

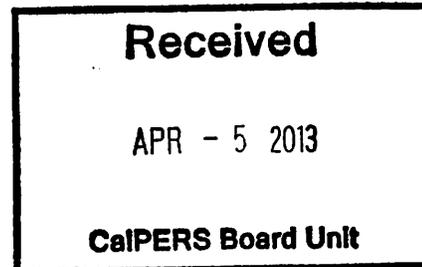
ATTACHMENT C
RESPONDENT(S) ARGUMENT



April 4, 2013

Via FedEx

CalPERS
400 Q Street, Room 3340
Sacramento, CA 95811



Re: **Konou/Wilson Proceeding**
CalPERS Case No. 9707

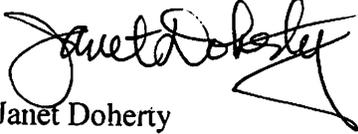
Dear Sir or Madam:

Enclosed is the Wilson Respondents' Arguments Against Proposed Decision in the above referenced proceeding.

Thank you.

Very truly yours,

COOPER, WHITE & COOPER LLP


Janet Doherty
Secretary to Richard J. Collier

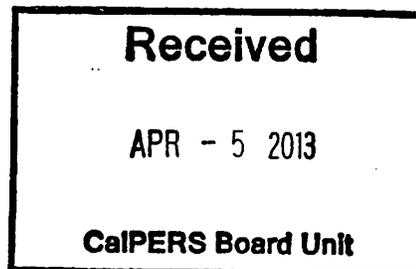
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Enclosure

714882.1

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



**BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

In the Matter of the Statement of Issues
Against:

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**

**WILSON RESPONDENTS'
ARGUMENTS AGAINST PROPOSED
DECISION**

Board Hearing Date: April 17, 2013

Respondents Stephen M. Wilson, Wendy Wilson, Peter Wilson and David Wilson, the brothers and sister of decedent Dr. Timothy Wilson, urge the CalPERS Board to reject the Proposed Decision issued by ALJ Hon. Michael Cohn dated March 8, 2013.

1. Neither of A. J. Konou's Claims to Dr. Wilson's CalPERS Benefits Can Be Sustained

A. J. Konou has made two claims to be entitled to the benefits of the CalPERS account of his domestic partner and spouse Dr. Timothy Wilson, and neither can be sustained.

The first claim is that Mr. Konou is the designated beneficiary on the CalPERS form PERS 850-241 which he and Dr. Wilson signed on July 3, 2006. However, CalPERS determined, and the ALJ finds in his Proposed Decision, that "Dr. Wilson's beneficiary designation was . . . revoked by operation of law when Dr. Wilson and Mr. Konou married in June 2008" (Proposed Decision, Legal Conclusions #3, page 9; see Government Code §21492 ("A member's marriage . . . shall constitute an automatic revocation of his or her previous revocable designation of beneficiary.")) Mr. Konou's first claim, derived from a revoked donative document, does not hold.

The second claim is that he is the "decedent's spouse" entitled to those benefits under Government Code §21493(a)(1). In the absence of a valid beneficiary designation, Government Code §21493(a) determines to whom benefits are payable, and first on the list is "the decedent's spouse." That statutory designation was the basis for CalPERS' awarding the benefits to Mr. Konou, and the basis for the ALJ's proposed confirmation of that determination (Proposed Decision, Legal Conclusions #4, page 9.)

But that statutory entitlement is precisely what Mr. Konou had waived in the Pre Registration Domestic Partnership Agreement (herein "the Domestic Partnership Agreement"):

"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. *Each party's waiver is intended to be an enforceable waiver of that party's rights under Probate Code sections 140-147.*"
(Emphasis added)

The referenced sections of the Probate Code validate a surviving spouse's written waiver of a number of rights, including an interest in "a pension plan" (see §141(a)(10) and §5000(a)). That the waivers in Paragraph 14 are valid has been confirmed in *Konou v. Wilson* (2012) 211 Cal.App.4th 1284 (review denied – see Exhibit A hereto), where the court determined that Mr. Konou's waiver of his right as a pretermitted spouse under the same Probate Code sections as referenced in Paragraph 14 was enforceable: "The waiver in the agreement unambiguously waived Konou's right to Wilson's estate . . ." (Id., 211 Cal.App.4th at 1300). Accordingly, Mr. Konou's second claim to the CalPERS benefits is

barred by his informed and specific waiver of that claim in the 2006 Domestic Partnership Agreement.¹

That was the conclusion reached in the first Proposed Decision issued May 8, 2012, at page 11 (Exhibit B hereto), on the basis of the same evidence as was available on remand:

"But Mr. Konou did waive those benefits when he signed the pre-domestic partnership agreement. The subsequent 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).) And because the pre-domestic partnership agreement was never revoked, it too continued to exist and to govern the rights of the parties even after their marriage. (Fam. Code, § 1614.)"

