

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 Lifetime Monthly Benefit
Payable Upon the Death of Jenny A. Donovan, by:**

MELISSA THOMPSON

and

DONNA M. DONOVAN,

Respondents.

Case No. 2021-0305

OAH No. 2021060583

PROPOSED DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter remotely on November 15 and 19, 2021.

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

Tyson R. Smith, Attorney, represented respondent Melissa Thompson, who was present throughout the hearing.

Steven H. Spiegelman, Attorney, represented respondent Donna M. Donovan, who was present throughout the hearing.

The matter was submitted for decision on November 19, 2021.

ISSUE

Is respondent Melissa Thompson eligible for the Option 2W lifetime monthly benefit and/or lifetime monthly survivor continuance benefit?

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. Jenny A. Donovan (Decedent) became a member of CalPERS through her employment with the Department of Parks and Recreation on September 18, 1994. She was a superintendent I.

2. On October 30, 2015, Decedent applied for service retirement and elected the Option 4 (Option 2W & Option 1 Combined) Individual Lifetime Beneficiary, naming her registered domestic partner, Donna M. Donovan (respondent Donovan), as the Option 2W beneficiary to receive a lifetime monthly allowance. She named her sister Laura Donovan as the Option 1 Balance of Contributions (Option 1) beneficiary, which is a return of Decedent's retirement contribution and interest if she passed away prior to exhausting her contribution. She named respondent Donovan as the retired death benefit beneficiary, which is a \$2,000 lump sum benefit. Decedent's retirement was effective October 1, 2015. Her monthly retirement benefit was \$4,884.63.

3. On December 22, 2017, the Sonoma County Superior Court entered a Judgment of Dissolution terminating the marriage/registered domestic partnership of Decedent and respondent Donovan effective February 16, 2018. Decedent prepared the divorce papers, and in her accompanying declaration for default or uncontested dissolution, Decedent indicated that there were no assets or debts to be disposed of by the superior court. Decedent did not disclose her CalPERS retirement.

4. On March 6, 2018, Decedent married Melissa Thompson (respondent Thompson).

5. On November 28, 2018, Decedent contacted CalPERS regarding changing her beneficiary. CalPERS mailed her the publication "Changing Your Beneficiary or Monthly Benefit After Retirement" (PUB 98) and a "Modification of Option and/or Life Option Beneficiary Estimate Request Form" (MOLOB). The MOLOB is a request for an estimate of the retirement benefit amounts a retiree may receive should he or she wish to change their original retirement option and/or name a new beneficiary. Designation of a new beneficiary to receive benefits after retirement can only occur with a qualifying event (such as a marriage or dissolution of marriage).

6. In a letter dated December 11, 2018, CalPERS confirmed that Decedent's lump-sum beneficiary designation form had been accepted for the retired death benefit (\$2,000) with respondent Thompson as the beneficiary. On December 11, 2018, per Decedent's written request, respondent Thompson was also designated as the Option 1 beneficiary.

7. On December 11, 2018, Decedent contacted CalPERS for assistance with filing her MOLOB estimate request. In particular, she wanted "an estimate for option 1" and information about other options for her new spouse. She was advised to submit

her dissolution documents for processing. That same day, she called to complain that the person "helping her had no idea how to do it" and told her to contact CalPERS via the website. She requested that someone call her who knew how to help her. She contacted CalPERS again on December 17, 2018, seeking the same information and made the same complaint.

8. On December 28, 2018, CalPERS representative Joy Fong spoke with Decedent. Fong told Decedent that she did not need a MOLOB because she already had the Option 1 as part of her Option 4 (2W & 1) selection with respondent Thompson as the beneficiary. Fong advised Decedent that if she wanted to remove respondent Donovan as her Option 2W beneficiary, she would need to submit her request in writing and include a complete copy of the judgment of the dissolution of domestic partnership awarding Decedent 100 percent interest in her CalPERS retirement account. Decedent was informed she could also go online to obtain estimates and elect a MOLOB to add respondent Thompson as a lifetime beneficiary.

