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**COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF GEORGE C. KEITH (DECEDENT)  
DOCKET NO. 2017-08  
CLAIM OF ELIZABETH BROOKE

**OPINION AND ORDER OF THE BOARD**

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the proposed Opinion and Recommendation of the Hearing Examiner. We note that neither party filed Exceptions to the proposed Opinion and Recommendation. The Board finds appropriate the History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation with the following modifications:

1. On page 10, Finding of Fact 19 is amended to "During the discussion, Decedent requested that PSERS email a new Nomination of Beneficiaries form to Intervenor Ward because Decedent wanted to name Intervenor Ward as the beneficiary on his PSERS retirement account. (N.T., pp. 140-141; Exhibit Ward-2)."

2. On page 26, footnote 7, the citation "*Forman* at 780" is amended to "*Snizaski* at \*22-23, quoting *Friedman v. Kinnen*, 305 A.2d 3, 4 (Pa. 1973)."

3. On page 28, footnote 8, the citation "*Commonwealth v. Jones*, 559 A. 2d 548, 500 (Pa. 1989) is amended to "*Commonwealth v. Jones*, 543 A.2d 548, 550 (Pa. Super. 1988)."

4. On page 29, the first paragraph is amended to read "There is simply insufficient evidence to conclude that Intervenor Ward acted in any manner that was self-serving. Intervenor Ward is the person last designated in writing to the Board by Decedent to receive Decedent's accumulated deductions

or a lump sum benefit upon the Decedent's death. Claimant did not establish by clear and convincing evidence that a confidential relationship arose between Decedent and Intervenor Ward and, therefore, that Intervenor Ward exercised undue influence over Decedent at any time."

With the above modifications, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own and, accordingly:

IT IS HEREBY ORDERED that Claimant's request to receive Decedent's death benefits is DENIED.

PUBLIC SCHOOL EMPLOYEES'  
RETIREMENT BOARD

Dated: October 11, 2019

By: Melva S. Vogler  
Melva S. Vogler, Chairman

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COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

PSERB  
EXECUTIVE OFFICE

In re: Account of George C. Keith (D) : Docket No. 2017-08  
Claim of Elizabeth Brooke :  
(James Ochoa Martinez, Substitute Claimant) :

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OPINION AND RECOMMENDATION

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Dates of Hearing: October 19, 2017  
December 20, 2018  
Hearing Officer: David M. Green, Esquire  
For Claimant: Brian Levine, Esquire  
For PSERS: Kathrin V. Smith, Esquire  
Dwight A. Decker, Jr., Esquire  
For Intervenor: Susan Ward, *pro se*

## HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on an appeal filed by Elizabeth Brooke ("Claimant") from a notification dated March 10, 2017 by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that the ESRC denied Claimant's request that it pay the Decedent's death benefit from the account of George C. Keith ("Decedent") to Claimant.

The procedural history of this case is protracted owing to parties, attorneys and witnesses being from different states, and Claimant's demise on March 11, 2018, resulting in a stay of the proceedings until the probate court of Tarrant County, Texas could appoint an "independent executor" of Claimant's estate.

In December 2013, Decedent submitted a Nomination of Beneficiaries form to PSERS naming Claimant, Decedent's ex-wife, as 100% beneficiary.

On February 11, 2016, Decedent signed a Nomination of Beneficiaries form naming his sister, Susan Ward ("Intervenor Ward") as 100% beneficiary, and naming Intervenor's husband ("Guy Ward") as the secondary beneficiary. PSERS received the Decedent's February 11, 2016 Nomination of Beneficiaries form on February 22, 2016.

Decedent passed away on February 23, 2016.

On March 15, 2016, PSERS notified Claimant by letter that Intervenor Ward was listed as the primary beneficiary, and Intervenor's husband as the secondary beneficiary on Decedent's latest Nomination of Beneficiaries form, to receive any death benefits that are available. PSERS notified Claimant of the procedure to appeal its decision, for review by the ESRC. A copy of this letter was mailed to Intervenor Ward. Claimant appealed PSERS' decision to the ESRC.

On February 23, 2017, the ESRC denied Claimant's request that PSERS pay Decedent's death benefit to her. By letter dated March 10, 2017, PSERS notified Claimant of the ESRC's decision and of the procedure to appeal the ESRC's decision to the Board.

On April 10, 2017, Claimant requested and was granted a 60-day extension of time by PSERS, until June 12, 2017, to file her appeal.

On June 12, 2017, Claimant filed an appeal with the Board.

On June 26, 2017, PSERS filed an answer to Claimant's appeal.

On July 12, 2017, Intervenor Ward filed a Petition for Leave to Intervene.

On July 28, 2017, the Board granted Intervenor Ward's Petition to Intervene.

On August 2, 2017, the undersigned hearing officer was appointed to act as hearing officer for Claimant's administrative hearing. On the same date, a hearing notice was issued by PSERS, which scheduled the hearing on Claimant's appeal for October 19, 2017 at 12:00 p.m. at the PSERS offices located at 5 N. 5<sup>th</sup> Street, Harrisburg, PA.

On October 6, 2017, counsel for Claimant filed a *Motion for Telephone Testimony by Expert Witness*, R. Brian Mitchell, M.D., requesting that Dr. Mitchell be permitted to testify telephonically at the upcoming hearing.

On October 10, 2017, the hearing officer issued an Order permitting the telephone testimony of Dr. Mitchell at the October 19, 2017 hearing, and directing that, on or before October 12, 2017, Claimant's counsel was to email to PSERS' counsel and Intervenor Ward copies of all exhibits, if any, pre-marked for identification, relating to Dr. Mitchell's proposed testimony or report.

On October 16, 2017, the hearing officer scheduled a telephonic pre-hearing conference with counsels owing to Claimant's failure to transmit complete and authenticated copies of

Decedent's medical records to all parties by the October 12, 2017 deadline. During the conference call, Claimant's counsel represented that the Decedent's medical records consisted of approximately 1,800 pages. On the same date, the hearing officer issued a *Pre-Hearing Order Following Telephone Conference*, directing that the absence of Decedent's medical records necessitated an additional hearing date for the telephone testimony of Dr. Mitchell and completion of the record. The Order further stated that, on or before October 19, 2017, Claimant's counsel was to provide Decedent's complete authenticated medical records in computer disk form to the other parties.

The first day of the hearing commenced as scheduled on October 19, 2017. At the outset of the hearing, counsel for Claimant provided a narrative chronology of his efforts to obtain certified records from the custodian of records and copying service for the hospital at which Decedent passed away but represented that he had not yet been able to obtain those certified records. (N.T., pp. 5-14, 204-212). Testimony was taken from Tammy Travitz of PSERS, Claimant, Intervenor Ward and Guy Ward, with the understanding that a second day of hearing would be necessary.

