ATTACHMENT A

PROPOSED DECISION

ATTACHMENT A

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

In the Matter of the Application for Death Benefits Payable Upon the Death of Elsie M. Smith by: ALFRED L. SMITH, Respondent, and JUNE C. COLLINS, GLENN M. SMITH, GINGER D. SMITH, MARIE A. SMITH, Respondents.	Case No. 2010-0824 OAH No. 2012070131

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, Office of Administrative Hearings, State of California, on January 30, 2013, in Sacramento, California.

Elizabeth Yelland, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Alfred L. Smith appeared on his own behalf.

Chuck Sylvester, Attorney at Law, appeared on behalf of respondents June C. Collins, Glenn M. Smith, Ginger D. Smith and Marie A. Smith. Respondent June C. Collins was also present.

Evidence and testimony were received, the record was closed and the matter was submitted for decision on January 30, 2013.

ISSUE

Whether Alfred L. Smith should be recognized as the sole beneficiary of a $2,000 Retired Death Benefit, as well as an Option 1 Death Benefit, both payable on the death of his spouse, Elsie M. Smith.

PUBLIC EMPLOYEES RETIREMENT SYSTEM
FILED March 5 2013
Lisa Okamoto

FACTUAL FINDINGS

1. The Statement of Issues was made and filed on July 10, 2012, by Mary Lynn Fisher, Chief of the Benefit Services Division of CalPERS. She did so in her official capacity.

Background

2. Decedent Elsie M. Smith was employed by the San Diego Community College District as a Senior Clerical Assistant. By virtue of her employment, she was a local miscellaneous member of CalPERS subject to the provisions of Government Code section 21490. Alfred L. Smith (respondent) was married to, albeit estranged from, Elsie Smith at the time of her death on April 10, 2010.

Respondent June C. Collins is the daughter of respondent and Elsie Smith. She was designated as the sole beneficiary of the $2,000 Retired Death Benefit. The natural born children of Elsie M. Smith are June C. Collins, Glenn M. Smith, Ginger D. Smith and Marie A. Smith. The four children were all designated as beneficiaries of Elsie M. Smith's Option 1 Death Benefit.

CalPERS' Initial Determination

3. Respondent submitted an application for Post Retirement Survivor Benefits of Elsie Smith to CalPERS on April 25, 2010. CalPERS received respondent's application, and made an initial determination that he was entitled to one half of the Option 1 Death Benefit. At the time of Elsie Smith's death, the remaining balance of her CalPERS contributions was $25,118.62, an amount referred to as her Option 1 Death Benefit. CalPERS responded to respondent's request by letter dated May 17, 2010, providing the following explanation regarding his entitlement to the Option 1 Death Benefit:

> When Elsie retired on July 6, 2005, she elected the Option 1 Benefit and designated her children, June C. Collins, Glenn M. Smith, Ginger D. Smith, and Marie A. Smith, as her option beneficiary. Option 1 stipulates that if there are any remaining contributions, this amount will be payable in a lump sum to the designated or statutory beneficiary(s). Upon Elsie's demise, there is a remaining balance of contributions of $25,118.62.
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> A surviving spouse has a community property interest in an Option 1 benefit payable from CalPERS when another person has been named as the beneficiary. Because you were married during the entire time of your wife's CalPERS covered employment, and you remained married until her death, you have a community property interest in the Option 1 balance payable to her children, as the designated beneficiaries.

> The standard "time-rule" formula has been used to determine your community property interest. Your community property interest is one half of the number of years of your marriage during your wife's CalPERS covered employment divided by her total number of service credit. Since you were married the entire time she worked for a CalPERS covered employer, your community property share is equal to 50% of the Option 1 benefit of $25,118.62. Therefore, you are entitled to a lump sum payment of $12,559.31.
>
> We have notified Elsie's children, that we intend to reduce their lump sum benefit and have given them the opportunity to file an objection. If one of them files an objection, CalPERS will require a court order that determines your community property interest from the family law court or the probate court.

4. By separate letter dated May 17, 2010, CalPERS provided respondent Collins with the same explanation of the Option 1 Benefit, and she was also given the right to file an objection if she disagreed with CalPERS' determination that respondent was eligible to receive 50 percent of the Option 1 Benefit as his community property share.

