BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
C. K.	)	
	)	OAH No. 06-0860-PER
	)	Div. R & B No. 2006-041

DECISION AND ORDER

I. Introduction

C. K. of Point Hope is the widow of M. D. W., a member of the Public Employees Retirement System (PERS). Mr. W. applied for retirement in 1999. On his retirement application he checked the box for "Level Income Option," and he included a signed "Spouse's Waiver of Survivor Option." On this basis, the division paid enhanced benefits to Mr. W. while he was alive and denied survivor benefits to Ms. K. after Mr. W. died. She has appealed. The parties cross-moved for summary adjudication, and partial summary adjudication was granted to the PERS Administrator just prior to the hearing without a full written explanation. The remainder of the case, which focused exclusively on the intent and actions of Mr. W., went to hearing in late June of 2007.

Part II of this decision and order provides a full explanation for the partial summary adjudication in favor of the Administrator that preceded the hearing. Part III makes findings of fact and conclusions of law regarding Mr. W.'s intent. The Administrator's decision is affirmed.

II. Partial Summary Adjudication

A. Standard for Granting Summary Adjudication

Ms. K. filed a motion for summary adjudication and the PERS Administrator responded and cross-moved for summary adjudication in her own favor. Although the cross-motion was untimely, the parties eventually agreed that it should be entertained.[1]

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[2] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing

[1] Record of Status Conference, ¶ 5 (June 8, 2007).

[2] *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

is not required.[3] In evaluating a motion for summary adjudication, if there is any room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom judgment may be granted.[4]

With respect to two of the three areas of contention in this appeal, there are some factual disputes as to details, but they are not important to the outcome. This is because even if the facts are taken in the light most favorable to Ms. K., they do not yield an outcome in her favor under the law.

B. General Factual Background

There is no dispute regarding the facts set out in this Part II-B.

C. K. is a lifelong resident of Point Hope, Alaska.[5] Although she is of Inupiaq background, English is her first language.[6] She has a high school education, but she is not a strong reader.[7] Her career has encompassed managing a fuel station and working as a family caseworker.[8]

In 1989 C. K. married M. D. W., a water plant operator in Point Hope employed by the North Slope Borough, a PERS employer. Ten years later, when he was 49 and she was 42, Mr. W. applied for early retirement under PERS.[9] The retirement would take effect in December of 1999, just after his fiftieth birthday.

The retirement application presented five options for receiving benefits. Three were "Survivor Options": a "75% Joint Survivor Option," a "50% Joint Survivor Option," and a "66-2/3% Last Survivor Option." An instruction for these options said that "A married member must name their spouse as a contingent beneficiary for a Survivor Option unless the spouse completes a waiver." A fourth option, entitled "Regular Retirement Benefit," carried the notation, "I do not elect a Survivor Option." The last option was a "Level Income Option" carrying the notation, "This option may not be selected if a survivor option has been selected." Mr. W. checked the box beside the last option.

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3 *See Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

4 *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

5 Ex. 1 to Administrator's Opp. to App. Mtn. for Summary Adjudication.

6 K. Deposition at 7. The pages of this deposition cited in this footnote and hereafter are found in various exhibits to the parties' cross-motions. For greater convenience, the whole of the deposition can be seen in one place at Hearing Exhibit N.

7 *Id.*

8 *Id.*

9 P32.

Further down the form were lines for "NAME OF SURVIVOR RECIPIENT," "RELATIONSHIP," "SOCIAL SECURITY NUMBER," and "BIRTHDATE." Mr. W. completed all of these lines with his wife's name and information.

Just below was an alert in bold face that "ALL BENEFITS INCLUDING MEDICAL COVERAGE WILL CEASE UPON DEATH OF THE APPLICANT if a survivor option is not selected." Under this notation, at the bottom of the form, was a section headlined "SPOUSE'S WAIVER OF SURVIVOR OPTION" with this statement:

> I acknowledge and approve the benefit selected. I understand the terms of the selection and freely waive entitlement to continuing survivor benefits, including health coverage, which may otherwise be payable to me, upon the death of the named applicant.

Ms. K. signed this waiver on March 25, 1999.

The division appointed Mr. W. to retirement effective December 1, 1999.[10] The appointment letter set his benefit (before cost of living allowance) at $1,706.30 until age 65 and $820.70 thereafter, and benefits were subsequently paid on this basis for some time.

At the time of his retirement, Mr. W. was in litigation with his employer, alleging that the employer had failed to offer him a supervisory position in 1998 on account of racial discrimination.[11] After a favorable decision for Mr. W. on the central legal issue,[12] the suit settled in July of 2005.[13] Part of the settlement was an alteration of Mr. W.'s retirement date to September 1, 2003, with various financial adjustments "as if he had worked for the North Slope Borough April 1, 1999, through August 31, 2003."[14] The adjustments were made within the context of the level income option, whereby a higher benefit is paid before age 65 and a lower one afterward.

The level income option under which the division paid benefits to Mr. W. yielded a substantially higher monthly benefit during his lifetime than he would have received during his lifetime under one of the survivor options.[15]

Mr. W. died in October of 2005. The division ended his PERS benefit as of that month, having paid Mr. W. a total of $139,922.97 up to that time.[16] Ms. K. subsequently asserted a claim for survivor benefits, which was denied.

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10 P30.

11 Ex. 13 to Administrator's Opp. to App. Mtn. for Summary Adjudication.

12 *Malabed [and W.] v. North Slope Borough,* 70 P.3d 416 (Alaska 2003).

13 P20 - P23.

14 P14, P20.

15 *See, e.g.*, P45-P46.

16 P67, P55-56. The benefit payments exceeded Mr. W.'s lifetime PERS contributions of $93,881.07. *Id.*

C. Appeal Issues

Ms. K.'s appeal falls into three broad subject areas. The first is the validity and effect of her own waiver. The second is the effect of the court settlement adjusting Mr. W.'s retirement "as if he had worked for the North Slope Borough . . . through August 31, 2003." The third is the intent and effect of Mr. W.'s own retirement elections. The first two areas have been fully resolved through the parties' cross-motions for summary adjudication. As to the third, summary adjudication was denied to both sides on June 18, 2007 for reasons explained in the order issued that date. Below is the full explanation of the *granting* of summary adjudication regarding the first two areas.

D. Ms. K.'s Waiver

1. Constitutional Requirements

As a threshold matter, Ms. K. contends that she had a constitutionally-protected right to survivor benefits at the time she signed the waiver, and any procedure (such as the PERS waiver procedure) under which she might be divested of that right must be accurate and thorough enough to meet a special standard devised by the U.S. Supreme Court in *Matthews v. Eldridge*[17] and endorsed by the Alaska Supreme Court in *Hilbers v. Municipality of Anchorage.*[18] The starting point for this argument is the contention that Ms. K., when she signed the waiver, was addressing a vested constitutional right. It is at this starting point that Ms. K.'s *Matthews v. Eldridge* argument fails.

Alaska's Constitution does expressly protect retirement benefits accrued by public employees.[19] Beginning with the case of *Hammond v. Hoffbeck,* the Alaska Supreme Court has held that these benefits and their protection vest when the employee first enrolls in the system.[20] Ms. K.'s counsel asserts that "[i]n no uncertain terms, the Alaska Supreme Court extended this constitutional right to 'beneficiaries of retirees' such as Ms. K.."[21] In support of this contention, she cites page 888 of the Court's decision in *Duncan v. Retired Public Employees of Alaska, Inc.*[22] One searches *Duncan*—at page 888 and elsewhere—in vain to find such an extension.

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17 424 U.S. 319, 334-35 (1976) (procedure evaluated by weighing "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail").

18 611 P.2d 31, 36 (Alaska 1980).

19 Alaska Const., art. XII, sec. 7.

20 627 P.2d 1052, 1055-56 (Alaska 1981).

21 C. K.'s Summary Judgment Motion at 7.

22 71 P.3d 882 (Alaska 2003).

Duncan determined only that the retirement benefits that vest in an employee upon employment and enjoy constitutional protection are not just pension payments, but the other elements of the retirement package as well, such as promised health insurance coverage.

More to the point is the seminal case of *Hammond v. Hoffbeck*. There, the Supreme Court appeared to accept that the rights of an employee's survivors would not vest *in the survivors* until the death of the employee.[23] The Court went on to hold that the right to confer benefits on survivors vests at the time of enrollment in the system, but the vesting it recognized was vesting in the PERS member, not the survivors.[24] Applying this construct to the present case, at the time Ms. K. signed her waiver Mr. W. had an important, vested, constitutionally protected right to confer survivor benefits—a right that will be addressed in Part III. Ms. K., however, did not at that time have a vested right to receive benefits from the PERS system. The special *Matthews v. Eldridge* test for procedures to divest someone of such a right therefore does not apply.

2. Subjective Intent and Expectations

While there is no constitutional dimension to the waiver procedure, it is nonetheless true that Mr. W. could not elect a retirement option without survivor benefits unless he provided a valid spousal waiver of such benefits. This waiver is required by a PERS statute, AS 39.35.450. If the waiver supplied was not effective, the statute would cause Mr. W.'s retirement to revert to a default option, the 50% joint survivor option. Ms. K. contends that her waiver was not effective.

The first basis for this contention is that she did not subjectively intend to waive a survivor option. Ms. K. acknowledges that she knew she was waiving something,[25] but offers testimony that she thought, on the basis of a discussion with her husband, that she was only waiving medical and dental coverage. Without evidence that she communicated this thought to PERS, however, it has no legal relevance. Rights to retirement benefits are contractual in nature, and waivers of these rights are governed by the general principles applicable to contracts. The contract "cannot be defeated by the unexpressed subjective intent of one of the parties."[26] In other words, assent to be bound in a contractual setting is found in the objective meaning of the parties' words and actions toward one another; "[a] party cannot rely on its subjective intent to

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23 627 P.2d at 1058-59.

24 *Id.* at 1059.

25 K. Dep. at 17.

26 *Howarth v. First Nat. Bank of Anchorage,* 596 P.2d 1164, 1167 n.8 (1979).

defeat the existence of a contract if its words and actions objectively and reasonably led another to believe a contract had been entered."[27] Hence Ms. K.'s waiver must be assessed solely on its objective meaning to the other party—the retirement system. Her subjective understanding based on private discussion with her spouse is irrelevant.

Ms. K. also contends that her waiver was not effective because her subsequent conduct shows that waiver of monetary survivor benefits was not among her "expectations at the time of contracting."[28] She offers testimony that she purchased her own eyeglasses and dental care, consistent with her understanding that she had waived dental and vision coverage,[29] and notes that she called to inquire within a month or two of failing to receive a survivor benefit.[30] Putting aside the question whether some of this evidence reflects at all on her intent, the evidence is irrelevant for the same reason her proffered direct testimony about her intent is irrelevant.

3. Objective Clarity of Waiver

Moving beyond the immaterial evidence of her own private state of mind, Ms. K. argues that the waiver was invalid because the waiver was "confusing and unclear."[31] The parties seem to agree that to be effective a waiver must describe or explain the right the spouse is giving up, and must affirmatively state that the spouse is giving up a right rather than containing generalized and indeterminate language.[32] The issue does not turn on whether the particular individual signing the waiver was herself confused or unclear about its meaning, but rather on whether the language is reasonably clear in describing or explaining the right and in specifically indicating that it is being given up.

The waiver at issue in this case is at the bottom of the main page of Mr. W.'s Application for Retirement Benefits, found in the record at P32. There are some areas in which the form as a

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[27] *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1281. *See also Dutton v. State*, 970 P.2d 925, 928 (Alaska App. 1999). *Cf. Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226 (2d Cir. 1995) (under ERISA, which does not govern PERS but is useful by way of guidance, signature and notarization suffice to establish a spousal waiver, in contrast to a waiver by the member himself, which is evaluated on the "totality of the circumstances"); *Vilas v. Lyons*, 702 F. Supp. 555, 559 (D. Md. 1988) (an ERISA plan administrator may rely upon a facially valid waiver absent actual knowledge that signer did not validly consent to waiver).

[28] C. K.'s Summary Judgment Motion at 19. *Cf.* P8 (Ms. K.'s August 2006 application for survivor benefits, seeking every type of survivor benefit).

[29] *Id.*; K. Dep. at 28. The brief asserts that she "began" purchasing these items upon signing the waiver, but the testimony suggests that she had always done so.

[30] C. K.'s Summary Judgment Motion at 19; K. Dep. at 33.

[31] C. K.'s Summary Judgment Motion at 21.

[32] The Administrator offered this standard in her cross-motion, and Ms. K. did not take issue with it. The only authority offered for the standard is *Lasche v. George W. Lasche Basic Retirement Plan*, 870 F. Supp. 336, 339 (S.D. Fla. 1994), an ERISA case used by analogy.

whole is not a model of clarity,[33] but the form and the waiver are clear in each of the two necessary respects.

First, the form reasonably describes or explains the right the spouse is giving up. Whatever its other shortcomings, the form is very clear in categorizing three options as "Survivor Options." If—as in this case—none of those boxes is checked, it is clear that the applicant has not selected a "Survivor Option." The "IMPORTANT" instruction above the spousal waiver then says that "ALL BENEFITS INCUDING MEDICAL COVERAGE WILL CEASE UPON DEATH OF THE APPLICANT if a survivor option is not selected." This tells the potentially waiving spouse that survivor options entail benefits after the death of the applicant, and the other options do not. The spouse is then presented with a "SPOUSE'S WAIVER OF SURVIVOR OPTION" that consists of two sentences, the first of which reads: "I acknowledge and approve the benefit selected." The title and the first sentence, in conjunction with the instruction just above, adequately alert the spouse that this waiver is about the selection of an option which determines the right to receive benefits "UPON DEATH OF THE APPLICANT."

Second, the waiver is unequivocal that the spouse, in signing, is giving up a right. It says that the spouse "freely waive[s] entitlement to continuing survivor benefits . . . upon death of the named applicant."

Because the waiver is objectively adequate in identifying the right it affects, and because it states affirmatively that this right is being given up, the waiver meets the only test for objective clarity that has been offered in this case. It is undisputed that Ms. K. signed the waiver, [34] and there is no claim of fraud or duress. This means the division was entitled to rely on the waiver.

Ms. K., through counsel, suggests that the waiver is undermined by what she characterizes as an inconsistency in the form. The alleged inconsistency is that Mr. W. checked the box for a non-survivor option, but then entered a name (his wife's) in the box for "NAME OF SURVIVOR RECIPIENT." It is true that entering a name in this box was unnecessary in

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[33] Perhaps the most significant oddity in the form's design is that the instruction above the spouse's waiver says that "the waiver below must be completed to select a regular income benefit." Under AS 39.35.450 the waiver would need to be completed to select either of the non-survivor benefit options. Thus, the phrase "regular income benefit" apparently is meant to encompass both the "Regular Retirement Benefit" and the "Level Income Option." The latter, however, is nowhere identified on the form as a "regular income benefit," and it is not self-evident that a "Level Income Option" is a "regular income benefit." The potential consequence of this unclear instruction would be that some applicants might not realize they need to get the spousal waiver when they have selected the "Level Income Option," and would therefore submit the form with the "Level Income Option" checked but with no waiver. In the present case, this did not occur, and so the imperfection in the instruction had no consequence.

[34] K. Dep. at 16-17.

light of his election of a non-survivor option. In the context of the waiver alone, however, the appearance of a name in the box does not create uncertainty as to what the waiver was about or whether it was a waiver. Indeed, the way the form has been designed the entry reads unremarkably as an identification of who the potential survivor is who will be filling out the waiver below.

E. Mr. W.'s Settlement

Ms. K. points out that Mr. W. could revise his retirement elections up to the time of his retirement, and that the retirement date imputed to him following his successful settlement of his discrimination lawsuit against the North Slope Borough was in 2003, not in 1999 when he made his elections. The agreed re-calibration of his retirement date occurred in 2005. For reasons that are not articulated, Ms. K. seems to contend that the division should have invited Mr. W. to alter his retirement elections in 2005 and, having failed to do so, should apply the statutory default option of a 50% joint survivor benefit.[35]

No argument has been offered to explain why this should be so. Alaska Statute 39.35.450(e) establishes that once an employee is appointed to retirement, his election of a payment option "is irrevocable." The 2005 settlement may best be conceived as an adjustment under AS 39.35.520 to correct an error as to Mr. W.'s retirement date and recalculate benefits accordingly. AS 39.35.520, however, contains no mechanism to override the irrevocability of the elections in effect at the time of appointment to retirement. Any change in those elections in 2005 would post-date both retirement dates—the original one and the revised one—and such a post-retirement change seems squarely prohibited by AS 39.35.450(e). Alternatively, if one conceives of the 2005 settlement as effecting a re-employment of Mr. W. from 1999 through 2003, a change of election is still impossible: AS 39.35.450(e) makes it clear that employees who are appointed to retirement and then re-employed "are subject to the initial election" as to benefits earned during the new period and are likewise "subject to the election at the time the employee was appointed to retirement" as to benefits earned during prior periods of employment. There is no basis to make the 2005 settlement a triggering event for an optional or mandatory revision of the 1999 elections.

[35] C. K.'s Summary Judgment Motion at 22-23.

III. Adjudication of Remaining Issues

Following resolution of the matters treated above in the preliminary ruling issued June 18, 2007, the case proceeded to a hearing "on the single issue of the intent and significance of *Mr. W.'s* elections."[36] Although it had been established that the requirement for a valid spousal waiver was met, and although the possibility of post-1999 revisions to the elections had been eliminated, it still remained to ascertain exactly what Mr. W.'s 1999 elections were.

A. Evidence Admitted

Testimony was taken from Kathleen S. Lea, Mary Bernadette Blankenship, Kathleen Marie Carson (all division employees), and C. K. Documentary evidence was admitted as set out in the table below. Notations in the table that certain division exhibits were admitted "without objection" means that no objection was made *apart* from the Motion for Sanctions seeking exclusion of all division evidence, which was ruled upon on December 17, 2007.

Administrative Record P1 to P81	Admitted without objection (division's initial objection to P69 - P81 not pursued)
Administrative Record P82	Admitted over objection to show that Mr. W. thoroughly and completely filled out many forms, and without objection to show that Mr. W. claimed 5 dependents
Administrative Record P83	Admitted without objection to show that Mr. W. had an opportunity to, and did not, request additional information on survivor benefit options and rights
Microfiche Contents (001 – 215)	Excluded; see order of Dec. 17, 2007
K. Exhibit 1	Admitted over objection
K. Exhibit 2	Admitted over objection as a more legible substitute for P69 – P71
Division Exhibit A	Admitted without objection
Division Exhibit B	Admitted without objection with stipulation that attribution to Mr. W. in paragraph 2 will not be relied on as evidence that he wrote the article
Division Exhibit C	Admitted over objection
Division Exhibit D	Excluded as evidence on issues covered at the hearing itself

[36] Order Reducing Scope of Hearing (June 18, 2007) (italics in original).

Division Exhibits E - G	Not offered (on issues covered at the hearing itself)
Division Exhibits H - J	Admitted over objection (complete copies substituted)
Division Exhibits K - L	No ruling at hearing; relevance objection sustained at this time in the context of the issues covered at the hearing itself (items never tied in by testimony as promised)
Division Exhibit N	Admitted without objection

B. Findings of Fact

1. The facts set forth in Part II-B above are incorporated by reference.

2. Ms. K. and Mr. W. did not discuss Mr. W.'s financial affairs in detail prior to his retirement.[37]

3. Ms. K. did not understand survivor options until after Mr. W. had retired.[38]

4. Mr. W. told Ms. K. that when he died she would be taken care of.[39] Mr. W. did not discuss in detail with Ms. K. how this would occur.[40]

5. Mr. W. was a fairly sophisticated man with excellent literacy.[41]

6. Mr. W. took some care over his application for retirement benefits.[42]

7. Mr. W. and Ms. K. had assets and potential sources of retirement income other than PERS.[43]

8. When Mr. W. applied for retirement benefits, he unequivocally marked the box for "Level Income Option."[44]

9. When Mr. W. applied for retirement benefits, he signed and included with his main application a separate form entitled "Retirement Benefits Election Level Income Option," confirming that he deliberately chose the "Level Income Option."[45]

10. When Mr. W. applied for retirement benefits, he submitted a spouse's waiver of survivor option.[46]

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37 K. Dep. at 32.
38 K. Dep. at 34.
39 Testimony of C. K..
40 To the extent that Ms. K.'s testimony might be construed as a recollection that Mr. W. told her specifically that she would receive a monthly benefit from PERS after he died, the testimony was unconvincing.
41 Division Exhibit C; K. Exhibit 1. *See also* testimony of C. K. (2nd appearance).
42 This finding is based on the neatness and precision of the entries, and on K. Exhibit 1.
43 Testimony of C. K. (cross-exam).
44 P32, P34.
45 P33.
46 P32.

11. Mr. W. elected post-retirement dental coverage for himself and Ms. K.[47]

12. When Mr. W. submitted a spouse's waiver of survivor option, he did not mistake that waiver as a waiver of dental benefits.[48]

13. When Mr. W. applied for retirement benefits, he was given an opportunity to request additional information and counseling on specified aspects his retirement benefits. Although he apparently noted this opportunity because he did request information on one topic, he checked "NO" when asked if he needed additional information on survivor benefit options and rights.[49]

14. When Mr. W. applied for retirement benefits, he checked a non-survivor option but later entered a name (Ms. K.'s) in the block for "name of survivor recipient."[50]

15. It was unnecessary to enter a name of a survivor recipient since a non-survivor option had been checked.[51]

16. No instruction on the application form told the applicant not to enter a name of a survivor recipient if a survivor option was not intended or checked.[52]

17. In light of the design of the form, entering a spouse's name in the block for "name of survivor recipient" could easily and reasonably be seen as simply a step to identify the person signing in the waiver block just below. There was no other place on the form to print the name and otherwise identify that person.[53]

18. Mr. W.'s entry of a name in the block for "name of survivor recipient" was not significantly inconsistent with a desire to select the Level Income Option.

19. The Application for Retirement Benefits required "Evidence of birthdate . . . for both the member and survivor" if the member elected a survivor option.[54]

20. To submit evidence of a spouse's birthdate would have no apparent purpose if no survivor benefits were being sought. Submission of evidence of a spouse's birthdate is moderately inconsistent with an intent to elect a non-survivor option.

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47 P35.

48 In addition to the preceding finding, this finding is supported by the fact that dental premiums of $78 per month were subsequently deducted from Mr. W.'s monthly benefit, with his knowledge, and there is no evidence that he contested the deduction or had it discontinued. P30.

49 P82.

50 P32.

51 Testimony of Kathleen Lea.

52 P32.

53 *Id.*

54 *Id.*

21. Evidence of whether Mr. W. submitted evidence of Ms. K.'s birthdate with his application is solely within the control of the Division of Retirement and Benefits. The Division of Retirement and Benefits is required to,[55] and has, maintained a record from which it can be ascertained whether Mr. W. submitted evidence of Ms. K.'s birthdate with his application.

22. From the evidence that was timely produced and admissible in this case, it cannot be determined whether Mr. W. submitted evidence of Ms. K.'s birthdate with his application for retirement.[56]

23. Because evidence of whether Mr. W. submitted evidence of Ms. K.'s birthdate with his application for retirement was solely within the control of the Division of Retirement and Benefits and was not timely produced and made admissible at the hearing, an inference is drawn, adverse to the Division, that Mr. W. did submit evidence of Ms. K.'s birthdate with his application for retirement.[57]

24. When Mr. W. settled his lawsuit against the North Slope Borough in 2005, the Division of Retirement and Benefits recalculated his benefit in consultation with his attorney. Mr. W. could not, and did not seek to, change his benefit payment election at that time. Mr. W.'s benefit was recalculated under the Level Income Option. His attorney did not contend that the irrevocable election Mr. W. had made in 1999 was something other than the Level Income Option. The 2005 recalculation, occurring during Mr. W.'s lifetime, represented an after-the-fact confirmation that the 1999 election was an election of the Level Income Option. Mr. W. was represented by counsel in connection with this confirmation.[58]

25. Prior to Mr. W.'s death, Mr. W. received and accepted a higher monthly benefit than he would have been entitled to receive under any survivor option.

