

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

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TO: Cheree Swedensky, Assistant to the Board  
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SENT BY: Warren O. Hodges, Jr. *WH*RE: In the Matter of the Application for Survivor Benefit Payable Upon  
the Death of Cecil C. Flournoy, Jr., by:  
SHIRLEY A. FLOURNOY, Respondent  
Case No.: Case No. 2012-0856

COMMENTS: Please see attached brief:

**RESPONDENT'S ARGUMENT IN OPPOSITION TO THE BOARD'S  
ADOPTION OF THE PROPOSED DECISION**

Please see attached.

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**BOARD OF ADMINISTRATION**  
**CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

**In the Matter of the Application for  
Survivor Benefit Payable Upon the  
Death of Cecil C. Flournoy, Jr., by:**

**SHIRLEY A. FLOURNOY,**  
Respondent,  
and  
**CECIL C. FLOURNOY III,**  
Respondent.

**Case No. 2012-0856**

## RESPONDENT'S ARGUMENT IN OPPOSITION TO THE BOARD'S ADOPTION OF THE PROPOSED DECISION

**Board of Administration Hearing**  
**Hearing Date: May 18, 2016**

This brief is presented by Respondent Shirley Flournoy (Respondent or Mrs. F) as her argument against the Board of Administration's adoption of the Proposed Decision rendered by ALJ Vincent Nafarrete on March 17, 2016.

As argued within, Respondent contends that Judge Nararrete's decision was inconsistent with his Factual Findings, and flawed. Respondent respectfully requests that the Board of Administration reverse Judge Nafarrete's decision, and find that Mrs. F was, in fact, the putative spouse of the deceased CALPERS Cecil A. Flournoy, Jr. (Mr. F) at the time of his death, and award her Survivor Continuance Benefits (SC Benefits).

**A. The Putative Spouse Doctrine Does Apply to Respondent's Claim**

**A. The Putative Spouse Doctrine Does Apply to Respondent F.**

Consistent with California law, Judge Nafarrete's decision correctly sets forth that putative spouse doctrine is applicable to this determination, and, if facts exist, is available to Mrs. F to prove her right to recover SC Benefits. *See Burnham v. Public Employees' Retirement System*, 208 Cal. App. 4th 1576 (held: CalPERS must recognize valid claims based on putative spouse status).

**B. Respondent Was The Deceased Member's Putative Spouse**

**B. Respondent Was The Deceased Member's Putative Spouse**  
Unfortunately, Judge Nafarrete wrongly decided that, upon his review of the case facts, Mrs. F did not have a good faith belief that she was still married to Mr. F at the time of his death. How he reached this decision is worth substantial scrutiny, for almost every notable factual finding he made and the sum of the evidence presented (or not presented to the detriment of CalPERS position) is counter to that conclusion. In

1 particular, he clearly was not convinced that the judgment of divorce was ever known to Mrs. F or her  
2 counsel. (Page 18, second full paragraph: "In this matter, if the only evidence suggesting that respondent  
3 was not married to the member at the time of his death was the final judgment of divorce  
4 entered in October 1981, then the inquiry could perhaps have stopped there and respondent might be  
5 classified as a putative spouse."). The chart attached hereto as Exhibit A shows how the volume and weight  
6 of all the evidence clearly supports Respondent's position herein. As does the very reason the putative  
7 spouse doctrine was developed.

8 Under California law, a putative spouse is one who believes, and can prove by a mere  
9 preponderance of the evidence that, based on the totality of the circumstances – including her personal  
10 background, culture and experience and all the circumstances surrounding the marriage – her "belief" was  
11 genuinely and honestly held. This belief does not need to be objectively reasonable; but only held in good  
12 faith; thus the inquiry focuses only on the subjective and actual state of mind of the alleged putative spouse.  
13 *Ceja v Rudolph & Sletten* (2013) 56 Cal.4th 1113.

