

OPINION NO. 2013-043**Syllabus:**

2013-043

1. A person designated as a beneficiary by a participating employee for the purpose of receiving, upon the death of the participating employee, the remaining benefits of the participating employee's account in the Ohio Public Employees Deferred Compensation Program is a "beneficiary" as defined in R.C. 5815.33(A)(1).
2. R.C. 5815.33 applies only to those contracts entered into on or after May 31, 1990.

To: R. Keith Overly, Executive Director, Ohio Public Employees Deferred Compensation Program, Columbus, Ohio

By: Michael DeWine, Ohio Attorney General, December 20, 2013

You have asked whether R.C. 5815.33 includes within its scope the Ohio Public Employees Deferred Compensation Program (OPEDCP), and if so, whether

R.C. 5815.33's application to OPEDCP is limited in any way. R.C. 5815.33 operates to revoke a beneficiary¹ designation for certain types of benefits where an individual previously has designated his or her spouse as a beneficiary and the marriage is later terminated. For the sake of clarity, and to provide context, you have provided us the following hypothetical: A participant² in OPEDCP passes away on April 1, 2013. The participating employee's beneficiary form on file with OPEDCP was completed on January 1, 2008, and designates the participant's spouse as the primary beneficiary. The participant and his spouse were officially divorced on March 1, 2012. Does the ex-spouse, who is still named as the participant's primary beneficiary under the relationship of "spouse," have any legal claim to the participant's OPEDCP account pursuant to R.C. 5815.33? Before addressing your specific questions, it is helpful to give some background on OPEDCP and explain the purpose of R.C. 5815.33.

Ohio Public Employees Deferred Compensation Program

In 1976, OPEDCP began offering Ohio's state and local government employees a supplemental retirement program administered in accordance with the Internal Revenue Code. *OPEDCP Summary Plan Description*, Ohio Deferred Compensation, <https://www.ohio457.org/iApp/tcm/ohio457/aboutus/summary/index.jsp> (last visited December 11, 2013); see I.R.C. § 457. OPEDCP supplements other retirement or deferred compensation programs provided by law for Ohio's public employees. R.C. 148.04(E). Today, OPEDCP is one of the largest deferred compensation plans in the country with approximately 200,000 participant accounts from over 1,800 Ohio employers. *OPEDCP Summary Plan Description*. Employees eligible to participate in OPEDCP include those who are members of the Public Employees Retirement System (PERS), the Police and Fire Pension Fund (PFPF), the School Employees Retirement System (SERS), the Highway Patrol Retirement System (HPRS), Alternative Retirement Plans (ARPs), and the State Teachers Retirement System (STRS). R.C. 148.01.

The Ohio Public Employees Deferred Compensation Board ("the Board") administers OPEDCP. R.C. 148.02. The Board is "authorized to promulgate and offer a program for deferral of compensation under any available federal statute, provided that the required approval of the Internal Revenue Service is obtained and the desired tax treatment is assured; the Board may act pursuant to [I.R.C. § 457] or

¹ Generally, a "beneficiary" is "[a] person for whose benefit property is held in trust; esp., one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.), or to receive something as a result of a legal arrangement or instrument." *Black's Law Dictionary* 176 (9th ed. 2009).

² A "participating employee" is "any eligible employee who is having compensation deferred pursuant to a contract that is executed before the compensation is earned and that is with the eligible employee's employer and the Ohio public employees deferred compensation board." R.C. 148.01(A)(3).

pursuant to any other available provisions.”³ 1991 Op. Att’y Gen. No. 91-005 (syllabus, paragraph 1); R.C. 148.04. The Board offers a deferred compensation plan qualified under I.R.C. § 457, commonly referred to as a “457 plan.”⁴ See *OPEDCP Plan Document*, p. 1 and p. 9, ¶8.09, Ohio Deferred Compensation, <https://www.ohio457.org/iApp/tcm/ohio457/program/publications/index.jsp> (last visited December 11, 2013). Under 457 plans, eligible employees are permitted to supplement existing retirement benefits or pensions by saving and investing pre-tax dollars through payroll deferrals. *OPEDCP Summary Plan Description*. Contributions and earnings are tax-deferred until an employee withdraws money from his deferred compensation account. *Id.* In order to qualify for this tax treatment, the plan must meet the specific requirements set forth in I.R.C. § 457.