9. On January 3, 2019, Decedent submitted a MOLOB request with a letter stating that she would like to remove respondent Donovan as her Option 2W beneficiary and that the "only beneficiary [she] should have on file at this time should be [respondent] Thompson." Decedent also submitted the dissolution documents, effective February 16, 2018, that indicated that there was no property to be divided.

10. On January 30, 2019, Decedent called CalPERS to inquire about her MOLOB request. Decedent indicated she did not want to do a MOLOB, her request was only to remove respondent Donovan as her Option 2W beneficiary. Fong explained to her that although the judgment in her dissolution was uncontested, the judgment did not specifically state that Decedent was awarded 100 percent of her CalPERS retirement. Decedent was advised to either have respondent Donovan sign a

community property release form or go back to court to obtain an amended judgment that awarded Decedent the total interest in her CalPERS account. Decedent stated she would try to go back to court or see if she could contact her former spouse. The CalPERS's Customer Touch Point Report, dated January 30, 2019, did not indicate that Decedent stated that she wanted to designate respondent Thompson as her Option 2W benefit replacement.

11. CalPERS sent a letter with its determination that Decedent was not eligible to modify her original option election and provided a Release of Community Property Interest in Life Option Benefit form. The letter explained that in lieu of an amended court order, Decedent's former spouse could voluntarily consent to give up all rights to her interest in Decedent's CalPERS benefits.

12. On February 13, 2019, Decedent contacted CalPERS and inquired about the possibility of returning to work.

13. Decedent did not return to CalPERS a signed Release of Community Property Interest in Life Option Benefit form or an amended judgment that awarded her the total interest in her CalPERS account. CalPERS had no further communications with Decedent.

14. Decedent became ill and was in hospice. On May 20, 2020, on her death bed, Decedent signed a notarized document titled: "CALPERS Lifetime Benefit Change" and stated as follow:

I, Jennifer (Jenny) Ann Donovan, hereby declare Melissa Louisa Thompson, as my domestic partner in marriage, the sole beneficiary of my CALPERS Lifetime Benefit effective 5/20/2020 @ 100.00% at the time of my death. This will

supersede my previous beneficiary Donna Donovan. Donna Donovan and I finalized our divorce in 2018. My new wife and domestic partner, Melissa L. Thompson will receive all my assets in my estate upon my death.

15. After signing this notarized document, Decedent was relieved to know that respondent Thompson would "be okay." Decedent passed away on May 21, 2020. At the time of Decedent's death, respondent Donovan was the Option 2W beneficiary and respondent Thompson was the Option 1 beneficiary.

16. On June 2, 2020, respondent Thompson contacted CalPERS to inquire about Decedent's death benefits. She stated that Decedent had been trying to modify her lifetime beneficiary and wanted to know if CalPERS would accept a notarized document signed by respondent Donovan waiving her interest in Decedent's CalPERS benefits.

17. On June 4, 2020, CalPERS requested that respondent Thompson submit an Application for Retired Member/Payee Survivor Benefits and supporting documents. Respondent Thompson signed the application on June 8, 2020, and attached the certificate of death, a copy of Decedent's living trust designating respondent Thompson as the beneficiary including the "PERS Retirement account," and supporting documents.

18. On June 8, 2020, CalPERS notified respondent Thompson that upon review of Decedent's file, CalPERS could not automatically start payment of a monthly benefit allowance because in order to qualify for the Survivor Continuance monthly allowance (distinguished from the Option 2W lifetime monthly allowance), respondent

Thompson would have to have been married one year prior to the Decedent's retirement date. CalPERS requested additional documentation.

19. On June 13, 2020, CalPERS contacted respondent Thompson who stated that Decedent was in the process of changing her option beneficiary to name respondent Thompson as her new option beneficiary, but Decedent passed away unexpectedly before having it completed. Respondent Thompson wanted to know what she could do. She was informed that she had the option to submit a written dispute, provide any supporting documentation, and request that it be reviewed by CalPERS's Exceptional Processing Unit.

20. On June 15, 2020, CalPERS received a letter from respondent Thompson, along with supporting documents, requesting an exception and reconsideration regarding the lifetime option beneficiary and survivor continuance monthly allowance.

21. On July 28, 2020, Alexis Woodyard, Associate Governmental Program Analyst, CalPERS Survivor Benefits Processing Section, sent a letter to respondent Thompson offering her condolences and indicating that a "thorough review" had been conducted of Decedent's file and it was determined that respondent Thompson was not eligible for a monthly allowance from CalPERS, citing Government Code sections 21462 and 21454. The letter explained that Decedent had only designated respondent Thompson as the beneficiary for the lump sum death benefit. The letter further explained that Decedent had been informed on January 3, 2019, that she needed to obtain a court order awarding her 100 percent of her CalPERS retirement. The letter further explained that Decedent's trust had been reviewed, but there was no provision in the law that allowed the trust to be used as a designation for payment of an ongoing CalPERS lifetime monthly allowance. Respondent Thompson was advised of her appeal rights.

22. CalPERS received an email from respondent Thompson's attorney Tyson Smith with supporting documents (previously submitted by respondent Thompson) attached regarding Decedent's uncontested dissolution of marriage to respondent Donovan.

23. On October 10, 2020, CalPERS contacted attorney Smith and explained that even though the declaration filed by Decedent stated it was an uncontested dissolution and there were no assets to divide, she was not specifically awarded the full interest in her CalPERS's retirement account. Since the superior court was not aware of the account, her CalPERS retirement account could not have been addressed in the dissolution. CalPERS explained that Government Code sections 21454 and 21462 allow a modification/and or change of beneficiary only if the superior court grants 100 percent interest to the retired member, and in this case that did not occur.

24. Government Code section 21454 provides:

Notwithstanding Section 21453, an election of optional settlement 2 or 3, or optional settlement 4 involving life contingency in which a spouse is designated as the beneficiary, may be modified as provided in this section in the event of a dissolution of marriage or a legal separation in which the division of the community property awards the total interest in the retirement system to the retired member, or in an annulment of the marriage in which a court confirms the annulment. The modification shall provide that payment shall be continued during the retired person's lifetime in accordance with the optional settlement then in effect but that no monthly allowance shall be paid

following the retired person's death, and in lieu thereof there shall be paid in a lump sum to the member's estate or a beneficiary designated by him or her the amount, if any, by which the member's accumulated contributions at retirement exceed the total payments made to the retired person to the date of his or her death.

This section shall apply to any member who retires on or before December 31, 2017.

Government Code section 21462 provides:

(a)(1) Notwithstanding any other provision of this part, a member who elected to receive optional settlement 2, 3, or 4, involving a life contingency of the beneficiary, may, if the beneficiary predeceases the member or if the member marries and the former spouse was not named as beneficiary, or, if a former spouse was named, in the event of a dissolution of marriage or a legal separation in which the judgment dividing the community property awards the total interest in the retirement system to the retired member, or in an annulment of marriage in which the court confirms the annulment, elect to have the actuarial equivalent reflecting any selection against the fund resulting from the election as of the date of election of the allowance payable for the remainder of the member's lifetime under the optional settlement previously chosen applied to a lesser allowance during the member's

remaining lifetime under one of the optional settlements specified in this article and name a different beneficiary.

(2) Notwithstanding paragraph (1), for an election pursuant to this section that occurs on or after January 1, 2014, a member may name the same beneficiary as previously designated, provided that the resulting benefit to the member and the named beneficiary otherwise meets the requirements of this section.

(b) The election provided by this section is irrevocable and shall be made within 12 months following the death of the beneficiary who predeceased the member, within 12 months of the date of entry of the annulment of marriage or judgment dividing the community property of the parties, or within 12 months following marriage if the spouse is named as beneficiary. The election shall become effective on the date specified on the election, provided that this date is not earlier than the day following receipt of the election in this system pursuant to this section.

25. On December 4, 2020, and January 21, 2021, Roger Fujita, Assistant Division Chief, CalPERS Benefit Services Division, Survivor Benefits Section, sent letters to respondent Thompson offering his condolences and indicating that a "thorough review" had been conducted of Decedent's file and it was determined that respondent Thompson was not eligible for a monthly allowance from CalPERS citing Government Code sections 21462 and 21454. Respondent Thompson was advised of her appeal rights.

26. On February 4, 2021, respondent Thompson filed an appeal and requested an administrative hearing. In the letter of appeal, her counsel argued that the superior court did not need to provide a division of the assets upon the dissolution of marriage because the parties retained their own interests and waived any right to receive spousal support. Furthermore, the superior court documents did not show that respondent Donovan retained an interest in the retirement account.

27. On May 27, 2021, complainant Keith Riddle, CalPERS Chief of Disability and Survivor Benefits Division signed the Statement of Issues on behalf of the Board of Administration of CalPERS. The Statement of Issues limited the issues on appeal to: whether respondent Thompson is eligible for the Option 2W lifetime monthly benefit and/or lifetime monthly survivor continuance benefit. The Statement of Issues alleged that:

After reviewing Decedent's file and additional information provided by respondent Thompson and her attorney, CalPERS determined that per Government Code section 21630, respondent Thompson does not qualify for a lifetime monthly Survivor Continuance benefit because she and Decedent were not married prior to Decedent's retirement. Second, the requirements of Government Code section 21454 were not met because CalPERS did not receive a new court order addressing the community property interest in Decedent's CalPERS benefits, nor a signed waiver disclaiming the community property interest from respondent Donovan the named designated beneficiary. Third, CalPERS determined that Decedent's failure to submit

the proper change of beneficiary forms does not constitute an "error or omission" that is correctable under Government Code section 20160. Therefore, respondent Donovan remains the Option 2W beneficiary, and respondent Thompson is not entitled to receive a monthly allowance.

28. This hearing ensued.

29. Woodyard testified at hearing. She works in the CalPERS Exceptional Processing Unit and handles the more complex cases. Woodyard confirmed Decedent's multiple attempts to remove respondent Donovan as her beneficiary. Woodyard confirmed that Decedent stated that she did not think it was possible to get her former spouse to sign the release form because it was not an amicable divorce and she had no contact with respondent Donovan. CalPERS provided Decedent with the information that she needed to change any designations.

According to Woodyard, it is important for CalPERS to have a copy of the judgment in a dissolution proceeding providing for 100 percent of CalPERS retirement to ensure that a member is allowed to make a change of beneficiary because of community property laws. Woodyard explained that when conditions change to allow a member to make a new beneficiary designation for Option 2W, a recalculation is required because the amount of the member's monthly check could change. In calculating the retirement benefit, the proposed beneficiary's date of birth and actuarial tables are considered. Generally, retirement benefits decrease the younger the beneficiary is.

Respondent Thompson's Additional Evidence

30. Respondent Thompson testified at hearing regarding Decedent's intent to provide for her and give her all assets. According to respondent Thompson, Decedent never gave any money to and had cut all ties with respondent Donovan. She described Decedent's relationship with respondent Donovan as tumultuous. Because of this, Decedent tried to implement the changes to her CalPERS retirement without contacting respondent Donovan. Respondent Thompson believes that Decedent did not follow through with providing the documentation requested by CalPERS, because the two ways suggested by CalPERS required Decedent to contact respondent Donovan, which she did not want to do. To return to superior court would have required Decedent to have respondent Donovan served.

While respondent Thompson's testimony was sincere, it provided no basis to overcome the statutory requirements regarding how the Option 2W lifetime monthly benefit and/or survivor continuance monthly benefit are to be modified under applicable law.