On November 3, 2017, the hearing officer received the Notes of Testimony ("N.T.") from the October 19, 2017 proceeding. On November 3, 2017, Claimant's counsel emailed the parties and the hearing officer an access code to the complete, authenticated electronic medical records of the Decedent.

On January 22, 2018, the hearing officer issued a *Post-Hearing Status and Scheduling Order*, limiting the relevance of Decedent's medical records to his February 9, 2016 hospital admission through and including the date and time that he signed the Nomination of Beneficiaries form naming Intervenor Ward as the primary beneficiary. The parties were notified that no expert

testimony relating to, or based upon, any events or treatment that took place after Decedent's signing of the Nomination of Beneficiaries form would be considered admissible. The order also requested available hearing dates from the parties for the months of April – July 2018.

On February 5, 2018, Claimant filed a *Motion for Telephone Attendance at Next Scheduled Hearing*, owing to a serious medical condition which prevented her attendance in person. On February 13, 2018, the hearing officer issued an Order granting Claimant's motion, with the proviso that Claimant's counsel was to attend the hearing in person.

On February 13, 2018, the hearing officer issued an Order granting Intervenor Ward additional time to identify any witnesses she intended to call at the resumed hearing and to provide a description of each witness's anticipated testimony.

On February 20, 2018, Intervenor Ward identified Paige Daniel, R.N. ("Nurse Daniel"), who was the charge nurse at the time of Decedent's hospitalization and was directly involved in his care, as a witness she intended to call, and requested that Nurse Daniel be permitted to testify by telephone.

On February 21, 2018, the Docket Administrator issued a Notice scheduling the second day of hearing for May 11, 2018.

On March 14, 2018, the hearing officer issued an Order granting Intervenor Ward's request that Nurse Daniel be permitted to testify telephonically, if Intervenor Ward was present in person at the hearing.

On March 19, 2018, Claimant's counsel notified all parties and the hearing officer that Claimant passed away on March 11, 2018.

On April 19, 2018, Claimant's counsel filed a Motion for Stay of the May 11, 2018 hearing and of the appeal in general, until the probate court of Tarrant County, Texas considered the application of Claimant's brother to be named executor of her will.

On April 26, 2018, the hearing officer issued an *Order Sua Sponte Issuing a Stay of Proceedings and Cancelling Continuation of Hearing Pending Appointment of Executor for Claimant's Estate*. The Order stayed the proceedings for no less than 90 days, continued the May 11, 2018 hearing generally, and directed Claimant's counsel to file a status report on or before June 30, 2018.

On June 11, 2018, Claimant's counsel filed a status report, as directed. On June 18, 2018, the hearing officer issued a *Memorandum Order Continuing Stay of Proceedings Pending Appointment of Executor for Claimant's Estate* and directed Claimant's counsel to file an updated status report on or before July 20, 2018.

On July 24, 2018, Claimant's counsel filed a notification, with supporting documentation from the Tarrant County, Texas court, that Claimant's brother, James Ochoa Martinez, had been appointed as "independent executor" of Claimant's estate, and an affidavit by Mr. Martinez of his intention to continue pursuit of this claim as a substitute claimant.

On August 22, 2018, Intervenor Ward filed a "*Motion Request for Telephone Testimony*," requesting to appear by telephone at the resumed hearing. On August 23, 2018, Claimant's counsel filed a response, indicating that he would not oppose Intervenor Ward's participation in the resumed hearing via telephone, provided that she not be permitted to testify unless she was present in person at the hearing, and that neither Nurse Daniel nor any other witness Intervenor Ward intended to call be permitted to testify by telephone unless Intervenor Ward was present in person at the hearing.



On September 24, 2018, the hearing officer issued an Order substituting Mr. Martinez (“Substitute Claimant”) for the Claimant<sup>1</sup> and lifting the Stay of Proceedings.

On September 25, 2018, the hearing officer issued an *Order Granting Telephone Participation of Intervenor at Rescheduled Hearing and Rescinding Order Granting Telephone Testimony of Paige Daniel, R.N.*

On October 2, 2018, the Docket Administrator issued a Notice scheduling the second day of hearing for December 20, 2018 at 10:00 a.m. at 5 N. 5<sup>th</sup> Street, Harrisburg, PA.

On October 23, 2018, Substitute Claimant, via counsel, filed a *Motion for Telephone Attendance of Jim Ochoa Martinez at Next Scheduled Hearing.*

On November 2, 2018, the hearing officer issued an Order granting Substitute Claimant’s Motion and permitting his participation in the December 20, 2018 hearing via telephone but precluding him from testifying during any proceeding at which he did not appear in person.

The second day of hearing was held, as scheduled, on December 20, 2018. Dr. Mitchell testified as Substitute Claimant’s expert witness. Intervenor Ward and Substitute Claimant attended via telephone.

On January 7, 2019, the hearing officer received the Notes of Testimony from the December 20, 2018 hearing. On February 4, 2019, the hearing officer issued an *Order Establishing Post-Hearing Briefing Schedule.* In accordance with the briefing schedule, Claimant’s Post-Hearing Brief was timely filed on March 7, 2019; PSERS’ brief was timely filed on March 20, 2019; Intervenor Ward’s brief was timely filed on April 4, 2019; and Claimant’s Reply Brief was timely filed on April 23, 2019.

The matter is now before the Board for final disposition.

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<sup>1</sup> Hereinafter, Mr. Martinez will be referred to, specifically, as “Substitute Claimant.” The term “Claimant” continues to refer to Elizabeth Brooke and/or her side of this case.

## FINDINGS OF FACT

1. George Keith (“Decedent”) was enrolled in the Public School Employees’ Retirement System (“PSERS”) in July of 2002. (N.T., p. 16).<sup>2</sup>
2. On December 19, 2013, PSERS received Decedent’s signed Nomination of Beneficiaries form (“2013 Nomination of Beneficiaries”). (*Id.*, p. 19; Exhibit PSERS-1).
3. The 2013 Nomination of Beneficiaries form was signed by Decedent on December 16, 2013. (N.T., p. 20; Exhibit PSERS-1, p. 3).
4. Section B of the 2013 Nomination of Beneficiaries form, titled “Primary Beneficiary,” listed Elizabeth Brooke (“Claimant”), Decedent’s ex-wife, as the sole primary beneficiary, to receive 100 percent of the benefit in the event of Decedent’s death. (N.T., p. 20; Exhibit PSERS-1, p. 1).
5. Section D of the 2013 Nomination of Beneficiaries form, titled “Secondary Beneficiary,” was blank. (*Id.*).
6. Claimant and Decedent were married for 10 years from 1991-2001. (N.T., p. 79).
7. Decedent’s 2013 Nomination of Beneficiaries form was the Decedent’s first Nomination of Beneficiaries form on file with PSERS. (N.T., p. 21; Exhibit PSERS -1).
8. Decedent was permitted to change his PSERS beneficiary(ies) at any time. (N.T., p. 23; Exhibit PSERS-2).
9. A change in beneficiary(ies) must be in writing; it cannot be made verbally or over the telephone. (N.T., p. 34).

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<sup>2</sup> The two volumes of Notes of Testimony span both portions of the hearing: the first portion on October 19, 2017 (N.T., pp. 1-212) and the second portion on December 20, 2018 (N.T., pp. 213-333).

10. In order to change his beneficiary nomination, Decedent was required to complete a new Nomination of Beneficiaries form and submit it to PSERS for processing. (*Id.*, pp. 22-23, 39-40; Exhibit PSERS-2).

11. Members of PSERS have access to a Nomination of Beneficiaries form in the event they wish to change their beneficiary(ies). (N.T., p. 39).

12. Decedent moved from Pennsylvania to Florida in mid-December 2015 after his mother, who had been living with him, moved to Florida, which was where Intervenor Ward lived. (*Id.*, pp. 116, 119, 190).

13. Upon moving to Florida, Decedent moved into Intervenor Ward and Guy Ward's home and accepted a job working for a business they owned. (*Id.*, pp. 119-121, 146, 190).

14. Shortly after moving to Florida, Decedent was diagnosed with cancer. (*Id.*, pp. 121-122).

15. When Decedent was diagnosed with cancer, Intervenor Ward and Guy Ward helped Decedent get his medical insurance coverage reinstated, since Decedent did not accept COBRA coverage when he resigned from his school district employment. (*Id.*).

16. Decedent was admitted to the hospital on February 9, 2016. (*Id.*, p. 190).

17. Claimant was notified of Decedent's hospitalization on February 9, 2016. (*Id.*, pp. 65, 190).

18. On February 9, 2016, a recorded telephone discussion regarding the procedure to change Decedent's Nomination of Beneficiaries form occurred in Decedent's hospital room among Decedent, Intervenor Ward and Mr. Randy Milligan, an employee of PSERS. (*Id.*, pp. 140-145, 200; Exhibits Ward-1, Ward-2).

19. During the discussion, Decedent requested that PSERS email a new Nomination of Beneficiaries form to Intervenor Ward because Decedent wanted to change the beneficiary on his PSERS retirement account. (N.T., pp. 140-141; Exhibit Ward-2).

20. On February 10, 2016, Decedent executed a "Living Will," which contained a provision that, in the event he was determined to be unable to provide express or informed consent, he designated Intervenor Ward as his surrogate to carry out its provisions. (Exhibit C-2).

21. Intervenor Ward completed the "Living Will" form at the hospital's request or direction in the presence of two witnesses, both of whom were nurses. (N.T., pp. 154-157).

22. Decedent placed his signature and initials on the "Living Will." (*Id.*, p. 154; Exhibit C-2).

23. On February 10, 2016, Decedent also signed a document giving the hospital his full permission to share any and all of his health information with Intervenor Ward, Guy Ward and Claimant ("Health Information Document"). (Exhibit C-3).

24. The handwriting on the "Health Information Document," other than the signature and date, belongs to Intervenor Ward, who drafted the document at the hospital's request. (N.T., pp. 159, 161-162, 164).

25. In the hospital, prior to the placement of a port, Decedent also signed a "Designation of Health Care Surrogate" form naming Intervenor Ward as his surrogate for health care decisions, and Claimant as alternate surrogate.<sup>3</sup> (N.T., pp. 187-189; "Claimant Exhibit 1" in 12/20/18 transcript).

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<sup>3</sup> Intervenor Ward does not recall the date this document (Exhibit C-1) was signed. (N.T., p. 188-189).

26. Intervenor Ward filled out the “Designation of Health Care Surrogate” form, except for the signatures of Decedent and the witnesses. (N.T., p. 149; “Claimant Exhibit 1” in 12/20/18 transcript).

27. In addition to the nurses who signed it as witnesses, Intervenor Ward witnessed Decedent sign the “Designation of Health Care Surrogate” form. (N.T., pp. 149-150, 188).

28. Intervenor Ward, Guy Ward and Claimant took turns keeping Decedent company in his hospital room and seeing to his needs. (*Id.*, pp. 97, 161, 199-200).

29. On February 11, 2016, Decedent signed a new Nomination of Beneficiaries form. (Exhibit PSERS-3, p. 3).

30. Section B of the 2016 Nomination of Beneficiaries form, titled “Primary Beneficiary,” listed Intervenor Ward, as the sole primary beneficiary, to receive 100 percent of the benefit in the event of Decedent’s death. (N.T., p. 24; Exhibit PSERS-3, p. 1).

31. Section D of the 2016 Nomination of Beneficiaries form, titled “Secondary Beneficiary,” listed Guy Ward as the sole secondary beneficiary. (N.T., pp. 24-25; Exhibit PSERS-3, p. 2).

32. Everything other than the signature and the date on the 2016 Nomination of Beneficiaries form was completed by Intervenor Ward at Decedent’s request. (N.T. p. 147; Exhibit PSERS-3).

33. Decedent signed the 2016 Nomination of Beneficiaries form in Intervenor Ward’s presence; however, Guy Ward was not present. (N.T., p. 187, 195; Exhibit PSERS-3).

34. On February 22, 2016, PSERS received Decedent’s 2016 Nomination of Beneficiaries form. (*Id.*, pp. 23-24; Exhibit PSERS-3).

35. Decedent's 2016 Nomination of Beneficiaries form was reviewed and accepted by PSERS, as set forth in its letter to him dated February 25, 2016. (N.T., pp. 25-26; Exhibit PSERS-4).

36. On February 23, 2016, Decedent passed away in Florida. (Exhibit PSERS-5).

37. On February 24, 2016, PSERS received notice of Decedent's death via a telephone call from Intervenor Ward. (N.T., p. 28).

38. On March 2, 2016, PSERS received a copy of Decedent's death certificate via fax, as required in order to process Decedent's death benefit. (*Id.*, pp. 27, 28; Exhibit PSERS-5).

39. By letter dated March 15, 2016, PSERS notified Claimant that on the latest Nomination of Beneficiaries form on file with PSERS, Decedent listed Intervenor Ward as his Primary Beneficiary and Guy Ward as the Secondary Beneficiary to receive any death benefits that were available. (Exhibit PSERS-6).

40. Enclosed with the March 15, 2016 PSERS letter were copies of the 2013 and 2016 Nomination of Beneficiaries forms. (*Id.*).

41. PSERS provided Claimant the opportunity to contest the death benefit, since PSERS received the 2016 Nomination of Beneficiaries form within 30 days of Decedent's death and Claimant had been listed as a previous beneficiary in the 2013 Nomination of Beneficiaries form. (N.T., pp. 29-31).

42. Claimant appealed PSERS' decision to the Executive Staff Review Committee (ESRC), which denied Claimant's appeal by letter dated March 10, 2017. (*Id.*, pp. 31-33; Exhibit PSERS-7).

43. On June 12, 2017, Claimant filed a timely appeal from the ESRC denial. (N.T., p. 33; Official Notice, Board Records).

44. On July 12, 2017, Intervenor Ward filed a Petition for Leave to Intervene. (Docket No. 2017-08).

45. On July 28, 2017, the Board granted Intervenor Ward's Petition to Intervene. (*Id.*).

46. The hearing on Claimant's appeal commenced on October 19, 2017; PSERS and Claimant were each represented by counsel and Intervenor Ward participated *pro se*. (N.T., pp. 1-212).

47. On March 19, 2018, Claimant's counsel notified all parties and the hearing officer that Claimant passed away on March 11, 2018. (Docket No. 2017-08).

48. On April 19, 2018, Claimant's counsel filed a Motion for Stay of the May 11, 2018 hearing and of the appeal in general, until the probate court of Tarrant County, Texas considered the application of Claimant's brother to be named executor of her will. (*Id.*).

49. On April 26, 2018, the hearing officer issued an *Order Sua Sponte Issuing a Stay of Proceedings and Cancelling Continuation of Hearing Pending Appointment of Executor for Claimant's Estate*. The Order stayed the proceedings for no less than 90 days, continued the May 11, 2018 hearing generally, and directed Claimant's counsel to file a status report on or before June 30, 2018. (*Id.*).

50. On July 24, 2018, Claimant's counsel filed notification, with supporting documentation from the Tarrant County, Texas court, that Claimant's brother, James Ochoa Martinez, had been appointed as "independent executor" of Claimant's estate, and an affidavit by Mr. Martinez of his intention to continue pursuit of this claim. (*Id.*).

51. On September 24, 2018, the hearing officer issued an Order substituting Mr. Martinez ("Substitute Claimant") in place of Claimant and lifting the Stay of Proceedings. (*Id.*).

52. On December 20, 2018, a second day of hearings was conducted, at which Dr. Brian Mitchell testified as Substitute Claimant's expert witness; Intervenor Ward and Substitute Claimant attended via telephone. (N.T., pp. 213-333).

53. R. Brian Mitchell, M.D., of Mid-Atlantic Medical Consulting, was accepted as an expert in the medical field of oncology during the hearing on Claimant's appeal. (*Id.*, p. 245-246, 265).

54. Although he provides pain management and palliative care to oncology patients, Dr. Mitchell is not board-certified in those areas of medicine, and he rarely, if ever, calls on doctors in those specialties to assist in the care of his patients. (*Id.*, pp. 252-253).

55. Dr. Mitchell reviewed Decedent's medical records from the hospital, which numbered approximately 1,800 pages. (*Id.*, p. 247).

56. Dr. Mitchell's review of Decedent's medical records included records covering the date of Decedent's February 9, 2016 admission to the hospital through February 11, 2016, the date when Decedent signed the 2016 Nomination of Beneficiaries form. (*Id.*, p. 247).

57. Dr. Mitchell's testimony did not reference the observations of Decedent made by Claimant, Intervenor Ward, or Guy Ward, who were present with Decedent in the hospital during his stay. (*Id.*, pp. 214-326).

58. Dr. Mitchell's testimony did not indicate whether he reviewed the testimony of Claimant, Intervenor Ward or Guy Ward at the October 19, 2017 hearing and Dr. Mitchell could not recall whether he reviewed that day's transcript. (*Id.*, p. 255).

59. Dr. Mitchell interviewed Claimant twice but did not rely on the information he obtained during those interviews in forming his opinion. (*Id.*).



60. Dr. Mitchell has never testified or prepared a report in any case challenging a contract or beneficiary nomination, or in a guardianship or conservatorship proceeding in Pennsylvania. (*Id.*, p. 254).

61. Dr. Mitchell's testimony is not reliable. (*Id.*, pp. 244-326).

62. Although Claimant was often present and active in caring for Decedent in the hospital, from February 11, 2019, the record contains no testimony regarding Claimant's observations of Decedent on that date or thereafter. (*Id.*, pp. 65-67, 70-72, 97).

## CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1- 62).
2. Claimant was afforded notice and an opportunity to be heard in connection with her appeal. (Findings of Fact Nos. 39-52).
3. Decedent's signature on the 2016 Nomination of Beneficiaries form gives rise to a presumption that it accurately expresses his state of mind. *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523, 526 (Pa. 1986); *Forman v. Public School Employees' Retirement System*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001), citing *Estate of McGovern*.
4. Decedent effectuated a contractual obligation on PSERS to pay the death benefit to his nominated beneficiary. *Estate of Rosenstein v. Public School Employees' Retirement System*, 685 A.2d 624 (Pa. Cmwlth. 1996).
5. A member's written nomination of beneficiary controls regardless of any perceived inequity with the selection. *Hess v. Public School Employees' Retirement System*, 460 A.2d 1231, 1232 (1983); *Titler v. Public School Employees' Retirement System*, 768 A.2d 899, 903 (Pa. Cmwlth. 2001).
6. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*. 589 A.2d 269 (Pa. Cmwlth. 1991).
7. Claimant had the burden of proving that the 2016 Nomination of Beneficiaries form was procured under undue influence or that Decedent was legally incompetent to execute the beneficiary designation. *Forman* at 780 (Pa. Cmwlth. 2001).
8. The presumption that a beneficiary nomination is valid may be rebutted where the challenger presents clear and convincing evidence that the person making the nomination is unable

to understand the nature and consequences of the transaction. *Forman* at 780, citing *Estate of McGovern* at 526.

9. Claimant has not proven, by clear and convincing evidence, that Decedent was legally incompetent, or that he was unable to understand the nature and consequences of the transaction at the time he executed the 2016 Nomination of Beneficiaries form. (Findings of Fact Nos. 1-40, 53-62).

10. The presumption may be overcome by establishing that a confidential relationship existed between Decedent and Intervenor Ward at the time the nomination was made. *Snizaski v. Public School Employees' Retirement Board, No. 1369 C.D. 2008, 2014 Pa. Commw. Unpub. LEXIS 506 at \*25-26* (Pa. Cmwlth. Aug. 13, 2014).

11. Claimant has not proven, by clear and convincing evidence, that Intervenor Ward and Decedent had a confidential relationship as of February 11, 2016. (Findings of Fact Nos. 1-36).

12. Decedent's 2016 Nomination of Beneficiaries was an *inter vivos* transaction. *Snizaski, at \*21-23*, citing *Fiumara v. Fiumara*, 427 A. 667, 671 at n. 6 (Pa. Super. 1981).

13. Intervenor Ward is competent to testify under the Dead Man's Statute in that she is a putative transferee in a presumptively valid *inter vivos* transaction, in which she stands as the representative of Decedent's interest.<sup>4</sup> (*Snizaski at \*21-23*, citing *Friedman v. Kinnen*, 305 A. 2d 3, 4 (Pa. 1973).

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<sup>4</sup> Decedent's estate is not a party to this proceeding and Claimant was not its executor. (N.T., p. 81, 185). Decedent's estate's interests are not relevant to this matter. Substitute Claimant, who is the Executor of *Claimant's* estate is a party, and assumes the adverse position previously occupied by Claimant.

14. As Claimant's interest, in her own right, was adverse to Decedent's interest, Claimant was incompetent to testify under the Dead Man's Statute. (*Snizaski*, citing *King v. Lemmer*, 173 A. 176 (Pa. 1934).

15. Decedent's statement to Mr. Milligan of PSERS that he wanted to change his beneficiary to Intervenor Ward was an exception to the hearsay rule, as it was probative of his state of mind when the statement was made. *Commonwealth v. Marshall*, 135 A. 301 (Pa. 1926); *Klischer v. Nationwide Life Insurance*, 422 A.2d 175 (Pa. Super. 1980).

16. Decedent's statement to Mr. Milligan of PSERS directing him to email a new Nomination of Beneficiaries form to Intervenor Ward was not hearsay, as it constitutes a verbal act of instruction. *Commonwealth v. Jones*, 559 A. 2d 548, 550 (Pa. 1989).

17. Intervenor Ward is the person last designated in writing to the board by Decedent to receive Decedent's accumulated deductions or a lump sum benefit upon the death of Decedent. (Findings of Fact Nos. 1-39).

18. Intervenor Ward is Decedent's sole primary beneficiary and is entitled to his death benefits. (Findings of Fact Nos. 1-39).

## DISCUSSION

This matter is before the Board on Claimant's appeal from the ESRC's decision to deny Claimant's request to pay the death benefit of its Member, George Keith ("Decedent") to Claimant.

PSERS derives its authority from the Retirement Code. 24 Pa. C.S. §§8101, *et seq.* The provisions of the Retirement Code create a contract between the Commonwealth and its public-school employees. *Kline v. Morrison*, 44 A.2d 267 (Pa. 1945). The contract that a public-school employee has with the Commonwealth must be liberally construed in favor of the member. *Bowers v. State Employees' Retirement System*, 371 A. 2d 1040 (Pa. Cmwlth. 1977).

The Retirement Code requires every member to nominate a beneficiary for death benefits by written designation filed with the Board. 24 Pa. C.S. §8507(e). A "beneficiary" is defined by the Retirement Code as "[t]he person or persons last designated in writing to the board by a member to receive his accumulated deductions or a lump sum benefit upon the death of such member." 24 Pa. C.S. §8102. A member is presumed to have been competent at the time he executed the Nomination of Beneficiaries form. *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523, 526 (Pa. 1986).

## BURDEN OF PROOF

The burden of proving the existence of mental incompetence or undue influence is upon the asserting party. *Estate of Bosico*, 412 A.2d 505 (Pa. 1980); *Weber v. Kline*, 141 A. 721 (Pa. 1928). To establish a lack of competence at the time of Decedent's execution of the 2016 Nomination of Beneficiaries form, Claimant must establish by clear and convincing evidence that Decedent was unable to understand the nature and consequences of his actions. *Forman v. Public School Employees' Retirement System*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001), citing *Estate of McGovern*. "Clear and convincing evidence" is "evidence that is 'so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts of the issue.'" *Elk*

*Mountain Ski Resort*, 114 A.3d 27, 34 (Pa. Cmwlth. 2015), quoting *Rohm & Haas Co. v. Cont'l Cas. Co.*, 566 Pa. 464, 781 A.2d 1172, 1179 (2001). See also, *Stafford v. Reed*, 363 Pa. 405, 410, 70 A.2d 345, 348 (1950).

To establish undue influence, Claimant must establish by clear and convincing evidence that a confidential relationship between Decedent and Intervenor Ward existed at the time Decedent signed the 2016 Nomination of Beneficiaries form. *Snizaski*, at \*25-26. The phrase “undue influence” denotes something violative of legal duty. The word “influence” does not refer to any and every line of conduct capable of disposing in one’s favor a fully and self-directing mind. It requires a control acquired over another which virtually destroys that other’s free agency. [citations omitted]. *In re Thompson’s Estate*, 387 Pa. 82, 88, 126 A.2d 740, 744. Opportunity for undue influence, suspicion and conjecture, do not create or amount to proof of either a confidential relationship or undue influence. [citations omitted]. *Id.*, 387 Pa. at 99, 126 A.2d at 749. “Opportunity is not evidence, and conjecture and suspicion do not take the place of testimony.” *Id.*, 387 Pa. at 100, 126 A.2d at 749, quoting *In re Rosenthal’s Estate*, 339 Pa. 488, 496, 15 A.2d 370, 374 (1940).

A confidential relationship is not confined to any specific association of the parties, such as a sibling relationship. It is one wherein a party is bound to act for the benefit of another and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed. *Frowan v. Blank*, 425 A. 2d 412, 416-17. (Pa. 1981). A confidential relationship is not created merely by nursing and caring for a sick man. *In re Thompson’s Estate*, 387 Pa. at 99, 126 A.2d at 749 (1956). Not every sibling relationship meets the definition of a “confidential relationship,” and a sibling relationship is not a “confidential relationship” *per se*. *Id.*

### **MENTAL INCOMPETENCE**

During the hearing Claimant acknowledged that her daughter was not mentioned as a beneficiary

in Decedent's 2013 or 2016 Nomination of Beneficiaries forms but testified that she is challenging the Decedent's 2016 Nomination of Beneficiaries form because of her daughter. Claimant testified that even though she and the Decedent divorced, they had a strong bond and a beautiful daughter together, and that she still loved him. Indeed, the evidence establishes that Claimant was with the Decedent in the hospital along with Intervenor Ward as he was nearing his demise. Claimant testified that when her daughter was two-years old, she was diagnosed with severe autism; her daughter is non-verbal and needs continuous help. When they divorced, the Decedent obtained custody of her daughter. Claimant testified that the Decedent raised their daughter for 12 years and knew of their daughter's needs and remained close to their daughter to the day that he died.