The various state government entities and political subdivisions whose employees are eligible to participate in OPEDCP must assist the Board in communicating the availability of the plan to those eligible employees. 2B Ohio Admin. Code 148-1-01(C)(3). Each employer must execute an employer agreement, which is an agreement between the employer and the Board designed to facilitate the Board’s common administration of all employer plan agreements adopted under OPEDCP. 2B Ohio Admin. Code 148-1-01(B)(5), (C)(3). Upon initial employment, an employer must provide an eligible employee with materials provided by OPEDCP regarding benefits and long-term savings of deferred compensation. R.C. 148.04(C)(1)(a). The employee must acknowledge his or her desire to participate or not participate in OPEDCP. R.C. 148.04(C)(1)(b); 2B Ohio Admin. Code 148-1-01(C)(4). An employee that wishes to participate in OPEDCP must contract with the employer by signing a “participation agreement” in order to become a member of the plan. R.C. 148.04(C)(2); 2B Ohio Admin. Code 148-1-01(C)(4); *OPEDCP Plan Document*, p. 2, ¶2.01; see 1979 Op. Att’y Gen. No. 79-076, at 2-245. Thereafter, the Board provides all the necessary services required to implement, offer, and administer the program on behalf of the employer, and is empowered in the employer agreement to perform any and all acts incidental to the administration of the plan. 2B Ohio Admin. Code 148-1-01(C)(4). OPEDCP must offer a reasonable number of investment options to an eligible employee for the investment of that employee’s deferred funds. R.C. 148.04(A).

All funds of the plan are held in trust by the Board on behalf of an eligible

³ Pursuant to R.C. 148.06 and R.C. 148.061, certain governmental units or boards of township trustees may offer to all of their officers and employees additional programs for deferral of compensation designed for favorable tax treatment. See 1988 Op. Att’y Gen. No. 88-028, at 2-115 (“the board of library trustees of a public library district may, in addition to the deferred compensation program offered under [R.C. Chapter 148], establish up to two deferred compensation programs for public library district employees”).

⁴ Although OPEDCP may offer plans under various provisions of the Internal Revenue Code, see, e.g., 1991 Op. Att’y Gen. No. 91-005 (syllabus, paragraphs 1 and 4), OPEDCP has chosen to only offer a plan under I.R.C. § 457. Thus, this opinion is only concerned with whether the 457 plan offered by OPEDCP is within the scope of R.C. 5815.33.

employer for the exclusive benefit of the eligible employees and their beneficiaries. 2B Ohio Admin. Code 148-1-01(B)(13), (C)(6). The members of the Board are trustees of the funds and must discharge their duties with respect to the funds solely in the interest of the eligible employees and beneficiaries. 2B Ohio Admin. Code 148-1-01(C)(12); *see* 2004 Op. Att’y Gen. No. 2004-014, at 2-117. All assets are assigned to the trust established by the Board. 2B Ohio Admin. Code 148-1-01(C)(6).

According to the OPEDCP Plan Document, benefits of the 457 plan are distributed to employees or their beneficiaries subject to the requirements of I.R.C. §§ 457(d) and 401(a)(9).⁵ *OPEDCP Plan Document*, p. 4, ¶4.01. Upon a participant’s severance from employment, he may elect a date to begin receiving withdrawals from the plan. *OPEDCP Plan Document*, p. 5, ¶4.02. A participant may elect a beneficiary for any benefits that he is entitled to receive under the plan and that are unpaid at the time of his death, on a beneficiary form filed with and accepted by the plan administrator. *OPEDCP Plan Document*, p. 6, ¶5.01. If a participant dies without having a proper beneficiary form completed and on file, the amount payable on or after his death shall be paid to the fiduciary of his probate estate, with certain exceptions. *OPEDCP Plan Document*, p. 6, ¶5.01. After the death of a participant, a spousal beneficiary will have all rights given to a participant regarding election of beneficiaries. *Id.* A participant may elect or change a beneficiary at any time by filing with the plan administrator a signed and dated beneficiary form. *OPEDCP Plan Document*, p. 6, ¶5.02; p. 7, ¶5.03. Currently, the plan contains no provisions addressing the effects of divorce, dissolution, or annulment of marriage on a participant’s beneficiary designation; however, it does give the plan administrator authority to act in accordance with a qualified domestic relations order. *OPEDCP Plan Document*, p. 9, ¶¶8.06-8.07.⁶

Scope of R.C. 5815.33; Abrogation of the Common Law

Under common law, a divorce, dissolution, or annulment of marriage stand-

⁵ The Internal Revenue Code addresses how distributions shall be made to beneficiaries under a 457 plan. *See, e.g.*, I.R.C. § 457(d)(2) (indicating that a plan must meet the distribution requirements of I.R.C. § 401(a)(9)); I.R.C. § 401(a)(9) (listing required distributions); 26 C.F.R. § 1.401(a)(9) *et seq.* (detailing distribution requirements under I.R.C. § 409(a)(9)); 26 C.F.R. § 1.401(a)(9)-8 (detailing distributions to be made in accordance with qualified domestic relations orders). These federal laws, however, are outside the scope of this opinion and we have not determined whether these laws impose any limitations on the application of R.C. 5815.33. *See* 1999 Op. Att’y Gen. No. 99-034, at 2-226 n.7 (the Ohio Attorney General does not “make definitive decisions concerning questions of federal law”); 1991 Op. Att’y Gen. No. 91-005, at 2-28. OPEDCP should contact the Internal Revenue Service for guidance in meeting these numerous federal requirements.

⁶ A participant’s account in OPEDCP is specifically included in the definition of “marital property” under R.C. 3105.171, which is to be divided equitably between the spouses. *See also* R.C. 3105.63 (including benefits from OPEDCP as property that must be included in a separation agreement).

ing alone did not “defeat the right of a named beneficiary to receive the proceeds of a former spouse’s life insurance policy.” *Phillips v. Pelton*, 10 Ohio St. 3d 52, 53, 461 N.E.2d 305 (1984). In other words, a former spouse might still be entitled to benefits from a life insurance policy if he or she had never been removed as the named beneficiary after the divorce, dissolution, or annulment. This common law rule applied equally to retirement benefits. See *Miller v. Miller*, No. E-97-014, 1997 WL 327138, at *5 (App. Erie County June 6, 1997) (applying this common law principle to the beneficiary of an individual retirement account). An exception to this general rule “exists when the parties specifically direct their attention in the decree or separation agreement to the issue of [the benefit] and express an intent to release all rights which each might have as a beneficiary under the policies of the other.” *Id.*; see *Lelux v. Chernick*, 119 Ohio App. 3d 6, 11, 694 N.E.2d 471 (Franklin County 1997); *Nat’l City Bank v. Estate of Rounsley*, No. 96-T-5588, 1997 WL 469856, at *3 (App. Trumbull County July 18, 1997) (involving a designated beneficiary on an individual retirement account); *Mihalenko v. Merrill, Lynch, Pierce, Fenner & Smith*, No. 68682, 1995 WL 472803, at *1 (App. Cuyahoga County August 10, 1995) (same as previous parenthetical).

R.C. 5815.33, the statute with which you are concerned, abrogates the common law by declaring, in pertinent part, as follows:

(B) (1) Unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section, if a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.

(2) If the spouse who made the designation or on whose behalf the designation was made remarries the other spouse, then, unless the designation no longer can be made, the other spouse shall not be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is not revoked because of the previous divorce, dissolution of marriage, or annulment.

This means that unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, if a spouse designates the other spouse as a beneficiary, and if the marriage is terminated after that designation, then the other spouse shall be deemed to have died before the spouse who made the designation and the designa-

tion of the other spouse as a beneficiary is revoked. If the spouse who made the designation remarries the other spouse, then the other spouse shall not be deemed to have died before the spouse who made the designation and the designation of the other spouse as a beneficiary is not revoked. For purposes of R.C. 5815.33 the term "beneficiary" is specifically defined to include a beneficiary of a "life insurance policy, an annuity, a payable on death account, an individual retirement plan, an employer death benefit plan, or another right to death benefits arising under a contract." R.C. 5815.33(A)(1). In other words, R.C. 5815.33 applies to only beneficiaries of these types of benefits.

