

ATTACHMENT A
THE PROPOSED DECISION

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

In the Matter of the Death Benefits Payable
Upon the Death of LOIS M. GABRILSKI by

Case No. 2015-0340

MICHAEL J. GABRILSKI,

OAH No. 2015060315

Respondent,

and

ROBERTA M. KNUDSEN,

Respondent.

PROPOSED DECISION

This matter was heard before Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 8, 2016, in Sacramento, California.

Austa Wakily, Staff Counsel, represented complainant Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS).

Respondent Roberta M. Knudsen (respondent Knudsen) was present and represented herself. There was no appearance by or on behalf of respondent Michael J. Gabrieliski (respondent Gabrieliski), and the matter proceeded as a default against him, pursuant to Government Code section 11520.

Evidence was received, the hearing was closed, and the record was held open until close of business on September 16, 2016, to allow the parties to submit closing briefs, and respondent Knudsen to submit additional exhibits and complainant to object thereto. On September 7, 2016, respondent submitted a closing brief, which was marked as Exhibit D. Respondent did not submit any additional exhibits. Complainant did not file a closing brief. The matter was submitted and the record was closed on September 16, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

FILED 10/18 2016

Debra Wooten

ISSUE

Did CalPERS correctly determine that respondent Knudsen is not an eligible beneficiary to receive the Member/Payee Survivor Benefits on the account of Lois M. Gabrilski?

FACTUAL FINDINGS

1. Lois M. Gabrilski (decedent) was employed by Madera County (County) beginning April 1, 1971. By virtue of her employment, decedent was a local miscellaneous member of CalPERS. She retired for service from the County in 1997.

2. In her Retirement Election and Beneficiary Designation form, dated March 31, 1997, and filed with CalPERS, decedent elected Option 1 and designated her son, respondent Gabrilski,¹ as her sole beneficiary for both the balance of her member contributions and the retired death benefit. Decedent signed the form in the presence of a notary public. No subsequent beneficiary designation was filed with CalPERS by or on behalf of decedent.

3. At the time of her death, decedent was divorced and had two children: respondent Knudsen and respondent Gabrilski. On December 29, 1998, decedent executed a last will and testament (Will) before two witnesses. Respondent Gabrilski was appointed the executor of the Will. On December 31, 1998, decedent executed a Declaration of Trust (Trust) before a notary public. Decedent named herself as trustee and respondent Gabrilski as her successor trustee. In the Trust, decedent left her pearls to respondent Knudsen and the remainder of her estate to respondent Gabrilski. Neither the Will nor the Trust mentioned decedent's CalPERS's retirement benefit. Respondent Knudsen was not aware of the existence of the Will or Trust prior to her mother's death.

4. In July 2014, decedent's longtime caregiver, Mary Pat Marshall, died. Respondent Knudsen moved her mother to Minneapolis, Minnesota to live with her. On August 18, 2014, before a notary public, decedent executed a Statutory Short Form Power of Attorney naming respondent Knudsen her power of attorney over her personal affairs including, in relevant part, her banking, insurance, fiduciary, gift and beneficiary transactions. Decedent further authorized respondent Knudsen to make gifts to herself or anyone she is legally obligated to support.

5. Decedent died on September 19, 2014, in Minneapolis, Minnesota. Upon her death, the payable survivor benefits consisted of a return of contributions benefit in the amount of \$24,015.45, a retired death benefit in the amount of \$2,000, and a pro-rated allowance benefit in the amount of \$1,198.86. On September 30, 2014, respondent Knudsen

¹On the beneficiary designation form, respondent Gabrilski's name is misspelled as "Micheal Jay Gabriski."

signed an Application for Retired Member/Payee Survivor Benefits and filed the form with CalPERS. On October 2, 2014, respondent Gabrilski also signed and filed with CalPERS an Application for Retired Member/Payee Survivor Benefits.

6. By letter dated November 6, 2014, CalPERS advised respondent Gabrilski of a dispute regarding decedent's beneficiary designation. CalPERS requested respondent Gabrilski to submit any documents that should be considered in determining decedent's eligible beneficiary. Thereafter, respondent Gabrilski submitted to CalPERS a copy of decedent's Will and Trust. In a letter to CalPERS dated November 30, 2014, respondent Knudsen alleged decedent had "disowned" respondent Gabrilski and also submitted bank records which she alleged showed her brother had "embezzled" roughly \$70,000 from their mother while she was still alive.

7. CalPERS reviewed the documentation submitted by respondents, found no evidence that decedent intended to change her designation for the CalPERS death benefits, and determined respondent Knudsen's claim for benefits must be denied. By letter dated January 19, 2015, CalPERS notified respondent Knudsen of its determination and her right to appeal. On February 15, 2015, respondent Knudsen timely appealed CalPERS's denial of her claim for death benefits. On May 11, 2015, complainant Anthony Suine filed the Statement of Issues solely in his official capacity as Chief of the CalPERS Benefit Services Division.

Respondent Knudsen's Testimony

8. Respondent Knudsen testified at hearing. She asserted that, in the months prior to her death, decedent suffered a massive stroke and was not physically well. Her caregiver and power of attorney at the time, Ms. Marshall, intended to move decedent into a nursing home; however, decedent had insufficient funds to pay for the home. Respondent Knudsen further asserted that, between 2007 and 2011, respondent Gabrilski had "embezzled" more than \$70,000 from decedent's bank accounts, that decedent did not check her account balances regularly, and that respondent Gabrilski's actions were not discovered until 2014, when Ms. Marshall attempted to move decedent into the nursing home. At hearing, respondent Knudsen could not produce any bank records or other documents to substantiate her claim of embezzlement.