Claimant therefore presented the testimony of R. Brian Mitchell, M.D., of Mid-Atlantic Medical Consulting, to establish that the Decedent lacked mental capacity to execute the 2016 Nomination of Beneficiaries form.<sup>5</sup> As stated, *supra.*, to establish a lack of competence, Claimant must establish by clear and convincing evidence that Decedent was unable to understand the nature and consequences of his actions when he executed the 2016 Nomination of Beneficiaries form. *Forman* at 780, citing *Estate of McGovern, supra.* This determination is not a medical determination, but rather is best established

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<sup>5</sup> Dr. Mitchell was accepted as an expert in the medical field of oncology. PSERS argues that Dr. Mitchell's testimony is unreliable in that it relies heavily on inadmissible, objected-to hearsay documents. While hospital records are an exception to the hearsay rule, and are admissible under section 6108 of the Uniform Business Records As Evidence Act, 42 Pa. C.S. § 6108, they are admissible only as to the fact of hospitalization, treatment prescribed and symptoms given. *Potheir v. Department of Transportation, Bureau of Traffic Safety*, 511 A.2d 939, 940 (Pa. Cmwlth. 1986), citing *Morris v. Moss*, 290 Pa. Super. Ct. 587, 435 A.2d 184 (1981). The report of the February 9, 2016 x-ray has been admitted into evidence and does not contain a diagnosis or opinion relating to Decedent's pain, medications, or mental state. (Exhibit "Claimant-1" in 12/20/18 transcript). It is the Board's role to determine whether the pain and/or pain medications had any effect on Decedent's ability to understand the nature and consequences of his signing the Nomination of Beneficiaries form on February 11, 2016.

The records Dr. Mitchell referred to reflected treatment given during February 9-11, 2016, including the fact of the hospitalization, the treatment prescribed, and medication and symptoms given. These records include reports of Decedent's pain and orders for the administration of pain medication, and thus fall under the exception. (Exhibits "Claimant 2" through "Claimant 4" in 12/20/18 transcript). These records formed the basis of the charts prepared and utilized by Dr. Mitchell in formulating and expressing his opinions as to Decedent's ability to understand the nature and consequences of his actions during the relevant time period. (Exhibits "Claimant 8" and "Claimant 9" in 12/20/18 transcript). Testimony based on those records is admissible.

by the testimony of those who observed Decedent at or before the time he executed the document in question. In the words of the Pennsylvania Supreme Court:

[W]here mental capacity to execute an instrument is at issue, “the real question is the condition of the person at the very time he executed the instrument or made the gift in question.... [A] person's mental capacity is best determined by his spoken words and his conduct, . . . . [T]he testimony of persons who *observed such conduct on the date in question outranks testimony as to observations made prior to and subsequent to that date.* *Sobel v. Sobel*, 435 Pa. 80, 83, 254 A.2d 649 (1969). (Emphasis added). “Mere mental weakness, if it does not amount to inability to comprehend the contract, and is unaccompanied by evidence of imposition or undue influence,” is insufficient to set aside a contract. *Law v. Mackie*, 373 Pa. 212, 95 A.2d 656 (1953). Finally, a presumption of mental incapacity does not arise merely because of an unreasonable or unnatural disposition of property. *Lawrence's Estate*, 286 Pa. 58, 65, 132 A. 786 (1926).

*Estate of McGovern* at 526 (emphasis in original).

Further, like any other professional opinion, the weight to be accorded to a medical expert's testimony is for the factfinder. *Gaydos v. Gaydos*, 693 A.2d 1368, 1377 (Pa. Super. Ct. 1997). *See also*, *Blair v. Bureau of Professional and Occupational Affairs, State Board of Nursing*, 72 A.3d 742, 752 (Pa. Cmwlth. Ct. 2013) (province of factfinder is to make reliability determinations, weigh evidence and resolve any conflicts in it). “A finder of fact is not bound by the testimony of a particular expert witness and is under no obligation to accept the expert's conclusions.” *In re Estate of Mumma*, 125 A.3d 1205, 1216 (Pa. Super. Ct. 2015) (citations omitted). In weighing any evidence, a factfinder “may rely on his or her experience [and] common sense” to arrive at a proper conclusion. *Commonwealth v. Segida*, 985 A.2d 871, 879 (Pa. 2009). *See also*, *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1161 (Pa. 2010) (“The credibility of witnesses, professional or lay and the weight to be given their testimony is strictly within the proper province of the trier of fact.”)

Expert testimony need not be utterly free of speculative elements, but speculation will not carry a preponderance burden or, in this case, a clear and convincing burden. *United Refining Company v. Dept. of Environ. Protection*, 163 A.3d 1125, 1132 – 33 (Pa. Cmwlth. Ct. 2017) (addressing expert testimony regarding potential dangers in fracking operation). A trier of fact has a duty to ensure that



“what might appear ... to be science is not in fact speculation in disguise.” *Blum by Blum v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314, 1325 (Pa. Super. 1997) abrog. on other grnds, *Trach v. Thrift Drug, Inc.*, 817 A.2d 1102 (Pa. Super. 2003). To qualify as an expert opinion, the opinion must “point to, rely on or cite some scientific authority.” *Snizavich v. Rohm & Haas Co.*, 83 A. 3d 191, 197 (Pa. Super. 2013). When an expert opinion fails to include such authority, the trier of fact must conclude that “the expert opinion reflects nothing more than mere personal belief.” *Id.* See also, *Tillery v. Children’s Hospital of Philadelphia*, 156 A3d 1233, 1242 at n. 2.

Based solely upon his review of the Decedent’s medical records, Dr. Mitchell opined that the Decedent was not competent to make complex decisions while in the hospital, due to a variety of factors including his level of pain and medication, persistent nausea and vomiting, and sleep deprivation and malnutrition. For example, Dr. Mitchell opined that the Decedent was not competent to sign the “Living Will” or “Health Information Document,” that he signed on February 10, 2016 (N.T., 317). Dr. Mitchell opined that the Decedent was not competent to sign the 2016 Nomination of Beneficiaries form on February 11, 2016 (N.T. 298-299). In fact, as of February 11, 2019, Dr. Mitchell testified generally that Decedent “was losing” or “had lost” his competence. (N.T., 317-320). Yet, Dr. Mitchell had no reservations about the Decedent’s mental capacity to name Intervenor Ward, Claimant Brooke, and Mr. Ward as his Health Care Surrogates and then approve their receipt of treatment information on February 10, 2016. In fact, Dr. Mitchell testified that he was “comfortable” with the Decedent making an important delegation decision regarding his treatment. Dr. Mitchell’s testimony is therefore equivocal. The fact that Decedent selected three surrogates to stay with him in shifts evidences the Decedent’s understanding of the complexities of his situation as of February 10, 2016, his Health Care Surrogates’ roles in his treatment, and the probable consequences. Dr. Mitchell’s personal beliefs or speculation as to the Decedent’s mental capacity the next day, on February 11, 2016, do not constitute clear and convincing evidence.

In addition, prior to forming his opinion, Dr. Mitchell did not listen to the recording that was made of Decedent's February 9, 2016 telephone call with the PSERS representative. Nor did he review any of the testimony from the October 19, 2017 hearing, which included not only the testimony of Intervenor Ward and Guy Ward of their observations of Decedent on February 10 and 11, 2016, but also Claimant's testimony regarding the time she spent with Decedent in the hospital. Moreover, although he interviewed Claimant twice, Dr. Mitchell did not utilize the information from that interview in reaching his opinion. As our Pennsylvania Supreme Court has long acknowledged, a person's mental capacity is best determined by his spoken words and conduct. The testimony of persons who observed such conduct on the date in question outranks testimony as to observations made prior to and subsequent to that date or, in the case of Dr. Mitchell, speculation gleaned from a review of Decedent's medical records. *Estate of McGovern, supra*.

Moreover, the only observations of Decedent's mental status that were recorded in his medical chart were the words "awake and alert."<sup>6</sup> Dr. Mitchell attributes these entries to an "electronic charting system" employed by the hospital, which he claims requires "extra effort" to make any entry other than just leaving the default "awake and alert" in place. Dr. Mitchell testified generally that "the nurses spend all day long charting and clicking in the computer, so a lot of things get left as the standard." (N.T., pp. 320-322). He made these statements seemingly to downplay the important element of whether Decedent met the incompetency standard in this case. Yet, the record is devoid of evidence to establish what the charting system and procedures of the Decedent's hospital were, or what the charting practices were of the nurses who treated the Decedent. In addition, Dr. Mitchell provided no testimony to establish what the proper standard is for a medical electronic record entry. Dr. Mitchell's testimony on this issue is nothing more than personal belief and/or speculation and is therefore rejected.

Dr. Mitchell lastly attributed several symptoms caused or exacerbated by Decedent's bowel

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<sup>6</sup> Intermittently referred to during Dr. Mitchell's testimony as "alert and oriented."

disease as additional factors affecting his competency. The crux of his opinion in this regard was that the medications were compromising Decedent's competence when the pain was not doing so. Notably, Dr. Mitchell considered the Decedent's pain scale tracking, ostensibly via the same electronic charting system in which Decedent was described as "awake and alert." He did not consider the observational evidence. In addition to being equivocal, Dr. Mitchell's testimony lacks scientific evidence or authority to support his analysis. His testimony overall is based solely on his beliefs and experience treating the pain-related elements of his own cancer patients. Dr. Mitchell's testimony is neither clear, direct, weighty or convincing, and fails to establish, without hesitancy, that Decedent was unable to understand the nature and consequences of actions when he signed his 2016 Nomination of Beneficiaries form.

There is no dispute that the Decedent had a relationship with his daughter and was aware of his daughter's needs. However, the medical condition or related needs of Decedent's daughter is not relevant to a determination of whether there was undue influence on the part of Intervenor Ward when the Decedent changed his Nomination of Beneficiaries form in 2016. Moreover, irrespective of a finding of undue influence or a confidential relationship between Decedent and Intervenor Ward in 2016, the Decedent's death benefit does not pass, as a matter of fact or law, to his daughter in any context. The Nomination of Beneficiaries form controls.

### **CONFIDENTIAL RELATIONSHIP**

Intervenor Ward testified about the relationship that she had with her brother, the Decedent. She testified that she and her brother were only 18 months apart in age and were very close – the Decedent was always her big brother and she was always Decedent's little sister; they only had each other.

Intervenor Ward testified that in September of 2015, their mother, who lived with the Decedent in Pennsylvania, had a stroke. At the time, the Decedent was also having serious health issues, so the Decedent and Intervenor Ward arranged for their mother to be placed in a nursing home and transferred to Florida to be closer to Intervenor Ward so she could be more involved in her care. At or about the

same time, the Decedent and Intervenor Ward realized that they both needed to get their own affairs in order.

After their mother was moved to Florida, Intervenor Ward and her husband offered Decedent a job in Florida with their business, which he accepted. Decedent gave his resignation to the school district in December 2015, moved to Florida and moved in with Intervenor Ward and her husband. In or around January 2016, shortly after moving to Florida, is when the Decedent received his diagnosis. According to Intervenor Ward, “[w]hen we got the diagnosis, that was probably the worst day in all of our lives. . . until you go through it, you cannot imagine the whirlwind of paperwork and doctors and everything’s coming at you at a hundred miles an hour, and you have to be strong.” (N.T. 120). Intervenor Ward testified that she did everything that Decedent asked her to do for him because she was all that he had. Intervenor Ward and her husband helped the Decedent get his medical insurance reinstated to get his hospital stay covered. Intervenor Ward testified that the Decedent shared his wishes with her. He told her he wanted to be cremated and did not want to be buried in Pennsylvania where their father had plots purchased for them. According to Intervenor Ward, “so we discussed all of these tough . . . things.” (N.T. 121) It was then that Decedent shared with Intervenor Ward that he wanted to change his beneficiary to her. *Id.*<sup>7</sup>

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<sup>7</sup> Objections were raised throughout the hearing to testimony by Claimant and Intervenor Ward regarding the Decedent’s wishes based on the Dead Man’s Act, 42 Pa. C.S. §5930. The purpose of the Dead Man’s Act, 42 Pa. C.S. §5930 (“Dead Man’s Rule”) is “to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely affect the *interest* of a decedent, when the decedent’s representative would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent’s death.” *Elk Mountain Ski Resort, Inc. v. Workers’ Compensation Appeal Board*, 114 A.3d 27 (Pa. Cmwlth. 2015), quoting *In re Estate of Hall*, 517 Pa. 115, 535 A.2d 47, 53 (1987) (emphasis in original).