5. By letter to CalPERS dated May 25, 2010, respondent contested the planned distribution of Elsie Smith's Option 1 Death Benefit. He requested that all distributions be placed on hold until the correct beneficiaries could be determined.

By letter to CalPERS dated June 1, 2010, respondent Collins objected to CalPERS' determination that respondent was eligible to receive a community property interest in the Option 1 Death Benefit.

CalPERS' Revised Determination

6. CalPERS subsequently reviewed documents which indicated that on November 26, 2001, respondent and Elsie Smith had executed a Marital Settlement Agreement (MSA). CalPERS determined that this MSA gave Elsie Smith sole interest in her CalPERS retirement account, and made respondent ineligible for the community property portion of Elsie Smith's Option 1 Death Benefit. By letter dated July 1, 2010, CalPERS advised respondent that it had changed its determination regarding his eligibility for the Option 1 Benefit. CalPERS explained to respondent:

> [Government Code section 21490] also provides that a designation for a death benefit derived from contributions earned during the marriage cannot be in derogation of a spouse's community property interest. However, there is an exception if there is an alternative order for division. We were recently provided with a copy of the Marital Settlement Agreement dated November 26, 2001, which was signed by you

> and your wife. In this agreement, Mrs. Smith was given sole interest in her CalPERS retirement account. Therefore, Mrs. Smith had the right to name someone other than yourself for the entire Option 1 Balance of Contributions Death Benefit. Based on this new information we have determined that you are not entitled to half ($12,559.31) of Option 1 benefit because you do not have a community property interest in your wife's retirement account.

7. CalPERS further advised respondent that he was not entitled to the $2,000 retired death benefit as this benefit was not derived from community property proceeds. Respondent was notified of his right to appeal from CalPERS' determination. He filed an appeal dated September 10, 2010.

On September 30, 2010, CalPERS advised respondent Collins that respondent had filed an appeal from CalPERS' denial that he be recognized as the sole beneficiary of benefits payable due to the death of Elsie Smith.

8. Per the Statement of Issues, the appeal is limited to the issue of "whether Respondent Alfred L. Smith should be recognized as the sole beneficiary of the Retirement Death Benefit, as well as the Option 1 Death Benefit, payable due to the death of Elsie M. Smith."

Discussion

Retired Death Benefit and Survivor Continuance

9. Elsie Smith completed and executed a Service Retirement Election Application on June 1, 2005. Section 4 of this application relates specifically to the Retired Death Benefit. Elsie Smith designated her beneficiary for this benefit to be her daughter, June Carol Collins. This designation was never changed by Elsie Smith, or otherwise revoked by a change in her marital status. The Retired Death Benefit is comprised of a $2,000 lump-sum distribution to the named beneficiary. It was Elsie Smith's sole and separate property. It is not derived from community property proceeds. For these reasons, CalPERS correctly determined that respondent has no right to collect any portion of the $2,000 Retired Death Benefit.

10. Elsie Smith completed Section 5 of the Service Retirement Election Application which related to the Survivor Continuance. She designated respondent as her surviving spouse. Accordingly, CalPERS has been paying respondent a lifetime Post Retirement Survivor Allowance in the amount of $430.30 per month. This amount is not in dispute.

Option 1 Balance of Contributions

11. On June 1, 2005, Elsie Smith completed Section 3d of the Service Retirement Election Application relating to the Option 1 Balance of Contributions. She designated her four children (June Carol Collins, Glenn M. Smith, Ginger Denis Smith and Marie Smith) as the beneficiaries for any lump sum death benefits. Respondent executed this Service Retirement Election Application on the portion entitled "Spouse's Acknowledgement." By so doing, respondent attested as follows: "By signing this beneficiary designation form, I acknowledge that I am aware of the designation made by my spouse. I also hereby state that I am the current spouse." Respondent's signature appears under this statement. He also handwrote the date he executed the document as "6/1/05."

12. On March 15, 2006, Elsie Smith and respondent executed a second Post Retirement Lump Sum Beneficiary Designation. The same four children were designated as primary beneficiaries of the "various lump sum benefits that may be payable." Respondent's signature appears below a spouse's acknowledgement containing language similar to that set forth in Finding 11.

13. It is undisputed that Elsie Smith desired that CalPERS distribute the Option 1 Balance of Contributions to her four children.

14. The following provisions of the Government Code govern distribution of the Option 1 Benefit in this case.

Government Code section 21261 confirms that by signing the "Spouse's Acknowledgement," respondent did not waive his community property interest in the Option 1 Benefit. It was merely an acknowledgement that he was aware of his spouse's designation. Section 21261 provides in part:

> The sole purpose of this section is to notify the current spouse of the selection of benefits or change of beneficiary made by a member. This section is not intended to conflict with community property law. An application for a refund of the member's accumulated contributions, an election of optional settlement, a designation of beneficiary, or a change in beneficiary designation shall contain the signature of the current spouse of the member, unless the member declares, in writing under penalty of perjury, any of the following:
>
> [¶]...[¶]
>
> (b) The current spouse has no identifiable community property interest in the benefit.
>
> [¶]...[¶]

(f) The member and the current spouse have executed a marriage settlement agreement pursuant to Part 5 (commencing with Section 1500) of Division 4 of the Family Code that makes the community property law inapplicable to the marriage.

In this case, Elsie Smith did not prepare a declaration in writing under penalty of perjury averring that respondent had no identifiable community property interest in the benefit, nor did she indicate that a marriage settlement agreement operated to make the community property law inapplicable to their marriage.

15. Government Code section 21490 provides in part as follows:

(a) Except as provided in subdivision (b), a member may at any time, including but not limited to, at any time after reaching retirement age, designated a beneficiary to receive the benefits as may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.

(b) (1) No designation may be made in derogation of the community property share of any nonmember spouse when any benefit is derived, in whole or in part, from community property contributions or service credited during the period of marriage, unless the nonmember spouse has previously obtained an alternative order for division pursuant to Section 2610 of the Family Code.

16. Family Code section 2610 provides in part as follows:

(a) Except as provided in subdivision (b), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:

(1) Order the disposition of any retirement benefits payable upon or after the death of either party in a manner consistent with Section 2550.

(2) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value.

> (3) Upon the agreement of the nonemployee spouse, order the division of accumulated community property contributions and service credit as provided in the following or similar enactments: (A) Article 2 (commencing with Section 21290) of Chapter 9 of Part 3 of Division 5 of Title 2 of the Government Code. ...

CalPERS' Position

17. CalPERS relied on the fact that both Elsie Smith and respondent signed CalPERS' Post-Retirement Lump Sum Beneficiary Designation Form naming the four children as beneficiaries of the Option 1 Benefit. This occurred on June 1, 2005, and again on March 15, 2006.

In addition, CalPERS contends that the November 26, 2001 MSA gave Elsie Smith sole interest in her CalPERS retirement account, and thus made respondent ineligible for any community property portion of the Option 1 Benefit. By signing the MSA, CalPERS believes that respondent waived any interest in his wife's retirement plan funds from the San Diego Community College District. As such, CalPERS determined that the November 26, 2001 MSA operated as a valid alternative disposition for division of the community property within the meaning of Government Code section 21490. For the reasons set forth below, the MSA did not operate as an alternative order for division.

18. First, the MSA was never made part of any court order relating to division of a community property share in any retirement plan. By its express language, Government Code section 21490 and Family Code section 2610 both contemplate having a court issue necessary or appropriate "orders" to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits. Under these circumstances, CalPERS cannot deem an MSA to be an "alternative order of division," even after CalPERS has made its own determination that the MSA was intended to be binding on the parties. Rather, the Public Employees Retirement Law (PERL) expresses an intent that distributions not be done in "derogation of the community property share of any nonmember spouse when any benefit is derived, in whole or in part, from community property contributions or service credited during the period of marriage, *unless the nonmember spouse has previously obtained an alternative order for division pursuant to Section 2610 of the Family Code.*" (Italics added. Gov. Code, § 21490, subd. (b)(1).) The PERL further provides that where parties rely upon an MSA so as to not require the signature of a nonmember spouse on the "Spouse's Acknowledgement" on a retirement election form, the member must sign a declaration under penalty of perjury that either the non-member spouse has no identifiable community property interest in the benefit, or that the MSA makes the community property law inapplicable to the marriage. (Gov. Code, § 21261, subds. (b) & (f).) Considered together, these PERL requirements suggest that one of CalPERS' important obligations is to ensure that community property interests are protected prior to making any lump sum distribution of benefits.

19. Second, there was no dissolution of marriage in this case. Respondent correctly noted that unlike premarital and marital agreements, marital settlement agreements are entered into during marriage and in contemplation of dissolution, legal separation, or nullity. The language of the November 26, 2001 MSA confirmed this understanding. The preamble notes that the MSA was made with reference to the following facts: "Unhappy and irreconcilable differences have arisen between us which have caused the irremediable breakdown of our marriage per the wife who is pursuing the divorce; ..."

In addition, paragraph XIII of the MSA is entitled "PRESENTATION TO COURT" and reads as follows: "This agreement shall be presented to the court in any divorce proceeding between the parties, it shall be incorporated into the Judgment therein, the parties shall be ordered to comply with all its provisions, and all warranties and remedies provided in this agreement shall be preserved." The MSA in this case was crafted in contemplation of marital dissolution. It was drafted by respondent and executed by both respondent and Elsie Smith. Although divorce proceedings commenced in San Diego County Superior Court, the couple did not continue through dissolution. The case was eventually dismissed and they remained married through the time of her death.

20. Third, although the MSA contained express language confirming their respective pension plans as being their separate property, other language in the MSA specified that "there is a community property interest in our pension plans."[1] It is apparent that the two wished to benefit from their respective pensions, but the MSA contained conflicting provisions regarding the characterization of their pension interests as community or separate property.

21. Finally, the MSA intended to make a final and complete settlement of all their rights and obligations concerning the division of property. It presumed good faith disclosure of all property interests. Thus, paragraph XIV of the MSA provided as follows:

> DISCLOSURES: Each party has made a full and honest disclosure to the other of all current finances and assets, and each enters into this agreement in reliance thereon. Each warrants to the other and declares under penalty of perjury that the assets and liabilities divided in this agreement constitute all of their community assets and liabilities.

22. Respondent contends that Elsie Smith "violated the rules of the divorce proceeding when she did not declare in her financial inventory the fact that she purchased a life insurance policy in the amount of $100,000. Further she did not declare her mutual fund

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[1] The MSA contained the following language regarding pension plans:

"Although there is a *community interest* in our pension plans, it is agreed that each shall benefit only from his/her own retirement funds and no attempt will be made to obtain any order to divide either as community property. In the event of the death of either person, the other is named as primary beneficiary." [Italics added.]

holding of $54,000." He avers that she knowingly withheld this information at the time to "coerce" him to change the beneficiary for lump sum death benefits. The merits of such contentions need not be addressed here. It is enough that there is a dispute over whether good faith disclosures were made at the time the MSA was executed. It further points to the problematic nature of deeming the MSA to be an alternative order of distribution as urged by CalPERS in this case.

The above matters having been considered, the November 26, 2001 MSA did not operate as a valid alternative disposition for division of the community property within the meaning of Government Code section 21490.

Children's Position

23. Elsie Smith's children joined CalPERS in the above arguments. They also contended that the MSA operated as and remained a binding contract, notwithstanding the fact that the couple remained married. They suggest that when the dissolution action was dismissed, the court took no position on the MSA, and essentially "left things as they were." Under the terms of the MSA, respondent children believe respondent relinquished and waived his community property interest in Elsie Smith's Option 1 Benefit. They further contend that the fact that the contract was labeled a "marital settlement agreement" should not be controlling.

