

**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 Survivor  
Benefit Payable Upon the Death of Member  
Cecil C. Flournoy, Jr., by:

Case No. 2012-0856

OAH No. 2014040555

SHIRLEY A. FLOURNOY,

Respondent,

and

CECIL C. FLOURNOY III,

Respondent.

**PROPOSED DECISION**

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles on July 2, 2015, and February 1, 2016. Complainant California Public Employees' Retirement System was represented by Cynthia A. Rodriguez and Christopher Phillips, Senior Staff Counsels. Respondent Shirley A. Flournoy was present and represented by Warren O. Hodges, Attorney at Law. Respondent Cecil C. Flournoy III made an appearance in this matter and he was dismissed as a party.<sup>1</sup>

During the hearing, complainant presented Exhibits 1 – 9 and 17 - 20, which were received in evidence, and the testimony of Cathy A. Modin, Retirement Program Specialist. Complainant's Exhibit 20 (Superior Court Minute Order) was admitted but for limited purposes. In addition, on February 1, 2016, complainant filed a copy

<sup>1</sup> The matter came before the Administrative Law Judge for hearing on September 16, 2014, and December 10, 2014. Respondent's requests for continuance of the hearing were granted on those dates.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

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of the transcript of the first hearing date, which was subsequently marked as Exhibit 30 and received in evidence. Respondent presented documentary evidence comprised of Exhibits A, E, G, K, L, M, O – U, and W – Z, which were all admitted into evidence. Respondent's Brief was marked as Exhibit AA. Respondent testified and presented the testimony of Cecil Carl Flournoy III and Beverly J. Jackson. The record was held open for respondent to file a revised exhibit list.

On February 16, 2016, respondent's counsel filed a Revised List of Exhibits. On February 17, 2016, the Administrative Law Judge received respondent's filing, which was marked as Exhibit BB.

Oral, documentary, and stipulated evidence and arguments having been heard or received, the Administrative Law Judge submitted this matter for decision on February 17, 2016, and finds as follows:

#### FACTUAL FINDINGS

1. On April 1, 2014, the Statement of Issues, Case Number 2012-0856, was made and signed for and on behalf of complainant California Public Employees' Retirement System, State of California (CalPERS), by Anthony Suine in his official capacity as Chief, Benefit Services Division, CalPERS, Board of Administration, State of California.
2. From on or about March 4, 1969, through June 1, 2011, Cecil C. Flournoy, Jr. (member), was employed as an industrial waste inspector by the Sanitation District of the County of Los Angeles. By virtue of his employment with the Sanitation District, the member was a local miscellaneous member of CalPERS within the meaning of Government Code sections 21624 and 21626.
3. (A) On April 19, 2011, the member filed a Service Retirement Election Application (retirement application) with CalPERS at the Regional Office in Glendale. On the retirement application, the member wrote "Emergency Retirement" and indicated that his address was "13107 Haas Avenue" in Gardena. He indicated that his last day on the work payroll was to be May 31, 2011 and that his retirement date was to be June 1, 2011. The member elected an unmodified allowance as his service retirement option. The retirement application provided that, for an unmodified allowance, there is no return of the member's contributions and no monthly benefits payable upon the member's death, except the survivor continuance benefit, if applicable, and that there is no beneficiary designation. The unmodified allowance option provides a CalPERS retiree with the highest monthly allowance for his lifetime but does not provide for any monthly allowance payable to a beneficiary such as a spouse.

(B) In section 4 of the retirement application, the member designated his son, Cecil C. Flournoy III, as the person to receive his lump-sum retired death benefit. In section 5, the member answered that he was married on and at least one year prior to his retirement date, he named Shirley A. Flournoy (respondent) as his spouse, and he indicated that he and respondent were married on September 14, 1968. The member thus named respondent as his spouse who would be eligible to receive the survivor continuance benefit. The survivor continuance benefit is a monthly allowance payable to a member's eligible spouse or children, which is derived from contributions or payments by the member's employer and authorized under Government Code section 21624.

(C) In section 9, the member signed the retirement application certifying under penalty of perjury that the information that he submitted was true and correct to the best of his knowledge. The member also certified under penalty of perjury that he was legally married. Respondent also signed the retirement application as the member's spouse. A CalPERS representative witnessed their signatures on the retirement application.

4. Later that day on April 19, 2011, respondent sent to CalPERS by facsimile transmission a copy of her and the member's marriage certificate, their son's birth certificate, and a voided check to facilitate the direct bank deposit of the member's retirement allowance. On the fax cover sheet, respondent thanked the representative for her "help and patience" that day and asked the representative to advise if there was anything else needed to complete the member's retirement application. In or about June 2011, the member began receiving his unmodified retirement allowance from CalPERS.

5. Nine months later, on January 19, 2012, the member died. On January 26, 2012, Cecil C. Flournoy III, respondent's and the member's son, reported the member's death to CalPERS. On or about February 22, 2012, Cecil C. Flournoy III filed an Application for Retired Member/Payee Survivor Benefits with CalPERS. On this application, Cecil C. Flournoy III indicated that his father had died, was married to respondent, and had one child. The member's son also noted that respondent's address was 13107 South Haas Avenue in Gardena and that respondent had paid the expenses for the member's funeral.

6. On February 7, 2012, respondent filed an Application for Retired Member/Payee Survivor Benefits with CalPERS. In this document, respondent stated that the deceased member was married to her since September 1968; had two children, Cecil Flournoy III and Bryon Flournoy; and did not leave a will or trust. Respondent stated that her address was 5368 Village Green, Los Angeles. On February 13, 2012, respondent filed the member's death certificate with CalPERS. Subsequently, CalPERS issued survivor continuance payments to respondent of \$11,437.80 on May 5, 2012; \$3,369.56 on June 1, 2012; and \$3,369.56 on July 1, 2012.

7. On June 11, 2012, CalPERS received a letter from Corey W. Flournoy, who asserted that he was also the son of the member and that respondent was not married to the member at the time of his death. Corey W. Flournoy stated the member was single and had been divorced from respondent since October 28, 1981. With his letter, Corey W. Flournoy submitted a copy of the member's death certificate and a Final Judgment of Dissolution of Marriage in the matter of the *Marriage of Shirley A. Flournoy, Petitioner, and Cecil C. Flournoy, Respondent* (Superior Court of California, County of Los Angeles, Case Number D-963-002). Corey W. Flournoy claimed respondent was "impersonating" and "posing" as the member's wife.

8. (A) On July 10, 2012, a manager of CalPERS's Death Benefit Unit called respondent and informed her that CalPERS would not be paying the survivor continuance benefit to her any longer because it had received information that she and the member were divorced in 1981 and she was not eligible for the benefit as a surviving spouse. Respondent expressed her disagreement with CalPERS' decision and asked for a copy of the member's Service Retirement Election Application and the final judgment of divorce.

(B) On July 16, 2012, CalPERS forwarded the documents to respondent and formally notified her that it had recently obtained a copy of the Final Judgment of Dissolution of Marriage in the matter of her marriage to the member and that the document showed that she and the member were not legally married when he retired. CalPERS further notified respondent that, because she was not the member's spouse, she was not entitled to receive the survivor continuance benefit. CalPERS' letter further stated:

Survivor Continuance is an employer paid benefit which is payable by law to an eligible survivor. When a member retires under a "Service Retirement", Government Code sections 21624 and 21626 (copy enclosed) define a "Surviving Spouse" [as] a husband or wife married to the member at least one year prior to his or her retirement and continuously to the date of his or her death. If there is no eligible spouse, the survivor continuance benefit may be payable to children who meet the eligibility requirements as defined in section[s] 21624 and 21626. A member cannot designate a beneficiary for the Survivor Continuance benefit.

CalPERS asked respondent to return the \$18,176.92 in survivor continuance benefit payments that had been sent to her.

9. In a fax message dated July 30, 2012, respondent acknowledged receipt of CalPERS' decision to stop paying the survivor continuance benefit to her. She asserted that the member's employment records will show that he listed her as his wife during his 42-year career with the Sanitation District. Respondent expressed

disagreement with CalPERS' decision and ostensibly asked for payment of the survivor continuance benefit.

10. On August 14, 2012, CalPERS denied respondent's request to receive the survivor continuance benefit on the ground that CalPERS was in possession of a final judgment of dissolution showing that she and the member were divorced in 1981 and, therefore, she did not qualify as a surviving spouse eligible to receive the benefit. CalPERS indicated that, under Government Code section 21624, the survivor continuance benefit is payable to a qualifying survivor and a surviving spouse is a husband or wife who was married to the member for a continuous period beginning at least one year prior to his retirement and ending on the date of his death. CalPERS clarified for respondent that the member did not designate her as a beneficiary under a retirement option but, rather, listed her as a survivor for purposes of the survivor continuance benefit and that she was not an eligible survivor. CalPERS stated that it was withholding the monthly continuance survivor benefit and health coverage and provided her with information about her appeal rights.

11. On or about September 26, 2012, respondent filed an appeal of CalPERS' decision that she was not entitled to receive the survivor continuance benefit as the member's surviving spouse and requested a hearing. Respondent stated in her appeal letter that dissolution of the marriage was invalid, that the member named her as his wife on legal documents and health benefit forms, and that the member believed he was married to her. On April 1, 2014, CalPERS made and filed the Statement of Issues and this matter ensued.

#### Respondent's Appeal

12. (A) Respondent attained a bachelor of arts from California State University at Dominguez Hills, a master of arts from Pepperdine University, and a doctorate from the University of Southern California (USC). Respondent then worked at the University of Southern California, Occidental College, and the California School of Professional Psychology. Currently, she is employed as an administrator with the Department of Mental Health, County of Los Angeles and has been so employed for an undetermined number of years.

(B) The member grew up and attended schools in Wasco, which is near Bakersfield. He then attended Bakersfield College and California State University Long Beach.

13. On September 14, 1968, respondent and the member were married in Las Vegas. Respondent was 19 years old and the member was 21 years old. They had met when both of them were community college students at Bakersfield College. After their marriage, the couple lived in Bakersfield for a short while and then moved to the Los Angeles area. In March 1969, the member began working for the

Sanitation District where he remained for the rest of his working career. Respondent worked for an insurance company for an undetermined period of time. In 1970, the couple had their only child, Cecil C. Flournoy III. Three years later, in 1973, the member and respondent purchased a home at 13107 South Haas Avenue in Gardena (Haas Avenue home or house).

14. (A) Beginning in or about 1974, the member began having extra-marital affairs. He was taking classes and was frequently away from home. Respondent became suspicious when, on one occasion, she answered the telephone at home and unknown women were on the line. On another occasion, a woman came to the Haas Avenue house with a baby who was ill. The woman told respondent that the member was the baby's father.

(B) By 1978, respondent had enough of the member's absences and infidelities. She had contracted a sexually-transmitted disease from her husband. From respondent's perspective, the marriage was not getting better despite the member professing that their marriage was important to him and promising to change his ways. In July 1978, respondent filed a petition to dissolve the marriage in the Superior Court of California, County of Los Angeles, and served the petition upon the member. Both respondent and the member retained counsel for the divorce proceeding. However, they continued living together in the Haas Avenue home during the pendency of the divorce.

(C) On July 10, 1979, respondent's counsel prepared and filed an Interlocutory Judgment of Dissolution of Marriage in the matter of the *Marriage of Shirley A. Flournoy, Petitioner, and Cecil C. Flournoy, Respondent*, Case Number D-963-002. Pursuant to a stipulation of the parties, the court awarded custody of the child Cecil to respondent and visitation rights to the member. The member was ordered to pay child support. The court also awarded the member the exclusive use of the family residence on South Haas Avenue in Gardena until the residence was sold and ordered him to pay the first and second mortgages. The court also ordered respondent and the member to list the residence for sale with a real estate broker and to sell the residence immediately. The member was awarded, as his sole and separate property, all of respondent's rights and interests in the member's pension or retirement benefits with the Sanitation District. Respondent's interest in her husband's pension was valued at \$3,295 for which respondent was to be given credit from the member's share of the proceeds from the sale of their residence. Under the interlocutory decree, the court retained jurisdiction over the matter, including the issue of spousal support.

(D) In December 1979, respondent moved out of the Haas Avenue house with her son. A few months later, in the spring of 1980, respondent and the member reconciled and respondent and her son moved back into the family residence. When her attorney called to see if she wanted to finalize her divorce, respondent informed her attorney that she and her husband had reconciled. Her attorney did not

file a final judgment of dissolution but she also did not file a dismissal of the dissolution petition. Respondent and the member resumed living together as a married couple.

15. Over a year and a half later, on October 14, 1981, the member's attorney filed a Request and Declaration for Final Judgment of Dissolution of Marriage (Request and Declaration). The member's signature was affixed to the Request and Declaration. The Request and Declaration stated, "Since entry of the Interlocutory Judgment the parties have not become reconciled and have not agreed to dismiss this proceeding." The Request and Declaration also stated, "I request that final judgment of dissolution of marriage be entered." By signing the Request and Declaration under penalty of perjury, the member adopted the statements contained therein.

16. On October 28, 1981, a Judge of the Superior Court signed and entered the Final Judgment of Dissolution of Marriage in the matter of the *Marriage of Shirley A. Flournoy, Petitioner, and Cecil C. Flournoy, Respondent*. The Final Judgment of Dissolution of Marriage was prepared and filed by the member's attorney. The court did not make any order restoring respondent's name to her former name.

17. It was not established that the Request and Declaration for Final Judgment of Dissolution of Marriage or the Final Judgment of Dissolution of Marriage was served upon respondent or her counsel. Shirley Cole, respondent's attorney who is now retired, did not recall receiving either the Request and Declaration or the Final Judgment of Dissolution of Marriage. If she had received the request for entry of a final judgment of dissolution, Cole testified that she would have been surprised and would have immediately called the member's lawyer and respondent. Cole recalled that respondent told her that she had reconciled with the member.

18. Respondent testified she never received the Final Judgment of Dissolution of Marriage after it was filed and entered in October 1981. She testified that, in 1981, the member never told her that he wanted a divorce or that the divorce had become final. They discussed reconciling and staying together. The member told respondent that he wanted to save their marriage.

19. (A) After reconciling with the member and returning to live with him in the Haas Avenue home in the spring of 1979, respondent and the member continued their relationship and resumed marital relations. All was well for several years.

(B) In September 1988, respondent and the member refinanced the mortgage or obtained a second mortgage on the Haas Avenue home in order to obtain funds to pay for their son's college. They obtained \$86,000 from California Federal

Savings and Loan Association of Los Angeles. Their son Cecil matriculated to Morehouse College in Atlanta.

(C) In the mid 1980's, the member began having extra-marital affairs again. He took separate vacations. Women not known to respondent began calling him at the family home. In 1990, respondent again contracted a sexually-transmitted disease. In or about 1991, she decided to move out of the Haas Avenue house that she shared with the member and moved to Torrance by herself. Around this time, respondent obtained her doctorate, began working at Occidental College, and bought a condominium.

20. (A) In 1990, respondent had worked part-time at the University of Southern California while completing her doctorate program. For income tax purposes, she claimed that her tax status was married and claimed five tax deductions. In 1991, respondent worked at the California School of Professional Psychology and claimed that her tax status was married. For the year 1991 when she was employed at Occidental College, respondent earned wages of \$38,071.56. For federal and state income tax purposes, she claimed married status.

(B) Respondent testified that she did not have any employee benefits at Occidental College and that she had health insurance coverage through the member's job. However, for the year 1991, respondent's Personal Statement of Benefit Contributions and Tax Deductions from Occidental College showed that she received health insurance coverage through Kaiser Health Insurance as well as dental insurance coverage through Delta Dental Plan of California (Delta Dental) from her job.

21. (A) Three Notices of Payment issued by Delta Dental to the member in April 1991, July 1997, and September 2004, showed that respondent was enrolled in the member's dental plan coverage. The dental plan benefit was provided through the member's employment with the Sanitation District. Respondent was enrolled in the dental plan as the member's spouse.

(B) Bills or notices issued in April 1993, November 1996, February 2002, and February 2012 by Allstate Insurance Company for payment of premiums for homeowners insurance on the Haas Avenue house were issued or mailed to both member and respondent. The bills or notices were addressed to the member and respondent as husband and wife and as joint tenants and mailed to them at the Haas Avenue house.

(C) According to a CalPERS Health Enrollment History, on December 1, 1979, both the member and respondent were new enrollees in member's health plan. A Health Benefits Plan Enrollment Form showed that the member added respondent to his health plan as his spouse effective December 1, 1979.

(D) A Confirmation Notice dated November 6, 2002, and Health Plan Personal Information sheets for 2003, 2007, and 2011, which were issued to the member by CalPERS showed that respondent was enrolled in the member's health plan at Kaiser Permanente. Respondent was enrolled in the health plan as the member's spouse. The notice and sheets also demonstrated that the member had five to seven of his children enrolled in his health plan. It was not established that respondent received or reviewed these Health Plan Personal Information sheets when they were sent to the member.

(E) Eight Statements of Earnings and Deductions, or paycheck stubs, issued to the member by the Sanitation District, County of Los Angeles, from December 1980 through March 1987 demonstrated that the member claimed status as a married person during this time period.

22. (A) In May 1991, respondent purchased or acquired a condominium located at 5368 Village Green in Los Angeles. She obtained ownership of the condominium by grant deed which stated that she obtained the property as "Dr. Shirley A. Flournoy, an unmarried woman."

(B) On or about February 10, 2003, respondent refinanced the mortgage or obtained a new loan on the Village Green condominium. She obtained a second or new loan of \$130,000 secured by the property from Downey Savings and Loan Association of Newport Beach. The deed of trust securing the loan indicated respondent was the borrower and referred to her as "Dr. Shirley A. Flournoy, An Unmarried Woman." Respondent signed and initialed each page of the security agreement.

(C) Respondent testified that she did not look at the grant deed or deed of trust for the Village Green condominium. She offered no explanation as to why she took ownership of the condominium as an unmarried woman.

23. An amended insurance policy declaration dated November 1992 demonstrated that respondent had automobile insurance with Mercury Casualty Company. Respondent was the insured under the policy and her address was the Village Green condominium. The insurance policy declaration was issued because respondent had changed her address to the Village Green condominium.

24. Earlier, on January 14, 1986, respondent's parents, Cleon C. Collins, and Thelma Lee Collins, gave her or sold to her their property in Bakersfield. The grant deed and purchase money deed of trust for the transfer was recorded on February 12, 1986. In both deeds, respondent was described as "an unmarried woman."

25. In or about 2000, the member was diagnosed with prostate cancer. He had to have surgery. Respondent accompanied the member to his medical

appointments and cared for him after his surgery. The member's cancer went into remission. In 2006, the member was diagnosed with a recurrence of his cancer. He called respondent for assistance. She went with him to his medical appointments. After another period of remission, the member's cancer returned in 2011. Respondent moved back into the Haas Avenue house with the member and began living with and caring for the member.

26. (A) On April 18, 2011, the member called CalPERS' Regional Office in Glendale and informed CalPERS staff that he wanted to come into the regional office and file an emergency retirement application due to his medical condition. A CalPERS representative informed the member that a retirement counselor could come to his home but the member indicated that he felt well enough and wanted to come into the regional office. The CalPERS representative gave the member information about a power of attorney and service retirement. The member stated that he would call back about coming into the regional office after speaking with his wife, Dr. Shirley Ann Flournoy. The member asked for retirement estimates and provided respondent's birthdate to the CalPERS representative.

(B) Later on April 18, 2011, the member called CalPERS back and indicated that he was at home with his wife Shirley and wanted to come into the regional office the next day to file an emergency retirement application. A CalPERS representative made an appointment for the member, informed him about the need to bring identification with him, and sent a Service Retirement Election Application to the member by facsimile transmission. On April 19, 2011, the member came into the CalPERS Regional Office in Glendale with respondent. Under the member's direction, respondent assisted the member in completing the service retirement election application.

(C) On April 19, 2011, the CalPERS representative conducted a retirement counseling session with the member during which time the representative reviewed retirement estimates prepared by CalPERS and advised the member about service and disability retirement, the different retirement options, and the special power of attorney form. The member chose the unmodified allowance as his retirement option even after the CalPERS representative explained the retirement options to him and to respondent. The member stated that he understood the various retirement options and understood that, under a different option, his beneficiary could receive the balance of his retirement contributions if he died in less than nine years. The member explained to respondent that he did not want to choose option 1 because the retirement allowance under option 1 was \$140 less than the unmodified allowance. The member also indicated that he did not want to leave a lump sum payment to either respondent or his son. The CalPERS representative noted that the member was "firm" in his retirement election and, based on her observations, the member "understood the options very well." The member asked that the processing of his retirement application be expedited due to his medical condition.

(D) At CalPERS' Regional Office with respondent, the member signed and executed a Special Power of Attorney in which he appointed respondent as his attorney-in-fact to make retirement-related business decisions for him. The power of attorney was limited to decisions related to the member's financial and health benefits under CalPERS. The member granted respondent as his attorney-in-fact the power and authority to transact matters on his behalf relating to CalPERS, including the selection of a retirement option, designating or changing his beneficiary, and designating herself as his beneficiary. Respondent did not exercise this power and authority as the member's attorney-in-fact.

(E) By executing the Special Power of Attorney, the member intended that this special power of attorney commence immediately and to remain in effect for his lifetime. The member signed the Special Power of Attorney and acknowledged that he was of sound mind and either understood his election or talked with an attorney about them. The member further acknowledged that he executed the legal document under his own free will. Two CalPERS representative co-signed the Special Power of Attorney as witnesses to the member's signature.

27. (A) On June 3, 2011, the member signed and executed an Advance Health Care Directive and appointed respondent as his primary health care agent to help him to make medical decisions. The member chose to appoint respondent to make health care decisions for him while he still had mental capacity to make his own decisions.

(B) On June 13, 2011, the member signed a Durable Unlimited Power of Attorney, appointing respondent as his attorney-in-fact to act in his name and to perform any act on his behalf in matters relating to his financial and business affairs including banking, property, insurance or annuity, and all business transactions.

28. On July 30, 2011, CalPERS sent a letter to the member and informed him that CalPERS had received an income withholding order from the County of San Bernardino and was withholding \$650 per month from his retirement allowance for a child support order. On August 16, 2011, CalPERS informed the member by letter that it was withholding another \$652 per month for another child support order plus \$653 per month for arrears in child support. It was not established whether respondent was aware of the CalPERS letters to the member.

29. On or about January 16, 2012, the member was admitted to Kaiser Foundation Hospital in Harbor City. The member died in the hospital three days later on January 19, 2012, from metastatic prostate cancer. A Kaiser Permanente physician certified the member's death. On February 2, 2012, the Director of Public Health and Registrar, Department of Public Health, County of Los Angeles, issued the Certification of Vital Record or death certificate. On the certificate, the member's marital status was described as married and respondent was listed as the member's

wife and surviving spouse. Respondent was the informant who provided the information for the death certificate.

30. (A) On or about July 10, 2012, "Tara R. Flourney" and "Corey Flourney" filed an Affidavit to Amend a Record with the Department of Public Health, County of Los Angeles. In this affidavit, Tara R. Flourney and Corey Flourney stated that the member's marital status was "listed incorrectly by the funeral home", that the member's marital status was divorced, and that respondent was the member's ex-wife. Tara R. Flourney stated she was the member's daughter and Corey Flourney certified he was the member's son. The Affidavit to Amend a Record was made part of the records of the Department of Health.

(B) On September 24, 2012, Corey W. Flournoy sent a copy of the member's original death certificate with the Affidavit to Amend a Record to CalPERS. A certified copy of the death certificate and Affidavit to Amend a Record had been obtained from the Department of Public Health on July 17, 2012.

31. (A) On February 17, 2014, respondent's former attorney informed CalPERS that he had filed a Request for Order to Vacate the Final Judgment of Dissolution of Marriage in the Superior Court, and, alternatively, a request to declare respondent the putative spouse of the member. The attorney asked CalPERS to refrain from paying the survivor continuance benefit until this matter was resolved.

(B) On or before May 29, 2015, respondent's request to vacate or set aside the Final Judgment of Dissolution of Marriage in the *Marriage of Shirley A. Flournoy, Petitioner, and Cecil C. Flournoy, Respondent*, came before the Superior Court of California, County of Los Angeles, for a hearing. The judge received and heard evidence. Prior to or during the hearing, respondent abandoned her request that she be declared a putative spouse if the final judgment was not set aside. On May 29, 2015, the court issued a Ruling on Submitted Matter and denied respondent's request to set aside the Final Judgment of Dissolution of Marriage. Respondent has appealed the decision of the Superior Court. The appeal is pending before the Court of Appeal. Respondent has made the putative spouse argument in this administrative matter.

#### Respondent's Witnesses

32. (A) As established by her testimony, respondent believed that she was married to the member until the day that he died. She filed the petition for divorce in 1978 but she reconciled with the member in the spring of 1980. Respondent told her attorney about the reconciliation and assumed that her petition would be dismissed. Respondent testified that she was not given a copy of and did not know about the final judgment of divorce. She further testified that the member did not mention to her that they were divorced or that he wanted a divorce. She stated that the member continued to refer to her as his wife and paid for her health benefits. While completing her

doctorate, respondent claimed that she did not receive financial aid from USC because she was married.

(B) Respondent acknowledged that she acquired the Village Green condominium in 1991 as an "unmarried woman" but contended that she did not look at the deed and still believed that she was married to the member. She found the member was a good provider and father even though he was a "womanizer." Respondent knew that the member had one son Bryon who was born in 1967 before they were married in 1968 and learned about his daughter Fawnette in 2011 when the member was in the hospital, but she did not know about his other children or that he was providing health insurance to them under his employee health plan. Respondent did not learn about the member's other children until his funeral on January 31, 2012. She further claimed that she did not hear anything about a final divorce decree until after the funeral.

(C) Respondent and her son Cecil C. Flournoy III arranged for the member's funeral and prepared the funeral program. In the funeral program, respondent was named as the member's wife and there were references to the date of their marriage and to the member's three children, Cecil, Bryon, and Fawnette. The funeral program was distributed to family and friends at the funeral service in Bakersfield, which was officiated by a reverend of the Tri Stone Baptist Church.

(D) Respondent presented photographs of events in her family life with the member through the years. (Exh. K, p. 112, and Exh. L.) For example, there are photographs of respondent and the member at their son's prom and high school graduation in 1988, at a Thanksgiving celebration in the 1990's, at a family wedding in Sacramento in 2000, at respondent's birthday dinners in 2007 and 2010, at dinner in 2009, and at the member's birthday dinner in 2008. Still, after she moved out of the Haas Avenue house in 1991 and lived separately from the member in her Village Green condominium, respondent and the member each had his or her own social life and dated other people.

(E) When the member's cancer returned in 2011 and he became ill, respondent moved back into the Haas Avenue house to care for him. She paid the bills and had repairs done to the house. She went with the member to his medical appointments and to the meeting at CalPERS when he filed his retirement application. While the member gave respondent the power of attorney to make financial decisions for him and to change his retirement option, respondent did not exercise the power of attorney and abided by the member's election.

33. Cecil Carl Flournoy III testified on behalf of respondent (his mother). When he was approximately eight-years-old, Cecil Carl Flournoy III recalled that his mother filed for divorce. He and his mother lived apart from the member (his father) for about a year. After they returned to live with his father at the Haas Avenue house, Cecil Carl Flournoy III stated that respondent and the member never referred to being

divorced and lived together for several years. Later in or about 1990, respondent moved into own condominium at Village Green but she and the member continued to attend family gatherings and parties and presented themselves as a married couple. Cecil Carl Flournoy III recognizes that his father was not faithful to his mother and had several children outside of his marriage to respondent. However, prior to the member's death, Cecil Carl Flournoy III did not know that Corey Flournoy and Tara Flournoy were his half-siblings. The member never acknowledged to his son that he had a half-brother named Corey Flournoy.

34. (A) Beverly J. Jackson (Jackson) presented testimony as respondent's close friend. She has known respondent since 1969. The two of them had children of about the same age. Jackson is the godmother to respondent's son. During the 1970's, respondent and Jackson socialized about two times each month at barbecues and children's and taco parties. Beginning in or about 1975, respondent told Jackson that her husband (member) was seeing other women, that a woman had come to the house with a baby, and that she had contracted a sexually-transmitted disease. In about 1978, respondent told Jackson that she had filed for divorce because she was tired of the member's infidelities and that she had moved out of the family house. When respondent moved back to live with the member, respondent told Jackson that the member promised to change and wanted their marriage to work. Respondent also told Jackson that she and the member had reconciled. Jackson did not hear about a final judgment of divorce and she heard the member refer to and introduce respondent as his wife. Jackson saw the member at family functions.

(B) Within five or six years of reconciling with respondent, Jackson learned from respondent that the member had resumed his philandering. Respondent mentioned to Jackson that she was leaving the member but would not divorce him. After respondent moved into her own place in 1990, respondent did not mention a divorce and the member continued to be present at family birthday parties and celebrations. Later, when the member became ill, Jackson corroborated that respondent cared for him and had access to his home. Jackson was surprised that respondent stayed married to the member but she believed that they loved each other.

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Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

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## LEGAL CONCLUSIONS

1. Government Code section 21506 provides, in pertinent part, that any monthly allowance payable to a person, that had accrued and remained unpaid at the time of his death, shall be paid in the following order, in the event of the death of a retired person, in the following order: the beneficiary entitled to payment in accordance with an optional settlement chosen by the member; the survivor entitled to payment of the survivor continuance benefit provided under section 21624; and the beneficiary entitled to receive the lump-sum death benefit provided upon death of a retired person if the person had not chosen an optional settlement and there was no survivor who was entitled to receive the survivor continuance benefit.

2. Government Code section 21624 provides that, upon the death of a patrol, state peace officer/firefighter, or state safety member, whose retirement for service or disability is effective on or after April 1, 1973, a monthly allowance derived from employer contributions equal to a percentage of the amount of his or her retirement as it was at his or her death based on service credited to him or her as a member subject to this section, but excluding any portion of the retirement allowance derived from additional contributions of the member, shall be paid to the surviving spouse throughout life.

A surviving spouse, for the purposes of service retirements subject to section 21624, means a husband or wife who was married to the member for a continuous period beginning at least one year prior to his or her retirement and ending on the date of his or her death.

3. In this matter, respondent asserts that she is entitled to receive the survivor continuance benefit overseen and managed by CalPERS because she is the surviving spouse of the deceased CalPERS member. Respondent contends that, notwithstanding the filing of the Final Judgment of Dissolution of Marriage in October 1981, she had a reasonable and good faith belief that she was the member's wife through the date of his passing and she should be considered the member's putative and surviving spouse. CalPERS, on the other hand, argues that respondent's claim that she believed she was the wife of the member was not held in good faith. CalPERS has emphasized the existence of the final divorce decree and the member's decision not to name respondent as a beneficiary under his service retirement election as evidence demonstrating that she was not the member's wife and that her claim is not credible.

4. Where a marriage is invalid due to some legal infirmity, an innocent party may be entitled to relief under the putative spouse doctrine. (*Estate of DePasse* (2002) 97 Cal.App. 4th 92, 107.) The putative spouse doctrine is an equitable doctrine that was first recognized by the courts and has been codified by the Legislature. In 1943, in *Vallera v. Vallera* (1943) 21 Cal 2d. 861, the California Supreme Court held that it was well settled that a woman who lives with a man as his

wife in the belief that they had a valid marriage, is entitled upon termination of their relationship to share in the property acquired by the couple during the existence of the marriage. The essential basis of a putative marriage is a belief in the existence of a valid marriage. The California Supreme Court further observed that, in the majority of cases, the de facto wife attempted to meet the requisites of a valid marriage and the marriage proved invalid due to some essential fact of which she was unaware, such as an earlier undissolved marriage of one of the parties. (*Vallera v. Vallera, Ibid*, 21 Cal 2d. 681, 683-684; *In re Domestic Partnership of Ellis and Arriaga* (2008) 162 Cal.App.1000, 1003. )

In 1969, the Legislature codified the putative spouse doctrine in former Civil Code section 4452. The section was similar to Family Code section 2251, subdivision (a), which provides, in pertinent part, that “[i]f a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall: [¶] (1) Declare the party or parties to have the status of a putative spouse.” Codification of the putative spouse doctrine was not intended to narrow the application of the doctrine only to parties to a void or voidable marriage, for the Legislature contemplated the continued protection of innocent parties who believe they were validly married. (*In re Marriage Vryonis* (1988) 202 Cal.App.3d 712, 719). Relief under the putative spouse doctrine is not precluded even if the circumstances do not establish a void or voidable marriage. (*Estate of DePasse, supra*.)

In *Estate of DePasse, supra*, and *In re Domestic Partnership of Ellis and Arriaga, supra*, the appellate courts held that the determination whether a putative spouse has a good faith belief in a valid marriage is tested by an objective standard and must rest on facts that would cause a reasonable person to harbor a good faith belief in the existence of a lawful marriage.

However, in the recent case of *Ceja v. Rudolph & Sletten, Inc.*(2013) 56 Cal.4th 1113, the California Supreme Court clarified the putative spouse doctrine in interpreting Code of Civil Procedure section 377.60, which provides, in part, that a wrongful death action may be brought by a decedent’s putative spouse. The issue before the Court was whether that section contemplated a subjective or objective standard of good faith for putative spouse status. The Court held that the inquiry of whether an alleged putative spouse harbored a good faith belief in the validity of a marriage is a subjective one that focuses on the actual state of mind of the alleged putative spouse. Good faith is a relative quality and depends on all the relevant circumstances, including objective circumstances. In determining good faith, a court must consider the totality of the circumstances, including the efforts made to create a valid marriage, the alleged putative spouse’s personal background and experience, and all of the circumstances surrounding the marriage. Moreover, the Court held that, although the claimed belief in a marriage need not pass a reasonable person test, the reasonable or unreasonable of the alleged putative spouse’s belief in the face of objective circumstances pointing to the invalidity of marriage is a factor that is

properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held. (*Ceja v. Rudolph & Sletten, Inc., Ibid.*, 56 Cal. 4th at 1131.)

5. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised therein. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 39 Cal.App.4th 471, 476.) In *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051, at footnote 5, the court considered the issue of the burden of proof in an administrative hearing regarding retirement benefits and found that the party asserting the affirmative at an administrative hearing has the burden of proof, including the burden of persuasion by a preponderance of the evidence. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof, as the moving party, to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 24 Cal.App.3d 1327, 1332.) “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ (citations omitted) . . . The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 34, 324-325.) [Emphasis in original.]

6. Discussion—In this matter, upon consideration of all of the evidence and the arguments of the parties, it must be concluded that respondent has not carried her burden of proof. She did not demonstrate by the preponderance of the evidence that she had a good faith belief that she was always married to the member.

The evidence did, in fact, demonstrate that respondent and her husband, the member, had a valid marriage at the outset of their adult lives and lived together in the same family house for over 20 years. After getting married in 1968, the couple moved to the Los Angeles area where the member obtained employment as an industrial waste inspector. They had a child in 1970 and bought the Haas Avenue home in Gardena in 1973. They raised their son in that house. In July 1978, after enduring the member’s serial infidelities, respondent filed for divorce. One year later, she and the member signed an interlocutory decree but they continued to live together. In December 1979, respondent moved out of the family home for several months, but, in the spring of 1980, the couple reconciled and respondent returned to live with the member. They lived together in their home for the remainder of the 1980’s and sent their son off to college.

Furthermore, respondent showed that, even after she moved out of the Haas Avenue house in 1991, she and the member continued to appear at family events and social gatherings and celebrated birthdays and holidays with their family and friends. That the member continued to provide health benefit coverage to respondent as his spouse through his county employment and claimed married status for income

tax purposes after their separation in 1991 was not necessarily determinative inasmuch as the documentary evidence showed that respondent had her own health insurance coverage at Occidental College in 1991. She obtained gainful employment after attaining her doctorate and bought the Village Green condominium. Respondent continued her career and currently works for county mental health department.

Beginning in 2000 when the member was first stricken with cancer, respondent dutifully cared for him and went with him to his medical appointments. When the member's medical condition worsened in 2006 and then in 2011, respondent continued her caregiving tasks. She moved back into the Haas Avenue house with the member, paid the bills, and had the house repaired. In April 2011, respondent accompanied the member to his service retirement counseling session at the CalPERS regional office and helped him to complete his retirement application. The member referred to respondent as his wife during the counseling session and on the retirement application and gave her the power of attorney, which had significance. When the member passed, respondent arranged for his funeral service and prepared the funeral program, thus presenting herself in public as the member's wife. Her devotion and compassion for the member in the last few years of his life were admirable.

In this matter, if the only evidence suggesting that respondent was not married to the member at the time of his death was the final judgment of divorce entered in October 1981, then the inquiry could perhaps have stopped there and respondent might be classified as a putative spouse. There was no evidence that respondent, the party who filed the divorce petition, requested entry of a final decree or that the final judgment was ever served on respondent or her counsel. Respondent told her counsel that she had reconciled with her husband. The member and respondent returned to living together in the same house, like a husband and wife, and did so for a number of years. They refinanced their home and sent their son to college. No family member or friend presented evidence that the couple spoke about or was known to be divorced. In fact, respondent's son and her friend Jackson testified to the contrary, to wit: they never heard the couple speak of being divorced. The length of time that respondent and the member lived together and their efforts at maintaining their relationship and family have a tendency in reason to support respondent's claimed belief that she was married to the member and was not divorced from him.

However, such is not the case and the inquiry does not end there. As required by California Supreme Court case of *Ceja v. Rudolph & Sletten, Inc., supra*, the totality of the circumstances, including objective circumstances, must be reviewed to ascertain whether respondent's belief that she was married to the member was held in good faith. Here, the objective circumstances include the fact that respondent bought and took ownership of her Village Green condominium in May 1991 by a grant deed that described her as "an unmarried woman." Respondent offered absolutely no explanation for the unmarried woman description on the grant deed.

She did not testify, for example, that she was exacting a form of revenge upon, or trying to hide an asset from, her philandering husband or that she bought the property with separate property funds.<sup>2</sup> Respondent only testified that she did not see the grant deed or did not notice the form of her ownership of the property. Her testimony was not helpful to her claim. In February 2003, respondent refinanced the mortgage on the Village Green condominium and the deed of trust showed respondent as the owner as “an unmarried woman.” Taking into account her educational background at that time in 1991 when she acquired the Village Green condominium, respondent had attained a doctorate from USC. She is a highly educated woman, whom one would naturally expect to have read and understood the import of taking title to the condominium as an unmarried woman.

In the absence of any explanation for the description on the grant deed, respondent’s taking of title to the condominium as “an unmarried woman” in 1991, when combined with her move out of the family home at about the same time period, her employment thereafter as a professional woman, and her life apart from the member for the succeeding 20 years or so, and considering the 1981 final judgment of divorce, altogether demonstrated that respondent’s claimed belief that she was married to the member up until his death was not a good faith belief. Because the totality of the circumstances did not demonstrate that respondent had a good faith belief that she was married to the member, respondent unfortunately cannot be considered to have been a putative spouse of the member. Accordingly, respondent did not qualify then as a surviving spouse for purposes of the member’s service retirement and the continuing survivor benefits under Government Code section 21624.

7. Based on Findings 1 – 34 and Conclusions of Law 1 – 6 above, grounds do not exist to grant respondent’s appeal that she is entitled to receive the survivor continuance benefits, which include a lifetime survivor continuance allowance and health coverage, as the surviving spouse of the deceased member, pursuant to Government Code sections 21506 and 21624.

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Wherefore, the following Order is hereby made:

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<sup>2</sup> In February 1986, respondent also took title to property in Bakersfield as “an unmarried woman,” but this transaction was not necessarily damaging to respondent’s claim because she received the property from her parents and she was still living with the member. Neither party in this matter addressed this transaction.

**ORDER**

1. The appeal or request of respondent Shirley A. Flournoy that she receive as the surviving spouse the survivor continuance benefits of the deceased member Cecil C. Flournoy, Jr., is denied, based on Conclusions of Law 1 – 7 above, jointly and for all.

2. The Statement of Issues, Case Number 2012-0856, OAH Number 2014040555, and the determination of the California Public Employees' Retirement System that respondent Shirley A. Flournoy is not eligible for the survivor continuance benefits as the surviving spouse, are sustained.

Dated: March 17, 2016

DocuSigned by:  
*Vincent Nafarrete*  
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**Vincent Nafarrete**  
**Administrative Law Judge**  
**Office of Administrative Hearings**