

ATTACHMENT C
RESPONDENTS ARGUMENTS

ATTACHMENT C

LAW OFFICES
SYLVESTER & ASSOCIATES, P.C.
111 PETROL POINTE - Suite 200
PEACHTREE CITY, GA 30269

CHUCK SYLVESTER
Email: SYLVESTERlaw1@gmail.com

Phone: 770 / 632-6011
Fax: 877 / 631-5859

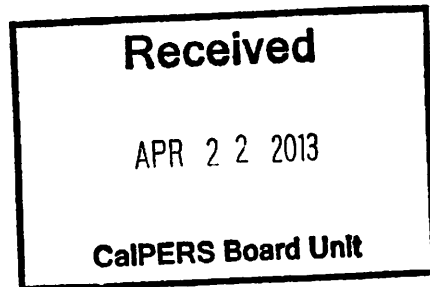
22 April 2013

S177 01 PED

Ms. Cheree Swendensky, Assistant Board
CalPERS Executive Offices
P.O. Box 942701
Sacramento, CA 94229-2701

Fax: 916-795-3972

RE: Ref. No. 2010-0824
Argument of Respondent Children
Matter of Application for Payment of Benefits Upon the
Death of Elsie Mayo Smith (Member)



Dear Board Members:

This argument regarding Option 1 Benefits encouraging the Board to consider the 'evidence' on record and the applicable legal principals as the sound basis for its ultimate decision rather than the proposal of Judge Lew is advanced on behalf of the four adult children of the Member, Mrs. Elise Smith.

The law cited by Mr. Smith does not bear upon the real issues before this Board. The proper decision in this case for this Board is grounded upon the law of **property rights, transmutation**¹ of those property rights, **gifts, evidence, allegations of fraud and burden of proof**, none of which justify the award as proposed by Judge Lew.

Please designate your decision as **precedent**, in whole as a warning to all CalPERS employees.

Key points for your careful consideration are:

1. CalPERS role in counseling the member, Elsie Smith and her estranged husband, Mr. Smith on 01 June 2005 and again on 15 March 2006 when the Smiths together, amicably sought guidance on the completion of necessary CalPERS paperwork - to document that Mr. Smith was agreeable that their children, not him, would receive any community property interests he may have in the Option 1 Benefits.
2. The undisputed intentions of the parties as contrasted with Judge Lew's perception, eight years later, of the failure of the CalPERS counselor to guide and assist Mrs. Smith and her husband in completion the necessary paperwork to seamlessly accomplish their mutual objective.
3. CalPERS role as trustee of the benefits payable to designated beneficiaries (the children).
4. The absence of any evidence of fraud as recently alleged.

It should not be misunderstood that the four children of Mr. and Mrs. Smith are fully qualified respondents. California law makes it clear that, a child can enforce the provisions of his parents' contract made for his benefit in the same manner as could a party to the agreement. *Walsh v. Walsh*, 42 Cal.App.2d 282, 285-286, 108 P.2d 760; *Reliance Life Ins. Co. v. Jaffe*, 121 Cal.App.2d 241, 244, 263 P.2d 82; *Waxman v. Citizens Nat. Trust & Sav. Bk.*, 123 Cal.App.2d 145, 148-149, 266 P.2d 48. Intended legatees and devisees are entitled to enforce their rights under the contract. *Daniels v. Bridges*, supra, 123 Cal.App.2d at page 590, 267 P.2d 343; *O'Neil v. Ross*, supra, 98 Cal.App. 315-316, 277 P. 123; Civil Code § 1559.

¹ Transmutation - a change in the nature of property such as from marital property into separate property.

**LAW OFFICES
SYLVESTER & ASSOCIATES**

CalPERS
Board of Administration
California Public Members Retirement System
22 April 2013
Page 2 of 6

On behalf of the “respondent children” of the Member, Elsie Smith and her spouse and all of CalPERS employees, I write to urge your rejection of Judge Lew’s thoughtful but erroneous decision for the following reasons:

ARGUMENT of the Smiths’ Children as Respondents and Designated Beneficiaries

1. CalPERS role as retirement counselor.

CalPERS has gone to great lengths to help its members to understand and to properly manage their retirement benefits. To that end, CalPERS designed, printed and provided the forms used to designate beneficiaries in a systematic way to promote efficiency and to ensure accuracy in complying with CalPERS guidelines. CalPERS also trains selected employees to counsel with employees to help them understand the retirement program, its forms, guidelines, employee benefits and the proper manner of designation of beneficiaries using the forms provided by CalPERS.

