ATTACHMENT A

THE PROPOSED DECISION
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 James P. McCarthy by:

MARY K. WATSON,
Respondent.

and

KENNETH IRVING McCARTHY,
Respondent.

Case No. 2018-0617
OAH No. 2018081052

PROPOSED DECISION

Irina Tentser, Administrative Law Judge (ALJ), heard this matter on January 17, 2019 at the Office of Administrative Hearings in Los Angeles, California.

John Shipley, Senior Attorney, represented the California Public Employees' Retirement System (CalPERS).

Paula A. Clarkson, Attorney, Merhab Robinson & Clarkson, A Professional Corporation, represented Mary K. Watson (Respondent Watson), who was present.

Kenneth I. McCarthy (Respondent McCarthy) represented himself and appeared by telephone.

The Statement of Issues pleading caption was amended at hearing to correct the name of the decedent from "John" to "James".

The record was left open by the ALJ, by agreement of the parties, for the written submission of closing briefs no later than February 7, 2019. CalPERS and Respondent Watson's counsel were ordered by the ALJ to mail copies of exhibits admitted at hearing to Respondent McCarthy no later than January 22, 2019.
Respondent McCarthy’s closing brief was filed on February 5, 2019, marked as Exhibit C. CalPERS and Respondent Watson’s closing briefs were filed on February 7, 2019. CalPERS and Respondent’s Watson’s closing briefs were marked, respectively, as Exhibits 24 and D.

The record was closed and the matter was submitted for decision on February 7, 2019.

FACTUAL FINDINGS

Jurisdiction and Issues

1. Anthony Suine, acting in his official capacity as the Chief of the Benefits Services Division of CalPERS, filed the Statement of Issues against respondents.

2. Pursuant to the Statement of Issues, the issue in this case is limited to whether Respondent Watson is the sole beneficiary under the Public Employees’ Retirement Law (PERL) (Gov, Code, § 20000 et seq.) for purposes of the Basic Death Benefit payable to James P. McCarthy’s (Decedent) beneficiaries based on his status as a CalPERS member.

3. The relevant questions are: (1) is there a writing that addresses the Decedent’s intent with respect to designating his CalPERS’ benefits?; (2) was the Decedent survived by a spouse or child at the time of his death?; (3) was the Decedent’s Basic Death Benefit part of Decedent’s Estate?; (4) what, if any effect, did the Probate Court’s January 9, 2018 Order (Probate Court Order) Determining Entitlement to Estate Distribution have on the legal parental relationship between Decedent and Respondent McCarthy for purposes of the distribution of Decedent’s Basic Death Benefit?

4. There is no writing designating a beneficiary and the Decedent was not survived by a spouse or children. The dispute arises out of the conflicting interpretations of which law governs the distribution of the Decedent’s Basic Death Benefit between the parties. To resolve the dispute, it is necessary, among other things, to determine whether Decedent’s Basic Death Benefit was part of Decedent’s Estate.

Factual Background

5. The Decedent became a member of CalPERS through his employment with the County of Riverside under the safety classification as a Peace Officer. As a CalPERS member, the Decedent was entitled to certain benefits, both in retirement and upon his death. The Decedent’s benefits are governed by PERL.

6. On April 1, 2017, Decedent passed away as an active member. At the time of his death, the Decedent had not submitted to CalPERS a pre-retirement beneficiary designation form (Beneficiary Designation Form). The Beneficiary Designation Form allows members to designate their CalPERS benefits to one or more beneficiaries. (Ex. 21.)
7. CalPERS contacted Decedent's employer, as well as interested parties, to determine if a Beneficiary Designation Form, or equivalent writing, such as a will, exists that would allow CalPERS to pay benefits pursuant to Decedent's intent. As of the date of hearing, no Beneficiary Designation Form or equivalent writing was provided to CalPERS.

8. After inquiry, CalPERS was informed that Decedent was not survived by a spouse or any children, but was survived by his parents. (Ex. 13.) Decedent's Birth Certificate lists Respondent Watson and Respondent McCarthy as his mother and father, respectively. (Id.) Because the Decedent was survived by his mother, Respondent Watson, and his father, Respondent McCarthy, CalPERS determined that Decedent’s Basic Death Benefit must be paid to them under Government Code section 21493 as Decedents “closest next-of-kin.” (Ex. 5.)