These arguments have largely been addressed. As earlier noted, marital settlement agreements are distinguishable from premarital ("antenuptual" or "prenuptial") and marital ("postnuptual") agreements. Marital settlement agreements are not made for an ongoing marriage. They are made in contemplation of dissolution or legal separation. This is an important distinction because individuals may be motivated by any number of reasons to agree to MSA terms in connection with a pending dissolution that they would never otherwise agree to in context of an ongoing marriage relationship. The MSA here made express reference to anticipated dissolution proceedings. It should be viewed in that context only, and not as an independent contract that continued in effect through the time of Elsie Smith's death.

Respondent's Position

24. Respondent contends that he is entitled to both the full Retired Death Benefit and the full Option 1 Benefit. He was under the mistaken impression that when he signed the "Spouse's Acknowledgement" he had waived any prior interest he had in those benefits. As noted in Finding 9 the $2,000 Retired Death Benefit was Elsie Smith's sole and separate property. It was not derived from community property proceeds. Regardless of any fraud or other issues respondent believes were at play, he had no right to collect any portion of the $2,000 Retired Death Benefit. With regard to the Option 1 Benefit, Elsie Smith made her intentions clear on the Service Retirement Election Application. Respondent's sole claim is to his community property interest in this benefit. As noted above, he did not waive this interest by executing the MSA.

25. Any other assertions put forth by CalPERS or respondents at the hearing, and not addressed above, are found to be without merit and are rejected.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) The formula for determining a member's retirement benefit takes into account: (1) years of service; (2) a percentage figure based on the age on the date of retirement; and (3) "final compensation" (Gov. Code, §§ 20037, 21350, 21352 and 21354; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) Members are afforded an opportunity to elect retirement payment options and to make beneficiary designations. This includes designation of beneficiaries to receive Option 1 Balance of Contributions and a Retired Death Benefit.

2. Thus, Government Code section 21490 provides in part as follows:

> (a) Except as provided in subdivision (b), a member may at any time, including but not limited to, at any time after reaching retirement age, designate a beneficiary to receive the benefits as may be payable to his or her beneficiary or estate under this part, by a writing filed with the board.
>
> (b) (1) No designation may be made in derogation of the community property share of any nonmember spouse when any benefit is derived, in whole or in part, from community property contributions or service credited during the period of marriage, unless the nonmember spouse has previously obtained an alternative order for division pursuant to Section 2610 of the Family Code.

Legal Conclusions

3. CalPERS correctly determined that the full Retired Death Benefit is payable to respondent June Carol Collins. This designation was never changed by Elsie Smith, or otherwise revoked by a change in her marital status. The Retired Death Benefit is comprised of a $2,000 lump-sum distribution to the named beneficiary. It was Elsie Smith's sole and separate property. It is not derived from community property proceeds. For these reasons, CalPERS correctly determined that respondent has no right to collect any portion of the $2,000 Retired Death Benefit. (Finding 9.)

4. The matters set forth in Findings 11 through 25 have been considered. Respondent did not meet his burden of establishing that he should be recognized as the sole beneficiary of the Option 1 Benefit. However, respondent does have a community property

interest in the Option 1 Benefit for which no alternative order for division was obtained pursuant to Family Code section 2610. CalPERS cannot properly deem the MSA in this case to be an alternative order for division. Nor did the MSA operate as a binding contract that relinquished and waived respondent's community property interest in Elsie Smith's Option 1 Benefit. The MSA looked ahead to a marital dissolution or separation. When this did not occur, it was not binding on the couple.

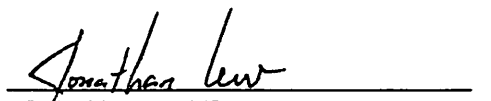
ORDER

1 The appeal of Alfred L. Smith to be recognized as the sole beneficiary of the $2,000 Retired Death Benefit is DENIED.

2. The appeal of Alfred L. Smith to be recognized as the beneficiary of the Option 1 Balance of Contributions Benefit is GRANTED in part. CalPERS shall pay Alfred L. Smith his community property interest in this benefit, or $12,559.31. The balance shall be paid to the four children designated by Elsie M. Smith on the Service Retirement Election Application she submitted to CalPERS.

3. The appeal of Alfred L. Smith to be recognized as the sole beneficiary of the Option 1 Balance of Contributions Benefit is DENIED.

DATED: March 1, 2013



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings