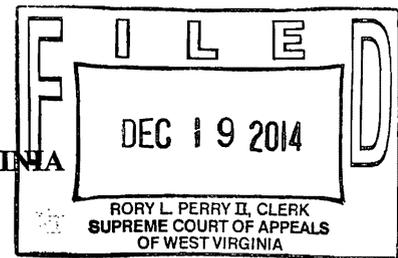


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 14-0734



PATRICIA JONES (formerly Akers),
Petitioner

V.)

Appeal from a final order
of the Circuit Court of Kanawha
County (10-C-746)

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

Response of CPRB to Brief of Petitioner Patricia Jones

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Statement of the Case

In this appeal, Petitioner Patricia Jones (Ms. Jones) asks the Court to rule that the Consolidated Public Retirement Board (CPRB) should have enforced one of two Domestic Relations Orders (DROs), which sought to assign to her the public pension benefits of her ex-husband, Danny K. Akers (Mr. Akers). The Statement of Facts set forth by Petitioner Jones omits many material facts and events; therefore, CPRB sets forth a complete Statement of Facts below.

Ms. Jones and Mr. Akers married on August 1, 1975, and in 1979, Mr. Akers began participating in the Public Employees Retirement System (PERS) as a state employee. (A.R. 107, 169)¹. Ms. Jones and Mr. Akers separated on July 8, 2006, and were divorced two years later, on June 30, 2008. (A.R. 107, 117). As of the date of separation, Mr. Akers had 26 years and six months of service credit in PERS. (A.R. 169-170). Mr. Akers continued to participate in PERS as an employee of the Division of Highways (DOH) after the separation and divorce, accruing 30 total years of PERS service credit. (A.R. 169-170). The Final Divorce Order, dated June 30, 2008, directed that Ms. Jones receive “one half (50%) of [Mr. Akers’] retirement assets accumulated as of the date of separation ... and ... all survivor benefits, surviving spouse benefits, death benefits, survivor annuities, and the like available under the retirement plans.” (A.R. 110).

Almost one year later, on June 4, 2009, the Family Court of Mercer County issued a “Qualified Domestic Relations Order” (the DRO). (A.R. 117). The DRO had been prepared by counsel for Ms. Jones. (A.R. 121). Once issued by the Court, Ms. Jones’ attorney sent the DRO

¹ References to the Appendix Record submitted by Petitioner Patricia Jones are set forth as “A.R. ____.”

to CPRB and asked that it be recognized as a Qualified Domestic Relations Order (QDRO). (A.R. 139). CPRB was not a party to the divorce proceeding, and Ms. Jones did not provide CPRB with a copy of the Final Divorce Order. (A.R. 117, 139).

The DRO acknowledged that as the administrator of PERS, CPRB was responsible for determining whether the DRO was “qualified,” and obligated Ms. Jones and Mr. Akers to “cooperate and do all things reasonably necessary to devise a form of Order acceptable to Plan Administrator consistent with applicable law,” should CPRB not approve the DRO. (A.R. 120-121, ¶¶ (13), (16) and (17)). No draft DRO had been submitted to CPRB for pre-approval. (A.R. 348, *see* Answer to Interrogatory No. 4).

The DRO contained conflicting instructions regarding the form in which the benefit should be paid. (A.R. 117). While several provisions stated that Mr. Akers could choose any form of benefit allowable by the plan, other provisions purported required CPRB to pay Mr. Akers’ benefits in the form of a joint and survivor annuity, regardless of what form he elected. (A.R. 118-119, compare ¶¶ (7)(b), (7)(d) and (8) with ¶ 7(f)). Moreover, while several provisions referred to Mr. Akers’ ability to choose a beneficiary, other provisions purported to require Ms. Jones to be the sole survivor beneficiary for all Mr. Akers’ PERS benefits upon his death, regardless of whether Mr. Akers might have elected otherwise. (A.R. 118-119, compare ¶¶ (7)(d) and (8) to (7)(b) and (7(f)).

CPRB responded on July 6, 2009, refusing to qualify the DRO due to the addition of paragraph (7)(f) in particular, which contained the bulk of the language conflicting with other provisions in the DRO. (A.R. 140-141). This correspondence was sent to Ms. Jones and her attorney, and Mr. Akers and his attorney, together with a copy of the PERS Model QDRO. (A.R.

113-116, 141). Ms. Jones' attorney asserts that neither he nor his client received the July 6, 2009 letter, though Mr. Akers' attorney received the letter. (A.R. 31, 167). Nonetheless, Ms. Jones sent no inquiry, response, objection, reply, revised DRO or other correspondence or communication whatsoever with respect to her request that CPRB approve the QDRO for many months thereafter. (A.R. 348-349).

By this time, Ms. Jones had remarried. (A.R. 127). On September 5, 2009, Mr. Akers was also remarried, to Judy Vannoy (Mrs. Akers). (A.R. 136). On September 15, 2009, CPRB received an Application for Disability Retirement Benefits from Mr. Akers. (A.R. 146). Mr. Akers died on December 16, 2009, while his disability application was still being processed by the CPRB. (A.R. 137, 156). Mrs. Akers was appointed the Administratrix of the estate. (A.R. 208, 435).

Initially, CPRB staff began processing Mr. Akers' death benefit as a pre-retirement death, in which case a benefit would have been payable by statute to his surviving spouse, Mrs. Akers. (A.R. 147-149); W. Va. Code § 5-10-27(b)(1). Once CPRB staff realized that Mr. Akers' disability application was pending, they informed Mrs. Akers that she would receive a pre-retirement survivor benefit only if the disability retirement benefit was denied. (A.R. 156). The disability retirement application submitted by Mr. Akers was approved on March 3, 2010, and became effective January 1, 2010. (A.R. 163, 171).

Because Mr. Akers died before the disability application process was complete, he did not complete a retirement beneficiary designation or retirement option form; had he survived until the completion of this process, he could have chosen one of three annuity types: a straight life annuity (a monthly annuity paid to the retirant until his death, with no survivor

benefits), a 100% joint and survivor annuity (a monthly annuity paid to the retirant until his death, followed by a monthly annuity to the beneficiary in the same amount), or a 50% joint and survivor annuity (a monthly annuity paid to the retirant until his death, followed by a monthly annuity to the beneficiary that is 50% of the monthly amount paid to the retirant). (A.R. 215). CPRB paid the survivor benefits as a 100% joint and survivor annuity to Mr. Akers' surviving spouse, Mrs. Akers - the most generous option for survivors available under the plan. (A.R. 162, 171).

CPRB had two pre-retirement beneficiary designations by Mr. Akers on file. (A.R. 132-135, 277-279). One, dated August 2, 2007, provided for a 100% joint and survivor annuity to Mr. Akers' surviving spouse. (A.R. 132-133, 277-278). A second, dated May 7, 2009, on the form applicable only to non-married members, provided for a single lump sum payment in equal parts to Mrs. Akers, at the time Mr. Akers' fiancé, and Mr. Akers' grandson. (A.R. 134, 279). A third form, also applicable only to non-married members, was executed by Mr. Akers on June 4, 2009, and given to counsel for Ms. Jones, but never provided to CPRB. (A.R. 135, 350, *see* Answer to Interrogatories 11 and 12). This form was for PERS participants who were not married at the time of death, with ten or more years of service, and opted for a lump sum payment to named beneficiary Ms. Jones. (A.R. 135). Because Mr. Akers was married at the time of his death, had his benefits been paid as a pre-retirement death benefit, the most only valid form on file with CPRB was the August 2, 2007 form, electing that the benefits be paid as a 100% joint and survivor annuity to Mr. Akers' surviving spouse. (A.R. 132-133, 277-278).

Had an acceptable QDRO been on file in favor of Ms. Jones (for example, in the form of the PERS model QDRO), CPRB would have begun paying Ms. Jones 50% of the marital

property portion of the benefits directly each month, until the earlier of her death, or the cessation of the joint and survivor annuity upon Mrs. Akers' death. (A.R. 113-116, 157).

On January 19, 2010, more than seven months after having sent the DRO to CPRB, Ms. Jones' attorney wrote to the agency asking when his client would begin receiving benefits under the DRO in light of Mr. Akers' death, and enclosing another copy of the DRO, as well as other Family Court orders. (A.R. 154-155). CPRB responded that the DRO had been rejected in July 2009, and that since no QDRO was in effect when the survivor benefits commenced to Mrs. Akers, Ms. Jones was not entitled to payment. (A.R. 157-158).

On February 11, 2010, Ms. Jones filed a Complaint against Mrs. Akers in the Circuit Court of Mercer County, individually and in her capacity as Administratrix of the Estate of Mr. Akers, along with a Motion for Temporary and Permanent Injunction, in which Ms. Jones sought to enjoin Mrs. Akers from spending or disposing any of the benefits she was receiving. (A.R. 435-438). A temporary injunction was granted on March 24, 2010, but dissolved on July 26, 2010, and the case was ultimately voluntarily dismissed by the parties. (A.R. 440-447). CPRB was not a party to those proceedings. *Id.*

Instead, on April 27, 2010, Ms. Jones initiated a separate lawsuit against CPRB and Mrs. Akers in Kanawha County Circuit Court, filing a Petition for Writ of Mandamus and Complaint for Injunction and Damages. (A.R. 25). Eventually, Mrs. Akers was removed as Administratrix of the Estate of Danny Akers, although no notice of that change was provided to CPRB. (A.R. 446).

CPRB moved to dismiss Ms. Jones' Complaint, the Circuit Court granted the Motion and Ms. Jones appealed. (A.R. 20-25, 80-96). On March 7, 2011, while her appeal to

this Court was pending, Ms. Jones submitted to CPRB a new DRO (that had actually been issued months before on December 9, 2010). (A.R. 122-126, 164-165). CPRB denied her request to qualify the DRO. (A.R. 164-165). This Court reversed the Circuit Court by Memorandum Decision dated September 23, 2011. (A.R. 20-24). Once the case was remanded, Judy Akers filed a Cross-Claim against CPRB, asserting that it should have awarded her a pre-retirement spousal benefit rather than a disability retirement spousal benefit. (A.R. 97-99). CPRB filed a Cross-Claim against Judy Akers, seeking repayment of the benefits paid to her in the event Ms. Jones' claims prevailed. (A.R. 101-105). CPRB's Cross-Claim has been stayed.

In September 2012, Ms. Jones amended her Complaint to address the rejection of the December 2010 DRO as well. (A.R. 28-79). After discovery, the parties filed Proposed Orders and/or Motions for Summary Judgment, response and replies. (A.R. 351-434, 448-605). The Circuit Court granted CPRB's Motions for Summary Judgment against Ms. Jones and Mrs. Akers. (A.R. 1-19). Ms. Jones appeals the Circuit Court's order with respect to its determination regarding the QDRO issues, but has not appealed the Circuit Court's order with respect to the form of benefit issues addressed by Mrs. Akers' Cross-Claim.

Summary of Argument

The DROs Ms. Jones asks this Court to enforce against CPRB were properly deemed unqualified. The DRO issued in June 2009 contained contradictory statements in several paragraphs, leaving unclear what CPRB's obligations were. This constituted a sufficient basis for CPRB to refuse to enforce or qualify the order, since QDROs are meant to provide plan administrators clear and precise directions. Both the DRO issued in June 2009 and the DRO issued in December 2010 were also unqualified because, even resolving the contradictory statements in favor of Ms. Jones' position, the DROs sought to force the plan to pay benefits in a

form and manner not permitted by the provisions governing PERS. What the DROs attempted to achieve is expressly permitted by statutes and regulations governing private employer pension plans including ERISA and the Internal Revenue Code; however, these provisions do not apply to governmental plans like PERS, which often (and in this case, did) have very different limitations for QDROs. Unfortunately, Ms. Jones' failure to take the different rules into account or consult with CPRB, resulted in the submission of two DROs that CPRB did not have statutory authority to enforce.

Ms. Jones also asks this Court to excuse her own failure to diligently pursue a QDRO. Although she submitted a request that CPRB honor the June 2009 DRO, and by her own claim received no response, she made no contact with CPRB whatsoever for more than seven months. While in many or even most cases this delay would cause CPRB no prejudice, in this case, Mr. Akers remarried and then died, with surviving spouse benefits becoming payable to Mrs. Akers. Ms. Jones is barred by laches from seeking relief in light of her delay. Ms. Jones' request that CPRB enforce a posthumous QDRO was also correctly denied, in light of the commencement of survivor benefits to Mrs. Akers during this time. The Circuit Court's Final Order should be affirmed, and Ms. Jones should be directed to pursue her claim for the marital property portion of the benefits against other parties, through other means, to the extent available.

Statement Regarding Oral Argument and Decision

Ms. Jones requested oral argument pursuant to Rule 20 of this Court's Rules of Appellate Procedures, stating that the issues in the case are issues of first impression for this Court. CPRB agrees that many of the issues in the case are issues of first impression for this Court.

Argument

The Circuit Court's entry of summary judgment must be reviewed *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case..." *Belcher v. Wal-Mart Stores*, 211 W. Va. 712, 719, 568 S.E.2d 19, 26 (2002) (per curiam) (citation omitted).

I. CPRB properly refused to accept and enforce the June 2009 DRO because it contained conflicting directions regarding the form of benefit and survivor beneficiary.

Ms. Jones' appeal asserts that CPRB was required to accept the June 2009 DRO as a QDRO and that had it done so, CPRB would have been required to pay Mr. Akers' benefits as a Joint and Survivor Annuity with Ms. Jones as the sole survivor beneficiary, regardless of what elections Mr. Akers might have actually made. (*See, e.g.*, A.R. 33, ¶ 17 (alleging that "[t]he Court should compel the [CPRB] to accept and enforce the terms of the [QDRO]...") (emphasis added)). If this was Ms. Jones' intent, the June 2009 DRO did not accomplish it. To be clear, CPRB does not believe a PERS QDRO could even be used to dictate the form of benefit or survivor beneficiary in these circumstances; however, that issue need not be reached by this Court if it agrees with the Circuit Court and CPRB that the June 2009 DRO was inconsistent on its face and therefore properly rejected by CPRB for that reason alone.

The Circuit Court concluded that the June 2009 DRO was "internally inconsistent on its face with regard to the form of benefit to be chosen by the participant in PERS, Mr. Akers," and that CPRB therefore "had authority to reject the DRO because it did not contain

sufficiently specific instructions and directives to the plan administrator.” (A.R. 9, ¶ 12). The

Circuit Court identified the inconsistencies in its findings of fact:

4. The following portions of the DRO stated that the form of benefit was to be elected by Mr. Akers at the time of his retirement:

(7)(b) ... if, at the time benefit payout commences, the Participant elects a benefit in the form of an annuity, then the VARB shall be the annuitized benefit which would have been available to the Participant as of the [QDRO] Determination Date If, at the time benefit payout commences, the Participant elects a return of contributions ...

(7)(d) The Alternate Payee shall be entitled to 50% of the marital property portion of the Participant’s VARB [Vested Accrued Retirement Benefit] ... payable at the same time and in the same manner (either in the annuity form or, if allowed, in a lump sum) as paid to the Participant or, if a joint and survivor or other optional form of annuity is elected by the Participant, at the same time as paid to the Participant and the Participant’s beneficiary. Provided, however, that nothing in this Order shall be construed as granting the Alternate Payee any election rights with respect to the form of benefit; rather, the form of benefit at time of payment shall be elected by the Participant

(8) ... if the Participant elects to be paid retirement benefits in the form of an annuity, the annuity payable to the Alternate Payee shall continue until the earlier of ...

Ex. 1.

5. In other provisions, the DRO purported to require the Board to force Mr. Akers to select a joint and survivor annuity and further provided that Mr. Akers was required to select Ms. Jones as the sole survivor beneficiary:

(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 Alternative 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.”

Ex. 1.

(A.R. 2-3, ¶¶ 4-5).

These conflicting provisions created an ambiguity in the June 2009 DRO. *See* syl. pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002) (“Contract language is considered ‘ambiguous’ where an agreement’s terms are inconsistent on their face....”). While the basic requirements for a QDRO are fairly straightforward, plan administrators determining whether a DRO should be “qualified” as a QDRO are obligated to protect the plan by determining whether the proposed QDRO would present a risk of competing claims for benefits. *Chenault v. Chenault*, 224 W. Va. 141, 146, 680 S.E.2d 386, 391 (2009) (per curiam) (DROs “must contain specific instructions and directives to the plan administrator” in order to be correct and enforceable).

The conflict in the June 2009 DRO was created when Ms. Jones added language to the model PERS QDRO in an attempt to create an affirmative requirement that Mr. Akers select, and CPRB pay, a joint and survivor annuity with Ms. Jones as the sole survivor beneficiary. Language in the model PERS QDRO explicitly gives the participant the option to choose the form of benefits, however. (A.R. 114-115, ¶ (7)(b), 7(d), (8)). The model QDRO also specifically references the general forms of benefit permitted by PERS: a lump sum payment or an annuity, including referencing an “optional” joint and survivor annuity. (A.R. 114, ¶ (7)(d)). This is consistent with the type of benefits payable in PERS generally, and with the fact that a

PERS member can generally revoke or change the form of benefit he wants to receive until the date he actually retires. *See* W. Va. Code §§ 5-10-22, 5-10-24.

As this Court recognized in *King v. King*, No. 35696, 2011 W. Va. LEXIS 242 (May 16, 2011) (Mem. D.), the language of the Model PERS QDRO - which was also in the June 2009 DRO - required CPRB to do precisely the opposite of what Ms. Jones intended. Quoting language identical from what is found in paragraph (7)(d) of the model QDRO and paragraph 7(d) of the June 2009 DRO, this Court held in *King* that an alternate payee was not entitled to “dictate what ‘retirement benefits’ are received by [the participant] to which she is to receive a 50% distribution.” *King*, 2011 W. Va. LEXIS 242 at *13 (A.R. 114-115, 119). Rather than remove or modify this language, in her attempt to dictate the form of benefits to be paid to Mr. Akers and require that she be the sole survivor beneficiary, Ms. Jones modified paragraph (7)(b) and added paragraph (7)(f), which clearly conflicted with paragraph 7(d) and other provisions of the DRO reserving all options to the participant, Mr. Akers. (A.R. 117-121). CPRB had to reject the DRO to avoid competing claims by Ms. Jones and Mr. Akers as to Mr. Akers’ right to elect the form of benefit or survivor beneficiary.

Ms. Jones responds that the language added to the Model QDRO was consistent with the agreement reached by herself and Mr. Akers, and memorialized in the Final Divorce Decree. The conflict or ambiguity within the DRO could not be resolved by looking to matters outside the DRO, such as the Final Divorce Decree; thus, Ms. Jones’ assertion that the added provisions were consistent with the Final Divorce Decree are not relevant. As this Court observed in *King*, “[i]n West Virginia, it is the QDRO which determines the allocation of

retirement benefits.” 2011 W. Va. LEXIS 242 at *14.² It is irrelevant whether paragraphs (7)(b) and (7)(f) were consistent with the Final Divorce Decree, which CPRB did not even have available at the time it reviewed the DRO. (A.R. 139). CPRB was only permitted to consider the DRO itself.

Ms. Jones takes issue with the fact that the Circuit Court’s conclusion of law declaring the June 2009 DRO internally inconsistent did not specifically reference paragraph (7)(f) of the June 2009 DRO. The Court’s Findings of Fact clearly identify all of the inconsistent provisions found in the DRO, including paragraphs (7)(b) and (7)(f). Ms. Jones also takes issue with the fact that the Circuit Court’s Final Order did not identify these ambiguities in the December 2010 DRO. This does not mean the Circuit Court had no basis to conclude the provisions were conflicting in the June 2009 DRO. It simply means that the Court did not address the inconsistencies in the context of the December 2010 DRO. Ultimately, the record is clear that the June 2009 DRO Ms. Jones submitted was ambiguous and therefore properly rejected by CPRB.

² See also W. Va. Code § 5-10-46 and W. Va. Code R. § 162-1-6.2 (2008) (providing that QDROs are the only exception to the general prohibition on execution, attachment, or garnishment); *Brown v. City of Fairmont*, W. Va., 221 W. Va. 541, 547, 655 S.E.2d 563, 569 (2007) (per curiam) (holding that “it is not necessary for the plan to look beneath the surface of the QDRO to inquire into its propriety under state law.” (citation omitted)); *McPhee v. Me. State Ret. Sys.*, 980 A.2d 1257, 1264 (Me. 2009) (A public pension plan administrator may not, in reviewing a DRO, determine “whether it squares with the intent of the parties or the divorce court as expressed in a separate settlement agreement or divorce judgment.”).

II. CPRB properly refused to accept and enforce the June 2009 DRO because it was inconsistent with PERS QDRO requirements.

A. PERS provisions govern the assignment of benefits in the course of a divorce and must be followed by CPRB when determining whether to qualify and enforce a DRO.

Generally, all of a PERS member's retirement account is exempt from any type of assignment; however, a member's benefits may be divisible if a valid QDRO is in effect. W. Va. Code § 5-10-46 provides that:

The right of a person to any benefit provided for in this article shall not be subject to execution, attachment, garnishment, the operation of bankruptcy or insolvency laws, or other process whatsoever, nor shall any assignment thereof be enforceable in any court except that the benefits or contributions under this system shall be subject to "qualified domestic relations orders" as that term is defined in Section 414(p) of the Internal Revenue Code as applicable to governmental plans.

Internal Revenue Code (the Code) § 414(p) applies to governmental plans, including PERS, only for the purpose of providing the same federal tax treatment to distributions made under a governmental plan QDRO as would apply to distributions made under a non-governmental plan QDRO.³ Code § 414(p)(11). Code § 414(p) does not actually define the substance of what constitutes a QDRO for PERS. Likewise, the QDRO provisions of the Employees Retirement Income Security Act of 1974 (ERISA), as amended, do not apply to governmental plans. 29 U.S.C. § 1003(b)(1).

Instead, PERS provisions govern what constitutes a QDRO, and unless those requirements are met, PERS benefits cannot be assigned through a court order, even to a former

³ Code § 414(p)(9) provides that all of paragraph (p) does not apply to those plans to which Code § 401(a)(13) does not apply. This includes governmental plans. See Code § 401(a) (stating that "Paragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 ... applies ...") and Code § 411(e)(1)(A) (stating that "The provisions of this section ... shall not apply to - a governmental plan."); see also Treas. Reg. § 1.401(a)-13a ("This section applies only to plans to which section 411 applies without regard to section 411(e)(2). Thus, for example, it does not apply to a governmental plan...").

spouse. See *State ex rel. Dep't of Health & Human Res. v. W.Va. Pub. Employees Ret. Sys.*, 183 W. Va. 39, 42, 393 S.E.2d 677, 680 (1990) (observing that W. Va. Code § 5-10-46 is the result of a public policy that “is especially wary of allowing garnishment of pension income,” and that garnishment is permitted only where statutorily authorized). While many governmental plan QDRO provisions are similar to their private-employer, ERISA-governed QDRO counterparts, they are not necessarily identical, and the body of law, practices and procedures that have been built around private employer plans may not have any application whatsoever to a governmental plan. See, e.g., Keith S. Bozarth, *QDROs and Public Pensions in Missouri*, 51 J. Mo. B. 149 (1995) (observing that in light of the exemptions for governmental plans from ERISA and the Code “the full range of standards normally applicable to QDROs does not apply ...”); Mark W. Dundee, Esq., *Qualified Domestic Relations Order Answer Book* (5th Ed.), Q 13:6 (“Each governmental plan is governed by its own set of laws; therefore, different requirements regarding the division of retirement benefits apply to each.”).

The QDRO requirements for PERS and other CPRB-administered plans is set forth in a legislative rule, and CPRB is prohibited from honoring any QDRO that does not meet the rule’s requirements:

6.1. The moneys in each of the Retirement Systems and the right of a person to receive any benefit ... are not subject to execution, garnishment ... or any other legal process whatsoever; and are not assignable nor transferable by any employee, retirant or beneficiary.

6.2. In cases of divorce or legal separation, the annuity, refund of accumulated contributions, or other provisions available to a member, retirant or beneficiary of any Retirement System may only be divisible as provided in this rule. ... [T]he Board shall not honor any Qualified Domestic Relations Order seeking to divide a members [sic] pension benefit which does not meet the requirements of this rule.

W. Va. Code R. § 162-1-6 (2008). (Since the time the June 4, 2009 DRO was issued, this Legislative Rule has been amended and renumbered, and now appears at W. Va. Code R. § 162-1-7 (2014). The parties agree that the language in effect at the time the June 2009 DRO was issued governs this case. All references to W. Va. Code R. § 162-1-6 hereafter refer to the version in effect when the June 2009 DRO was issued).

Absent a QDRO, Ms. Jones cannot obtain relief against CPRB, given the prohibition on assignment and alienation set forth in W. Va. Code § 5-10-46 and W. Va. Code R. § 162-1-6. Whether Ms. Jones had or has a valid claim against Mr. Akers, his estate, or Mrs. Akers is a separate issue. *See Kinsinger v. Pethel*, No. 13-0892, 2014 W. Va. LEXIS 1211 (Nov. 13, 2014) (concluding that an award of equitable distribution of property rights to a former spouse was not extinguished as against the former spouse even where the party failed to timely secure a QDRO). While Ms. Jones asserted claims against each of them in a lawsuit to which CPRB was not a party, she eventually voluntarily dismissed the case, choosing instead to pursue her claim only against CPRB. (A.R. 435-447). (Although she named Mrs. Akers in this suit, she claimed to do so only to “enable her to respond and protect her interests in the outcome of this litigation.” (A.R. 36, ¶ 19). Ms. Jones does not assert any claims in this lawsuit against Mrs. Akers for amounts she received that allegedly should have been paid to Ms. Jones, for example. *Kinsinger*, 2014 W. Va. LEXIS 1211 The Circuit Court’s order correctly ruled on the basis of CPRB’s authority to accept or reject QDROs.

- B. W. Va. Code R. § 162-1-6 generally limits the amount that can be divided to the marital property, and recognizes the participant’s right to select form of benefit and beneficiary; the June 2009 DRO violated these limitations.**

W. Va. Code R. § 162-1-6 applies a coverture factor, such that only the marital property portion of a PERS benefit can be assigned by a QDRO; any benefits attributable to

service credit earned prior to or after the marriage cannot be assigned by a QDRO. The rule states that:

the marital property portion of a member's or retirant's retirement benefit which is subject to division shall be computed by the Board by multiplying the Vested Accrued Retirement Benefit, less all benefits due to Exempt Service, by a fraction, the numerator being the number of years of contributing service incurred during the marriage, and the denominator being the total number of years of contributing service towards the pension at the date of separation or the date of divorce.

W. Va. Code R. § 162-1-6.2.1. The Vested Accrued Retirement Benefit is defined as the benefit that would be due the member as of the date of separation or the date of divorce (either can be elected by the parties or the court). W. Va. Code R. §§ 162-1-6.2.1.1, 6.2.2. Thus, the final average salary of the member as of the date of separation or date of divorce is also taken into account in cases where a member elects to receive a monthly annuity. *Id.*; *see also* W. Va. Code § 5-10-22 (setting forth the formula for determining a member's accrued benefit in the form of an annuity). In addition to service credit earned before or after the marriage, several other non-marital types of service credit are excluded from being treated as marital property, such as previously withdrawn service credit that was not reinstated in full by the date of separation or date of divorce and Exempt Service, consisting of noncontributory military service credit and accumulated sick and/or annual leave. W. Va. Code R. §§ 162-1-6.2.1, 6.2.1.2.

The rule's prohibition on awarding more than the marital property portion of the benefit is consistent with the statute governing the equitable division of property upon divorce in West Virginia, which defines "marital property" generally as "[a]ll property and earnings acquired by either spouse *during a marriage*." W. Va. Code § 48-1-233(1) (emphasis added). In the context of pensions generally, this Court has recognized that the phrase "during the marriage" authorizes the use of a coverture factor in the course of an equitable division of

property upon divorce, which in effect distinguishes between contributions to the retirement program and earnings accrued during the marriage from contributions and earnings accumulating before or after the marriage. *McGee v. McGee*, 214 W. Va. 36, 45-46, 585 S.E.2d 36, 45-46 (2003); *Butcher v. Butcher*, 178 W. Va. 33, 40, 347 S.E.2d 226, 233 (1987).

W. Va. Code R. § 162-1-6 also preserves a plan participant's right to choose the form of benefit or choose a survivor beneficiary, adopting a "shared payment approach," wherein benefits to the alternate payee are not available unless and until benefits are paid to the participant and only in the form elected by the participant. W. Va. Code R. § 162-1-6.2.3. Specifically, the rule provides that the Alternate Payee will be "paid an agreed upon or court ordered percentage of the marital property portion of the member's or retirant's Vested Accrued Retirement Benefit at the same time and in the same form as the benefit elected by and paid to the member once he or she enters pay status." *Id.* A QDRO may not "provide the alternate payee with any type or form of benefit, or any option, not otherwise provided under the plan." *Id.* at § 162-1-6.2.6.

This preservation of the participant's rights is consistent with PERS statutes. Private-employer plans subject to ERISA and Internal Revenue Code must pay a married member's benefits in the form of a joint and survivor annuity with the surviving spouse as beneficiary absent receipt of a waiver by the spouse. Code §§ 411(a)(11) and 417; 29 U.S.C. § 1055 (generally requiring plans to pay benefits in the form of a Qualified Joint and Survivor Annuity (QJSA) and Qualified Preretirement Survivor Annuity (QPSA) in the event of the death or retirement of a married participant unless the spouse executes a valid waiver). QDRO rules under the Code and ERISA expressly permit a QDRO to award all of the survivor benefits under a QJSA or QPSA to a former spouse, to the exclusion of a subsequent spouse. Code § 414(p)(5);

29 U.S.C. § 1056(d)(3)(F) (providing that “[t]o the extent provided in any [QDRO] - the former spouse of a participant shall be treated as a surviving spouse of such participant ... and any spouse of the participant shall not be treated as a spouse of the participant for such purpose). Thus, any plan provisions in a private-employer plan vesting the right to select the form of benefit or beneficiary in the participant are expressly modified by the law applicable to QDROs. These provisions do not apply to governmental plans, and as a result, PERS, like other governmental plans, operates very differently. *See* Code § 414(p)(9) and note 3, above; 29 U.S.C. § 1003(b)(1) (exempting governmental plans from 29 U.S.C. § 1056).

In contrast, a married PERS member may elect a straight life annuity, for example, or may nominate someone other than his or her spouse as the beneficiary even if a joint and survivor annuity is chosen, without the spouse’s waiver. W. Va. Code § 5-10-24 (2009) (This provision has also been amended since the time the June 2009 DRO was issued. References hereafter indicate the version at issue in June 2009 unless otherwise stated). These elections are generally irrevocable once retirement occurs, and in most cases, CPRB does not even receive an election from a member until retirement. W. Va. Code § 5-10-24. The only provisions permitting a QDRO to override a participant’s form of benefit and beneficiary elections, included in W. Va. Code § 5-10-24, are applicable only to changes to the form of benefit or beneficiary made by individuals who divorce or remarry after retirement. Thus, the express scope of the circumstances in which a QDRO can dictate how CPRB pays a benefit and who is the beneficiary is much more narrow in PERS than in an ERISA-governed plan.

The Circuit Court correctly determined that PERS provisions did not allow the June 2009 DRO to be enforced. The June 2009 DRO sought to supplant plan provisions limiting the application of a QDRO to marital property, and giving the participant the right to elect the

form of benefit and beneficiary. Lacking the necessary statutory authority, CPRB could not have qualified the June 2009 DRO. *See McPhee v. Me. State Ret. Sys.*, 980 A.2d 1257 (Me. 2009) (determining that a DRO could not be qualified because it attempted to transfer surviving spouse benefits without statutory authority); *Erb v. Erb*, 661 N.E.2d 175, 178-179 (Oh. 1996) (holding that a plan administrator could not comply with court order to pay a participant's benefits to his former spouse because it would violate the terms of the plan).

Two statements in the June 2009 DRO in particular attempted to require CPRB to pay the benefits as a joint and survivor annuity with Ms. Jones as the sole beneficiary, regardless of what Mr. Akers might have actually elected. In paragraph (7)(b), the DRO provided that “[t]he 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.” (A.R. 118). Paragraph (7)(f) followed, stating that “[t]he 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.” (A.R. 119). As discussed previously, these provisions contradicted other statements in the DRO, leaving it unclear what Mr. Akers’ and CPRB’s obligations under the order would be, but even assuming in Ms. Jones’ favor that these particular provisions controlled, CPRB could not accept the DRO because of them.

By attempting to name Ms. Jones as the sole survivor beneficiary for all of Mr. Akers’ benefits, the June 2009 DRO sought to award her more than the marital property portion of the benefit as defined by W. Va. Code R. § 162-1-6.2.1. Applying the rule’s formula, and assuming a 100% joint and survivor annuity with Mrs. Akers as the beneficiary, Mr. Akers’ Vested Accrued Retirement Benefit or VARB as of the date of separation would have been based

on 26.51882 years of service credit, and his final average salary as of the date of separation; however, by the time he retired, his actual monthly benefit was based on 30 total years of service credit, and a final average salary of \$40,104.28. (A.R. 171).

Under W. Va. Code R. § 162-1-6.2.1, a QDRO could only award Ms. Jones up to 100% of the benefits attributable to the 26.51882 years of service credit and final average salary at the date of separation; Ms. Jones could not receive more than that through a QDRO. Nonetheless, Ms. Jones asks CPRB to enforce the DRO that would have awarded her 50% of that amount while Mr. Akers was alive, but 100% of his total benefits after his death, including those not attributable to the marriage and thus not divisible by a QDRO. (A.R. 118-119, ¶¶ (7)(b) and (7)(f)). This would have meant that even upon Mr. Akers' death, Mrs. Akers would not have received any surviving spouse benefits, not even those attributable to her own marriage with Mr. Akers.

In addition to awarding Ms. Jones more than the marital property portion of the benefit, paragraphs (7)(b) and (7)(f) of the DRO sought to restrict Mr. Akers' ability to select the form of benefit and beneficiary, by requiring CPRB to pay his retirement benefits in the form of a joint and survivor annuity with Ms. Jones as the sole survivor beneficiary, even if Mr. Akers elected something different. Both the attempt to award non-marital property through a QDRO and the attempt to impose restrictions on Mr. Akers' elections were sufficient bases for CPRB to reject the June 2009 DRO since such requirements were not permitted by PERS statutes and legislative rules.

With regard to the limitation that a QDRO assign only the marital property portion of the benefit, Ms. Jones asserts that "no non-marital portion of the benefits paid to Mr.

Akers during his lifetime were divided,” implicitly admitting that the June 2009 DRO would award 100% of both the marital and non-marital benefits to Ms. Jones after Mr. Akers’ death. Ms. Jones argues that the June 2009 DRO did not actually restrict Mr. Akers’ options, and merely changed the timing of when he made his options. This argument has no merit. Ms. Jones clearly thought Mr. Akers was required to elect a joint and survivor annuity and name her as the sole beneficiary when he retired. More importantly in this case, she thought CPRB should pay the benefits as a joint and survivor annuity with her as the sole beneficiary, regardless of what Mr. Akers may have actually chosen at any time, prior to or at retirement. This is clearly an attempt to restrict Mr. Akers’ options and require CPRB to enforce those restrictions - timing has nothing to do with it.

Ms. Jones also argues that CPRB should have accepted the DRO because these provisions did not actually require CPRB to take any action. This argument also contradicts Ms. Jones’ position in this litigation - she has sued CPRB, including seeking money damages, all on the theory that CPRB should have accepted and enforced the DRO, regardless of what Mr. Akers might have actually elected himself. (*See, e.g.*, A.R. 33, ¶ 17-18, 21-24). Any claim by Ms. Jones that the objectionable provisions in the June 2009 DRO did not require CPRB to take any action are, simply, wrong. The very reason she included them in the June 2009 DRO was in an effort to require CPRB to enforce the restrictions against Mr. Akers.

Ms. Jones further claims that this Court’s decision in *King v. King* holds that a QDRO can include such restrictions, relying on dicta in which this Court stated that “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...” 2011 W. Va. LEXIS 242, at *11. The question of whether a PERS

QDRO could include these restrictions was not actually litigated in the *King* case, and the Court expressly recognized that the participant could have opposed such an attempt. *Id.* Moreover, CPRB was not a party to that case, and the question of whether W. Va. Code § 5-10-24 or W. Va. Code R. § 162-1-6 permitted such restrictions was not raised. If anything, the *King* case is instructive that CPRB will be subject to claims by participants if the agency attempts to take away the right to choose the form of benefit or a beneficiary absent clear and express statutory authority for the restriction.

C. W. Va. Code § 5-10-24 did not allow the June 2009 DRO to restrict the form of benefit or beneficiary upon Mr. Akers' initial retirement; only changes after retirement may be restricted by a QDRO.

Ms. Jones' primary response to the Circuit Court's ruling is that the restrictions she sought in the June 2009 DRO were expressly permitted to be included in a QDRO by W. Va. Code § 5-10-24. Under the clear language of this statute, Ms. Jones' reliance is misplaced. W. Va. Code § 5-10-24 allows such restrictions only in the case of changes to a retiree's election upon divorce or remarriage after retirement. Since those circumstances were not present here, CPRB had no authority to accept or enforce the June 2009 DRO.

As previously discussed, W. Va. Code § 5-10-24 generally makes retirement elections irrevocable after retirement. W. Va. Code § 5-10-24 establishes three exceptions to this general rule. First, if a retirant selected a joint and survivor annuity naming a spouse as beneficiary and began receiving monthly annuity payments, but his or her spouse then dies, the retirant may elect to begin receiving a straight life annuity, or may name a different beneficiary and have the benefit recalculated based on the new beneficiary and paid prospectively. *Id.* Second, if a retirant divorces after having retired, he or she may elect to begin receiving a different option, such as switching to a straight life annuity or naming a new beneficiary as a

result of the divorce after retirement. *Id.* Third, if a retirant remarries after retirement, the retirant may name his or her new spouse as the survivor beneficiary annuitant prospectively.