Discussion

9. Watson appealed CalPERS’ determination. (Ex. 6.) Watson’s appeal letter acknowledges that the Decedent “was not survived by a spouse or child but was survived by his biological parents, Mrs. Watson and Kenneth Irving McCarthy.” (Id.) According to Respondent Watson, however, she is entitled to 100 percent of the foregoing benefit based on the argument that, by virtue of the Probate Court’s Order Determining Entitlement to Estate Distribution (Ex. 16), the Superior Court of California has deemed that Respondent McCarthy does not have a parent-child relationship with Decedent. Accordingly, Respondent McCarthy has “predeceased” Decedent disqualifying him from inheriting from Decedent under any circumstances, probate or otherwise. (Ex. 6, p. 2.) Respondent Watson further asserts that, based on Respondent McCarthy’s failure to carry out his fiscal and fatherly responsibilities to Decedent, paying him 50 percent of Decedent’s Death Benefit is unfair and improper.

10. CalPERS agrees with Respondent Watson that Decedent’s Basic Death Benefit is not a “probateable asset.” However, CalPERS argues that its Board is vested with the exclusive power to determine who is a beneficiary for purposes of CalPERS’ benefits and maintains that the benefits at issue are not within the jurisdiction of the probate court because the benefits are a statutory entitlement created by the PERL, and not a property interest which passes as part of Decedent’s estate. Accordingly, CalPERS maintains that the CalPERS’ Board, and not the probate court, must determine who is a beneficiary of the Decedent’s Basic Death Benefit. Based on the circumstances in this matter, absent something in writing addressing the designation of CalPERS’ benefits, CalPERS asserts that, while the result may seem unfair to Respondent Watson, it is legally obligated to pay benefits pursuant to section 21493; and that under the Government Code, the probate estate is not the next entitled beneficiary. Respondent McCarthy asserts his right to Decedent’s Basic Death Benefit, disputes that he abdicated his financial and parental responsibilities to Decedent, and

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1 All further statutory references are to the Government Code unless otherwise noted.
argues that he, by virtue of his relationship to Decedent as “parent,” is entitled to 50 percent of his Death Benefit pursuant to section 21493.

Discussion

11. The parent-child legal relationship between Respondent McCarthy and Decedent was severed for purposes of Decedent’s Estate by the probate court on January 9, 2018 after Decedent’s death. No legal severing of the parental-child relationship between Respondent McCarthy and Decedent occurred prior to Decedent’s death. On April 17, 2018, during the communications between the probate attorney handling Decedent’s estate, Lynn Kambe, and CalPERS, Ms. Kambe informed CalPERS that Decedent’s Basic Death Benefit was not included as part of the estate. (Ex. 20, p. 3.) Accordingly, based on the content of the Probate Court Order (Ex. 16), it is clear that the severing of the parent-child relationship by the Probate Court applies only to Decedent’s Estate assets. As Decedent’s Basic Death Benefits is separate from the estate, the Probate Court Order severing the parent-child relationship does not determine the distribution of the CalPERS benefit, rather PERL is operative.

12. Based on Factual Finding 11, Respondent McCarthy is a “parent” of Decedent under PERL’s statutory scheme. Accordingly, as more fully discussed in the Legal Conclusions, section 21493 requires that CalPERS’ pay Decedent’s Basic Death Benefits to Decedent’s parents, Respondent Watson and Respondent McCarthy, in equal shares.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Respondent Watson is an applicant for a benefit and 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) 214 Cal.App.3d 1327, 1332.)

2. In an administrative hearing concerning retirement benefits, the party asserting the claim has the burden of proof, including both the initial burden of going forward and the burden of persuasion, by a preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5.)

3. “Preponderance of the evidence” means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that one is unable to say that the evidence on either side of an issue preponderates, the finding on that issue must be against the party who had the burden of proving it. (People v. Mabini (2000) 92 Cal.App.4th 654, 663.) To meet the burden of proof by a preponderance of the evidence, the party with the burden of proof “must produce substantial evidence, contradicted or uncontradicted, which supports the finding.” (In re Shelley J. (1998) 68 Cal.App.4th 322, 329.)
CalPERS Right to Beneficiary Determination For Decedent’s Basic Death Benefit

4. The CalPERS Board of Administration is vested with the right to determine beneficiaries entitled to receive benefits upon the death of a member, like Decedent. (Gov. Code, §§ 21490, 21492, and 21493.) Section 21490, subdivision (c), provides, “[T]he determination 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 . . . .”

5. The Board is also vested with the power and authority to determine and adjudicate rights to CalPERS benefits, subject to a claimant’s right to seek review in the Superior Court. (Gov. Code, §§ 21531, 11517, and 11523; Cal. Code Regs., tit. 2, §§ 555.1, 555.2, and 555.5.)

