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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JANE DOE,	)	Docket Number: X
	)	
Appellant,	)	PREHEARING SUBMISSION: FACTS AND
	)	ISSUES
vs.	)	
	)	
OFFICE OF PERSONNEL MANAGEMENT,	)	
	)	
Agency.	)	

THIS PREHEARING SUBMISSION is by: Appellant JANE DOE pursuant to Judge Kang's
October 4, 2011 ORDER AND NOTICE OF HEARING AND PREHEARING CONFERENCE.

I. STATEMENT OF FACTS

Appellant JANE DOE and Frederick Doe married in 1962 and were divorced in 1988. During their marriage, they jointly owned their homes and shared joint checking accounts.¹ At the time of their divorce, they each retained their own counsel, and on March 3, 1988, they signed an Agreed Final Decree of Divorce ("Divorce Decree").² This decree was submitted to the Office of Personnel Management shortly thereafter.³

¹ See Affidavit of Appellant Jane Doe.

² See Agreed Final Decree of Divorce.

³ See Affidavit of Appellant Jane Doe.

1 OPM's actions demonstrated that it was processed as a court order awarding a survivor annuity
2 to Appellant. After submitting the Divorce Decree to OPM, Appellant was not notified that it
3 was unacceptable for processing.⁴ OPM continued to pay Mr. Doe a reduced annuity in order to
4 provide a survivor benefit.

5 Despite OPM's acceptance of the Divorce Decree, in 2008 after Mr. Doe passed away, OPM
6 informed Appellant that the Divorce Decree was not a qualifying order for the purposes of
7 awarding a survivor annuity.⁵ In reaching this conclusion, OPM relied on regulations that were
8 not enacted until 1993—approximately five years after the Divorce Decree was issued.⁶ From
9 the date of submission of the Divorce Decree to OPM until the date of Mr. Doe's death,
10 Appellant had no knowledge that the Divorce Decree was deficient.⁷

11 Item 13 on pages 6 and 7 of the Divorce Decree includes terms dividing Mr. Doe's Civil Service
12 Retirement System (CSRS) benefit.⁸ The fourth paragraph awards to Appellant as alternate
13 payee:

14 "As part of the just and right division of the estate of the parties, Alternate Payee is
15 hereby awarded a portion of the sum which Participant, or Participant's designated
16 beneficiary or estate, is entitled to and is receiving from the Plan, by way of a return of
17 accumulated deposits (including interest as allowed thereon) or by way of any annuity
18 that has become payable as a result of Participant's participation in the Plan, such portion
19 being 40% percent of the total monthly payment. All payments to Alternate Payee under
20 this paragraph shall cease upon Alternate Payee's death."⁹

21 The agreement states, and the intention of all parties was, that Appellant would receive a CSRS
22 benefit until her death.¹⁰ Appellant always believed that she would receive a survivor benefit for
23 her life, and she had no knowledge that the Divorce Decree was deficient in that manner.¹¹ As
24 the Divorce Decree shows, Mr. Doe and Appellant each took certain property from the

25 ⁴ See Affidavit of Appellant Jane Doe.

26 ⁵ See OPM Final Decision, August 23, 2011.

27 ⁶ *Id.*

28 ⁷ See Affidavit of Appellant Jane Doe.

⁸ See Agreed Final Decree of Divorce.

⁹ *Id.*

¹⁰ See Agreed Final Decree of Divorce; see also Affidavit of Appellant Jane Doe.

¹¹ See Affidavit of Appellant Jane Doe.

1 marriage.¹² Appellant gave up her rights to their jointly owned home and other property in
2 exchange for the CSRS pension.¹³

3 Appellant was not the only one who believed that the intention of the parties was to provide her
4 with a survivor annuity lasting until her death. A few months after the divorce was finalized, her
5 attorney for the divorce proceeding, Mr. Attorney, sent a letter on her behalf detailing what Ms.
6 Doe was to receive from the Divorce Decree.¹⁴ Mr. Attorney negotiated with Mr. Doe's attorney
7 and Mr. Attorney had intimate knowledge about all parties' intentions.¹⁵ In his November 13,
8 1987 letter, Mr. Attorney states that Ms. Doe will receive "monthly income from her ex-
9 husband's retirement plan *for the rest of her life*."¹⁶

10 Furthermore, Appellant's post-divorce attorney, Mr. Attorney, sent a letter to OPM on February
11 22, 1990 requesting confirmation of several benefits awarded to Ms. Doe in her divorce,
12 including her entitlement to "Receive 40% of his [Frederick Doe's] gross monthly retirement
13 benefits directly from OPM beginning January 1, 1991 *for as long as she lives*."¹⁷ It references
14 page 6, item #4 of the Divorce Decree, as quoted above.¹⁸

15 After Appellant's CSRS pension stopped, she was forced to move into a 500-square-foot low-
16 income rental apartment.¹⁹ Ms. Doe believes that after 25 years of marriage, 22 of which were
17 during Mr. Doe's service with the IRS, Mr. Doe would never have intended for the pension
18 benefit to stop before her death, or for her to have to live where she now resides.²⁰

19 II. STATEMENT OF ISSUES

20 Discussion

21 The appellant bears the burden of proving entitlement, by a preponderance of the evidence, to a
22 survivor annuity under CSRS. *Cheeseman v. Office of Personnel Management*, 791 F.2d 138,
23 140-141 (Fed. Cir. 1986). A preponderance of the evidence is that degree of relevant evidence

24 ¹² See Agreed Final Decree of Divorce.

25 ¹³ *Id.*

26 ¹⁴ See Letter dated November 13, 1987.

27 ¹⁵ *Id.*

28 ¹⁶ *Id.*

¹⁷ See Letter dated February 22, 1990.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

1 that a reasonable person, considering the record as a whole, would accept as sufficient to find
2 that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

3 The divorced spouse of a retired federal employee is entitled to a survivor annuity if the
4 employee has elected a survivor annuity or a survivor annuity has been provided for in a divorce
5 decree or a court order or court-approved property settlement agreement issued in connection
6 with the decree. 5 U.S.C. §§ 8339(j)(3), 8341(h).

7 Introduction

8 In determining that Appellant's Divorce Decree was not a qualifying order for the purposes of
9 awarding a survivor annuity, the Office of Personnel Management ("OPM") erroneously relied
10 on provisions that were not added to the regulations until 1993—approximately five years after
11 the Divorce Decree was issued.²¹ The 1993 regulations are not retroactive.²² Prior to the 1993
12 amendments, court orders submitted to OPM were subject to less stringent qualification
13 requirements. Under the pre-1993 regulations, the Divorce Decree is a qualifying court order.

14 In the interest of justice, Appellant respectfully requests that this Court qualify the survivor
15 annuity provision of the Divorce Decree pursuant to the pre-1993 regulations and direct that
16 OPM pay Appellant forty percent of the survivor annuity pursuant to 5 U.S.C. § 8341(h).

17 Furthermore, Appellant is entitled to the survivor annuity independent of any divorce decree
18 pursuant to 5 U.S.C. §§ 8339(j)(3) because OPM failed to notify Mr. Doe of a post-divorce
19 election and Mr. Doe intended to award Appellant the survivor annuity. Appellant respectfully
20 requests that this Court direct that OPM pay Appellant forty percent of the survivor annuity
21 pursuant to 5 U.S.C. §§ 8339(j)(3).

22 I. Appellant Is Entitled To Forty Percent of the Survivor Annuity Pursuant To 5 U.S.C. 23 § 8341(h)

24 The Divorce Decree is sufficient for the purpose of awarding a survivor annuity under the
25 regulations in effect when OPM received the Divorce Decree. 5 U.S.C. § 8341(h), 5 C.F.R. §§
26 838.1001-838.1018.

27
28 ²¹ See OPM Final Decision, August 23, 2011.

²² See 5 C.F.R. § 838.101(c).

1
2 a. The 1993 Regulations Are Not Retroactive

3 OPM erred in determining that the Divorce Decree was not a qualifying order for the purposes of
4 awarding a survivor annuity because OPM erroneously applied post-1993 regulations.²³ The
5 1993 regulations are not retroactive.²⁴ OPM determined that the Divorce Decree was not
6 acceptable for processing as a survivor annuity because it did not include the additional language
7 required by the 1993 amendments.²⁵ *Id.*

8 The regulations specify which provisions apply retroactively and which apply prospectively.²⁶
9 Certain provisions apply only to court orders received by OPM on or after January 1, 1993,
10 because these provisions were not added to the regulations until 1993.²⁷ For court orders
11 received by OPM before January 1, 1993, the rules of Subpart J, 5 C.F.R. §§ 838.1001-838.1018,
12 apply. *See* 5 C.F.R. § 838.101(c) ((1) Subparts A through I of this part apply only to court orders
13 received by OPM on or after January 1, 1993; (2) Subpart J of this part applies only to court
14 orders received by OPM before January 1, 1993).

15 In *Perry v. Office of Personnel Management*, 243 F.3d 1337 (2001), the court overturned OPM's
16 determination that the language of a divorce decree was insufficient to award a survivor annuity
17 because OPM had erroneously applied post-1993 regulations to a 1988 divorce decree.
18 Qualifying the divorce decree as sufficient under the pre-1993 regulations, the court stated that
19 "[w]hen the Florida court entered the divorce decree in 1986, it had no reason to anticipate that
20 seven years later OPM would impose a new requirement without which the court's language
21 would be unacceptable." *Id.* at 1343.

22
23 ²³ *See* OPM Final Decision, August 23, 2011.

24 ²⁴ *See* 5 C.F.R. § 838.101(c).

25 ²⁵ OPM erroneously cited to 5 C.F.R. §§ 838.201-838.933 as the regulatory basis for the court order. These
26 provisions provide that any court order labeled as a "qualified domestic relation order" is not a court order
27 acceptable for processing and that "a court order that provides that the former spouse's portion of the employee
28 annuity shall continue after the death of the employee or retiree," by using language such as "will continue to
receive benefits after the death of" the employee, that the former spouse "will continue to receive benefits for his (or
her) lifetime" or "that benefits will continue after the death of" the employee, but does not use terms such as
"survivor annuity," "death benefits," "former spouse annuity," or similar terms is not a court order acceptable for
processing." 5 C.F.R. §§ 838.803, 838.804, 838.911, and 838.912. *See* OPM Final Decision, August 23, 2011.

²⁶ *See* 5 C.F.R. § 838.102(a)(6).

²⁷ *See* 57 Fed. Reg. 33,570, 33,580 (July 29, 1992).

1 Similarly in this case, OPM erred when it retroactively applied post-1993 regulations to
2 Appellant's 1988 Divorce Decree. The Divorce Decree, dated March 3, 1988, was submitted to
3 OPM prior to 1993. Before 1993, specific language was not required to make a divorce decree
4 acceptable for processing and, likewise, certain language did not make a divorce decree
5 deficient.²⁸ Common sense dictates that a benefit that should continue until "Alternate Payee's
6 death" means a survivor annuity. Neither the Texas divorce court nor the parties involved (their
7 attorneys) had reason to anticipate that five years later OPM would impose new requirements on
8 divorce decrees. Pursuant to OPM's own regulations, the Divorce Decree should have been
9 analyzed under the less stringent pre-1993 regulations in effect when the Divorce Decree was
submitted.²⁹

10 b. The Divorce Decree Is a Qualifying Court Order Under the Pre-1993 Regulations

11 Prior to the 1993 amendments, court orders submitted to OPM were subject to less stringent
12 qualification requirements. Pursuant to 5 CFR § 838.1004, the pre-1993 regulation describing
13 "qualifying court orders" stated that

14 (a) A former spouse is entitled to a portion of an employee's retirement benefits only to
15 the extent that the division of retirement benefits is expressly provided for by the court
16 order. The court order must divide employee retirement benefits, award a payment from
17 employee retirement benefits, or award a former spouse annuity.

18 (b) The court order must state the former spouse's share as a fixed amount, a percentage
19 or a fraction of the annuity, or by a formula that does not contain any variables whose
value is not readily ascertainable from the face of the order or normal OPM files.

20 (c)(1) For purposes of payments from employee retirement benefits, OPM will review
21 court orders as a whole to determine whether the language of the order shows an intent by
22 the court that the former spouse should receive a portion of the employee's retirement
benefits directly from the United States.

23 Orders that direct or imply that OPM is to make payment of a portion of employee
24 retirement benefits, or are neutral about the source of payment, will be honored unless the
retiree can demonstrate that the order is invalid in accordance with §838.1009.

25 5 CFR § 838.1004 (emphasis added); *see also Perry v. Office of Personnel Management*, 243
26 F.3d 1337 at 1343.

27
28 ²⁸ See 5 C.F.R. § 838.102(a)(6); *see also* 57 Fed. Reg. 33,570, 33,580 (July 29, 1992).

²⁹ See §5 C.F.R. § 838.102(a)(6).

1 Pursuant to the pre-1993 regulations, a divorce decree is a qualifying order for the purpose of
2 awarding a survivor annuity where it (1) expressly provides for a survivor annuity and (2) the
3 circumstances surrounding the divorce decree objectively show an intent by the court to award a
4 survivor annuity. 5 C.F.R. § 838.1004.

5 The statute requires that the right to a survivor annuity be “expressly provided for” in the court
6 order; however, “magic words” are not required and the “expressly provided for” requirement is
7 satisfied if the divorce decree “contains a clause which could fairly be read as awarding a CSRS
8 survivor annuity.” *Fox v. Office of Personnel Management*, 100 F.3d 141, 145-6 (Fed.Cir.
9 1996)(emphasis added).

10 *Ingle v. Office of Personnel Management*, 102 M.S.P.R. 202 (2006) held that a consent order
11 provision stating “[t]he husband shall designate the wife, Sharon Ingle, irrevocably as entitled to
12 the former wife’s annuity as provided for in the retirement plan” was sufficient to award a former
13 spouse a survivor annuity. The Board found that the language was sufficient because it specified
14 that the former spouse was the beneficiary of a “former wife’s annuity.” *Id.* This case is similar
15 in that a divorce decree that designates a portion of a benefit to be awarded to a beneficiary
16 demonstrates an intent to provide for a former spouse beyond the death of the employee in the
17 form of a survivor annuity.

18 *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651 (1991), held that a clause stating
19 “Husband agrees to maintain all rights and benefits to which Wife is entitled and may realize in
20 connection with his retirement and pension package” clearly and unambiguously referred to the
21 husband’s decision to provide a survivor annuity, despite lack of the phrase “survivor annuity.”
22 Presently, in our case, the Divorce Decree awards Appellant a portion of “any annuity payable as
23 a result of Participant’s participation in the plan” and any benefit that his “designated beneficiary
24 or estate is entitled to.”³⁰ This case is similar in that it acknowledges the award of certain rights
25 and benefits for the life of the former spouse.

26 A court order is ambiguous to the extent that its terms are susceptible to more than one
27 reasonable interpretation. *Dodd v. Office of Personnel Management*, 108 M.S.P.R. 96 (2008).

28

³⁰ See Agreed Final Decree of Divorce.

Appellant's Divorce Decree contains two statements that unambiguously refer to a CSRS survivor annuity.

First, the Divorce Decree states that "[a]ll payments to Alternate Payee shall cease upon Alternate Payee's death."³¹ The Divorce Decree is clear in stating that the payments to Appellant end upon Appellant's death, and Appellant's death only. No other individual's death is referenced in the provision. The language is not ambiguous because there is only one possible meaning for the term. The Divorce Decree does not reveal any inconsistency regarding the life upon which the payments are based. If the parties had intended the benefits to terminate upon another individual's death, the Divorce Decree would have referenced Mr. Doe's death. "If the order had intended that result, it would have said so directly." *Davenport v. Office of Personnel Management*, 62 F.3d 1384, 1387 (1995). Because there is only one possible meaning for the term, the Divorce Decree satisfies the "expressly provided for" provision in 5 U.S.C. §8341(h)(1).³²

Second, the Divorce Decree states that "[Appellant] is hereby awarded a portion of the sum which Participant, or Participant's designated beneficiary or estate is entitled to."³³ The term "estate" refers to the property that one leaves after death.³⁴ By referencing Mr. Doe's "designated beneficiary or estate," the Divorce Decree unambiguously references Mr. Doe's death and acknowledges that his estate will continue to receive a benefit beyond his death. The Divorce Decree could not be referencing only a life annuity since a life annuity ends upon the death of the employee. The only possible interpretation is that Appellant is awarded a survivor annuity because a survivor annuity is the only CSRS annuity that a former spouse is entitled to beyond the life of the employee.

Statements referencing a life interest in a retirement benefit appear on the face of the Divorce Decree. To satisfy her burden, Appellant need not prove that these statements award a survivor annuity beyond a reasonable doubt or any higher evidentiary standard. Instead, to satisfy the evidentiary burden, Appellant need only show that by a preponderance of the evidence, the

³¹ *Id.*

³² See *Fox v. Office of Personnel Management*, 100 F.3d 141, at 146 ("If such evidence dictates only one possible meaning for such a term, then it is legal error to conclude that the document has not expressly provided for the award of a survivor annuity.")

³³ See Agreed Final Decree of Divorce.

³⁴ See Black's Law Dictionary (9th ed. 2009), estate.

1 statements “could fairly be read” as awarding a survivor annuity. *Fox v. Office of Personnel*
2 *Management*, 100 F.3d 141, 145-6 (Fed.Cir. 1996). Because statements that “could fairly” be
3 read as awarding a survivor annuity appear on the *face of* the Divorce Decree pleading,
4 Appellant has satisfied her burden. Thus, the “expressly provided for” requirement of 5 CFR §
5 838.1004 is met.

6 Divorce decrees governed by pre-1993 regulations must be analyzed in light of the intent of the
7 court and former spouse. 5 C.F.R. § 838.1004. The circumstances surrounding the drafting of a
8 divorce decree order are relevant to interpretation of the parties' intent. *Davenport v. Office of*
9 *Personnel Management*, 62 F.3d 1384 (1995). And when a divorce decree “contains a clause
10 which could fairly be read as awarding a CSRS survivor annuity, the judge must examine any
11 evidence introduced concerning the marriage parties’ intent and the circumstances surrounding
12 the execution of the document” and “[i]f such evidence dictates only one possible meaning for
13 such a term, then it is legal error to conclude that the document has not expressly provided for
14 the award of a survivor annuity.” *Fox v. Office of Personnel Management*, 100 F.3d 141, at 146.

15 The Divorce Decree states that Appellant should continue to receive benefits until her death and
16 the circumstances surrounding the Divorce Decree show a clear intent on behalf of all parties to
17 award Appellant a survivor annuity.

18 The court should look only to the evidence of the parties’ intent and the circumstances
19 surrounding the execution of the Divorce Decree. *Fox v. Office of Personnel Management*, 100
20 F.3d 141, (Fed.Cir. 1996), *Davenport v. Office of Personnel Management*, 62 F.3d 1384 (1995).
21 Thus, the Affidavit and Position Statement of Sarah Smith submitted by Intervenor’s Attorney is
22 immaterial because Sarah Smith was a not a party to the Divorce Decree and did not marry Mr.
23 Doe until 1993.³⁵ Thus, whether or not Mr. Doe intended to provide Sarah Smith with the
24 remainder of the survivor annuity is not relevant. Moreover, even if Mr. Doe had intended to
25 provide Sarah Smith with the maximum survivor benefit, such an election would be void to the
26 extent that it conflicts with the Divorce Decree.³⁶

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28 ³⁵ See Position Statement of Sarah Smith; see also Affidavit of Sarah Smith.

³⁶ See 5 C.F.R. § 831.611 (qualifying court orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to comply with the court order and §831.614).

1 The circumstances surrounding the drafting of this Divorce Decree objectively support the award
2 of a survivor annuity to Appellant:

3 i. Property Settlement

4 In *Fox v. Office of Personnel Management*, 100 F.3d 141, 144 (Fed.Cir. 1996), the court
5 recognized that the fact that the former spouse waived certain rights, including claims to
6 continuous spousal support or alimony, was a “further indication” that the divorce decree
7 referred to a survivor annuity “since it was intended to provide the sole means of support (if
8 there was to be any) for her.”

9 Similarly, Appellant understood that she would receive a survivor benefit for her life and she
10 waived certain rights to spousal support or alimony at the time of divorce. See Affidavit of
11 JANE DOE. Until Mr. Doe’s death, Appellant had no knowledge that the Divorce Decree was
12 deficient. *Id.* As the Divorce Decree shows, Appellant and Mr. Doe each took certain property
13 from the marriage. Appellant gave up her rights to their jointly owned home and other property.
14 In exchange for these concessions, Appellant expected lifetime income from her husband’s
15 CSRS pension. *Id.* Had she known the CSRS annuity was going to cease upon Mr. Doe’s death,
16 she likely would have demanded additional property, spousal support, or alimony at the time of
17 the divorce. *Id.*

18 ii. Restoration of Annuity

19 Courts have held that “an employee’s continued acceptance of a reduced annuity following
20 divorce, standing alone, adequately demonstrated that employee’s intent to provide a survivor
21 annuity for the former spouse.” *Wood v. Office of Personnel Management*, 241 F.3d 1364, 1368
22 (Fed.Cir.2001); see also *Hairston v. Office of Personnel Management*, 318 F.3d 1127, 1130
23 (Fed.Cir.2003) (“Evidence that the employee, upon retirement, elected to provide a spousal
24 annuity, and after divorce declined to restore benefit payments or did not object to the continued
25 discounted payment consistent with the election of a spousal annuity is sufficient to prove the
26 employee intended to provide a former spouse survivor annuity”); *Vallee v. Office of Personnel*
27 *Management*, 58 F.3d 613, 616 (Fed.Cir.1995); and *Brush v. Office of Personnel Management*,
28 982 F.2d 1554, 1559 (Fed.Cir.1992).

1 At the time of divorce, Mr. Doe elected that Appellant receive a survivor annuity. After the
2 Divorce Decree was filed, he did not object to the reduced payments nor did he elect to restore
3 the full annuity payment he would have received had he not elected to have a survivor annuity.
4 Instead, Mr. Doe chose to continue receiving reduced payments after the divorce, demonstrating
5 an intent to provide Appellant with a survivor annuity pursuant to the Divorce Decree.

6 OPM's actions demonstrate that it had processed the Divorce Decree to award a survivor annuity
7 to Appellant. If OPM had processed the Divorce Decree with only a life annuity to Appellant, it
8 would have restored Mr. Doe's annuity to the non-reduced amount pursuant to its OPM's own
9 regulations.³⁷ After processing the Divorce Decree, OPM continued to pay Mr. Doe the reduced
10 annuity.

11 iii. Appellant's Divorce Attorney

12 Appellant was assured by her divorce attorney, Mr. Attorney, that she would receive a survivor
13 benefit. On November 13, 1987, Mr. Attorney sent a letter to Appellant assuring Appellant that
14 she was to receive "monthly income from her ex-husband's retirement plan *for the rest of her*
15 *life.*"³⁸ As her attorney for the divorce proceedings and the one who negotiated with Mr. Doe's
16 attorney, Mr. Attorney had intimate knowledge about all parties' intentions. Mr. Attorney's
17 letter shows that all parties intended that Ms. Doe would receive a survivor benefit for the rest of
18 her life.

19 iv. Appellant's Post-divorce Attorney

20 Another attorney, Mr. Attorney, sent OPM a letter on February 22, 1990, requesting
21 confirmation of several benefits awarded to Ms. Doe in her divorce, including the entitlement to
22 "Receive 40% of his [Frederick Doe's] gross monthly retirement benefits directly from OPM
23 beginning January 1, 1991 *for as long as she lives,*" and it references page 6, item #4 of the
24

25
26 ³⁷ See 5 U.S.C. § 8339(j)(5)(A) ("Any reduction in an annuity for the purpose of providing a survivor annuity for the
27 current spouse of a retired employee or Member shall be terminated for each full month—(i) after the death of the
28 spouse or (ii) after the dissolution of the spouse's marriage to the employee or Member, except that an appropriate
reduction shall be made thereafter if the spouse is entitled, as a former spouse, to a survivor annuity under section
8341(h) of this title").

³⁸ See Letter dated November 13, 1987.

1 Divorce Decree.³⁹ Again, this is evidence of the fact that Ms. Doe and all parties to the divorce
2 proceeding believed that she was to receive a survivor annuity from OPM.

3 In summary, the Divorce Decree is a qualifying order for the purpose of awarding a survivor
4 annuity because it expressly provides for a survivor annuity, and the circumstances surrounding
5 the Divorce Decree objectively show an intent by the court and the parties to award a survivor
6 annuity to Appellant.

7 Because the Position Statement of Sarah Smith submitted by Intervenor's Attorney erroneously
8 applies and relies upon post-1993 regulations and case law interpreting post-1993 regulations, it
9 is immaterial.⁴⁰

10 c. OPM Is Estopped From Denying Appellant the Survivor Annuity Because OPM's
11 Action Demonstrated that OPM Accepted and Processed the Divorce Decree

12
13 The Divorce Decree satisfies the pre-1993 regulations but assuming, *in arguendo*, that it was
14 deficient under the pre-1993 regulations, OPM would be estopped from denying the survivor
15 annuity award because (1) OPM failed to notify Appellant that the survivor annuity provision of
16 the Divorce Decree was not acceptable for processing and (2) OPM continued to pay the reduced
17 annuity to Mr. Doe after processing the Divorce Decree.

18 Upon receipt of a court order not acceptable for processing, OPM is obligated to inform the
19 former spouse that OPM cannot approve the application pursuant to 5 C.F.R. § 838.424. OPM
20 failed to provide Appellant with notification that the survivor annuity clause in the Divorce
21 Decree was not acceptable for processing.⁴¹ From the date the Divorce Decree was submitted to
22 OPM until the date of Mr. Doe's death, Appellant had no knowledge that the Divorce Decree
23 was deficient.⁴² OPM waited more than 16 years to inform Appellant that the court order was
24 not acceptable for processing.⁴³ By failing to notify Appellant that the Divorce Decree was
25 insufficient, OPM demonstrated that it had accepted the Divorce Decree as acceptable for
26 processing and OPM is now estopped from denying Appellant the survivor annuity award.

27 ³⁹ See Letter dated February 22, 1990.

⁴⁰ See Position Statement of Sarah Smith.

⁴¹ See Affidavit of Appellant Jane Doe.

⁴² *Id.*

⁴³ See OPM Final Decision, August 23, 2011.

1 Additionally, OPM failed to comply with 5 U.S.C. § 8339(j)(5)(A) when it continued to pay Mr.
2 Doe's annuity at a reduced rate reflecting survivor annuity coverage after having received a
3 Divorce Decree that did not award a survivor annuity.⁴⁴ If OPM had processed the Divorce
4 Decree with only a life annuity to Appellant, it would have restored Mr. Doe's annuity to the
5 non-reduced amount pursuant to its OPM's own regulations.⁴⁵

6 OPM's actions upon receipt of the Divorce Decree objectively demonstrate that it accepted and
7 processed the Divorce Decree as a qualifying order awarding a survivor annuity pursuant to pre-
8 1993 regulations, thus OPM is estopped from denying Appellant the survivor annuity.

9 II. The Agency Has Authority to Pay Forty Percent of the Survivor Annuity to
10 Appellant

11 Although a spousal survivor annuity normally goes only to a single surviving spouse, OPM may
12 pay CSRS survivor annuities to an employee's spouse at the time of death and all former spouses
13 if the sum of the CSRS survivor annuities do not exceed fifty-five percent of the single-life
14 annuity to which the annuitant was entitled. See 5 U.S.C. § 8341(h)(2), 5 U.S.C. 8339(j)(2), 5
15 C.F.R. § 838.134 (receipt of multiple court orders allows two or more former spouses to receive
16 benefits).

17 In *Davis v. Office of Personnel Management*, 112 M.S.P.R. 543 (2009), a former spouse was
18 awarded thirty-five percent of the maximum possible survivor annuity pursuant to a divorce
19 decree despite the employee's election of a maximum survivor annuity for his current spouse.
20 The current spouse received the remaining portion of the survivor annuity. *Id.* In *Davenport v.*
21 *Office of Personnel Management*, 62 F.3d 1384 (1995), the court awarded a portion of a survivor
22 annuity to a former spouse pursuant to a divorce decree despite the fact that a spousal survivor
23 annuity normally goes to only a single surviving spouse.

24 As stated in the regulations and applied in the cases above, Appellant is entitled to the portion of
25 the survivor annuity awarded in the Divorce Decree, with the remaining portion to be paid to

26 ⁴⁴ See 5 U.S.C. § 8339(j)(5)(A) ("Any reduction in an annuity for the purpose of providing a survivor annuity for the
27 current spouse of a retired employee or Member shall be terminated for each full month—(i) after the death of the
28 spouse or (ii) after the dissolution of the spouse's marriage to the employee or Member, except that an appropriate
reduction shall be made thereafter if the spouse is entitled, as a former spouse, to a survivor annuity under section
8341(h) of this title").

⁴⁵ See 5 U.S.C. § 8339(j)(5)(A).

1 Sarah Smith. The Divorce Decree entitles Appellant to “40% of the total monthly payment” of
2 “any annuity that has become payable as a result of Participant’s participation in the Plan” with
3 all payments to “cease upon Alternate Payee’s death.”⁴⁶ Until Appellant’s death, Appellant is
4 entitled to forty percent of any payment that Mr. Doe’s designated beneficiary or estate is
5 receiving. Mr. Doe’s designated beneficiary or estate currently receives a survivor annuity.
6 Thus, Appellant is entitled to forty percent of the survivor annuity that Ms. Smith is currently
7 receiving. Pursuant to the Divorce Decree, this payment shall not cease until Appellant’s death.

8 III. Appellant Is Entitled to the Survivor Annuity Because the Agency Failed to Meet
9 Its Notification Requirements and Mr. Doe Intended to Provide a Survivor
10 Annuity to Appellant

11 The divorced spouse of a retired federal employee is also entitled to a survivor annuity
12 independent of any divorce decree if the employee has elected a survivor annuity under 5 U.S.C.
13 §§ 8339(j)(3). However, when a participant does not make such an election, then the survivor
14 annuity is awarded to the former spouse when the OPM failed to notify the participant of the
15 post-divorce election and there is evidence sufficient to show that the retiree intended to provide
16 a survivor annuity for former spouse.⁴⁷

17 In this case, OPM failed to notify Mr. Doe of a post-divorce election and Mr. Doe intended to
18 provide a survivor annuity for Appellant, thus, Appellant is entitled to a survivor annuity. 5
19 U.S.C. § 8339(j)(3).

20 Although Mr. Doe elected a survivor annuity for his wife at the time of his retirement and before
21 the divorce, the pre-divorce election does not provide Appellant with a survivor annuity
22 following the divorce, and Appellant is not asserting that it does.⁴⁸ See 5 U.S.C. § 8339(j).
23 Instead, Appellant is asserting that a survivor annuity is payable because OPM failed to provide
24 notice to Mr. Doe, and Appellant has demonstrated that Mr. Doe intended to provide a survivor
25 annuity to Appellant.

26 ⁴⁶ See Agreed Final Decree of Divorce.

27 ⁴⁷ See *Hernandez v. Office of Personnel Management*, 450 F.3d 1332.

28 ⁴⁸ If Mr. Sleet had made an election to provide Appellant with a survivor benefit post-divorce during the two year
window, such an election would be void to the extent that it conflicts with a qualifying court order. See 5 C.F.R.
§ 831.612.

1 Within two years after the date on which the marriage of the former spouse to the employee or
2 member is dissolved, an employee has the option of making an election to provide a survivor
3 annuity for a former spouse. 5 U.S.C. § 8339(j)(2). OPM has an obligation to provide notice to
4 the employee “stat[ing] that a pre-divorce election automatically terminates upon divorce and
5 that an annuitant must make a new election to provide a survivor annuity for a former spouse.”
6 *Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1365 (fed.Cir.2003).

7 However, in *Hernandez v. Office of Personnel Management*, 450 F.3d 1332, the court held that
8 when a participant does not make an election for survivor annuity for participant, then the
9 survivor annuity can be payable if: (1) the annuitant did not receive required notice; and (2) there
10 is evidence sufficient to show that retiree intended to provide a survivor annuity for former
11 spouse.

12 A. Appellant Is Entitled to the Survivor Annuity Because the Agency Failed to
13 Notify Mr. Doe of the Survivor Annuity Election

14 When attempting to prove that it provided statutorily mandated notice of election rights to
15 retirees, OPM must show that notice was actually sent, and such evidence must be more than
16 bare allegation that notice was sent. OPM must offer proof as to the contents of annual notices
17 pursuant to 5 U.S.C.A. § 8339(j), (k)(2). *Brush v. Office of Personnel Managment*, 982 F.2d
18 1554, 1560-61 (Fed. Cir. 1992).⁴⁹

19 Despite the fact that “OPM presumably has access to the pertinent records, as well as to the
20 people who deal with those records,” OPM has failed to provide Appellant with information
21 pertaining to whether notices were sent to Mr. Doe. Appellant requested this information in a
22 letter⁵⁰ a request for discovery,⁵¹ a Freedom of Information Act request,⁵² a Freedom of
23
24
25

26 ⁴⁹ “The onus is, as it must be in a case such as this, upon OPM to show that notice was sent. When a nonfrivolous
27 allegation is made that OPM has not sent the mandatory notice as required by statute, the burden of going forward
(or the burden of production) falls to OPM.” *Id.*

28 ⁵⁰ See Western States Pension Assistance Project Request for Records dated February 23, 2009, Exhibit A.

⁵¹ See Appellant’s Request for Discovery dated June 8, 2009, Exhibit B.

⁵² See Freedom of Information Act Request dated November 9, 2009, Exhibit C.

1 Information Act appeal,⁵³ and a subsequent request for discovery.⁵⁴ OPM has failed to provide
2 any notices.⁵⁵

3 Because the ultimate burden is on OPM to show that the notice was actually sent and OPM has
4 failed to meet that burden, Appellant has shown that OPM did not notify Mr. Doe of his election
5 rights.

6 B. Appellant Is Entitled to the Survivor Annuity Because Mr. Doe Intended to
7 Provide a Survivor Annuity for Appellant

8 When a retiree is not notified of the survivor annuity election and the former spouse can show
9 that the retiree intended to make the survivor annuity election, the court can direct the award of
10 survivor annuity to the former spouse. *See Warren v. Office of Personnel Management*, 407 F.3d
11 1309 (2005); *Hairston v. Office of Personnel Management*, 318 F.3d 1127, 1130 (Fed.Cir.2003);
12 *Wood v. Office of Personnel Management*, 241 F.3d 1364, 1368 (Fed.Cir.2001); *Vallee v. Office*
13 *of Personnel Management*, 58 F.3d 613, 616 (Fed.Cir.1995); and *Brush v. Office of Personnel*
14 *Management*, 982 F.2d 1554, 1559 (Fed.Cir.1992).

15 Appellant has established that Mr. Doe intended to provide her with a survivor annuity in the
16 preceding section by way of Appellant's waiver of spousal rights and alimony in the property
17 settlement, Mr. Doe's decision to maintain a reduced annuity, statements made by Appellant's
18 divorce attorney, and statements made by Appellant's post-divorce attorney. Thus, Appellant
19 should be awarded a survivor annuity pursuant to 5 U.S.C.A. § 8339(j), (k)(2).

20 Conclusion

21 Appellant has met her burden of proving entitlement, by a preponderance of the evidence, to a
22 survivor annuity under CSRS pursuant to 5 U.S.C. §§ 8339(j)(3) and 8341(h). Thus, Appellant
23

24
25 ⁵³ See Freedom of Information Act Appeal dated December 11, 2009, Exhibit D.

26 ⁵⁴ See Appellant First Discovery Request dated October 4, 2011.

27 ⁵⁵ See Agency Response to Appellant's First Discovery, Exhibit E; *see also* OPM's response to Freedom of
28 Information Act dated November 19, 2009, Exhibit F; *see also* Response to Freedom of Information Act appeal
dated April 19, 2010, Exhibit G; *see also* Response to Appellant's Request for Discovery dated October 6, 2011,
Exhibit H (States that "[a]ll pertinent documents pertaining to this case were enclosed with OPM's response dated
September 28, 2011." OPM's response dated September 28, 2011, does not contain any 5 U.S.C. § 8339(j), (k)(2)
notices).

1 respectfully requests that this court direct OPM to pay Appellant the portion of the survivor
2 annuity.

3 Dated this 19th day of October 2011

4
5 JUSTIN FREEBORN
6 Representative of Appellant
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Western States Pension Assistance Project
Senior Legal Hotline
Justin Freeborn (SBN 264767)
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444 N. Third Street #312
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Representatives of Appellant

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JANE DOE,	)	Docket Number: X
	)	
Appellant,	)	POSTHEARING SUBMISSION:
	)	APPELLANT'S CLOSING ARGUMENT
vs.	)	
	)	
OFFICE OF PERSONNEL MANAGEMENT,	)	
	)	
Agency.	)	

THIS SUBMISSION is by: Appellant JANE DOE pursuant to Judge Kang's November 22, 2011 ORDER.

A. The Divorce Decree is a Qualifying Court Order for Purposes of Awarding a Survivor Annuity Pursuant to 5 U.S.C. § 8341(h)

I. The Specificity Section that Intervenor Relies on Does Not Apply Because It Was Not in Effect in 1988

The Divorce Decree should be analyzed under the regulations in effect at the time that the Divorce Decree was entered. Under the regulations in effect, the Divorce Decree is a qualifying court order for purposes of awarding a survivor annuity.

In arguing that Appellant's Divorce Decree was not a qualifying order for the purposes of awarding a survivor annuity, Intervenor erroneously relies on 5 C.F.R. Part 838, Subpart J,

Appendix B (“Appendix B”), which was not added to the regulations until 1990—approximately two years after the Divorce Decree was issued.¹ The effect of the divorce on the annuity is governed by the law in effect at the time of the divorce.² The section, entitled “Specificity Required to Award a Former Spouse Annuity,” does not apply to this case because it was not in the regulations when the Divorce Decree was entered.³

Intervenor would have this court believe that this section applies to the Divorce Decree.⁴ Intervenor accuses Appellant of ignoring Appendix B; however, this section was not added until 1990, two years after the Divorce Decree was entered, and it was not published in the Code of Federal Regulations until January 1, 1991.⁵ Additionally, the case Intervenor cites in support of applying Appendix B discloses the very information that Intervenor tries to hide: “the Guidelines For Interpreting State Court Orders Awarding Survivor Annuity Benefits to Former Spouses (Appendix B to Subpart J of Part 838), *published in 1990* pursuant to 5 C.F.R. § 838.1014.”⁶ (Emphasis added.)

Neither the Texas divorce court nor the parties involved (their attorneys) had reason to anticipate that two years later OPM would impose new guidelines on divorce decrees. Under the regulations in effect at the time that the Divorce Decree was entered, the Divorce Decree awards a survivor annuity to Appellant.

¹ See Intervenor’s Response to Appellant’s Prehearing Submission, p. 9; *see also* 5 C.F.R. § 831, Subpt. Q, App. B (1-1-90 Edition); *see also* 5 C.F.R. § 831, Subpt. Q, App. B (1-1-91 Edition).

² *Brush v. Office of Pers. Mgmt.*, 982 F.2d 1554, 1558 (Fed. Cir. 1992)(citing Section 831.601(e), recodified at 831.611(a) in 1985, 50 Fed.Reg. 20,070 (1985); at issue was whether proper notice had been sent to participant spouse; discussion concerned the conflict between the notice provision in the Code of Federal Regulations and the statute upon which that regulation is based. Case was remanded after court determined that notice should have been sent.)

³ 5 C.F.R. § 831 (1-1-88 Edition).

⁴ See Intervenor’s Response to Appellant’s Prehearing Submission, p. 9.

⁵ 5 C.F.R. § 831, Subpt. Q, App. B (1-1-90 Edition); *see also* 5 C.F.R. § 831, Subpt. Q, App. B (1-1-91 Edition).

⁶ *Hokanson v. Office of Pers. Mgmt.*, 122 F.3d 1043, 1046 (1997)(At issue was a divorce decree dated June 18, 1990 and an amended divorce decree dated April 5, 1991. The decree included the following awards: “As her portion of said civil service retirement benefits, [Ms. Hokanson] shall be paid the sum of \$556 per month.” *Id.* at 1044-45. The court found that the “1991 amended divorce decree failed to expressly award her a former spouse annuity.” *Id.* at 1048.)

1 II. Even If the Specificity Section of Appendix B Were To Apply, This Court May
2 Award a Survivor Annuity Because Appendix B Is Only A Guideline, Not a
3 Regulation

4 Appendix B does not apply to this case for the reasons stated above. However, even if the
5 section were applicable, the court has discretion because the Guidelines are advisory and not
6 required.⁷

7 In *Thomas v. Office of Pers. Mgmt.*, 46 M.S.P.R. 651 (1991), the husband argued that the divorce
8 decree was insufficient to award a survivor benefit to his former wife because the language failed
9 to comply with Appendix B. The court awarded the wife a survivor benefit because the
10 Guidelines are only advisory, not required:

11 “We find that, despite the use of the word “must,” the Guidelines were intended as aids to
12 the practitioner, not as mandatory requirements.

13 First, it is apparent that OPM itself does not view the Guidelines as substantive rules,
14 since it did not cite them in its reconsideration decision as a basis for granting Mr.
15 Thomas's request for a life rate annuity, and since OPM's current position is that the
16 court-approved property settlement agreement is a qualifying court order under 5 U.S.C.
17 § 8341(h)(1) and 5 C.F.R. § 831.1704.

18 Second, it is significant that the Guidelines are not contained in the regulations
19 themselves, but in a separate Appendix. They presumably would have been incorporated
20 into the regulations themselves if intended as mandatory requirements. Third, the term
21 “Guidelines,” as opposed to “rules,” “regulations,” or “requirements,” connotes
22 something of an advisory nature.”

23 *Id.* at 655.⁸ (Emphasis added.) The court relied on and cited legislative history to demonstrate
24 the purpose behind Congress enacting Section 8341(h):

25 “For most former spouses of Federal employees, the threat of living in poverty is
26 exacerbated. Most of these women remained in the home during their marriages and are
27 not eligible for either social security or private pensions. Access to survivor benefits is
28 vital to this group of former spouses. H.R. No. 1054, 98th Cong., 2d Sess. 12, *reprinted*
in 1984 U.S.Code Cong. & Admin.News 5540, 5542-43.

... [I]f a divorce decree or other court order fails to use appropriate language to award a
survivor annuity, the former spouse does not have the opportunity to go back into state
court and amend or modify the decree to properly award a survivor annuity. This lack of

⁷ *Thomas v. Office of Pers. Mgmt.*, 46 M.S.P.R. 651 (1991).

⁸ *Thomas v. Office of Pers. Mgmt.*, 46 M.S.P.R. 651, 654 (1991) (The court stated that “[a]lthough the property settlement agreement in this case could have been more artfully worded, we believe that the language used-“The Husband agrees to maintain all rights and benefits to which the Wife is entitled and may realize in connection with his retirement and pension package as a [Federal retiree]”-clearly and unambiguously referred to the appellant's then-existing survivor annuity.”)

1 an opportunity to correct an ambiguously worded order further militates against an overly
2 strict or hypertechnical reading of section 8341(h).

3 *Id.* at 655-656.

4 Thus, even if the advisory section that Intervenor relies upon was in effect in 1988, the court
5 would be acting in the intent of Congress by awarding the survivor annuity to Appellant to
6 decrease the risk that the former spouse of a federal employee would live in poverty.

7 III. The Divorce Decree Is a Qualifying Court Order Under the Pre-1993 Regulations

8 The Divorce Decree is a qualifying court order because all three sections of 5 CFR § 838.1004,
9 which codifies the requirements of a qualified court order, are met.

10
11 a. The Divorce Decree Is a Qualifying Court Order Because It Satisfies 5 CFR §
12 838.1004(a)

13 5 CFR § 838.1004(a) states that “A former spouse is entitled to a portion of an employee's
14 retirement benefits only to the extent that the division of retirement benefits is expressly
15 provided for by the court order. The court order must divide employee retirement benefits,
16 award a payment from employee retirement benefits, or award a former spouse annuity.”

17 *Fox v. Office of Personnel Management*, 100 F.3d 141, 145-6 (Fed.Cir. 1996), sets forth a
18 framework for analyzing whether a court order provides the survivor annuity benefit under 5
19 C.F.R. § 8341(h).

20 First, the court must determine whether the divorce decree contains a pertinent clause
21 regarding a survivor annuity. If the court finds that the divorce decree contains such a
22 clause, the court inquires into whether the operative terms can fairly be read to award the
23 annuity. If the operative terms can be read to fairly award the annuity, the court
24 examines evidence concerning marriage parties’ intent and circumstances surrounding
25 the execution of the document.

26 *Id.*

27 Intervenor accuses Appellant of “attempt[ing] to skip” step one of the *Fox* framework.⁹

28 However, Intervenor disregards the three pages of analysis Appellant provided in the Prehearing

⁹ See Intervenor’s Response to Appellant’s Prehearing Submission, p. 13.

Submission demonstrating how the Divorce Decree contains two statements that unambiguously refer to a CSRS survivor annuity.¹⁰

In the Prehearing Submission, Appellant provides an analysis that satisfies steps one and two of the *Fox* framework; thus, the court may examine evidence concerning the marriage parties' intent and the circumstances surrounding the execution of the Divorce Decree. The intent and circumstances support the award of a survivor annuity.

Intervenor cites *Downing v. Office of Personnel Management*, 619 F.3d 1374 (2010), to support its argument that this court should stop at the first step of the *Fox* analysis. However, Intervenor fails to disclose to this Court that this case applies post-1993 regulations to a 2006 divorce decree. In *Downing*, the court stopped at the first step of the *Fox* framework because the language of the divorce decree was insufficient under the strict post-1993 regulations.¹¹ We are not disputing whether or not Appellant's Divorce Decree is insufficient under the post-1993 regulations; at issue are the pre-1993 regulations. This case has no bearing on the facts of our case.¹²

Because Appellant's Prehearing Submission analysis satisfies steps one and two of the *Fox* framework, this court may examine evidence concerning the marriage parties' intent and the circumstances surrounding the execution of the Divorce Decree. Intervenor states that Appellant's argument that her former spouse's continued acceptance of a reduced annuity following the divorce is "unavailing" and Appellant failed "to cite any authority" on the matter.¹³ Intervenor unsuccessfully attempts to distinguish the cases cited in Appellant's Prehearing Submission by alleging that the former spouses in the cases were awarded a survivor annuity because "there was no evidence to controvert the annuitant's intent to provide a survivor annuity for a former spouse."¹⁴

¹⁰ See Appellant's Prehearing Submission: Facts and Issues, p. 7-9.

¹¹ See *Downing v. Office of Personnel Management*, 619 F.3d 1374 (2010).

¹² Moreover, in Appellant's Prehearing Submission, Appellant satisfied steps one and two of the *Fox* framework applying pre-1993 standards and demonstrating that Appellant's Divorce Decree contains two statements that unambiguously refer to a survivor provision and a CSRS survivor annuity. See Appellant's Prehearing Submission: Facts and Issues, p. 7-9.

¹³ See Intervenor's Response to Appellant's Prehearing Submission, p. 16-17.

¹⁴ *Id.* Intervenor erroneously alleges that Appellant cited *Hernandez v. Office of Personnel Management*, 450 F.3d 1332, to show intent of a participant to provide a spousal annuity; Appellant cited the case for the proposition that notification is required post-divorce. Appellant did not cite *Hernandez* because the participant in that case took

1 In *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1559 (Fed.Cir.1992), the court held
2 that a participant's continued receipt of a reduced annuity over a period of two years, after his
3 own self-interest could have dictated a change, showed an intent to provide a survivor annuity to
4 his former spouse. The court stated that:

5 "We need not speculate why Brush continued this payment to his detriment and to his
6 former wife's benefit for yet another two years, but nothing in the record indicates that he
7 lacked comprehension of his actions, or that he was unaware that he was continuing his
8 election to "pay" for an annuity for Mrs. Brush, or that, if he had been notified, he would
9 not have confirmed his choice by filing the additional piece of paper demanded. Every
10 indication in the record here compels the conclusion that Brush affirmatively desired the
11 annuity for Mrs. Brush. Furthermore, it is clear that he had no reason to believe that he
needed to do anything further to effectuate it. One need not strain to perceive the election
by Brush, in spite of the agency's failure to give notice. Arguably, he had indeed *made*
the very election expected, in writing, at least constructively. And he "paid his dues."
(Emphasis added.)

12 Similarly, in this case, there is nothing in the record to indicate that Mr. Doe, an accountant for
13 the Internal Revenue Service, lacked comprehension of his actions or was unaware that he was
14 continuing to receive a reduced annuity for seven years after his divorce. In addition, the
15 Divorce Decree states that "This order does not require Participant to select any particular
16 standard or optional retirement benefit upon becoming eligible for retirement or upon retiring."¹⁵
17 Moreover, if Mr. Doe had made an election to provide Appellant with a survivor benefit post-
18 divorce during the two-year window, such an election would be void to the extent that it conflicts

19 active steps within one year of the divorce to inform the Agency that he did not want the former spouse to receive
20 survivor benefits. Appellant agrees with the holding that continued receipt of a reduced annuity in light of those
21 facts is insufficient to award a survivor annuity. Additionally, Intervenor asserts that the court awarded a survivor
22 annuity in *Vallee v. Office of Personnel Management*, 58 F.3d 613, 616 (Fed.Cir.1995), because participant engaged
23 in no negative conduct prior to this death that would have suggested that he didn't intend to provide a survivor
24 annuity to this former spouse. Intervenor misrepresents the case. The court held that the evidence of participant
25 electing a survivor annuity for a former spouse prior to retirement and his declining to restore his annuity when he
26 was provided notification that he could do so was sufficient evidence to award a former spouse annuity.
27 Furthermore, not once in *Hairston v. Office of Personnel Management*, 318 F.3d 1127, 1130 (Fed.Cir.2003), does
28 the court state that a survivor annuity will be awarded only if there is no evidence to controvert the annuitant's intent
to provide a survivor annuity. In fact, the court cites Vallee, 58 F.3d at 616, and Brush, 982 F.2d at 1559, in holding
that "Evidence that the employee, upon retirement, elected to provide a spousal annuity, and after divorce declined
to restore benefit payments or did not object to the continued discounted payment consistent with election of a
spousal annuity is sufficient to prove the employee intended to provide a former spouse survivor annuity. Finally, in
Wood v. Office of Personnel Management, 241 F.3d 1364, 1368 (Fed.Cir.2001), the court held the Agency had
failed to send sufficient statutory notice to participant, the notices sent were confusing, participant's compliance
with a post-divorce election was excused and the participant's act in sending a letter to the Agency awarding his
former wife a survivor annuity was sufficient intent to award a survivor annuity. The court did not state a
requirement that there must be no evidence of conduct contrary to such intent.

¹⁵ See Agreed Final Decree of Divorce, p. 7.

1 with a qualifying court order.¹⁶ In other words, the Divorce Decree would trump any subsequent
2 election. Thus, Mr. Doe had no reason to believe that he needed to do anything further to
3 effectuate the election he made before divorce and the award provided for in the divorce decree.

4 Intervenor argues that Mr. Doe did not intend to provide for Ms. Doe because “Fred personally
5 confided to Karen” that he did not intend to provide for Ms. Doe.¹⁷ However, as Appellant
6 stated in Appellant’s Prehearing Submission,¹⁸ such information is irrelevant because the court
7 should look only to evidence of the parties’ intent and the circumstances surrounding the
8 execution of the Divorce Decree.¹⁹ Intervenor’s assertions are immaterial because Sarah Smith
9 was a not a party to the Divorce Decree and did not marry Mr. Doe until 1993, five years after
10 the Divorce Decree was entered.²⁰ The evidence that Intervenor cites is irrelevant and Intervenor
11 failed to refute how the circumstances surrounding the drafting of this Divorce Decree
12 objectively support the award of a survivor annuity to Appellant.²¹

13 Despite Intervenor’s interpretation of Appellant’s case law, Intervenor fails to cite a case that
14 stands for the proposition that a survivor annuity is only awarded when “there was no evidence
15 to controvert the annuitant’s intent to provide a survivor annuity for a former spouse.”²² Thus,
16 the authority Appellant cites to support the argument that her former spouse’s continued
17 acceptance of a reduced annuity following the divorce prevails.

18 b. The Divorce Decree Is a Qualifying Court Order Because It Satisfies 5 CFR §
19 838.1004(b)

20 5 CFR § 838.1004(b) states that “[t]he court order must state the former spouse's share as a fixed
21 amount, a percentage or a fraction of the annuity, or by a formula that does not contain any
22 variables whose value is not readily ascertainable from the face of the order or normal OPM

23 ¹⁶ See 5 C.F.R. § 831.612.

24 ¹⁷ See Intervenor’s Response to Appellant’s Prehearing Submission, p. 16.

25 ¹⁸ See Appellant’s Prehearing Submission, p. 9.

26 ¹⁹ *Fox v. Office of Personnel Management*, 100 F.3d 141, (Fed.Cir. 1996), *Davenport v. Office of Personnel*
27 *Management*, 62 F.3d 1384 (1995).

28 ²⁰ Even if Mr. Sleet had intended to provide Sarah Smith with the maximum survivor benefit, such an election would
be void to the extent that it conflicts with the Divorce Decree pursuant to 5 C.F.R. § 831.611 (qualifying court
orders that award former spouse annuities prevent payment of current spouse annuities to the extent necessary to
comply with the court order and §831.614); see also Position Statement of Sarah Smith; see also Affidavit of Sarah
Smith.

²¹ See Appellant’s Prehearing Submission, p. 10-12.

²² See Intervenor’s Response to Appellant’s Prehearing Submission, p. 17.

1 files.” The Divorce Decree provides that Appellant’s share is 40%.²³ Forty percent is a
2 percentage. Thus, 5 CFR § 838.1004(c) is satisfied.

3 c. The Divorce Decree Is a Qualifying Court Order Because It Satisfies 5 CFR §
4 838.1004(c)

5 5 CFR § 838.1004(c) states that “For purposes of payments from employee retirement benefits,
6 OPM will review court orders as a whole to determine whether the language of the order shows
7 an intent by the court that the former spouse should receive a portion of the employee's
8 retirement benefits directly from the United States. Orders that direct or imply that OPM is to
9 make payment of a portion of employee retirement benefits, or are neutral about the source of
10 payment, will be honored unless the retiree can demonstrate that the order is invalid in
11 accordance with §838.1009.” (Emphasis added.) The Divorce Decree directs OPM to make all
12 payments directly to Appellant.²⁴

13 IV. The Divorce Decree Is a Qualifying Court Order Pursuant to Case Law
14 Interpreting the Pre-1993 Regulations

15 The language of the Divorce Decree is sufficient to award a survivor annuity under pre-1993
16 regulations. In *Bliznik v. Office of Personnel Management*, 58 M.S.P.R. 340, 344 (1993), the
17 court found that a divorce decree awarding a “lifetime monthly benefit” was sufficient to award a
18 survivor annuity.²⁵ In our case, the reference to a benefit that “shall cease upon Alternate
19 Payee’s death” can only mean a benefit for the lifetime of Appellant.²⁶ Thus, like in *Bliznik*, the
20 language is sufficient to award a survivor annuity.

21 Intervenor cites *Summers v. Office of Personnel Management*, 46 M.S.P.R. 657 (1991) to support
22 its argument that Appellant’s Divorce Decree language is insufficient to award a survivor
23 annuity under pre-1993 regulations. However, Intervenor’s reliance on this case is inapposite

24 ²³ See Agreed Final Decree of Divorce, p. 6, section 4.

25 ²⁴ *Id.* at p. 7, section 10.

26 ²⁵ *Bliznik v. Office of Personnel Management*, 58 M.S.P.R. 340, 342 (1993)(“The appellant’s divorce decree states,
27 in pertinent part, that the parties’ intent was to provide the appellant with a “lifetime...benefit.”” *Id.* at 344. The
28 court found this to be “an “express” statement in the divorce decree.” *Id.* The August 23, 1990, divorce resulted in a
divorce decree that stated the following: “It is the parties’ intent that the plan pay benefits to the alternate payee
under a straight life annuity OR payment as provided by the Civil Service Retirement Fund, which would provide
the alternate payee with a lifetime monthly benefit OR fifty (50%) percent of any lump sum payment. Her date of
birth is 06/06/46.” The court held this to be sufficient to award a survivor annuity.)

²⁶ See Agreed Final Decree of Divorce.

1 because the case fails to provide the language of the divorce decree.²⁷ Without the language of
2 the divorce decree at issue, it is unknown how or why the language was insufficient and
3 impossible to ascertain how the pre-1993 regulations were applied. The language in the divorce
4 decree could have been so deficient as to state “benefits to wife,” in which case, its inadequacy
5 would be undeniable. But no language is provided. Thus, this case only supports the uncontested
6 proposition that some language may indeed be held to be insufficient under pre-1993 regulations.

7 Similarly, Intervenor cites *Bottrel v. Office of Personnel Management*, 36 M.S.P.R. 338 (1988),
8 to support its argument that Appellant’s Divorce Decree fails to meet the requirements of 5
9 U.S.C. § 8341(h). In that case, the court upheld the administrative judge’s finding that the
10 appellant was not entitled to a survivor annuity for two reasons, neither of which applies to our
11 case. First, the court found that the divorce decree failed to provide a method of payment. In our
12 case, the Divorce Decree clearly states that Appellant is awarded 40%.²⁸ Second, the court found
13 the language was insufficient because “death benefits” could mean a monthly survivor annuity or
14 a lump-sum payment. In our case, there is no ambiguity between an award of a survivor annuity
15 and a lump-sum payment. Thus, this case is also inapposite.

16 Intervenor unsuccessfully attempts to distinguish three cases that Appellant cites in support of
17 the award of a survivor annuity.

18 First, Intervenor states that Appellant’s Divorce Decree is distinguishable from the decree in
19 *Ingle v. Office of Personnel Management*, 102 M.S.P.R. 202 (2006), because Appellant’s
20 Divorce Decree fails to reference Appellant’s previous CSRS annuity and fails to designate
21 Appellant as an irrevocable beneficiary. However, the wording of Appellant’s decree indeed
22 does both. First, it references a CSRS benefit (“any annuity payable as a result of Participant
23 participation in the plan”). Second, and more importantly, it does more than direct the former
24 spouse to designate Appellant as a beneficiary; it explicitly and irrevocably designates Appellant
25 as a recipient of 40% of any benefit that Mr. Doe’s “designated beneficiary or estate is entitled
26 to.”

27 ²⁷ See Intervenor’s Response to Appellant’s Prehearing Submission, p. 11.

28 ²⁸ See Agreed Final Decree of Divorce, p. 6, section 4.

1 Second, Intervenor argues that language used in the divorce decree in *Thomas v. Office of Pers.*
2 *Mgmt.*, 46 M.S.P.R. 651 (1991), was sufficient, while the language in Appellant's decree was
3 insufficient.²⁹ However, in that case, the court disposed of the husband's argument that a
4 qualifying court order must contain certain specific phrases, held that Appendix B was not a
5 requirement but only a guideline, and awarded a survivor annuity for policy reasons in light of
6 Congress' intent in enacting Section 8341(h) (intended to decrease the risk that the former
7 spouse of a federal employee would live in poverty).³⁰

8 Third, Intervenor cites *Perry v. Office of Personnel Management*, 243 F.3d 1337 (2001), and
9 argues that the language used in the divorce decree is distinguishable. Appellant agrees.
10 Appellant did not assert that the language was comparable to the Divorce Decree.³¹ Appellant
11 utilized the case for the proposition that post-1993 regulations are not retroactive.³²

12 The language of the Divorce Decree is sufficient to award a survivor annuity under pre-1993
13 regulations and under cases analyzed in light of the pre-1993 regulations.

14 B. Appellant Is Entitled to the Survivor Annuity Because OPM Failed to Show that It
15 Provided Adequate Notices and Mr. Doe Intended to Provide a Survivor Annuity to
16 Appellant

17 Appellant is entitled to a survivor annuity because OPM failed as a matter of law to provide
18 adequate notices to Mr. Doe. The notices that were sent out by OPM between 1989 and 1991
19 were legally deficient.³³ When a notice is legally deficient, a pre-divorce election of a survivor
20 annuity is effective if the participant continued to accept a reduced annuity after divorce.³⁴

21 The facts in *Simpson v. Office of Personnel Management*, 347 F.3d 1361 (Fed. Cir. 2003), are
22 analogous to the facts in Appellant's case. Upon retirement, Mr. Simpson elected a survivor
23 benefit for Mrs. Simpson; five years later, they divorced.³⁵ Mr. Simpson continued to receive

24 ²⁹ *Thomas v. Office of Pers. Mgmt.*, 46 M.S.P.R. 651 (1991) (The divorce decree stated "The Husband agrees to
25 maintain all rights and benefits to which the Wife is entitled and may realize in connection with his retirement and
26 pension package as a [Federal retiree].")

27 ³⁰ *Thomas v. Office of Pers. Mgmt.*, 46 M.S.P.R. 651, 655-656 (1991); see also Section II above for analysis of
28 *Thomas*.

³¹ See Appellant's Prehearing Submission: Facts and Issues, p. 5-6.

³² *Id.*

³³ *Simpson v. Office of Personnel Management*, 347 F.3d 1361 (Fed. Cir. 2003).

³⁴ *Id.* at 1366.

³⁵ *Id.*

1 reduced annuity benefits until his death.³⁶ Despite the court finding that OPM had satisfied its
2 burden of establishing that notice was sent as required by *Brush v. Office of Personnel*
3 *Management*, 982 F.2d 1554 (Fed. Cir. 1992), the notices were deficient as a matter of law.³⁷ As
4 a result, Mrs. Simpson was awarded a survivor annuity because Mr. Simpson’s intent to provide
5 for his wife was shown by his pre-divorce election and his continued acceptance of the reduced
6 annuity.³⁸

7 Our case is analogous. OPM may have established that notices were sent to Mr. Doe,³⁹ but the
8 notices are the same notices that were found to be legally inadequate in *Simpson*.⁴⁰ Mr. Doe
9 elected a survivor annuity for Appellant before the divorce, and Mr. Doe continued to accept the
10 reduced annuity for more than seven years after the divorce.

11 Because the notices that may have been sent to Mr. Doe are deficient as a matter of law,⁴¹ the
12 pre-divorce election Mr. Doe made, along with Mr. Doe’s continued acceptance of a reduced
13 annuity, entitles Appellant to the survivor annuity.

14
15 ³⁶ *Id.*

16 ³⁷ The court found that “Smith-Toomey’s affidavit may have met the government’s burden of showing that a notice
17 was sent to [participant], there is no indication in the affidavit or anywhere else in the record that a notice was sent
18 that informed [participant] that he needed to make a reelection.” *Id.* at 1365. The court held that “OPM’s notice was
19 legally deficient in that it failed to adequately inform Mr. Simpson that, if he still intended that his former spouse
20 receive an annuity, he must make a new election within two years of their divorce.” *Id.* at 1364. The notices “failed
21 to comply with the statutory requirement of notice because an annuitant who elects an annuity for his (or her) spouse
22 while married reasonably expects that he has complied with the statutes sufficiently to cause the annuity to be paid
23 on his death.” *Id.* “At the time of divorce, Mr. Simpson had already made an election. The problem was that he did
24 not make that election after the divorce, and OPM’s notice did not state that he had to do so again even if he had
25 previously made such an election.” *Id.*

26 ³⁸ *Id.* at 1365.

27 ³⁹ Intervenor states that Appellant’s contention that Mr. Sleet did not receive notice was “simply not true.” See
28 Intervenor’s Response to Appellant’s Prehearing Submission, p. 15. However, at the time that Appellant submitted
the Prehearing Submission, OPM had failed to provide Appellant with *any* information pertaining to whether notices
were sent to Mr. Sleet despite Appellant requesting this information in a letter, a request for discovery, a Freedom of
Information Act request, a Freedom of Information Act appeal, and a subsequent request for discovery. OPM failed
to provide proof of *any* notices. See Appellant’s Prehearing Submission: Facts and Issues, Exhibits A-H. No
documents were produced until October 31, 2011, more than two years after Appellant requested the documents,
pursuant to Judge Kang ordering OPM to produce the evidence. See Order and Summary of Prehearing Conference,
October 20, 2011, p. 2; see also OPM October 31, 2011, Supplementation, p. 1.

⁴⁰ The affidavit provided by OPM in our case was signed by the same administrator as in the *Simpson* case, the
affidavit cited the same authority (Public Law 95-317), the notices were sent out during the same years as the years
in *Simpson* (1989-1996), and, most importantly, the notices OPM provided as attachments are the same standard
notices that were found to be deficient in *Simpson* (notices entitled “Information and Reminder About Survivor
Annuity Benefits”); see also OPM October 31, 2011, Supplementation, p. 3.

⁴¹ *Id.*

Conclusion

Appellant has met her burden of proving entitlement, by a preponderance of the evidence, to a survivor annuity under CSRS pursuant to 5 U.S.C. §§ 8339(j)(3) and 8341(h). Thus, Appellant respectfully requests that this court direct OPM to pay Appellant the portion of the survivor annuity.

Dated this 2nd day of December 2011

JUSTIN FREEBORN
Representative of Appellant