

**ATTACHMENT A**  
**THE PROPOSED DECISION**

BEFORE THE  
BOARD OF ADMINISTRATION  
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM  
STATE OF CALIFORNIA

In the Matter of the Application for Payment  
of Benefits Upon the Death of Philip Timothy  
Wilson by:

STEPHEN M. WILSON, DAVID G. WILSON,  
PETER M. WILSON and WENDY S. WILSON,

Respondents

and

ANTIPAS JOHNLANG KONOU,

Respondent.

Case No. 9707

OAH No. 2011100405

**PROPOSED DECISION  
FOLLOWING REMAND**

This matter was originally heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on March 19, 2012, in Oakland, California.

Petitioner California Public Employees' Retirement System was represented by Henry W. Crowle, Senior Staff Counsel.

Respondents Stephen, David, Peter and Wendy Wilson were represented by Richard J. Collier, Attorney at Law. Respondents Stephen and Wendy Wilson were present.

Respondent Antipas Johnlang Konou was represented by Pamela E. Smith, Attorney at Law.

The administrative law judge submitted a proposed decision to CalPERS on May 8, 2012. On June 13, 2012, the CalPERS Board of Administration remanded the case to the administrative law judge to receive and consider additional evidence on the questions of "whether the member's beneficiary designation amended the [domestic] partnership agreement executed by the member and his surviving spouse" and if so, whether the

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 3-12-2013

*John Langlet*

agreement survived the couple's subsequent marriage, and to determine "whether CalPERS properly rejected the surviving spouse's disclaimers of interest executed in May and July 2009."

On remand, the matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on December 12, 2012, in Oakland, California.

Petitioner California Public Employees' Retirement System was represented by Patricia B. Miles, Senior Staff Counsel.

Respondents Stephen, David, Peter and Wendy Wilson were represented by Richard J. Collier, Attorney at Law. Respondents Stephen and Wendy Wilson were present.

Respondent Antipas Johnlang Konou was represented by Pamela E. Smith, Attorney at Law.

Additional evidence was received, further argument was heard, and the record was held open to allow the parties to submit closing briefs. Respondents' closing briefs were received on January 31, 2013. The Wilsons' brief was marked as Exhibit O for identification. Mr. Konou's brief was marked as Exhibit P for identification. Petitioner did not submit a closing brief. With their briefs, respondents each submitted a Request for Official Notice. The Wilsons requested that official notice be taken of the decision of the California Court of Appeal, filed on December 13, 2012, in the case of *Estate of Wilson, Konou v. Wilson* (2012) 211 Cal.App.4th 1284, and of the court's order denying Mr. Konou's petition for rehearing of that case. Mr. Konou requested that official notice be taken of the appellate decision and of his petition for review in the California Supreme Court, filed on January 21, 2013. Both requests are granted. The Wilsons' request and attached documents are marked as Exhibit Q. Mr. Konou's request and attached documents are marked as Exhibit R. Mr. Konou submitted a reply brief on February 5, 2013, and a correction to that brief on February 7. They are marked collectively as Exhibit S for identification.

The matter was deemed submitted for decision on February 7, 2013.

## SUMMARY

Philip Timothy Wilson, a state safety member of CalPERS, died on November 6, 2008. Competing applications for death benefits were subsequently submitted, one by his siblings, Stephen, David, Peter and Wendy Wilson, and one by his spouse, Antipas Johnlang Konou. After CalPERS determined that Mr. Konou was entitled to the benefits, the Wilsons appealed. At issue in this proceeding is whether, prior to applying for death benefits, Mr. Konou had validly waived or disclaimed any interest in his spouse's CalPERS account. It is determined that it was not established by clear and convincing evidence that Mr. Konou did validly waive such interest, and that he is therefore entitled to the death benefits.

## FACTUAL FINDINGS

### *Background*

1. Philip Timothy Wilson was employed by the Department of Corrections and Rehabilitation as a psychiatrist. By virtue of that position, Dr. Wilson was a state safety member of the California Public Employees' Retirement System.
2. On May 17, 2006, Dr. Wilson and respondent Antipas Johnlang Konou registered as domestic partners. Prior to that, on May 9, 2006, Dr. Wilson and Mr. Konou had signed a "Pre Registration Domestic Partnership Agreement (the domestic partnership agreement or the agreement). Paragraph 14 of the agreement provides that, "Each of the parties hereby waives the right to receive any property or rights upon the death of the other party unless that right is created or affirmed by the other party in a living trust, last will and testament or other written document." Paragraph 18 provides that, "This agreement may not be amended or terminated except in a written instrument signed by both parties." Among other things, the agreement reflected the parties' acknowledgment that Dr. Wilson was the sole owner of any interest he might have in his CalPERS pension and that Mr. Konou "specifically waives any interest in the CalPERS pension."
3. On July 3, 2006, less than two months after the domestic partnership agreement was executed, Dr. Wilson signed and subsequently filed with CalPERS a beneficiary designation in which he named Mr. Konou as his sole beneficiary. Mr. Konou also signed the beneficiary designation.
4. On June 20, 2008, Dr. Wilson and Mr. Konou married.
5. Dr. Wilson died on November 6, 2008. In addition to his spouse, Dr. Wilson was survived by his parents and four siblings.
6. On August 4, 2009, Stephen Wilson, acting as administrator of Dr. Wilson's estate, filed with CalPERS an "Application for Active-Member/Non-Member Survivor Benefits" on behalf of himself and his siblings, David, Peter and Wendy Wilson. Included with the application were a number of documents including portions of the May 9, 2006 domestic partnership agreement, disclaimers of interest signed by Dr. Wilson's parents on July 30, 2009, a disclaimer of interest signed by Mr. Konou on May 20, 2009, and a declaration purportedly signed by Mr. Konou on July 24, 2009.
7. On November 6, 2009, Mr. Konou filed with CalPERS an "Application for Pre-Retirement Death Benefits."
8. On November 19, 2009, CalPERS advised the attorney for Dr. Wilson's estate that it had determined the disclaimers that were submitted with the Wilsons' application for survivor benefits were not valid for purposes of disclaiming CalPERS benefits and that

CalPERS was accepting Mr. Konou's application for death benefits. The Wilsons appealed, triggering this proceeding.

*Events of July 2008 to November 2009*

9. Mr. Konou, a native of the Marshall Islands, was a legal alien at the time he married Dr. Wilson. Before meeting Dr. Wilson, Mr. Konou had suffered a felony conviction. Shortly after their marriage, Dr. Wilson and Mr. Konou traveled to Russia with Dr. Wilson's parents and siblings. On their return in late July 2008, Mr. Konou was detained by the Department of Homeland Security. Because he was an alien with a felony conviction, he was subject to detention and possible deportation.

10. Mr. Konou remained in custody from July 28, 2008, through September 15, 2009, while a deportation action against him proceeded. He was incarcerated at various county jails in California. Dr. Wilson hired and paid for an immigration lawyer to defend Mr. Konou.

11. On November 6, 2008, Dr. Wilson took his own life. A week before he died, Dr. Wilson had asked his sister, Wendy Wilson, if she would take over paying for the immigration lawyer because he was under financial strain. She agreed to do so. Thereafter, she covered all fees for Mr. Konou's lawyer.

12. While Mr. Konou was incarcerated, Wendy Wilson and her husband remained in close contact with him. They set up a calling plan so he could make calls when he got the opportunity. They wrote him hundreds of letters and postcards. They sent him spending money for personal items and snacks. Throughout his incarceration they expressed their love and support for him. When Mr. Konou said he was tired of fighting the deportation, Wendy Wilson encouraged him not to give up and promised to continue paying for his attorney. In a letter dated May 5, 2009, Mr. Konou thanked Ms. Wilson for this encouragement and advised her he had asked his attorney to file an appeal to the Ninth Circuit from an adverse deportation ruling issued by the Board of Immigration Appeals.

13. Dr. Wilson's brother Stephen, an attorney in Alabama, was appointed administrator of Dr. Wilson's estate. He notified CalPERS of his brother's death in March 2009. He engaged a California law firm to represent the estate's interests.

