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FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PATRICIA JONES,

Plaintiff,

2010 JUN 11 PM 4:00

CATHY S. GATSON
KANAWHA COUNTY CIRCUIT COURT

v.

Civil Action No. 10-C-746
Judge Tod J. Kaufman

WEST VIRGINIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM, a corporation d/b/a
WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD
and JUDY VANNOY AKERS,

Defendants.

FINAL ORDER

Before the Court is Plaintiff's Petition for Writ of Mandamus and Complaint for Injunction Damages, filed April 21, 2009. On December 4, 2009, Defendant Judy Akers filed her Special Appearance for Motion to Dismiss. Defendant West Virginia Consolidated Public Retirement Board ("CPRB") filed its Answer and Response, Motion to Dismiss, and Memorandum in Support of Motion to Dismiss on May 24, 2010. In its Memorandum in Support, Defendant CPRB states that Plaintiff's Petition for Writ of Mandamus and Complaint for Injunctive Damages should be dismissed pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure because it fails to state a claim upon which relief can be granted, as her complaint does not allege the requisite elements for mandamus or injunctive relief.

In issuing a writ of mandamus, a court should consider the urgency which prompts an exercise of discretion, the interests of the public and third persons, the results of a refusal of the writ, and the promotion of substantial justice. *State ex rel. Sams v. Kirby*, 208 W. Va. 726, 542 S.E.2d 889 (2000). Where the right involved and the duty sought to be enforced are clear and

where there is no other available specific and adequate remedy at law, the writ will issue. *Kirby*, 208 W. Va. 726. However, it will not lie where it would serve no useful purpose or where it would work an injustice or hardship or be harmful to the public interest. *Id.*

The traditional standard for the issuance of mandamus relief was articulated in *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969):

A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right to the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Although the coexistence of the three elements, standing alone, will not always be sufficient to justify the issuance of the writ, in the court's discretion, the absence of any of these elements may make the issuance of the writ invalid. *State ex rel. Brown v. Corp. of Bolivar*, 209 W. Va. 138, 544 S.E.2d 65 (2000); *Lexington Land Co., LLC v. Howell*, 211 W. Va. 644, 567 S.E.2d 654 (2002).

In the present case, Plaintiff cannot show that she is entitled to the relief she seeks.

Though Plaintiff has the Final Divorce Decree from the Family Court of Mercer County directing Mr. Akers "to ensure that [Petitioner] is named as the beneficiary for all survivor benefits, and the like," the Decree left it up to Petitioner to prepare the Qualified Domestic Relations Order ("QDRO") to ensure that the CPRB would be able to pay out Mr. Akers's benefits in conformity with state and federal regulations and in conformity with the Final Divorce Decree. The CPRB may not pay out funds in any manner not permitted by statute and which is not in the exclusive interests of the plan participants. These laws mandate that the CPRB has to carefully review proposed QDROs to ensure that they can be implemented properly and that they comply with

applicable law. Because proposed QDROs come in many variations, as the administrator of the PERS plan, the CPRB must exercise discretion to accept or reject such a proposed order.

In this case, the CPRB timely reviewed and rejected the proposed order submitted by Petitioner. Following the CPRB's rejection of the proposed QDRO, Petitioner had at least five months in which to submit for approval another proposed QDRO prior to Mr. Akers's death. Additionally, the CPRB clearly identified in its rejection letter what aspects of the proposed QDRO were unacceptable, which would have enabled Petitioner to easily restructure the proposed QDRO to conform to the CPRB's requirements. Nonetheless, at the time of Mr. Akers's death, there was no valid QDRO in place, which means that the CPRB was legally required to pay benefits out according to the directives of the plan participant.

Accordingly, this Court finds that Petitioner has no clear right to the relief requested and therefore DENIES Petitioner's Petition for Writ of Mandamus and Complaint for Injunction Damages.

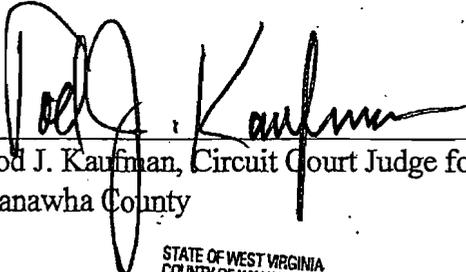
This case is hereby DISMISSED and STRICKEN from the docket of the Circuit Court.

The clerk of the court shall distribute copies of this Order to all counsel of record:

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Enter this Order the 10 day of June, 2010.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, ESQ., Counsel for the Petitioner, do hereby certify that I have this day served a true copy of the foregoing **DOCKETING STATEMENT** upon Lenna R. Chamber, Esq., Counsel for the The West Virginia Consolidated Public Retirement Board and upon Randal R. Roahrig, Esq., Counsel for Judy Vannoy Akers; by placing same in the United States Mail, postage paid, addressed as follows:

LENNA R. CHAMBERS, ESQ.
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Dated this 16th day of September, 2010.



Anthony R. Veneri

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

2010 SEP 17 PM 3:30

FILED