ATTACHMENT A

THE PROPOSED DECISION

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

In the Matter of the Appeal of Death Benefits Payable Upon the Death of David Duran by: CHANE D. BILLOW, Respondent, CHASE C. BILLOW, Respondent, and JESSICA CRANE, Respondent.	Case No. 2015-1132 OAH No. 2016010771

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 28 and August 12, 2016, in Sacramento, California.

James C. Paul, Attorney at Law, represented the California Public Employees' Retirement System (CalPERS).

J. David Horspool, Attorney at Law, represented respondent Chane D. Billow (respondent Chane).

Jeff Grotke, Attorney at Law, represented respondent Jessica Crane (respondent Jessica).

Respondent Chase C. Billow (respondent Chase) represented himself.

Evidence was received on July 28 and August 12, 2016. The record remained open to allow the parties to submit closing briefs. On September 7, 2016, respondent Jessica submitted a closing brief, which was marked for identification as Exhibit R-35. On

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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September 9, 2016, respondent Chane and CalPERS submitted closing briefs, which were marked for identification as Exhibits R-36 and C-20, respectively. On September 12, 2016, respondent Jessica submitted a reply brief, which was marked for identification as Exhibit R-37. On September 23, 2016, respondent Chane submitted a reply brief, which was marked for identification as Exhibit R-38.[1] The record was closed, and the matter was submitted for decision on September 23, 2016.

ISSUE

Did CalPERS correctly determine that respondent Jessica was entitled to receive the lump sum Option 1 Balance of Contributions Benefit (Option 1 Balance Benefit) and Prorated Allowance Payment upon the death of her uncle, David Duran?[2]

FACTUAL FINDINGS

1. David Duran was employed by the Employment Development Department as a Criminal Investigator. By reason of his employment, Mr. Duran was classified as a state safety member of CalPERS. Mr. Duran was not married and did not have any children. Respondent Jessica was Mr. Duran's niece. Her mother Elizabeth was Mr. Duran's sister.

2. Respondents Chase and Chane are brothers. They were not related by blood to Mr. Duran. They and their family were friends with Mr. Duran. Although they were not related by blood, respondents Chase and Chane called Mr. Duran "uncle."

Mr. Duran's Retirement Application, Beneficiary Designations and Special Powers of Attorney

3. On September 5, 2013, CalPERS received a Service Retirement Election Application (Application) signed by Mr. Duran. Handwritten at the top of the Application was "Emergency Retirement." In his Application, Mr. Duran designated his last day on the payroll as October 31, 2013, and the effective date of his retirement as November 1, 2013. Mr. Duran elected an Option 1 Allowance. He designated respondent Chase as the beneficiary of the Option 1 Balance Benefit. He designated respondent Jessica as the beneficiary of the Lump Sum Retired Death Benefit. On September 20, 2013, CalPERS also received a Special Power of Attorney (September 2013 Special Power of Attorney) signed by

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[1] Respondent Chase did not submit any post-hearing briefs. CalPERS did not submit a reply brief.

[2] At the hearing, both respondents Chase and Chane argued that respondent Chane was the proper beneficiary of the Option 1 Balance Benefit and Prorated Allowance Payment.

Mr. Duran, which designated Gloria Barnett, his sister and respondent Jessica's aunt, as his Attorney-In-Fact.

4. On February 20, 2014, CalPERS received a Post Retirement Lump Sum Beneficiary Designation (February 2014 Beneficiary Designation) signed by Mr. Duran, which designated respondent Chane as Mr. Duran's beneficiary of the Option 1 Balance Benefit.

5. On March 6, 2014, CalPERS received another Post Retirement Lump Sum Beneficiary Designation (March 2014 Beneficiary Designation) for Mr. Duran. The March 2014 Beneficiary Designation designated respondent Jessica as the beneficiary of the Option 1 Balance Benefit. On the signature line of the March 2014 Beneficiary Designation was an "X." Attached to the March 2014 Beneficiary Designation was a notary public acknowledgement, signed by Lisa Olson, a notary public, which acknowledged that on March 5, 2014, Mr. Duran personally appeared before Ms. Olson and proved to her "on the basis of satisfactory evidence" that he was the person who executed the instrument.

