c). Defendant therefore is willing, if the parties agree, to waive oral argument on its motion.

INTRODUCTION OF ISSUE

Section 104.140 RSMo provides survivorship benefits to the surviving spouse, or to eligible children, of Missouri Highway Patrol Employees who die before retirement. Plaintiff, Kelly D. Glossip, admits that he was never married to Trooper Dennis Engelhard (Pet., ¶ 30), who died while performing his duties. Notwithstanding, Plaintiff applied for survivorship benefits based on a same-sex relationship between Plaintiff and Trooper Engelhard that Plaintiff

describes as the “functional equivalent of a spousal relationship.” (Pet., ¶ 19). MPERS denied the claim because Plaintiff did not qualify as a “spouse” under Missouri law.

Plaintiff has now filed a petition for declaratory and injunctive relief, alleging that Sections 104.140.3¹ and 104.012² RSMo (hereinafter, “the subject statutes”) are unconstitutional to the extent that they exclude Plaintiff from the classification of a “surviving spouse” of a retirement system member. Notably, Plaintiff concedes that he “does not challenge the legality of Missouri’s ban on marriage between persons of the same sex.” (Pet., ¶ 7). Rather, Plaintiff asserts that he “simply seeks” the same survivor benefit that is afforded to a surviving opposite sex spouse. (*Id.*).

SUMMARY OF ARGUMENT

Plaintiff concedes that he is not challenging Missouri’s constitutional ban on marriage between persons of the same sex, Article I, § 33. Ultimately, the subject statutes survive constitutional analysis, because they do not violate Plaintiff’s right to equal protection or substantive due process, nor are they special laws.

The subject statutes are constitutional because limiting benefits paid from MPERS funds to surviving spouses of marriages to deceased retirement system members is rationally related to conceivable and legitimate state interests. Such interests include administrative efficiency in making objective beneficiary eligibility determinations, controlling costs, and/or preserving

¹ Section 104.140.3 provides: “For the purpose of computing the amount of a benefit payable pursuant to this section, if the board finds that the death was a natural and proximate result of a personal injury or disease arising out of and in the course of the member’s actual performance of duty as an employee, then the minimum benefit to such member’s surviving spouse or, if no surviving spouse benefits are payable, the minimum benefit that shall be divided among and paid to such member’s surviving eligible children under the age of twenty-one shall be fifty percent of the member’s final average compensation. The service requirements of subsections 1 and 2 of this section shall not apply to any benefit payable pursuant to this subsection.”

² Section 104.012 provides: “For the purposes of public retirement systems administered pursuant to this chapter, any reference to the term “**spouse**” only recognizes marriage between a man and a woman.”

limited retirement system resources for surviving spouses and eligible children, whom the legislature has determined are most likely to be economically dependent upon a deceased member. The retirement system's denial of Plaintiff's application for survivorship benefits has not burdened the rights that Plaintiff has identified as fundamental. For these reasons, as more fully established below, Plaintiff's claims should be dismissed as a matter of law.

I. THE SUBJECT STATUTES DO NOT VIOLATE PLAINTIFF'S RIGHT TO EQUAL PROTECTION.

A. The Subject Statutes are Constitutional Under the Rational Basis Standard.

Under Missouri law, statutes are presumed to be constitutional. *St. John's Mercy Health Sys. v. Div. of Employment Sec.*, 273 S.W.3d 510, 515 (Mo. banc 2009). Plaintiff has the burden of showing that a statute is unconstitutional. *Id.* Here, Plaintiff alleges that he has a fundamental right to collect survivorship benefits. As a matter of law, however, there is no fundamental right to benefit from a retirement system by virtue of a party's relationship with a retirement system member. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). Rather, the subject statutes touch only upon economic interests. *See Alderson v. State*, 273 S.W.3d 533, 537 (Mo. banc 2009) (statute excluding certain county employees from retirement plan eligibility upheld as economic legislation). Accordingly, Plaintiff can overcome the presumed rationality of the subject statutes only by a "clear showing of arbitrariness and irrationality." *Alderson*, 273 S.W.2d at 537.

The core question before this Court is whether the statutory classification limiting survivorship benefits to surviving spouses of marriages to deceased retirement system members bears some rational relation to a legitimate state interest. *See Alderson* at 537; *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008). Under the minimum rationality standard of the equal protection clause,

see *Murphy v. State of Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988), a classification is constitutional “if any state of facts can be reasonably conceived that would justify it.” *Alderson* at 537; *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added). See also *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (mandatory judicial retirement at age 70 due to “threat of deterioration” conceivably rational); *Shaw v. Oregon Pub. Employees’ Retirement Bd.*, 887 F.2d 947, 949 (9th Cir. 1989) (statute awarding larger benefit to class of police and firefighters rational even if originally based on difference in mandatory retirement age that no longer existed).

Importantly, when applying the rational basis standard, Missouri courts do not question the social or economic policies underlying a statute. *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). The “wisdom, social desirability or economic policy underlying a statute” are matters for the legislature. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.3d at 102. Moreover, a court need not make evidentiary findings to identify a reasonably conceivable basis to uphold challenged legislation.³

The subject statutes further MPERS’ legitimate governmental interest in efficiently administering the retirement benefits system. In this regard, a number of authorities recognize the rationality of making beneficiary eligibility determination more objective and uniform, controlling costs, and preserving limited retirement system resources. Likewise, the subject

³ Defendant anticipates that Plaintiff will contend that this Court must undertake a specific evidentiary analysis under its rational basis review, and that the parties must conduct related discovery. Indeed, Plaintiff already has propounded written discovery to Defendant. However, the United States Supreme Court has provided a clear description of the elements of rational basis review, and has instructed that a statutory classification not only must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis,” but also that the government “has no obligation to produce evidence to sustain the rationality of a statutory classification.” See *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Accordingly, because the issues presented are purely legal, Defendant respectfully suggests that its motion is suitable for determination on the parties’ written briefs, without hearing, pursuant to Rule 55.30(c). Defendant therefore is willing, if the parties agree, to waive oral argument on its motion.

statutes further the rational and legitimate purpose of benefiting those whom the legislature perceives as most likely to be dependent upon the deceased employee for support, and furthers administrative convenience by avoiding case-by-case, subjective eligibility determinations. *Finley v. Astrue*, 601 F.Supp.2d 1092, 1106 (E.D. Ark. 2009) (state statute barring posthumous child through in vitro fertilization and mother from obtaining social security death benefit furthered administrative convenience; no equal protection violation). Limiting the class of eligible beneficiaries to surviving spouses furthers the legitimate governmental interest in controlling the cost of benefits. *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996), *cert denied*, 117 S.Ct. 193 (1996) (government interest in controlling costs); *Robinson v. Fauver*, 932 F.Supp. 639 (D. N.J. 1996) (containing cost of health care).

The legislature could rationally conclude that married couples are the most economically interdependent in comparison to unmarried couples. *See Smith v. Sullivan*, 767 F.Supp. 186, 190 (C.D. Ill. 1991). Limiting beneficiaries to surviving spouses or children under twenty-one provides compensation to those most likely to be financially harmed or dependent upon the wages of the deceased member. Excluding unmarried partners is rationally related to the legitimate purpose of compensating those most likely to be financially harmed by an employee's death and does not violate equal protection. *See Etling v. Westport Heating & Cooling Svcs, Inc.*, 92 S.W.3d 771, 775 (Mo. banc 2003) (distinguishing between dependent and nondependent heirs for workers' compensation death benefits). The subject statutes do not violate Plaintiff's right to equal protection where all unmarried cohabitants (including heterosexual couples who have not married) may not obtain survivorship benefits on the basis of an intimate relationship. *National Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 155 (Mich. Ct. App. 2007).

The statute limiting “spouse” to a marriage between a man and a woman for purposes of administering the public retirement system, rather than extending benefits to unmarried couples, furthers the government’s interest in maintaining an efficient, objective system for administering survivor benefits. *Rutgers Council of AAUP Chapters*, 689 A.2d at 833. In this regard, marriages are required to be registered and can be objectively verified with limited effort (e.g., reviewing a marriage certificate). The “surviving spouse” classification allows MPERS to reach uniform results and objectively determine eligibility, avoiding the conflict and subjective analysis inherent in attempting to make judgments about the nature of a non-marital applicant’s relationship to a deceased employee. *Id.* at 833-34. Plaintiff’s claim amply illustrates this point.

Plaintiff argues that his former relationship with Trooper Engelhard should be considered a “functional equivalent of a spousal relationship” (Pet. at ¶ 19) to justify obtaining survivorship benefits, factoring in such things as joint ownership of property, how the couple held themselves out to the public, and the like (*Id.* at ¶¶ 23-29). An attempt to administer benefits under this scheme, however, requires highly subjective analysis and decision making. It would involve choosing various tangible and intangible aspects of a non-marital relationship to evaluate, and then subjectively weighing them -- from estate and financial planning, to intestacy, to adoption of children, to name just a few.

Moreover, if Missouri’s statutory benefits scheme was not limited to the survivors of marital couples, it would create a risk of competing claims by multiple applicants based on non-marital relationships with the same deceased member. For example, an individual claiming to have been the fiancé of a deceased member, and a second person who had a child with the decedent (and asserted that he or she was still involved in an intimate relationship with the member on the date of death), might *both* apply for survivorship benefits if the marriage

requirement were eliminated. In doing so, each would submit his or her own subjective proffer for why their relationship with the deceased should be given validity and priority.

The interests of the contingent statutory beneficiaries -- i.e., eligible children of members -- also merit consideration. Plaintiff has a child from a previous relationship (Pet., ¶ 28), as do many unmarried persons. In situations where a member in a non-marital relationship is survived by an eligible child, the statutory scheme allows MPERS to make an objective determination that, in the absence of a surviving spouse, a deceased member's child should be eligible for survivorship benefits. A claim such as Plaintiff's could enable a non-marital adult claimant to displace the right of an eligible child to receive survivor benefits.

The classification limiting survivorship benefits to surviving spouses or eligible children is rationally related to legitimate state interests and does not violate equal protection.

B. Plaintiff's equal protection challenge is not subject to "strict scrutiny" analysis.

Defendant anticipates that Plaintiff will contend that his equal protection challenge should be analyzed under "strict scrutiny." A statute that does not operate to the disadvantage of a suspect class or impinge on a fundamental right, however, is subject to a rational basis test rather than strict scrutiny. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.3d at 102; *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997). The subject statutes should not be analyzed based on strict scrutiny because unmarried couples are not considered a suspect class. *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993). Accordingly, classifications based on marital status are not subject to heightened scrutiny. *See e.g., Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833 (N.J. Super. Ct. App. Div. 1997) (rejecting equal protection challenge to denial of health insurance benefits to same-sex domestic partners); *Smith*, 5 F.3d at 239; *Phillips v. Wisconsin Personnel*

Comm'n, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992). Moreover, homosexuality has been held not to be a suspect classification. *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1307 (M.D. Fla. 2005); *Lofton v. Sec'y of Dept. of Children and Family Serv.*, 358 F.3d 804, 818 (11th Cir. 2004); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997).

The subject statutes also do not impinge upon any of Plaintiff's fundamental rights. Plaintiff affirmatively states in his Petition that he does not directly challenge the constitutionality of article I, section 33 of the Missouri constitution, which only recognizes a marriage between a man and a woman as valid (see Pet., ¶ 7).⁴ However, Plaintiff contends that opposite sex couples may obtain survivor benefits by marrying, while same-sex couples (who are not eligible to marry), are legally precluded from receiving survivor benefits. (Pl.'s Pet., ¶ 6). Thus, although Plaintiff states that he does not challenge the constitutionality of Article I, § 33, Plaintiff appears to implicitly question the constitutional limitation on marriage, at least insofar as he asserts that interpreting Sections 104.012 and 102.140.3 to apply only to surviving spouses from legally recognized marriages is unconstitutional. Missouri, like other jurisdictions, however, does not prescribe a fundamental right to marry a person of the same sex. *Wilson v. Ake*, 354 F.Supp.2d 1298, 1306 (M.D. Fla. 2005); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), 409 U.S. 810 (1972), *dismissed for want of substantial federal question*. There also is no fundamental right to benefit from a retirement system, including by virtue of a party's relationship with a retirement system member. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). Because the subject statutes involve no suspect classification and do not impinge upon a fundamental right, the rational basis standard applies. Under that standard, as

⁴ Plaintiff admits that he was never married to the decedent, even in a jurisdiction that permits same-sex marriage. (Pet., ¶ 30)

established above, there is no equal protection violation as a matter of law.

II. THE DENIAL OF PLAINTIFF'S APPLICATION FOR BENEFITS DID NOT VIOLATE SUBSTANTIVE DUE PROCESS.

Plaintiff's claim that operation of the subject statutes violates his right to substantive due process under article I, section 10 of the Missouri Constitution also fails a matter of law. When government action is legislative, due process protects fundamental rights and liberties that are "implicit in the concept of ordered liberty." *In re Marriage of Woodson*, 92 S.W.3d at 783. Here, Plaintiff asserts fundamental rights to "intimate association and pursuit of happiness" and to "private intimate contact and family relationship with his committed same-sex domestic partner." (Pet., ¶¶ 69, 70). Plaintiff thus appears to suggest that denial of his application for survivorship benefits interfered with a fundamental right to intimate association or a "family relationship" with the decedent. *But see Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 814-15 (11th Cir. 2004); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 920-21 (5th Cir. 2000) (right to family integrity limited to persons related by blood, or legally recognized permanent relationships such as marriage or adoption).

Plainly, however, the posthumous denial of an application for benefits cannot be said to have interfered with Plaintiff's past association or relationship with the deceased. In fact, Plaintiff does not assert that Defendant ever interfered with his personal relationship with Trooper Engelhard. The denial of Plaintiff's application for benefits, after his relationship with Trooper Engelhard ended in death, simply did not operate directly on Plaintiff's relationship with the decedent, disturb his ability to live with Trooper Engelhard, or otherwise amount to the intrusive regulation of "family living arrangements" that substantive due process typically would guard against. *See Flowers v. City of Minneapolis*, 478 F.3d 869, 874 (8th Cir. 2007). Mere economic consequences do not critically affect associational rights. *In re Marriage of Kohring*,

999 S.W.2d 228, 232 (Mo. banc 1999). For these reasons, the subject statutes do not violate Plaintiff's right to substantive due process.

III. THE SUBJECT STATUTES ARE NOT SPECIAL LAWS.

A law based on open-ended characteristics is entitled to a presumption of constitutionality, and is not a special law on its face. *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. banc 2009). When a law is open-ended⁵, a standard of reasonableness applies to the statutory classification. *Id.* The same general principles used to determine if a statute violates equal protection thus apply in determining whether legislation is special. *Id.*

The subject statutes create an open-ended class because beneficiaries may enter and then leave the class of eligible beneficiaries as marriages to members begin and end, and as children are born and pass the age limit for eligibility. Because the class of survivorship beneficiaries is open-ended, this Court need only determine whether the classification is reasonable. *Alderson*, 273 S.W.3d at 538. A law is not special "if it applies to all of a given class alike and the classification is made on a reasonable basis." *Id.*

Plaintiff alleges that the subject statutes are special laws that exclude same-sex couples from receiving survivor benefits on the basis of sexual orientation. The prohibition against special laws contained in Article III, section 40 is satisfied if the statutory classification includes all who are similarly situated "and omits none whose relationship to the subject matter cannot be reasonably distinguished from those included." *Civilian Personnel Div. v. Bd. of Police Comm'rs*, 914 S.W.2d 23, 25 (Mo. App. E.D. 1995). The statutory classification of "surviving spouse" satisfies this test. The subject statutes do not classify on the basis of sexual orientation. Rather, they create a class based on marital status. Thus, an unmarried heterosexual claimant

⁵ A class is considered "open-ended" if it is possible that the status of members of the class could change. *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. banc 1994).

also may not obtain survivor benefits on the basis of his or her relationship to a deceased member. The subject statutes likewise exclude many others who could not legally marry Trooper Engelhard in Missouri, including cousins, parents, siblings, those related too closely by blood to legally marry, and those legally married to another, “no matter how dependant or emotionally bonded” they may have been to the deceased. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 837 (N.J. Super. Ct. App. Div. 1997).

Plaintiff is in the same position as all unmarried persons and his application for benefits was denied not because of his sexual orientation, but because he was not married to the decedent. The classification of beneficiaries includes all married persons of either gender who survive the death of an unretired member. Because the statute includes all who are similarly situated, it is not a special law. *Civilian Personnel Div.*, 914 S.W.2d at 25.

As noted above, the beneficiary classification is rational under the equal protection analysis because, at a minimum, the classification “can conceivably be rationally related to a legitimate state interest.” *Powell v. Amer. Motors Corp.*, 834 S.W.2d 184, 191 (Mo. banc 1992); *Alderson*, 273 S.W.3d at 538. There is a reasonable basis for classifying beneficiaries based on their marital relationship to an eligible member. The subject statutes therefore are not special laws.

IV. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF.

The requirements for a preliminary injunction are: (1) the movant’s probability of success on the merits; (2) the threat of irreparable harm to the movant absent the injunction; (3) the balance between this harm and the injury that the issuance of the injunction would inflict on other interested parties; and (4) the public interest. *State ex rel. Director of Revenue v. Gabbert*,

925 S.W.2d 838, 839 (Mo. banc 1996). Plaintiff must make a showing of probability of success on the merits before a preliminary injunction will be issued. *Id.*

The party seeking injunctive relief also “must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest” if the injunction is issued. *Gabbert*, 925 S.W.2d at 839. Here, Plaintiff cannot show a probability of success on the merits. As established earlier above, Plaintiff has failed to state a claim for relief and does not have a probability of success on the merits on his constitutional claims. In any event, economic loss alone does not justify granting injunctive relief. *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985), *cert denied*, 476 U.S. 114 (1986). Moreover, “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.” *Id.*, quoting *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Defendant has interests in administrative efficiency in making beneficiary eligibility determinations, controlling costs, and preserving limited retirement system resources for the surviving spouses and children the legislature has determined are most likely to be economically dependent upon a deceased member that are protected by the statutory scheme. These interests outweigh any limited economic interest Plaintiff might have.

CONCLUSION

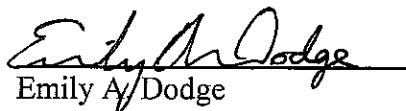
WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiff's claims with prejudice, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2011, the above and foregoing

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