Now the ALJ has reached a different conclusion, but the reasoning is opaque and unconvincing. Interestingly, the Proposed Decision first repeats the earlier conclusion almost *verbatim* – as it had to, given the intervening holding of the Court of Appeal examining the same issue:

"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 too continued to exist and to govern the rights of the parties even after their marriage. (Fam. Code, § 1614.)"

But then a blatant *non sequitur* leads to a different conclusion:

"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

¹ Only a "written document" creating an overriding right to receive property at Dr. Wilson's death could overcome that waiver. The CalPERS beneficiary designation was such a document, but it had been revoked.

waiver of his right to an interest in Dr. Wilson's CalPERS pension." (Proposed Decision Legal Conclusions # 3, page 9; see also Legal Conclusions #4, page 9.)

A revoked beneficiary designation somehow is not revoked? It was a nullity, but not for all purposes? Did the beneficiary designation form *delete* from Paragraph 14 of the Domestic Partnership Agreement the provision that the parties waived "the right to receive any property or rights" upon the other's death, or the specific waiver of the right to a pension plan under Probate Code sections 140-147? Did it delete the provision that "parties waive any rights, claims or interest whatsoever in law or equity in the present or future property, income, or estate of the other" (Agreement section 2.3, page 5)?

The ALJ's error is that the beneficiary designation form did *not* modify or amend the Domestic Partnership Agreement. Rather, it was a separate donative document expressly authorized by Paragraph 14 of that Agreement: "Each of the parties hereby waives 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. . . .*" (Emphasis added) Shortly after registering as domestic partners, Dr. Wilson "created" for Mr. Konou "the right to receive property or rights" (i.e., rights upon Dr. Wilson's death to his CalPERS pension plan) in an "other written document" (i.e., the beneficiary designation form signed by both Dr. Wilson and Mr. Konou). Mr. Konou's claim to the CalPERS benefits would have to be upheld in spite of the Paragraph 14 waiver, **except that** the right created by that separate written document -- that discrete right -- was revoked, with the effect that the Domestic Partnership Agreement's waiver of the CalPERS pension interest stands, and bars Mr. Konou's claim.

2. There is No Need to Reach the Issue of the Validity of the 2009 Disclaimer and Declaration, but the *Hittle* Grounds for Invalidating Them Are Not Available

In his first Proposed Decision, ALJ Cohn determined that he did not need to reach the issue of the validity of the Disclaimer and Declaration signed by Mr. Konou in 2009 because the claim was barred by the 2006 waiver in the Domestic Partnership Agreement. See Exhibit B, Legal Conclusions ## 7, 8, page 12. That was the correct determination, and the earlier Proposed Decision should be reinstated.

Instructed by the Board on remand to address this issue, ALJ Cohn now finds that the 2009 Disclaimer and Declaration (1) are *valid waivers* under IRC §2518 and (2) are *valid waivers* under Probate Code §295 and Probate Code §278. Nonetheless, he concludes that the waivers cannot be enforced because they do not meet "the stringent requirements" set out in *Hittle v. Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374 (Proposed Decision, Legal Conclusions ## 5 and 6, pages 9-11.)

What information is sufficient information may be in the eye of the beholder, but here it must be said that the otherwise valid 2009 waivers set out all the information that was available to the Wilsons at the time (Proposed Decision Legal Conclusions #6 at page 10) and that the Disclaimer and Declaration unambiguously waive Mr. Konou's entire interest in the CalPERS plan. Moreover, the Proposed Decision erroneously attributes to the Wilsons the fault for failing to make available the information claimed to be lacking, when the fault must be laid squarely on Mr. Konou's shoulders and those of CalPERS (which declined to release information about Dr. Wilson's plan and its benefits). It is rank speculation, without any basis in the evidence, for the ALJ to find that the Wilsons "certainly could have calculated the approximate value of the interest Mr. Konou was waiving and included that in the disclaimers." (Proposed Decision at Legal Conclusions # 6 at page 10.) By contrast, Mr. Konou (1) had signed the 2006 Domestic Partnership Agreement that provided details of the value of the CalPERS pension; (2) had signed the 2006 beneficiary designation form naming him as beneficiary (which the Wilsons did not find out about until September 2009); (3) had the opportunity to review the May 2009 Disclaimer before he signed it; and (4) was in communication with the Wilsons about what he was being asked to sign (Proposed Decision at Factual Findings ##17, 18 at page 5 and #22, footnote #1, page 6). Given these circumstances, Mr. Konou could and, if he had any hesitation or need for further knowledge, should have asked what he was giving up. Not once, but twice he reaffirmed his 2006 waiver and independently waived his right – his entire right -- to the CalPERS plan without raising a concern or a question. That is classic estoppel – Mr. Konou appears to have been doing and saying whatever was necessary to keep himself in the Wilsons' good graces until he could get released from jail, at which point he promptly changed his tune.

The 2009 Disclaimer and Declaration were valid and effective under the Internal Revenue Code (IRC §2518) and thus are valid and effective under the California Probate Code's §295; they also satisfy the requirements for a disclaimer of Probate Code §278. (See Proposed Decision Legal Conclusions ##7 and 8, page 11.) There is no prejudice to Mr. Konou in enforcing them in spite of *Hittle* because he chose to forego the opportunity to get the information he might otherwise have been entitled to. Moreover, the 2006 waiver in the Domestic Partnership Agreement did meet the *Hittle* tests since detailed information about Dr. Wilson's CalPERS account was attached as an Exhibit to the Agreement. (See Proposed Decision issued May 8, 2012, Exhibit B hereto, Legal Conclusions #5 at page 11.)

Conclusion

The CalPERS Board remanded ALJ Cohn's initial Proposed Decision to receive and consider additional evidence on three identified issues. However, at the remand hearing ALJ Cohn concluded that no additional evidence should be received because the issues were matters of law, not of fact. Nonetheless, after considering additional briefing, ALJ Cohn has reversed himself, finding that none of Mr. Konou's three separate waivers

of his interest in Dr. Wilson's CalPERS account is enforceable. For the reasons stated above, that conclusion cannot be sustained as a matter of fact and as a matter of law. The Board should decline to adopt the Proposed Decision before it and adopt the Proposed Decision issued May 8, 2012 as being correctly decided.

DATED: April 4, 2013

LeCLAIRRYAN LLP

COOPER, WHITE & COOPER LLP

By: Richard J. Collier
Richard J. Collier
Attorneys for Respondents STEPHEN M.
WILSON, DAVID G. WILSON, PETER M.
WILSON and WENDY S. WILSON

714686.2

PROOF OF SERVICE

I am a resident of the State of California. I am over the age of eighteen years, and not a party to this action. My business address is 201 California Street, Seventeenth Floor, San Francisco, California 94111-5002.

On April 4, 2013, I served the following document(s):

WILSON RESPONDENTS' ARGUMENTS AGAINST PROPOSED DECISION

on each of the parties listed below at the following addresses:

Patricia B. Miles, Esq.
California Public Employees'
Retirement System
P.O. Box 242707
Sacramento, CA 94229-2707

Pamela E. Smith, Esq.
482 W. Hamilton Ave., #2
Campbell, CA 95008

BY MAIL: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On the date specified above, as to each of the parties identified in the above service list, a true copy of the above-referenced document(s) were placed for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid; and on that same date that envelope was placed for collection in the firm's daily mail processing center, located at San Francisco, California following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 4, 2013, at San Francisco, California.



Janet Doherty

Court of Appeal, First Appellate District, Division Two - No. A133952

S208135

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Estate of PHILIP TIMOTHY WILSON, Deceased.

ANTIPAS JOHNLANG KONOU, Petitioner and Appellant,

v.

STEPHEN M. WILSON et al., Objectors and Respondents.

The petition for review is denied.

Chin, J., is of the opinion the petition should be granted.

SUPREME COURT
FILED

MAR 27 2013

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

**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

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

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 matter was submitted for decision on March 19, 2012.

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 pension. It is determined that Mr. Konou did waive such interest when in 2006 he signed a pre-domestic partnership agreement giving up the right to receive any property upon the death of Dr. Wilson, including any interest in Dr. Wilson's CalPERS pension.

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 an agreement entitled "Pre Registration Domestic Partnership Agreement." In that agreement, they waived "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." The agreement also 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. Less than two months later, on July 3, 2006, Dr. Wilson signed, and subsequently filed with CalPERS, a beneficiary designation in which he named Mr. Konou as his sole beneficiary.

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, Dr. Wilson's brother 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 Pre Registration 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 Application for Active-Member/Non-Member Survivor Benefits were not valid for purposes of disclaiming CalPERS benefits, and that it was accepting Mr. Konou's Application for Pre-Retirement Death Benefits. This appeal followed.

The Pre Registration Domestic Partnership Agreement

9. As indicated above, Dr. Wilson and Mr. Konou signed a "Pre Registration Domestic Partnership Agreement" on May 9, 2006. The agreement provides that, "The parties have attempted to provide reasonable good-faith disclosures of property and financial obligations, attached hereto." It further provides that, "The parties acknowledge that they have been afforded sufficient data and reasonable time and opportunity to investigate and analyze the other party's disclosures pertaining to the separate property assets and liabilities set forth in attached exhibits. Parties recognize that they have the right to request and receive more complete disclosures of the other's separate property." Among the attached exhibits was Dr. Wilson's 2005 CalPERS Member Statement, which showed his years of service credit and the total amount in his account.

10. The agreement also includes the following provision: "Each party acknowledges that [he] has been represented in the negotiations and in preparation of this agreement by an independent attorney of [his] own choosing: [Dr. Wilson] has been represented by Cheryl A. Sena; and [Mr. Konou] has been represented by Malcolm Smith. Each party has carefully read this agreement in its entirety, and his attorney has fully explained its contents and legal effect." Both attorneys signed the agreement.

11. Despite the recitations in the agreement, Mr. Konou denied he was represented by counsel. He denied reading the agreement before signing it. He denied seeing any attachments to the agreement. He denied that the CalPERS Member Statement was attached to the agreement, that he saw it, or that he was aware of the amount in Dr. Wilson's account before signing the agreement. In fact, Mr. Konou denied knowing at the time that Dr. Wilson had a CalPERS account.

Events of July 2008 to November 2009

12. Mr. Konou, a native of the Marshall Islands, was a legal alien at the time he married Dr. Wilson. Because the federal government does not recognize same sex marriages, his marriage to Dr. Wilson did not afford him the benefits of citizenship. 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 Protection. Because he was an alien with a felony conviction, he was subject to detention and possible deportation.

13. 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.

14. 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. In total, Wendy Wilson paid between \$18,000 and \$20,000 for Mr. Konou's legal fees.

15. 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, \$600 to \$800 in total, 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.

16. Dr. Wilson's brother, Stephen Wilson, 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.

17. 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 of over \$3,000 a month and homeowners' fees, was a drain on the estate. The Wilsons decided the best course of action was to sell it. Mr. Konou agreed with this decision and advised Wendy Wilson of this in a letter dated March 23, 2009. He told her he trusted her "100%" and was confident she would "do what is right for all of us."

18. 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 Pre Registration 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 pre-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.

19. 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."

20. 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. But Mr. Konou did not feel Ms. Wilson was threatening him; he felt she was just advising him of the right thing to do. He cannot recall if he read the disclaimer before signing it.

21. Wendy Wilson denied telling Mr. Konou that she would cut off funding for his lawyer if he did not sign the disclaimer, although she conceded she may have said it was getting difficult to pay both the expenses on the Cathedral City home and the immigration attorney. She understood that the disclaimer dealt only with the Cathedral City home and she encouraged him to sign it because they needed to sell the home.

22. Notarization of documents in jail is handled through the Friends Outside organization. Wendy Wilson, who lives in Alabama, spoke to Mr. Konou's friend Neil Price about making the necessary arrangements. Mr. Price testified he told Ms. Wilson that the disclaimer looked like a "a very one-sided agreement." He said she told him this was what Stephen Wilson said was necessary to handle the estate and expedite the sale of the Cathedral City home. Mr. Price testified that he asked Ms. Wilson what would happen if Mr. Konou did not sign, and she said she would discontinue paying for his attorney. Mr. Price testified he conveyed that statement to Mr. Konou.

23. 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.