31. Kelly McCague had known Decedent since 1994. She testified regarding Decedent's intent to take care of respondent Thompson, and ensure that she (and not respondent Donovan) had access to all her assets, including Decedent's CalPERS retirement benefits.

32. Kathleen Douglass is Decedent's maternal aunt. She officiated at Decedent and respondent Thompson's wedding. She was aware of the tense relationship between Decedent and respondent Donovan. She testified regarding Decedent's intent to have her wife, respondent Thompson, be taken care of.

Respondent Donovan

33. On June 6, 2020, CalPERS sent a letter to respondent Donovan notifying her that she was a beneficiary payable due to the death of Decedent and requested an application, death certificate, and divorce decree. On July 14, 2020, CalPERS received an Application for Retired Member/Payee Survivor Benefits from respondent Donovan, who designated her relationship to Deceased as former domestic partner.

34. Respondent Donovan testified at hearing. She was married to Decedent for approximately seven years. Respondent Donovan has remarried and is now Donna Starr. She did not look to Decedent for any financial support. Decedent's CalPERS retirement was not discussed in the dissolution of the domestic partnership. She had no personal contact with Decedent before her death. Respondent Donovan never asked Decedent for money from her retirement account.

Discussion

35. CalPERS properly denied respondent Thompson the Option 2W lifetime monthly benefit because Decedent never completed the process to either obtain a judgment awarding her 100 percent of her CalPERS retirement in the dissolution of her domestic partnership or have respondent Donovan sign a release form. Decedent's intent to provide for respondent Thompson is compelling, but it does not overcome the applicable statutes that CalPERS must comply with.

36. CalPERS properly denied respondent Thompson the lifetime monthly survivor continuance benefit because Decedent and respondent Thompson were not married one year prior to Decedent's retirement date. There is no legal or factual basis to support this lifetime benefit to respondent Thompson.

LEGAL CONCLUSIONS

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

2. Public employee pension legislation should be construed liberally in favor of the member; however, the legislative purpose is paramount. (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 473.) The rule of liberal construction cannot be permitted to eradicate the legislative purpose of the law or to allow eligibility for those for whom it obviously is not intended. (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.) Courts have given great weight to CalPERS's construction of the Public Employees' Retirement Law. (*Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, 1164.)

3. CalPERS is a "prefunded, defined benefit" retirement plan. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) Government Code section 21462 provides that a member may, provided certain conditions are satisfied, elect to provide for a new beneficiary to receive benefits upon the member's death. One condition is that in the event of a dissolution of marriage or a legal separation, there must be a judgment dividing the community property awarding the total interest in the retirement system to the retired member. Because of actuarial considerations, there may be a cost to the member to provide for a new option beneficiary; and the cost is typically reflected as a permanent reduction to the member's monthly retirement allowance to pay for the new option benefit that the member is electing to provide. The recalculation of benefits becomes effective once the member submits the formal

election documents to CalPERS, and both the member and the new option beneficiary are alive on the effective date for the recalculation of options.

4. Concerning the Option 2W Lifetime Monthly benefit, in order to change the beneficiary from respondent Donovan to respondent Thompson, the pertinent statutes require court documentation demonstrating that Decedent was entitled to receive 100 percent of her retirement benefit. CalPERS has no court record showing that Decedent was awarded 100 percent of her retirement benefit and that respondent Donovan was not entitled to any portion of Decedent's retirement benefit. Despite the communications with Decedent and specific instructions on what documentation CalPERS needed, Decedent did not submit any court documentation showing that she was awarded 100 percent of her retirement benefit or a signed release from respondent Donovan. Neither did Decedent submit a MOLOB to request estimates of the different settlement option benefits respondent Thompson may have received had Decedent ultimately been successful in naming her as the Option 2W beneficiary. This is a form that is required to make such a change. Decedent's communications with CalPERS did not suffice to meet the requirements to change the beneficiary from respondent Donovan to respondent Thompson. None of the requirements were met to effectuate a change in beneficiary for the Option 2W lifetime monthly benefit.

5. Concerning the survivor continuous monthly benefit, Government Code section 21630 defines a "surviving spouse" as having been married to the member (Decedent) one year prior to the member's retirement, and for their marriage to have continued until the death of the member. In this case, respondent Thompson is not eligible for this monthly benefit because Decedent retired on October 1, 2015, and respondent Thompson and Decedent married on March 6, 2018—more than two years after her retirement.

In sum, while respondent Thompson's position is unfortunate, the applicable statutes dictate that CalPERS properly determined her to not be eligible for an Option 2W lifetime monthly benefit and/or a lifetime monthly survivor continuance benefit.

Errors or Omissions/Estoppel

6. Government Code section 20160, subdivision (a), provides that CalPERS may, in its discretion, correct the errors or omission of any active or retired member, or any beneficiary of an active or retired member, if:

(1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.

(2) The error or omission was the result of mistake, inadvertence, surprise, or excusable neglect, as each of those terms is used in Section 473 of the Code of Civil Procedure.

(3) The correction will not provide the party seeking correction with a status, right, or obligation not otherwise available under this part.

Failure by a member or beneficiary to make the inquiry that would be made by a reasonable person in like or similar circumstances does not constitute an "error or omission" correctable under this section. Subdivision (d) provides that the party

seeking correction of an error has the burden of presenting evidence establishing the right to correction.

7. Respondent Thompson contends that Decedent made consistent efforts through CalPERS to change the beneficiary from respondent Donovan and Decedent complained about the information she received from CalPERS. Therefore, it should be concluded that she was having difficulty with effective assistance and CalPERS made a correctable error. The evidence established that CalPERS provided Decedent with the information and explained the process and provided the forms she needed to ultimately designate respondent Thompson as her Option 2W beneficiary. It is regrettable that Decedent failed to act. It cannot be found that Decedent's failure to designate respondent Thompson as her beneficiary for more than a year before her death was the result of mistake, inadvertence, surprise, or excusable neglect. Respondent is not entitled to relief based on Government Code section 20160.

8. Alternatively, respondent Thompson contends that she is entitled to relief based on the evidence of Decedent's clear statements of her intent to remove respondent Donovan as her beneficiary, arguing that Decedent was hindered by their prior tumultuous relationship from reaching out to respondent Donovan to either be served to return to superior court or to sign the waiver. Furthermore, respondent Thompson contends that the severance of their legal connection through the dissolution with no continuing financial obligations, such as spousal support, should be considered. Also, respondent Thompson contends that Decedent's failures should be viewed as merely "technically insufficient efforts" to complete the forms. These arguments appear to be requesting relief under the doctrine of estoppel.

Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, sets forth the elements that must be present to establish estoppel against a public agency: (1) the party to be

estopped must be apprised of the true facts; (2) the party must intend that its conduct shall be acted upon, or must so act that the party asserting estoppel had a right to believe it was so intended; (3) the party asserting estoppel must have been ignorant of the true state of facts; and (4) that party must have relied upon the conduct to its injury. In cases involving public employee pensions, estoppel may not be invoked where to do so would "directly contravene statutory limitations." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.)

The evidence appears to support that Decedent intended that respondent Thompson receive the benefits. However, Decedent's intent cannot supplant her failings in complying as instructed by CalPERS. Respondent Thompson has not established that estoppel should be applied in this case. To do so would contravene statutory limitations on a divorced member's rights to change beneficiaries from a former spouse to a subsequent spouse.

9. Respondent Thompson has not established that CalPERS erred in its determination that she is not eligible for an Option 2W lifetime monthly benefit and/or a lifetime monthly survivor continuance benefit. Accordingly, respondent Thompson's appeal should be denied.

10. All other contentions and arguments have been considered and determined to be without merit.

ORDER

The appeal of Melissa Thompson is denied.

DATE: 12/17/2021

Regina Brown

REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings