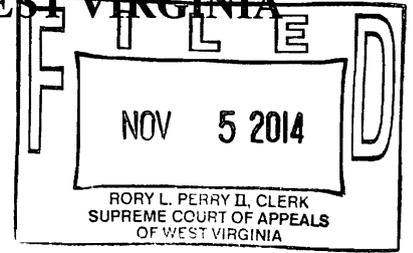


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0734



**PATRICIA JONES (formerly Akers),
(Petitioner/plaintiff below)**

PETITIONER,

vs.)

**APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY (10-C-746)**

**WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM,
A CORPORATION D/B/A WEST VIRGINIA PUBLIC
CONSOLIDATED RETIREMENT BOARD
(Respondent/defendant below)**

RESPONDENT,

and

**JUDY VANNOY AKERS
(Respondent/defendant below)**

RESPONDENT.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Kanawha County, West Virginia, erred by failing to declare the June 4, 2009, qualified domestic relations order as valid and enforceable.
2. The Circuit Court of Kanawha County, West Virginia, erred by failing to order the West Virginia Public Employees Retirement System to enforce and honor the terms of the June 4, 2009, qualified domestic relations order.
3. After failing to declare the June 4, 2009, qualified domestic relations order as valid and enforceable, the Circuit Court of Kanawha County, West Virginia erred by failing to declare the December 9, 2010, qualified domestic relations order as valid and enforceable.
4. After failing to order the enforcement of the June 4, 2009 qualified domestic relations order, the Circuit Court of Kanawha County, West Virginia, erred by failing to order the West Virginia Public Employees Retirement System to enforce and honor the terms of the December 9, 2010, qualified domestic relations order.
5. The Circuit Court of Kanawha County, West Virginia erred by not calculating the amount of the survivor annuity payments erroneously paid to Judy Vannoy Akers and then awarding Patricia Akers (Jones) monetary damages either as a judgment subject to execution or as a judgment subject to an adjustment to the future monthly survivor annuity benefit payments.

STATEMENT OF THE CASE

This case involves the application and enforcement of qualified domestic relations orders to divide retirement benefits held by the West Virginia Consolidated Public Retirement Board. Throughout this brief, the West Virginia Consolidated Public Retirement Board shall be referred to as the “Board.”

PROCEDURAL HISTORY

This case was filed on April 21, 2010, and the Board filed a motion to dismiss. The Circuit Court dismissed the case on June 11, 2010, and the case was appealed to this Court. On September 26, 2011, this Court reversed the decision of the Circuit Court to dismiss the case, and remanded it for further proceedings. [App 20]

After conducting some discovery, the parties submitted motions for summary judgment and submitted proposed findings of fact and conclusions of law. On July 10, 2014, the Circuit Court entered a final judgment in favor of the Board on all issues. [App 1] Patricia Akers (Jones) submitted her notice of appeal on July 25, 2014.

FACTS

Patricia Akers and Danny Akers were married to each other in Summers County, West Virginia, on August 1, 1975, and they ultimately were divorced by a Final Order entered on June 30, 2008. [App 107] According to the financial disclosures, Patricia and Danny Akers had nominal assets for a marriage of greater than 30 years. [App 172-175, 198-201] At the time of the divorce, Danny Akers’ monthly income was \$2,200.00 working for the West Virginia Department of Highways. [App 199]

The statement of contributions and interest for Danny K. Akers in the Public Employees Retirement System established that as of May 15, 2006, Danny Akers had 26 years of credited service with the West Virginia Department of Highways starting in 1979, four years after the parties were married. [App 138, 169]

On August 2, 2007, *after the separation of the parties*, but *prior* to their hearing for divorce and the entry of the divorce decree, Danny Akers elected a 100% joint and survivor annuity for his pre-retirement benefits by tendering the appropriate form to the Board, and he named Patricia Akers, his then estranged wife, as the beneficiary thereof. [App 132]

With regard to spousal support and the retirement assets of the parties, the parties made a very detailed agreement in paragraph 7 of the final divorce order. [App 108-110] The retirement assets were specifically divided in paragraph 7(d) of the Final Order of Divorce as follows:

“d.) The Petitioner shall receive the use, possession, and ownership of her retirement (the IRA), and one half (50%) of the Respondent's retirement assets accumulated as of the date of separation (defined benefit plan(s), 401k plan(s), and others, but not the credit union account) and the Petitioner shall receive and be entitled to all survivor benefits, surviving spouse benefits, death benefits, survivor annuities, and the like available under the retirement plans. The Respondent shall ensure that the Petitioner is named as the beneficiary of all survivor benefits, surviving spouse benefits, death benefits, survivor annuity benefits, and the like, and he shall provide her with the proof of same. A QDRO(s) shall be prepared by counsel for the Petitioner, but the Respondent shall provide the Petitioner with the plan names, addresses, plan administrator's names, and other identifying information to prepare same. The counsel for the Petitioner and counsel for the Respondent are hereby granted authorization to communicate with the retirement plan agents to obtain information to prepare the QDRO(s).” [App 110]

Relying on the representations of the parties, the Family Court of Mercer County, West Virginia, determined that the agreement of the parties was fair, equitable, and just, and that it was not the product of any fraud, duress, coercion, or other misconduct of anyone. [App 111-112] Both Patricia Akers and Danny Akers waived their right to appeal the Final Order of Divorce. [App 112]

On June 4, 2009, the Family Court of Mercer County conducted a hearing on two separate issues, and entered a QDRO which incorporates the boilerplate language from the Board's model QDRO except in the following two respects:

(1) In paragraph 7(b) of the qualified domestic relations order, it is recited that the Alternate Payee [Patricia Akers] is to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the parties when the Board's model Order states that the Alternate Payee is not to be treated as the surviving spouse of the Participant for purposes of calculating those benefits.

[App 118]

(2) The following paragraph was added to the QDRO that does not exist in the Board's model QDRO:

"(f) The Participant shall designate the Alternate Payee as the surviving spouse or survivor beneficiary of his retirement benefits and he shall elect a joint survivor annuity and name the Alternate Payee as the beneficiary thereof." [App 119]

The June 4, 2009, QDRO was not appealed. The only issue appealed to the Circuit Court from the Family Court was spousal support, and the Circuit Court reversed the Family Court regarding only that issue. [App 127, 130]

On July 6, 2009, the Board rejected the June 4, 2009 QDRO and stated the following as its exclusive basis to reject the same:

“1. Pursuant to our model QDRO, you have added a paragraph 7(f). The Executive Director has reviewed your QDRO and it cannot be accepted with the additional language you added.” [App 140]

After the entry of the QDRO, Danny Akers married Judy Vannoy on or about the 5th day of September, 2009. [App 136] Ten days later, on the 15th day of September, 2009, Danny Akers filed for disability benefits with the Board (although he signed the application in August). [App 146] Danny Akers died on December 16, 2009, [App 137] and his estate was valued at only \$2,070.00. [App 208]

On the 3rd day of March, 2010, the Board granted a “posthumous” disability retirement award with a 100% survivor annuity payable to Judy Vannoy Akers. [App 162] The Board paid a lump sum to her and then began paying her monthly benefits in the amount of \$1,247.51. [App 163] The monthly benefit later increased to \$1,561.44. [App 326]

On December 9, 2010, Patricia Akers (Jones) obtained a second (amended) QDRO from the Family Court of Mercer County, West Virginia which was identical in every respect to the June 4, 2009 QDRO, except paragraph 7(f) was omitted. [App 122] On April 1, 2011, the Board rejected the December 9, 2010 qualified domestic relations order claiming two separate reasons:

- (1) The December 9, 2010 QDRO was entered *after the death* of the Participant, Danny Akers, and
- (2) The QDRO required Patricia Akers (Jones) to be treated as the surviving spouse for purposes of calculating the benefits payable. [App 164, 165]

SUMMARY OF THE ARGUMENT

Danny Akers agreed in his divorce case to elect a survivor annuity and designate Patricia Akers (Jones) as the exclusive beneficiary thereof. Therefore, the June 4, 2009, QDRO ordered Mr. Akers to elect a joint survivor annuity, and both the June 2009 QDRO and the December 2010 QDRO restricted the designation of the beneficiary to be Patricia Akers (Jones). This restrictive language is acceptable since West Virginia Code 5-10-24 permits a QDRO to restrict Mr. Akers' election of benefits and restrict Mr. Akers' designation of a beneficiary. This Court has also stated that a QDRO can restrict a beneficiary to be the former spouse to the exclusion of a new spouse.

Although WVCSR 162-1-6.2.1 applies a QDRO formula to allocate only the "marital" portion of the benefits, WVCSR 162-1-7.1.1 authorized Mr. Akers to designate Patricia Jones to be the survivor annuity beneficiary since she had an insurable interest in his life.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Since the interpretation of West Virginia Code 5-10-24 regarding a QDRO's restriction of benefit options and designation of beneficiaries, and the application of former WVCSR 162-1-7 are essentially of first impression for this Court, an argument under Rule 20 of the West Virginia Rules of Appellate Procedure is proper.

STANDARD OF REVIEW

This Court reviews the Circuit Court's entry of summary judgment *de novo*. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994) Furthermore, this Court applies the same standard that the Circuit Court employed, or should have employed, in examining summary judgment motions. Cook v. Williams, 209 W.Va. 285, 546 S.E.2d 767 (2001).

ARGUMENT

Patricia Akers (Jones) takes no issue with the legal rights of Danny Akers to elect a retirement benefit option and to designate a beneficiary, *but once Mr. Akers voluntarily committed to name her to receive his survivor annuity benefits in their divorce case, he effectively made his election of available retirement options and designation of the beneficiary.* The fact that he was required to “formally” make that election and designation with the Board later when he retired does not change his agreement and legal obligation to do so. *The decision to make a particular election and designation may occur many years before the formal election occurs at retirement using the Board’s forms.*

I. LAW CREATING AND GOVERNING THE PLAN

The plan is created by state law, and federal law also imposes some requirements.

STATE LAW

The State of West Virginia established the West Virginia Public Employees Retirement Act (PERS) in West Virginia Code 5-10-1 et. seq. The Act creates the Retirement Board, and creates a retirement system; the system is actually constituted as a “body corporate.” West Virginia Code 5-10-3.

The legislature intended that the West Virginia Public Employees Retirement Act be liberally construed and that the same meet federal qualification requirements. The following is recited, in part, in West Virginia Code 5-10-3a:

“(a) The provisions of this article shall be liberally construed so as to provide a general retirement system for the employees of the state herein made eligible for such retirement...”

* * * * *

(c) The retirement system is intended to meet the federal qualification requirements of Section 401(a) and related sections of the Internal Revenue Code as applicable to governmental plans. Notwithstanding any other provision of state law, the board shall administer the retirement system to fulfill this intent for the exclusive benefit of the members and their beneficiaries.

This Court has embraced the “remedial nature of the PERS Act” given the legislature’s direction to “*construe its provisions liberally in favor of its intended beneficiaries.*” Flanigan v. West Virginia Public Employees’ Retirement System, 176 W.Va. 330, 342 S.E.2d 414, 419 (1986), *emphasis added*.

The Act mandates that benefits under the retirement system shall not be subject to execution, alienation, or assignment except by “qualified domestic relations orders” as that term is defined in 26 U.S.C.S. 414(p) of the Internal Revenue Code as applicable to government plans. [See West Virginia Code 5-10-46.] The Board acknowledges “*serious consequences to the State Retirement Plans*” if the QDRO did not meet “*the federal tax code requirements for QDROs.*” [App. 141]

The Act permits participants to receive a retirement annuity pursuant to West Virginia Code 5-10-22. Numerous code provisions describe the calculation of those benefits. The Act provides for “annuity options.” West Virginia Code 5-10-24. In summary, participants in the plans have the choice of three different types of annuities:

[1] A *lifetime* annuity upon the retirement of the participant, payable to him or her for life, with no survivor annuity benefits;

[2] *Option A—Joint and survivor annuity.* This is essentially an annuity payable to a participant for his or her lifetime at retirement which, upon his or her death,

continues to be paid throughout the lifetime of a designated beneficiary having an insurable interest in the participant's life; and

[3] *Option B—Modified joint and survivor annuity.* This is essentially an annuity payable to a participant for his or her lifetime upon retirement which, upon his or her death, continues to be paid in the form of a reduced annuity throughout the lifetime of a designated beneficiary having an insurable interest in the participant's life.

The Act creates a disability retirement which also enables participants to elect one of the three annuity options referred to above (see West Virginia Code 5-10-25) and the Act also creates "preretirement death annuities" which enables a participant to elect Option A (and not Option B) provided above (see West Virginia Code 5-10-27).

The legislature authorized the promulgation of rules. Former WVCSR 162-1-6 discussed retirement benefits, and former WVCSR 162-1-7 discussed "*death benefits.*"

FEDERAL LAW

Congress established statutory provisions in the I.R.S. Code which authorize courts to divide accrued retirement benefits, using *qualified domestic relations orders*, in divorce cases where marital property rights must be allocated. The term "qualified domestic relations order" and "domestic relations order" are defined in 26 U.S.C. 414(p)(1):

"(A) Qualified domestic relations order defined.—The term 'qualified domestic relations order' means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order.—The term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).”

Furthermore, 26 USC 414(p)(11) recites as follows:

“(11) Application of rules to certain other plans.—For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b)) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirements of clause (i) of paragraph (1)(A).” See 26 U.S.C. 414(p)(11)

The June 2009 and December 2010 QDROs satisfy the conditions of 26 USC 414(p)(1).

II. THE JUNE 4, 2009 QDRO IS VALID AND ENFORCEABLE.

By adopting the Board’s proposed order, the Circuit Court stated two reasons for rejecting the June 4, 2009, QDRO: (1) internal inconsistency within the QDRO which makes it unenforceable and (2) even if the ambiguity is resolved in favor of Patricia Akers Jones, the QDRO conflicts with applicable law. [App 9: paragraph 10 of the conclusions in the Final Order granting summary judgment.] Since establishing that the June 4, 2009, QDRO is consistent with applicable law also demonstrates, in part, that it is not inconsistent, the analysis under applicable law is addressed first.

A. THE QDRO IS CONSISTENT WITH APPLICABLE LAW.

The June 4, 2009, QDRO uses the boilerplate language from the Board’s model QDRO, but deviates in only two respects:

(1) Paragraph 7(b) of the QDRO states that the alternate payee (Patricia Akers Jones) “**is**” to be deemed the surviving spouse for purposes of calculating the benefits allocated in the QDRO whereas the Board’s model QDRO states that the alternate payee “**is not**” to be deemed the surviving spouse for purposes of such calculations of benefits.

(2) Paragraph 7(f) was added which ordered Danny Akers to do that which he agreed to do in the final divorce order: elect the joint (and) survivor annuity and designate the alternate payee (Patricia Akers Jones) as the beneficiary of that annuity.

Neither of the above deviations conflict with applicable law.

(a) **PATRICIA AKERS (JONES) AS THE DESIGNATED BENEFICIARY.**

The relevant statute, rules, and law from this Court establish that the June 4, 2009 QDRO can designate Patricia Akers (Jones) as the surviving spouse of Mr. Akers.

In the first instance, the I.R.S. Code does not prohibit a governmental plan QDRO from designating a former spouse as the surviving spouse *to the exclusion of a current spouse*.

Second, West Virginia Code 5-10-24 specifically states that the designation of the beneficiary of the survivor annuity under either Option A or Option B can be restricted.

The last paragraph in West Virginia Code 5-10-24 recites as follows:

“Upon remarriage, a retirant may name the new spouse as an annuitant for any of the retirement benefit options offered by the provisions of this section: Provided, That the beneficiary shall furnish to the board proof of marriage: Provided, however, That the retirant certifies under penalty of perjury that **no qualified domestic relations order that would restrict such a designation is in effect:** ...” [See West Virginia Code 5-10-24, ***Emphasis Added.***]

The legislature would not have referred to a QDRO that “would restrict such a designation” unless a QDRO **could restrict such a designation!** The statute is clear and unambiguous; it expressly contemplates that the June 4, 2009, QDRO can restrict the designation of the beneficiary of the survivor benefits to be Patricia Akers (Jones) to the exclusion of the new wife, Judy Vannoy Akers.

Third, this Court has confirmed that which the legislature states in the statute. In the memorandum decision of Judith King v. Charles E. King, Jr. and Phyllis Slack King, 2011 LEXIS 242, no. 35696, May 16, 2011, this Court stated as follows:

“If Appellee wanted her spousal share of Appellant’s retirement benefit and **wanted to preclude Appellant from naming any subsequent spouse as beneficiary, her attorney could have placed such language in the QDRO, which Appellant could have opposed.**” [King v. King, supra, **emphasis added.**]

The language placed in the June 4, 2009, QDRO in paragraph 7(b) and 7(f) that directs that the alternate payee (Patricia Akers Jones) **is** deemed to be the surviving spouse for purposes of calculating the allocation of benefits is consistent with all applicable law. The Board may not prevent her from being deemed the surviving spouse.

(b) RESTRICTING THE ELECTION OF THE FORM OF BENEFIT.

The second, and final, deviation in the June 4, 2009, QDRO from the Board’s model QDRO boilerplate language is the directive to Danny Akers (**and not the Board**) in paragraph 7(f) to elect a joint (and) survivor annuity.

Just like the restriction of the designation of beneficiaries discussed above, West Virginia Code 5-10-24 specifically authorizes courts to restrict the election of benefit options. Consider the language:

“Upon divorce, a member may elect to change any of the retirement benefit options offered by the provisions of this section to a life annuity in an amount adjusted on a fair basis to be of equal actuarial value of the annuity prospectively in effect relative to the retirant at the time the option is elected: Provided, That the retirant furnishes to the board satisfactory proof of entry of a final decree of divorce or annulment: Provided, however, That the retirant certifies under penalty of perjury that **no qualified domestic relations order that would restrict such an election is in effect: ...**” [See West Virginia Code 5-10-24, ***Emphasis Added.***]

The legislature would not have referred to a QDRO that “would restrict such an election” unless a QDRO **could restrict such an election!** The statute is clear and unambiguous; it contemplates that the June 4, 2009, can restrict the election of benefits.

(c) **SURVIVOR BENEFITS: WVCSR 162-1-7 TRUMPS WVCSR 162-1-6.2.1.**

The Circuit Court concluded that because former WVCSR 162-1-6.2.1 provided a formula which divides only the “marital property” portion of the benefits, the June 4, 2009, QDRO is at odds with the law. This conclusion fails because of the application of former WVCSR 162-1-7 and the actual division of benefits during the lifetime of Mr. Akers.

Former WVCSR 162-1-7 clearly and unambiguously authorizes a plan participant to designate *any* person who has an “insurable interest” in his or her life to be the beneficiary of the *survivor* benefits of a joint and survivor annuity:

“7.1. The several Retirement Systems to be administered by the Board have varying and different definitions of who a survivor beneficiary may be if the member dies **prior to retirement** and **following retirement**. The Board has adopted the procedures in this section for the payment of death benefits for all systems.

7.1.1. The “beneficiary” means the person who the member has **designated as beneficiary in writing** as of the date of his or her death. To the extent that plan provisions require the existence of an **insurable interest** between the named beneficiary and the member, the Board shall have the discretion to decide whether such interest exists.” [See former WVCSR 162-1-7, et. seq., **emphasis added**]

Given that the final divorce decree awarded Patricia Akers Jones support, she clearly meets the qualification of having an “insurable interest” because of the following language in the Board’s form affidavit for designating a beneficiary for survivor benefits:

*“Note: In order for insurable interest to exist between non-relatives on the basis of the existence of a legal claim for service or support where the named beneficiary has a reasonable right to expect some pecuniary advantage from the continuance of the participant’s life, evidence must demonstrate the existence of at least one or more of the following factors: joint ownership of real estate, joint banking accounts, **the existence of a court order of support**, or other legal evidence of financial obligations of service or support of the participant for the named beneficiary. The Board retains the discretion to deny any nominations of beneficiary which it finds does not satisfy the required legal standard.” [App 166, **emphasis added.**]*

In this analysis, it is important to note that the June 4, 2009, QDRO divides only the “marital portion” of the benefits to be paid to Danny Akers while he was living and could personally receive benefits. A review of paragraphs 7(d) and 7(e) of the QDRO proves that, consistent with the final order of divorce, no non-marital portion of the benefits *paid to Mr. Akers during his lifetime* were divided—only the 50% of the marital portion paid to Patricia Akers was to be deducted from payments made to Mr. Akers.

With the application of former WVCSR 162-1-7, Danny Akers had the right select Patricia Akers to be the beneficiary of the survivor annuity; **he had the right to make that decision at the time of his divorce case**. He could negotiate and promise the survivor annuity benefits to Patricia Akers as part of the settlement, and equally as important, Patricia Akers had the right to rely upon that promise and agreement—she gave up rights in arriving at that agreement. Significantly, the Family Court, pursuant to its duty under West Virginia Code 48-6-201, made a finding that the agreement was fair and equitable, and was not the product of fraud or other misconduct. [App 111]

(d) **DANNY AKERS' RIGHTS TO ELECT AND DESIGNATE PRESERVED.**

A QDRO's restriction of the election of benefits and restriction of the designation of beneficiaries merely changes the *timing of when those legal rights are decided*. Qualified domestic relations orders are typically entered in divorce cases after the entry of a final divorce decree which allocates property rights; retirement may be years later.

Since spouses of participants in plans also have rights to be preserved in divorce cases (marital property, spousal support, child support), the legal analysis above which permits the restriction of the participant's election of the form of benefit and designation of beneficiaries only compels the participant, as a party to the divorce proceeding, to make decisions regarding the election of benefits and designation of beneficiaries *at the time of the divorce proceedings* and not at the time of his or her retirement.

The circumstances of this case are analogous to the circumstances that occurred in Perkins v. Prudential Insurance Company of America, 455 F. Supp. 499 [S.D.W.Va. 1978] where a husband had promised, and was ordered in his divorce decree, to name the children from his former marriage as the beneficiaries of his life insurance. Notwithstanding his promise and the court's order, the husband in Perkins changed the designation of the beneficiary of his life insurance to his new spouse without the knowledge of his former spouse or his children. After reviewing the case, the United States District Court for the Southern District of West Virginia refused to allow such an inconsistent position, ruling that the husband had made an "equitable assignment" of the life insurance at the time of his divorce case. The District Court therefore permitted the children from the prior marriage to take the proceeds.

B. THE JUNE 4, 2009 QDRO IS NOT INTERNALLY INCONSISTENT.

In paragraph 12 of the Circuit Court's conclusions of law, the Court concluded that the June 4, 2009, QDRO was internally inconsistent only with regard to the form of the benefit to be chosen by Mr. Akers. The Court stated its conclusion as follows:

"12. The "June DRO was internally inconsistent on its face with regard to the form of benefit to be chosen by the Participant in PERS, Mr. Akers (compare Ex. 1, ¶¶ (7)(b), (7)(d) and (8) to ¶¶ (7)(b) and (8)); therefore, as a matter of law, the Board had authority to reject the DRO because it did not contain sufficiently specific instructions and directives to the plan administrator." [See App 9, conclusion of law #12.]

The Court did not state how the paragraphs cited were inconsistent, and significantly, *the Court did not conclude that the same paragraphs in the December 9, 2010, QDRO were inconsistent even though the language in those paragraphs is identical to that in the paragraphs of the June 4, 2009, QDRO.* In fact, the final order is unclear as to what comparison the Court made, however, Patricia Akers Jones presumes that the Court compared the paragraphs in the June 2009 QDRO with the Board's model QDRO paragraphs, or else the conclusion, aside from being erroneous, makes no sense.

(a) THE STANDARD FOR REVIEWING A QDRO

The Board does not have the discretion to only accept Qualified Domestic Relations Orders that are written verbatim like its "model" QDRO, and reject those QDRO's that are not. The Board cannot arbitrarily ignore West Virginia Code 5-10-24 that permits QDROs to restrict the election of benefits and the designation of beneficiaries, and WVCSR 162-1-7 which permits Participants to designate any beneficiary having an "insurable interest" in his or her life to receive the survivor annuity benefits.

The Act does not specifically incorporate a standard of review for the Board in reviewing QDROs; however, federal law discussing the Internal Revenue Code and ERISA definitions of a QDRO provide guidance. The I.R.S. Code provisions governing QDROs substantially mirrors the ERISA provisions regarding QDROs. [Compare 26 USC 414(p) to 29 USC 1056(d).] Therefore, the jurisprudence discussing ERISA based QDROs provides guidance for the subject QDRO which, although dividing a government plan, is defined by the I.R.S. Code. [See West Virginia Code 5-10-46; 26 USC 414(p)(11)]

Generally, all that is required is that the QDRO “meets the statutory requirements to be a QDRO.” See Trustees of the Director’s Guild of America—Producer Pension Benefits Plans v. Tise, 234 F. 3d 415, 421 (9th Cir. 2000). Referring to an ERISA plan, the United States Court of Appeals for the Second Circuit stated as follows:

“It would be abuse of an administrator’s discretion to refuse to treat an Order that...substantially complies with ERISA requirements of a QDRO.”
Metropolitan Life Insurance Co. v. Bigelow, 283 F. 3d 436 (2nd Cir. 2002)

The Court in Bigelow determined that courts applying QDRO requirements “...generally have not demanded literal compliance with those requirements...”
Metropolitan Life Insurance Company v. Bigelow, supra at 443.

(b) THE FORM OF THE BENEFIT TO BE SELECTED IS CLEAR.

With regard to paragraphs 7(b), 7(d), and 8 that the Court compared in its conclusion, *there is no change in the language that relates to the form of the benefit*. The only change that was made in those three (3) paragraphs [from the Board’s model QDRO] was in paragraph 7(b) which now requires that the benefits payable be calculated assuming that the Alternate Payee *is treated as the surviving spouse* of the Participant.

Paragraphs 7(b), 7(d), and 8 cannot cause the June 2009 QDRO to be internally inconsistent given that they contain the Board's boilerplate language stating that the Participant is the only person who can select the form of the benefit. There is no language in the QDRO that permits any person other than the Participant to select the form of benefit: paragraph 7(f) orders the Participant to select the benefit.

(c) **PARAGRAPH 7(f) WAS NOT RULED TO BE INCONSISTENT.**

In its conclusions of law, the Court did not rule that paragraph 7(f) of the June 2009 QDRO was inconsistent with other paragraphs. It is paragraph 7(f) that: (1) ordered Danny Akers to designate Patricia Akers to be the beneficiary of the survivor benefits elected, and (2) ordered Danny Akers to select a joint (and) survivor annuity. *That paragraph does not order the Board to do anything—it only orders Danny Akers to do what he agreed to do in the divorce.* Since the Board is not required to take any action pursuant to paragraph 7(f), it cannot require the Board to act inconsistently. When Danny Akers would have made the election that he was ordered to make in the final divorce decree and in paragraph 7(f), then the Board was directed to calculate the benefits payable to each party as directed in the remaining paragraphs the QDRO.

III. THE DECEMBER 9, 2010 QDRO IS VALID AND ENFORCEABLE.

The Circuit Court concluded that the December 2010 QDRO was unenforceable for only two reasons: (1) it was submitted after the death of Mr. Akers and (2) it conflicted with applicable law. [App 13, 14, conclusion of law #27.] Posthumous QDRO's are enforceable (*and the Board's model QDRO language supports this contention*), and the December 2010 QDRO complies with the law.

A. POSTHUMOUS QDROS ARE VALID AND ENFORCEABLE.

In conclusion #28, the Court stated that West Virginia Code 5-10-24 requires the Board to only make payments to the retirant's designated beneficiary [*thus underscoring the impact of WVCSR 162-1-7 as argued in the preceding sections*], and also concluded that:

“29. The Board properly rejected the December 2010 DRO issue after the death of Mr. Akers because a surviving spouse annuity became payable to Mrs. Akers (*the wife of only 3 months-Judy Vannoy Akers*) effective January 1, 2010 at which point the Board had no authority to hold or segregate the benefits, and such benefits became irrevocable and could not be altered by a QDRO. See W.Va. Code § 5-10-24.” [App 14, conclusion of law #29.] [*Clarification added.*]

The Court failed to recognize that: (a) Mr. Akers never designated a beneficiary for his disability retirement benefits, (b) the Board's model QDRO states that a QDRO can be amended, (c) state law and the model QDRO provide that prospective payments can be adjusted to account for the amendments, and (d) federal case law from the United States District Court for the Northern District of West Virginia supports the right to amend.

(a) NO BENEFICIARY WAS DESIGNATED FOR RETIREMENT BENEFITS.

By recognizing the importance of a Participant *designating a beneficiary for retirement benefits*, the Court inadvertently agreed that such a designation pursuant to former WVCSR 162-1-7 trumps the application of WVCSR 162-1-6.2.1, which is directly relevant to the enforceability of the June 2009 QDRO. This is precisely why Patricia Akers Jones requested, and the Family Court so ordered in paragraph 7(f) of the June 2009 QDRO, *that Mr. Akers designate Ms. Jones as the beneficiary of the joint (and) survivor annuity benefits!* The error with the Court's conclusion #28 is that Mr. Akers did not elect a form of retirement benefit and did not designate a beneficiary of the survivor benefit for a joint and survivor annuity--he died before a designation was made.

In March 2010, the Board granted Danny Akers a *posthumous* disability award three months after his death in December 2009. [App 162] Mr. Akers never submitted a form for his disability retirement annuity options as provided in West Virginia Code 5-10-25, and he never applied for regular retirement. [App 270, 277-279] *The Board granted a posthumous disability award and then began paying the new Mrs. Akers of only three months (Judy Vannoy Akers) the full survivor benefit from the joint and survivor annuity.* Consequently, the Court's analysis in conclusions #28 and #29 are irrelevant to the viability of the December 2010 QDRO because the QDRO could not be at odds with a designation for retirement benefits never made by Mr. Akers. The only designations that he made was for *pre-retirement death benefits*. [App 277-279]

(b) THE MODEL QDRO STATES THAT A QDRO CAN BE AMENDED.

The Board's boilerplate language (in its model QDRO) regarding amendments to QDROs was implemented into the June 2009 QDRO, that was later amended by the December 2010 QDRO. The Board's model paragraphs 13 and 14 state the following:

"13. In the event that the Plan Administrator does not approve the form of this Order, or should be subsequently determined that amendment of this Order is necessary to ensure its status as a Qualified Domestic Relations Order, then each party shall cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan Administrator consistent with applicable law." [App 115, 116]

"14. This Court retains jurisdiction to enforce, revise, modify, or amend this Order insofar as is necessary to establish or maintain its qualifications as a Qualified Domestic Relations Order, provided, however, that neither this Order nor any subsequent revision, modification, or amendment shall require the Plan to provide any form or amount of benefit not otherwise provided under the Plan." [App 116]

The language in paragraphs 13 and 14 does not state that revisions, modifications, or amendments can only be made while the member is alive, and not posthumously.

The Court erred by not recognizing that the terms of the Board's model QDRO and, therefore the June 2009 QDRO provide for amendments without requiring that the Participant be alive. The Court also failed to acknowledge that the Board has *waived* any right to claim that a QDRO cannot be enforced posthumously since it instructed parties and their counsel to rely upon the language in paragraphs 13 and 14 of its model QDRO. The Board should be *estopped* from taking a position contrary to its own model QDRO. [For a discussion of waiver and estoppel, see Potesta v. Fidelity & Guaranty Co., 202 W.Va. 308, 504 S.E.2d 135, 142-145 (1998); Haba v. Big Arm Bar and Grill, Inc., 196 W.Va. 129, 468 S.E.2d 915 (1996) citing E.H. v. Matin, 189 W.Va. 102, 428 S.E.2d 523 (1993).]

(c) **PROSPECTIVE PAYMENTS CAN ACCOMMODATE AMENDMENTS.**

The Court failed to recognize that if the December 9, 2010 QDRO was enforced, it would only have to be enforced *prospectively*. This is not only permitted by state law and in the Board's model QDRO, *but the Board, due to its own error, has changed the monthly payments to Judy Vannoy Akers prospectively*, even providing her a lump sum to account for the difference in the Board's calculations. [App 266, 267, 328]

West Virginia Code 5-10-44 is entitled "**Correction of errors; underpayments; overpayments**" and recites in subsection (a) as follows:

"(a) General rule: *If any change or employer error in the records of any participating public employer or the retirement system results in any member, retirant, or beneficiary receiving from the system more or less than he or she would have been entitled to receive had the records been correct, the board shall correct the error. If the correction of the error occurs after the effective retirement date of a retirant, and as far as practicable, the board shall adjust the payment of the benefit in a manner that the actuarial equivalent of the benefit to which the retirant was correctly entitled to be paid.*" West Virginia Code 5-10-44(a) (*Emphasis added*)

The Board's model QDRO language anticipates receiving QDRO's after benefits have begun, and then paying the benefits *prospectively*:

“(16) Payments to the Alternate Payee under this Order shall be *prospective* only, and shall commence only after benefits are available to the Participant and following the Board's *receipt and acceptance* of the entered Qualified Domestic Relations Order.” [App 116] *[Emphasis added]*

Both the June 2009 QDRO and the December 2010 QDRO incorporate the above language from model paragraph 16.

The Board has in essence proven the effectiveness of West Virginia Code 5-10-44. The Board made an error in its original calculation of benefits to be paid assuming Judy Vannoy Akers was to receive the benefits. In March of 2011, the Board, consistent with West Virginia Code 5-10-44(c), increased Ms. Akers' monthly payment from \$1,247.51 to \$1,561.44, and paid her a lump sum amount of \$4,395.02 to satisfy the arrearage created.

This Court in Flanigan recognized the ability of the Board to make prospective adjustments. Flanigan v. West Virginia Public Employees Retirement System, supra, @ 342 S.E. 2d 420. The Board was compelled to give magistrate Mike Flanigan full credit for his service, cancelling his Teacher's Retirement System benefits and rolling the same along with his military credit into the PERS System, provided that magistrate Flanigan reimbursed the system that which he would have paid [as well as that which he would not have received if he had been enrolled in the PERS System] when he became a magistrate.

West Virginia Code 5-10-44 enabled the Board to implement paragraphs 13, 14, and 16 into its model QDRO which parties and family courts rely upon in dividing benefits. The statute therefore accommodates amendments of QDRO's *prospectively* so that retired members and beneficiaries do not forfeit benefits that they are entitled to receive.

(d) FEDERAL JURISPRUDENCE SUPPORTS *POSTHUMOUS* QDROS.

The United States District Court for the Northern District of West Virginia specifically addressed the issue of a *posthumous* QDRO in 2005 by ruling to enforce, *prospectively*, an ERISA plan QDRO although it was entered after the death of a member.

In National City Corporation v. Ferrell, 2005 U.S. Dist. LEXIS 36149 [N.D.W.Va. 2005], the Court discussed federal statutory law and precedent from the United States Court of Appeals for the Fourth Circuit, and established that the right to receive the survivor annuity benefits is determined by a *Domestic Relations Order* (usually the Final Order of Divorce), and that a QDRO merely *enforces* the right to receive those benefits. The Court ruled that a *posthumous* QDRO may be enforced *prospectively* after its receipt.

There is no provision in the PERS Act or in the West Virginia Code of State Rules effective 2009 or 2010 that prohibit the enforcement of a *posthumous* QDRO. Although a review of an ERISA plan QDRO, the rationale in Ferrell, when combined with West Virginia Code 5-10-44 and paragraphs 13, 14 and 16 of the Board's model QDRO (also in the June 2009 QDRO), establish that the December 2010 QDRO should be enforced *prospectively* from the time the Board received it in March 2011.

B. THE DECEMBER 9, 2010 QDRO COMPLIES WITH THE LAW.

In ruling that the December 2010 QDRO does not comply with the applicable law, the Circuit Court incorporated its analysis rejecting the June 2009 QDRO because the December 2010 QDRO, like the June 2009 QDRO, purportedly awarded Patricia Akers Jones more than the "marital property portion" of the survivor annuity benefit. The key legal conclusion of the Court is recited as follows:

“30. The December 2010 DRO was also properly rejected because, like the June 2009 DRO, it sought to award more than the marital property portion of Mr. Akers’ PERS benefits as defined by W. Va. R. § 162-1-6.2.a (2010), by attempting to require Ms. Jones to be named as the sole survivor beneficiary for Mr. Akers’ PERS benefits. Ex. 3.H., ¶ (7)(b).” [App 14, conclusions #30.]

The analysis in support of the June 2009 QDRO is incorporated herein by reference to avoid excessive duplication, and that analysis is summarized as follows:

1. Federal law does not prohibit a state governmental plan QDRO from designating a former spouse to receive the survivor benefits to the exclusion of a current spouse.
2. State law specifically permits a QDRO to both “restrict the election of the benefit” and “restrict the designation of the beneficiary.” West Virginia Code 5-10-24. Furthermore, former WVCSR 162-1-7 permits a Participant to designate any person who had an “insurable interest” in his or her life to be the beneficiary.
3. This Court in its memorandum opinion in King v. King, supra, established that a QDRO could prevent a Participant from naming a new spouse as the beneficiary.

In addition to the above reasons, there are two other legal reasons why the December 2010 QDRO should be enforced: **waiver** and **estoppel**. The only material changes from the Board’s model QDRO made by Patricia Akers Jones in the June 2009 QDRO was the addition of paragraph 7(f), and language in paragraph 7(b) that the Alternate Payee (Ms. Jones) “is” (instead of “is not”) to be deemed the surviving spouse of the Participant (Mr. Akers) for purposes of calculating the benefits payable to each of them. The Board did not object to the change in Paragraph 7(b) of the June 2009 QDRO in its rejection letter of July 6, 2009.

Given that the Board's only objection to the June 2009 QDRO was paragraph 7(f), Patricia Akers Jones amended the QDRO by deleting paragraph 7(f) from the December 2010 QDRO. In its April 2011 letter rejecting the December 2010 QDRO, the Board did object to the change in paragraph 7(b), and it has since argued that the change in both QDROs does not comply with applicable law.

The Board has waived, and should be estopped from, arguing that paragraph 7(b) of the December 2010 QDRO does not comply with the law when it did not object to, or reject, that language in the June 2009 QDRO, *before* the death of Mr. Akers. See Potesta v. Fidelity & Guaranty Co., *supra*.

IV. LACHES IS NO BAR TO RELIEF

The Circuit Court ruled that Patricia Akers Jones' claims for relief on ***both*** QDROs should be denied by virtue of the doctrine of laches. [App 15, 16, conclusions 33-39.] The Court cited the case of Province v. Province, 196 W.Va. 473, 473 S.E.2d 894 (1996) to establish two elements: (1) unreasonable delay and (2) prejudice. The Court concluded that "Ms. Jones' failure to pursue her request for a QDRO for more than seven months after submitting it to the board constitutes unreasonable delay in these circumstances." [App 15, conclusion #36.] The Court then determined that the intervening remarriage, retirement, and death of Mr. Akers *required* the Board to commence making monthly payments to Judy Vannoy Akers. The Court's decision to sign the proposed order submitted by the Board instead of crafting its own order demonstrates that the Court failed to consider some of the key facts and law which defeats laches.

First of all, if this Court determines that the June 2009 QDRO is valid and enforceable, as it should, there is no possibility of laches. The June 2009 QDRO was submitted to the Board just after its entry, and before the remarriage and death of Mr. Akers. If this Court rules favorably regarding that QDRO, then the Board has simply committed error by not accepting it and applying it.

Second, even if Patricia Akers Jones was aware in July 2009, that the June QDRO was rejected, there was no practical way for her to file her case in the Circuit Court of Kanawha County and have the issues raised herein decided prior to the remarriage of Mr. Akers in September 2009 and his death in December 2009. **It has taken five (5) years to get these issues addressed with finality, including a second appeal to this Court.**

Third, the Board did not rule on Mr. Akers' request for disability retirement until March 2010: this was six (6) months after it was filed, three (3) months after the death of Mr. Akers, and one (1) month after the Board was put on notice (by counsel's February 4, 2010, letter) that legal proceedings were going to be commenced to enforce the June 2009 QDRO. [App 162] The Board chose to award, posthumously, Mr. Akers' request for disability retirement. Because he died without designating a beneficiary, the Board made the decision to pay Judy Vannoy Akers the entire survivor benefit, ***choosing to not even pay it to Mr. Akers' estate pursuant to former WVCSR 162-1-7.1.2. which states:***

"7.1.2. If upon the death of a member or retirant, a dispute arises between two (2) or more people who claim beneficiary or survivor benefits, the Board may make payment to the duly registered legal representative of the estate of the deceased member or retirant. Payment may only be made upon submission of written proof of the representative of the estate, generally incorporated in a probate order. The board shall accept the Last Will and Testament of the deceased member or retirant for purposes of payment to the estate under this subdivion." [App 235]

The Board's delay in ruling on the disability claim and its decision to not pay the monthly payments to the estate of Mr. Akers has created this purported "prejudice" to the Board. *Before a payment was made by the Board, it was on notice of the claims to enforce the June 2009 QDRO and to seek to obtain the survivor benefits for Patricia Akers Jones. To seek equity, the Board must have "clean hands."* Pittsburgh and West Virginia Gas Co. v. Nicholson, 87 W.Va. 540, 105 S.E. 784 (1921)

Fourth, the Board's model QDRO states in paragraphs 13 and 14 that it can be amended, and the Board's language in paragraph 16 recites that a QDRO is enforceable *prospectively* after its receipt and acceptance. The Board has represented to parties and practitioners that even if a QDRO is erroneous, it can be corrected. The Board is not entitled to an equitable defense when it has misled Patricia Akers Jones to believe that her June 2009 QDRO, if erroneous, could be amended and enforced *prospectively*. [For fraud as a bar to equitable relief, see Rich v. Rich, 178 W.Va. 791, 364 S.E.2d 804 (1987).]

Finally, neither counsel for Patricia Akers Jones nor Ms. Jones, knew that the June 2009 QDRO was rejected by the Board in July of 2009. After Mr. Akers' death in December 2009, counsel made calls to the Board and then sent a letter dated January 19, 2010, which enclosed the June 4, 2009 QDRO, and the July 10, 2010 Order of the Family Court finding that Patricia Akers was to receive the survivor annuity benefits. [See App 154] On February 3, 2010, the Board sent a letter indicating that the QDRO had previously been rejected. [See App 157] On February 4, 2010, Ms. Jones, by counsel, sent a letter which stated that a civil action would be filed in the Circuit Court of Kanawha County to enforce the June 2009 QDRO and significantly, the letter recites as follows:

“Having not heard from anyone after the January 19, 2010, letter was submitted, I called your office and initially spoke with Ellen Fleet who then transferred me to Teresa Cline. Ms. Cline then transferred me to Anita Brewster who advised me that in July 2009, a letter was tendered to me which rejected the Qualified Domestic Relations Order. **I advised her that I had not received such a letter, and I asked her if it had been sent certified receipt requested. She indicated that it had not been sent certified receipt requested; I then asked Ms. Brewster to telefax the letter to me.** Her telefax cover sheet and the purported letter of July 6, 2009, are attached to this letter for your review. Apparently, you had rejected the Qualified Domestic Relations Order because of the addition of paragraph (7)(f). **My client advised me that she did not receive the letter either.**” [App 159, **emphasis added.**]

All action taken after the death of Mr. Akers until the February 4, 2010, letter of counsel is consistent with neither counsel nor Patricia Akers Jones knowing that the June 4, 2009, QDRO had been rejected in July 2009. No action could be taken until counsel had knowledge of the rejection.

V. THE MECHANISM OF ENFORCEMENT

The Amended Petition for Writ of Mandamus and Amended Complaint for Declaratory Judgment, Injunction, and Damages seek multiple forms of legal relief.

MANDAMUS

This Court has granted a writ of mandamus against the West Virginia Public Employees Retirement System directing it to pay or otherwise assign benefits to individuals other than a plan participant:

“Mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer ***though another remedy exists***, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him.” State Ex Rel. D.H.H.R. v. Public Employee’s Retirement System, 183 W.Va. 39, 393 S.E.2d 677 (1990), ***emphasis added.***

The Board is under a misapprehension of law believing that it cannot pay more than the marital property portion of the benefits to Patricia Akers Jones, and therefore, the Board refused to accept and enforce two valid QDROs: both the June 4, 2009, QDRO and the December 9, 2010 QDRO. The Board does not have the discretion to deny Patricia Akers Jones the right to receive the survivor benefits when Mr. Akers agreed to assign them to her and the law (West Virginia Code 5-10-24 and WVCSR 162-1-7) provides the legal means to do so. Mandamus is an appropriate remedy.

DECLARATORY JUDGMENT

West Virginia has adopted the uniform declaratory judgment act:

“Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection of the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment.” West Virginia Code 55-13-1

Patricia Akers Jones has standing to seek declaratory relief against the Board pursuant to West Virginia Code 55-13-2, and she may seek further relief premised upon the declaratory judgment. See West Virginia Code 55-13-8.

INJUNCTION

West Virginia has authorized courts of competent jurisdiction to grant injunctions. See West Virginia Code 53-5-1; 53-5-3; 53-5-4. Patricia Akers Jones not only sought to have the Circuit Court declare that the two QDRO's were valid and enforceable, but she also sought the Court to enjoin the Board from paying the survivor benefits to Judy Vannoy Akers, and instead pay those benefits to her. Injunctive relief is also a proper remedy.

DAMAGES CAN BE AWARDED

A cause of action against the Board for damages is viable according to a fair reading of West Virginia Code 5-10-24 regarding the restriction of the election of benefits:

“Upon divorce, a member may elect to change any of the retirement benefit options offered by the provisions of this section to a life annuity in an amount adjusted on a fair basis to be of equal actuarial value of the annuity prospectively in effect relative to the retirant at the time the option is elected: *Provided*, That the retirant furnishes to the board satisfactory proof of entry of a final decree of divorce or annulment: *Provided, however*, That the retirant certifies under penalty of perjury that no qualified domestic relations order that would restrict such an election is in effect: ***Provided further***, That no cause of action against the board may then arise or be maintained on the basis of having permitted the retirant to name a new spouse as annuitant for any of the survivorship retirement benefit options.” [See West Virginia Code 5-10-24, **Emphasis Added.**]

The statute further recites as follows regarding the restriction of the participant’s designation of beneficiaries for the survivor annuity:

“Upon remarriage, a retirant may name the new spouse as an annuitant for any of the retirement benefit options offered by the provisions of this section: *Provided*, That the retirant shall furnish to the board proof of marriage: *Provided, however*, That the retirant certifies under penalty of perjury that no qualified domestic relations order that would restrict such a designation is in effect: ***Provided further***, That no cause of action against the board may then arise or be maintained on the basis of having permitted the retirant to name a new spouse as annuitant for any of the survivorship retirement benefit options. The value of the new survivorship annuity shall be the actuarial equivalent of the retirant’s benefit prospectively in effect at the time the new annuity is elected.” [See West Virginia Code 5-10-24, **Emphasis Added.**]

The legislature would not have declared in its statute that no cause of action “may ***then*** arise or be maintained” unless a cause of action could be maintained. The only condition prohibiting a cause of action is the Board’s receipt from the retirant that he or she certifies under penalty of perjury that no QDRO exists which restricts the election of benefits or designation of the beneficiary. That condition does not exist in this case.

Danny Akers never certified under the penalty of perjury that there was no qualified domestic relations order that would restrict the election of benefits or designation of a beneficiary. [App 265] To the contrary, the Board was on notice by July 2009 that the June 4, 2009 QDRO not only existed, *but that it both restricted the election of benefits and designation of the beneficiary.*

Furthermore, West Virginia Code 5-10-44 allows for the “correction of errors.” If an individual has been underpaid as a result of an error in the records of the Retirement Board, the Board must correct the error and adjust the payment of the benefits. See Flanigan v. West Virginia Public Employees Retirement System, supra.

Patricia Akers (Jones) has been denied her payments at \$1,561.44 per month since the effective date of the award, January 2010. Her loss is already more than \$90,000.00.

CONCLUSION

Patricia Akers (Jones) requests this Court to **REVERSE** the Circuit Court’s order granting summary judgment in favor of the Board and rule that the June 4, 2009 QDRO is valid and enforceable. She also requests this Court to **REMAND** this case to the Circuit Court for the enforcement of the June 4, 2009 QDRO, together with an award of damages.

Alternatively, if this Court does not rule that the June 4, 2009, QDRO is valid and enforceable, then Patricia Akers (Jones) requests this Court to **REVERSE** the Circuit Court’s order granting summary judgment in favor of the Board and rule that the December 9, 2010 QDRO is valid and enforceable. She also requests this Court to **REMAND** this case to the Circuit Court for the enforcement of the December 9, 2010 QDRO, together with an award of damages.

PATRICIA AKERS JONES

By counsel,


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CERTIFICATE OF SERVICE

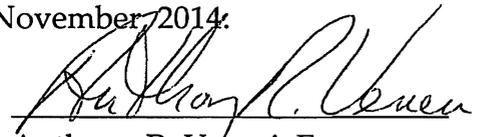
I, ANTHONY R. VENERI, ESQ., counsel for Petitioner Patricia Jones (formerly Akers), do hereby certify that I have this day served a true copy of the foregoing **PETITIONER'S BRIEF** and **JOINT APPENDIX** upon **LENNA R. CHAMBERS, ESQ.**, counsel for the West Virginia Consolidated Public Retirement Board and upon **RANDAL R. ROAHRIG, ESQ.**, counsel for Judy Vannoy Akers, by hand delivery as follows:

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Dated this 5th day of November 2014.

Signed:


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