Members should be able to trust the counsel of specially trained CalPERS retirement counselors and, should not be penalized if the CalPERS counselor makes a mistake. Where it is apparent that the member and beneficiary together seek guidance from a CalPERS counselor to accomplish a ‘change of beneficiary’ their clear mutual intentions should be respected even where the CalPERS counselor failed to have them complete every form later thought by Judge Lew to be required.² When the CalPERS retirement counselor determined that Mr. Smith’s sworn renunciation of any “community property interest in the benefit” appearing in the earlier contract (MSA) prepared by Mr. Smith was then sufficient per the law, the Board should not now undermine/reverse that decision – penalizing the respondent children and ignoring the clear mutual intentions of Mr. Smith and his spouse, Mrs. Smith, the Member.

2. The undisputed intentions of the parties.

It has been undisputed that Mr. Smith had the legal right to gift to his four adult children by the Mrs. Smith, the member, his community property rights/interest in the Mrs. Smith’s Option 1 benefits. Making a gift to his children of this community property rights/interest is referred to as a transmutation of the character of that property right from community property of Mr. Smith to a gift of property rights of his children.

Contract: A contract has been defined as “An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” *Black’s Law Dictionary*, Eighth Edition. “The terms of a contract must be interpreted to give effect to the mutual intention of the parties.” (CA Civ. Code, § 1636.) Judge Lew erroneously concluded in ¶ 4 on page 9 of his proposed decision that the contract (MSA) did not “operate as a binding contract” as the parties clearly intended.

In a case having similar issues, years ago, California affirmed that a “separation agreement” can be a valid contract.³ That holding defined a contract as “. . . an agreement to do or not to do a certain thing.” In that case, Mr. & Mrs. Hallidan who had for living children endorsed under oath the provisions of a “settlement agreement” prepared by Mr. Hallidan. As in the present matter before this Board, “Mr. &

² In his Proposed Decision, page 5 at ¶ 10, Judge Lew indicates that according to Government Code 21261 (b), Mr. Smith should have also signed a sworn declaration that he has no identifiable community property interest in the benefit.

³ *Hallidin v. Usher*, 315 P.2d 418 (Cal. App. 2 Dist., 1957)

LAW OFFICES
SYLVESTER & ASSOCIATES

CalPERS
Board of Administration
California Public Members Retirement System
22 April 2013
Page 3 of 6

Mrs. Hallidan subscribed the instrument and swore thereto before a notary public, . . .” The instrument was found to contain all the essential elements of a contract: a) an agreement by competent parties; b) evidencing their consent; c) having a lawful object. Thus, “the agreement created contractual obligations.” . . . “Either a husband or wife may enter into a contract with the other respecting property.”

California law provides that “[t]he mutual intention of the contracting parties at the time the contract was formed governs. Civ. Code, § 1636; *Palmer [v. Truck Ins. Exchange]* (1999) 21 Cal.4th 1109] 1115. If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs.” *American Alternative Ins. Corp. v. Superior Court*, 135 Cal.App.4th 1239 (2006) Hearing **Exhibit 18** a “contract” (dated 03 December 2001 and 07 March 2002 – though denominated as a Marital Settlement Agreement or MSA). In that contract, Mr. Smith renounced any “community property interest in the benefit” in the contract (MSA) he prepared and endorsed under the penalty of perjury in 2001.

Mr. & Mrs. Smith settled other important differences between them by contract regardless of the fact that they were at the time separated, and continued to remain separated until death. To hold otherwise, as did Judge Lew would render meaningless all sorts of contracts between disputing parties. Contracts do not require the approval of a court to be valid or the Courts would be overwhelmed. In effect the contract prepared by Mr. Smith, and endorsed by him and by the Member expressly declared, among other things, that what was his community property interest in her Option 1 benefits were no longer his.

Interestingly, there is no dispute that Mr. Smith, as recently as (his concise and unambiguous sworn testimony during) the evidentiary hearing before Judge Lew, still maintains that it was his intention to give to his children his interest in his wife’s Option 1 benefits. Mr. and Mrs. Smith together communicated their mutual intentions to the CalPERS counselor when they met together with her on 01 June 2005.

The Board should not now have CalPERS disallow the respondent children from receiving in full the Option 1 Death Benefits that each parent, in cooperation with the other, sought to ensure they received. The Board should not disregard the clear intentions of Mr. & Mrs. Smith and allow the “label” or “title” of the contract meticulously prepared by Mr. Smith to control over the clear intentions of the parties.

Transmutation: California Courts have struggled with the transmutation of marital property in divorce actions in the Family Courts. Seldom is there an issue of transmutation of marital or community property between parents and their children. A gift to children of a community property interest is very different from a family court review of whether a gift by one spouse to another qualifies as transmutation of the character of the property gifted. There is no reason to question the unambiguous intentions of both spouses that ‘marital property’ be gifted away from both spouses to their children – the natural subject of a parent’s affection and as third parties.

Even so, the carefully worded contract provisions, crafted by Mr. Smith in **Exhibit 18** make it clear that Mr. Smith was not to receive the retirement benefits of the Member. In it, at page 3, § VII. ¶ B.12 (also initialed by Mr. Smith), page 4 under § VII. ¶ B.11 and again on page 5 in the paragraph denominated “Pension Plans” Mr. Smith three times provided three express declarations that he assigned to his wife his interest in her Retirement Plan Funds with the San Diego Community College District (Option 1 Benefits). Those sworn declarations authorized her to designate as beneficiaries the four children of Mr. & Mrs. Smith as each intended.

**LAW OFFICES
SYLVESTER & ASSOCIATES**

CalPERS
Board of Administration
California Public Members Retirement System
22 April 2013
Page 4 of 6

Whether the transmutation of Mr. Smith's community property interest in the Option 1 benefits resulted from the contract he prepared in 2001 or occurred at the time of the change of beneficiary designation in 2005 is not particularly important. Under current California law, (Family Code 852⁴) Mr. Smith expressly declared that his community property interest in the Option 1 benefits of the Member was no longer his.

Mr. Smith's express declarations were acknowledged/affirmed approximately three years later, in writing by both Mr. and Mrs. Smith in hearing Exhibit 3 (dated 01 June 2005) with the guidance and assistance of a CalPERS retirement counselor. Both the Member and her husband acknowledged/assented to the designation of their children as the sole beneficiaries of the Option 1 benefits. Thereafter, in the evidentiary hearing, Mr. Smith unequivocally affirmed, under oath, that his intentions were for his children to receive all the Option 1 benefits.

As such, Judge Lew misplaced his focus on CalPERS argument of transmutation based upon Family Code § 2610 and instead should have considered Family Code § 852, addressed above and his conclusion in last paragraph of ¶ 22 of his proposed decision is erroneous for that reason. Judge Lew was remiss in concluding that the contract (MSA) between the parties had to somehow qualify as an "alternative order for division" as he did in ¶ 4 on page 11 of his proposed decision to be valid.

3. CalPERS role as trustee.

The member was not entitled to the Option 1 benefits. She was merely entitled to designate the beneficiary of one-half of those benefits and her spouse, Mr. Smith was entitled to receive the other one-half of the benefits – after the death of the Member. Until her premature death, CalPERS, as trustee had a duty to hold, invest and manage those benefits and thereafter to pay them to the beneficiaries designated by the member with the assistance of CalPERS in doing so.

When the member, Mrs. Smith and her spouse on 01 June 2005 sought and followed the guidance of CalPERS retirement counselor to acknowledge what they believed to be, the transmutation of Mr. Smith's community property rights to their four children, CalPERS became the trustee for the benefit of the children. CalPERS held and, still holds the Option 1 benefits in trust for the children.

At the conclusion of the meeting with Mr. and Mrs. Smith, CalPERS (through its representative)

- a) was satisfied that it clearly understood the intentions of the parties;
- b) had documented those intentions and with the contract (MSA) prepared and endorsed by Mr. Smith, in which he declared his renunciation of any "community property interest in the benefit"; and,
- c) when the time came, CalPERS had clear direction that the proceeds of the Option 1 benefits were to be paid by CalPERS as trustee for the benefit of the children of the Member and her husband.

This had been accomplished with the written acknowledgment, assent and blessings of Mr. Smith on the forms presented by CalPERS. Mr. & Mrs. Smith met together with a CalPERS retirement counselor a second time on 15 March 2006 to again – under the guidance of the CalPERS retirement counselor – acknowledged/affirmed their joint objective that their four children (respondents) would receive all of Mrs. Smith's Option 1 Death Benefits.