6. In this matter, it is undisputed that at the time of Decedent’s death, his father, pursuant to his birth certificate, was Respondent McCarthy. Respondent Watson has failed to cite persuasive legal or factual authority to support her argument that the Probate Court’s Order (Factual Finding 9) severing the parent-child relationship between Respondent McCarthy and Decedent for purposes of his Estate distribution applies to the Board’s jurisdiction to adjudicate who is a beneficiary for the purposes of the Decedent’s CalPERS Basic Death Benefit. In fact, it was established that Decedent’s Death Benefit was not an estate asset. (Factual Finding 11). Accordingly, there is insufficient evidence to support the conclusion that Decedent’s Death Benefit is part of Decedent’s estate and, therefore, subject to the Probate Court’s Order severing the parent-child relationship between Respondent McCarthy and Decedent, and not a CalPERS benefit which is subject to the Board’s power and authority of adjudication, as set forth in Legal Conclusions 4 and 5. Under the foregoing circumstances, CalPERS’ Board, and not the Probate Court, determines who is a beneficiary of Decedent’s Basic Death Benefit.

Section 21493 Governs CalPERS’ Payment of Decedent’s Basic Death Benefit

7. Sections 21490-21635.5 generally govern CalPERS Death Benefits. Section 21531 provides the benefit “shall be paid provided in this article to the beneficiary designated by the member under Section 21490 or 21492.” Section 21490 provides the method of a CalPERS member to designate a beneficiary, and Section 21492 provides the method for a CalPERS member to revoke a prior beneficiary designation. For a change of beneficiary retirement benefits to be effective, a clear manifestation in writing of the member’s intent to make the change is necessary. (Hudson v. Posey (1967) 255 Cal.App.2d 89; Watenpaugh v. State Teachers’ Retirement System (1959) 51 Cal.2d 675.) Oral expressions by a decedent of an intention to change a beneficiary is insufficient to support the change without an affirmative writing. (Hudson, supra, 225 Cal.App.2d at 92; Watenpaugh, supra, 51 Cal.2d at 681.) In this matter, it is undisputed that Decedent did not execute a writing of his intent to receive his CalPERS retirement benefits, including his Basic Death Benefit. (Factual Findings 4, 6, and 7.) As a result, section 21493 was properly utilized by CalPERS to determine Decedent’s Basic Death Benefit beneficiary.
Section 21493 Mandates CalPERS’ Pay Decedent’s Basic Death Benefit to Decedent’s Parent

8. Section 21493, subdivision (a), provides for the following statutory order for payment of Decedent’s Death Benefit if no beneficiary designation is in effect on the date of death: (1) spouse, (2) children, (3) parents, (4) brother and sisters. Section 21493, subdivision (b), provides that the death benefit is payable to the decedent’s estate, and subject to the jurisdiction of the probate court, only if the deceased member had no effective beneficiary designation and there are no survivors in the four groups specified in section 21493, subdivision (a). Respondent Watson agrees that Decedent’s Basic Death Benefits should be payable to Decedent’s parents under section 21493, subdivision (a)(3). (Ex. C, p.3.) However, as previously noted, Respondent Watson contends that the determination of “parent” being applied by CalPERS (which includes both Respondent Watson and Respondent McCarthy) is incorrect because the Superior Court of California has already determined that Respondent McCarthy based on a parent-child relationship. (Id.) Based on Factual Finding 8-12 and Legal Conclusions 4-7, Respondent Watson’s argument is unconvincing. Absent a writing from Decedent designating a beneficiary or equivalent writing, such as a will, and because both of Decedent’s parents are alive, the Decedent’s Basic Death Benefit was not a part of Decedent’s estate, and the Probate Court Order severing the parent-child relationship between Respondent McCarthy and Decedent applied only to Decedent’s estate assets, CalPERS cannot pay the death benefit to Decedent’s estate. Under the circumstances, CalPERS determination that section 21493, subdivision (a), was operative and Decedent’s Basic Death Benefit must be paid to Respondent Watson and Respondent McCarthy in equal shares is the correct legal result because Respondent McCarthy was a parent of the Decedent, and the Superior Court’s determination that he was not a parent for purposes of Decedent’s estate distribution is not binding.
ORDER

1. Respondent Watson's appeal of death benefits payable upon the death of James P. McCarthy is dismissed.


DATED: March 6, 2019

IRINA TENTSER
Administrative Law Judge
Office of Administrative Hearings