14 In this case, Respondent Mrs. F accumulated assets with Mr. F over the course of a  
15 marriage that she believed lasted 44 years, and in detrimental reliance on that belief. In good faith, Mrs. F  
16 believed that she remained married to her husband after the divorce action she initiated ended. She believed  
17 it had ended by abandonment or dismissal, and that once she told her attorney that she and her husband had  
18 reconciled (her attorney testified at trial that this was so), her attorney had taken the necessary steps to  
19 terminate the proceeding. She did not learn until after her husband's death that a judgment of divorce had  
20 been entered. She and her attorney still doubt and dispute whether it was properly entered. In any case, the  
21 evidence is clear that her attorney and she never knew, or had reason to know of the entry of judgment.

22 That is completely credible because the entry of the divorce judgment is inconsistent with all of the  
23 information she was privy to about her marriage, and how she lived her life and relationship with Mr. F after  
24 she reconciled with him in 1980. Judge Nafarette's decision acknowledges this: "The length of time that  
25 respondent and the member lived together and their efforts at maintaining their relationship and family have  
26 a tendency in reason to support respondent's claimed belief that she was married to the member and was not  
27 divorced from him." (Page 18, second full paragraph). Mrs. F and her husband did live apart for many years,  
28 but that was their unique approach to managing what was definitely a challenging marriage, given his serial  
infidelity, and one instance where he transmitted a venereal disease to Mrs. F. But, she loved him,  
and after they reconciled in 1980, she made the best of the marriage, on uncommon, but acceptable terms.  
They lived together until 1991, and thereafter continued to socialize together regularly, date and attend all  
family functions together, all the while holding themselves out socially as husband and wife. No one  
testified that Mr. F ever stated that a divorce had been finalized, or that he was not married to Mrs. F. In  
fact, several witnesses confirmed that Mr. F always referred to Mrs. F as his wife, and/or that when Mrs. F  
described their relationship on several occasions in his presence as being "separated, but not divorced," that  
he was in agreement with that statement.

Further, in all of their work-related documents, and Mrs. F's school and financial aid applications,  
they identified themselves as married to each other, even when to do so was detrimental, including her  
applications for financial aid during her graduate studies. They carried each other on their medical and auto  
insurance policies over the years. Mr. F designated Mrs. F as his wife in ALL of his CalPERS paperwork,

1 even through his retirement application with CalPERS where he named her as his durable agent vested with  
2 the power of attorney, including the power to change his health care and pension benefits, even the plan  
3 beneficiaries. She took care of him in his struggles with cancer, taking him to his medical visits, and even  
4 moved back in to live with Mr. F for his last year of life. To the end, in all of the available medical records,  
5 Mr. F designated Mrs. F as his wife, and that is what the Coroner put on the death certificate [there is no  
6 competent evidence that the Death Certificate was ever changed].

7 In sum, Mrs. F acted as Mr. F's wife, and believed herself to be so until his death. Mr. F worked for  
8 45 years for CalPERS with CalPERS believing that he was married to Mrs. F, because that is what he  
9 consistently represented to CalPERS, including to the counselors when he filed his retirement application.  
10 He believed – and, notably CalPERS does not contest that it was Mr. Flourroy's true belief – that he and Mrs.  
11 F were married through his death. (See Exhibit 7, where CalPERS writes to R and states "We do not doubt  
12 Mr. F's state of mind at the time he applied for retirement.", Ex. Z, where CalPERS admitted marriage claim  
13 looked "totally legit" to them) He believed until his death that no matter what wrongs he may have done to  
14 Mrs. F during their marriage, at the last he had at least taken care of her financially after his death.  
15 CalPERS own administrators admit that he and she had the clear expectation that the person he knew and  
16 represented to be his wife would receive SC Benefits of more than \$3,300 per month upon his death. Noone  
17 disputes this fact, and that Mrs. F receiving said benefits was Mr. F's clear intention. (See CalPERS  
18 administrator Cathy Modin's testimony during Day 1 of the proceedings at page 63, et seq, wherein she  
19 admits this was discussed with Mrs. F and M. Flournoy).

20 So, why is CalPERS so determined to upset Mr. F's intentions? He worked as required for the  
21 Sanitation Department for more than forty years, working and paying into his retirement plan with the  
22 expectation that he and his family would receive all of the benefits he had earned. How does it benefit  
23 CalPERS to deprive Mr. F and Mrs. F of the benefit of his and ger legitimate expectations, based on a  
24 technicality. What did Mrs. F (Respondent herein) do that was so wrong that she would deserve such  
25 shabby treatment and an unjust result from this state agency, which should not have a side to take, or an axe  
26 to grind in this situation? She suffered through the difficult marriage, dealing with the insecurity, pain and  
27 trauma of Mr. F's serial infidelities. She made the sacrifices to keep the family together, eating her pride  
28 and enduring the shame of her husband's other women calling their house. She did what should be  
29 applauded, being forgiving, returning home, not proceeding with the divorce, choosing to live together until  
30 their son was through college, and even then, only after Mr. F had returned to cheating on her, and gave her  
31 an STD, moving out to live apart from his damaging behavior. But, friends and a loyal wife she remained.  
32 And when he was diagnosed and had several bouts with cancer, each time he called on her to take him to his  
33 medical visits. She cared for him throughout, even moving in with him the months before his death. She  
34 didn't take advantage of Mr. F's having given her Power of Attorney to change his retirement elections.

35 And CalPERS wants to deny her SC Benefits because "maybe" she knew the marriage had been  
36 terminated by a court judgment, even though all evidence points to the fact that neither she or Mr. F knew it  
37 had been entered. And how does that result make any sense? Is it CalPERS position that Mr. F meant to  
38 intentionally deceive CalPERS or Mrs. F about his marital status? That Mrs. F intended to do so? That they  
39 both knew, and intended to cheat CalPERS? Really?

40 Well, Mrs. F had the power of attorney to make a change to Mr. F's pension designation to her

1 benefit, and did not. Why? Because she subjectively, reasonably, and in good faith believed she was Mr.  
2 F's wife. If she knew or suspected that they were, in fact, divorced, she logically could and would have  
3 taken steps to protect her interests, which in this case approximate \$3,700 per month. Consequently, the fact  
4 that she did not change his pension designation points to one unique and persuasive reason and fact. She did  
5 not do so because she believed they were married, and that she would receive the SC Benefit. If she did  
6 know they were not married, she took a significant risk by not changing the designation, which would  
7 undermine Judge Nafarrete's suggestion that Mrs. F was particularly sophisticated and manipulative. How  
8 sad, for Mrs. F to be punished for being trusting, loyal and unselfish.

9 Despite finding no facts that support that Mrs. F knew or should have known that the divorce  
10 judgment had been entered, Judge Nafarrete found that Mrs. F's taking title to her condo as "an unmarried  
11 woman" was dispositive of the issue. This fact outweighed all others in his evaluation of the "totality of  
12 circumstances." He opined that her education and experience would have caused her to reasonably know  
13 how she was acquiring title. But, his conclusion is predicated on a false fact, that she knew how she took  
14 title because she looked at the grant deed prior to the transaction closing. There is no proof of that. In fact,  
15 none of the loan application documents submitted by CalPERS shows her making a knowing designation of  
16 taking title as an unmarried woman. In fact, she did not review the grant deed to her, and there was no  
17 evidence that she was requested or expected to do so. Her review, signature and acceptance was not  
18 required. Only the Seller signs the grant deed, and has his/her signature thereto notarized. Judge Nafarrete  
19 suggests that he might have found in Mrs. F's favor, if only she had given some explanation for why she took  
20 title as she did, even if that explanation would have suggested she was intentionally trying to hide the asset  
21 from her husband. But, that penalizes her for her candor (while, apparently, an admission of deceit might  
22 have saved her case). That she made no attempt to explain why she took title as she did supports, not  
23 undermines her claim that she had no knowledge of this fact.

24 The putative spouse doctrine was created for situations like these, to make sure the innocent spouse  
25 is not cheated by technicalities out of benefits earned through a relationship believed to be legal. Here is an  
26 additional point of irony: CalPERS has taken the position that if Mr. F had changed Mrs. F's beneficiary  
27 designation from "surviving spouse" to another classification, she would be entitled to benefits. If he had  
28 lied, she would receive money. In the end, adopting Judge Nafarrete's proposed decision – based upon a  
divorce decree she was wholly unaware of, and which had no substantive impact on her relationship with her  
husband – and that was late discovered, by, of all people, one of Mr. F's illegitimate sons (who did not even  
testify) – will punish Mrs. F more than her husband ever did or intended.

DATED: May 6, 2016

Respectfully submitted,

RITT, TAL, THVEDT & HODGES  
A Limited Liability Partnership

  
WARREN O. HODGES, JR.  
Attorney for Respondent SHIRLEY A.  
FLOURNOY



Analysis of Facts Supporting Judge Nafarrete's Proposed Decision		
Issue of Relevant Fact	Facts Supporting CalPERS Position	Facts Supporting Respondent's Position
Did Mr. Flournoy know or believe that a divorce judgment was entered and the divorce was final, ever tell such to anyone, or act consistent with such belief?	None. Judge Nafarrete made no factual findings and CalPERS failed to present any evidence, even by way of testimony from the illegitimate son of Mr. Flournoy who initiated this matter, Corey Flournoy, that Mr. Flournoy knew or believed that his divorce was final, or ever told anyone this fact/belief. This is a significant hole in CalPERS case.	<p>Conversely, Respondent presented much evidence that supports her position, that neither she or Mr. Flournoy know of the divorce decree. The facts presented at trial, and Judge Nafarrete's factual findings (FF) in the proposed decision also support that conclusion:</p> <ul style="list-style-type: none"> <li>- No admissible evidence proving actual mailing of judgment.</li> <li>- No receipt/knowledge by R's attorney, or communication to R of entry of judgment. FF17, 18</li> <li>- R's atty testified that it was customary for family law attys to have clients sign all divorce papers on first visit, and perhaps request for judgment was automatically submitted by Mr Flournoy's atty, w/o his knowledge and consent.</li> <li>- Mr. Flournoy was consistent until his death that Respondent was his wife, including his statements to CalPERS, CalPERS not only believed R and Mr. Flournoy were married, but that R and Mr. Flournoy believed that they were married. (See Exhibit 7, where CalPERS writes to R and states "We do not doubt Mr. Flournoy's state of mind at the time he applied for retirement", Ex. Z, where CalPERS admitted marriage claim looked "totally legit" to them) FF 3B, 3C, 4, 13.</li> <li>- no part of the divorce judgment was followed: no sale of the house, no support payments made. FF 14C, 19</li> <li>- they clearly reconciled, and were reconciled, and continued living together as husband and wife (with conjugal relations) for at least 10 years after supposed finalization of divorce. They refinanced the family house, as husband and wife, in 1989 to pay their son's college expenses. FF 18, 19, 32D</li> </ul>