R.C. 5815.33 applies prospectively to only those contracts entered into on or after the effective date of the statute, May 31, 1990. *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St. 3d 164, 616 N.E.2d 893 (1993) (syllabus); see *In re Estate of Holycross*, 112 Ohio St. 3d 203, 207, 2007-Ohio-1, 858 N.E.2d 805, 808, at ¶30; 1989-1990 Ohio Laws, Part III, 4512, 4568 (Am. Sub. H.B. No. 346, eff. May 31, 1990). The provisions of R.C. 5815.33, as applied to contracts entered into before the effective date of the statute, impair the obligation of contracts in violation of Ohio Const. art. II, § 28. *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St. 3d 164 (syllabus). Courts in Ohio have determined that the date the contract was entered into is the date the last beneficiary designation was signed, assuming the language of the plan and surrounding facts support such a finding. See *Western Southern Life Ins. v. Braun*, 116 Ohio App. 3d 423, 427-428, 688 N.E.2d 534 (Franklin County 1996) (finding that it was the date the beneficiary form was completed that is considered the effective date of the contract, depending on the language of the plan); *Nationwide Life Ins. Co. v. Kallberg*, Lorain App. No. 06CA008968, 2007-Ohio-2041, at ¶17 (same as previous parenthetical).

Ohio Deferred Compensation is "Another Right to Death Benefits Arising Under A Contract"

We now turn to your question whether OPEDCP is within the scope of R.C. 5815.33. When interpreting statutory language "we accord the words their usual, normal, or customary meaning." *State ex rel. Wolfe v. Delaware Cnty. Bd. of Elections*, 88 Ohio St. 3d 182, 184, 724 N.E.2d 771 (2000). Remedial laws, which are a legislative response to abuses which the General Assembly deems necessary to safeguard the public interest, are to be construed liberally. See R.C. 1.11; *State ex rel. Nat'l Mut. Ins. Co. v. Conn*, 115 Ohio St. 607, 155 N.E. 138 (1927). Moreover, "[t]he rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws." R.C. 1.11. Here, it is reasonable to believe R.C. 5815.33 is the result of the General Assembly's effort to remedy the inequities caused by the common law rule that a divorce, dissolution, or annulment of marriage standing alone did not "defeat the right of a named beneficiary to receive the proceeds of a former spouse's life insurance policy" or retirement benefits. *Phillips v. Pelton*, 10 Ohio St. 3d at 53; see *Miller v. Miller*, No. E-97-014, 1997 WL 327138, at *5 (App. Erie County June 6, 1997) (applying this common law principle to the beneficiary of an individual retirement account). Thus, R.C. 5815.33 should be considered a remedial law and construed liberally.

The provisions of R.C. 5815.33(B) apply to OPEDCP benefits so long as a

person designated as a beneficiary by a participating employee in OPEDCP is a “beneficiary” as defined in R.C. 5815.33(A)(1). A person is a “beneficiary,” as defined in R.C. 5815.33(A)(1), if he is a beneficiary of a “life insurance policy, an annuity, a payable on death account, an individual retirement plan, an employer death benefit plan, or another right to death benefits arising under a contract.”⁷ For the following reasons, we believe that OPEDCP benefits are “another right to death benefits arising under a contract.”

The term “death benefits” is not defined in R.C. 5815.33. Its usual, normal, or customary meaning is “money payable to the beneficiary of a deceased.” *Merriam-Webster’s Collegiate Dictionary* 319 (11th ed. 2003). When a participant of OPEDCP dies prior to exhausting his account, the remaining account value is paid to the designated beneficiary in accordance with the plan. *OPEDCP Plan Document*, p. 5, ¶4.03. Thus, such a beneficiary payment under OPEDCP meets the definition of “death benefit” because money is payable to the beneficiary of a deceased. The term “contract” means “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” *Black’s Law Dictionary* 365 (9th ed. 2009). OPEDCP “death benefits” arise under “contract” because upon the employee’s application to participate in the program, the employee must execute a participation agreement by which the employee becomes a member of the plan. R.C. 148.04(C)(2); 2B Ohio Admin. Code 148-1-01(C)(4); *OPEDCP Plan Document*, p. 2, ¶2.01; see 1979 Op. Att’y Gen. No. 79-076, at 2-245. The participation agreement is the agreement between the employer

