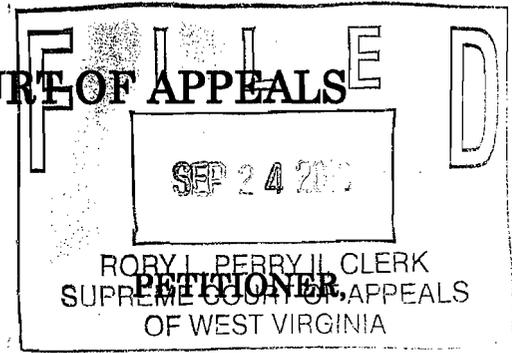


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



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

vs.)

DOCKET NO. 101327

FILED WITH MOTION

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.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
(THE HONORABLE TOD J. KAUFMAN)

**AMENDED
PETITION FOR APPEAL**

COUNSEL FOR PETITIONER:

ANTHONY R. VENERI, ESQ.
VENERI LAW OFFICES
1600 WEST MAIN STREET
PRINCETON, WV 24740
TELEPHONE: (304) 425-8751
WV STATE BAR NO.: 4310

NATURE OF THE PROCEEDINGS BELOW

On April 21, 2010, Patricia Akers (now Jones), who shall be referred to throughout this Petition as "Mrs. Akers," filed a Petition for Writ of Mandamus and Complaint for Injunction and Damages in the Circuit Court of Kanawha County, West Virginia. That pleading requested the Circuit Court of Kanawha County to award damages and compel the West Virginia Public Employees Retirement System, a corporation, d/b/a West Virginia Consolidated Public Retirement Board [hereinafter referred to as Retirement Board] to honor the terms of a Qualified Domestic Relations Order entered in the Family Court of Mercer County, West Virginia on June 4, 2009 in the case of In Re: The Marriage of Patricia Akers [Petitioner] and Danny K. Akers [Respondent], Civil Action No.: 06-D-604-EW. The Retirement Board filed an answer and a motion to dismiss on May 24, 2010; Judy Akers also filed a special appearance and a motion to dismiss. Not even 30 days after the Retirement Board had filed its motion to dismiss, the Circuit Court of Kanawha County dismissed the proceedings with an entry of a "Final Order" signed June 10, 2010, and entered in the Clerk's Office on June 11, 2010. Mrs. Akers seeks relief from the ruling of the Circuit Court of Kanawha County to dismiss her case.

STATEMENT OF FACTS

Mrs. Akers and Danny K. Akers were married to each other on August 1, 1975, and had two children born of their marriage. After essentially 31 years of marriage, in 2006, Mrs. Akers filed for a divorce in the Family Court of Mercer County, West Virginia, and a Final Order was entered by the Family Court on June

30, 2008. [The Final Order of divorce was attached as Exhibit A to the Petition for Writ of Mandamus and Complaint for Injunction and Damages.] The Final Order of divorce represented an uncontested agreement of the parties to resolve their differences and the same was reduced to writing in paragraphs 7(a) through 7(g). Paragraph 7(c) awarded alimony and also divided Mr. Akers' retirement.

In summary, prior to Mr. Akers attaining 55 years of age, he was to pay \$250.00 per month in spousal support unless he received his retirement at which time he was to pay Mrs. Akers her marital share until her marital share was paid directly to Mrs. Akers by a Plan Administrator. When Mr. Akers turned the age of 55, if he retired, he was to pay Mrs. Akers her marital share of the retirement until a Plan Administrator would pay her directly. If Mr. Akers had not retired at the age of 55 and was either on disability or working, or neither, Mr. Akers was to pay Mrs. Akers a sum of spousal support that equaled her marital portion of Mr. Akers' retirement that she would have received if Mr. Akers had retired at the age of 55. If Mr. Akers was not able to retire at the age of 55, or if he was not able to receive disability, then Mrs. Akers could file a petition to revisit the issue of spousal support. It was clear that the parties agreed to the following:

"It is the intention of the parties that the Petitioner receive her share of the Respondent's retirement if at all possible either prior to or by the Respondent's age of 55 years, even if the same is taken as a disability and the Petitioner must be paid in the form of spousal support, but if the Respondent cannot possibility retire or receive disability at the age of 55 years, then the issue of spousal support may be revisited." [See paragraph 7(c)(iii)]

Paragraph 7(d) of the Final Order also recites in part the following:

"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." (*Emphasis added*)

Prior to the final hearing for the Final Order of divorce, Mr. Akers on August 2, 2007, elected a joint and survivor annuity and nominated Mrs. Akers as the survivor beneficiary. [See Exhibit B attached to the Petition for Writ of Mandamus and Complaint for Injunction and Damages.] On June 4, 2009, the parties conducted a hearing wherein, among other things, the issue of the Qualified Domestic Relations Order was presented. The Family Court entered a Qualified Domestic Relations Order which was attached as Exhibit C to the Petition for Writ of Mandamus and Complaint for Injunction and Damages. Consistent with the Final Order of the Family Court granting the divorce, which was an agreement by the parties, the Qualified Domestic Relations Order recites in part, as follows:

"7(b) ...the Alternate Payee is to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the Participant or Alternate Payee hereunder."

"7(f) The Participant shall designate the Alternate Payee as the surviving spouse or the surviving beneficiary of his retirement benefits and shall elect a Joint Survivor Annuity and name the Alternate Payee as the beneficiary thereof."

On July 6, 2009, the Retirement Board tendered a letter indicating that it would not accept the Qualified Domestic Relations Order because it incorporated paragraph 7(f) above. [That letter was attached as Exhibit E to the Petition for Writ of Mandamus and Complaint for Injunction and Damages.] The letter also, according to the language therein, included a "model" Qualified Domestic Relations Order which the Retirement Board "routinely approves" and instructed counsel to use it or the form on the website in dividing the retirement benefits in question. Neither the undersigned counsel nor Mrs. Akers received the July 6, 2009 letter in the mail, although it is believed that counsel for Mr. Akers received the letter in the mail.

A close analysis of the "model" Qualified Domestic Relations Order tendered by the Retirement Board establishes a distinct inconsistency with the terms of the Final Order. The language in paragraph 7(b) of the model Q.D.R.O. states that "the Alternate Payee is not to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the Participant or Alternate Payee hereunder." Furthermore, there is no paragraph in the "model" Qualified Domestic Relations Order comparable to paragraph 7(f) quoted above which was implemented by the Family Court of Mercer County, West Virginia in the Qualified Domestic Relations Order entered on June 4, 2009.

Sometime in the fall of 2009, but after the entry of the Q.D.R.O., Mr. Akers married Judy Vannoy and thereafter applied for disability retirement benefits. In December of 2009, after his short marriage to Judy Vannoy and after his application for disability retirement benefits, Mr. Akers died. After the death of Mr. Akers, the Retirement Board was contacted to determine when Mrs. Akers would receive her survivor benefits according to the terms of the Qualified Domestic Relations Order and the Final Order of divorce. It was then discovered that the Q.D.R.O. entered by the Family Court was rejected by the Retirement Board.

To underscore the misconduct of Mr. Akers, in subsequent litigation in the Circuit Court of Mercer County, West Virginia, styled Patricia Jones [formerly Akers], Plaintiff vs. Judy Akers, Individually and as the Administratrix of the Estate of Danny K. Akers, Civil Action No.: 10C-66-OA, it was discovered that contrary to the Final Order of divorce, on May 7, 2009, Mr. Akers, *without notice to Mrs. Akers*, changed his designation of beneficiary for his retirement benefits to someone other than Mrs. Akers. He made that change less than 30 days before the June 4, 2009 hearing to enter the Qualified Domestic Relations Order. As established above, on August 2 2007, Mr. Akers had named Mrs. Akers as the beneficiary for his Joint and Survivor Annuity, and he allowed it to remain in those terms, just as the Final Order of divorce had commanded him to do, until May 7, 2009. Nevertheless, during a hearing in the above styled collateral litigation, it was discovered that on May 7, 2009, Mr. Akers changed the written nomination for his beneficiary from Mrs. Akers to Judy Vannoy [his then fiancé] and Jordan Smith [his

grandson]. [See Exhibit F attached to the Petition for Writ of Mandamus and Complaint for Injunction and Damages.] This change was not only contrary to the express provisions of the Final Order, but not correcting the change also violated subparagraph 7(f) of the Q.D.R.O. entered on June 4, 2009. It was not known to Mrs. Akers, until after the death of Mr. Akers, that Mr. Akers was in contempt of two (2) separate orders, both the Final Order of divorce and the Q.D.R.O.

Sometime in 2010, the Retirement Board awarded disability retirement benefits **posthumously** as a result of Mr. Akers' application for disability retirement benefits. The Retirement Board pays those benefits to Judy Vannoy Akers and not Mrs. (Patricia) Akers. The Retirement Board's decisions to reject the Q.D.R.O. and/or to accept the post Final Order of divorce change in designation of beneficiaries has enabled Judy Vannoy Akers, with a marriage of less than six months to Mr. Akers, to receive the benefits instead of Mrs. (Patricia) Akers, in spite of her 31 years of marriage, an uncontested Final Order of divorce, and a Q.D.R.O. which directs that Mrs. (Patricia) Akers should receive those benefits.

ASSIGNMENT OF ERROR

The Circuit Court of Kanawha County, West Virginia, committed prejudicial error in dismissing the Petition for Writ Mandamus and Complaint for Injunction and Damages pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure, and therefore denying any relief, since the Retirement Board breached its obligation and duty to accept and honor the terms of an enforceable Qualified Domestic Relations Order which complied with federal law, state law, and the plan.

POINTS AND AUTHORITIES

Federal Statutory Law:

Internal Revenue Code	26 U.S.C. 414(p)
ERISA	29 U.S.C. 1056(d)

State Statutory Law:

<u>West Virginia Code</u>	5-10-24
<u>West Virginia Code</u>	5-10-25(c)
<u>West Virginia Code</u>	5-10-27

Federal Cases:

Hopkins v. AT&T Global Information Solutions Company,
105 F.3rd 153 (4th Cir. 1997)

Metropolitan Life Insurance Company v. Bigelow,
283 F.3rd 436 (2nd Cir. 2002)

National City Corporation, et als. v. Ferrell,
2005 U.S. Dis. Lexis 36149 (N.D.W.Va. 2005)

Owens v. Automotive Machinists Pension Trust,
551 F.3rd 1138 (9th Cir. 2009)

Perkins v Prudential Insurance Company of America,
455 F.Supp. 499 (S.D.W.Va. 1978);

Trustees of the Directors Guild of America-Producer Pension Benefits
Plans v. Tise, 234 F.3rd 415, 421 (9th Cir. 2000)

State Cases:

State Ex Rel. D.H.H.R. v. Public Employee's Retirement System,
183 W.Va 39, 393 S.E.2d 677 (1990)

State Ex Rel McGraw v. Scott Runyan Pontiac-Buick,
194 W.Va. 770, 461 S.E.2d 516 (1995)

LAW AND DISCUSSION

I. Standard of Review

The West Virginia Supreme Court reviews a circuit court's entry of an order granting a motion to dismiss or a motion for summary judgment *de novo*. State Ex Rel McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995). Complaints are to be read liberally, and motions to dismiss or motions for summary judgment should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his, her, or its claim which would entitle him, her or it to relief." *Id.*

The standard of review for a Circuit Court's review of a plan administrator's conclusions regarding a Qualified Domestic Relations Order is *de novo*. Owens v. Automotive Machinists Pension Trust, 551 F.3rd 1138 (9th Cir. 2009).

There were two legal theories and remedies relied on by Ms. Akers in her pleading. In addition to a complaint for an injunction and damages, Mrs. Jones sought relief in the form of a petition for a writ of mandamus. The Retirement Board has been the subject of a mandamus proceeding wherein the following standard was stated:

"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*.

II. Validity of the Family Court's Qualified Domestic Relations Order

The Q.D.R.O. entered by the Family Court complies with federal law, state law and the plan, and is an enforceable order. The federal Q.D.R.O. requirements for the West Virginia public employees' plan (which is a "government" plan) are found in the IRS Code, 26 U.S.C. 414(p). ERISA does not apply to government plans, but ERISA Q.D.R.O.s for non-government plans must comply with 29 U.S.C.1056(d)(3). *The IRS Code and ERISA requirements mirror each other concerning Q.D.R.O.s, and the case law for one should apply to the other.* Both federal statutes define a Q.D.R.O. as a domestic relations order 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..." 26 U.S.C. 414(p)(1)(A)(i); 29 U.S.C.1056(d)(3)(B)(I)

Under both federal statutes, a Q.D.R.O. must identify the plan to which they apply, and they must specify the name and address of the participant and alternate payee, the percentage (or the means of determining the percentage) of benefits assigned or to be paid, and the number of payments or the period to which the order applies. 26 U.S.C. 414(p)(2)(A-D); 29 U.S.C.1056(d)(3)(C)(i-iv). Under both statutes, 26 U.S.C. 414(p)(3)(A-C) and 29 U.S.C.1056(d)(3)(D)(i-iii), QDROs must **not** require:

- (1) A plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;
- (2) The plan to provide increased benefits (determined by actuarial value), and
- (3) The payment of benefits to an alternate payee that have already been assigned to another alternate payee previously in a Q.D.R.O.

The June 4, 2009, Q.D.R.O. incorporates language which accomplishes all of the above mandatory provisions under 26 U.S.C. 414(p). *This compliance is not surprising since the language in the June 4, 2009, Q.D.R.O. is virtually identical to the comparable provisions in the Retirement Board's "model" Q.D.R.O.*

In addition to the above provisions, both statutes allow a participant in a plan to designate a former spouse *in* a Q.D.R.O. to receive the *survivor* benefits:

"To the extent provided in any Qualified Domestic Relations Order, the former spouse of a participant shall be treated as a surviving spouse of such participant..." 26 U.S.C. 414(p)(5)(A); 29 U.S.C.1056(d)(3)(F)(i)

The West Virginia legislature has mandated that the retirement plan at issue provide pre-retirement and post retirement annuity options which include the right to select a joint and survivor annuity, and enable a member to nominate by written designation a qualified person to receive those benefits; the member must file the written designation with the board prior to the date of retirement. West Virginia Code 5-10-24; West Virginia Code 5-10-27. The same joint and survivor annuity options with the right of nomination of a beneficiary is also available for *disability retirement*. See West Virginia Code 5-10-25(c).

The Family Court's June 4, 2009, Q.D.R.O. specifically and directly complies with the above statutory requirements. Consider the following language from the June 4, 2009, Q.D.R.O. in paragraph (7) and its relevant subparts:

"(The Alternate Payee is to be treated as the surviving spouse of the Participant for purposes of calculating benefits payable to the Participant or the Alternate Payee hereunder.)" [See subparagraph 7(b)]

"The Participant shall designate the Alternate Payee as the surviving spouse or the surviving beneficiary of his retirement benefits and shall elect a Joint Survivor Annuity and name the Alternate Payee as the beneficiary thereof."
[See subparagraph 7(f)]

The above provisions in the Q.D.R.O. are consistent with the provisions of the Final Order granting the divorce, which was uncontested, and the property allocation therein, which was by the agreement of both Mr. and Mrs. Akers.

III. The Dispute with the Retirement Board.

In spite of the federal and state statutory language cited above, and further in spite of the express language in the agreed, uncontested Final Order of divorce, the Retirement Board in a letter dated July 6, 2009, rejected the June 4, 2009, Q.D.R.O. because it included subparagraph 7(f). The Retirement Board in that same letter then directed counsel to either utilize the "model" Q.D.R.O. which was enclosed, or retrieve a form Q.D.R.O. from the board's website. This created two serious problems.

First, the Retirement Board's Q.D.R.O. (whether the "model" tendered with the letter or the form on the website) specifically stated that the Alternate Payee was ***NOT*** to be treated as the surviving spouse for purposes of calculating the benefits payable to the Participant or the Alternate Payee. [See the board's "model" Q.D.R.O. in paragraph 7(b)] **This was contrary to the terms of the uncontested, agreed Final Order of divorce, and denied both Mr. Akers and Mrs. Akers the right allowed by federal law and state law to name Mrs. Akers in the Q.D.R.O. as the person to receive the joint and survivor annuity benefits upon Mr. Akers' death.**

Second, without the express language in subparagraph 7(f), the Retirement Board would never know that Mr. Akers was required, and in fact, ordered in the Final Order of divorce, to name Mrs. Akers as the beneficiary of the joint and survivor annuity benefits. The language in the board's "model" Q.D.R.O. is silent as to who is to be nominated in writing as the beneficiary (and that form must be filed with the board by the member). Members/participants like Mr. Akers could change the election of benefits and the nomination of the beneficiary without the former "innocent" spouse ever knowing. *This actually happened to Mrs. Akers!*

When the Family Court of Mercer County conducted the hearing on June 4, 2009, to enter the Q.D.R.O., neither the Family Court nor Mrs. Akers knew that Mr. Akers had already violated the Final Order of divorce. *On May 7, 2009, Mr. Akers changed his August 2, 2007, written nomination filed with the Retirement Board (which named Mrs. Akers as the beneficiary of the joint and survivor benefits) and instead, he nominated his fiancé and his grandson to receive a lump sum benefit.*

Obviously, once Mr. Akers died, it was not possible for the court to adjudge him in contempt and sanction him. Individuals like him die having believed that he or she had accomplished the task of defeating his or her former spouse's claim to retirement assets that the former spouse "did not earn and therefore did not deserve."

A similar type problem has been addressed where a spouse failed to nominate the appropriate, "court-ordered" person as the beneficiary to receive life insurance benefits upon the spouses' death. The United States District Court for the Southern

District of West Virginia in Perkins v Prudential Insurance Company of America, 455 F.Supp. 499 (S.D.W.Va. 1978), imposed an “**equitable assignment**” of a father’s life insurance benefits which by the terms of a final divorce order were supposed to pass to his children. The father, contrary to the November 1974 final divorce order, named his new wife of less than one year (they were married prior to June 11, 1975) as the new beneficiary of the life insurance policies instead of his children. After the father died in 1977, litigation ensued, and the court ultimately determined that the children should receive the money, and not the new wife, and such was ordered.

IV. Subparagraph 7(f) of the Q.D.R.O. complies with the law and the plan.

Subparagraph 7(f) of the Q.D.R.O. did not and does not compel the plan or the Retirement Board to do anything. All that subparagraph 7(f) accomplished was to order Mr. Akers to do that which he had already agreed to and was **ordered** to do: nominate Mrs. Akers as the beneficiary of the joint and survivor annuity benefits.

As established above, by operation of law the plan must enable its members, and specifically Mr. Akers, to elect a joint and survivor annuity; it must also enable its members, and specifically Mr. Akers, to nominate a former spouse as the beneficiary of the joint and survivor annuity benefits. West Virginia Code 5-10-24; West Virginia Code 5-10-27. The same is true for disability retirement. West Virginia Code 5-10-25(c). Federal law, and specifically 26 U.S.C. 414(p)(5)(A) and 29 U.S.C.1056(d)(3)(F)(i), authorizes the implementation of language in a Q.D.R.O. (government and non-government) which names the former spouse as the “surviving spouse” for purposes of the survivor benefits.

The plan must provide the above stated options *and the forms for the election of benefits and nomination of beneficiaries establishes that it does*. Since Mr. Akers agreed to name Mrs. Akers as the beneficiary of the joint and survivor annuity benefits he had already elected prior to the entry of the Final Order, the Family Court had the right to implement the subparagraph 7(f) language in its Q.D.R.O. Subparagraph 7(f) did not require the plan to: (1) pay any benefit not authorized under the plan, (2) pay any increased benefits, or (3) pay any benefit that had already been assigned in another Q.D.R.O. Again, it did not require the plan or the Retirement Board to do anything; the burden was placed on Mr. Akers.

V. Error in the Circuit Court's "Final Order."

There are multiple erroneous conclusions of law or omissions in the Order.

1. A separate and distinct legal claim and theory of relief was not discussed.

Although the Circuit Court discussed the elements for a writ of mandamus, it never discussed the elements for an injunction or damages. The plaintiff's pleading, after the request for the writ of mandamus, separately requested relief in the form of an injunction and damages, and was specifically titled as "complaint for injunction and damages." Although the Circuit Court did ultimately deny the relief requested, it is obvious that the Circuit Court focused squarely and exclusively on the Petition for Writ of Mandamus. The allegations in the complaint for injunction and damages, taken as true, would entitle Mrs. Akers to relief. State Ex Rel McGraw v. Scott Runyan Pontiac-Buick, 94 W.Va. 770, 461 S.E.2d 516 (1995)

2. The Circuit Court erroneously concluded that the Retirement Board had the discretion to reject the Family Court's Qualified Domestic Relations Order (apparently even if it complied with the law) since they "come in many variations."

On page 2 and 3 of the Final Order, the Circuit Court stated the following:

"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."

The above standard is legally incorrect. The role of a plan administrator, the Retirement Board in the case *sub judice*, is to determine whether a domestic relations order is "qualified," not whether the administrator likes one particular "qualified" order better than another "qualified" order. 26 U.S.C. 414(p)(6)(A)(ii); 29 U.S.C.1056(d)(3)(G)(i)(II). Although referring to an ERISA plan, the Court in Metropolitan Life Insurance Company v. Bigelow, 283 F.3rd 436 (2nd Cir. 2002), stated:

"...it would abuse an administrator's discretion to refuse to treat an order that...substantially complies with ERISA requirements of a QDRO." Id @ 444

All that is required is that the Family Court's order "...meets the statutory requirements to be a QDRO..." Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.3rd 415, 421 (9th Cir. 2000). Courts applying the QDRO requirements "...generally have not demanded literal compliance with those requirements..." Metropolitan Life Insurance Company v. Bigelow, 283 F.3rd 436, 443 (2nd Cir. 2002) The Retirement Board cannot compel the Family Court to craft its orders in any particular way, but can only reject orders which do not qualify as Q.D.R.O.s under the law.

3. The Court did not review the Q.D.R.O. to determine if it complied with the law.

The Circuit Court failed to determine one way or the other whether the Q.D.R.O. complied with the law. Instead, it ruled that the Retirement Board could simply accept or reject it. The Court committed error by not reviewing the Q.D.R.O.

If the plan administrator renders an erroneous conclusion in the first instance, "a court of competent jurisdiction" decides the issue on review. 26 U.S.C. 414(p)(7)(A); 29 U.S.C.1056(d)(3)(H)(i); Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.3rd 415, 421 (9th Cir. 2000). As indicated above, a Q.D.R.O. that substantially complies with ERISA must be accepted and enforced, and an administrator abuses his discretion not to. Metropolitan Life Insurance Company v. Bigelow, 283 F.3rd 436, 444 (2nd Cir. 2002) The same is true for a government plan Q.D.R.O. regulated by 26 U.S.C. 414(p).

4. Since the Family Court's June 4, 2009, Q.D.R.O. complied with the law, and was entered before Mr.Akers' remarriage and death, Mrs. Akers is entitled to relief.

Should this Court determine that the Family Court's June 4, 2009, Q.D.R.O. complies with the law, then Mrs. Akers is entitled to relief. The Final Order of divorce was entered on June 30, 2008, and that order vested Mrs. Akers' interest in the survivor benefits. National City Corporation, et als. v. Ferrell, 2005 U.S. Dis. Lexis 36149 (N.D.W.Va. 2005). The Q.D.R.O. was entered before Mr. Akers was remarried, and before the posthumous award of disability retirement benefits; the Q.D.R.O. must be enforced and benefits paid to Mrs. (Patricia) Akers. National City Corporation, et als. v. Ferrell, 2005 U.S. Dis. Lexis 36149 (N.D.W.Va. 2005);

Hopkins v. AT&T Global Information Solutions Company, 105 F.3rd 153 (4th Cir. 1997). The Circuit Court erred by prematurely dismissing the case and denying relief to which Mrs. Akers is clearly entitled.

The statement by the Circuit Court that the Petitioner had at least five months to tender another Q.D.R.O. which could have been “easily” restructured for approval is erroneous. First of all, the Petition for Writ of Mandamus and Complaint for Injunction and Damages alleges that neither Mrs. Akers nor her counsel received the Retirement Board’s rejection letter until after Mr. Akers death. (See paragraph #11) Those allegations are to be taken as true. State Ex Rel McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995). Second, and most important, the Retirement Board’s “model” Q.D.R.O. “that it routinely accepts” mandates that the Alternate Payee (Mrs. Akers) **would NOT be deemed the surviving spouse for purposes of calculating benefits paid to the Participant and the Alternate Payee.** Under no circumstances would Mrs. Akers seek a Q.D.R.O. from the Family Court which did not enforce her vested right to the survivor annuity benefits granted to her in the Final Order; she did not have to accept a Q.D.R.O. which specifically stated that she would NOT be deemed the surviving spouse for purposes of determining her benefits. Had the board’s letter been received in July 2009, the case would have proceeded then to the Circuit Court of Kanawha County *before Mr. Akers’ death*, instead of after. Regardless of when the Retirement Board’s rejection letter was received, a final decision regarding the enforceability of the Q.D.R.O. was destined to occur *after* Mr. Akers’ death.

REQUEST

The Petitioner requests this Court to grant the Petition for Appeal, and reverse the "Final Order" of the Circuit Court of Kanawha County, West Virginia, with instructions to the Circuit Court to: (1) enter an order compelling the enforcement of the June 4, 2009 Qualified Domestic Relations Order entered by the Family Court of Mercer County, West Virginia, and (2) conduct further proceedings for a determination of damages.

PATRICIA JONES (formerly Akers)

By Counsel,



Counsel for the Petitioner

ANTHONY R. VENERI, ESQ.
VENERI LAW OFFICES
1600 West Main Street
Princeton, WV 24740
West Virginia State Bar No.: 4310
Telephone: (304) 425-8751aar

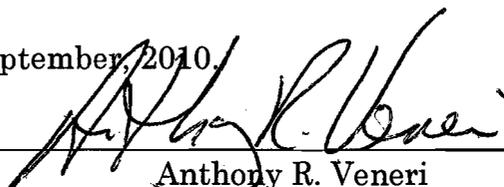
CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, ESQ., Counsel for the Petitioner, do hereby certify that I have this day served a true copy of the foregoing **AMENDED PETITION FOR APPEAL** 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.
BOWLES RICE McDAVID GRAFF & LOVE, LLP
P.O. BOX 1386
600 QUARRIER STREET
CHARLESTON, WV 25325**

**RANDAL W. ROHRIG, ESQ.
THE ROHRIG LAW FIRM
1512 PRINCETON AVENUE
PRINCETON, WV 24740**

Dated this 23rd day of September, 2010.



Anthony R. Veneri