

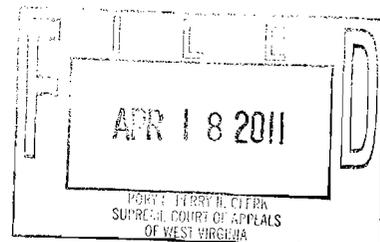
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

PETITIONER,

vs.)

DOCKET NO. 101327



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)

PETITIONER'S REPLY BRIEF

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REPLY TO THE RETIREMENT BOARD'S RESPONSE

The Retirement Board (hereinafter referred to as "Board") has filed a brief in response to the Amended Petition for Appeal which incorporates, by reference, a portion of its response previously filed to oppose the Amended Petition for Appeal. The Board's brief also includes documents, and argument regarding those documents, which are not contained in the record before this Court; it attaches a December 9, 2010, QDRO and a Board rejection letter of April 1, 2011, which were not addressed by the circuit court below. The Petitioner shall address what she perceives to be the key points.

I. THE INTERNAL REVENUE CODE APPLIES

The Internal Revenue Code, specifically 26 U.S.C. 414(p)(5)(A), enables a QDRO to specifically state that a former spouse shall be treated as a "surviving" spouse. The only way for the Board to avoid this statutory provision and the wealth of federal case law interpreting the QDRO provisions in the Internal Revenue Code is to argue that the Board's plans are exempt from the application of the I.R.S. code and therefore, that statute and the case law do not apply. To support the rejection of the I.R.S. code, the Board cites 26 U.S.C. 414(p)(9) which excepts plans to which "code section 401(a)(13) does not apply -- this includes government plans." The Board then supports this contention by referring to the minimum vesting standards and 26 U.S.C. 411(e)(1) which purportedly excludes government plans. (See pages 18 and 19 of the Board's response to the Amended Petition for Appeal which was included by reference in its brief at page 6, footnote 1). This argument fails.

Federal law provides that a government plan **shall** be treated as meeting the requirements of section 401(a) “*if such plan meets the vesting requirements resulting from the application of sections 401(a)(4) and 401(a)(7) as in effect on September 1, 1974.*” See 26 U.S.C. 411(e)(2). As established below, this applies in this case. Consequently, when plans are treated as meeting the requirements of section 401(a), the provisions of 26 U.S.C. 414(p) applies, and the federal case law interpreting the same (and the mirror provisions in ERISA) has relevance.

West Virginia law directly refutes the Board’s argument. The following statutory provision states that federal qualification requirements are intended to be, *and shall be*, met:

“The retirement system is intended to meet the federal qualification requirements of Section 401(a) [26 USCS §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. Any provision of this article referencing or relating to such federal tax qualification requirements shall be effective as of the date required by federal law. The board may promulgate rules and amend or repeal conflicting rules in accordance with the authority granted to it pursuant to section one [§ 5-10D-1], article ten-d of this chapter to assure compliance with this section.” West Virginia Code 5-10-3a(c) (Emphasis added)

The above statute is clear, and it is not isolated. Consider the following provision:

“Notwithstanding anything in this code to the contrary, the payment of benefits under this article shall be made in accordance with Section 401(a)(9) [26 U.S.C.S. 401(a)(9)] of the Internal Revenue Service and federal regulations promulgated thereunder.” West Virginia Code 5-10-27b

West Virginia law also imposes the compensation requirements of Section 401(a). See West Virginia Code 5-10D-7.

West Virginia law regarding “Direct Rollovers” found in West Virginia Code 5-10-27c(a)(1)(ii) establishes that an “Eligible rollover distribution” includes “...any distribution to the extent that the distribution is required under Section 401(a)(9) of the Internal Revenue Code...”

Clearly, the West Virginia legislature has directed the Board to take the action necessary to make the plan comply with 26 U.S.C. 401(a), and therefore the plan is not exempt from the Internal Revenue Code QDRO provisions in 26 U.S.C. 414(p), given the language of 26 U.S.C. 411(e)(2). To further substantiate this, the legislature specifically stated in West Virginia Code 5-10-46 that the exception to the doctrine that the benefits shall not be subject to execution is the existence of a “qualified domestic relations order” *as that term is defined in 26 U.S.C. 414(p)*.

The legislature did not intend to create, nor did it create, its own body of law equivalent to 26 U.S.C. 414(p); it incorporated QDROs as contemplated in 26 U.S.C. 414(p). Even the language in the state rules is consistent with federal law.

II. STATE LAW IS NOT MORE RESTRICTIVE THAN THE IRS CODE

The Board argues that its QDRO requirements are more restrictive than those in the IRS code, and therefore that which the federal statutes and federal case law offer is specifically rejected or excluded under state law. Not only is this incorrect, but this Court must wonder why either the legislature or the Board would establish standards making it more difficult for innocent spouses of retired or deceased members to obtain their benefits? After all, the legislature has established domestic relations law which demands the fair treatment of both parties

with respect to property distribution and spousal support, and it enables Family Courts to protect financially disadvantaged spouses of lengthy marriages by offering a selection of remedies to Family Courts which may be ordered in final divorce decrees.

This Court has also been diligent in protecting the interests of innocent spouses with mainstream rights nonexistent forty years ago, only to now be told by the Board that a defiant and deceitful member can secretly decide, *after* his divorce is final, not to “elect” to treat his wife of more than 30 years as the beneficiary of survivor benefits in spite of the fact that he promised the Family Court that he would do so. This Court should not embrace the Board’s position.

There is nothing in the West Virginia statutes which states that a Family Court cannot order, either in a final domestic relations order or in a Qualified Domestic Relations Order, that a member elect a joint and survivor annuity and nominate his wife (to become the former spouse) as the beneficiary. Such is not only true in a contested domestic case, *but it is certainly true in a case where a member has negotiated a settlement in his or her divorce case and agreed to provide the joint and survivor benefit to the former spouse.*

In the first instance, West Virginia Code 5-10-24 allows the election of joint and survivor annuities. Just because it states that a member “may” make such an election does not mean that a Family Court of competent jurisdiction cannot order the member to make a particular election. To the contrary, the statute expects the

Family Courts to impose restrictions or elections given the language in that particular section which states as follows:

“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...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...*

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...*” **West Virginia Code 5-10-24 (emphasis added)**

What happens if the member or retirant “commits perjury” and then dies?

What is the remedy for the innocent former spouse given that the penalty of perjury is no threat to a deceased member or deceased retirant?

Clearly, the above statute establishes that the legislature expected Family Courts to be able to dictate or restrict the election of annuities by a member or retirant who is a party, or was a former party, to a divorce proceeding. The legislature expected members, retirants, and the Board to honor those restrictions or directives. Not only does West Virginia Code 5-10-24 state this fact, but this concept is supported by domestic relations law, West Virginia Code 48-6-201 and West Virginia Code 48-7-102, which enables the Family Court to order a property division in accordance with a separation agreement; such is the case before this Court. Furthermore, in contested cases, Family Courts *shall* order the transfer of legal title to property of the parties to achieve equitable distribution. West Virginia Code 48-7-105.

Perhaps West Virginia Code 48-5-610(a) recites it best: when the pleadings raise the issue of equitable distribution, “the court *shall* order such relief as may be required to effect a *just and equitable distribution of the property* and to *protect the equitable interests of the parties therein.*” (*emphasis added*)

Finally, it is important to note that West Virginia 162 CSR 1, et. seq., is essentially consistent, if not identical, with the parallel provisions of 26 U.S.C. 414(p) et. seq., which defines the federal, IRS code parameters for a valid Qualified Domestic Relations Order. In fact, both the Board’s “model” QDRO and the June 4, 2009, QDRO at issue in this case incorporate the same language as that provided in 26 U.S.C. 414(p)(2)(A-D) and 26 U.S.C. 414(p)(3)(A-C).

In summary, state law, even in the absence of the federal statutes and case law, authorizes that which June 4, 2009, QDRO orders. State law permits a Family Court to order, in a Qualified Domestic Relations Order, that a Participant/member in the Board’s plans elect his/her spouse/former spouse to receive a joint and survivor annuity. It is inconceivable that a member could escape the jurisdiction of the Family Court and seriously impair, or eliminate, the only significant income producing asset available for his or her innocent former spouse.

III. THERE ARE NO INCONSISTENT PROVISIONS IN THE QDRO

The Board next argues that the addition of paragraph 7(f) is inconsistent with the provisions in paragraphs 7(b), 7(d), and 8 of the June 4, 2009, QDRO. This is not correct.

First, paragraph 7(f) is perfectly consistent with the provisions in paragraph 7(b) which states that: “The alternate payee is to be treated as the surviving spouse of the Participant for the purposes of calculating benefits payable to the Participant or Alternate Payee hereunder.”

Second, the language in paragraph 7(b) reciting: “If...the Participant elects a benefit in the form of an annuity...” does ***not*** confer the right of the Participant to elect a particular benefit (that right is conferred by West Virginia Code 5-10-24), but it qualifies that the VARB is to be an annuitized benefit *if the annuity is elected*.

Third, a similar analysis yields the same results when examining paragraph 7(d). The language in paragraph 7(d) stating: “...if a joint and survivor or other optional form of annuity is elected by the Participant...” does ***not*** confer the right of the Participant to elect a joint and survivor benefit (that right is conferred by West Virginia Code 5-10-24), but it qualifies that *if it is* elected, it is payable at the same time and in the same manner as “...paid to the Participant and the Participant’s beneficiary.”

Finally, with regard to paragraph 8, again a similar analysis yields the same results. The language in paragraph 8 stating: “ Therefore, if the Participant elects to be paid retirement benefits in the form of an annuity...” does ***not*** confer the right of the Participant to elect an annuity (that right is conferred by West Virginia Code 5-10-24), but it qualifies that *if it is* elected, it will continue to be payable to the

Alternate Payee until his or her death or until the annuity payments (including joint and survivor annuity payments) cease.

In summary, the ability of the Family Court to compel Mr. Akers in paragraph 7(f) to elect the joint and survivor annuity naming his former spouse, Ms Akers (now Jones), as the beneficiary thereof (as he agreed to do in the final divorce decree) does not alter or impact in any way the language in paragraphs 7(b), 7(d), and 8. It only told the Board that the election was required and, therefore, the Board was on notice as to which method or means it needed to use to calculate the benefits payable and which method of payment it was required to make accordingly.

IV. MARITAL PROPERTY LIMITATION --CSR 162-1-6.2.1

The Board argues that awarding Mrs. Akers (now Jones) the entire amount of the survivor benefit grants her a portion of Mr. Akers' separate property, or the post separation accumulation of retirement benefits. This argument also fails.

First, Mr. Akers had the right to negotiate as part of his divorce settlement that he would elect the joint and survivor annuity, and cause it to be paid to Ms. Akers (now Jones). He did agree to that and he agreed to be ordered to do it in the final order of divorce. Family Courts routinely approve property distributions where, for example, a spouse will give up a portion of his or her marital property or separate property to reduce or eliminate alimony or spousal support. **The reduction of alimony/spousal support occurred in this case!**

Second, *survivor* annuity benefits are not marital property, but are the separate property of the former spouse as the designated beneficiary. Marital

property is property that is accumulated prior to the separation of the divorcing parties [see West Virginia Code 48-1-233 and West Virginia Code 48-1-237(5)] and survivor annuity benefits to a former spouse do not spring until the death of the member/retirant/Participant, which is by definition after the divorce is complete.

Survivor annuity benefits paid to a former spouse are in line with life insurance proceeds paid to a former spouse, although the annuity benefits are taxable and the life insurance usually is not. As with life insurance, the deceased former spouse expended funds during his or her lifetime to purchase the policy of life insurance, but the payment of the proceeds upon his or her death is the separate property of the designated beneficiary, the former spouse. Unlike life insurance, however, with a survivor annuity the former spouse usually pays a portion from his or her property for that survivor annuity benefit. It must be remembered that while the annuity that is paid during the lifetime of the retirant/Participant is reduced to account for the cost of the survivor annuity benefits, that portion of the annuity that is paid to the former spouse (during the lifetime of the retirant/Participant) *also is reduced to pay for the cost of the survivor annuity.*

Finally, the Family Court may award spousal support to a former spouse (unless waived) and thus where there is no agreement to allocate the survivor annuity to the former spouse, a Family Court could order the award of the survivor annuity to the former spouse *even if the member/retirant/Participant must pay the cost of acquiring the survivor annuity and that cost is in the nature of spousal support paid by the member/retirant/Participant with his post separation benefits.*

V. RELIANCE ON THE DIVORCE DECREE

Ms. Akers (now Jones) did not expect the Board to review the final order of divorce to corroborate the terms of the June 4, 2009, Qualified Domestic Relations Order which compelled Mr. Akers to do that which he agreed to do in arriving at the terms of the final order. She did not send the final order to the Board for review along with the QDRO! To the contrary, Ms. Akers (now Jones) as the former spouse expected the Board to know, pursuant to paragraph 7(f), that Mr. Akers was ordered to elect the joint and survivor annuity benefit, and name his former wife as the beneficiary thereof. The Board was expected to honor that obligation! **The position taken by the Board underscores the importance of paragraph 7(f)—without the Final Order of divorce, how would the Board know that Mr. Akers had agreed (and was ordered) to elect the joint and survivor annuity and nominate Ms Akers (now Jones) as the beneficiary?** Before Mr. Akers married Judy Vannoy Akers, he had, without disclosure, violated the final order of divorce by naming her and his grandson as the beneficiaries of the retirement benefits on the election form!