26. There is mixed evidence regarding whether Mr. W.'s application as a whole expressed an intent to select a benefit payment under the Level Income Option, which has no survivor benefit component. On balance, the evidence of an intent to select the Level Income Option (particularly findings 8, 9, 10, 13, 24, and 25) is more persuasive than the evidence that he intended to select a different option among the five options available or that he intended to select an option with a survivor benefit component.

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[55] *See* AS 39.35.100 (must maintain "an adequate system of . . . records for the plan").

[56] Testimony of Kathleen Lea (ALJ exam, Tr. 203-204). *See* Ruling on Motion for Sanctions (Dec. 17, 2007).

[57] The inference is drawn under the doctrine described in such treatises as 2 K. Broun et al., *McCormick on Evidence* § 264 (6th ed. 2006)

[58] P20 – P23; testimony of Kathleen Carson; P16 – P19 (letter recalculating under Level Income Option and noting "there are no survivor options with an LIO").

27. It has not been demonstrated in this case that a private party acted in reasonable reliance upon a belief caused by the Division that survivor benefits would be available to Ms. K.

C. Conclusions of Law

1. If a member fails to elect a benefit payment option under AS 39.35.450(a) and makes no effective revocation under AS 39.35.450(c), an election of the 50% Joint Survivor Option is imputed to the member.[59]

2. In circumstances where a deceased member's intent was fundamentally unclear due to an *omission* by the Division of Retirement and Benefits (such as an omission to clarify an election that should reasonably have been viewed as ambiguous, or an omission to maintain an adequate record of the election), it is arguable that the division might be estopped to deny that the member elected a survivor benefit, estopped to assert that the member made a particular election, or estopped to assert that the member made an election at all.[60] Estoppel has not been asserted or argued in this case. At least one element of estoppel, a demonstration of reasonable reliance, is missing.

3. Under his retirement system, Mr. W. had a vested right, protected by the Alaska Constitution, to provide for his spouse through a survivor benefit.

4. Under his retirement system, Mr. W. had a vested right, protected by the Alaska Constitution, to elect not to provide for his spouse through a survivor benefit, so long as he supplied a valid waiver from her.

5. In a case involving competing allegations that Mr. W. made disparate constitutionally-protected elections, Mr. W.'s rights are appropriately protected by sharing the risk of error in roughly equal fashion between the rights.[61] Accordingly, a preponderance of the evidence standard of proof is appropriate.

6. Because it is more likely than not that M. D. W.'s application for retirement benefits, taken as a whole, represented an election of the Level Income Option under former AS 39.35.460, he should be deemed to have made that election.

IV. Conclusion

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[59] AS 39.35.450(h).

[60] *Cf., e.g., Crum v. Stalnaker*, 936 P.2d 1254, 1258 & passim (Alaska 1997). The present decision should not be construed as a determination of circumstances under which estoppel could be applied. The Alaska Supreme Court has suggested that equitable estoppel may be used only as a defense or for the protection of a right, and not as an independent basis for relief. *See Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 & n.7 (Alaska 1984). Use of estoppel in the contexts suggested here may not violate this injunction as it has been applied in such cases as *Crum*, but the matter is arguable and has not been briefed in this case.

[61] *Cf. DeNuptiis v. Unocal Corp.*, 63 P.3d 272, 279 (Alaska 2003).

For the reasons explained in Parts II and III above, the Administrator's decision of November 8, 2006 to deny survivor benefits is affirmed.

DATED this 14th day of January, 2008.

By: ____*Signed*_____
Christopher Kennedy
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 11th day of February, 2008.

By: ____*Signed*_____
Christopher Kennedy
Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]