14. On March 27, 2009, Stephen Wilson wrote to CalPERS requesting the balance in his brother's account as of the date of death and his brother's beneficiary designation, if any. CalPERS declined to provide this information, deeming it confidential.

15. Dr. Wilson and Mr. Konou had owned two homes, one in San Francisco and one in Cathedral City. Expenses for the Cathedral City home, including mortgage payments and homeowners' fees, were a drain on the estate. The Wilsons decided the best course of action was to sell the Cathedral City home. Mr. Konou agreed with this decision and advised Wendy Wilson of this in a letter dated March 23, 2009.

16. The disclaimer of interest Mr. Konou subsequently signed on May 20, 2009, was drafted by the estate's attorneys as part of the probate action. In section 1 of the disclaimer, Mr. Konou acknowledged that in the May 9, 2006 domestic partnership agreement he had waived any interest in Dr. Wilson's San Francisco residence, personal property, financial accounts, vehicle and estate. He reconfirmed those waivers and then went on to "fully and forever . . . disclaim my right to receive any interest in the decedent's estate including but not limited to the above-referenced assets." In section 2, Mr. Konou stated, "The decedent was the owner of several retirement accounts including but not limited to a 401(k) Thrift Plan and 457 Deferred Compensation plan, a Pension Plan and an Individual Retirement Account." Mr. Konou acknowledged that in the May 9, 2006 domestic partnership agreement he had "waived any right, claim or interest in these retirement accounts" and he reconfirmed that waiver. He then disclaimed any rights or interests "in the above-referenced accounts or any other retirement accounts or plans." In section 3, Mr. Konou stated that he and Dr. Wilson owned the Cathedral City home as community property with right of survivorship. He disclaimed any right to receive any interest in the Cathedral City home.

17. Stephen Wilson sent a copy of the disclaimer to Mr. Konou, who was then in a jail in Santa Clara County, as an enclosure to a letter dated May 4, 2009. In the letter, Mr. Wilson stated, "If you should have any questions with these documents or you do not understand them, please have them reviewed by your attorney." He also stated that the disclaimer "acknowledges that you are disclaiming your interest in [Dr. Wilson's] estate, [Dr. Wilson's] retirement accounts, and any other asset that passes outside of [the] estate."

18. Mr. Konou denied he received the May 4 letter from Mr. Wilson. However, he testified he spoke to Wendy Wilson about the disclaimer before he signed it on May 20, 2009. He testified Ms. Wilson advised him to sign it, telling him that it would be best for him to sign it because the Cathedral City house was draining the estate. He further testified that Ms. Wilson told him that if he did not sign the disclaimer the family would cut off any further funding while he was incarcerated. Ms. Wilson denies this, and Mr. Konou's claim does not square with the fact that at about the same time, in early May 2009, Ms. Wilson had encouraged Mr. Konou not to give up fighting his deportation, promising him she would continue to pay for his attorney.

19. The disclaimer was brought to Mr. Konou in the Santa Clara County jail by a notary public, who witnessed his signature and notarized the document.

20. In July 2009, the estate's attorneys drafted a declaration for Mr. Konou to sign. According to Stephen Wilson, this was related to the sale of the Cathedral City home, and several sections of the declaration dealt with that property and clarified some items that were missing from the May 20 disclaimer. But in addition, section 3 provided more details about various financial and retirement accounts, including the CalPERS account. Account numbers for two bank accounts and Dr. Wilson's 457 deferred compensation plan that had not been included in the disclaimer were specified in the declaration. And while the

disclaimer had not specifically referred to a CalPERS pension, stating only that Dr. Wilson owned “a Pension Plan,” the declaration confirmed that Mr. Konou had disclaimed interest in any of Dr. Wilson’s retirement accounts including, “any retirement benefits or plans held at the California Public Employees Retirement System.”

21. Neither the May 2009 disclaimer nor the July 2009 declaration contained any financial information regarding the interests Mr. Konou was waiving. He was not advised of the value of Dr. Wilson’s CalPERS account or of the benefits to which he might be entitled as Dr. Wilson’s surviving spouse.

22. On the date this declaration was signed, July 24, 2009, Mr. Konou was incarcerated in a jail in Kern County. Although the declaration bears what purports to be Mr. Konou’s signature and was notarized, Mr. Konou denied that he signed either the declaration or the notary journal. He testified he recalls the notary coming to the jail and taking his thumbprint, but denied the signatures on the document and in the notary journal are his. While he testified he could not recall whether he had ever seen the declaration, he was insistent “that is not my signature.”<sup>1</sup>

23. In September 2009, Mr. Konou had a bail bond hearing scheduled in San Francisco. Wendy Wilson flew from Alabama to attend the hearing and testify on Mr. Konou’s behalf. She had found someone who would give Mr. Konou a job in her home town of Huntsville and she told the court that Mr. Konou could live with her and her husband. Ms. Wilson and her husband paid for Mr. Konou’s bond and they paid for an airline ticket to fly him to Alabama. Ms. Wilson provided Mr. Konou with a cell phone and a credit card he could use for expenses. Mr. Konou stayed for a brief time in the home he and Dr. Wilson had shared in San Francisco before flying to Huntsville, where he lived in Ms. Wilson’s home until November 2009.

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<sup>1</sup> Mr. Konou’s testimony on this point is disbelieved. Mr. Konou, who testified by telephone from the Marshall Islands, was not a credible witness. Concerning the domestic partnership agreement, despite specific recitations in the agreement, Mr. Konou denied he read that agreement or saw any of the attachments to it before signing it. He denied knowing Dr. Wilson even had a CalPERS account. And perhaps most tellingly, he denied being represented by counsel even though his attorney also signed off on the agreement.

In regard to the disclaimer, Mr. Konou denied receiving the May 4, 2009 letter from Stephen Wilson transmitting it to him and maintained he first saw the disclaimer when a notary brought it to him on May 20, 2009. Yet in a letter dated May 10, 2009, Mr. Konou advised Wendy Wilson he had “received the forms from . . . Steve [and was] waiting for the people . . . to show up here at the jail for notarizing the forms.”

Because Mr. Konou did not tell the truth about the circumstances surrounding his signing of either the domestic partnership agreement or the disclaimer, his assertion that he did not sign the declaration cannot be believed.

24. Wendy Wilson, her husband, and Mr. Konou returned to San Francisco for Mr. Konou's deportation hearing. Ms. Wilson testified she was not too concerned about this hearing because of the pending Ninth Circuit appeal. But Mr. Konou was ordered deported. He was given the choice of being returned to custody or being immediately deported. Mr. Konou did not wish to return to jail and chose to leave the country. Ms. Wilson bought his plane ticket to the Marshall Islands. She paid his rent there for one year in advance. She told him he could continue to use the credit card she had given him.

25. Mr. Konou was deported to the Marshall Islands on November 19, 2009. Ms. Wilson continued to provide financial support. At one point she wired Mr. Konou \$3,000 to start a tourism-related business. And for 18 months she continued to pay the expenses Mr. Konou charged on the credit card she had given him. At first, these charges ran about \$1,000 a month. But in early 2011, they increased to \$4,500 to \$5,000 a month. Ms. Wilson contacted Mr. Konou to ask what this was about, but he never responded. At that point, around May 2011, she cancelled the card.

#### *CalPERS Actions*

26. On October 22, 2009, CalPERS sent Mr. Konou a letter explaining the benefits to which he was entitled as Dr. Wilson's surviving spouse. These included a \$5,000 term life insurance benefit, either a lump sum benefit of \$660,408.57 or a lifetime monthly allowance of \$8,558.35 plus a \$750 monthly survivor allowance beginning at age 60 or 62 that would continue regardless of remarriage, and lifetime health and dental benefits. The letter further stated that CalPERS could not accept the May 20, 2009 disclaimer of interest "because it does not state the benefit or the amount you will be disclaiming." Mr. Konou was advised that if he wished to disclaim the benefits he needed to sign an enclosed "Disclaimer of CalPERS Benefits" that listed each of the monetary benefits to which he would be entitled and explained that if he did disclaim the benefits they would go to Dr. Wilson's next of kin.

27. Mr. Konou testified that until he received this letter he was unaware of his potential CalPERS benefits and the consequences of disclaiming them. He declined to sign the CalPERS disclaimer and instead on November 6, 2009, filed his application for death benefits.

28. On November 19, 2009, CalPERS sent a letter to the attorney for Dr. Wilson's estate explaining that it could not accept Mr. Konou's May 20, 2009 disclaimer because it had not fully disclosed to Mr. Konou the CalPERS benefits he would be disclaiming. Citing Probate Code section 277, subdivision (d)(2), (a disclaimer must "describe the interest to be disclaimed"), CalPERS asserted that to be a valid disclaimer for its purposes, the disclaimer must (1) identify the member, (2) describe the benefit being disclaimed, and (3) specify to what extent the benefit is being disclaimed.<sup>2</sup>

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<sup>2</sup> The reference to Probate Code section 277, subdivision (d)(2) appears to have been in error. That section refers to disclaimers made on behalf of minors or decedents. The

## *Other Litigation*

29. In February 2009, Stephen Wilson filed a petition to probate Dr. Wilson's will. In April 2011, Mr. Konou filed a petition seeking a determination of entitlement to distribution of the estate. He asserted two primary claims: first that he was a pretermitted spouse entitled to a portion of the estate (Dr. Wilson's will was executed before he met Mr. Konou); and second, that the disclaimer of interest he signed on May 20, 2009, was invalid. The parties stipulated to bifurcate the hearing on Mr. Konou's petition and to have the court decide only two issues deemed to be questions of law: 1) whether the marriage between Dr. Wilson and Mr. Konou invalidated their domestic partnership agreement; and 2) whether the agreement was a valid waiver of Mr. Konou's rights as a pretermitted spouse. In September 2011, the probate court held that the marriage did not invalidate the domestic partnership agreement and that the agreement constituted a valid waiver of Mr. Konou's rights. Because of the bifurcation, the probate court did not rule upon the validity of the May 20, 2009 disclaimer. Mr. Konou appealed the court's ruling.

30. On December 13, 2012, the day after the remand hearing in this matter, the Court of Appeal filed and certified for publication its decision in *Estate of Wilson, Konou v. Wilson* (2012) 211 Cal.App.4th 1284. The court affirmed the judgment of the probate court. Mr. Konou subsequently filed a petition for review by the California Supreme Court.

## LEGAL CONCLUSIONS

### *Domestic Partnership Agreement*

1. In May 2006, Mr. Konou and Dr. Wilson signed a domestic partnership agreement in which each waived "the right to receive any property or rights upon the death of the other . . . unless that right is created or affirmed by the other party in a living trust, last will and testament or other written document." In July 2006, Dr. Wilson created such a right when he signed a beneficiary designation naming Mr. Konou as his sole beneficiary for CalPERS purposes. Because both parties signed that document, under the terms of the agreement it constituted a modification of the agreement. Thus, in July 2006, Mr. Konou's waiver of any interest in Dr. Wilson's CalPERS pension was nullified.

2. The marriage of Dr. Wilson and Mr. Konou did not extinguish their domestic partnership. The marriage and the domestic partnership co-existed until Dr. Wilson's death. (See Fam. Code, § 299, subdivision (e).) Nor did their marriage extinguish or invalidate the domestic partnership agreement. It continued to exist and to govern the rights of the parties even after their marriage. (*Estate of Wilson, Konou v. Wilson, supra*, 211 Cal.App.4th 1284.)

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correct citation was to Probate Code section 278, which applies to disclaimers in general. It contains the same three requirements as section 277, subdivision (d)(2), i.e., the disclaimer must identify the creator of the interest, must describe the interest to be disclaimed, and must state the extent of the disclaimer.

3. Government Code section 21492 provides, “A member’s marriage . . . shall constitute an automatic revocation of his or her previous revocable designation of beneficiary.” Dr. Wilson’s beneficiary designation was therefore revoked by operation of law when Dr. Wilson and Mr. Konou married in June 2008. But while the designation was no longer effective for CalPERS purposes, it did not become a nullity for all purposes. Reflecting the intent of the couple, it continued to serve as a modification of the domestic partnership agreement, nullifying Mr. Konou’s previous waiver of his right to an interest in Dr. Wilson’s CalPERS pension.<sup>3</sup>

4. When a CalPERS member dies without having a beneficiary designation in effect, benefits are paid as specified in Government Code section 21493, subdivision (a). First in line for those benefits is the decedent’s spouse. Because the domestic partnership agreement had been modified in July 2006 to nullify Mr. Konou’s earlier waiver, upon Dr. Wilson’s death Mr. Konou was entitled to receive CalPERS death benefits under section 21493 as a surviving spouse.

#### *2009 Disclaimer and Declaration*

5. *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, held that a purported waiver of a statutory right must be “knowingly and intelligently made” and “is not legally effective unless it appears the party executing it had been fully informed of the existence of the right, its meaning, [and] the effect of the ‘waiver’ presented to him, and [had a] full understanding of the explanation.” “[A] valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived.” (All *Id.* at p. 389. Citations omitted.) “The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and ‘doubtful cases will be decided against a waiver.’ [Citation.]” (*Id.* at p. 390.)

6. The Wilsons have the burden in this proceeding of proving the validity of Mr. Konou’s May 20, 2009 disclaimer and July 24, 2009 declaration (collectively, the disclaimers). They have failed to demonstrate by clear and convincing evidence that the disclaimers met the test set out in *Hittle*. Although in the domestic partnership agreement Mr. Konou had previously waived all interest in Dr. Wilson’s CalPERS account, and although he presumably knew from the member statement the account balance at that time, this does not clearly and convincingly demonstrate that when he executed the disclaimers three years later he had “an actual and demonstrable knowledge” of the right being waived, that he had been “fully informed of the existence of the right,” or that he had a “full understanding” of what he was waiving.

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<sup>3</sup> While the probate court held that the domestic partnership agreement constituted a valid waiver of Mr. Konou’s rights as a pretermitted spouse, a ruling that was affirmed by the appellate court, the courts did not rule on the question of whether the CalPERS beneficiary designation had modified the agreement. In fact, there is no evidence that issue was ever presented to the probate court.

In the disclaimers, Mr. Konou acknowledged that he had previously waived his right to an interest in Dr. Wilson's CalPERS account, confirmed that waiver and again waived his rights. As the Wilsons point out, on three occasions – on May 9, 2006, on May 20, 2009, and on July 24, 2009 – Mr. Konou waived his interest in Dr. Wilson's CalPERS account. But at least as to the two 2009 waivers (the only ones that remain relevant in this proceeding given the finding that the signing of the beneficiary designation in July 2006 nullified the May 2006 waiver), Mr. Konou was provided no financial information at all. Nor did anyone explain to him the monetary value of the interest he was waiving. The Wilsons argue that the disclaimers did not provide details of the benefits being waived because CalPERS had refused to give that information to Stephen Wilson or the estate's attorneys. But while the Wilsons may not have known the exact value of the interest Mr. Konou was waiving because CalPERS had declined to provide that information, they and the estate's attorneys did know the balance in Dr. Wilson's account (or at least the balance from three years earlier). They certainly could have calculated the approximate value of the interest Mr. Konou was waiving and included that in the disclaimers. It is unlikely that Mr. Konou could have made a similar determination. He was incarcerated at the time and, while he did have counsel to aid in his immigration proceeding, he had limited access to her and there was no showing counsel was available to him for other forms of legal advice. In addition, Mr. Konou asserts that he was "legally unsophisticated." Considering all the evidence presented, it would not be unreasonable to conclude this to be true.

When Mr. Konou was provided a detailed explanation of the benefits he had previously waived, benefits that would pay him more than \$8,500 per month for life plus lifetime medical and dental benefits, he declined to sign the disclaimer CalPERS provided him and opted to apply for his spousal survivor benefits. Although this is not proof, in and of itself, that the earlier disclaimers had failed to adequately inform Mr. Konou of the rights he was waiving, it is an indication that until he received the CalPERS letter in October 2009 he did not have "a full understanding" of what he was waiving.