24. 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." Mr. Wilson does not know why confirmation of the earlier disclaimer of interest in the retirement accounts was included.

25. 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."

26. 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 he 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.

27. 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. 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.

28. Mr. Konou was deported to the Marshall Islands on November 19, 2009. Ms. Wilson continued to provide financial support. At one point she wired him \$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

29. 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 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.

30. 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 Pre-Retirement Death Benefits.

31. 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. The letter further explained that CalPERS would not recognize the Pre Registration Domestic Partnership Agreement as a disclaimer of death benefits, stating that "while a member may be free to enter into any contract, including an antenuptial agreement, such member may not do so where such a contract would circumvent public policy or where it would contravene statutory enactments." A subsequent letter to the estate's attorney stated, "CalPERS does not accept pre-nuptial or pre-domestic partnership agreements to legally establish a member's account as their sole property. Therefore, although Mr. Konou was represented by an attorney and he was aware of the amount in [Dr.] Wilson's CalPERS account from the Annual Member Statement, the 'agreement' cannot be accepted." CalPERS presented no legal authority for its stated policy not to accept pre-nuptial or pre-domestic partnership agreements.

Credibility Findings

32. Mr. Konou, who testified by telephone from the Marshall Islands, was not a credible witness. In relation to first the pre-domestic partnership agreement and second the disclaimer and declaration, Mr. Konou essentially portrayed himself as a dupe who was taken advantage of by Dr. Wilson in the first instance and his siblings in the second. Concerning the pre-domestic partnership agreement, as stated above, 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.

33. Despite his claims of lack of knowledge, it was established by clear and convincing evidence that before signing the pre-domestic partnership agreement Mr. Konou had been fully informed of the existence of his rights.

34. 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 you Wendy and also from Steve [and was] waiting for the people from the organization (People Outside) to show up here at the jail for notarizing the forms.” And in another letter on May 17, 2009, he told Ms. Wilson that Neil Price had “dropped off the forms at the office of People Outside” and he was still waiting for them to come by so he could sign them. Mr. Konou’s claim that Wendy Wilson told him that she would stop paying for his attorney if he did not sign the disclaimer 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.

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

36. Mr. Konou implied that he was part 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 previously signed away all such rights when he signed the pre-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 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.

Parties’ Contentions

37. Mr. Konou makes the following assertions and arguments:

a. The May 20, 2009 disclaimer is ineffective because it does not satisfy the requirements of Probate Code sections 260 through 295 in that it fails to properly describe the interest being disclaimed and fails to describe the property being disclaimed. (Prob. Code, § 278.) The disclaimer makes no mention of CalPERS, disclaiming only a “401(k) Thrift Plan and 457 Deferred Compensation plan, a Pension Plan and an Individual

Retirement account.” Importantly, it does not describe the monetary value of the property being disclaimed.

b. He did not sign the July 24, 2009 declaration. Even if he had, however, it suffers the same infirmities as the May 20, 2009 disclaimer. While the declaration sought to expand the disclaimer, making specific reference to disclaiming “any retirement benefits or plans held at the California Public Employees’ Retirement System,” it still failed to describe the property being disclaimed, including the value of that property.

c. Neither the disclaimer nor the declaration informed him of his statutory rights to receive benefits. *Hittle v. Santa Barbara County Employees Retirement Association* (1983) 39 Cal.3d 374, provides that a waiver of benefits is not legally effective unless it appears the party was fully informed of the existence of his rights.

d. CalPERS’ determination that the Pre Registration Domestic Partnership Agreement did not affect the payment of benefits is supported by *Knight v. Board of Administration* (1983) 148 Cal.App.3d 973, *Hudson v. Posey* (1967) 255 Cal.App.2d 89, and *Lee v. Board of Administration* (1982) 130 Cal.App.3d 132.

e. The May 20, 2009 disclaimer makes no mention of the fact that, after signing the Pre Registration Domestic Partnership Agreement, Dr. Wilson designated Mr. Konou as his CalPERS beneficiary. Had Dr. Wilson not subsequently married Mr. Konou, which marriage extinguished the beneficiary designation by operation of law (Gov. Code, § 21492), Mr. Konou would have been entitled to benefits under that designation.

f. The disclaimer is an unenforceable and unconscionable spousal waiver 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 incarcerated awaiting deportation and in mourning for the suicide of his husband. (Prob. Code, §§143, 144.)

g. The disclaimer is subject to rescission due to fraud, undue influence and/or mistake. The lack of full disclosure constituted constructive fraud and undue influence was taken because Mr. Konou was incarcerated, in mourning, and unable to obtain legal advice.

