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Analysis

Sub. H.B. 439 – Rep. Willamowski

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ORSC Position

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The bill generally makes changes to the rights of surviving spouses under Ohio's probate laws. This analysis simply addresses the potential impact of such changes on the five state retirement systems in Ohio: the Public Employees Retirement System (PERS), the State Teachers Retirement System (STRS), the School Employees Retirement System (SERS), the Ohio Police and Fire Pension Fund (OP&F) and the Highway Patrol Retirement System (HPRS).

Generally speaking, current Ohio law permits a surviving spouse to take against the written will of a deceased spouse and elect to receive part of the probate estate of the deceased spouse in lieu thereof. Under current law, the surviving spouse receives one-half of the net probate assets of the decedent or, if the decedent had two or more children, one-third of the net probate assets. The surviving spouse's elective share is limited to the decedent's probate assets *only*; that is, the decedent's nonprobate assets are excluded from the surviving spouse's elective share, such as assets held in trust, payable-on-death (POD) accounts, transfer-on-death (TOD) securities, paid to a designated beneficiary for assets like insurance and retirement, or held in joint ownership with right of survivorship. To the extent such assets fall outside the probate process, the surviving spouse has no opportunity to elect to receive such assets and potentially may become subject to disinheritance.

Sub. H.B. 439 is intended to provide greater assurance that a surviving spouse will not become disinherited by a decedent under Ohio probate law. Under the bill, the surviving spouse may elect to receive one-half of the deceased spouse's "augmented estate," which generally would include both the decedent's probate and nonprobate assets that are marital property net of any marital debt. Included in the decedent's augmented estate would be any payments made under a pension fund, including the five state retirement systems in Ohio, except the Social Security System. The surviving spouse would be required to make and provide notice of such election no later than six months after the decedent's death. In order to satisfy the surviving spouse's elective share under the bill, the probate court would be authorized to order payment of such share from the assets of the decedent's augmented estate or by contribution from the other beneficiaries thereunder.

Staff Comments - Sub. H.B. 439 raises the following concerns as it relates to the five state retirement systems in Ohio:

- Federal benefits and payments under the Social Security System are specifically excluded from the decedent's "augmented estate" subject to the surviving spouse's elective share under the bill. No comparable exclusion is provided for benefits and payments made under the five state retirement systems, a substantial portion of which are in lieu of Social Security which does *not* cover public employment otherwise covered by the state retirement systems. Accordingly, the surviving spouses of public employees in Ohio are treated differently than the surviving spouses of all other employees in Ohio regarding the elective share amount of the decedent's "augmented estate" provided under the bill.

- The rights of surviving spouses are generally protected under the laws governing the five state retirement systems. Under PERS, STRS, SERS and OP&F, the spouse is entitled to no less than a 50% joint and survivor annuity unless the spouse provides written consent to waive this right. Under HPRS, the surviving spouse is automatically entitled to 50% of the deceased member's pension. Each retirement system also provides for monthly benefits to the surviving spouse and dependent children of active members who die prior to retirement, with one limited exception. Under PERS, STRS and SERS, the member may designate a beneficiary other than a spouse who may elect a lump sum refund of the member's account. In lieu of including the state retirement systems in Sub. H.B. 439, we would recommend that the member's designation of beneficiary be made subject to the same spousal consent requirement noted above to satisfy the intent of the bill to provide further protection to surviving spouses.
- The state retirement systems are governed by statutes that, among other things, direct payment of statutory benefits to specific individuals. Sub. H.B. 439 would conflict with such statutes by directing the state retirement systems to make payment to the probate court upon receipt of notice that a surviving spouse has filed a petition for the elective share. The fact that the surviving spouse would have up to six months after the decedent's death to file such petition and that such payment would become subject to the probate process could create unnecessary delay and financial hardship for those dependent on such payment for their support pending the final distribution of benefits by the probate court.
- Sub. H.B. 98, which was enacted last session with a delayed effective date of 10/27/06, amended the laws of the five state retirement systems to provide further protections to the rights of the member's former spouse by allowing a continuation of benefits upon the death of the member to the former spouse and dividing the annual cost-of-living allowance between the member and former spouse; whereas, Sub. H.B. 439 would provide further protections to the rights of the member's surviving spouse. How the provisions of these two bills with seemingly contrary objectives are to be reconciled and administered by the state retirement systems is unclear and should be addressed under the bill.

Fiscal Impact - Sub. H.B. 439 would create additional administrative costs to the five state retirement systems, and could create unnecessary delay and financial hardship to those dependent on timely receipt of monthly survivor benefits for their support.

ORSC Position – At the March 8, 2006 meeting of the Ohio Retirement Study Council, the ORSC voted to recommend that the 126th Ohio General Assembly amend Sub. H.B. 439 to exclude the benefits and payments made by the state retirement systems from the provisions of the bill and in lieu thereof that the laws in PERS, STRS and SERS governing the member's designation of beneficiary be amended to require spousal consent to satisfy the intent of the bill to provide further protection to surviving spouses.