West Virginia Code 5-10-24 states that a Qualified Domestic Relations Order may restrict Mr. Aker's election after he is divorced. Paragraph 7(f) accomplishes that task. The Board should not be allowed to restrict or dilute that which the legislature specifically authorizes.

It is important to note that the Board's model QDRO would NOT grant Ms. Akers (now Jones) her joint and survivor annuity benefits. Paragraph 7(b) of the Board's model QDRO specifically states that *"...the Alternate Payee is not to be*

treated as the surviving spouse of the Participant for purposes of calculating the benefits payable to the Participant or Alternate Payee hereunder.”

VI. MATTERS NOT IN THE RECORD—THE DECEMBER 2010 QDRO

The Board concludes its argument by attaching documents not in the record below, and not reviewed by the lower court. It attached a December 9, 2010, Qualified Domestic Relations Order which omitted the only portion of the June 4, 2009, which the Board objected to: paragraph 7(f). The Board also attached its rejection letter. The Board will not follow the precedent from the United States District Court for the Northern District of West Virginia, Judge Keely, in National City Corporation, et als. v. Ferrell, 2005 U.S. Dis. Lexis 36149 (N.D.W.Va. 2005), which authorizes the enforcement of “posthumous” QDROs if the original final divorce decree granted the former spouse the right to receive the survivor annuity.

A. THE COURT SHOULD NOT CONSIDER MATTERS NOT IN THE RECORD

Appellate review is generally limited to the record below (designated for appeal) and nonjurisdictional issues considered by the lower court. State v. Day, 225 W.Va. 794, 696 S.E.2d 310 (2010) Clearly, the 2010 Qualified Domestic Relations Order and the Board’s rejection letter were not considered by the lower court and were not part of the record for appeal.

B. THE BOARD HAS CONTINUED TO IGNORE VALID PRECEDENT

Should this Court give any consideration to the December 2010 Qualified Domestic Relations Order and rejection letter, it should note that even in the face of federal precedent which establishes why a “posthumous” QDRO is enforceable

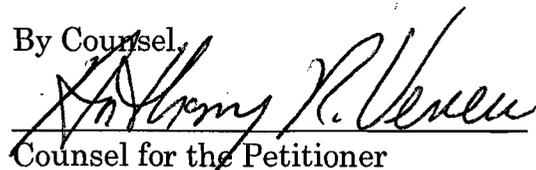
prospectively, the Board simply will not enforce and apply the QDRO. Judge Keely elaborately established in Ferrell how and why a prospective enforcement of a right previously granted to a former spouse during the original divorce proceeding complies with federal law. Although the Board had only originally objected to the language in paragraph 7(f), even in its absence (given that the death of Mr. Akers makes it moot), the Board will still not grant Ms. Akers (now Jones) her benefits. There is no basis in federal law or West Virginia law for the Board to take a position contrary to the principles in Ferrell.

REQUEST

The Petitioner, Patricia Akers (now Jones) requests this Court to reverse the decision of the Circuit Court of Kanawha County, West Virginia, and declare that the June 4, 2009, Qualified Domestic Relations Order was and is a valid and enforceable order. The Petitioner further requests this Court to remand this case to the lower court for the entry of an order enforcing the June 4, 2009, Qualified Domestic Relations Order and to conduct further proceedings regarding damages due to the lost benefits wrongfully paid to Judy Vannoy Akers.

PATRICIA JONES (formerly Akers)

By Counsel,


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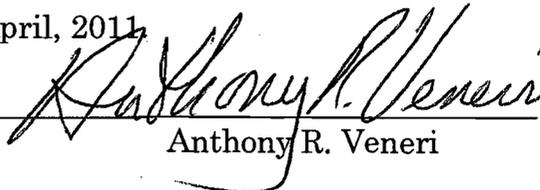
CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, ESQ., Counsel for the Petitioner, do hereby certify that I have this day served a true copy of the foregoing **PETITIONER'S REPLY BRIEF** upon Lenna R. Chamber, Esq., Counsel for 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:

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Dated this 15th day of April, 2011.



Anthony R. Veneri