38. The Wilsons make the following assertions and arguments:

a. The pre-domestic partnership registration agreement is valid. While the beneficiary designation may or may not have been a permitted modification of the agreement, that beneficiary designation was wiped out by operation of law when Dr. Wilson and Mr. Konou married. Therefore, the agreement still governs the parties’ rights. CalPERS has presented no legal authority for the policy stated in its November 30, 2009 denial letter: “CalPERS does not accept pre-nuptial or pre-domestic partnership agreements to legally establish a member’s account as their sole property.”

b. Mr. Konou's disclaimer was properly executed, with knowledge, and not under duress.

c. Mr. Konou's disclaimer was valid under Internal Revenue Code §2581(b) and Reg. §25.2518-2(b)(1) and is therefore valid under Probate Code § 295.

39. CalPERS makes the following assertions and arguments:

a. The Wilsons have the burden of proving CalPERS' determination was in error. Under *Hittle v. Santa Barbara County Employees Retirement Association, supra*, 39 Cal.3d at p. 390, this must be by clear and convincing evidence, and "doubtful cases will be decided against the waiver."

b. Contracts, such as pre-nuptial agreements, may not circumvent or violate public policy or statutory enactments, such as the Public Employees' Retirement System, including the statutory scheme to determine beneficiaries.

c. Mr. Konou's disclaimer and declaration were prepared for probate purposes. The circumstances under which they were prepared and presented to Mr. Konou are unknown. This makes their lack of detail particularly important. The documents contain no details of what is being disclaimed or of the consequence of disclaiming – i.e., who would receive the disclaimed benefits. Because of this, it cannot be said that Mr. Konou made an informed decision, even if he did sign both documents.

d. Under Probate Code 142, a waiver of rights by a surviving spouse must be entered into freely with mutuality of consent and free of duress, undue influence and mistake. Parties must understand what is being waived and its consequences. Waiver requires "an actual and demonstrable knowledge of the very right being waived." It is questionable whether Mr. Konou had such knowledge.

e. The disclaimer and declaration "cannot be used to subvert respondent Konou's entitlement to the CalPERS benefits evidenced by the Beneficiary Designation of July 3, 2006 in which decedent named his then domestic partner, who[] he later married, as sole, 100% beneficiary."

LEGAL CONCLUSIONS

1. While the parties have focused much of their energy on the validity of Mr. Konou's May 20, 2009 disclaimer and July 24, 2009 declaration, this matter can be resolved without having to determine the validity of either of those documents.

2. On May 9, 2006, Mr. Konou and Dr. Wilson signed a Pre Registration 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.” Dr. Wilson may or may not have created such a right when on July 3, 2006, he signed a beneficiary designation naming Mr. Konou as his sole beneficiary for CalPERS purposes. However, that beneficiary designation was extinguished by operation of law when Dr. Wilson and Mr. Konou married on June 20, 2008. Government Code section 21492 provides, “A member’s marriage . . . shall constitute shall constitute an automatic revocation of his or her previous revocable designation of beneficiary.”

3. When a CalPERS members dies without having a beneficiary designation in effect, benefits are paid under Government Code section 21493, subdivision (a). First in line is the decedent’s spouse, second are the decedent’s children, third the decedent’s parents and fourth the decedent’s siblings. Thus, unless he waived or otherwise disclaimed the right to receive the CalPERS benefits, Mr. Konou was entitled to Dr. Wilson’s CalPERS benefits.

4. But Mr. Konou did waive those benefits when he signed the pre-domestic partnership agreement. The subsequent 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).) And because the pre-domestic partnership agreement was never revoked, it too continued to exist and to govern the rights of the parties even after their marriage. (Fam. Code, § 1614.)

5. Mr. Konou’s waiver of rights in the pre-domestic partnership agreement was knowingly made. As recited in the document, Mr. Konou acknowledged he had been afforded sufficient data, time and opportunity to investigate Dr. Wilson’s disclosures, that he had been represented by independent counsel, and that he had carefully read the agreement. His assertions at the hearing that none of this was true, and that he was unaware that Dr. Wilson had a CalPERS account, much less the amount in that account, were not believable. It was demonstrated by clear and convincing evidence that Mr. Konou was fully informed of the existence of his rights as required by *Hittle v. Santa Barbara County Employees Retirement Association*, *supra*, 39 Cal.3d 374.

6. CalPERS provided no legal authority for its policy not to accept pre-nuptial agreements to modify the statutory scheme for determining beneficiaries. In support of that policy, however, Mr. Konou has cited *Knight v. Board of Administration* (1983) 148 Cal.App.3d 973, *Hudson v. Posey* (1967) 255 Cal.App.2d 89, and *Lee v. Board of Administration* (1982) 130 Cal.App.3d 132. However, none of these cases is directly on point.

In *Hudson*, the decedent had designated his wife Pearl as his beneficiary at the time he entered the retirement system. He did not change the beneficiary designation after purportedly divorcing Pearl and marrying Mary. Despite a will leaving certain property to Pearl and the residue of his estate to Mary, the court held this did not indicate the decedent had, or had intended to, change the earlier pension beneficiary designation. Pearl was entitled to the pension benefits because of that designation, not because of statute, and no pre-nuptial agreement was involved.

In *Lee*, the decedent, who had been separated from his spouse for 23 years at the time of his death, and who had become a member of the retirement system after that separation, had designated another woman as beneficiary of his benefits. However, the court held the decedent's spouse was entitled to those benefits because the statutory scheme indicated the legislature's intent that a surviving spouse take precedence over a designated beneficiary. As in *Hudson*, no pre-nuptial agreement was involved.

Knight is the only one of the three cases to involve a pre-nuptial agreement that sought to contract away entitlement to retirement benefits. Prior to their marriage, the decedent and her husband had executed such an agreement providing that each waived all claims and rights that he or she might acquire solely by reason of the marriage. After the marriage, the decedent filed a beneficiary designation naming her grandchildren as beneficiaries of her retirement benefits. CalPERS nevertheless found that the benefits should go to the surviving spouse. In a subsequent mandate proceeding, the court made two findings: first, that the pre-nuptial agreement did not constitute a waiver of the CalPERS benefits; and second, that the statutory scheme did not give preference to a surviving spouse over a named beneficiary. CalPERS was ordered to make payments to the grandchildren. On appeal, the judgment was reversed. Following *Lee*, the Court of Appeals held the husband was entitled to the benefits because of the legislative intent that the surviving spouse has precedence over a named beneficiary. Importantly, however, the court did not decide the effect of the pre-nuptial agreement because that issue had not been raised on appeal. Thus, *Knight* has no precedential effect on the question of whether one spouse may contract away his or her statutory rights to the other spouse's retirement benefits.

7. There being no authority for CalPERS' policy not to recognize pre-nuptial agreements, it is determined that the May 9, 2006 Pre Registration Domestic Partnership Agreement is controlling. Mr. Konou having knowingly waived his rights to Dr. Wilson's retirement benefits, he is no longer entitled to receive those benefits.

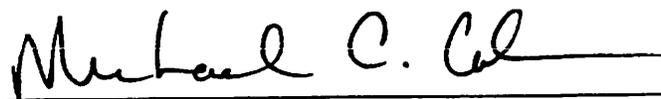
8. As a result of this determination, it is unnecessary to further determine whether Mr. Konou's May 20, 2009 disclaimer and/or his July 24, 2009 declaration were sufficient disclaimers under CalPERS law. Nor is it necessary to address any of the other contentions made by the parties.

9. While Mr. Konou is not entitled to receive Dr. Wilson's retirement benefits, it does not necessarily follow that those benefits should go to the other respondents, Dr. Wilson's siblings, Stephen, David, Peter and Wendy Wilson. After Mr. Konou, next in line under Government Code section 21493, subdivision (a), are Dr. Wilson's parents. Although they also filed disclaimers with CalPERS, the agency has determined that those disclaimers were invalid. However, Dr. Wilson's parents were not a party to this proceeding and their rights cannot be determined in this decision.

ORDER

The appeal of respondents Stephen, David, Peter and Wendy Wilson is granted. CalPERS' determination to award Philip Timothy Wilson's retirement benefits to respondent Antipas Johnlang Konou is set aside.

DATED: May 8, 2012

A handwritten signature in black ink, appearing to read "Michael C. Cohn", written over a horizontal line.

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings