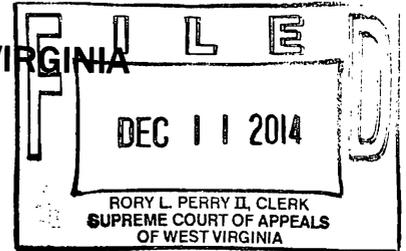


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0734



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

**PETITIONER,**

vs.)

**APPEAL FROM THE CIRCUIT COURT  
OF KANAWHA COUNTY (10-C-746)**

**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.**

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**RESPONDENT JUDY VANNOY AKERS' RESPONSE  
TO PETITIONER'S BRIEF**

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## **RESPONDENT JUDY AKERS' RESPONSE TO PETITIONER'S ASSIGNMENT OF ERRORS**

Petitioner Jones lists five assignments of errors. These assignments of errors refer to two decisions by the Circuit Court of Kanawha County who confirmed the Board's denial of the June 4, 2009, Domestic Relations Order as being invalid and improper, as well as a posthumous Domestic Relations Order entered on December 9, 2010. The remainder of Petitioner Jones' assignment of errors refer to the failure of the Circuit Court of Kanawha County to pay and enforce the previous disapproved Domestic Relations Orders of June 4, 2009, and December 9, 2010. Respondent Judy Akers' asserts that the Board was correct in disapproving both the June 4, 2009 Domestic Relations Order and the posthumously entered June 9, 2010, Domestic Relations Order. Respondent Judy Akers also asserts that the Circuit Court of Kanawha County was correct in paying the surviving spouse annuity benefits to her rather than Patricia Akers since Danny Akers was not retired nor had he become disabled at the time of his death on December 16, 2010.

### **STATEMENT OF THE CASE**

This case concerns preretirement death benefits and not post- retirement benefits earned as a result of Danny Akers' 30 year employment with the West Virginia Department of Highways, and whether disapproved QDROs can impact preretirement surviving spouse benefits. The real question is whether a member of the Consolidated Public Retirement Board plan can disenfranchise his current spouse from his preretirement benefits. Throughout this brief, Petitioner Jones will be referred to as "Petitioner Jones"; the West Virginia Consolidated Public Retirement Board will be referred to as the "Board"; and the widow of Danny Akers will be hereinafter referred to as "Mrs. Akers".

### **FACTS**

Patricia Jones and Danny Akers were married on August 1, 1975, separated in 2006, and had a final divorce hearing on December 19, 2007, which was not entered until June 30, 2008. (See Vol. I, App 117). On June 4, 2009, at the hearing before Family Law Judge Griffith, the parties

appeared pursuant to the petition for modification. At that hearing, the Court did relieve Danny Akers from the house payment since Patricia Jones had left the marital residence and remarried on April 19, 2009, and ordered the cessation of alimony. Further, Family Law Judge Griffith reviewed Family Law Judge Edwin Wiley's Order from the December 19, 2007, hearing which Order was not entered until June 30, 2008, wherein Family Law Judge Wiley had determined that the Final Order was not made by fraud, duress, or coercion, and was entered into voluntarily by all parties. Family Law Judge Griffith found, on June 4, 2009, as follows:

“By law the payment of alimony by Danny Akers to Patricia Akers, now Jones, ceased from the date of her remarriage on April 19, 2009 . . .”  
(Vol. I, App 128, ¶1).

The Court went on to find that the court orders pursuant to the Final Order entered by Judge Wiley and the Qualified Domestic Relations Order entered herein that,

**“after retirement and upon Mr. Akers’ death**, the alternative payee, Patricia Akers (now Jones), is the sole beneficiary of the retirement benefits accrued and earned by Danny Akers. The Court acknowledges that Mr. Akers has executed the appropriate documents in regard thereto.”  
(Emphasis added). (Vol. I, App 128, ¶3).

The Court went on to hold that,

“The Court also enters the executed Qualified Domestic Relations Order which the Court finds complies with the terms of the June 30, 2008, Final Order which awarded Patricia Akers (now Jones) 50% of Mr. Akers’ retirement benefits accrued up and to July, 2006.”  
(Vol. I, App 128, ¶4).

On July 6, 2009, the Board rejected the June 4, 2009, Domestic Relations Order. (See Vol. I, App 140).

In early 2010, Judy Akers and the Estate of Danny Akers were sued by Plaintiff Patricia Jones. (Vol. II, App 435). Ann Lambright was the Executive Director of Consolidated Public Retirement Board at all times relevant hereto and was subpoenaed to testify on March 29, 2010. (See Vol. II, App 606). During Ann Lambright’s testimony she explained that Danny Akers had not yet met the requirements of retirement as he had not attained the age of 55. As a result of him being an active employee and

not a retirant, he had the election to leave to his surviving spouse as Ann Lambright testified,

**“He would be eligible to leave to his surviving spouse, and it has to be his spouse at the time of death --- yes, spouse at the time of death -- a -- what is known as a surviving spouse benefit, and it’s in the statute.” (Emphasis added). (Vol. II, App 623).**

Executive Director Ann Lambright confirmed that the law trumps any beneficiary forms entered into prior to his remarriage.

**“ . .but the law trumps the beneficiary form because he was remarried at the time that he died.” (Vol. II, App 606, Pg. 627).**

Ann Lambright further confirmed that,

**“No matter what he (Danny Akers) chose -- I don’t care if he had chosen your client (Patricia Jones), she would not have been able to receive it, because the pre-retirement section of the code says that the surviving spouse has to receive that benefit -- the actual surviving spouse, not the surviving ex-spouse.” (Vol. II, App 627).**

The Jones Domestic Relations Order followed the language in the Final Order which required Danny Akers to name his former spouse as a beneficiary of his retirement benefits. According to the statutory law of West Virginia, a domestic relations order cannot require a participant to name a certain beneficiary as Director Lambright opined,

**“The QDRO cannot require a participant, who at that point is not retired yet -- a QDRO cannot require a participant to name anybody as a beneficiary. And it also cannot require the participant to choose one of the options.” (Emphasis added). (Vol. II, App 632).**

Executive Director Lambright was clear that a QDRO cannot direct the participant, Danny Akers, to choose the same beneficiary as the Final Order directed him to because the IRS would disqualify the State of West Virginia’s Plan and further that the West Virginia Legislature had adopted this specific model QDRO which cannot be changed. Director Lambright confirmed the QDROs are only for retirement benefits. (Vol. II, App 606, Pg. 647). Preretirement death triggers the application of the preretirement death benefit statute (W.Va. Code §5-10-27(b)). (See Vol. II, App 606, Pgs. 653-654).

**Executive Director Lambright opined,**

**“ . . . It converted the surviving spouse benefit that Mrs. Akers was to receive, under the pre-retirement code section I just gave to you. (§5-10-27) . . . to a disability benefit. It doesn't change the dollars, but what it changes is the tax benefits. It is much more beneficial tax-wise, both federal and state, to have a disability pension rather than a surviving spouse pension.” (Vol. II, App 653 and 654).**

**Executive Director Lambright further confirmed that Patricia Jones never sent the proposed QDRO to the Board for approval prior to Family Law Judge Griffith entering it on June 4, 2009, which is the way the Board always handles proposed QDROs. As she testified, this one (DRO) is unique in that you didn't send us a draft before she (the Family Judge) signed it. Further questioning revealed that Executive Director Lambright and the Board never received Danny Akers' designation of Patricia Jones as the annuitant of the preretirement benefits which Mr. Akers signed in the Courthouse on June 4, 2009. Executive Director was asked to assume that she received the preretirement designation to Petitioner Patricia Jones and she was asked to assume that Danny Akers got married, which happened when Danny Akers married on September 6, 2009, then any preretirement death benefit election means nothing because he remarried and died before he retired.” (See Vol. II, App 606, Pg. 674).**

**Executive Director Lambright further confirmed that the DRO that was submitted and rejected was because the DRO involved things that dealt with preretirement benefits and QDROs can only deal with retirement benefits.” (See Vol. II, App 606, Pgs. 71-72).**

**Executive Director Lambright summed up Patricia Jones' predicament when she confirmed that a surviving spouse is preretirement and that there is no surviving spouse in post-retirement situations.**

**“ . . . Surviving spouse or survivor beneficiary goes to pre-retirement benefits language after that, and electing a joint and survivor annuity and naming the Alternate Payee as the beneficiary thereof - - actually, it doesn't quite make sense. You're not a beneficiary of the joint and survivor.” (Vol. II, App 689).**

Thereafter, Honorable Aboulhosn, Mercer County Circuit Judge, did find, in his Order dated July 26, 2010, that,

**“The decedent, Danny K. Akers, was not retired at the time of his death and not disabled at the time of his death.” (Vol. II, App 444).**

**PETITIONER JONES SEEKS NO MONEY DAMAGES OR  
MAKES ANY CLAIM AGAINST JUDY AKERS IN THIS CASE**

Petitioner Jones’ Amended Complaint asserts no duties owed by Judy Akers nor any breach of any such duties nor does she make any claim for any money damages owed from Judy Akers to Patricia Jones. Patricia Jones’ Amended Complaint addresses Judy Akers in Paragraphs 19 and 38 of her Amended Complaint as follows,

**“Respondent/Defendant Judy Akers is named herein as a party to enable her to respond and protect her interests in the outcome of this litigation.” (Vol. I, App 36 and 47).**

Additionally, in Petitioner Jones’ responses to Judy Akers’ request for admissions, she responded as follows,

**Request No. 1 “In regard to this action, please admit that Judy Akers did not owe you any duty as your right to receive benefits from Judy’s deceased husband’s retirement plan.”**

**Response: “Admit as to this action.”**

**Request No. 2 “In this action please admit that you did not assert any direct claim against Judy Akers stating that she owes you any duty; that Judy Akers violated any duty to you; and that Judy Akers, individually, owes you any money.”**

**Response: “Admit as to this action.”**

**Request No. 3 “Please admit that only the Board would owe you any duty or money in this action.”**

**Response: Admit as to this action.”  
(Vol. II, App 590 and 591).**

## **SUMMARY OF ARGUMENT**

Family Law Judge Mary Ellen Griffith determined that Petitioner Jones' rights to Danny Akers' retirement benefits commences only after retirement and thereafter upon his death.

West Virginia Code §5-10-24 applies only to retirants. Since Mr. Akers was not retired nor disabled at the time of his death, this section does not apply whatsoever in this case. Additionally, West Virginia Code of State Rules §162-1-7.1.1 takes a back seat behind West Virginia statute, §5-10-27(b)(1). As a result, neither Domestic Relations Order entered June 4, 2009, nor the Domestic Relations Order entered December 9, 2010, which were disallowed, can supersede the mandatory application of West Virginia Code §5-10-27(b)(1) pertaining to preretirement death benefits.

## **STANDARD OF REVIEW**

Respondent agrees that the standard of review is *de novo*.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The issues in this appeal are a matter of statutory construction and as a result, oral argument should not be necessary. Additionally, Judy Akers believes that the facts and legal arguments should be adequately presented in the Briefs and the record on appeal and that the decisional process would not be significantly aided by oral argument.

## **ARGUMENT**

### **THE BOARD WAS CORRECT IN DISALLOWING THE JUNE 4, 2009, DOMESTIC RELATIONS ORDER**

Patricia Jones would have one believe that her ex-husband, Danny Akers, could not remarry and have an actual surviving spouse upon his death, preretirement. Rather, Petitioner Jones asserts that only she can be deemed the surviving spouse upon Danny Akers' death because of the terms of the Final Divorce Decree and the Domestic Relations Order entered June 4, 2009, makes it so.

When this Court sent back Judge Kaufman's Dismissal Order for failure to state a claim

entered by the Circuit Court of Kanawha County in Jones v. West Virginia Public Employees Retirement System and Judy Akers, No. 101327, decision rendered September 23, 2011, appeared to place great emphasis upon post-divorce elections of beneficiaries prior to the entry of the domestic relations order wherein this Court stated,

“Prior to the Board deciding whether the QDRO would be accepted and honored, Mr. Akers changed the name of his surviving beneficiary to his fiancée and later wife, Respondent Judy Vannoy Akers, in violation of the parties’ agreement, the Family Court divorce order, and the Family Court’s QDRO submitted to the Board. This was done without the knowledge of the Petitioner or her lawyer. Further, nothing in the record or the brief indicates that the Board knew of Mr. Akers’ changing of the surviving beneficiary.” Jones, Ibid.

Unfortunately, a record had not been developed which would have shown the inaccuracy of the above misstatement of fact as follows,

1. On May 7, 2009, Danny Akers filed with the Board his preretirement beneficiary options, naming Judy Vannoy, fiancée, and Jordan Smith, grandson, secondary beneficiaries. (Vol. I, App 134).

2. On June 4, 2009, Danny Akers named Patricia Akers Jones as his preretirement death benefit beneficiary at 100%. (Vol. I, App 135).

More significantly, however, this Court was unaware of the actual Order entered on July 10, 2009, by Family Law Judge Griffith as a result of the June 4, 2009 hearing, when Judge Griffith specifically found, pursuant to the Final Order entered by Judge Wiley,

“ . . .and the Qualified Domestic Relations Order entered herein, that **after retirement AND UPON MR. AKERS’ DEATH, THE ALTERNATIVE PAYEE, PATRICIA AKERS (NOW JONES), IS THE SOLE BENEFICIARY OF THE RETIREMENT BENEFITS ACCRUED AND EARNED BY DANNY AKERS.** The Court acknowledges that Mr. Akers has executed the appropriate documents in regard thereto. (Emphasis added). (Vol. I, App 128, ¶3).

As a result of the findings in the foregoing Order, it is clear that Danny Akers did not violate any of the terms of the Final Order prior to the Board receiving the rejected QDRO because it hadn’t

even been entered until June 4, 2009, and the one change that Danny Akers made reflected pre-retirement benefits occurred on May 7, 2009. Executive Director Ann Lambright's testimony as to why she disallowed and rejected the June 4, 2009, Domestic Relations Order, clearly renders the Petitioner's prior position in front of this Court when it issued its decision inapplicable. Director Lambright explained that Danny Akers had not yet met the requirements of retirement as he had not obtained the age of 55. As the result of him being an active employee and not a retirant, he had the election to leave to his surviving spouse as follows,

**"He would be eligible to leave to his surviving spouse, and it has to be his spouse at the time of death -- yes, spouse at the time of death -- a -- what is known as a survivor spouse benefit, and it's in the statute. (Emphasis added). (Vol. II, App 623).**

Executive Director Lambright went on to testify that,

**". . . but the law trumps the beneficiary form because he was remarried at the time that he died.**

**No matter what he (Danny Akers) chose -- I don't care if he had chosen your client (Patricia Jones), she would not have been able to receive it, because the pre-retirement section of the code says that the surviving spouse has to receive that benefit -- the actual surviving spouse, not the surviving ex-spouse." (Vol. II, App. 627).**

The dicta cited by Petitioner Jones in the King v. King and King case, 2011 Lexis 242, No. 35696, May 16, 2011, remains just that. The Board was never a party in that case and thus whether or not the Board would have accepted such language in the QDRO was not decided. Executive Director Lambright was clear that the June 4, 2009 QDRO could not be accepted because it deemed Patricia Jones to be the surviving spouse. When she testified that,

**"The QDRO cannot require a participant, who at that point is not retired yet -- a QDRO cannot require a participant to name anybody as a beneficiary. And it also cannot require the participant to choose one of the options." (Vol. II, App 632).**

Contrary to Petitioner Jones' assertions, the circumstances of the case at bar are not analogous to the circumstances in Perkins v. Prudential Insurance Company of America, 455 F.Supp. 499 (So. Dist. of WV, 1978). That case dealt with a life insurance policy where the husband was

ordered in his divorce case to name the children from his former marriage as beneficiaries of the said life insurance. Thereafter the husband changed the designation of the beneficiary to a new spouse without the knowledge of his former spouse or children. In this case, Family Law Judge Mary Ellen Griffith specifically found that after retirement and upon Mr. Akers' death, Patricia Jones is the sole beneficiary of the retirement benefits accrued and earned by Danny Akers.

**“ . . .and the Qualified Domestic Relations Order entered herein, that after retirement AND UPON MR. AKERS' DEATH, THE ALTERNATIVE PAYEE, PATRICIA AKERS (NOW JONES), IS THE SOLE BENEFICIARY OF THE RETIREMENT BENEFITS ACCRUED AND EARNED BY DANNY AKERS. The Court acknowledges that Mr. Akers has executed the appropriate documents in regard thereto. (Emphasis added). (Vol. I, App 128, ¶3).**

The District Court's ruling in the Perkins case bears no relevance to the facts of the case at bar as confirmed by Judge Griffith's ruling. At the time of the submission of the June 4, 2009, Domestic Relations Order to the Board, Danny Akers was in full compliance with all his duties and obligations of the final divorce decree.

Petitioner Patricia Jones continues to confuse a beneficiary with surviving spouse. A beneficiary is designated preretirement and prior to death. Once the active employee (not retired) remarries, then it doesn't matter what beneficiary was chosen by election nor ordered to be chosen by a final order because he has an actual surviving spouse. In explaining why the June 4, 2009, DRO was rejected, Executive Director Ann Lambright testified,

**“ . . . Surviving spouse or survivor beneficiary goes to pre-retirement benefits language after that, and electing a joint and survivor annuity and naming the Alternate Payee as the beneficiary thereof - - actually, it doesn't quite make sense. You're not a beneficiary of the joint and survivor.” (Vol. II, App 689).**

**WEST VIRGINIA CODE OF STATE RULES 162-1-6.21 DOESN'T APPLY TO THE CASE AT BAR.**

The applicable rule in Section 162-5-19.3, Survivor Annuity, states if a member dies prior to retirement, like Danny Akers, a survivor annuity is payable pursuant to West Virginia Code §5-10-27 which pays the annuity to the actual surviving spouse at the time of death.

The laws of West Virginia, which are similar to the federal laws, allow a QDRO to speak only as to retirement benefits. The anti-alienation sections of both federal and West Virginia law only allow a QDRO to speak. Since Mr. Akers never retired nor was granted disability benefits prior to his death, the QDRO proposed on June 4, 2009, nor the amended QDRO proposed in December, 2010, cannot speak to preretirement beneficiaries of Danny Akers. As Executive Director Ann Lambricht testified, beneficiaries are for preretirement benefits. QDROs do not control preretirement benefits of the plan participant. QDROs are only to deal with retirement benefits. (Vol. I, App 684, Lines 2-3).

**WEST VIRGINIA CODE §5-10-24 (ANNUITY OPTIONS) DOES NOT APPLY NOR DOES IT PERMIT PATRICIA JONES BEING DESIGNATED AS THE SURVIVING SPOUSE OF MR. AKERS.**

West Virginia Code §5-10-24 applies only to a retirant. West Virginia Code §5-10-24(c) provides as follows,

“Upon divorce, a **RETIRANT** may elect to change any of the 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, final decree of divorce, or other court order that would restrict the election 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 **REITRANT** to name a new spouse as annuitant for any of the survivorship retirement benefit options.”  
(Emphasis added).

In the above language it is easy to see that the legislature intended to restrict only a retirant’s ability to elect his or her new spouse or ex-spouse as his survivor.

Upon marriage, West Virginia Code §5-10-24(d) provides as follows,

“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 **RETIRANT** shall furnish to the board proof of the marriage: *Provided, however*, That the **RETIRANT** certifies under penalty of perjury that no qualified domestic relation order, final decree of divorce or other court order would restrict the 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. The value of the new survivorship annuity shall be the actuarial equivalent of the **RETIRANT'S** benefit prospectively in effect at the time the new annuity is elected." (Emphasis added).

Contrary to Patricia Jones' assertion, the option in elections contained within the domestic relations order cannot be changed posthumously. West Virginia Code of State Regulations 162-5-16.2 provides as follows,

**"Option chosen final. When the choice of an option has been made, that choice is final and cannot after that date be changed, except as provided in W.Va.Code §5-10-24 (which is limited to living retirants). A beneficiary cannot affect or change the option chosen by the member."** (Emphasis added). §162-5-16.2. (Vol. I, App 251).

#### **THE BOARD PROPERLY REJECTED THE POSTHUMOUS DOMESTIC RELATIONS ORDER SUBMITTED IN MARCH, 2011**

Under both federal and West Virginia law, a QDRO is the only way to alienate retirement benefits. Since there was not a QDRO entered prior to Danny Akers' death preretirement, it cannot supersede, then, the rights of a surviving spouse. The majority of courts have held that a QDRO entered after the participant's death does not supersede the rights of a surviving spouse. See Samaroo v. Samaroo, 193 F.3d 185, at 187 (3<sup>rd</sup> Circuit, 1999) wherein the Third Circuit Court of Appeals opined,

**"The majority of cases hold that a surviving spouse annuity vests on the date of the participant's death and a proposed QDRO entered posthumously is not enforceable." Id., at 187. See also Davenport, 146 F. Supp. at 780; 2000 W.L. 1898846.**

In the case of Selvey v. Long, 696 A.2d 102 (NJ Appellate Div. 1997), a property settlement agreement entitled the decedent's first wife to 50% of her husband's state pension benefits, as in the case at bar. However, a valid QDRO was not entered. Thereafter the husband remarried and died. The issue before the court was whether the second wife was required to share her widow's benefits with the ex-spouse. In the absence of a valid QDRO entered prior to death, the New Jersey court determined that the second wife, the surviving spouse, alone was entitled to widow benefits

which the court deemed to be her property under the state retirement statute. Long, Id. at 157-58.

In the case of Stahl v. Exxon Corp., 212 F. Supp 2d 657 (S.D. Texas 2002), the Court addressed a retirement plan similar to West Virginia's plan. The minimum retirement age was 55 (as in the West Virginia retirement plan). The Plan provided that when an employee dies prior to receiving any benefits, the surviving spouse will receive an annuity of 50% of the benefits earmarked for the employee, Andrew. A DRO was presented to the plan administrator, but rejected because it did not specify the proper distribution scheme. Thereafter Andrew, the participant, married Jacqueline and subsequently died.

Andrew's ex-wife sued the employer alleging she was entitled to one-half of the proceeds under the surviving spouse annuity. The Stahl court ruled,

“Accordingly, this court cannot enforce the fourth domestic relations order entered after Andrew's death, where the effect would be to divest Jacqueline (new wife) of her statutorily mandated interest in SSA benefits.” Stahl, Id. at 667.

The Stah court went on to find that although the last proposed QDRO was drafted correctly,

“. . . it is without legal effect because it was not in place prior to Andrew's death, when **Jacqueline's right to surviving spouse benefits matured and vested under the Plan.**” (Emphasis added). Stahl, Id., at 667.

In the Samaroo case, *Ibid.*,, the former spouse of a plan participant, who, (unlike this case) had not remarried and who (like this case) had not yet retired, sought to amend the divorce decree *nunc pro tunc* after the participant's death to provide for an award of preretirement survivorship annuity. The Third Circuit in that case relied on similar reasoning contained in the Fourth Circuit case of Hopkins v. AT&T Global Information Solutions Co., 105 F.3d 153 (4<sup>th</sup> Cir. 1997), and concluded that a Domestic Relations Order entered after the death of a participant is not an enforceable QDRO. The Third Circuit also upheld the District Court's ruling that the ex-wife's entitlement to a survivorship annuity was to be determined as of the date of the death of the participant.

In the case of Ross v. Ross, 705 A.2d 784 (Ct. App. Div. 1998), the Court ruled in absence of a valid QDRO entered prior to the participant's death, a former spouse was not entitled to proceeds of the participant's pension plans which were payable to the participant's current surviving spouse. The Court noted that survivor benefits from a pension plan automatically pass to the current surviving spouse upon the participant's death. Id., at page 792. The Ross court opined as follows,

“ . . . where a surviving spouse has not waived her right to benefits and a QDRO does not exist, ERISA prevents a participant from naming a beneficiary other than a surviving spouse. In that case, a participant will be unable to alienate any of his or her pension plans, even by distribution in a property settlement agreement.” Ross at 793.

Accordingly, Respondent Judy Akers, widow, asserts that her right to **preretirement death benefits** vested on the date her husband died, December 16, 2009. See Hopkins v. AT&T Global Information Solutions Company, 105 F.3d 153 (4<sup>th</sup> Cir. 1997). Samaroo, Ibid.; Selvey, Ibid.; Stahl, Ibid.; Ross, Ibid.

**WEST VIRGINIA CODE §5-10-27(b)(1) MANDATED THAT THE BOARD PAY PRERETIREMENT BENEFITS TO JUDY AKERS, THE ACTUAL SURVIVING SPOUSE**

The West Virginia legislature provided for the death of one of its public employees prior to retirement in a separate statute. See West Virginia Code §5-10-27, et seq. Since the decedent, Danny Akers, was 53 at the time of his death, he was not eligible for retirement. Since he died prior to the awarding of the disability retirement and prior to obtaining the age of 55, and had over ten years of credited service, his preretirement death benefits are governed by West Virginia Code §5-10-27(b)(1) as follows,

“In the event any member who has ten or more years of credited service, or any former member with ten or more years of credited service and who is entitled to a deferred annuity, pursuant to section twenty-one of this article: Dies; and **leaves a surviving spouse, the surviving spouse shall immediately receive an annuity** computed in the same manner in all respects as if the member had: (A) Retired the day preceding the date of his or her death, notwithstanding that he or she might not have attained age sixty or sixty-two years, as the case may be; (B) elected option A provided in section twenty-four of this article; and (C) nominated his or her surviving spouse as beneficiary.” (Emphasis added). West Virginia Code §5-10-27(b)(1).

The above operative words are “the surviving spouse shall immediately receive an annuity”.

Since Judy Akers’ preretirement surviving spouse benefits vested on December 9, 2009, the date of her husband, Danny’s, death (see Samaroo, Stahl, Selvy, Ross), the Board could not pay benefits to Danny Akers’ estate, but was statutorily mandated to pay the actual surviving spouse (W.Va. Code §5-10-27(b)(1). This statute trumps Rule 162-1-7.1.2 which Petitioner Jones asserts requires the Board to pay to the estate of the member. However, the Rule actually states,

“If, upon 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 . . . estate . . .” (Emphasis added).

This Rule is discretionary whereas both West Virginia Code §5-10-27(b)(1) and West Virginia Rule 162-5-19.3 require the Board to pay the actual surviving spouse the preretirement benefits.

The fact of the matter remains that the courts have been consistent in finding that surviving spouse benefits vest on the date of the participant’s death as to preretirement benefits and that a QDRO only speaks to retirement benefits and not preretirement benefits. In the Samaroo case, *Ibid.*, no benefits were paid to anybody because of the ex-wife’s failure to get a DRO qualified that referenced survivor benefits. In regard to Petitioner Jones’ equitable argument that she should receive all preretirement benefits to the exclusion of the actual surviving spouse, the Third Circuit said,

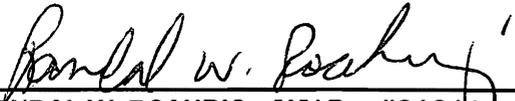
“The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture. . . but rather part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan.” Samaroo, *Id.* at 188).

The West Virginia legislature has codified and has chosen to limit the amount of a participant’s interest that can be awarded by a QDRO. West Virginia has chosen to leave a Plan participant with control over the portions of his or her benefits attributable to service before marriage and, of course, after separation. A DRO should never be qualified that disenfranchises the surviving widow preretirement.

**CONCLUSION**

For the foregoing reasons, the Board was correct in rejecting Petitioner Jones' DRO entered June 4, 2009, and her posthumous DRO entered December 9, 2010, and submitted in March, 2011. As a result, Judy Akers, the widow of Danny Akers, is properly and legally receiving his preretirement death benefits.

RESPECTFULLY SUBMITTED,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of December, 2014, true and accurate copies of the foregoing Respondent Judy Akers's Response to Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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