⁷ In *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), the U.S. Supreme Court held that a Washington law similar to R.C. 5815.33 was preempted by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA requires that distributions to beneficiaries be in accordance with plan documents. See *Dunson-Taylor v. Metro. Life Ins. Co.*, 164 F. Supp. 2d 988, 994 (S.D. Ohio 2001). Therefore, administrators of an ERISA plan had to distribute money to beneficiaries in accordance with the plan, not state law. *Egelhoff*, 532 U.S. at 147-148. ERISA preemption, however, does not apply to government plans. 29 U.S.C.A. § 1144 (ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C.A. § 1003(a)] of this title and not exempt under [29 U.S.C.A. § 1003(b)] of this title”); 29 U.S.C.A. § 1003(b) (“the provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a governmental plan [defined in 29 U.S.C.A. § 1002(32)]”); *Mariott Mgmt. Servs. Corp. v. Sch. Employees Ret. Sys.*, 156 F.3d 1230 (6th Cir. 1998) (noting that government plans are exempt from ERISA); *Eschleman v. United-Health Grp., Inc.*, 2:12-CV-519, 2013 WL 4832066 (S.D. Ohio Sept. 10, 2013) (same as previous parenthetical). OPEDCP is a “government plan” because it is established by the laws of Ohio and maintained for employees of the State of Ohio and political subdivisions of the state. See 29 U.S.C.A. § 1002(32) (“the term ‘governmental plan’ means a plan established or maintained for its employees by . . . the government of any State or political subdivision thereof”). Therefore, R.C. 5815.33 is not preempted by ERISA in its application to OPEDCP because OPEDCP is a government plan.

and employee by which an employee “adopts the plan agreement and elects to become a participating employee under the plan.” 2B Ohio Admin. Code 148-1-01(B)(8). Therefore, construing the statute liberally, OPEDCP provides a “right to death benefits arising under a contract.”

Furthermore, the term “another right to death benefits arising under a contract” in R.C. 5815.33 follows the terms “life insurance policy,” “annuity,” “payable on death account,” “individual retirement plan,” and “employer death benefit plan.” If OPEDCP benefits are considered to be “another right to death benefits arising under a contract,” under the doctrine of *ejusdem generis* we must determine whether they are sufficiently similar to these other types of benefits listed to be within the scope of R.C. 5815.33. See *Moulton Gas Serv., Inc. v. Zaino*, 97 Ohio St. 3d 48, 2002-Ohio-5309, 776 N.E.2d 72, at ¶14 (under the rule of *ejusdem generis*, the broader term at the end of a series is to be considered as embracing only things of a similar character as those embraced in the preceding limited and confined terms); *In re Monro*, 282 B.R. 841, 844-45 (Bankr. N.D. Ohio 2002) (“when a comma is placed between the modifying clause and the phrase(s) immediately preceding it, the general rule of statutory construction holds that the qualifying phrase applies not just to the phrase immediately preceding it, but instead to all of the antecedent[]phrases”).

The first benefit listed is “life insurance.” Life insurance is generally defined as “an agreement between an insurance company and the policyholder to pay a specified amount to a designated beneficiary on the insured’s death.” *Black’s Law Dictionary* 1010 (9th ed. 2009). The second benefit listed is “annuity.” In its most general sense, an annuity is “an obligation to pay a stated sum, usually monthly or annually, to a stated recipient.” *Black’s Law Dictionary* 105 (9th ed. 2009); see *Bronson v. Glander*, 149 Ohio St. 57, 59, 77 N.E.2d 471 (1948) (recognizing an annuity as “an obligation by a person or company to pay to the annuitant a certain sum of money at stated times during life or a specified number of years, in consideration of a gross sum paid for such obligation”); *Beard v. New York Life Ins. & Annuity Corp.*, Franklin App. No. 12AP-977, 2013-Ohio-3700, at ¶12 (defining annuity as an investment “where a person or company is obligated to pay to the annuitant a sum of money over stated intervals during the annuitant’s life, in consideration for a gross sum paid for such an obligation”); *Trangenstein v. Wheaton Coll. Bd. of Tr.*, 148 Ohio App. 3d 382, 384, 2002-Ohio-2937, at ¶9 (Greene County) (relying on *Bronson, supra*, for the definition of annuity). The third benefit listed is a “payable on death account.” A “pay-on-death account” is defined as “[a] bank account whose owner instructs the bank to distribute the account’s balance to a beneficiary upon the owner’s death.” *Black’s Law Dictionary* 21 (9th ed. 2009); see R.C. 1109.07 (“[a] bank may enter into a written contract with a natural person for the proceeds of the person’s deposits to be payable on the death of that person to another person or to any entity or organization in accordance with the terms, restrictions, and limitations set forth in [R.C. 2131.10 and R.C. 2131.11]”). The last two benefits listed are “individual retirement plan” and “employer death benefit plan.” These benefits are both specifically defined within R.C. 5815.33. An “individual retirement plan” means “an individual retirement

account or individual retirement annuity as defined in [I.R.C. § 408].” R.C. 5815.33(A)(3).⁸ An “employer death benefit plan” means “any funded or unfunded plan or program, or any fund, that is established to provide the beneficiaries of an employee participating in the plan, program, or fund with benefits that may be payable upon the death of that employee.” R.C. 5815.33(A)(2).

Reading the terms “life insurance,” “annuity,” “payable on death account,” “individual retirement plan,” and “employer death benefit plan” together, we believe that OPEDCP benefits are sufficiently similar to these types of benefits that OPEDCP benefits should be included within the scope of R.C. 5815.33. The several items specified in R.C. 5815.33(A)(1) are “death benefits” in the sense that they all involve a certain sum of money that will pass to a beneficiary on the death of a policy holder or plan participant. Some of the benefits will be enjoyed only by the beneficiary on the death of the policy holder or participant, such as life insurance and employer death benefit plans. Others, however, similar to OPEDCP benefits, will be enjoyed by the policyholder or participant for the life of the policyholder or participant and then transferred to the beneficiary on the policyholder or participant’s death, such as annuities and individual retirement accounts. *See Bronson*, 149 Ohio St. at 59 (holding that annuity contracts involve an agreement to pay a certain sum to the annuitant annually during life or for a given number of years, while life insurance involves paying a specific sum of money on the death of the insured or on his reaching a certain age). Moreover, annuities and individual retirement accounts, like OPEDCP benefits, are benefits that are available to aid in retirement planning. Thus, OPEDCP benefits are sufficiently similar to the terms “life insurance,” “annuity,” “payable on death account,” “individual retirement

⁸ Pursuant to I.R.C. § 408(q), a governmental deferred compensation 457 plan can be deemed an individual retirement account or individual retirement annuity if the plan elects to allow employees to make voluntary employee contributions to a separate account or annuity established under the plan and if that account or annuity otherwise meets the requirements of I.R.C. § 408 for an individual retirement account or annuity. Regulations under this provision explain that the governmental deferred compensation plan and the deemed individual retirement account or annuity are treated as separate entities under the Internal Revenue Code and are subject to separate rules applicable to governmental deferred compensation plans and individual retirement accounts or annuities. 26 C.F.R. § 1.408(q)-1(c). However, they will not be treated as separate entities where the governmental deferred compensation plan contains the “deemed [individual retirement account or annuity] provisions.” 26 C.F.R. § 1.408(q)-1(d)(1). A member of your staff has informed us that OPEDCP does not offer a separate individual retirement account or annuity under this section, nor does OPEDCP’s plan contain the required deemed individual retirement account or annuity provisions required under regulation. Therefore, OPEDCP’s 457 plan is not an individual retirement account or annuity for purposes of I.R.C. § 408(q).

plan,” and “employer death benefit plan” that it is reasonable to conclude that OPEDCP benefits are within the scope of R.C. 5815.33.⁹

Limitations on Application of R.C. 5815.33

You also have asked if there are any limitations on R.C. 5815.33’s application to OPEDCP. R.C. 5815.33 has been limited to apply only to contracts entered into on or after the effective date of the statute, May 31, 1990. *Aetna Life Ins. Co. v.*

⁹ Other states have enacted similar laws that are likewise drafted broadly enough to include a supplemental retirement benefit, such as OPEDCP. *See* Colo. Rev. Stat. Ann. § 15-11-804 (Colorado broadly defines governing instrument as a “governing instrument executed by the divorced individual before the divorce or annulment of his or her marriage to his or her former spouse”); Okla. Stat. tit. 15, § 178 (Oklahoma law defining death benefits as including “retirement arrangements, compensation agreements, . . . and other contracts designating a beneficiary of any right, property, or money in the form of a death benefit”); 20 Pa. Cons. Stat. § 6111.2 (Pennsylvania law that applies to a “life insurance policy, annuity contract, pension or profit-sharing plan, or other contractual arrangement providing for payments to the spouse”); S.D. Codified Laws § 29A-2-804 (South Dakota law defining “governing instrument” as “a will, trust, or other governing instrument executed by the divorced individual before the divorce or annulment of the individual’s marriage to the former spouse”); Utah Code Ann. § 75-2-804 (Utah law defining “governing instrument” as “a governing instrument executed by the divorced individual before the divorce or annulment”); Va. Code Ann. § 20-111.1 (Virginia law defining the term “death benefit” to include “any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit”); Wash. Rev. Code § 11.07.010 (Washington law broadly defining the term “nonprobate asset” to include an “employee benefit plan, annuity, or similar contract”); Wis. Stat. § 854.15 (Wisconsin statute defining “disposition of property” to mean “a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument”).

Similarly, the Uniform Probate Code advocates applying laws such as R.C. 5815.33 broadly to encompass retirement benefits. It includes a section providing for the revocation upon divorce, dissolution, or annulment of marriage of a property disposition made by the divorced individual to his or her former spouse in a governing instrument. Unif. Probate Code § 2-804(b)(1). “Governing instrument” is defined as “a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.” Unif. Probate Code § 2-804(a)(4). Comments accompanying the provision state it is intended to cover revocable “retirement-plan beneficiary designations.” Unif. Probate Code § 2-804. It also claims to be the “most comprehensive provision of its kind” and mentions that the Ohio statute, R.C. 5815.33, relates to the consequences of divorce on “life insurance and retirement-plan beneficiary designations.” *Id.*

Schilling, 67 Ohio St. 3d 164 (syllabus); see *In re Estate of Holycross*, 112 Ohio St. 3d at ¶30 (2007); 1989-1990 Ohio Laws, Part III, 4512, 4568 (Am. Sub. H.B. No. 346, eff. May 31, 1990). Lower courts have determined the date of the last beneficiary designation to be the effective date of the contract, assuming that the language of the plan and surrounding facts support such a finding. See *Western Southern Life Ins. v. Braun*, 116 Ohio App. 3d at 427-428; *Nationwide Life Ins. Co. v. Kallberg*, 2007-Ohio-2041 at ¶17.

Turning now to the hypothetical you proposed in your request, R.C. 5815.33 applies to the situation you described. In that hypothetical, a participant passed away on April 1, 2013, and had on file with OPEDCP a beneficiary form completed on January 1, 2008, designating his former spouse as the primary beneficiary. The participant and his spouse were officially divorced on March 1, 2012. The provisions of R.C. 5815.33 apply to this situation because the beneficiary form was completed after the effective date of the statute, May 31, 1990, assuming the facts of the particular case support a finding that the completed beneficiary form is a new contract.¹⁰ See *OPEDCP Plan Document*, p. 1 (“the plan consists of the provisions set forth in this document and in the participation agreement and is applicable to each eligible employee”); *OPEDCP Plan Document*, p. 6, ¶5.02 (noting that a participant or spousal beneficiary may change a beneficiary at any time and that all beneficiary elections shall be effective on the date filed with and accepted by the Plan Administrator).¹¹

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised:

1. A person designated as a beneficiary by a participating employee for the purpose of receiving, upon the death of the participating employee, the remaining benefits of the participating employee’s account in the Ohio Public Employees Deferred Compensation Program is a “beneficiary” as defined in R.C. 5815.33(A)(1).
2. R.C. 5815.33 applies only to those contracts entered into on or after May 31, 1990.

¹⁰ The Attorney General does not use the opinion-rendering function to interpret particular agreements or contracts. Such a determination is a right that falls within the jurisdiction of the judiciary. 1983 Op. Att’y Gen. No. 83-087, at 2-342; see 2010 Op. Att’y Gen. No. 2010-027, at 2-198 n. 2.

¹¹ It is important to note that the hypothetical you provided does not state that the beneficiary designation form or judgment or decree granting the divorce specifically provides that the former spouse was to remain as the beneficiary. If this was the case, R.C. 5815.33 would not apply. See R.C. 5815.33(B)(1).