With regard to the latter exception, specifically at issue here, W. Va. Code § 5-10-24 provides that:

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: 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.

(emphasis added). “Retirants,” and “members,” are distinct persons under PERS. W. Va. Code § 5-10-18(a); *see also* W. Va. Code §§ 5-10-2(13) and (23) (defining a “member” as “any person who has accumulated contributions standing to his or her credit in the member’ deposit fund.” and a “retirant” as “any member who commences an annuity payable by the retirement system.”).

At the time the June 2009 DRO was issued and considered by CPRB, Mr. Akers was an actively employed member in PERS. (A.R. 171). Thus, Mr. Akers was not a “retirant,” and CPRB had no authority under W. Va. Code § 5-10-24 to accept a QDRO that would dictate how his benefits would be paid and to whom. Stated another way, payment of the benefits to Mrs. Akers was not the result of any “change” in form of benefit or beneficiary election by Mr. Akers to remove Ms. Jones - both the divorce and the remarriage occurred prior to Mr. Akers’ retirement altogether. (A.R. 107, 136). The only beneficiary elections CPRB ever received were for pre-retirement death benefits, which were not paid here. (A.R. 132-135, 277-279). Even had

the benefits been paid as a pre-retirement death benefit, Mr. Akers was still free to change his pre-retirement beneficiary election at any time, since none of the restrictions found in W. Va. Code § 5-10-24 applied to pre-retirement benefits at all. It is clear that W. Va. Code § 5-10-24's references to QDRO restrictions had no application to Mr. Akers' situation, or CPRB's actions in the context thereof.

Read together, PERS statutes and the QDRO legislative rule permit a QDRO to restrict the participant's right to choose the form of benefit or survivor beneficiary in only limited cases: when the participant is a retirant, and then divorces after retirement or remarries after retirement and seeks to change the form of benefit or survivor beneficiary as a result of divorce or remarriage after an effective retirement date. *See* syl. pt. 6, in part, *Cnty. Antenna Serv. Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 712 S.E.2d 504 (2011) (“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.”) (quoting *Freuhauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975)); *Nichols v. State*, 213 W. Va. 586, 584 S.E.2d 220 (2003) (per curiam) (applying the concept of regarding statutes in *pari materia* to legislative rules).

This is different than private employer plans, for which the Code and ERISA both expressly authorize a QDRO to contain these restrictions in all cases. *See* Code § 414(p)(5) and 29 U.S.C. § 1056(d)(3)(F) (requiring a former spouse to be treated as a surviving spouse for purposes of any Qualified Joint Survivor Annuity or Qualified Preretirement Survivor Annuity to the extent provided in any QDRO, to the exclusion of any spouse of the participant). A comparison of the language of the Code and ERISA provisions regarding QDROs to the

language used in W. Va. Code § 5-10-24 justifies very different results. (The QDRO legislative rule has since been clarified to make this more apparent to members, beneficiaries and their legal counsel, who may not be familiar with the unique rules governing public pension QDROs, since this limitation does not exist for private, ERISA-governed plans. *See* W. Va. Code R. § 162-1-7, effective July 1, 2014).

Ms. Jones complains that this fails to sufficiently protect the spouses of public employees, but it was likely designed precisely to provide protection to the public employees themselves, instead. PERS was established for the purpose of “provid[ing] a general retirement system for the employees of the state...” W. Va. Code § 5-10-3a. A Kentucky court considering a statute that classified certain government retirement accounts as non-marital property that could not be divided by a QDRO pointed out that pension plans for government employees “encouraged their continued service despite salaries which were legislatively found to be lower than those in private enterprise,” and that “[w]hile the wisdom of such an approach is not indisputable, it is not arbitrary and bears a substantial relation to a permissible governmental purpose.” *Haydon v. Haydon*, Nos. 2002-CA-000042-MR, 2002-CA-000079-MR, 2003 Ky. App. Unpub. LEXIS 64, at *19 (Aug. 8, 2003). Likewise, this Court can conclude that the express exclusion of non-marital property from the portion of a PERS benefit that can be subject to a QDRO, together with the express limitations on imposing form of benefit and beneficiary designations on participants through a QDRO, served a rational purpose: they account for the reality that participants are often married more than once over the course of a career, and allow for proportionate awards of benefits in the case of divorce based on the length of the marriage.

These kinds of restrictions are not uncommon in governmental plans. For example, an Ohio court recognized that the Ohio PERS system did not allow a QDRO to contain

a requirement that a participant must select a Joint and Survivor Annuity or name the alternate payee as the survivor beneficiary. *Beddell v. Beddell*, No. 2008 CA 00292, 2009 WL 4263631 (Ohio Ct. App. Nov. 23, 2009). That court determined that a plan provision stating that the alternate payee could have no right or privilege under a QDRO not otherwise provided in the plan prohibited a QDRO from restricting the form of benefit, and prohibited the plan administrator from enforcing such a QDRO. *Beddell*, 2009 WL 4263631, at * 3. PERS contains a similar limitation. See W. Va. Code R. § 162-1-6.2.6. The *Beddell* court also held that because the QDRO statute recognized that a member “may be eligible to apply for and receive either a monthly benefit *or* lump sum payment and provides for a division of that monthly benefit or lump sum payment to an alternative payee...,” the court could not limit the participant’s ability to choose the form of benefit. 2009 WL 4263631 at *3. Thus, the QDRO could only order that the alternate payee receive a portion of the monthly benefit or lump sum, as chosen by the participant. W. Va. Code R. §§ 162-1-6.2, 6.2.3 similarly recognize that a participant retains the right to select from among several benefit forms, including a return of contributions, straight life annuity or joint and survivor annuity.

As previously discussed, this does not mean that Ms. Jones had no entitlement to amounts in addition to those defined in the QDRO rule as marital property, simply that she could not enforce any such entitlement against CPRB directly using a QDRO. Had she submitted an acceptable QDRO - for example, using the model PERS QDRO - she would have begun receiving 50% of the marital property portion of the Vested Accrued Retirement Benefit effective January 1, 2010, and would continue to receive that amount monthly, until Mrs. Akers’ death. She could have even negotiated to receive 100% of the marital property portion. By failing to take into account the provisions governing PERS QDROs, and instead assuming that

the QDRO rules for private, Code- and ERISA-governed plans applied, she submitted a DRO that CPRB could not accept, even though there were reasonable alternatives that would have offered her the protection she sought.

D. Whether the June 2009 was consistent with the Final Divorce Order or what Mr. Akers could have elected voluntarily is irrelevant to whether CPRB could have accepted the DRO.

Ms. Jones makes several other arguments regarding matters beyond the language of the June 2009 DRO itself, and are therefore irrelevant. At issue in this case is CPRB's obligations, which are determined by only the QDRO itself. W. Va. Code § 5-10-46 and W. Va. Code R. § 162-1-6 (permitting CPRB to honor and enforce an assignment of a member's benefits only pursuant to a QDRO); *see also King*, 2011 W. Va. LEXIS 242 at *16 ("In West Virginia, it is the QDRO which determines the allocation of retirement benefits.").

First, Ms. Jones claims that the restrictions imposed by the June 2009 DRO were consistent with the Final Divorce Decree, which was in turn the product of agreement by the parties and had court approval. Whether the DRO is consistent with a Final Divorce Decree or agreement of the parties is not something a plan administrator can even consider when determining whether the DRO is enforceable as a QDRO. *See, e.g., McPhee*, 980 A.2d at 1264 (observing that the statute permitting QDROs "makes no provision ... for the [plan] to assess a proposed QDRO in relation to the related settlement agreement, divorce judgment, or other documents."). Likewise, PERS statutes and legislative rules applicable to this case contain no authority for consideration of the same. In fact, the Final Divorce Order was not even provided to CPRB until long after the June 2009 DRO, and therefore could not have even been considered by CPRB. (A.R. 117, 139).

Ms. Jones also argues that PERS provisions governing survivor benefits “trump” the QDRO rules, and that since the survivor benefits rules would have permitted Ms. Jones to be named the survivor beneficiary, the QDRO should have been permitted to do the same. CPRB has never disputed that Mr. Akers could have voluntarily selected anyone with an insurable interest, which would have included Ms. Jones, as the survivor beneficiary. *See* W. Va. Code § 5-10-24; W. Va. Code R. § 162-1-7 (2008). This is a separate question from whether a QDRO could dictate how CPRB would pay benefits notwithstanding any election by Mr. Akers to the contrary. It is clear that W. Va. Code § 5-10-24, W. Va. Code § 5-10-46 and W. Va. Code R. § 162-1-6 are the provisions governing QDROs.

What Mr. Akers could have done voluntarily is not at issue in this case, and is relevant only to claims Ms. Jones may have against Mr. Akers’ estate. Ms. Jones does not acknowledge in her appeal that the QDRO is not the exclusive method for receiving benefits in a divorce. Courts, including this Court, have recognized that where a QDRO could not be used to obtain the full extent of the benefits a participant agreed or was ordered to pay to an alternate payee, an alternate payee could still be entitled to relief against the participant himself. *Kinsinger*, 2014 W. Va. LEXIS 1211 (concluding that an award of equitable distribution of property rights to a former spouse was not extinguished as against even where the party failed to timely secure a QDRO); *see also Butcher*, 178 W. Va. at 39 (observing that in the context of a military pension with limitations on the amount that could be awarded under a QDRO, a Minnesota court had held that “a state court wishing to award a former spouse more than 50 percent of disposable retired pay must order direct government payments *and* payments by the member of the military to the spouse.” (emphasis in original; citation omitted)); *Fischbach v. Mercuri*, 919 N.E.2d 804 (Ohio Ct. App. 2009) (applying a constructive trust against a plan

participant in light of statutes relating to public retirement plan that prohibited direct enforcement of divorce judgment against the plan)). Ms. Jones inexplicably voluntarily dismissed her attempts to obtain such relief against Mr. Akers, his estate and Mrs. Akers. (A.R. 446). Thus, as often as Ms. Jones may claim that the QDRO rules do not sufficiently protect those in her situation, she refuses to recognize that the QDRO is not the only method for obtaining relief, and that she failed to pursue those other remedies of her own accord.

III. The Circuit Court correctly ruled that the December 2010 DRO could not be enforced posthumously.

The Circuit Court concluded that the December 2010 DRO was unenforceable because it was submitted after the death of Mr. Akers, and, similar to the June 2009 DRO, conflicted with applicable law. (A.R. 13-14). By the time the December 2010 DRO was issued, a year had passed since survivor benefits vested in Mrs. Akers. Ms. Jones did not actually submit the December 2010 DRO to CPRB and ask that it be enforced until March 2011. (A.R. 164-165). CPRB could not enforce the DRO because it had no authority to divest a survivor - beneficiary already receiving benefits under a joint and survivor annuity.

In asserting that CPRB should have and could have accepted the December 2010 DRO posthumously, Ms. Jones relies primarily on authority issued by courts considering ERISA-governed pension plans. These rules do not apply to PERS, nor does PERS contain any comparable provisions. For example, the decision in *Nat'l City Corp. v. Ferrell*, 2005 WL 2143984, at *4 (N.D.W.Va. 2005), the primary case on which Ms. Jones relies in her appeal for this issue, determined that posthumous QDROs could be acceptable in light of an ERISA statute. The ERISA statute requires plans to segregate funds for a period of time while the question of whether a DRO is a QDRO is pending, even if the benefits are otherwise in pay status. 29

U.S.C. § 1056(d)(3)(H)(i). The Court in *Ferrell* determined that the 18-month segregation period established by ERISA did not terminate upon the death of the participant. 2005 WL 2143984, at * 4-5. Subsequent to the *Ferrell* decision, Department of Labor (DOL) regulations were modified to expressly recognize that posthumous QDROs can be enforced generally, but only as long as they meet the other requirements of a QDRO. 29 C.F.R. §§ 2530.206(c), (d).

PERS has no similar provision granting CPRB authority to withhold funds during the process of determining whether a QDRO is enforceable, or expressly permitting enforcement of a posthumous QDRO. Rather, W. Va. Code § 5-10-24 (2010) states that “[u]pon the death of a retiree who elected option A, his or her reduced annuity shall be continued through the life of and paid to the beneficiary ...” and provides no exception for receipt of a QDRO after this point other than the circumstances not present here. The Circuit Court correctly determined that once the participant died, the benefit to the survivor beneficiary, Mrs. Akers, became irrevocably payable. (A.R. 14, ¶¶ 28-29).

In response, Ms. Jones argues that since Mr. Akers did not actually complete his retirement “elections,” a posthumous QDRO must therefore be acceptable notwithstanding W. Va. Code § 5-10-24 (2010). The key event was not the election, but the death of the participant and corresponding commencement of payments to the survivor beneficiary, as the Circuit Court determined in paragraph 29 of its Final Order. (A.R. 14). At that point, there is no longer a benefit due to the participant that can be subject to a QDRO. *See Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 156-157 (4th Cir. 1997) (holding, under ERISA, that a surviving spouse’s benefits generally vest at the time of the participant’s death).

The Circuit Court also determined that the December 2010 DRO was not enforceable because, like the June 2009 DRO, it would have required CPRB to violate plan provisions limiting a QDRO to the marital property portion of a benefit, and granting the participant election rights. (A.R. 3-14); *see* W. Va. Code § 5-10-24 (2010) and W. Va. Code R. § 162-1-6 (2010). For the same reasons set forth above with regard to the June 2009 DRO, CPRB believes this ruling was correct and should be affirmed. Ms. Jones responds that because no election was made, a posthumous QDRO cannot be at odds with state provisions governing the participant's right to select a benefit. Ms. Jones would have this Court hold, then, that posthumous QDROs are acceptable only in the rare cases that a retiree does not complete his form or benefit and beneficiary election - something that happens only in the case of a posthumous disability. Such a distinction is illogical.

Finally, Ms. Jones claims that the CPRB must recognize a posthumous QDRO because the model PERS QDRO allows for prospective amendments and modifications. To make this argument, Ms. Jones relies on one provision in the model PERS QDRO to the exclusion of all others, and to the exclusion of all other applicable plan provisions, including those that vest benefits in the survivor beneficiary as of the date of the participant, those that limit the application of a QDRO to the marital property portion of the benefit, and those that make a participant's benefit form and beneficiary selection irrevocable upon retirement, for example. If her claim is that she interprets the model PERS QDRO to permit a prospective amendment or modification of a QDRO that violates all other legal requirements for a QDRO, it should be dismissed. The Circuit Court's determination that CPRB could not accept a posthumous QDRO in this case should be affirmed.

IV. The Circuit Court correctly ruled that Ms. Jones was barred by laches from seeking relief against CPRB because her delay in pursuing and modifying the June 2009 DRO resulted in prejudice to the CPRB.

The Circuit Court concluded that, putting all of the substantive issues aside with respect to the two DROs, CPRB was entitled to summary judgment because Ms. Jones was barred by laches from seeking any relief against CPRB. (A.R. 15-16). This was based on Ms. Jones' failure to pursue her request for a QDRO for more than seven months after submitting the June 2009 DRO to the CPRB, during which time Mr. Akers remarried and then died. (A.R. 15).

In response, Ms. Jones first claims that if this Court determines that the June 2009 DRO was valid and enforceable, laches is no bar to relief. CPRB disagrees. The doctrine of laches applies regardless of whether the party against whom it is asserted would otherwise have a valid claim for relief. *Province v. Province*, 196 W. Va. 473, 483, 473 S.E.2d 894, 904 (1996) (“laches is an equitable doctrine based on the maxim that equity aids the vigilant, not those who slumber on their rights.”) (citations and internal quotations omitted); *see also State ex rel. Smith v. Abbot*, 187 W. Va. 261, 418 S.E.2d 575 (1992) (refusing a natural father's appeal on the basis of laches, even where this Court concluded that the original adoption order was “technically invalid,” because the natural father failed to contest the adoption in a timely manner). The elements for establishing laches are: (1) a lack of diligence by the party against whom laches is asserted, and (2) prejudice to the party asserting laches. *Province*, 196 W. Va. at 483. Whether Ms. Jones should have prevailed on her request to enforce the June 2009 DRO substantively is not an element that should be considered.

Ms. Jones also claims laches is no bar to relief because even had she timely objected, she does not believe the case would have been resolved prior to Mr. Akers' remarriage or death. There is no evidence or proof that establishes this assertion. Moreover, she could have

had a modified, acceptable DRO entered well before the remarriage and death of Mr. Akers that provided her greater protection and benefits, even if not to the fullest extent she sought with the June 2009 DRO, and sought remaining relief against Mr. Akers directly. *See Kinsinger*, 2014 W. Va. LEXIS 1211. There is no reason to believe some relief or substantial, if not whole, mitigation of her claimed damages could have been achieved, had she diligently sought to pursue the matter. Instead, she voluntarily dismissed the case she brought against Mr. Akers, his estate, and Mrs. Akers, decided not to accept any responsibility for her lack of diligence, and instead placed all bets on obtaining relief from CPRB.

Third, Ms. Jones claims CPRB cannot obtain relief through laches because it should have paid the disputed benefits to Mr. Akers' legal representative. She basis this claim on W. Va. Code R. § 162-1-7.1.2 (2008), which provides that

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 court order. The Board shall accept the Last Will and Testament of the deceased member or retirant for the purposes of payment to the estate under this subdivision.

This provision is not mandatory, and should not prevent CPRB from obtaining relief on the basis of laches. More importantly, Ms. Jones' argument implying that CPRB somehow violated this provision conveniently ignores that at the time benefit payments commenced, Mrs. Akers was the legal representative for his estate. (A.R. 208, 435). Ms. Jones also omits from her argument the fact that she never made a demand that CPRB make payment to the legal representative of Mr. Akers' estate, instead demanding only that payment be made directly to her. (A.R. 154-155, 159-161). Her argument regarding this regulation has no merit.

Ms. Jones next argues laches is no bar by again pointing out that QDROs can be amended and enforced prospectively. This contradicts the position Ms. Jones has taken against CPRB in demanding that benefits be paid to her as if she had been the sole survivor beneficiary from the commencement of the benefit payments. She is seeking something more than prospective payment. The June 2009 DRO also required Ms. Jones to “cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan Administrator consistent with applicable law.” (A.R. 63). Ms. Jones clearly failed to comply with this requirement, and therefore cannot now claim that the fact that a QDRO can be amended entitles her to evade this responsibility.

Finally, Ms. Jones claims laches cannot apply because neither she nor her attorney were aware the QDRO had been rejected. She does not dispute that they took no action to follow-up, inquire, or contact CPRB for seven months after submitting the DRO, however. (A.R. 348-349). That Ms. Jones and her attorney were aware that they had received no response and still made no attempt to pursue the claim is sufficient to establish laches.

Since the Circuit Court order was issued and this appeal initiated, this Court ruled that laches could apply to bar someone from getting a QDRO. *Kinsinger*, 2014 W. Va. LEXIS 1211. In *Kinsinger*, the participant withdrew his benefits from the plan during the alternate payee’s delay in obtaining a QDRO. *Id.* at * 4. Thus, there was nothing left in the plan for a QDRO to apply to, causing the plan administrator to reject the QDRO. *Id.* In that case, the Court held that laches barred a contempt order against the participant, who withdrew the funds despite the divorce agreement awarding them to the alternate payee, but further ruled that laches did not bar any claim for the funds the alternate payee nonetheless had against the participant.

Id. at * 14-15. Here, it is the plan that is prejudiced, but Ms. Jones may nonetheless pursue her claims against Mr. Akers directly.

V. Ms. Jones is not entitled to any of the types of relief she seeks in her Amended Petition for Writ of Mandamus and Complaint for Declaratory Judgment, Injunction and Damages.

The Circuit Court concluded that CPRB was entitled to summary judgment on each of Ms. Jones' claims, consisting of a Petition for Writ of Mandamus, and a Complaint for Declaratory Judgment, Injunction and Damages, because it properly rejected both the June 2009 and December 2010 DROs, and because Ms. Jones was barred by laches from pursuing relief against CPRB. For the reasons set forth above, CPRB respectfully requests this Court to affirm the Circuit Court's order, and deny Ms. Jones' appeal.

In addition, the Circuit Court determined that Ms. Jones' request for a writ of mandamus should be denied because CPRB's decisions regarding the June 2009 and December 2010 were discretionary. (A.R. 17). As this Court has held, a "non-discretionary or ministerial duty in the context of a mandamus action is one that 'is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]'" *Nobles v. Duncil*, 202 W. Va. 523, 534, 505 S.E.2d 442, 453 (1998) (citing syl. pt. 3, in part, *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972)). There is sufficient authority governing the complexity of governmental plan QDROs to establish that Ms. Jones' entitlement to a QDRO is not "so plain in point of law and so clear in matter of fact that no element of discretion" is left to CPRB. While some of CPRB's responsibilities related to DROs are non-discretionary - for example, the requirement to actually review, consider and approve or reject a QDRO - there are others, such as determining whether the QDRO is consistent with the plan, which will inevitably involve discretion. Because the mandamus form of relief was not intended

to prescribe the manner in which a government officer or agency should act, but rather to simply require them to act, CPRB respectfully requests that this Court also affirm the Circuit Court's summary judgment against Ms. Jones on this basis as well. *Id.* at 453-454 (citing syl. pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924)).

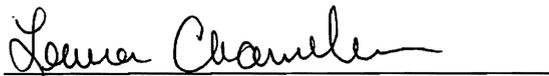
Ms. Jones' claims for damages rests in large part on W. Va. Code § 5-10-24 which, for the reasons previously described, did not apply to CPRB in determining whether her request to enforce either QDRO should have been granted. She also claims damages under the PERS error correction statute, W. Va. Code § 5-10-44. Even if CPRB's determination that the QDROs were not enforceable is reversed, CPRB urges the Court to consider that a requirement to pay damages would create an unfunded liability for the plan in light of the payments PERS has and continues to make to Mrs. Akers. Moreover, given Ms. Jones' own contributions to the damages she seeks, CPRB requests that any damages awarded be reduced to account for her own failure to mitigate her damages.

Conclusion

For the foregoing reasons, CPRB respectfully requests that the Court affirm the Circuit Court's order granting summary judgment in favor of CPRB.

West Virginia Consolidated Public
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Certificate of Service

I hereby certify that on this 19th day of December 2014, a true and accurate copy of the foregoing **Response of CPRB to Petitioner Patricia Jones** was deposited in the U.S. Mail, contained in a postage-paid envelope, addressed to counsel for all other parties to this appeal as follows:

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