6. On March 6, 2014, CalPERS also received a Special Power of Attorney (March 2014 Special Power of Attorney) for Mr. Duran, which designated respondent Jessica as Mr. Duran's Attorney-In-Fact. The March 2014 Special Power of Attorney appears to have been partially signed by Mr. Duran. Attached to the March 2014 Special Power of Attorney was a notary public acknowledgement signed by Ms. Olson. The notary public acknowledgement stated that Mr. Duran and respondent Jessica personally appeared before Ms. Olson and proved on the "basis of satisfactory evidence" that they were the persons who executed the instrument.

7. Mr. Duran died on March 11, 2014. As set forth in the death certificate, the immediate cause of Mr. Duran's death was "malignant mesothelioma right chest." Other significant conditions contributing to Mr. Duran's death were "hypertension, hyperlipidemia, coronary artery disease." Mr. Duran was 59 years old when he died.

8. Death benefits payable upon Mr. Duran's death consisted of: (1) a lump sum Option 1 Balance Benefit of $109,699.91; (2) a Retired Death Benefit of $2,000; and (3) a Prorated Allowance Payment of $1,375.94. Because respondent Jessica was at all relevant times designated by Mr. Duran as the beneficiary of the Lump Sum Retired Death Benefit, CalPERS determined that the $2,000 Retired Death Benefit was payable to her. As set forth below, CalPERS also determined that respondent Jessica was entitled to the lump sum Option 1 Balance Benefit of $109,699.91 and the Prorated Allowance Payment of $1,375.94 because she was designated as the beneficiary on the March 2014 Beneficiary Designation. Respondents Chase and Chane disputed CalPERS' determination with regard to the Option 1 Balance Benefit and Prorated Allowance Payment.

Review by CalPERS

9. In May 2014, CalPERS received a letter from respondents Chase and Chane, who asserted that respondent Jessica "by way of fraud and/or undue influence, unlawfully made herself the Beneficiary of David Duran's CalPERS death benefits." Respondents Chase and Chane also asserted that, "At least one week prior to the final Beneficiary change, David Duran was no longer able to manage his own financial or legal affairs, being acutely affected in body and mind by pain-management narcotics and other medications during his final in-home hospice care." Respondents Chase and Chane asserted further that: (1) respondent Jessica kept the beneficiary change hidden; (2) she had a "personal relationship" with notary public Lisa Olson; and (3) during the two weeks before his death, Mr. Duran "was either physically or mentally unable or not allowed to communicate with loved ones he had been in contact with every day up to that point." In their letter, respondents Chase and Chane included text messages from and to respondent Jessica.

10. Daniel Schofield is employed by CalPERS as a Retirement Program Specialist II. After Mr. Duran's death, Mr. Schofield reviewed the May 2014 letter sent by respondents Chase and Chane. By letter dated September 18, 2014, Mr. Schofield sought additional information from respondent Chase, including a statement from Mr. Duran's treating physician "as to his cognitive state on March 5, 2014," the day he signed the March 2014 Beneficiary Designation.

11. On September 18, 2014, Mr. Schofield also wrote to respondent Jessica. In this letter, Mr. Schofield stated that CalPERS had received a dispute to the validity of the March 2014 Beneficiary Designation. Given this dispute, CalPERS would "take into consideration the member's competency and understanding of signing such a document." Mr. Schofield asked respondent Jessica to provide information for CalPERS' consideration.

12. On July 7, 2015, CalPERS sent letters to respondents Chase and Chane, notifying them that CalPERS had determined that they were not entitled to any benefits as a result of Mr. Duran's death. As the July 7, 2015 letters explained,

> On May 2, 2014, we received a letter from [respondents Chase and Chane]. In your letter you advised us that you believe that Mr. Duran was not mentally competent when he signed his Post Retirement Lump Sum Beneficiary Designation dated March 5, 2014. You provided documentation in support of this claim. However, upon review of the documentation we found no information indicating Mr. Duran was not mentally competent on March 5, 2014. Therefore, on September 18, 2014, we requested that you provide a statement from Mr. Duran's treating physician regarding his mental capacity on March 5, 2014. No statement has been received as of this date.

The July 7, 2015 letters stated that, "absent proof otherwise, CalPERS must recognize Mr. Duran's Post Retirement Lump Sum Beneficiary Designation dated March 5, 2014, as a valid beneficiary designation." The letters stated that respondent Jessica was deemed to be the proper beneficiary of the Option 1 Balance Benefit in accordance with the March 2014 Beneficiary Designation, and that the Prorated Allowance Payment was payable to her as the Option 1 beneficiary in accordance with Government Code section 21506. The letters notified respondents Chase and Chane of their rights to appeal from CalPERS' determination. Respondent Chane timely appealed from CalPERS' determination.

13. At the hearing, Mr. Schofield testified that respondents Chase and Chane did not submit any documentation from a medical professional that opined that Mr. Duran was not competent to execute the March 2014 Beneficiary Designation because of cognitive deficits. There was no information in the death certificate to indicate that Mr. Duran suffered from Alzheimer's or dementia. The March 2014 Beneficiary Designation was signed in the presence of a notary. Mr. Schofield is not an investigator. If respondents Chase and Chane believed that Mr. Duran was subjected to undue influence or elder abuse, they needed to submit findings from a court to that effect. According to Mr. Schofield, without a court determination, CalPERS could not consider respondents Chase and Chane's claims of undue influence and fraud. Mr. Schofield also testified that he did not have the expertise to interpret chart notes in Mr. Duran's medical records to determine Mr. Duran's competence to execute the March 2014 Beneficiary Designation. An opinion of a medical expert was required to make such a determination.

Respondents' Testimony and Other Evidence at Hearing

14. Respondents Chase, Chane and Jessica testified at the hearing. In addition, Robert Crane, respondent Jessica's husband, testified.

15. Mr. Duran had a close personal relationship with respondents Chase and Chane and their family their entire lives.

16. Mr. Duran also had a close personal relationship with respondent Jessica, his niece, her entire life. For more than one year before Mr. Duran died, he lived in respondent Jessica's home in California with respondent Jessica, Mr. Crane and their young son. Mr. Duran moved into respondent Jessica's home in or about January 2013, after Mr. Duran's own home was foreclosed upon. Mr. Duran did not pay for rent or food while he lived in respondent Jessica's home. Respondent Jessica and Mr. Crane had lived in Mr. Duran's home after Mr. Crane got out of the Marines. According to respondent Jessica, Mr. Crane had a "special" relationship with Mr. Duran because they had both been in the Marines.

17. In or about August 2013, Mr. Duran was diagnosed with cancer. After this diagnosis, Mr. Duran continued to live with respondent Jessica and Mr. Crane. In or about February 2014, Mr. Duran began receiving hospice care in respondent Jessica's home. Skilled nurses and other healthcare workers came to respondent Jessica's home to provide hospice care to Mr. Duran. Respondent Jessica scheduled this care. Respondent Jessica, Mr.

Crane, and Mr. Duran's sisters, including respondent Jessica's mother, Elizabeth, assisted Mr. Duran during this period.

18. On February 12, 2014, Mr. Duran and Henry Yeo, M.D., signed a Physician Orders for Life-Sustaining Treatment (POLST), which included a Do Not Attempt Resuscitation (DNR) order. The POLST provided that the only medical intervention that would be provided to Mr. Duran would be comfort measures to relieve his pain and suffering. The POLST provided further that Mr. Duran would not receive any artificial means of nutrition, including no feeding tubes.

19. In the beginning of 2014, respondent Chane was living in Florida. In or about January 2014, Mr. Duran spoke to respondent Chane about designating him as his beneficiary. In or about the middle of February 2014, respondent Chane visited Mr. Duran in California and stayed at respondent Jessica's home. On February 20, 2014, shortly after respondent Chane returned to his home in Florida, respondent Jessica took Mr. Duran to the regional office of CalPERS, where Mr. Duran submitted the February 2014 Beneficiary Designation designating respondent Chane as his Option 1 Balance Benefit beneficiary.

20. On February 23, 2014, shortly after Mr. Duran had returned from a hospital visit, respondent Chase and his mother Nancy went to respondent Jessica's home to visit Mr. Duran. When they arrived, several of Mr. Duran's relatives were there, including respondent Jessica, Mr. Crane, Mr. Duran's mother, his sisters Elizabeth and Gloria, his brother Michael, and respondent Jessica's siblings. Respondent Chase and his mother took Mr. Duran to visit respondent Chase's grandmother. When they returned to respondent Jessica's home, there was an argument between Nancy, respondents Chase and Chane's mother, and Elizabeth, respondent Jessica's mother. After this argument, respondent Jessica refused to allow Nancy to visit Mr. Duran at respondent Jessica's home. Respondent Jessica did not refuse to allow respondents Chane and Chane to visit. Respondent Chase testified that although no one ever told him that he could no longer visit Mr. Duran, he "felt very uncomfortable" and as if he was "not welcome." Respondent Chase did not see or communicate with Mr. Duran after this time.

21. Respondent Jessica testified that on March 5, 2014, she spoke to Mr. Duran about respondent Chane. At that time, respondent Chane was working as a stock broker in Florida. Mr. Duran was "upset" because he had given respondent Chane money to learn how to invest in the stock market, and respondent Chane had gotten "greedy" and "lost" it all. Mr. Duran told respondent Jessica that respondent Chane had lost $10,000. Mr. Duran stated further that he was going to change his beneficiary to be respondent Jessica because respondent Chane was "irresponsible" with money. Mr. Duran told respondent Jessica to go into his room and get the CalPERS' paperwork from his drawer. He also asked for his reading glasses. Because Mr. Duran's hands were shaking, respondent Jessica called a mobile notary to come to her home to acknowledge Mr. Duran's signature. Respondent Jessica filled out the March 2014 Beneficiary Designation, except for the checked boxes on the form, which Mr. Duran checked himself. Respondent Jessica also filled out the March 2014 Special Power of Attorney. The notary public read the forms out loud to Mr. Duran.

Mr. Duran was worried about signing the forms because his hand was shaking. The notary public explained that it did not matter what he put on the signature line so long as the notary public saw that it was Mr. Duran doing it. The notary public witnessed Mr. Duran sign an "X" on the March 2014 Beneficiary Designation. Respondent Jessica and Mr. Crane also witnessed Mr. Duran signing his "X."

22. Mr. Duran was a member of the Church of Jesus Christ of Latter Day Saints, also known as the Mormon Church. At some point in his past, he had been excommunicated. Before he died, he sought to be rebaptized in the church. On March 4, 2014, Mr. Crane took Mr. Duran to the Mormon Church, where he met with a council of about 20 to 30 men, who interviewed him to determine whether he met the criteria for rebaptism. On March 6, 2014, Mr. Crane took Mr. Duran back to the church to be rebaptized. While in the church, Mr. Duran was asked questions about his beliefs and return to the church. From Mr. Crane's observations, Mr. Duran understood the questions and was able to respond. With assistance, Mr. Duran walked into the baptismal font, submerged himself, and was rebaptized. Mr. Duran's rebaptism occurred the day after the March 2014 Beneficiary Designation was executed.

23. At the hearing, respondent Chane denied that Mr. Duran had given him $10,000, which he lost. Instead, he asserted that Mr. Duran gave him about $1,700 over time to invest in the stock market to learn how to be a stock broker. According to respondent Chane, the $1,700 was a gift that he was not expected to pay back.

24. Respondents Chase and Chane offered into evidence an excerpt from a March 3, 2014 text message from respondent Jessica to their mother Nancy, which they asserted showed that respondent Jessica was trying to prevent them and their family from visiting Mr. Duran during the days before his death. That text message, in relevant part, stated: "Regarding your questions earlier only family can visit he doesn't recognize many people anymore." Respondents Chase and Chane also offered text messages between respondent Jessica and respondent Chane about respondent Chane's helping to pay for Mr. Duran's funeral expenses. These text messages indicated that respondent Jessica was also going to ask respondent Chase and his brother Chad "to chip in."

25. Respondent Chane offered into evidence copies of Skilled Nurse Visit and Progress Notes and other medical records. These notes and records were admitted as administrative hearsay, and have been considered to the extent permitted under Government Code section 11513, subdivision (d).[3]

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[3] Government Code section 11513, subdivision (d), in relevant part, provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Respondent Chane's Arguments

26. In his post-hearing briefs, respondent Chane argued that: (1) respondent Jessica obtained Mr. Duran's mark on the March 2014 Beneficiary Designation by undue influence; and (2) the March 2014 Beneficiary Designation was not validly executed under Civil Code section 14, so it is of no force and effect.

27. Undue Influence Argument. Respondent Chane argued that the standard of proof when undue influence is alleged is "preponderance of the evidence," and that the burden of proof is on the "party asserting the position." Respondent Chane also argued that the burden was on him to prove the elements of undue influence, and that, once he did so, the burden shifted to respondent Jessica to prove that Mr. Duran's execution of the March 2014 Beneficiary Designation was not the result of undue influence. Respondent Chane pointed to Welfare and Institutions Code section 15610.70 as the statute that sets forth the elements of undue influence applicable in this matter. According to respondent Chane, when the elements set forth in Welfare and Institutions Code section 15610.70 are applied, he met his burden of creating a presumption that the execution of the March 2014 Beneficiary Designation was the result of undue influence on the part of respondent Jessica, so it then became respondent Jessica's burden to prove by a preponderance of the evidence that the execution of the March 2014 Beneficiary Designation was not the product of undue influence, which she failed to do. Welfare and Institutions Code section 15610.70 provides:

> (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
>
> (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.
>
> (2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary,

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Respondent Chane argued that the Skilled Nurse Visit and Progress Notes should be admitted as business records. (Evid. Code, § 1270 et seq.) Respondent Chane did not offer a certification or testimony from a custodian of records attesting to the notes' identity or mode of preparation, or any testimony or declarations from the healthcare providers who wrote these notes. Consequently, respondent Chane failed to establish that there were any exceptions to the hearsay rule that would allow these notes to be admitted into evidence other than as administrative hearsay under Government Code section 11513, subdivision (d).

family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

28. Civil Code section 14 Argument. Respondent Chane argued that CalPERS could not accept the March 2014 Beneficiary Designation as valid because it was not executed in accordance with Civil Code section 14, which, in relevant part, provides:

> Words used in this code in the present tense include the future as well as the present; ... signature or subscription includes mark, when the person cannot write, his name being written near it, by a person who writes his own name as a witness; provided, that when a signature is by mark it must in order that the same may be acknowledged or may serve as the signature to any sworn statement be witnessed by two persons who must subscribe their own names as witnesses thereto.

Discussion

Standard and Burden of Proof

29. This matter arose under the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq. In accordance with Government Code section 20134 of the PERL, the hearing in this matter was conducted under the Administrative Procedure Act (APA), Government Code section 11500 et seq. CalPERS initiated this proceeding by filing a statement of issues pursuant to Government Code section 11504, which in relevant part, provides:

> A hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

30. As the court explained in *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, the applicable standard and burden of proof in this matter are as follows:

> As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.

31. In this case, CalPERS, after reviewing the submissions of the parties, determined that respondent Jessica was the proper beneficiary of Mr. Duran's Option 1 Balance Benefit under the March 2014 Beneficiary Designation. In making this determination, CalPERS, acting in its official capacity as a governmental agency, performed its official duty. As a result, CalPERS is entitled to the presumption that its official duty was regularly performed. (Evid. Code, § 664.) Consequently, as set forth in *McCoy*, respondents Chase and Chane had the burden, including both the initial burden of going forward and the burden of persuasion, to prove by a preponderance of the evidence that CalPERS' determination should be overturned. As set forth below, respondents Chane and Chase failed to meet their burden of proof.

Undue Influence

32. Welfare and Institutions Code section 15610.70. As set forth above, respondent Chane argued that the elements of undue influence set forth in Welfare and Institutions Code section 15610.70 should be applied in this case. Respondent Chane's

argument was not persuasive. That section was enacted effective January 1, 2014, as part of the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act). The Legislature stated its intent in enacting the Elder Abuse Act was as follows:

> ...it is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.

(Welf. & Inst. Code, § 15600, subd. (i).)

33. From this statement of legislative intent, there is no indication that the Legislature intended to make Welfare and Institutions Code section 15610.70 applicable to CalPERS' administrative proceedings involving the issues raised in this case. Respondent Chane did not cite any law that would make the provisions of the Elder Abuse Act applicable to this proceeding. Consequently, respondent Chane failed to establish that Welfare and Institutions Code section 15610.70 applies in this case.

34. Law Re: Undue Influence and Presumption. Courts have addressed the issue of undue influence in cases involving wills. The reasoning in these cases is instructive in this proceeding. In *In re Welch's Estate* (1954) 43 Cal.2d 173, 175-176, the court described the elements that must be established to prove undue influence as follows:

> In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [Citation.] Evidence must be produced that pressure was brought to bear directly upon the testamentary act. [Citation.] Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. [Citation.] [M]ere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [Citation.]

35. In *Estate of Mann* (1986) 184 Cal.App.3d 593, 606, the court made clear that to establish undue influence, "[t]here must be proof of "'a pressure which overpowered the

mind and bore down the volition of the testator at the very time the will was made.'" (Citations omitted.) But the court recognized that, "When a confidential relationship exists between the decedent and the beneficiary, and the beneficiary both actively participates in procuring the execution of the will and unduly profits by it, a presumption of undue influence arises and places on the beneficiary the burden to show that the will was freely made." (*Ibid.*)

36. In *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 861-862, the court elaborated on the elements that must be proven to give rise to a presumption of undue influence as follows:

> In this state a presumption of undue influence arises when there is a concurrence of the following elements: '(1) the existence of a confidential or fiduciary relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in preparation or execution of the will; and (3) an undue benefit to such person or another person under the will thus procured.' [Citations.] All three of these factors must be present in order to have the benefit of the presumption.

The court explained further that, "The presumption of undue influence, when established, is a rebuttable presumption." (*Estate of Gelonese, supra,* 36 Cal.App.3d at p. 862.)

37. With regard to the three elements giving rise to a presumption, respondent Chane established that the second element existed: respondent Jessica actively participated in the preparation and execution of the March 2014 Beneficiary Designation. All the handwriting on the March 2014 Beneficiary Designation was hers, except for the checked boxes and the "X," which Mr. Duran filled in. She obtained the services of a notary public to notarize Mr. Duran's mark. Thus, respondent Chane established the second element for a presumption of undue influence to arise.

38. But respondent Chane did not establish the first and third elements necessary to give rise to a presumption against respondent Jessica. With regard to the first element, respondent Chane did not establish that there was a confidential or fiduciary relationship between respondent Jessica and Mr. Duran. In *Estate of Gelonese,* the court found there was a confidential relationship between a parent and her children. In *In re Welch's Estate, supra,* 43 Cal.2d at p. 516, the court found that there was no confidential or fiduciary relationship between a brother and sister, concluding that, "Consanguinity of itself does not create a fiduciary relationship." In *Estate of Mann,* a nephew conceded that he had a confidential relationship with his aunt, so there was no reason for the court to make a determination on this issue. From the reasoning set forth in these three cases, a confidential or fiduciary relationship does not automatically arise between a niece and an uncle due solely to their blood relationship. Instead, sufficient facts must be proven to establish such a relationship.

Even though Mr. Duran lived in respondent Jessica's home for the last year of his life, and she coordinated his healthcare and assisted him with activities of daily living, there was insufficient evidence offered at hearing to establish that she had a confidential or fiduciary relationship with Mr. Duran.

39. But even if it were found that a confidential or fiduciary relationship existed between respondent Jessica and Mr. Duran, respondent Chane did not establish the third element necessary to give rise to a presumption against respondent Jessica: that she received an undue benefit from the March 2014 Beneficiary Designation. Of all three respondents in this case, respondent Jessica was the most natural object of Mr. Duran's Beneficiary Designation: She was the only respondent who was Mr. Duran's blood relative. Mr. Duran lived in her home in California for the last year of his life, without paying for rent or food. She coordinated his healthcare, and assisted him with his daily living activities. In contrast, respondents Chane and Chase were not blood relatives. They lived outside California during the last year of Mr. Duran's life. Consequently, respondents Chase and Chane failed to establish that respondent Jessica received an undue benefit from the March 2014 Beneficiary Designation.

40. In sum, respondent Chane failed to establish the three elements set forth in *Estate of Gelonese* to give rise to a presumption of undue influence against respondent Jessica. Thus, the burden remained with respondents Chase and Chane to offer adequate evidence of undue influence to overturn CalPERS' determination that respondent Jessica was the rightful recipient of Mr. Duran's Option 1 Balance Benefit. As set forth below, the evidence they offered at hearing was not adequate to meet this burden.

41. Mr. Duran's Health and Intention: Respondents Chase and Chane argued that Mr. Duran's declining health, as reflected in the Skilled Nurse Visit and Progress Notes and other medical records showed that Mr. Duran was too ill to knowingly and willingly execute the March 2014 Beneficiary Designation on March 5, 2014. This argument was not persuasive. Respondents Chase and Chane did not call any healthcare providers to testify about Mr. Duran's health during the last month of his life. While the progress notes and medical records reflect that Mr. Duran health was declining during the last month of his life, they do not indicate that he had dementia, Alzheimer's or other cognitive deficits that would have made him unable to voluntarily and knowingly change his Beneficiary Designation before he died. Respondents Chase and Chane did not offer any evidence from medical experts who opined that, when Mr. Duran made his mark on the March 2014 Beneficiary Designation, he did not have the cognition, competence or volition to voluntarily and knowingly change his beneficiary from respondent Chane to respondent Jessica. Thus, respondents Chase and Chane failed to provide adequate evidence to meet their burden of proving that Mr. Duran's failing health made him unable to voluntarily and knowingly change his beneficiary designation on March 5, 2014.

42. Respondents Chane and Chase also argued that respondent Jessica isolated Mr. Duran during the last weeks of his life. This argument was not borne out by the evidence. While respondent Jessica may have sent a text telling respondents Chase and Chane's mother

that non-family members were limited from visiting after March 3, 2104, the evidence showed that Mr. Duran's extensive family and numerous healthcare workers regularly attended to him during his final days.

43. Respondents Chase and Chane further argued that the circumstances of the execution of the March 2014 Beneficiary Designation indicated that respondent Jessica exerted her will over Mr. Duran to sign that document. The evidence did not support this argument. During the days before and after Mr. Duran signed the March 2014 Beneficiary Designation, he met with the elders of his church, answered their questions, returned to his faith and was rebaptized. The determination he showed in doing so was a testament to the strength of his intention and will during the last week of his life. If Mr. Duran had the determination, intention and strength of will to be rebaptized, it must be found that he also had the determination, intention and strength of will to execute the March 2014 Beneficiary Designation designating respondent Jessica as the recipient of his Option 1 Balance Benefit.

44. The evidence offered at hearing did not demonstrate that respondent Jessica exercised such strong influence and undue pressure over Mr. Duran as to destroy his free agency and substitute her will for his in an effort procure the March 2014 Beneficiary Designation. To the contrary, the evidence showed that Mr. Duran, at the time he executed the March 2014 Beneficiary Designation, had the cognition, strength, volition and determination to do so of his own free will. In sum, respondents Chase and Chane failed to meet their burden of establishing that respondent Jessica exercised undue influence over Mr. Duran to execute the March 2014 Beneficiary Designation on March 5, 2014. Even if a presumption were found to arise against respondent Jessica, the evidence presented at hearing was strong enough in her favor to rebut any such presumption and establish that she is the proper recipient of Mr. Duran's Option 1 Balance Benefit.

Civil Code section 14

45. As set forth above, respondent Chane argued that the March 2014 Beneficiary Designation was not signed in accordance with Civil Code section 14, and consequently is of no force and effect. Specifically, respondent Chane argued that because the March 2014 Beneficiary Designation was not signed by two witnesses in addition to the notary acknowledgement, it did not meet the requirements of Civil Code section 14 to be valid. As set forth below, this argument was not persuasive.

46. Respondents Chase and Chane did not establish that the March 2014 Beneficiary Designation was subject to the requirements of Civil Code section 14. That designation was on a form created by CalPERS. There is nothing on that form to indicate that it must be executed in accordance with the requirements of Civil Code section 14. There are no instructions in the form's preprinted language that if a member is unable to sign his name, he must have his mark both notarized and acknowledged in writing by two witnesses.

47. CalPERS determined that the notary public's acknowledgement of Mr. Duran's mark on the March 2014 Beneficiary Designation was sufficient, standing alone

without additional witness signatures, to establish that its form was properly executed. As set forth below, Government Code section 21490, subdivision (c), grants CalPERS the authority to make the "conclusive determination" based upon "evidence satisfactory to it" of who is the proper beneficiary under a beneficiary designation. Given this clear and specific authority vested in CalPERS under the PERL, CalPERS' determination that the March 2014 Beneficiary Designation was properly executed by Mr. Duran must be found to be conclusive, notwithstanding any general provisions in Civil Code section 14 to the contrary.

48. But even if Civil Code section 14 were deemed to be applicable in this proceeding, courts interpreting that section have not required strict compliance with its terms in order to uphold wills executed without proper acknowledgement or witness signatures. As the court in *Estate of McCabe* (1990) 224 Cal.App.3d 330, 334, explained, where the "opportunity for fraud is minimal[,]... strict compliance with the statutory requirements in order to remove that opportunity was unnecessary."

49. Given the circumstances under which the March 2014 Beneficiary Designation was signed, the opportunity for fraud in this matter was minimal. The notary public's acknowledgement of the March 2014 Beneficiary Designation stated that Mr. Duran personally appeared before her and acknowledged that he was signing in his individual capacity. The notary public acknowledged Mr. Duran's signature under penalty of perjury in accordance with her official duty as a notary. She is entitled to a presumption under Evidence Code section 664 that her official duty was regularly performed. Respondent Jessica and Mr. Crane observed Mr. Duran's signing the March 2014 Beneficiary Designation. Their testimony was credible. Respondents Chase and Chane did not subpoena the notary public to testify or offer any other evidence to prove that the mark on the March 2014 Beneficiary Designation was not made by Mr. Duran of his own free will. Consequently, respondents Chase and Chane failed to establish that the March 2014 Beneficiary Designation was not properly executed by Mr. Duran.

50. When all the evidence offered at hearing and all the arguments of the parties are considered, respondents Chase and Chane did not submit adequate evidence or arguments to overturn CalPERS' determination that respondent Jessica was the proper beneficiary of Mr. Duran's Option 1 Balance Benefit under the March 2014 Beneficiary Designation. CalPERS' determination that respondent Jessica was entitled to the Option 1 Balance Benefit and Prorated Allowance Payment must therefore be sustained.

LEGAL CONCLUSIONS

1. By virtue of his employment, Mr. Duran was a state safety member of CalPERS.

2. Government Code section 21490, in relevant part, provides:

> (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.
>
> [¶] ... [¶]
>
> (c) The designation, subject to conditions imposed by board rule, may be by class, in which case the members of the class at the time of the member's death shall be entitled as beneficiaries. **The designation shall also be subject to the board's conclusive determination, upon evidence satisfactory to it, of the existence, identity or other facts relating to entitlement of any person designated as beneficiary**, and payment made by this system in reliance on any determination made in good faith, notwithstanding that it may not have discovered a beneficiary otherwise entitled to share in the benefit, shall constitute a complete discharge and release of this system for further liability for the benefit.

(Bolding added.)

3. Government Code section 21506, in relevant part, provides:

> Any monthly allowance payable to a person, that had accrued and remained unpaid at the time of his or her death, or any uncashed warrant issued prior to the date of death of the person that has been returned to this system, ... shall be paid in the following order:
>
> (a) In the event of the death of a retired person, to one of the following:
>
> (1) The beneficiary entitled to payment in accordance with an optional settlement chosen by the member.

4. CalPERS determined that respondent Jessica was the proper beneficiary of Mr. Duran's Option 1 Balance Benefit under the March 2014 Beneficiary Designation. It was within CalPERS' authority to make this determination under Government Code section 21490. Respondents Chase and Chane did not submit sufficient evidence to establish that CalPERS' determination should be overturned. Consequently, their appeals must be denied.

ORDER

The appeals of respondents Chase and Chane Billow are DENIED. Respondent Jessica Crane shall receive the lump sum Option 1 Balance of Contributions Benefit and Prorated Allowance Payment from the death of her uncle, David Duran.

DATED: October 4, 2016

DocuSigned by:
Karen Brandt
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KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings