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COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF SANDRA N. LAPCEVIC (D)
DOCKET NO. 2006-21
CLAIM OF WILLETTE GALLMAN

ORDER OF THE BOARD

WHEREAS, on June 24, 2008, this Board determined that Willette Gallman ("Claimant") was the properly named beneficiary of the account of Sandra N. Lapcevic ("Member").

WHEREAS, Karen E. Snizaski and Christine M. Vilsack ("Interveners") appealed the Board's determination to the Commonwealth Court of Pennsylvania.

WHEREAS, on May 29, 2009, the Commonwealth Court reversed the Order of the Board holding that the altered beneficiary form did not meet the statutory and regulatory requirements of Section 8507(e) of the Public School Employees' Retirement Code ("Retirement Code"), 24 Pa.C.S. § 8507(e), because the Member did not re-execute the form and the changes made by Claimant using "wite-out" were not initialed by the Member.

WHEREAS, the Supreme Court of Pennsylvania granted Claimant's petition for allowance of appeal to consider "whether the Commonwealth Court correctly interpreted 24 Pa.C.S. §8507(e) to require in this case that a Public School Employees' Retirement System nomination of benefits form must have been completed entirely in

the hand of the member/decedent in order to effectuate a valid change of beneficiary designation."

WHEREAS, on May 28, 2013, the Supreme Court reversed the Commonwealth Court holding that 24 Pa.C.S. §8507(e) does not require nomination of beneficiary forms to be completed entirely in the hand of a member or that changes must be made in the member's own hand and that any such requirements are unreasonable and impractical.

WHEREAS, the Supreme Court remanded the matter back to the Commonwealth Court to review the following remaining issues raised by Intervenors:

(1) whether the Board erred because it failed to consider the "confidential and fiduciary relationship" between Claimant and the Member and the resulting presumption of "undue influence;"

(2) whether the Board erred because it failed to shift the burden to Claimant to show the absence of deception, that she took no unfair advantage of her relationship with the Member and that the Member's designation of Claimant as Principal Beneficiary was fair and beyond suspicion; and

(3) whether the Board erred because it failed to exclude Claimant's self-interested testimony about her conversations with the Member under the Dead Man's Statute.

WHEREAS, on August 13, 2014, the Commonwealth Court determined that the Board failed to issue a specific finding of fact on whether a confidential relationship existed when the Member signed the August 2002 and October 2002 Nomination of Beneficiary forms.[1] Accordingly, the Court remanded this matter back to the Board to remand to the hearing officer to make findings of fact and conclusions of

[1] The Commonwealth Court also held that Claimant was competent to testify under the Dead Man's Statute.

law on whether a confidential relationship existed between the Member and Claimant, ordering that:

> The parties shall be allowed to submit Briefs and proposed findings of fact and conclusions of law. If it is determined that a "confidential relationship" existed between the [Member], the Claimant, Willette Gallman, shall be given the opportunity to demonstrate by clear, precise and convincing evidence that the transaction was free of any taint of undue influence or deception and that it was fair, conscientious, and beyond the reach of suspicion. The Board shall render a decision in accordance with this opinion.

WHEREAS, on September 24, 2014, the Board remanded this matter to Hearing Officer Jackie Wiest Lutz, Esquire. In accordance with the Commonwealth Court's Order, this Board directed that the briefs of the parties shall consist of proposed findings of fact and conclusions of law solely on the issue of whether, *based on the existing record*, a confidential relationship existed between the Member and Claimant when the Member signed the August 2002 and October 2002 Nomination of Beneficiary forms. After the submission of briefs, the Hearing Officer was directed to issue a recommendation to the Board whether, *based on the existing record*, a confidential relationship existed between the Member and Claimant when the Member signed the August 2002 and October 2002 Nomination of Beneficiary forms.

WHEREAS, neither party filed objections to the Board's September 24, 2014, order.

WHEREAS, on October 10, 2014, the Hearing Officer directed the parties to file simultaneous briefs by November 12, 2014. Claimant and Interveners timely filed Briefs to the Hearing Officer.

WHEREAS, on November 13, 2014, Claimant filed objections to the Interveners' Brief claiming that Interveners improperly relied upon facts not in the record.

WHEREAS, following a telephonic conference call with the parties, the Hearing Officer ordered Interveners to file an amended brief by January 30, 2015, based on the evidentiary record that was created during the September 12, 2007, administrative hearing.

WHEREAS, on January 14, 2015, Interveners filed a Motion to Incorporate the Commonwealth Court Record to which Claimant filed a Response on January 21, 2015.

WHEREAS, by Order dated January 26, 2015, the Hearing Officer denied the Interveners' Motion and reminded the Interveners of their deadline to submit an amended brief by January 30, 2015.

WHEREAS, on February 4, 2015, Interveners filed an Exception From Hearing Officer's Decision to not Incorporate Commonwealth Court Record with the Board, and requested the Board to appoint an alternative Hearing Officer. Intervenors did not re-submit a brief for consideration in this matter, as directed by the Hearing Officer.

WHEREAS, on March 16, 2015, this Board dismissed Interveners' exceptions without prejudice, and denied Interveners' request to remove the Hearing Officer.

WHEREAS, on April 3, 2015, Interveners filed a Motion to Determine the Existence of a Confidential Relationship or Alternatively, a Motion to Reopen the Record. Claimant's Reply to Motion to Reopen the Record was filed on April 10, 2015.

WHEREAS, by Order dated April 14, 2015, the Hearing Officer granted Intervenors' Motion to Determine the Existence of a Confidential Relationship and denied Intervenors' alternative Motion to Reopen the Record. The Hearing Officer further ordered that, because Interveners failed to re-submit an amended brief, Interveners were deemed to have waived their right to submit findings of fact and argument in favor of their position.

WHEREAS, on May 18, 2015, the Hearing Officer issued a Proposed Opinion and Recommendation finding that the existing record created by the parties fails to establish that a confidential relationship existed between the Claimant and the Member when the Member executed the August 2002 and October 2002 Nomination of Beneficiary forms.

WHEREAS, on June 18, 2015, Interveners filed Exceptions from Hearing Officer's Opinion and Recommendation via overnight mail sent on June 17, 2015; to which Claimant filed a Brief Opposing such exceptions by email on June 24, 2015.

WHEREAS, on July 6, 2015, Interveners filed a Motion to Incorporate the Entire Record/Accept Amended Filing.

WHEREAS, by Order dated July 28, 2015, Interveners were directed to show cause why their Exceptions from the Hearing Officer's Opinion and Recommendation were untimely filed.

WHEREAS, on August 21, 2015, Interveners filed an Answer and New Matter to Order to Show Cause asserting that: (1) the "mailbox rule presumption" should apply; (2) there was a breakdown in the administrative/judicial process in determining the exceptions were one day late; and (3) the exceptions should be accepted as timely filed *nunc pro tunc.*

WHEREAS, on August 26, 2015, Claimant filed a Response in Opposition to Interveners' Motion for Nunc Pro Tunc Filing of Exceptions.

NOW THEREFORE, after a careful and independent review of the entire record of this proceeding, the Board finds appropriate the Hearing Officer's Findings of Fact, Discussion, Conclusions of Law, and Recommendation attached hereto, and we hereby adopt them as our own and, accordingly, finds as follows:

(1) The formal record does not contain sufficient evidence that would support a finding that a confidential relationship existed between the Member and the Claimant when the Member executed the August 2002 and October 2002 Nomination of Beneficiary forms. Accordingly, the Member's death benefit is payable to Claimant as designated by the Member in the Member's most recently filed, processed and acknowledged Nomination of Beneficiary form received by PSERS on October 29, 2002.

(2) Interveners failed to timely file exceptions to the Hearing Officer's Proposed Opinion and Recommendation, and they thereby waive any exceptions to the Hearing Officer's Proposed Opinion and Recommendation. *See, e.g., Account of Sheila A. Eberhardt (D),* Docket No. 2008-33 (PSERB October 12, 2010), *appeal dismissed by motion, Eberhart v. Public School Employees' Retirement Board*, No. 2331 C.D. 2010 (Pa.Cmwlth. February 22, 2011) (order granting motion to dismiss for failure to preserve question below by filing exceptions 3 days late). Interveners fail to assert any facts to support their request for relief *nunc pro tunc* or their claim of a misunderstanding. Clearly, Interveners understood the deadline to be June 17, 2015, because, under the mailbox rule presumption, if applicable, such proof of mailing the document overnight would have preserved a timely filing. Such is not the procedural mandate of the *General Rules of Administrative Practice and Procedure,* 1 Pa. Code § 31.11. *See, Harasty v. Public School Employees' Retirement Board*, 945 A.2d 783 (Pa.Cmwlth. 2008).

(3) Interveners' Motion to Incorporate the Entire Record/Accept Amended Filing is DENIED. The facts relied upon by Interveners are contained in documents attached to a pleading, which were objected to by PSERS in its Answer on the basis of hearsay, authenticity and relevancy and strict proof was demanded. Interveners had an opportunity during the administrative hearing in this matter to testify, examine witnesses and offer evidence and exploited such opportunity. No party moved or offered into evidence the documents at issue, or presented any medical testimony or documentation regarding the mental and/or

physical state of the Member. The record before the Board does not include testimony or exhibits not offered in evidence. 1 Pa. Code § 31.3 (relating to definition of "formal record"). Such facts, therefore, are not part of the evidentiary record and cannot be a basis for a finding by this Board.

Moreover, it is well established that, as the ultimate fact finder, the Board determines the credibility and the weight of a witness's testimony and is free to select between conflicting evidence. *Albright v. State Employes' Retirement System,* 500 A.2d 522, 523 (Pa. Cmwlth. 1985). Resolutions of credibility are within the exclusive province of the Board as fact finder. *Id. See also, Dowler v. Public School Employees' Retirement Board,* 620 A.2d 639, 644 (Pa. Cmwlth. 1993), citing *Prudential Property and Casualty Insurance Company v. Department of Insurance*, 595 A.2d 649, 659 (Pa. Cmwlth. 1991). The Board, however, cannot weigh evidence that was never submitted for consideration. Failure to present evidence during the administrative hearing, therefore, is not a basis for which Interveners are entitled to relief.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: October 6, 2015

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

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

In Re:	:	
Account of Sandra N. Lapcevic (D)	:	
Claim of Willette Gallman	:	**Docket No. 2006-21**
	:	

OPINION AND RECOMMENDATION

Hearing Officer: **Jackie Wiest Lutz, Esquire**
For Claimant: **Edward T. Harvey, Esquire**
For Intervenors: **James R. Antoniono, Esquire**

PROCEDURAL HISTORY

This matter is before the Public School Employees' Retirement Board ("Board") on remand from the Commonwealth Court of Pennsylvania ("Commonwealth Court") to make findings of fact and conclusions of law on whether a confidential relationship existed between Sandra N. Lapcevic ("Decedent") and Willette Gallman ("Claimant") when the Decedent executed her August 2002 and October 2002 Nomination of Beneficiary Forms.

The case has a protracted procedural history, having first come before the Board on October 6, 2006, when Claimant filed a Request for Administrative Hearing to appeal a decision of the Public School Employees Retirement System (PSERS) which determined that the Decedent's beneficiaries were those individuals named on the Decedent's December 9, 2004 Nomination of Beneficiary form ("December 2004 Nomination form").

The December 2004 Nomination form was signed by a Court-appointed Guardian of the Estate of the Decedent. Claimant challenged the validity of the December 2004 Nomination form on the ground that the Guardian lacked authority under 20 Pa. C.S. §5536 to change a beneficiary without petitioning the court.

Prior to 2004, the Decedent had identified her mother as the sole principal beneficiary of her retirement account, and listed Karen E. Snizaski and Christine M. Vilsak ("Intervenors") as co-equal contingent beneficiaries. Shortly after the Decedent's retirement, her mother died, and the Decedent, with Claimant's assistance changed her beneficiary designations by completing a new Nomination of Beneficiary Form (the "August beneficiary form"). The August beneficiary form identified Claimant as the

Decedent's principal beneficiary, with a 50% distribution rate, and continued to identify the Intervenors as co-equal contingent beneficiaries, with a benefit distribution of 25% each. The Decedent signed and dated the August beneficiary form and filled in her own social security number. All other information on the form was in Claimant's handwriting at the direction of the Decedent.

The August beneficiary form was received by PSERS on August 2, 2002, but was returned to the Decedent by PSERS with instructions that the distribution percentages in each section of the form, i.e., principal beneficiary and contingent beneficiary, must each total 100%. The Claimant assisted Decedent in making the corrections to the form by using white-out to change Claimant's distribution rate from 50% to 100%, and the Intervenors' distribution rate from 25% each to 50% each. ("October beneficiary form"). The only changes that were made to the October beneficiary form were the distribution rates adjacent to Claimant and Intervenors' names, respectively. After Claimant assisted the Decedent make these corrections through the use of white-out, the Decedent did not re-sign the form or initial the corrected percentages.

The corrected October beneficiary form was mailed to PSERS, and was received on October 29, 2002. Approximately two months later PSERS notified the Decedent that it had received and processed the October beneficiary form and that if she wished to change beneficiaries in the future she should obtain, complete and send a new Nomination of Beneficiary form to PSERS.

On October 17, 2006, PSERS notified Christine M. Vilsack, Karen E. Snizaski, Laura Lapcevic and Joseph Lapcevic of their right to intervene in Claimant's Request for Administrative Hearing.

On October 20, 2006, Jennifer A. Mills, Esquire, filed an Answer to Claimant's Request for Administrative Hearing, claiming that the Board lacks jurisdiction to interpret the provisions of 20 Pa. C.S. §5536 to determine whether the court appointed guardian lacked the authority to change a beneficiary without petitioning the court.

Claimant's Request for Administrative Hearing was subsequently stayed by PSERS, to allow the parties to proceed in a court of competent jurisdiction to determine whether the Guardian lacked the authority to change the beneficiaries of the Decedent's account.

On June 28, 2007, the Court of Common Pleas of Allegheny County, Pennsylvania, Orphans' Court Division, Ordered, Adjudged and Decreed that the Guardian lacked the authority under 20 Pa. C.S.A. §5536(b) to submit the December 2004 Nomination form to PSERS.

By Order dated August 2, 2007, the Board granted Claimant's request to set aside the December 2004 Nomination form and dismissed Claimant's appeal as moot. However, the Board further ordered that the case shall proceed to an administrative hearing on the remaining issue of how the Decedent's death benefit should be distributed.

On August 7, 2007, Jackie Wiest Lutz, Esquire was appointed to act as hearing officer for the administrative hearing in this matter. The hearing was held on September 12, 2007 at 5 North Fifth Street, Harrisburg, PA. Claimant was present at the hearing, and was represented by Edward T. Harvey, Esquire. Karen E. Snizaski and Christine M. Vilsak ("Intervenors") were also present at the hearing and were represented by James R. Antoniono, Esquire. Jennifer A. Mills, Esquire, represented PSERS.

At the conclusion of the hearing, both parties were granted the opportunity to file post-hearing briefs. On March 10, 2008, the Hearing Officer issued an Opinion and Recommendation to the Board, recommending that PSERS be required to honor its contract with the Member and to pay the Decedent's death benefit to Claimant.

Following the filing of Exceptions by all parties, the Board determined on June 24, 2008 that Claimant was the properly named beneficiary of the Decedent's account.

Intervenors appealed the Board's determination to the Commonwealth Court, which reversed the order of the Board on May 29, 2009. In its Order, Commonwealth Court held that the altered beneficiary form did not meet the statutory and regulatory requirements of Section 8507(e) of the Public School Employees' Retirement Code, 24 Pa. C.S. §8507(e), because the Decedent did not re-execute the form, and the changes made by Claimant using "white-out" were not initialed by the Decedent.

Claimant filed a petition for allowance of appeal from the Commonwealth Court's opinion with the Supreme Court of Pennsylvania ("Supreme Court"). The Supreme Court granted Claimant's appeal to consider "whether the Commonwealth Court correctly interpreted 24 Pa. C.S. §8507(e) to require that Public School Employees' Retirement System nomination of benefits form must have been completed entirely in the hand of the member/decedent in order to effectuate a valid change of beneficiary designation."

On May 28, 2013, the Supreme Court reversed the Commonwealth Court, holding that 24 Pa. C.S. §8507(e) does not require nomination of beneficiary forms to be completed entirely in the hand of a member or that changes must be made in the member's own hand, and that any such requirements are unreasonable and impractical.

The Supreme Court remanded the matter back to the Commonwealth Court to review the following issues that were raised by Intervenors, but not previously addressed by Commonwealth Court:

- Whether the Board erred because it failed to consider the "confidential and fiduciary relationship" between Claimant and the [Decedent] and the resulting presumption of "undue influence;"

- Whether the Board erred because it failed to shift the burden to Claimant to show the absence of deception, that she took no unfair advantage of her relationship with the [Decedent] and that the [Decedent's] designation of Claimant as Principal Beneficiary was fair and beyond suspicion; and,

- Whether the Board erred because it failed to exclude Claimant's self-interested testimony about her conversations with the [Decedent] under the Dead Man's Statute.

On August 13, 2014, the Commonwealth Court issued an unreported opinion in which it determined that Claimant was competent to testify under the Dead Man's Statute, but that the Board failed to issue a specific finding of fact on whether a confidential relationship existed when the Decedent signed the August 2002 and October 2002 Nomination of Beneficiary forms. Accordingly, Commonwealth Court remanded the matter back to the Board to remand to the hearing officer to make findings of fact and conclusions of law on whether a confidential relationship existed between the Decedent and Claimant. The Commonwealth Court specifically ordered:

> The parties shall be allowed to submit Briefs and proposed findings of fact and conclusions of law. If it is determined that a "confidential relationship" existed between [Claimant and] (sic) the Decedent, Sandra Lapcevic, the Claimant, Willette Gallman, shall be given the opportunity to demonstrate by clear, precise and convincing evidence that the transaction was free of any taint of undue influence or deception and that it was fair, conscientious, and beyond the reach of suspicion. The Board shall render a decision in accordance with this opinion.

On September 24, 2014, the Board remanded this matter to the Hearing Officer who was previously appointed in this matter with the following instructions:

- The Hearing [Officer] shall issue a briefing schedule to the parties.
- The briefs of the parties shall consist of proposed findings of fact and conclusions of law solely on the issue of whether, based on the existing record, a confidential relationship existed between the [Decedent] and Claimant when the [Decedent] signed the August 2002 and October 2002 Nomination of Beneficiary forms.
- After the submission of briefs, the Hearing [Officer] shall make a recommendation to the Board whether, based on the existing record, a confidential relationship existed between the [Decedent] and Claimant when the [Decedent] signed the August 2002 and October 2002 Nomination of Beneficiary forms.

Consistent with the Board's September 24, 2014 Order, the Hearing Officer established a briefing schedule to allow the parties to submit briefs and proposed findings of fact and conclusions of law on whether *based on the existing record*, a confidential relationship existed between the Decedent and Claimant when the Decedent signed the August 2002 and October 2002 Nomination of Beneficiary forms. The Hearing Officer directed the parties to file simultaneous briefs by November 12, 2014, and instructed that briefs shall contain a brief statement of the case, proposed findings of fact, *supported by references to the pages of the record or exhibits where the evidence appears,* proposed conclusions of law, and a concise discussion supported by the record and decisional law on the issue of whether a confidential relationship existed between the Decedent and Claimant when the Decedent signed the August 2002 and October 2002 Nomination of Beneficiary forms.

Timely briefs were filed by both parties. However, on November 12, 2014, Claimant, through counsel, filed *Objections to the Intervenors' Proposed Findings of Fact*, claiming that Intervenors, in their Proposed Findings of Fact, improperly introduced

matters not contained in the evidentiary record or, alternatively, suggested findings of fact which contain innuendo or argument. On or about November 25, 2014, Intervenors filed a *Response to the Claimant's Objections to the Intervenors' Proposed Findings of Fact.*

The Hearing Officer convened a telephonic conference with the parties on December 30, 2014 to discuss the Claimant's objections and the Intervenors' response, and issued an Order following the conference which directed that:

> Intervenors shall have until January 30, 2015 to re-submit their brief. All references to testimony and/or exhibits shall be limited to testimony and exhibits that comprise the evidentiary record that was created during the September 12, 2007 administrative hearing; references to documents and other extraneous information that are not part of the evidentiary record will not be considered.

The Order further directed that Proposed Findings of Fact Nos. 3, 20 -22, 78 – 83 proffered by the Intervenors shall be stricken from consideration inasmuch as these proposed Findings of Fact refer to testimony, documents or other extraneous matters that are not part of the evidentiary record.

On January 12, 2015, Intervenors, through counsel, filed a *Motion to Incorporate the Commonwealth Court Record Filed on Behalf of Karen E. Snizaski and Christine M. Vilsack,* to which Claimant filed a *Response* on January 20, 2015.

By Order dated January 26, 2015, the Hearing Officer denied Intervenors' *Motion to Incorporate the Commonwealth Court Record Filed on Behalf of Karen E. Snizaski and Christine M. Vilsack,* and reminded Intervenors that they have until January 30, 2015 to re-submit their brief as previously directed.

On January 28, 2015, Intervenors filed an *Exception From Hearing Officer's Decision to not Incorporate Commonwealth Court Record* with the Board, and requested

the Board to appoint an alternative Hearing Officer. Intervenors did not re-submit a brief for consideration in this matter, as directed by the Hearing Officer.

On March 16, 2015, an *Opinion and Order of the Board* was issued which dismissed Intervenors' exceptions without prejudice, and denied Intervenors' request to remove the Hearing Officer. Thereafter, on April 1, 2015, Intervenors filed a *Motion to Determine the Existence of a Confidential Relationship or Alternatively, a Motion to Reopen the Record. Claimant's Reply to Motion to Reopen the Record* was filed on April 10, 2015.

By Order dated April 14, 2015, the Hearing Officer granted Intervenors' *Motion to Determine the Existence of a Confidential Relationship* and denied Intervenors' alternative *Motion to Reopen the Record.* The Hearing Officer further ordered:

> Owing to the Intervenors' failure to re-submit their brief by the January 30, 2015 deadline for doing so, Intervenors shall be deemed to have waived their right to submit findings of fact and argument in favor of their position based solely on the evidentiary record that was created during the September 12, 2007 administrative.
>
> The Hearing Officer understands that the parties' have had sufficient opportunity to attempt to resolve this matter amicably and that settlement has failed, and mediation was not pursued. It is therefore ORDERED that the pleadings are now closed.

The matter is now before the Board for disposition.

FINDINGS OF FACT

SUBSTANTIVE FACTS

1. Sandra N. Lapcevic ("Decedent") was first enrolled in the Public School Employees' Retirement System ("PSERS") in January of 1967. (Joint Exhibit A, ¶ 1)

2. Decedent filed an Application for Retirement with PSERS dated May 6, 2002 retiring from employment effective June 11, 2002 with 35.56 years of service. (Joint Exhibit A, ¶ 2 - Exhibit 1)

3. At the time of Decedent's retirement, Decedent was 57 years of age, unmarried, and lived alone. (N.T. 59; Joint Exhibit A - Exhibits 1 and 2)

4. On her Application for Retirement, Decedent nominated Helen Lapcevic, Decedent's mother, as principal beneficiary with distribution of 100% and Karen E. Snizaski and Christine M. Vilsack ("Intervenors") as contingent beneficiaries with distribution of 50% respectively. (Joint Exhibit A, ¶ 3; Joint Exhibit 1)

5. The evidentiary record does not establish who Intervenors are/were in relation to the Decedent, other than "friend." (Transcript, *passim;* Exhibit 1 (Application for Retirement))

6. Claimant first met Decedent over 30 years ago at H&R Block, where Claimant prepared Decedent's income tax returns. (N.T.[1] 37)

7. The last tax return that Claimant prepared for Decedent was in 2003. (N.T. 38)

8. Claimant worked for H&R Block for 10 years and prepared Decedent's income returns for those 10 years as an employee of H&R Block; Claimant later left H&R Block and started her own business in the East Hills Shopping Center where she worked from an office located within her floral business, Gallman's Flower Shop. (N.T. 38-39)

[1] "N.T." refers to "notes of testimony" from the September 12, 2007 administrative hearing.

9. Claimant saw Decedent on an annual basis to prepare Decedent's tax returns, but Decedent also came by to see Claimant a couple of times each year to just talk in general or to ask Claimant questions. (N.T. 38-40)

10. In 2001, Decedent came to Claimant's office and was walking with a cane; Decedent was still employed with the Penn Hill School District as a school teacher at the time but, as they conversed, Claimant learned from Decedent that she had been diagnosed with Parkinson's disease. (N.T. 40-41)

11. During their conversation, Decedent asked Claimant if she could help her to find someone to take her to see her mother, who was in Hospice. (N.T. 40)

12. Claimant made several inquiries of individuals on Decedent's behalf to see if they would be willing to drive Decedent to see her mother, but, everyone that she asked declined because they were concerned that if something happened to Decedent during the transport that they would be responsible. (N.T. 41-42)

13. Unsuccessful in finding anyone to assist Decedent, Claimant, in time, told Decedent that after she closed her flower shop for the day, she would take Decedent to see her mother. (N.T. 42)

14. From that point forward, Claimant began driving Decedent on a daily basis for more than a year so the Decedent could visit with her mother. (N.T. 42-43)

15. Claimant and Decedent became good friends throughout this process. (N.T. 45)

16. When they visited with Decedent's mother, Claimant and Decedent's routine included taking the Decedent's mother to dinner. (N.T. 44)

17. Decedent's physical condition throughout this time period stayed about the same. (N.T. 43)

18. Over time, the Decedent's physical condition worsened and Claimant began helping Decedent at Decedent's home with her household chores; Claimant took care of the Decedent's laundry for her and saw to it that Decedent's house was cleaned because Decedent could no longer do that. (N.T. 45)

19. Decedent had nobody else to help her with her household chores. (N.T. 45)

20. Claimant also arranged for improvements to be done at the Decedent's home so that it would be more accessible to someone with the Decedent's physical disabilities. (N.T. 45)

21. Claimant's routine was to go to Decedent's home in the evenings to help her; anytime that Decedent had paperwork that needed to be completed, Decedent would place the paper work on her table for Claimant to complete. (N.T. 56)

22. Claimant never received anything of value from Decedent for the favors that she did for her. (N.T. 45)

23. Shortly after Decedent's retirement on June 11, 2002, Decedent's mother, Helen Lapcevic, died on July 15, 2002. (Joint Exhibit A, ¶ 4)

24. In or around August of 2002, Claimant hired Carolyn L. Howard, LPN ("Nurse Howard") to help the Decedent throughout the day. (N.T. 75)

25. By this time, improvements had already been made to Decedent's home so that it was accessible to someone with the Decedent's physical disabilities. (N.T. 76)

26. Decedent was still mobile at this time, but was having more difficulty with walking. (N.T. 75-76)

27. Nurse Howard generally arrived at Decedent's home around 10:00 a.m. and stayed with her until 4:30 p.m., making sure that Decedent had her lunch and took her medicine. (N.T. 75)

28. If Decedent had a doctor's appointment, Nurse Howard, accompanied by Claimant, would take Decedent to her appointment. (N.T. 75)

29. Decedent had an established routine with her mail. When Nurse Howard arrived in the mornings, she would bring in Decedent's mail and leave it on the desk for her. (N.T. 76)

30. By around 11:00 a.m. every day, Nurse Howard would help Decedent to her desk, where Decedent would sit, open her mail, go through her papers and make telephone calls, mainly to doctors to schedule her doctors' appointments. (N.T. 76)

31. Whenever there was anything that Decedent wanted Claimant to see, she would put it on a pile for the Claimant to look at when she arrived. (N.T. 56, 77)

32. On August 2, 2002, PSERS received a new Nomination of Beneficiaries form from Decedent, which designated Claimant as Decedent's new principal beneficiary, and Intervenors as Decedent's contingent beneficiaries, as they had been previously listed on Decedent's Application for Retirement (the "August beneficiary form"). (Joint Exhibit A, ¶ 6 – Exhibit 3)

33. The Decedent changed her beneficiary designations by completing the August beneficiary form with Claimant's assistance, which was consistent with Claimant and Decedent's routine for reviewing mail and other paperwork that the Decedent put on a pile for Claimant to review when she arrived in the evening. (N.T. 48-50, 56, 77)

34. The August beneficiary form listed Claimant's distribution as "50%" adjacent to her name, and listed the Intervenors' distribution as "25%" adjacent to their respective names. (Joint Exhibit A, ¶6 - Exhibit 3)

35. With the exception of the Decedent's signature, date and social security number, all of the handwriting on Decedent's August beneficiary form is Claimant's handwriting. (N.T. 49-50; Joint Exhibit 3)

36. Everything on Decedent's August beneficiary form that appears in Claimant's handwriting was written by Claimant at the direction of Decedent. (N.T. 54)

37. Decedent's August beneficiary form was signed and dated by Decedent on July 29, 2002. (Joint Exhibit A, ¶ 7)

38. There is no evidence that the Decedent suffered from weakened intellect at the time that she, with Claimant's assistance, completed her August beneficiary form. (Transcript and Exhibits, *passim*)

39. There is no evidence that the Claimant exercised overmastering influence over the Decedent when the Claimant assisted the Decedent with completing her August beneficiary form. (Transcript and Exhibits, *passim*)

40. By letter dated October 19, 2002, PSERS returned the August beneficiary form to Decedent, advising her that the distribution percentages for each section, i.e., principal beneficiary(ies) and contingent beneficiary(ies), must total 100 percent within each section. (Joint Exhibit A, ¶ 8 – Exhibit 4)

41. The letter instructed Decedent that if the information requested can be included on her form without altering existing information, feel free to do so. If not, a blank form is enclosed to assist her in submitting an acceptable form. (Exhibit 4)

42. The August beneficiary form was among the paperwork on Decedent's table that was waiting for Claimant when she arrived at Decedent's home as she was accustomed to do. (N.T. 56)

43. Claimant sat with Decedent at the table that evening and assisted the Decedent with this paperwork; the Decedent instructed Claimant that Section A has to be 100% and Section B has to be 100%. (N.T. 56)

44. The identified beneficiaries on the form remained unchanged. (Exhibit 5)

45. Decedent had whiteout among her papers and instructed Claimant to put "100% on A" and "50/50 on B." (N.T. 56)

46. Claimant applied the whiteout to the form for the Decedent and wrote "100" adjacent to her name, and "50" adjacent to the names, Karen E. Snizaski and Christine M. Vilsack. (N.T. 57; Exhibit 5)

47. Decedent did not re-sign the beneficiary form or initial the revised percentage distributions. (Joint Exhibit A, ¶ 12)

48. Claimant left the corrected beneficiary form with the Decedent when she left for the evening. (N.T. 57-58)

49. Decedent later advised Claimant that she mailed the form. (N.T. 57-58)

50. On October 29, 2002, PSERS received the Decedent's corrected beneficiary form ("the October beneficiary form"). (Joint Exhibit A, ¶'s 9 and 10 – Exhibit 5)

51. The only difference between the August beneficiary form and the October beneficiary form was the percentages that were written next to the named beneficiaries in Sections A and B through the use of whiteout. (Joint Exhibit A, ¶'s 9 and 10 – Exhibit 5)

52. The October beneficiary form changed the percentage distribution adjacent to Claimant's name in Section A from 50% to 100%, and changed the percentage distribution adjacent to Intervenors in Section B to 50%, respectively, so that the percentages totaled 100% within each section. (Joint Exhibit A, ¶ 11 – Exhibit 5)

53. There is no evidence that the Decedent was suffering from weakened intellect at the time that she, with Claimant's assistance, made the corrections to her October 2002 beneficiary form. (Transcript and Exhibits, *passim*)

54. There is no evidence that the Claimant exercised overmastering influence over the Decedent when she assisted the Decedent in making the corrections to her October 2002 beneficiary form. (Transcript and Exhibits, *passim*)

55. By letter dated December 27, 2002, PSERS informed Decedent that PSERS "received and processed [her] Nomination of Beneficiary Form (PSRS-187)" (hereinafter "October beneficiary form"). (Joint Exhibit A, ¶ 13 – Exhibit 6)

56. PSERS notified Decedent, "[i]f you wish to change your beneficiary nomination with PSERS in the future, you must obtain a new Nomination of Beneficiary Form, complete it and forward it to PSERS for processing." (Exhibit 6)

57. Claimant saw the December 27, 2002 letter from PSERS around a month later when she was at the Decedent's home and learned from the Decedent that it had been approved. (N.T. 58-59)

58. On March 6, 2003, the Decedent signed a Power of Attorney which named Claimant as her "Attorney- in-Fact" and which gave Claimant immediate and complete control over the Decedent's personal and financial affairs. (N.T. 59-63)

59. The Power of Attorney was prepared by Attorney Zinford Mitchell, Claimant's nephew. (N.T. 66; Claimant's Exhibit A)

60. On March 6, 2003 Decedent also executed her Last Will and Testament which named Claimant the sole beneficiary of her entire estate. (N.T. 59-63; Claimant's Exhibit B)

61. The Last Will and Testament was also prepared by Attorney Mitchell. (N.T. 66)

62. Both Decedent's Power of Attorney and Will contain an incorrect spelling of the Decedent's last name in multiple locations throughout each form. (Claimant's Exhibits A and B)

63. On both the Power of Attorney and the Decedent's Will, the spelling of the Decedent's last name was manually corrected at each location where the incorrect spelling appeared and adjacent to each correction, the Decedent initialed each change. (Claimant's Exhibits A and B)

64. There is no evidence that the Decedent suffered from a weakened intellect at the time that she executed her March 6, 2003 Power of Attorney and Will and initialed each and every correction of the spelling of her last name as it appeared on these forms. (Transcript and Exhibits, *passim*)

65. There is no evidence that the Claimant exercised overmastering influence over the Decedent when the Decedent executed her March 6, 2003 Power of Attorney and Will. (Transcript and Exhibits, *passim*)

PROCEDURAL FACTS

66. On October 18, 2004, the Court of Common Pleas of Allegheny County, PA, Orphan's Court Division, Ordered, Adjudged and Decreed Dianne Spivak ("Guardian") as Permanent Plenary Guardian of the Estate of Decedent. (Board records)

67. On December 13, 2004, PSERS received a Nomination of Beneficiary form dated December 9, 2004, signed by the Guardian, naming Intervenors Christine Vilsack and Karen Snizaski, along with Laura Lapcevic and Joseph Lapcevic, as primary beneficiaries of Member's death benefit. (Board records)

68. Decedent died on February 11, 2006 leaving a balance of $688,514.01 to be paid to her last named beneficiaries. (Joint Exhibit A, ¶5 - Exhibit 2)

69. On February 23, 2006, PSERS determined that the last named beneficiaries of Decedent's death benefit were Intervenors Christine Vilsack and Karen Snizaski, Laura Lapcevic and Joseph Lapcevic. (Board records)

70. On October 6, 2006, Claimant filed a Request for Administrative Hearing to appeal the decision of PSERS on the basis that the Guardian lacked the authority under 20 Pa. C.S. §5536 to change a beneficiary without petitioning the court to do so. (Board records)

71. On October 17, 2006, PSERS notified Intervenors and Laura Lapcevic and Joseph Lapcevic of their right to intervene in Claimant's Request for Administrative Hearing. (Board records)

72. On October 20, 2006, PSERS filed an Answer to Claimant's Request for Administrative Hearing asserting that the Board lacked jurisdiction to interpret 20 Pa.

C.S. §5536 to determine whether a court appointed guardian lacks authority to change a beneficiary without petitioning the court. (Board records)

73. Through counsel, Intervenors and Laura Lapcevic and Joseph Lapcevic verbally notified PSERS of their intent to intervene in this matter and of the parties' intent to proceed in a court of competent jurisdiction to determine whether the Guardian lacked the authority to change the beneficiaries of the Decedent's account. (Board records)

74. On November 30, 2006, PSERS notified the parties in writing that the administrative hearing was stayed pending the decision of the Court of Common Pleas of Allegheny County, Commonwealth of PA, Orphan's Court Division. (Board records)

75. On June 28, 2007, the Court of Common Pleas of Allegheny County, Commonwealth of PA, Orphan's Court Division Ordered, Adjudged and Decreed that the Guardian lacked the authority under 29 Pa. C.S. §5536(b) to submit the Nomination of Beneficiary form dated December 9, 2004. (Board records)

76. On June 28, 2007, Intervenors verbally notified PSERS, following up in writing by letter dated July 6, 2007 through counsel, of their intent to challenge the Nomination of Beneficiary form received by PSERS on October 29, 2002, that would pay 100% of the death benefit to the Claimant as the primary beneficiary. (Board records)

77. The June 28, 2007 Orphans' Court Order was not appealed and is now final. (Judicial Notice)

78. By Order dated August 2, 2007, the Board granted Claimant's request to set aside the December 2004 Nomination form and dismissed Claimant's appeal as moot, but ordered that the case shall proceed to an administrative hearing on the remaining issue of how the Decedent's death benefit should be distributed. (Board records)

79. The administrative hearing was held on September 12, 2007 at 5 North Fifth Street, Harrisburg, PA. (Transcript, *passim*)

80. Claimant was present at the hearing, and was represented by Edward T. Harvey, Esquire. Intervenors were also present at the hearing and were represented by James R. Antoniono, Esquire. Jennifer A. Mills, Esquire, represented PSERS. (Transcript, *passim*)

81. On March 10, 2008, the Hearing Officer issued an Opinion and Recommendation to the Board, recommending that PSERS be required to honor its contract with the Member and to pay the Decedent's death benefit to Claimant. (Board records)

82. The Board determined on June 24, 2008 that Claimant was the properly named beneficiary of the Decedent's account.

83. Intervenors appealed the Board's determination to the Commonwealth Court

84. Commonwealth Court reversed the order of the Board on May 29, 2009, holding the altered beneficiary form did not meet the statutory and regulatory requirements of Section 8507(e) of the Public School Employees' Retirement Code, 24 Pa. C.S. §8507(e), because the Decedent did not re-execute the form, and the changes made by Claimant using "white-out" were not initialed by the Decedent.

85. Claimant filed a petition for allowance of appeal from the Commonwealth Court's opinion with the Supreme Court of Pennsylvania ("Supreme Court").

86. The Supreme Court granted Claimant's appeal to consider "whether the Commonwealth Court correctly interpreted 24 Pa. C.S. §8507(e) to require that Public School Employees' Retirement System nomination of benefits form must have been completed entirely in the hand of the member/decedent in order to effectuate a valid change of beneficiary designation."

87. On May 28, 2013, the Supreme Court reversed the Commonwealth Court, holding that 24 Pa. C.S. §8507(e) does not require nomination of beneficiary forms to be completed entirely in the hand of a member or that changes must be made in the member's own hand, and that any such requirements are unreasonable and impractical.

88. The Supreme Court remanded the matter back to the Commonwealth Court to review remaining issues that were raised by Intervenors, but not previously addressed by Commonwealth Court.

89. On August 13, 2014, the Commonwealth Court issued an unreported opinion in which it determined that Claimant was competent to testify under the Dead Man's Statute, but that the Board failed to issue a specific finding of fact on whether a confidential relationship existed when the Decedent signed the August 2002 and October 2002 Nomination of Beneficiary forms.

90. Commonwealth Court remanded the matter back to the Board to make findings of fact and conclusions of law on whether a confidential relationship existed between the Decedent and Claimant.

91. On September 24, 2014, the Board remanded this matter to the Hearing Officer with instructions consistent with the Commonwealth Court's Remand Order.

92. The parties had an opportunity to submit briefs containing proposed findings of fact, conclusions of law and argument on whether *based on the existing record*, a confidential relationship existed between the Decedent and Claimant when the Decedent signed the August 2002 and October 2002 Nomination of Beneficiary forms.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1-92)

2. A confidential relationship is not confined to any specific association of the parties but, rather, is one in which a party is bound to act for the benefit of another, and can take no advantage to himself. *Frowen v. Blank,* 493 Pa. 137, 425 A. 2d 412 (Pa. 1981) (*quoting, Leedom v. Palmer*, 274 Pa. 22 at 25, 117 A. 410 at 411).

3. A confidential relationship 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. *Id.*

4. "Weakness, dependence or trust *justifiably reposed*" refers to and requires a relationship which involves or includes managing or advising a dependent person in business or financial matters. *In Re: Thompson Will,* 387 Pa. 82, 126 A. 2d 740 (Pa. 1956).

5. A confidential relationship may be determined as a matter of law or through an "intensely fact-specific" inquiry. *Basile vs. H&R Block, Inc.* 616 Pa. 212, 52 A. 3d 1202, 1210 (Pa. 2012); *Truver v. Kennedy,* 425 Pa. 294, 229 A. 2d 468 (Pa. 1967).

6. In Pennsylvania, accountant-client relationships are not per se confidential. *Basile* at 226, 52 A. 2d 1211, FN 7).

7. The burden of proving the existence of a confidential relationship is on the party asserting it. *Banko v. Malanecki* , 499 Pa. 92, 451 A. 2d 1008 (Pa. 1982).

8. Where undue influence and incompetency do not appear, and the relation between the parties is not one ordinarily known as confidential in law, the evidence to sustain a

confidential relation must be certain. *In re Estate of Scott,* 316 A. 2d 883, 886 (Pa. 1974).

9. The evidence does not establish with any degree of certainty that a confidential relationship existed between the Claimant and the Decedent when the Decedent executed her August 2002 and October 2002 Nomination of Beneficiary Forms. (Findings of Fact Nos. 1-65)

DISCUSSION

The sole issue before the Board in this remanded proceeding is whether the evidentiary record supports a finding that a confidential relationship existed between the Claimant and the Decedent when the Decedent executed her August 2002 and October 2002 Nomination of Beneficiary Forms.

The burden of proving the existence of a confidential relationship is on the party asserting it (Intervenors). *Banko v. Malanecki* , 499 Pa. 92, 451 A. 2d 1008 (Pa. 1982). Once a confidential relationship is established, the burden then shifts to the person who is in such relationship to "prove the absence of fraud, and that the transaction was fair and equitable." *Ruggeri v. West Forum Corp.*, 282 A. 2d 304, 307 (Pa. 1971).

The Pennsylvania Supreme Court has long recognized that it is impossible to precisely define "confidential relationship." *In Re: Thompson Will,* 387 Pa. 82, 126 A. 2d 740 (Pa. 1956). It is generally accepted, though, that a confidential relationship may be determined in one of two ways: 1) as a matter of law, where, for example, a fiduciary relationship exists, such as in the case of an attorney and client, guardian and ward or trustee and *cestui que trust*; or, 2) through an "intensely fact-specific" inquiry. *Basile vs. H&R Block, Inc.* 616 Pa. 212, 52 A. 3d 1202, 1210 (Pa. 2012); *Truver v. Kennedy,* 425 Pa. 294, 229 A. 2d 468 (Pa. 1967).

In *Frowen v. Blank,* 493 Pa. 137, 425 A. 2d 412, (Pa. 1981), the Supreme Court explained:

> The general test for determining the existence of such a relationship is whether it is clear that the parties did not deal on equal terms. . . . We have had occasion to describe a confidential relationship as follows:

> Confidential relation is not confined to any specific association of the parties; 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; in both an unfair advantage is possible.
>
> *Id.* at 145-146, 425 A. 2d at 416-417. (*citations omitted*).

In *Thompson Will,* 387 Pa. 82, 126 A. 2d 740 (Pa. 1956), the Supreme Court explained what is meant by the phrase, "weakness, dependence or trust, justifiably reposed." As explained by the Court:

> "Weakness, dependence or trust *justifiably reposed"* is not created merely by nursing and caring for an old sick lady; that language or yardstick refers to and requires a relationship which involves or includes managing or advising a dependent person in business or financial matters. . . . Such a relationship, *when established, if coupled with the proof that testatrix was of weakened intellect,* shifts the burden of proof to the confidential adviser to prove that the bequest was the free, voluntary and clearly understood act of the testatrix. . . .
>
> *Id.* at 99, 126 A. 2d at 749 (*emphasis* in original)(citations omitted).

Nearly two decades later, this same explanation was followed in *Scott Estate,* 455 Pa. 429, 316 A. 2d 883 (Pa. 1974), where the Supreme Court similarly avowed: "[p]hysical limitations imposed on a party to a transaction by disease and advancing age do not by themselves create a confidential relationship with another; *such limitations support an inference of confidentiality only insofar as they may bear on a party's capacity to understand the nature of the transaction in question.*" *Id.* at 433, 316 A. 2d 886 (*emphasis added*).

Neither party asserts that a confidential relationship exists between the Claimant and the Decedent as a matter of law. Hence, the inquiry here must be fact-specific.

FACTUAL INQUIRY

The Findings of Fact establish how and when the Claimant and Decedent initially met and how their relationship grew from being tax preparer and client to friends. Claimant first met the Decedent over 30 years ago when Claimant began preparing the Decedent's income tax returns. During these years, until the year 2001, Claimant generally saw the Decedent once annually to prepare Decedent's tax returns, and a couple of times in between, when the Decedent would come by the office to see Claimant to talk in general or to ask questions. "In Pennsylvania, accountant-client relationships have not been deemed to be per se confidential in the sense of generating attendant fiduciary duties." *Basile* at 226, 52 A. 2d 1211, (FN 7); *Drob v. Jaffe,* 351 Pa. 297, 300, 41 A. 2d 407, 408 (1945).

In 2001, while the Decedent was still employed with the Penn Hill School District as a teacher, the Decedent came to Claimant's office and was walking with a cane. Claimant learned from Decedent that she had been diagnosed with Parkinson's disease. During this visit, the Decedent, who was unmarried, had no children and lived alone, asked Claimant if she could help her to find someone to take her to see her mother, who was in Hospice. Claimant made several inquiries of individuals on Decedent's behalf, but everyone that she asked declined. Unsuccessful in finding anyone to assist the Decedent, Claimant ultimately agreed to do so. From that point forward, Claimant began driving Decedent to see her mother on a daily basis for more than a year. Throughout this time, the Claimant and Decedent became good friends.

As time went by, the Decedent's physical condition worsened to the point that Claimant eventually began helping Decedent at Decedent's home with her household

chores. Claimant took care of the Decedent's laundry for her and saw to it that Decedent's house was cleaned because Decedent could no longer do that herself. Claimant also arranged for improvements to be done at the Decedent's home so that it would be more accessible to someone with the Decedent's physical disabilities.

The Decedent retired from the School District in June of 2002. On Decedent's Application for Retirement dated May 6, 2002, the Decedent listed her mother, Helen Lapcevic, as principal beneficiary with distribution of 100%, and Intervenors as contingent beneficiaries with distribution of 50% respectively.

Approximately one month after the Decedent's retirement on June 11, 2002, the Decedent's mother, Helen Lapcevic, died on July 15, 2002. Claimant's general routine by this time was to go to Decedent's home in the evenings to tend to Decedent's needs. In August of 2002, Claimant also hired Nurse Howard to help the Decedent throughout the day. By the time Nurse Howard was hired by Claimant to help care for the Decedent, Claimant already had improvements made to the Decedent's home so that it was accessible to someone with the Decedent's physical disabilities. Decedent was still mobile, but was having more difficulty with walking.

Both Claimant and Nurse Howard offered testimony regarding the Decedent's routine in reviewing mail and other paperwork that was received by the Decedent. Nurse Howard testified that she generally arrived at Decedent's home around 10:00 a.m. and stayed with her until 4:30 p.m., making sure that the Decedent had her lunch and took her medicine. If the Decedent had a doctor's appointment, Nurse Howard and Claimant would take Decedent to her appointment. Nurse Howard testified that when she arrived in the mornings, she would bring in Decedent's mail and leave it on the desk for her. By

around 11:00 a.m. every day, Nurse Howard would then help Decedent to her desk, where the Decedent would sit, open her mail, go through her papers and make telephone calls, mainly to doctors to schedule her doctors' appointments. Both Claimant and Nurse Howard testified that whenever there was anything that Decedent wanted Claimant to see, she would put it on a pile for the Claimant to look at when she arrived. According to Nurse Howard, "[i]f there were sales that she was interested in, it would go in a pile for Mrs. Gallman. Whatever she wanted, like sale items, clothing or food items on sale or something, it would be in a pile. This is pretty much what she did every day." (N.T. 77)

It is undisputed that on August 2, 2002, PSERS received a new Nomination of Beneficiaries form from Decedent (the "August beneficiary form") that designated Claimant as Decedent's new principal beneficiary, with a distribution of 50% adjacent to Claimant's name, and Intervenors as Decedent's contingent beneficiaries, with a distribution of 25% adjacent to their respective names. With the exception of the Decedent's signature, date and social security number, all of the handwriting on Decedent's August beneficiary form was Claimant's handwriting. Claimant credibly testified that everything on Decedent's August beneficiary form that appears in Claimant's handwriting was written by Claimant at the direction of Decedent.[2]

It is further undisputed that by letter dated October 19, 2002, PSERS returned the August beneficiary form to the Decedent, advising her that the distribution percentages for each section, i.e., principal beneficiary(ies) and contingent beneficiary(ies), must total

[2] It is also undisputed that on March 6, 2003, the Decedent signed a Power of Attorney which named Claimant as her "Attorney- in-Fact" and which gave Claimant immediate and complete control over the Decedent's personal and financial affairs. The Power of Attorney was prepared by Attorney Zinford Mitchell, Claimant's nephew. Also, on March 6, 2003, the Decedent executed her Last Will and Testament which named Claimant the sole beneficiary of her entire estate. The Last Will and Testament was also prepared by Attorney Mitchell.

100 percent within each section. Claimant testified that the August beneficiary form was among the paperwork on Decedent's table that was waiting for her when she arrived at Decedent's home one evening. Claimant testified that she sat with Decedent at the table that evening and the Decedent instructed her that Section A has to be 100% and Section B has to be 100%. Using whiteout that the Decedent had among her papers, Claimant applied the whiteout to the form for the Decedent and changed "50" to "100" adjacent to her name in Section A, and "25" to "50" adjacent to the names, Karen E. Snizaski and Christine M. Vilsack in Section B, respectively. Decedent later advised Claimant that she mailed the form.

On October 29, 2002, PSERS received the Decedent's corrected beneficiary form ("the October beneficiary form") and, by letter dated December 27, 2002, informed Decedent that PSERS "received and processed [her] Nomination of Beneficiary Form (PSRS-187)."

Four months later, on March 6, 2003, the Decedent signed a Power of Attorney which named Claimant as her "Attorney- in-Fact" and which gave Claimant immediate and complete control over the Decedent's personal and financial affairs. On the same date the Decedent executed her Last Will and Testament which named Claimant the sole beneficiary of her entire estate.[3]

Intervenors argue that the foregoing facts establish that within three months of PSERS receiving and processing the October beneficiary form, the Decedent and Claimant were in a *per se* confidential relationship. Intervenors base this contention on the fact that the Decedent made Claimant her attorney-in-fact under the written Power of

[3] The Power of Attorney and Last Will and Testament was prepared by Attorney Mitchell, Claimant's nephew.

Attorney dated March 6, 2003, and, on the same date, executed a Last Will and Testament naming Claimant as her sole beneficiary.[4] Citing *Foster v. Schmitt,* 429 Pa. 102, 239 A. 2d 471 (Pa. 1968),[5] Intervenors argue that there is no clearer indicia of a confidential relationship than the giving by one person to another of a Power of Attorney.

Intervenors concede that the operative time period for ascertaining whether a confidential relationship existed between the Claimant and the Decedent was August 2002 and October 2002, when Decedent signed her Nomination of Beneficiary forms. *Pyewell's Estate,* 334 Pa. 154, 5 A. 2d 123 (Pa. 1939) (since the gifts of the property in question all occurred prior to the power of attorney, these facts could not establish a confidential relation at the time of the gifts). Nonetheless, Intervenors argue that while the *per se* confidential relationship occurred *after* the filing of the Decedent's October beneficiary form, it is strong evidence that a confidential relationship existed at the time the corrections to this form were made.[6]

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[4] Contrary to Intervenors' representation, the Decedent's October 2002 nomination of beneficiary form, i.e., her *inter vivos* gift to Claimant, predates the Power of Attorney by four (4) months. The August beneficiary form predated the Power of Attorney by six (6) months.

[5] The facts in *Foster* are largely distinguishable from the facts at issue here. In *Foster,* the decedent, who had a large sum of money in an account at the Western Savings Fund Society, executed a power of attorney over the account on *August 27, 1957* in favor of her close friend and companion for 47 years – Margaret Schmitt. On *March 10, 1961*, pursuant to this power of attorney, Schmitt withdrew the decedent's entire balance and re-deposited the money into a new account titled only in Schmitt's name. Meanwhile, in May of 1964, the decedent became hospitalized and began to make demands on Schmitt for the return of her money. The decedent's money remained in Schmitt's account until June 12, 1964, when it was withdrawn in cash by Schmitt. Decedent died on January 18, 1965. Following a trial in equity, the chancellor concluded that the decedent's executrix, niece, and sole beneficiary under the decedent's will was entitled to have a trust impressed upon the money that was found to have been misappropriated by Schmitt for her own use. The court concluded that there was no doubt that a confidential relationship existed between the decedent and Schmitt.

[6] However, these facts also support a different conclusion, i.e., that the Decedent was acting consistent with the decision she made four months earlier in naming the Claimant as the principal beneficiary of her retirement account. The fact that the Decedent had to physically initial every corrected spelling of her last name where the corrections appear in multiple locations on these two forms support the notion that she knew exactly what she was doing and that she was determined to finalize her affairs in the manner as instructed on these forms.

Intervenors add that Claimant befriended the Decedent by taking her to see her sick mother every day for over a year;[7] that Claimant performed additional duties for the Decedent; that using the Decedent's funds, the Claimant had the Decedent's home renovated so that it better suited her needs with Parkinson's disease; that Claimant cleaned the Decedent's house and did her laundry; and, that Claimant hired Nurse Howard to care for the Decedent. Intervenors further maintain that Nurse Howard testified that at the time she helped care for the Decedent, she and the Claimant were the only caregivers for the Decedent.

According to the Intervenors:

> The Claimant's own testimony establishes a clear timeline that makes it obvious when the relationship between the Claimant and the Decedent went from accountant-client to confidential. The Decedent completely relied on the Claimant to accomplish her daily tasks because her health was continually deteriorating. She permitted the Claimant to spend her money by hiring contractors to renovate her home and hiring an LPN to care for the Decedent. The Claimant made sure that the Decedent's basic daily needs were met including meals, medication, clothing, laundry and healthcare. It appears that the Decedent, due to her deteriorating physical condition, would not have been able to exist in her home for as long as she did without the assistance of the Claimant. The Decedent was completely dependent on the Claimant and the record clearly establishes that the Claimant and the Decedent were in a confidential relationship which started in 2001, and was well established in October of 2002. . . .
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> (Brief of Intervenors, p. 21)[8]

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[7] Intervenors gratuitously add that after driving the Decedent to see her mother every day, the Claimant would take the Decedent to dinner. However, the evidence does not support this claim. Claimant's testimony was that Claimant and Decedent's routine was to take the Decedent's mother to dinner every day. (N.T. 44)

[8] *Intervenors also rely extensively on facts not in evidence for their position that a confidential relationship existed between the Claimant and the Decedent in August and October 2002, when the Decedent executed her nomination of beneficiary forms.* For example, on pages 20 and 21 of Intervenors' brief, Intervenors recite the following facts – none of which are part of the evidentiary record that was created during the September 12, 2007 administrative hearing:

Claimant counters that Intervenors wrongly focus on Decedent's *physical disabilities* due to Parkinson's disease, and Claimant's kindness in helping her deal with such a massive physical disability, in an apparent effort to convince the fact-finder that evidence supports the existence of a confidential relationship. Claimant further counters that *none* of the facts relied upon by the Intervenors support the proposition that the Decedent suffered from intellectual weakness, or that Claimant exercised an overmastering influence upon the Decedent upon which it can be concluded that a confidential relationship existed at the time of the August 2002 and October 2002 beneficiary forms. To that end, Claimant argues that Nurse Howard's testimony supports two relevant facts: 1) although Decedent may have had an overwhelming physical

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> The Decedent's condition became even worse in 2004, and she was hospitalized. Dr. Ronald Stiller, Decedent's treating physician, testified that Decedent required an "emergency guardian" because she required life-saving surgery. Decedent had been admitted to the hospital with a gastrointestinal bleed, severe malnutrition, and possible intestinal perforation, and she was delirious, in renal failure and had mouth sores. At the same time, the Decedent, who suffered from depression, was evaluated by Kurt Ackerman, M.D. Dr. Ackerman's notes indicate that there were "allegations of possible neglect or abuse which warrant an independent guardian." On October 18, 2004, the Decedent was adjudicated an incapacitated person by the Court of Common Pleas of Allegheny County at Docket No. 5010 of 2004. As a result, the Allegheny County Court of Common Pleas appointed Dianne Spivak as guardian for the Decedent. It is noted that after the Decedent became sick she was moved to a personal care home. Claimant was barred from visiting the Decedent at the personal care home. . . . .
>
> The Claimant continued her confidential relationship until that relationship was terminated by the Orphan's Court Division of the Allegheny County Court of Common Pleas when they appointed a guardian for the Decedent. The Court of Common Pleas had to appoint a guardian for the decedent because her health had deteriorated to the point that she could no longer care for herself or make decisions. Additionally, it was alleged by medical professionals that the Claimant had neglected and/or abused the Decedent to the point that she required an appointed guardian and was moved to a personal care home.
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> (Brief of Intervenors, pgs. 20-21)

disability, she had no mental disability during the time period of the October beneficiary form because Decedent was reviewing her mail and handling her own affairs; and, 2) the important pieces of mail that the Decedent would put aside to discuss with Claimant consisted of sales brochures for food and clothing. (Brief on behalf of Claimant, p. 14)

The evidence is clear, as both parties contend, that Claimant assisted Decedent with daily household tasks and made sure that the Decedent's needs, including meals, medication, clothing, laundry and healthcare, were met. Claimant also hired contractors to make improvements to the Decedent's home to accommodate the Decedent's mounting physical disabilities associated with her disease. However, no evidence was offered by Intervenors to establish that the Decedent suffered from a weakened intellect at this time, or that the help that Claimant provided for the Decedent was not at the Decedent's behest. The record is devoid of evidence to establish that the Claimant was managing or advising the Decedent in business or financial matters at this time. The evidence does not establish that the Decedent was physically incapacitated, confined to bed or completely reliant on Claimant in August or October 2002 or any time thereafter for her life's necessities. To the contrary, the Decedent's daily routine in August and October 2002 was to sit at her desk, open her mail, go through her papers and make telephone calls for doctor's appointments. In addition, there is no evidence that the Decedent's August and October Nomination of Beneficiary forms were executed by the Decedent against her will.

As the Pennsylvania Supreme Court aptly observed in *Thomas Will,* 387 Pa. 82, 126 A. 2d 740 (Pa. 1956):

> "Weakness, dependence or trust *justifiably reposed*" is not created merely by nursing and caring for an old sick lady; that language or

> yardstick refers to and requires a relationship which involves or includes managing or advising a dependent person in business or financial matters. . . .
>
> *Id.* at 99, 126 A. 2d at 749.

Missing from the record is any testimony to establish what personal connections or familial relationships existed between the Decedent and the Intervenors. The only evidence that sheds light on this issue is the Decedent's Application for Retirement, which lists Intervenors as "friends." Intervenors, whose burden it is to prove the existence of a confidential relationship between the Claimant and the Decedent, offered no testimony or other evidence regarding their relationship with the Decedent. Intervenors offered no testimony or other evidence of their knowledge of any overmastering influence asserted by Claimant over the Decedent. Intervenors offered no testimony or other evidence regarding their personal knowledge of weakness, dependence or trust, justifiably reposed on the part of the Decedent. *Intervenors offered no testimony at all.*

The only evidence available from which to determine whether a confidential relationship existed between the Claimant and the Decedent when the Decedent executed her August and October 2002 beneficiary forms is the testimony of Claimant and Nurse Howard.[9] Both Claimant and Nurse Howard were credible witnesses and their testimony simply does not establish that such a relationship existed. Where undue influence and

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[9] The Hearing Officer recognizes that in the April 24, 2014 Memorandum Opinion authored by Judge McGinley in *Snizaski and Vilsack vs. Public School Employees' Retirement Board* (No. 1329 C.D. 2008), the Majority of the Commonwealth Court *has already opined:*

> This Court holds that sufficient evidence exists in the record from which a fact-finder could conclude that there was a 'confidential relationship' between Gallman [Claimant] and Decedent when Decedent signed the *August 2002 and October 2002 Nomination of Beneficiary Forms.*

However, it appears that the Commonwealth Court had information before it, relied upon by Intervenors here, that did not make its way into the evidentiary record of the September 12, 2007 administrative hearing.

incompetency do not appear, and the relation between the parties is not one ordinarily known as confidential in law, the evidence to sustain a confidential relation must be certain. *In re Estate of Scott,* 316 A. 2d 883, 886 (Pa. 1974).

Upon a careful examination of the facts and the law, the Hearing Officer finds that the evidence in this case fails to establish with any degree of certainty that a confidential relationship existed between the Claimant and the Decedent when the Decedent executed her August 2002 and October 2002 Nomination of Beneficiary forms.

By the time the Decedent's mother died on July 15, 2002, the Claimant had been caring for the Decedent and taking the Decedent to see her mother at Hospice for over a year. Throughout this time period and continuing after the Decedent's mother died, Claimant made sure that the Decedent's needs, including meals, medication, clothing, laundry and healthcare, were attended to daily. Claimant arranged for improvements to be done to the Decedent's home so that it was accessible to someone with the Decedent's physical disabilities. It is not unreasonable under these circumstances that the Decedent, who lived alone and had no children, would nominate Claimant as her principal beneficiary on her August 2002 and October 2002 Nomination of Beneficiary forms.

The record does not establish that the Decedent executed her August 2002 and October 2002 beneficiary forms against her will or as the result of overmastering influence exerted over her by the Claimant. There is no evidence that the Decedent suffered from a weakened at this time. The burden of proving the existence of a confidential relationship was/is on the Intervenors. Intervenors have failed in their burden to offer any testimony or other evidence on this issue.

For all of these reasons, it is recommended as follows:

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re:	:	
Account of Sandra N. Lapcevic (D)	:	
Claim of Willette Gallman	:	**Docket No. 2006-21**

RECOMMENDATION

AND NOW, this 18th day of May 2015, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer recommends that the Board find that the existing record fails to establish that a confidential relationship existed between the Claimant and the Decedent when the Decedent executed her August 2002 and October 2002 Nomination of Beneficiary forms.

Jackie Wiest Lutz
Chief Hearing Officer

Date of Mailing: May 18, 2015