Analysis of Facts Supporting Judge Nafarrete's Proposed Decision		
Issue of Relevant Fact	Facts Supporting CalPERS Position	Facts Supporting Respondent's Position
Did Respondent know or believe that a divorce judgment was entered and the divorce was final, ever tell such to anyone, or act consistent with such belief?	None. Judge Nafarrete made no factual findings and CalPERS failed to present any evidence that Respondent knew that her divorce was final, or ever told anyone this fact/belief. Significantly, noone testified Respondent had such knowledge/belief.	As stated above, and supported by the evidence and FF referenced therein, Respondent presented much evidence that supports her position that she did not know of the divorce decree. Respondent believed they were "separated, but married" until Mr. Flournoy's death. Her lawyer never told her of a judgment. Mr. Flournoy never told her of a judgment. See below regarding Mr. Flournoy and Respondent's interaction with CalPERS about his retirement benefits. FF 17, 18, 32A
What did their family members and friends know or believe about their marital status?	None.	Respondent's witnesses, the son she had with Mr. Flournoy and family friend Beverly Jackson, both testified strongly that Respondent and Mr. Flournoy never finalized their divorce, or said they had, and continued to be "separated, but married" until Mr. Flournoy's death. FF 5, 32C, 32D, 33-35
What did they tell their educational institutions, employers and the government about their marital status?	None.	Consistently, for 44 years, both Respondent and Mr. Flournoy represented to their respective employers that they were married to each other. No evidence suggests otherwise. See FF 20-21 Respondent's statement of her marital status as "married" prevented her from obtaining some financial aid for her graduate studies in the late 1980s. When it would have clearly benefitted her to have claimed divorced status, she did not. FF 32A



Analysis of Facts Supporting Judge Nafarrete's Proposed Decision		
Issue of Relevant Fact	Facts Supporting CalPERS Position	Facts Supporting Respondent's Position
What other facts give evidence that either Respondent or Mr. Flounoy knew that the divorce was final, or acted in accordance with that belief?	<p><b>Only One.</b> Despite finding no facts that support that Respondent knew or should have known that the divorce judgment had been entered, Judge Nafarrete found that Respondent's taking title to her condo as "an unmarried woman" was dispositive of the issue. This fact outweighed all others in his evaluation of the "totality of circumstances." He opined that her education and experience would have caused her to reasonably know how she was acquiring title. But, his conclusion is predicated on a false fact, that she knew how she took title because she looked at the grant deed prior to the transaction closing. There is no proof of that. In fact, none of the loan application documents submitted by CalPERS shows her making a knowing designation of taking title as an unmarried woman. In fact, she did not review the grant deed to her. Her signature and acceptance was not required. Only the Seller signs the grant deed, and has his/her signature thereto notarized. Judge Nafarrete suggests that he might have found in Respondent's favor, if only she had given some explanation for why she took title as she did, even if that explanation would have suggested she was intentionally trying to hide the asset from her husband. But, that penalizes her for her candor (while, apparently, an admission of deceit might have saved her case). That she made no attempt to explain why she took title as she did - she had no reason - supports her claim that she had no knowledge of this fact.</p>	<p>None. Respondent represented herself in public at Mr. Flounoy's funeral as his wife, a claim that would have exposed her to ridicule if actually false. FF 32C. Mr. Flounoy's retirement elections, and Respondent's acceptance of them further prove that he and Respondent did not know or believe that a divorce judgment was entered and the divorce was final. R and Mr. Flounoy were expressly told that Respondent's SC Benefits would be \$3,300 per month because (and only if) she was Mr. Flounoy's wife. (See CalPERS administrator Cathy Modin's testimony during Day 1 of the proceedings at page 63, et seq, wherein she admits this was discussed with Respondent and M. Flounoy). If Mr. Flounoy, who made such a great effort to involve Respondent in his retirement benefits decision, knew (as he clearly did based on his elections) that the only way Respondent would receive any benefits on his death were if she was his wife, then why would he have made the elections he did if he, in fact, knew she was not his wife because of the divorce judgment? He purposely chose to identify her as his spouse under the SV benefits section of the election form, and CalPERS verified their marriage for that reason (required marriage certificate). Moreover, why would Respondent consented to his choice if she knew they were not still married, and would therefore be deprived of any benefits. Finally, if Respondent knew they were not married, and that she could therefore lose all rights to benefits, why did she not exercise the broad rights he gave to her as his Power of Attorney to change his retirement elections prior to his death, to ensure benefits would flow to her upon his death? The fact she did not do so is consistent with her belief that there was no reason to do so - they were married.</p>