9. Respondent Knudsen testified that, after decedent moved to Minneapolis, she verbally told respondent Knudsen and respondent Knudsen's son that decedent "disowned" respondent Gabrilski. However, thereafter, decedent did not change her CalPERS's beneficiary designation, her 1998 Will or Trust, or otherwise put in writing her intent to disown her son. After decedent died, respondent Knudsen paid for her burial services in the amount of \$2,899.94.

10. At hearing, respondent Knudsen also questioned the authenticity of decedent's signature on the CalPERS's beneficiary designation form, asserting that it did not match her signatures on the Will and Trust. Additionally, she challenged the validity of the Will and

Trust, asserting that she was informed by decedent's attorney, Steven Mortimer, that he had prepared decedent's Will and Trust, but that he never received an executed copy. Mr. Mortimer did not testify at hearing, and therefore, any statements made by him to respondent Knudsen constitute inadmissible hearsay and cannot be considered.

Discussion

11. In order to effect a change of beneficiary of a retirement fund, there must be a clear manifestation in writing of the member's to make such change. (*Hudson v. Posey* (1967) 255 Cal.App.2d 89; *Watenpaugh v. State Teachers' Retirement System* (1959) 51 Cal.2d 675; *Lyles v. Teachers Retirement Bd.* (1963) 219 Cal.App.2d 523.) Oral expressions by a decedent of an intention to effect a change of beneficiary are insufficient to support a change without affirmative act in writing. (*Hudson v. Posey, supra*, 255 Cal.App.2d at p. 92; see also *Watenpaugh v. State Teachers' Retirement System, supra*, 51 Cal.2d at p. 681 (there was sufficient manifestation of intent and action by member who executed but mislaid a change of beneficiary form, which was not filed until after his death).) Said writing may be a will or trust which specifically bequeaths the benefits to a beneficiary. (*Lyles v. Teachers Retirement Bd., supra*, 219 Cal.App.2d at pp. 527 -528.)

12. In making any determination of decedent's intent, the standard of proof to be applied is that of "clear and convincing evidence." (See *Hudson v. Posey* (1967) 255 Cal.App.2d 89, 95.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; the evidence should be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

13. Respondent Knudsen took care of her mother in the final months of decedent's life. At her own expense, she moved decedent from California to her home in Minnesota so that she could better care and provide for her. When decedent passed away, it was respondent Knudsen who made and paid for burial services in Minneapolis. It is therefore understandable that respondent Knudsen was surprised to learn that decedent had designated respondent Gabrilski as the sole beneficiary of her CalPERS's benefits, excluding respondent Knudsen entirely. Notwithstanding these circumstances, there was no clear and convincing evidence of decedent's intent to remove respondent Gabrilski as the designated beneficiary of her CalPERS's benefits. Even assuming decedent verbally told respondent Knudsen of her intent to "disown" respondent Gabrilski, this alone is insufficient to change respondent Gabrilski as her CalPERS's beneficiary. It is undisputed that decedent made no writing evidencing her intent to remove respondent Gabrilski or otherwise change the beneficiary designation for her CalPERS's retirement benefits.

14. Respondent Knudsen's challenge to the authenticity of decedent's signature on the CalPERS's Beneficiary Designation form is also rejected. Decedent signed the form before a notary public. The following year, decedent also executed a Will and Trust in which she designated respondent Gabrilski as her executor, successor trustee, and beneficiary of the remainder of her estate. Both documents were signed before attesting witnesses or notary

public. Respondent Knudsen offered no expert opinion which asserted the signature on the CalPERS form was not that of decedent. She offered no credible evidence at all on this point except for her own speculative testimony. Similarly, respondent Knudsen offered no documentation or other evidence to corroborate her testimony that respondent Gabrilski had embezzled funds from decedent's bank accounts while she was still alive. Therefore, this claim is rejected.

15. When all the evidence is considered, respondent Knudsen failed to establish that she is an eligible beneficiary of decedent's CalPERS's benefits. Rather, the evidence established that CalPERS's determination that respondent Knudsen is not an eligible beneficiary to receive Member/Payee Survivor benefits on decedent's CalPERS's account was correct.

LEGAL CONCLUSIONS

1. Respondent bears the burden of proving she is eligible for disability retirement benefits by a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052, fn. 5.) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

2. Government Code section 21490 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.

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

(2) No designation may be made by an unmarried member who has attained the minimum age for voluntary service retirement applicable to the member in his or her last employment preceding death if that designation is in derogation of the rights of the member's unmarried, dependent children who are under the age of 18 years at the time of the member's death.

(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.

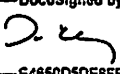
3. As set forth in Factual Finding 2, decedent executed and filed a valid CalPERS Beneficiary Designation form in which she named respondent Gabrilski as the sole beneficiary for both the balance of her member contributions and the retired death benefit. That designation was never revoked nor was a subsequent designation ever filed with CalPERS.

4. As set forth in Factual Findings 11 through 15, CalPERS's determination that respondent Knudsen is not an eligible beneficiary to receive Member/Payee Survivor benefits on decedent's CalPERS account was correct and should be upheld.

ORDER

The appeal of respondent Roberta M. Knudsen is denied. The determination by CalPERS that respondent Knudsen is not eligible to receive the Member/Payee Survivor Benefits on the account of decedent Lois M. Gabrilski is upheld.

DATED: October 17, 2016

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings