

MEMORANDUM

State of Alaska
Department of Law

To: Guy Bell, Director
Division of Retirement and Benefits
Department of Administration

Date: October 2, 2002

File No.: 663-03-0071

Tel. No.: 465-2127

From: John B. Gaguine
Assistant Attorney General
Governmental Affairs – Juneau

Re: Validity of QDRO Naming
Ex-spouse as Survivor for
Member's Entire Benefit

A superior court in Fairbanks issued a qualified domestic relations order (QDRO) that names the member's ex-wife as the member's survivor, whether the member (who is still an active member) should die before or after retirement.¹ Former Retirement Representative David Watson rejected this QDRO on the grounds that it improperly eliminates the survivor rights of the member's future spouse, should he remarry before retirement. You affirmed Mr. Watson's decision. The ex-wife's attorney has on several occasions since then attempted, unsuccessfully, to have the QDRO accepted. After her last attempt, you asked us to look into the question of acceptability. It is our opinion that the QDRO is valid, and should be accepted.

Since the QDRO was issued by a court, it should of course be accepted unless for some reason it is statutorily invalid. While the Alaska statutes do provide in general that a member who is married at the time of retirement must elect a joint and survivor (J&S) option naming his or her spouse as the beneficiary (AS 39.35.450(a) and 39.35.490(a)), other provisions of these statutes make clear that this general rule can be overridden by a QDRO. Thus, AS 39.35.490(c)(2)(C) provides that a member may revoke his or her J&S option without the spouse's consent "if the spouse has no rights to the option because of the terms of a qualified domestic relations order," and AS 39.35.490(a)(1) provides that a surviving spouse's status as an automatic beneficiary does not apply "to the extent a qualified domestic relations order filed with the administrator provides for payment to a former spouse or other dependent of the employee." The QDRO in question here has done precisely that.

¹ Curiously, after the member retires, the QDRO does not give his ex-wife 50 percent of his benefit, but only 50 percent of that portion of his benefit attributable to his PERS service during the period of the marriage.

In order to have tax-qualified status under the federal Internal Revenue Code (a vital matter to any retirement plan), a retirement system such as the PERS must comply with a myriad of mandates in the code. Among these are a mandate that a plan require a member with a surviving spouse to elect a J&S option at the time of retirement; that the plan provide a pre-retirement survivor annuity to a deceased vested member with a surviving spouse (26 U.S.C. 401(a)(11)); and that a member's waiver of a J&S option is not valid unless the spouse consents in writing (26 U.S.C. 417(a)). However, 26 U.S.C. 414(p), the provision in this part of the code (the part dealing with retirement plans) that authorizes QDROs, provides in paragraph (5), subparagraph (A), that "the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes)" to the extent provided by a QDRO. In other words, the provisions of a QDRO override the provisions of sections 401(a)(11) and 417 that would otherwise apply. Hence the code does not preclude your acceptance of the QDRO at issue.²

There are certainly strong policy arguments against allowing a member, in a situation like this, from terminating the survivorship rights of a future spouse, should the member remarry in the future before he or she retires. However, implementation of such an anti-termination policy would require an amendment to the state QDRO statutes or, at the least, the adoption of regulations. Given the existing statutes and regulations, we do not believe that you have the authority to refuse to accept the QDRO at issue.

Please feel free to contact us if you have any questions about this matter. We will of course be happy to work with you if you wish to propose amending the PERS QDRO statutes or to propose PERS regulations that would place limits on what may be included in a QDRO for it to be valid.

JBG:jn

cc: Anselm Staack, Chief Financial Officer
Kathy Lea, Retirement Supervisor
David Stout, Retirement Representative
Paul Carlson, Retirement Representative
Division of Retirement and Benefits

² A government plan, like the PERS, which is subject to the code tax qualification provisions but not to the Employee Income Retirement Security Act (ERISA), is not required to authorize QDROs in order to protect its tax-qualified status. 26 C.F.R. 1.401(a)-13(g)(2) (IRS regulation). However, once a government plan has authorized QDROs, the provisions of 26 U.S.C. 414(p) are applicable to the plan.