

STACEY D. SMITH

ATTORNEY AT LAW

P.O. BOX 50244
Eugene, Oregon 97405

(541) 504-6985

FAX (503) 660-4066

Stacey@StaceySmithLaw.com

27 June 2025

Oregon PERS – Members of the PERS Board

ATTN: Joel Mellor, PERS Rules Coordinator

By email transmission to: joel.mellor@pers.oregon.gov

RE: Public Comment - Notice of Rulemaking for Divorce Rules:
OAR 459-045-0010 *Tier One/Tier Two Division of Benefits*
OAR 459-045-0012 *OPSRP Pension Program Division of Benefits*
OAR 459-045-0014 *Individual Account Program (IAP) Division of Benefits*
OAR 459-045-0020 *Court Orders*

Dear Joel:

The undersigned are licensed Oregon ‘QDRO’ lawyers. Collectively, we have 80 years of experience drafting Oregon PERS orders and submit perhaps 2/3 of all PERS division orders processed by PERS each year. Clark Williams was the principal author on behalf of the Oregon State Bar of the original version of ORS 238.465 as enacted by the Oregon Legislature in 1993 and he participated with PERS in drafting the first set of OARs concerning the division of PERS benefits in divorce. We offer the following public comments regarding the above-referenced, proposed rulemaking (or rule-amending).

The following are our written comments on the proposed amendments to the rules:

1. Regarding the 5/30/2025 letter to “Members of the PERS Board” from Melanie Chandler and Stephanie Vaughn, providing notice that “staff has begun rulemaking”:
 - a. On page 2, under “IMPACT” we note that the rulemaking is not mandatory and that the rulemaking is intended to benefit members and legal practitioners by ‘providing clarity about available options related to the division of PERS benefits in divorce.’
 - b. Some of the proposed changes to the rules do not appear to achieve that goal, and those instances are identified and discussed in further detail, below.

2. As a principal objection: ORS 238.465 expressly allows a court (having jurisdiction) to define the particulars for how PERS benefits are divided and assigned, without limitations on the court's authority as to the manner in which the PERS benefits are divided.
3. OAR 459-045-0010
 - a. Without an opportunity to review the revised PERS administrative forms, we cannot provide thorough or complete comments to the proposed rules, nor thorough or complete objections thereto.
 - b. We object to PERS' assertion that it will not accept or administer lawful portions of a court order that are "not included on existing forms" because:
 - i. The "existing forms" that are now available and viewable on PERS' website (i) contain provisions that PERS cannot lawfully administer or (ii) are devoid of provisions that PERS can administer (*i.e.*, relief that is otherwise lawful and available to the parties).
 - ii. If by "existing forms" PERS means the new (divorce) forms that have not yet been completed, approved by PERS, or published by PERS, or are otherwise unavailable to us for review, then we are not afforded due process to comment on the lawfulness or propriety of PERS' assertion that it will not accept or administer provisions in the court order that are "not included on existing forms."
 - iii. To the extent that PERS' position is that it will not accept or administer lawful portions of a court order that are "not included on existing forms" this rulemaking is changing law, not simply "provid[ing] additional clarity."
 - iv. The forms, rather than provide clarity for division, lure inexperienced parties and legal practitioners with a false sense of simplicity.
 - c. Section 4(d) – "Whether the member may change their beneficiary designation...the member's monthly benefit must be recalculated." PERS recently imposed a retroactive recalculation in a case, which was appealed by the Member. The Member won on appeal. This section of the rule should establish the 'start date' for the new amount/the recalculated monthly amount or should reference such other rule or law that governs the start date (effective date) for the recalculated benefit.

4. OAR 459-045-0012

- a. We reassert items a – b, above
- b. Separate benefit option for Alternate Payee (“AP”) vs Shared payment award.
 - i. (2)(a) allows AP to choose between a shared payment award or a separate benefit option. Therefore, the court order will either (i) require a separate benefit option or a shared payment award; *or* (ii) permit the AP to choose between the two options.
 - ii. In either case, application of the married time rule creates a deferred interest award. Such an award cannot legally ‘perfect’ or ‘vest’ until the election is made and/or the benefit commences.
 - iii. PERS acknowledges that in the shared payment context, AP’s benefit can revert to the member if AP predeceases.
 - iv. PERS has recently stated (in writing and orally) that if the award requires AP to elect a separate benefit option (on AP’s life), then if AP does not survive to the date of payment, PERS will not honor a court order that provides for a reversion of AP’s award back to the member. There is no authority for that position. See **EXHIBIT A** (electronic communication from Clark Williams to Peter Ungern, attached hereto and incorporated herein by reference). Moreover, the proposed rules implicitly or explicitly appear to allow for such a reversion to the member if AP is “eligible to elect a separate benefit option” but dies before commencement of benefits:
 - 1. See 2(c), which appears to allow the DRO to specify that AP’s award will end upon AP’s date of death.
 - 2. See 2(g), which provides that the DRO can order termination of AP’s award (and presumably reversion to Member) “if [the AP’s awarded benefit is] not taken as a separate benefit” and if AP “dies before the Member.”

Clearly the rules, when applied to real life facts, become murky and problematic, and need a detailed court order to sort out the various possible contingencies to which the forms do not lend themselves.

- v. 2(d) provides that “if not taken as a separate benefit [again, this suggests that the DRO can provide AP a choice, to be made well after the divorce], whether the member must select a specific benefit payment option.”
 - 1. In order to implement such a provision, the form would need to list the various options so that ‘boxes’ could be checked in the DRO.
 - 2. We cannot know whether or to what extent to object to this provision, without seeing the new forms; and we have been advised that there will not be an opportunity to review the new forms, or for public hearing or public comment on the proposed forms. We object to PERS decision to not allow opportunity for hearing or comment on the new forms.
- vi. 2(f) needs to be revised to remove an incomplete clause that creates an ambiguity. It should read as follows: “Whether the court order designates the alternate payee as beneficiary to receive a percentage of any pre-retirement death benefit pursuant to ORS 238A.230.”
- vii. An additional concern about Form 459-535, Section B.6’s treatment of ORS 238A.230 benefits (and why the Court order needs to provide additional terms/language):
 - 1. The current ‘existing form’ provides only that “**The court directs PERS to award** [*the word award should be deleted and replaced with “distribute”*] **any pre-retirement death benefits as indicated below: Award _____ percent to A**”
 - 2. In a deferred interest/married time rule context, where the member is still accruing creditable service after the divorce, it is impossible to know or state a percentage that corresponds to the married time rule award.
 - 3. For many years PERS has approved DROs that establish a contingent award of ORS 238A.230 benefits to AP, consisting of *either* 100% of the pre-retirement death benefit if member is unmarried at the time of death, *or* a percentage of the pre-retirement death benefit that corresponds to the married time rule.

- viii. 3(d) – “Whether the member may change their beneficiary designation...the member’s monthly benefit must be recalculated.” See comment above for Rule 459-045-0010 (*i.e.*, what is the effective date for recalculation?)
 - ix. If the Member is required to elect a joint and survivor (“JT&S”) option and to designate AP as JT&S beneficiary, but AP predeceases the Member before benefits commence, PERS forms have a provision whereby the benefit can revert to the Member or be distributed to AP’s chosen beneficiary. But there is no provision that releases the Member from the requirement that they elect a JT&S form of benefit. That is an ambiguity and while it may seem obvious that the Member could/should be permitted to elect Option 1, would PERS not look to the Court order for guidance?
5. OAR 459-045-0014. Regarding section 4: The new language provides that “*If any EPSA excess as defined in 459-005-0001 becomes payable, PERS will determine what will be paid to the member, beneficiary and/or AP based on the IAP award in the court order.*”
- a. It is unclear whether this new proposed language changes PERS’ previously established policy that AP cannot receive any share of EPSA excess unless the DRO articulates AP’s IAP award as a percentage share. The rules should clarify that.

In conclusion, without seeing the proposed PERS forms, we must object to the notion that the DRO must be restricted to the 4 corners of the forms. We have not been afforded the opportunity to review or comment on the upcoming, new forms; and the proposed rules refer only to the existing forms.

Alternatively, if PERS were to continue to accept and administer lawful portions of the court order that extend beyond the new forms, the opportunity for hearing or comment on the new forms would not be necessary.

The proposed prohibition of PERS from approving or administering any language not appearing on or in ‘the forms’ (whether the current forms, which PERS acknowledges are problematic, or the new forms which have not been subject to public hearing or public comment, and which Joel says will not be so subject) will in some cases violate the law. Courts having jurisdiction over the division of PERS benefits, and lawyers (in particular DRO lawyers) need to be able to clarify or modify terms on the forms when the circumstances require such changes to fulfill or comply with applicable domestic relations law, including ORS 107.105’s mandate to the Court to provide for a ‘just and proper’ division of marital property. The apparent, proposed prohibition against ‘free-form DROs’ to supplement or clarify the terms of the award or the ambiguous-as-applied terms of the PERS forms prevents the court from implementing the law (ORS 107.105, Ch 238, 238A).

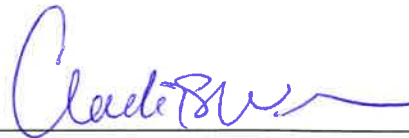
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Thank you for your time and consideration of the foregoing. Any or all of us would be pleased to offer further comment, should PERS request that.

Sincerely,



Stacey Smith, OSB 983481



Clark B. Williams, OSB 794415
Heltzel Williams, PC
117 Commercial St. NE, Fourth Floor
PO Box 1048
Salem OR 97308-1048



Deb Lush, OSB 023732
Heltzel Williams, PC
117 Commercial St. NE, Fourth Floor
PO Box 1048
Salem OR 97308-1048

cc: Peter K. Ungern, PERS Benefit Preparation Section Manager; Jeremy Frese, Program Analyst 1

Subject: AP's pre-commencement death benefit in OPSRP
Date: Tuesday, December 3, 2024 at 10:54:34 AM Pacific Standard Time
From: Clark Williams
To: UNGERN Peter * PERS
CC: Deb Lush, Karen Neill, Stacey Smith, MOEN Susan * PERS

Hi, Peter - -

Thanks again for presenting at our annual QDRO legal education program on November 15. It is so refreshing to have an open and collaborative relationship with you and others in the Divorce Unit, as we work to make the division of PERS benefits on divorce as smooth and efficient as possible for our clients.

I am writing to ask for reconsideration of the position that PERS staff have taken with regard to the disposition of OPSRP benefits awarded to an Alternate Payee (AP) who then dies before benefits commence. I understand PERS' position is that those benefits are payable to the AP's surviving spouse, if any, and if none then the AP's benefit evaporates and cannot revert to the OPSRP Member.

We believe that position is incorrect, for each of two reasons.

First, ORS 238.465(1) provides in relevant part as follows: “. . . any pension, annuity, retirement allowance, disability benefit, death benefit, refund benefit or other benefit that would otherwise be made to a person entitled thereto under this chapter or ORS chapter 238A shall be paid, in whole or in part, by the Public Employees Retirement Board to an alternate payee *if and to the extent expressly provided for* in the terms of any judgment of annulment or dissolution of marriage or of separation, or the terms of any court order . . . (emphasis supplied).”

An AP of an OPSRP member cannot access the benefit before the member's age 55. The assignment is necessarily conditioned on the AP surviving to that date. If the AP dies before that date, there is no award “expressly provided for” to the AP. And therefore, since there is no assignment to the AP who dies before age 55, the member necessarily retains that benefit. Whether this is termed as a “reversion” or a “retention,” the effect is the same – the purported assignment is moot and the member keeps the entire benefit. If it would help, we can include language in our orders to expressly provide that any award to an AP is conditioned on the AP's survival to the member's age 55.

Second, ORS 238.465 (4) (3) provides that if an alternate payee dies before commencing, “. . . the alternate payee shall be considered a member of the system who died before retiring for the purposes of the death benefits provided in . . . 238A.230 (Death benefit) . . .”

ORS 238A.230, says: “**1)** If a member of the pension program who is vested dies before the member's effective date of retirement, the Public Employees Retirement Board shall pay the death benefit provided for in this section to: . . .

b) The former spouse of the member as provided in a judgment or order under ORS 238.465.”

To substitute “AP” for “member,” as instructed by ORS 238.465(4)(3), ORS 238A.230 now reads as follows:

“**1)** If a ~~member~~ **AP** of the pension program who is vested dies before the ~~member's~~ **AP's** effective date

of retirement, the Public Employees Retirement Board shall pay the death benefit provided for in this section to: . . .

b) The former spouse of the ~~member~~ AP as provided in a judgment or order under ORS 238.465.”

The former spouse of the AP is the member. So the AP’s death benefit is paid to the member, not the AP’s subsequent spouse. In other words, by reading an alternate payee as a “member” under ORS 238.230A, the AP’s death benefit goes to his/her former spouse, who is the original member. Therefore, court orders that provide that the AP’s benefit reverts to the member comply with this statute.

We ask you to reverse your position on this or, in the very least, to present this issue to the your DOJ representative to consider.

Thank you, Peter

Clark B. Williams, *Lawyer*

HELTZEL WILLIAMS PC

117 Commercial Street NE, Fourth Floor, PO Box 1048, Salem, OR 97308-1048

clark@heltzel.com Ph: (503) 585-4422, ext. 309 Fax: (503) 370-4302

<https://www.heltzel.com>