If a valid *inter vivos* transfer can be shown by independent evidence before the admission of any testimony by the alleged donee (transferee), the donee (transferee) will be considered to represent the interest of the decedent and will be permitted to testify. *Forman* at 780. Given the presumption of validity that the presence of Decedent’s signature confers upon the 2016 Nomination of Beneficiaries form, Intervenor Ward stands as the representative of Decedent’s interests and is competent to testify under the Dead Man’s Rule. *Snizaski*, citing *King v. Lemmer*, 173 A. 176 (Pa. 1934). Under this analysis, Claimant’s interest was adverse to Decedent’s, rendering Claimant incompetent to testify under the Dead Man’s Rule. Substitute Claimant, who is the Executor of Claimant’s estate is a party, and assumes the adverse position previously occupied by Claimant.

As the Supreme Court has stated, [w]hen someone “comes to a strange city to live with [his] sister, to whom else would [he] turn except to [his] sister for the recommendation of a doctor” or, in this case, in matters relating to a sudden need for healthcare? *In re Thompson’s Estate*, 387 Pa. at 101, 126 A.2d at 750. The Supreme Court has also stated, “It is, we repeat, certainly natural to appreciate the help, comfort and affection of those who are caring for you... especially if it is a near relative.” *Id.*, 387 Pa. at 98, 126 A.2d at 748.

Intervenor Ward testified that even though the Decedent was in pain and medicated, he knew what was going on. On February 9, 2016, Decedent was admitted to the hospital. On the same date, is when the telephone call was made to PSERS from Decedent’s hospital room. The transcribed recording of the call was as follows:

**Mr. Milligan:** This is Randy in the Harrisburg office. How may I help you?  
**Intervenor Ward:** Hi Randy. Good morning. I’m calling, I have my brother right here, and he wants to change his beneficiary. So he wanted to talk to you about that.  
**Mr. Milligan:** Okay. I can talk to him.  
**Intervenor Ward:** Okay, he’s right here. He’s on speaker.  
**Decedent:** Hello?  
**Mr. Milligan:** Yes, good morning. How are you today?  
**Decedent:** Okay.  
**Mr. Milligan:** I understand that you are wanting to change the beneficiary on your PSERS’ retirement account?  
**Decedent:** Yeah, to my sister, Susan Ward.  
**Mr. Milligan:** Okay. Now, that is not something that I can change over the telephone. What I will need to do is sent you a new Nomination of Beneficiaries form. You can complete that and name your sister and send it back in, and then we will update our beneficiary information for your account.  
**Decedent:** Would you be able to e-mail it to her:  
**Mr. Milligan:** I can e-mail the blank form, yes.  
**Decedent:** Okay, that would be great.  
**Mr. Milligan:** Okay. Do you have her e-mail address? Or if you want to put her on the phone, I can talk to her.  
**Decedent:** Yeah, I’ll let her give it to you.  
...  
**Mr. Milligan:** Okay. Yeah, I will e-mail the blank form, and we would prefer if you did not send the form back to us by e-mail because it has a lot of confidential information, particularly your brother’s social security number, and probably your social security number. . . we

just don't want those numbers to get somehow directed in the wrong way as a result of an e-mail that did not go as it was supposed to go.

**Intervenor Ward:** Sure. That's fine. So we can just print it out, fill it out, and then mail it to you?

**Mr. Milligan:** Um-hmm, yes.

**Intervenor Ward:** Okay. Does he need to do anything else then?

**Mr. Milligan:** No, I don't think so. That signed form will let us know that he's wanting to change his beneficiary, and we'll make that change.

**Intervenor Ward:** Okay. Okay. So do you -- do you have any other questions, George (Decedent)?

**Decedent:** No.

...

(N.T., page 140, lines 9 – 25, page 141, lines 1 – 18, page 142, lines 1 – 25 and page 143, line 1)<sup>8</sup>

On February 10, 2016, one day after contacting PSERS, Decedent signed his Living Will and his Health Information Document giving the hospital permission to share all his health information with Intervenor Ward, Guy Ward and Claimant. On February 11, 2016, Decedent signed his 2016 Nomination of Beneficiaries form. Intervenor Ward testified that she completed everything on that Nomination form other than Decedent's signature and his written date.

Claimant argues that it is inconceivable that Decedent would choose Guy Ward to be the secondary beneficiary and that this choice was induced by Intervenor Ward's undue influence. However, this argument has no evidentiary support factually and overlooks the fact that, when Decedent named Claimant as primary beneficiary in 2013, he did not name a secondary beneficiary, be it their daughter, or otherwise, nor was he required to do so. In 2016, when Decedent named Guy Ward as secondary beneficiary, that nomination was made without Mr. Ward's knowledge or a promise from him of any kind.

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<sup>8</sup> Decedent's statement to Mr. Milligan of PSERS that he wanted to change his beneficiary to Intervenor Ward, was an exception to the hearsay rule, as it is probative of his state of mind when it was made. *Commonwealth v. Marshall*, 135 A. 301 (Pa. 1926); *Klischer v. Nationwide Life Insurance*, 422 A.2d 175 (Pa. Super. 1980). Decedent's request of Mr. Milligan of PSERS that he email a new Nomination of Beneficiaries form to Intervenor Ward, was not hearsay, as it constitutes a verbal act of instruction. *Commonwealth v. Jones*, 559 A. 2d 548, 550 (Pa. 1989).

There is simply insufficient evidence to conclude that Intervenor Ward acted in any manner that was self-serving. Intervenor Ward is the person last designated in writing to the Board by Decedent to receive Decedent's accumulated deductions or a lump sum benefit upon the Decedent's death. Even if a confidential relationship arose between Decedent and Intervenor Ward, Claimant has failed to meet her burden to establish by clear and convincing evidence, that Intervenor Ward exercised undue influence over the Decedent at any time.

In accordance with the foregoing findings of fact, conclusions of law and discussion, the following proposed order shall issue:

**COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

**In re: Account of George C. Keith (D)** : **Docket No. 2017-08**  
**Claim of Elizabeth Brooke** :  
**(James Ochoa Martinez, Substitute Claimant)** :

**PROPOSED ORDER**


**AND NOW**, this 13<sup>th</sup> day of **June 2019**, in accordance with the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer recommends that Decedent's death benefits shall be payable to Intervenor, Susan Ward, as directed by the Decedent's February 11, 2016 Nomination of Beneficiaries form. It is further recommended that the claim of Elizabeth Brooke and, by substitution, James Ochoa Martinez, should be **DISMISSED**.

**BY ORDER:**

  
**David M. Green**  
**Hearing Officer**

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**Intervenor:** Susan Ward  


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**Date of Mailing:** June 13, 2019