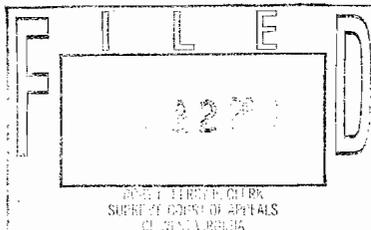


ARGUMENT DOCKET

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 (TO RESPONSE OF RESPONDENT JUDY VANNOY AKERS)

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REPLY TO JUDY VANNOY AKER'S RESPONSE

This Court denied the motion to dismiss filed by Respondent Judy Vannoy Akers and granted her the opportunity to file a brief in response. The Court then granted the Petitioner an opportunity to file a reply on or before July 30, 2011.

I. THE QDRO IS VALID AND ENFORCEABLE

Respondent Judy Akers argues that the QDRO was properly rejected by the Retirement Board. The Retirement Board rejected it because it contained paragraph 7(f), which compelled Mr. Akers to elect the joint and survivor annuity, and designate the Petitioner as the beneficiary.

Federal law allows a QDRO to state that a former spouse shall be designated as a "surviving spouse" of a plan participant. See 26 U.S.C. 414 (p)(5)(A) and 29 U.S.C. 1056(b)(3)(F)(i). State law also allows a QDRO to restrict the "election" of annuities and the "designation" of beneficiaries in favor of a former spouse:

"Upon divorce, a member may elect to change any 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...*

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)

It was not only proper, but also anticipated, that the June 4, 2009, Qualified Domestic Relations Order could restrict Mr. Akers' "election" of benefits and his "designation" of beneficiaries. The QDRO predates Mr. Akers remarriage and death. It grants the Petitioner no additional rights not already given to her in the Final Order of divorce, and this Court should not allow the Retirement Board to compel the Petitioner to accept less rights than those granted in that Final Order, as the Retirement Board's proposed "form" QDRO would have done.

II. THE AUTHORITY TO ASSIGN 100% OF THE SURVIVOR ANNUITY BENEFITS TO A FORMER SPOUSE

Respondent Judy Vannoy Akers, argues that the June 4, 2009, Qualified Domestic Relations Order cannot be enforced because it grants the Petitioner 100% of the joint and survivor annuity, and this is more than her share of the marital portion of the retirement benefits accrued. This argument fails for obvious reasons.

A. MR. AKERS HAD THE RIGHT TO AGREE, DURING PROCEEDINGS LEADING UP TO THE FINAL DIVORCE ORDER, TO ELECT AND ASSIGN THE JOINT AND SURVIVOR ANNUITY TO THE PETITIONER.

West Virginia Code 5-10-24 specifically authorized Mr. Akers (a participant) to elect either a 50% or a 100% joint and survivor annuity, and name Petitioner Patricia Akers Jones as the beneficiary thereof. After commencement of the divorce proceedings, and before the entry of the agreed Final Divorce order, Mr. Akers, on August 2, 2007, nominated the Petitioner to receive a 100% joint and survivor annuity. (See Exhibit B to the Petition for Writ of Mandamus and Complaint for Injunction and Damages). With his consent and agreement in paragraph 7(d) of the

Final Divorce order entered June 30, 2008, Mr. Akers granted the Petitioner herein all of those surviving spouse annuities and death benefits. In paragraph 7(d), he further agreed to insure that the Petitioner was named as the beneficiary of those survivor annuity benefits, and he had done so *until he changed his mind on May 7, 2009*. (See Exhibit F attached to the Petition for Writ of Mandamus and Complaint for Injunction and Damages.)

The Family Court had the authority to approve the settlement. West Virginia Code 48-7-102. There is no legal basis to deny the Petitioner the right to enforce the only significant asset which, by the agreement of Mr. Akers, was granted to her.

B. A FAMILY COURT OF COMPETENT JURISDICTION COULD ORDER MR. AKERS, EVEN OVER HIS OBJECTION, TO ELECT A JOINT AND SURVIVOR ANNUITY AND NAME THE PETITIONER AS THE BENEFICIARY THEREOF.

The Petitioner submits that even if Mr. Akers had not agreed to grant the Petitioner his joint and survivor annuity, a Family Court of competent jurisdiction could Order, even in the absence of an agreement, that Mr. Akers provide such benefits to the Petitioner, his former spouse. The authority of the Family Court to do this very thing is derived from the application of West Virginia Code 5-10-24 and West Virginia Code 48-5-101, et.seq.

As recited above, the legislature specifically contemplated that the Retirement Board and plan participants would abide by Qualified Domestic Relations Orders *“that would restrict such an election ...”* and *“would restrict such a designation.”* See West Virginia Code 5-10-24 (emphasis added) It goes without saying that Family Court Judges enter Qualified Domestic Relations Orders

pursuant to domestic relations proceedings, not the application of West Virginia Code 5-10-1, et.seq. But, logically speaking, a Family Court Judge can, pursuant to the statute, restrict a plan participant's election and designation in a Qualified Domestic Relations Order.

Beyond the above, Family Court Judges have subject matter jurisdiction to decide property division and spousal support of parties to a divorce proceeding. See West Virginia Code 48-5-102; West Virginia Code 48-5-602; and West Virginia Code 48-5-610. Specifically, West Virginia Code 48-5-610(a) directs a Family Court Judge to not only achieve a just and equitable distribution, but it also instructs the Family Court to allocate property "to protect the equitable interests of the parties."

Family Court Judges may also alter the presumed equal (50/50) division of marital property if there is justification to do so. See West Virginia Code 48-7-103.

Consequently, regardless of how this Court classifies the joint and survivor annuity (property, spousal support, a combination thereof, or otherwise), the Family Court could have awarded it to the Petitioner pursuant to its inherent authority granted by statute to grant relief to the parties. This Court should not establish precedent which confines the ability of the Family Court to make a just and fair final order to achieve the equitable interests of parties to a divorce proceeding.

III. DISABILITY RETIREMENT VS. REGULAR RETIREMENT AND PRERETIREMENT ANNUITIES

Respondent Judy Vannoy Akers also attempts to distinguish surviving spouse annuity rights in a disability retirement under West Virginia Code 5-10-25 from regular retirement under West Virginia Code 5-10-22 and preretirement death

annuities as provided in West Virginia Code 5-10-27. The Respondent argues that a posthumous award of disability retirement grants a current spouse the surviving spouse annuity even in the face of an enforceable Qualified Domestic Relations Order. A review of the statutes establishes that the Respondent's argument fails.

The statute authorizing disability retirement specifically allows members to elect joint and survivor annuities as provided in West Virginia Code 5-10-24. Consider the following language from the statute:

“For any member or former member retiring and any member retired, as of March one, one thousand nine hundred seventy, he or she *shall* receive a straight life annuity computed according to section twenty-two [5-10-22] hereof *and* he or she *shall* have the right to elect an option provided for in section twenty-four [5-10-24] hereof...” West Virginia Code 5-10-25(c) (*emphasis added*)

The joint and survivor annuities provided in West Virginia Code 5-10-24 are subject to the restriction of elections and designations of beneficiaries established in a QDRO. This Court has no reason to believe that the legislature's reference in West Virginia Code 5-10-25(c) to the options in West Virginia Code 5-10-24 would, *without specifically stating so*, exclude the language regarding the elections and designations of beneficiaries being restricted pursuant to a QDRO entered by a Family Court. The statute should be given its plain meaning.

The Respondent's argument also defies logic. Why would the legislature allow a wife of only two or three months to take such enormous benefits to the exclusion of a wife of more than 30 years just because one benefit is denominated as a “disability” retirement and the other benefit would be either a regular retirement or

a preretirement annuity? There are no distinctions regarding the elections available under West Virginia Code 5-10-24 in a plain reading of West Virginia Code 5-10-25.

Finally, the Respondent's argument defies the explicit terms of the agreed Final Divorce order. Paragraphs 7(c)(i,ii,&iii) contemplate a division of disability retirement during the life of Mr. Akers, *even if the same was to be paid in the form of spousal support!* Furthermore, paragraph 7(d) specifically states that the Petitioner was to receive all survivor annuities available under the retirement plans. That paragraph did not carve out an exception for "disability" retirement.

IV. ANY FUTURE BENEFITS AVAILABLE UNDER A JOINT AND SURVIVOR ANNUITY VESTED WITH THE PETITIONER UPON THE ENTRY OF THE AGREED FINAL DIVORCE ORDER OF JUNE 30, 2008

The United States District Court for the Northern District of West Virginia in the case of National City Corporation, et als v. Ferrell, 2005 U.S. DIS. Lexis 36149 (N. D. W. Va. 2005) clearly enunciated a principle of law which underscores the argument of the Petitioner.

In sustaining the enforceability of a "posthumous" Q.D.R.O., Judge Keeley in Ferrell established that Domestic Relations Orders (such as the June 30, 2008 Final Order of divorce) grant the survivor spouse annuity rights to former spouses, and Qualified Domestic Relations Orders *merely enforce those rights*.

The above principle of law supports why the June 4, 2009, QDRO is valid and enforceable. Paragraph 7(f) of that QDRO merely enforces those rights granted to the Petitioner in paragraph 7(d) of the Final Order of the divorce.

Enforcing the Qualified Domestic Relations Order will take nothing away from Respondent Judy Vannoy Akers that was hers once she married Mr. Akers; *the survivor spouse annuity was already given to the Petitioner by Mr. Akers in the final order of divorce.*

V. NO RES JUDICATA

Respondent Judy Vannoy Akers is factually and legally incorrect by arguing that Judge Aboulhosn's order in Civil Action 10-C-66-OA, Mercer County Circuit Court, barred any further litigation of the enforceability of the June 4, 2009, Qualified Domestic Relations Order.

Factually, civil action 10-C-66-OA neither sought to determine the enforceability of the QDRO nor did it even include the Retirement Board as a party. (See exhibit 1, which includes multiple pleadings, attached to "Judy Akers' Special Appearance for Motion to Dismiss" in the record below.) To the contrary, the complaint filed in that civil action (attached as part of that exhibit 1) *specifically advised Judge Aboulhosn of the following:*

"The plaintiff herein is challenging the decision of the State of West Virginia Consolidated Public Retirement Board to reject the Qualified Domestic Relations Order in a separate Civil Proceeding which is to be filed in the Circuit Court of Kanawha County, West Virginia; the notice of claim was sent on February 4, 2010, a duplicate of which is attached hereto and incorporated by reference." (See the latter part of paragraph 10 of the complaint in civil action 10-C-66-OA, attached as exhibit 1 to the "Judy Akers' Special Appearance for Motion to Dismiss.")

The prayer for relief in civil action 10-C-66-OA seeks to intercept and gain possession of any benefits paid to Judy Akers individually or as the personal representative of the Estate of Danny Akers by the Retirement Board. There is no request for relief to enforce the QDRO.

Furthermore, Judge Aboulhosn has not, in fact, ruled on the viability of the QDRO; he only “finds” that it was rejected by the Retirement Board.

Legally, for any order to implicate the doctrine of *res judicata*, it must be a final and nonappealable order, and involve the same issues and the same parties or their privies. Porter v. McPherson, 198 W.Va. 158, 479 S.E.2d 668 (1996) None of the above exist. First of all, there is no final order in 10-C-66-OA. Second, the Retirement Board is the only entity which could accept or reject the QDRO, and it was not even a party to the proceeding. No stretch of rational thinking could make Judy Vannoy Akers the privy of the Retirement Board. Finally, the enforceability of the QDRO was not an issue adjudicated in 10-C-66-OA.

VI. JUDY VANNOY AKERS HAS IMPROPERLY RELIED ON FACTS WHICH ARE NOT IN THE RECORD BELOW

Respondent Judy Vannoy Akers has permeated her brief with facts which are not in the record below. Examples of this are on pages 10, 11, and 12 where testimony of Ann Lambright is stated (but not cited from the record), and pages 12, 13, and 14 where a posthumous QDRO is referred to (but not cited from the record). Beyond being procedurally improper, none of those facts will assist this Court in determining whether the June 4, 2009, Qualified Domestic Relations Order at issue was and is a valid and enforceable Order.

A. ABSENT JURISDICTIONAL ISSUES, THIS COURT'S REVIEW OF THE LOWER COURT'S ORDER IS CONFINED TO THE RECORD BELOW.

Twice before Respondent Judy Vannoy Akers filed her brief in response, the Petitioner cited this Court's decision in State v. Day, 225 W. Va. 794, 696 S.E.2d 310 (2010), first on April 15, 2011 when addressing the Retirement Board's brief in response, and again on April 20, 2011 on page 1 of the Petitioner's response opposing the Motion to Dismiss Respondent Judy Vannoy Akers from the Appeal.

In Day, this Court made clear that absent a jurisdictional question, the issues addressed on appeal shall be confined to the record below. In the face of that precedent, which Respondent Judy Vannoy Akers was clearly aware of, she has again permeated her brief in response with many facts not contained in the record.

B. THE FACTS STATED IN THE BRIEF WHICH ARE NOT IN THE RECORD BELOW DO NOT ASSIST THIS COURT IN RESOLVING THE ISSUES PRESENTED.

The primary issue in this case is whether or not, as a matter of law, the June 4, 2009, Qualified Domestic Relations Order is valid and enforceable. This Court does not need to consider facts not contained in the record to decide this issue.

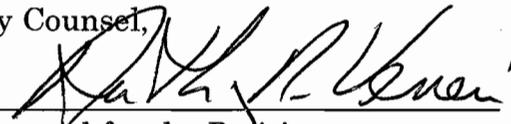
The Qualified Domestic Relations Order accomplishes the allocation of the joint and survivor annuity as contemplated in the June 30, 2008, agreed Final Order of divorce. The Qualified Domestic Relations Order complies with both federal and state law, and does not order the plan to do anything that it cannot legally do. This Court may review the order and determine as a matter of law whether or not it is valid and enforceable.

REQUEST

The Petitioner requests this Court to determine as a matter of law that the June 4, 2009, Qualified Domestic Relations Order is valid and enforceable. The Petitioner further requests that this Court remand this case with instructions to the Circuit Court of Kanawha County, West Virginia, to not only enforce the QDRO, but also conduct further proceedings to determine the award of damages resulting from any benefits improperly paid to Respondent Judy Vannoy Akers.

PATRICIA JONES (formerly Akers)

By Counsel,


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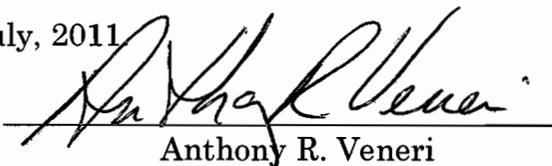
CERTIFICATE OF SERVICE

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 (TO THE RESPONSE FILED BY RESPONDENT JUDY VANNOY AKERS) 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 21st day of July, 2011



Anthony R. Veneri