⁴ *In re Marriage of Benson*, 116 P.3d 1152, 32 Cal.Rptr.3d 471 (2005)

**LAW OFFICES
SYLVESTER & ASSOCIATES**

CalPERS
Board of Administration
California Public Members Retirement System
22 April 2013
Page 5 of 6

Now, eight years later you, the Board of Directors should carefully avoid bringing reproach upon CalPERS to the unwarranted detriment of the respondent children, by willfully disregarding:

- a) the sworn, explicit renunciation by Mr. Smith in the contract (MSA) of any "community property interest in the benefit" when he prepared the contract, had Mrs. Smith, the Member endorse it and he, himself endorsed under the penalty of perjury (as Judge Lew maintains was necessary);
- b) the apparent decision of previous CalPERS retirement counselors in 2005 and again in 2006 that all paperwork was in order to accomplish the mutual objectives of Mr. and Mrs. Smith that the respondent children and not Mr. Smith would receive all the Option 1 Death Benefits of Mrs. Smith, as Member.

4. The absence of any evidence of fraud.

As of today, Mr. Smith has not disavowed his longstanding intentions that his four children were to receive what would have otherwise been his one-half interest in the Option 1 benefits of Mrs. Smith. Mr. Smith recently convinced himself that Mrs. Smith had more assets⁵ than he was aware of - at the time he renounced under oath any "community property interest in the benefit" allowing Mrs. Smith to designate their four children as beneficiaries of 100% of the benefits.

Mr. Smith acknowledged that he was aware of an insurance policy on the life of the Member and that he was aware that she also had some savings. However, Mr. Smith argues at some time before her death on 04 April 2010 that the Member had more savings and a larger life insurance policy, which he presumes - without any evidence - that she, had back before June of 2005. He offers no details or particulars of the supposed fraud. Neither does Mr. Smith argue that the other coverage or savings were acquired in the five years after the beneficiary designation on 01 June 2005 or before that time. Here merely assumes that they existed before then and, that assumption is the basis for Mr. Smith's claim of fraud.

Fraud must be specifically plead. "The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, (2004). There has been no effort by Mr. Smith to demonstrate the existence of any of the required elements.

From the outset of the evidentiary hearing, Judge Lew made it clear that when either party made an assertion of fact that the burden of establishing facts sufficient to prove the assertion was the burden of the one making the assertion. Not once, did Mr. Smith even attempt to demonstrate *when* the other term insurance or other savings were obtained. It is only reasonable to believe that any additional savings or other insurance were acquired after the divorce case had been dismissed and Mr. and Mrs. Smith got on with their separate lives. There is nothing to indicate otherwise.

Mr. Smith's recent assertion, more than five years after he undertook to cooperate with Mrs. Smith's beneficiary change, was accepted on its face. Instead, Judge Lew failed to respect the absence of any supporting evidence of Mr. Smith's assertion saying, near the end of ¶ 22 on page 9, "It is enough that there is a dispute over whether good faith disclosures were made at the time the MSA was executed."

⁵ Additional term life insurance and additional savings.

LAW OFFICES
SYLVESTER & ASSOCIATES

CalPERS
Board of Administration
California Public Members Retirement System
22 April 2013
Page 6 of 6

Judge Lew presided over an *evidentiary hearing* – the only one in this case - and had already admonished all parties of their respective obligations to carry their burden of proof on assertions they made. The Board should not allow itself to be led into such an embarrassing and unwarranted conclusion.

Failure by CalPERS to deliver the entirety of the Death Benefits of the Member to the children constitutes a violation of CalPERS fiduciary responsibility. CalPERS holds the funds in trust for the children, rather than for the children and for Mr. Smith – based upon the transmutation of Mr. Smith's former community property interests in the Member's Option 1 Death benefits due the children as both parents undisputedly intended. Approving the proposed decision sends the wrong message to all of CalPERS members.

Conclusion

Both parents, Mr. Smith & Mrs. Smith made it clear (in completing the documents provided by CalPERS and by Mr. Smith's recent sworn testimony) that each intended for all the Option 1 Death Benefits to pass to their four children. Each signed the Service Retirement Election Application on June 1, 2005 acknowledging that mutually arranged disposition of the benefits - in reliance upon the representations of the CalPERS representative with whom they then conferred.

The sworn renunciation of any "community property interest in the benefit" by Mr. Smith to his wife cloaked her with legal authority to designate their four children as sole beneficiaries. Those Option 1 Death Benefits remained and are now in trust with CalPERS. Mr. Smith suggests but offers no evidence of any fraud four years before the untimely death of the member. CalPERS, as trustee is to pay the Death Benefits to the persons entitled to them.

As trustee and counselor to the Member and to Mr. Smith, CalPERS has no evidence sufficient to authorize it to avoid its fiduciary responsibility to pay the Option 1 Death Benefits to the children in that the only rationale suggested for not paying 100% of the Option 1 Death Benefits to the children is the unsubstantiated suggestion of fraud by Mr. Smith.

For these reasons, the proposed decision, to the extent that it suggests splitting the Option 1 Death Benefits should be scuttled. This Board should honor the gift of his community property interest in the Death Benefits of the Member that Mr. Smith unambiguously intended to renounce under oath, any "community property interest in the benefit" in order to enable her to designate their children as sole beneficiaries as Mr. Smith swore in the evidentiary hearing was his intention. CalPERS should carry out the trust imposed upon it.

This Board should not penalize intended beneficiaries (the four Smith children) because an administrative law judge elected to allow a label (Marital Settlement Agreement) to override the unambiguous, express and sworn intention of both Mrs. Elsie Smith and her husband. Further, the complete absence of any evidence of fraud should not be ignored. No evidence of any fraud means that there is no valid claim of any fraud. The recent "claim of fraud" is a proverbial 'red herring' in this case. It is without merit.

The Board should affirm the Smith's clear intentions by awarding of the entirety of Mrs. Smith's Death Benefits *solely* to the four Smith children as both parents originally intended and have consistently affirmed.

Sincerely,

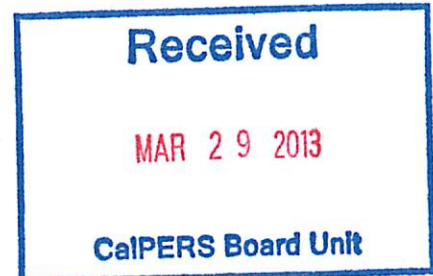
Chuck Sylvester

Chuck Sylvester, Attorney for respondents, the four children of Elsie M. Smith

Alfred L. Smith, Jr.

March 25, 2013

BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM
CalPERS Executive Offices
PO BOX 942701
SACRAMENTO CA 94229-2701



Ref. No. 2010-0823 RESPONDENT'S ARGUMENT

Subject: In the Matter of the Application for Payment of Benefits
 Upon the Death of Elsie M. Smith by ALFRED SMITH, Respondent,
 and JUNE C. COLLINS, Respondent

Greetings

Thank you for this opportunity to object to the proposed decision of the Administrative Law Judge denying me as sole beneficiary for Option 1 Death Benefit and to request that the Board will amend the decision to make it a correct finalization of this administrative appeal process. I am sending my response to you early as it may be that some members of the board may wish to see the transcript of the hearing and/or refer to the basic arguments set forth in my original Appeal document dated September 10, 2010.

It is clear that the Administrative Law Judge has sought to mitigate his legal responsibility by rendering a decision he feels will please all parties. The primary job of the Administrative Law Judge is to ferret out the truth and make a decision that is based on the law and not on feelings and appeasement. Based on your review, you will find that either this appeal process needs to be repeated or in the interest of justice, an amended decision needs to be made by the Board.

First, a review of the entire proposed decision DOES NOT INCLUDE EVEN ONE REFERENCE to established case law involving similar legal cases that have already been heard by the California Appellant Courts. This is because the Administrative Law Judge has gone out of way to skirt around the key issue of fraud in this appeal process. You will find that this happened because he admitted his inadequacy in dealing with matters involving family law. Therefore we see no vestige of his even reading any of the established legal precedents of cases referenced in my written appeal and during the hearing itself. This has led to a flawed decision on his part.

CALPERS BOARD OF ADMINISTRATION
RESPONDENT'S ARGUMENT

Ref: No. 2010-0824

OAH No. 2012070131

March 25, 2013

Page 2 of 6

Second, there were numerous other legal errors committed that likewise led to this unjust decision.

SERIOUS LEGAL ERRORS ALLOWED DURING MY APPEAL HEARING:

1. CalPERS did not follow its own stated process for handling this case in the instance of a respondent's objection. If an objection were raised, then a determination would have to be made and a court order would have come from a family law court or a probate court.
2. The original Administrative Law Judge assigned QUASHED all six of my legally issued subpoenas! Subsequently, although I detailed my objections to this action in writing, substitute Administrative Law Judge would not even allow me to comment on this because I refused to participate in telephone conference call. Accordingly, the insurance company, the banks, credit union, executor of estate and former attorney did not provide documentation critical to proving non-disclosure of finances.
3. Apparently, someone picked up on this serious breach of my legal rights and took the original Administrative Law Judge off this case/hearing at the very last minute. Why was she taken off without any notice to anyone? Evidently something serious happened, because the new Administrative Law Judge walked in Wednesday morning and admitted he knew absolutely nothing about the case at hand or the purpose of the hearing.
4. Next, presiding Administrative Law Judge had an "off the record" session immediately after the first morning break and confessed he did not feel capable of handling this hearing. More on this on page three.
5. In "off the record" session, two issues arose which further prejudiced my case. CalPERS counsel tactfully told Administrative Law Judge that if he did not continue to be Officiating Hearing Officer, she would have to file some type of negative report on him. Afterward, Administrative Law Judge acknowledged his long standing relationship with CalPERS and present CalPERS representative. Did coercion and favoritism prevail?
6. The presiding Administrative Law Judge would not allow me to cite case law that applied to my case during my testifying, although the case already decided upon by California Appellant Court was the very same as mine. He said he would read case law on his own time. Yet, check his 11-page "Proposed Decision" and you will not find ONE reference to any case law!!!
7. Two key witnesses (two youngest daughters, [REDACTED]) called by CalPERS did not appear for the hearing although the original Administrative Law Judge made it crystal clear that everyone was to appear in person and that no phone conferencing would be allowed. Not a word of reprimand or censure, nor was CalPERS ever questioned as to why their two key witnesses were not present. My opinion is that they all realized that the testimony of Ginger and Marie would prove my case arguments to be true.

CALPERS BOARD OF ADMINISTRATION
RESPONDENT'S ARGUMENT

Ref: No. 2010-0824

OAH No. 2012070131

March 25, 2013

Page 3 of 6

The basic real problem with this particular appeal hearing is that CalPERS failed to execute its own anticipated legal process. In CalPERS initial determination (see page 3. Par.2 of Proposed Decision) it is plainly stated: *"If one of them files an objection, CalPERS will require a court order that determines your community property interest from the family law court or the probate court."* (Italics and underlining is mine) When the Administrative Law Judge discovered this anticipated outcome, he agreed with it and expressed his opinion that this case should indeed be determined by the family law or probate court.

You need to be aware that when the Administrative Law Judge walked into the Hearing Room, he had not been briefed and had no idea about anything to do with this case. He was replacing the original Administrative Law Judge assigned who was removed at the last minute for some very important reason. For your own appreciation of the complications involved, please inquire as to why this last minute change in Administrative Law Judges took place. None of the participating parties were informed of any changes. Why? I suggest the answer will help you to better understand what went on.

Nevertheless, our new Administrative Law Judge had an "off the record" discussion with all the principals in which he explained his misgiving with handling this case on the administrative hearing level. He expressed that this, technically, was "over his head" as far as his experience in family or probate law. He even suggested that he remove himself, but wanted to get our feedback. What did I know? This was my very first Administrative hearing. However, counsel for CalPERS was adamant that he should not step down, that her department felt this was the proper venue for this case (which was not true because of the above quoted statement issued by her very own department) and she added a very thinly veiled comment to the effect that if he stepped down, she would be forced to record some type of negative report on him (which would probably affect his future assignments and possible retirement plans). Please consult with both the Administrative Law Judge and the representing CalPERS counsel for their versions of the "off the record" session held immediately after our first break of the morning. You will probably find that he should not have officiated the hearing. But he gave in and agreed to continue after hearing CalPERS counsel's position. Both respondents really didn't have a say. I explained that my position was that this administrative hearing was not necessary as CalPERS had taken their stand with which I disagreed, and that the only reason I was present was because in my consultation with an attorney I was going to hire to take this directly to Superior Court advised me that the Superior Court would look unfavorably on my case because I had not exhausted all possible remedies before bringing it to them. I was ready to go to Superior Court then and now I am even more ready to go to Superior Court now. The Administrative Law Judge admitted that he had lots of history working with CalPERS and present counsel and partially made decision to continue hearing the case because desiring to continue in the good graces of CalPERS.

CALPERS BOARD OF ADMINISTRATION
RESPONDENT'S ARGUMENT

Ref: No. 2010-0824

OAH No. 2012070131

March 25, 2013

Page 4 of 6

Now, let's move on to the Administrative Law Judge's "Discussion" beginning on page 4. This is when the Administrative Law Judge dodges the real issue of fraud, deceit and misrepresentation. Everyone knows that "ignorance of the law is no excuse." Evidently my wife DID NOT KNOW that she did not need my signature on June 5, 2005 when she convinced me to sign over the \$2,000 lump sum death benefit. I did not know either. What I do know is that she deliberately lied to me, asking me to sign this over to our oldest daughter, because she had NOTHING to leave if and when she would die. The life insurance for \$100,000 taken out in 2002 was in effect in 2005 for three years! Laws are partially predicated on what a reasonable person would think or do. Would you, as a reasonable person agree to sign over a \$2,000 death benefit if you knew your spouse had already arranged for that person to receive \$25,000? Fraud enters the picture at this point. My wife's frame of mind is being revealed. She didn't know that she did not have to lie to me; in her mind the death benefit of \$2,000 would go to me upon her death and so in order to circumvent me from getting it, she deceived me into signing. CalPERS argument is that my signature is there on the paper in 2005 and again my signature is there on the paper on March 15, 2006. Their position is they do not care HOW my wife maneuvered me into signing; they say that is not important. Yet your very retirement policies say otherwise; state and federal law on the matter of retirement say otherwise. Cases already decided by California appellate courts say otherwise. One's spouse cannot deliberately act to deprive sole surviving spouse of retirement benefits.

Sorry, but Administrative Law Judge's conclusion stated as item 13 on page 5 is NOT TRUE. Based on State and Federal laws, I have every right to dispute any decision to convey this balance to the four children instead of to myself as the sole surviving spouse beneficiary. **Why? Because my wife conspired and did deliberately concealed her financial standing from me.** So, again in 2006 she came to me with the same lie "I have nothing to leave our children, so would you please sign over a portion of what you would get to each of them." So, when I signed on March 15, 2006, I was signing over \$1,000 each to each of the children. This was our agreement at lunch before going to the San Diego CalPERS office to sign. It wasn't until 2010 when CalPERS sent me copies of the paperwork that it showed that I had signed over everything I was supposed to receive as sole surviving spouse to the four children. Again, what would you have done as a reasonable spouse? In 2006, all four of our children were full grown adults (respectively, **June** was 36 years old, **Glenn** 32, **Ginger** 30 and **Marie** was 28 year old). **June** was married, living with her husband in **Raleigh, N.C.**, **Glenn** was married, living in **Fort Worth, TX**, and **Ginger** and **Marie** still lived in the house I brought for them here in **Chula Vista, CA**. **Ginger** was nationally certified **Sign Language Interpreter** earning \$40 - \$50 per hour and **Marie** was **Southwest Airline Flight Attendant** for over 10 years. Accordingly, my intended allotment of \$1,000 each was reasonable. If my wife had properly disclosed about the \$100,000 life insurance policy and the fact that she had over \$50,000 in cash, I would have NEVER signed over anything. CalPERS says all this is immaterial. And guess what, the Administrative Law Judge decided all this was immaterial also. He states in item 22 on

CALPERS BOARD OF ADMINISTRATION
RESPONDENT'S ARGUMENT

Ref. No. 2010-0824

OAH No. 2012070131

March 25, 2013

Page 5 of 6

page 8 ***"Respondent contends..."*** It was not a matter of what I contended. It was for him to find out the truth. Did my wife hide her financial standing from me or not? Either she did or did not. He should plainly state his findings, not what I "contended." And in the same paragraph (page 9) he states ***"He avers..."*** What? The whole purpose of the Hearing is so the Administrative Law Judge can decide the truth. Either my wife knowingly withheld this information or she didn't. What do the facts show? Then Administrative Law Judge concludes in same paragraph ***"The merits of such contentions need not be addressed here."*** What is he talking about? This is the WHOLE REASON FOR THE HEARING. And, so, he excuses himself from making the hard decisions. But we cannot be too hard on him, because he told us in the "off the record" session that this case was out of his league. But you cannot let him get away with failing to consider the issue of guilt due to concealment, fraud and deceit, not once, but twice!!! The Administrative Law Judge chided me for using case law in my defense during the hearing, stating that it was unnecessary as he would read all the case law on his own before deciding. Obviously, he did not read any. On page 10 (item J) of my 16-page Appeal Document dated 09/10/10 I stated and quoted case law, to wit: "Yes, it would be nice to take the emotional solution, allowing sentiment to rule, and ignore all the evidence of misrepresentation and intent to defraud. However, this would circumvent our body of laws. In Knight v Board of Administration, 1983, the Court lamented: (1a) 'Respondent's argument that the position taken by PERS frustrates the intent of the member has some facial merit and we are aware of the apparent inequity which will ensue in adopting appellant's position since decedent's plan was clearly to leave her benefits to her grandchildren. Blake took nothing under decedent's will nor was he ever a designated beneficiary for her death benefits. HOWEVER, UNDER THE CURRENT STATE OF THE Law WE HAVE NO CHOICE BUT TO REVERSE THE COURT'S DECISION.'" This is case law that Administrative Law Judge refused to consider. And if he refused to consider this one case, it is apparent that he "excused" himself from considering any other case law with the statement ***"The merits of such contentions need not be addressed here."*** If not here, then where is he suggesting that "the merits of such contentions" be addressed? Remember, CalPERS counsel made it clear that they wanted him to decide on this case, I assume she meant to decide the case on its merits, not on the basis on his past or future relations with CalPERS. So, Administrative Law Judge took the easy way out, by simply dividing the benefits between both respondents. This decision is not based on law, as you will quickly find out when we go to Superior Court and Appellant Court. On page six I am clearly setting forth the case law from California Appellant Courts which sets the precedent for this case. Hopefully you will acknowledge the clear application of such decisions to this case/hearing now.

Based on the above, I venture to say that, if he could have found a way to circumvent it, the Administrative Law Judge would have not decided in my favor relative to the MSA (Page 9, par. 1). Quote: ***"The above matters having been considered, the November 26, 20001 MSA did not operate as a valid alternative disposition for division of the community property within the meaning of Government Code section 21490."***

CALPERS BOARD OF ADMINISTRATION
RESPONDENT'S ARGUMENT

Ref: No. 2010-0824

OAH No. 2012070131

March 25, 2013

Page 6 of 6

CALIFORNIA CASE LAW REFERENCES:

1. Knight v Board of Administration, 144 Cal.App.3d 973; 196 Cal.Rptr. 423 (Nov. 1983)
2. Lee v Board of Administration (1982) 130 Cal.App.3d 122 {181 Cal.Rptr. 754}
3. Beck v Board of Administration ((1982) 136 Cal.App.3d 1031 [186 Cal.Rptr. 574]
4. Ruster v. Ruster (1974) 40 Cal.App.3d 379, 383 [114 Cal.Rptr. 812]

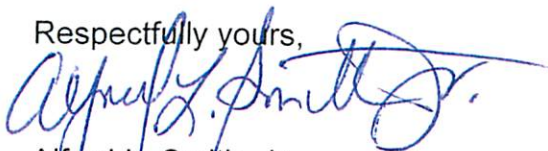
CASE LAW ON FRAUD

1. Richardson v. Weatherford, 997 So. 2d 1254 (Fla. Dist. Ct. App. 5th Dist. 2009)
2. Sparks v. Guaranty State Bank, 182 Kan. 165, 318 P.2d 1062 (1957)
3. CA State Gov Code Section 20085 (Fraud Unlawful)
4. AMJUR Fraud & Deceit Sec. 109
5. AMJUR Concealment Sec.233

Therefore, in the interest of justice and in accordance with legal precedents already in the body of California law and Federal law, it would be in the best interests of all parties concerned for the CalPERS Board of Administration to amend their final decision in favor of the legal husband of Elsie M. Smith as the sole surviving spouse and sole beneficiary of decedent's Option 1 Contribution of Benefits.

Unlike the Administrative Law Judge who presided, you do have to consider case law before making your final decision. Please give attention to the above cited cases and others that your attorneys will share with you. Then you will have a basis for making a decision that will finalize this matter or one that will take us to court where all the legal errors made in this hearing will not be made, where the witnesses will be forced to appear, where the subpoenas will not be quashed, where there will be no professional ties between CalPERS and the Judge/Jury, and where you will end up paying twice plus all court costs and attorney fees.

Respectfully yours,



Alfred L. Smith, Jr.

Appellant/Respondent