There is no evidence that the Wilsons, in failing to provide Mr. Konou full details of the rights he was waiving in the disclaimers, were attempting to take advantage of him. They knew that Mr. Konou had previously waived his rights to all interests in Dr. Wilson's property and financial interests and it was not unreasonable for them to believe that he would do so again after Dr. Wilson's death.<sup>4</sup> But in failing to provide Mr. Konou a

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<sup>4</sup> Mr. Konou intimated that he was the victim of a conspiracy put in place by the Wilson siblings to deprive him of his interests in Dr. Wilson's estate. But Mr. Konou had once before signed away all such rights when he signed the domestic partnership agreement. And the evidence presented contradicts the assertion that the Wilson siblings were taking advantage of Mr. Konou. To the contrary, Wendy Wilson and her husband, in particular, were extraordinarily supportive of Mr. Konou during his incarceration, sending him numerous letters, providing him spending cash, paying for his attorney, working to get him released on bail, and providing him housing and a job. And after Mr. Konou was deported, Ms. Wilson continued to support Mr. Konou, paying his credit card expenses and sending

complete explanation of the rights he was waiving, the Wilsons ran afoul of the stringent requirements set out in *Hittle*. Again, because it was not clearly and convincingly demonstrated that Mr. Konou had been fully informed of the interest he was waiving, or that he had actual and demonstrable knowledge of the extent of that interest, the disclaimers must be found legally ineffective under *Hittle*.

7. The Wilsons contend that Mr. Konou's 2009 disclaimers were valid waivers because they satisfied the provisions of Probate Code section 278. As set forth above in footnote 2, that section requires that a disclaimer must be in writing and must identify the creator of the interest, describe the interest to be disclaimed, and state the disclaimer and the extent of the disclaimer. While the disclaimers generally met the requirements of section 278, the holding in *Hittle* requires more than simple compliance with section 278. At least when dealing with statutory pension-related rights, it must also be shown that the party executing the waiver had "an actual and demonstrable knowledge" of the right being waived, that he had been "fully informed of the existence of the right," and that he had a "full understanding" of what he was waiving. That was not shown here by clear and convincing evidence.

8. The Wilsons also contend that Mr. Konou's disclaimers were valid under 26 USC §2581(b) and 26 CFR §25.2518-2(b)(1) and are therefore valid and effective under Probate Code section 295. Probate Code section 295 provides, "Notwithstanding any other provisions of this part, if as a result of a disclaimer . . . the disclaimed . . . interest is treated pursuant to the provisions of Title 26 of the United States Code . . . and the regulations promulgated thereunder, as having never been transferred to the beneficiary, then the disclaimer . . . is effective as a disclaimer under this part." Again, even assuming the disclaimers were valid to avoid a transfer for tax purposes under the federal statute and regulation, and were therefore deemed effective under Probate Code section 295, in the present situation *Hittle* requires more. Once again, it was not clearly and convincingly demonstrated that the *Hittle* requirements were met.

#### *Other Contentions*

9. In light of the determinations made in Legal Conclusions 1 through 8, it is not necessary to address various other contentions made by the parties, including the following contentions made by Mr. Konou: 1) that the disclaimers were unenforceable and unconscionable spousal waivers because there was no fair and reasonable disclosure of the value of the property, because Mr. Konou was not provided with an attorney at the time he signed the documents, and because Mr. Konou signed the document while he was

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him money to start a business in the Marshall Islands. Ms. Wilson continued to pay the charges Mr. Konou incurred on the credit card until May 2011, more than a year and a half after Mr. Konou made his claim for Dr. Wilson's retirement benefits. It defies belief that Ms. Wilson was part of a conspiracy to deprive Mr. Konou of his rights.

incarcerated awaiting deportation and in mourning over the death of his husband; 2) that the disclaimers are subject to rescission due to fraud, undue influence and/or mistake; and 3) that the lack of full disclosure constituted constructive fraud and undue influence because Mr. Konou was incarcerated, in mourning, and unable to obtain legal advice.

ORDER

The appeal of respondents Stephen, David, Peter and Wendy Wilson is denied. CalPERS' determination to award death benefits to respondent Antipas Johnlang Konou is affirmed.

DATED: March 8, 2013



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MICHAEL C. COHN

Administrative Law Judge  
Office of Administrative Hearings