STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLENE RENY, PETITIONER FOR THE ESTATE OF ANNE M. BIRCH,

Petitioner,

vs.

Case No. 16-7617

DEPARTMENT OF MANAGEMENT SERVICES, DIVISION OF RETIREMENT,

Respondent.
_____/

RECOMMENDED ORDER

On October 10, 2017, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by video conference in Tallahassee and Lauderdale Lakes, Florida.

APPFEARANCES

For Petitioner: Anthony V. Falzon, Esquire
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For Respondent: Thomas E. Wright, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to receive survivor benefits from a joint and survivor annuity, under

Option 3 of the Florida Retirement System (FRS) defined benefit plan, following the death of her spouse, Anne M. Birch, who, as an FRS member, elected Option 1 in 2012 when Florida law would not allow Ms. Birch to elect Option 3 or 4 and designate the joint annuitant as Petitioner, whom she lawfully married after electing Option 1.

PRELIMINARY STATEMENT

By letter dated September 22, 2016, Petitioner advised Respondent that she was the surviving spouse of Ms. Birch, who had died on May 24, 2016, and inquired about the status of Petitioner's claim for surviving spouse benefits from Ms. Birch's account in the FRS defined benefit plan.

By letter dated October 20, 2016, Respondent acknowledged receipt of the September 22 letter, which Respondent properly characterized as a request to receive survivor benefits under Option 3 following the death of Ms. Birch. Respondent's letter states that Ms. Birch retired on October 1, 2012, when she entered the Deferred Retirement Option Program (DROP), stated that she was unmarried at the time of her retirement, and elected Option 1, under which the benefits ended with her death.

By letter dated November 9, 2016, Petitioner requested a formal administrative hearing.

At the hearing, Petitioner called one witness and offered into evidence 43 exhibits: Petitioner Exhibits 1-43.

Respondent called two witnesses and offered into evidence 24 exhibits: Respondent Exhibits 1-24. All exhibits were admitted except Petitioner Exhibits 41 and 42. Attachment D to Petitioner Exhibit 36 was admitted as Petitioner Exhibit 43.

The court reporter filed the transcript on November 1, 2017. The parties filed proposed recommended orders by December 19, 2017.

FINDINGS OF FACT

1. Ms. Birch, who was born on September 12, 1950, and Petitioner, who was born on August 26, 1956, fell in love and began to live together in 1992. They jointly owned all significant property, including their primary residence, with a right of survivorship and were jointly liable for household expenses and debt, including the mortgage note on their primary residence. On January 31, 2001, Ms. Birch executed a will that left any remaining property to Petitioner and named her as the personal representative of the estate.[1/] Ms. Birch designated Petitioner as her primary beneficiary for employee benefits that authorized such designations. On October 11, 2002, Ms. Birch and Petitioner signed an Amended Declaration of Domestic Partnership, pursuant to the Broward County Domestic Partnership Act of 1999, to register themselves as domestic partners under Broward County Ordinance 1999-18.

2. Fully vested and having accrued substantial benefits from having worked for Broward County in an FRS-covered position for nearly 30 years, on October 23, 2012, Ms. Birch entered DROP, effective October 1, 2012. At that time, Ms. Birch elected Option 1 for the payment of her benefits, checking the "no" box in response to the question of whether she was married. As described in the Conclusions of Law, Option 1 is the maximum benefit and is payable for the life of the retiree. Ms. Birch's monthly Option 1 benefit was $3039.25. The monthly Option 3 benefit, which, as described below, is payable until the latter death of the FRS member or her surviving spouse,[2/] would have been nearly $1000 less than the monthly Option 1 benefit.[3/]

3. Respondent implemented Ms. Birch's election by paying Ms. Birch's Option 1 benefits into her DROP account. In August 2013, Ms. Birch became ill with cancer. She eventually had to quit working and terminated DROP, at which point Respondent paid Ms. Birch her Option 1 benefits directly. On June 16, 2014, Ms. Birch and Petitioner were lawfully married in Massachusetts. Almost two years later, on May 24, 2016, Ms. Birch died, at time all payments under Option 1 ended.

4. When Ms. Birch and Petitioner registered as domestic partners in Broward County, no state allowed or recognized same-sex marriage, often pursuant to a "Defense of Marriage Act" (DOMA). Continuously since 1997, Florida law banned the

allowance and recognition of same-sex marriage, even if performed in a jurisdiction where such a marriage were legal, and restricted "marriage" to a legal union between a man and a woman and "spouse" to a member of such a union. § 741.212(1) and (3); Ch. 97-268, § 1, at 4957, Laws of Fla. (Florida DOMA).[4/]

5. Massachusetts was the first state to allow and recognize same-sex marriage, effective in 2004. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003) (decision stayed 180 days to allow legislature to enact law consistent with the court's ruling). Three or four years after Goodridge, Ms. Birch and Petitioner visited Massachusetts, but did not exercise their right to enter into a lawful marriage at that time.

6. A series of court decisions invalidated the federal and state DOMAs, including the Florida DOMA. On June 26, 2013, the U.S. Supreme Court in United States v. Windsor, 133 S. Ct. 2675 (2013), held that the federal DOMA, as applied to federal tax law, was unconstitutional. By order entered August 21, 2014, in Brenner v. Scott, 999 F. Supp. 2d 1278 (N.D. Fla. 2014) (Brenner I), Respondent was enjoined from enforcing or applying the Florida DOMA, although the court stayed its injunction. The U.S. Supreme Court lifted the stay,[5/] as reported by the district court in Brenner v. Scott, 2016 U.S. Dist. LEXIS 91969 (N.D. Fla. 2016) (Brenner II), in which, on March 30, 2016, the court

issued a summary judgment on its injunction in Brenner I. Between Brenner I and Brenner II, on June 26, 2015, the U.S. Supreme Court held that state DOMAs were unconstitutional in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

7. Petitioner testified that she and Ms. Birch would have been lawfully married by October 2012, when Ms. Birch retired, but for the Florida DOMA. This testimony is credited. Long prior to 2012, Ms. Birch and Petitioner organized their financial affairs as though they were lawfully married, sharing assets and liabilities equally. Petitioner testified credibly that she and Ms. Birch always "played by the rules": thus, Ms. Birch and Petitioner would have been deterred from getting married prior to Ms. Birch's retirement, such as when they were visiting Massachusetts in 2007, due to the legal futility of attempting to obtain recognition in Florida of a marriage lawfully performed elsewhere.

8. Less persuasive is Petitioner's testimony that, in October 2012, Ms. Birch would have elected Option 3, if this option had been available to her, and it is impossible to find on this record that she would have done so. There is no evidence that Ms. Birch and Petitioner rearranged their financial affairs to achieve, to the extent possible, an Option 3 election. Household income was $1000 per month greater under Option 1 than Option 3, so life insurance on Ms. Birch or

an annuity for Petitioner could have mitigated Ms. Birch's inability to choose Option 3 when she retired. Prior to retiring, Ms. Birch did not attempt to elect Option 3 in writing or orally. Even after retiring, as noted below, Ms. Birch displayed ambivalence about whether she wanted to change her election.

9. As a named defendant in Brenner I, on April 14, 2015, Respondent responded to the injunction against its enforcement or application of the Florida DOMA by issuing Information Release #2015-184 (Release). Sent to FRS members who retired prior to January 2, 2015, and elected Option 1 or 2, the Release states:

> . . . FRS retirees and . . . DROP participants who were in legally-recognized same-sex marriages at the time they retired or began DROP participation and chose Option 1 or Option 2 will have an opportunity to change benefit payment options in light of . . . Brennan. These retirees will be able to change their retirement payment option from their current selection to Option 3 or Option 4 to provide a continuing monthly benefit to their spouse. The retirees impacted by this change have an effective retirement date or DROP begin date on or before January 1, 2015.

10. The Release provides that an eligible retiree interested in a second election must contact Respondent in writing, identify the retiree's spouse, and certify that the retiree and spouse were married in a state or country that

allowed same-sex marriage when the FRS member retired. The Release states that Respondent will respond with an estimate of the new benefit payment under the option that the retiree intends to select and provide the retiree with the paperwork necessary to make the second election.

11. Available on Respondent's website,[6/] the Release provides the opportunity of a second election of Option 3 or 4 to any FRS member[7/] who retired prior to January 2, 2015; chose Option 1 or 2 when she retired; and was in a same-sex marriage when she retired. The Release places no limit on how far in the past the retirement took place.[8/]

12. The thrust of Petitioner's case is directed toward backdating her lawful marriage to Ms. Birch to a point prior to Ms. Birch's retirement. As noted above, the timing of the lawful marriage is a problem under the Release, which requires a lawful marriage at the time of retirement, but another problem under the Release is the fact that the Release provides to the FRS retiree, not her surviving spouse, the opportunity for a second election, nor, as discussed immediately below, is this a technical requirement that can be overcome by Petitioner's serving as a representative of Ms. Birch--the second election is extended only to living FRS retirees. The virtue of the Release for Petitioner is that it confers the opportunity of a second election without any proof that, at the time of the first

election, the FRS member would have elected Option 3 or 4. If Petitioner does not rely on the Release, she must also prove that Ms. Birch would have elected Option 3 or 4, which, as noted above, she has failed to prove.

13. By limiting the second election to the FRS retiree, the Release limits the potential of adverse selection in allowing a second election, possibly years after the first election.[9/] There are three possibilities at the time of the second election: both spouses are alive, only the FRS retiree is alive, and only the surviving spouse is alive. The Release's restriction of the right to make the second election to the FRS retiree means that the second and third possibilities do not result in second elections: respectively the FRS retiree would not reduce her payment to provide an annuity to a spouse who is already deceased[10/] and a surviving spouse has no right to make an election under the Release. The couple may gain a minor financial advantage by the opportunity to revisit the payment option several years after the retirement of the FRS member, so that they may be better informed of the health of each of them. But the surviving spouse would gain a significant financial advantage by the opportunity to revisit the payment option after the death of the FRS member.

14. Shortly after Respondent issued the Release, Ms. Birch filed with Respondent a Spousal Acknowledgement Form that she

had signed on May 8, 2015. This form indicates that Ms. Birch is married, but nothing else. At about the same time, though, Ms. Birch contacted Respondent by telephone to discuss the Release and any choices that she may now have under the Release. By letter dated May 26, 2015, Respondent calculated monthly benefit amounts under Options 1 through 4, but the letter warns: "Your benefit option will not be changed unless you complete and return the required forms noted in this letter" and indicate a choice of repaying in a single payment or installments the excess benefits of Option 1 over the smaller benefits paid under Option 3 or 4.

15. The May 26 letter requires further action on Ms. Birch's part and predicates any right to a second election upon a lawful marriage at the time of retirement. The record provides no basis for finding that any of Respondent's representatives misstated the lawful-marriage condition. To the contrary, in at least one conversation with Ms. Birch, Respondent's representative insisted on verification of a lawful marriage as of October 2012.

16. Additionally, Ms. Birch was not requesting a right to make a second election; at most, she was gathering information to prepare to decide whether to ask to change her election. By June 26, 2015, pursuant to a note documenting a telephone conversation between Ms. Birch and a representative of

Respondent, Ms. Birch decided to keep Option 1 rather than make a second election of Option 3.[11/]

17. In May 2016, Ms. Birch finally made a clear attempt to change her election to Option 3. By letter dated May 12, 2016, Ms. Birch stated that she was lawfully married to Petitioner on June 12, 2012, and asked for "the change in beneficiary for my pension, due to the one time option given" in the Release. Even at this late date, Ms. Birch was not yet ready to elect Option 3 because the letter concludes: "I would like to see the breakdown of monetary options to make an informed decision." However, on May 20, 2016, during a telephone call with a representative of Respondent, Ms. Birch provided the date of birth of Petitioner and asked Respondent to expedite her request because she did not have long to live. On the same date, Ms. Birch signed an Option Selection form electing Option 3.

18. By letter dated July 18, 2016, Respondent acknowledged the death of Ms. Birch and informed Petitioner that all pension benefits ended at that time. By letter dated September 22, 2016, Petitioner asked for reconsideration and supplied copies of various documents, the relevant provisions of which have been referenced above. By letter dated October 20, 2016, Respondent denied the request for reconsideration.

CONCLUSIONS OF LAW

19. Due to the unusual circumstances of this dispute, DOAH and Respondent lack subject-matter jurisdiction over Petitioner's request for retirement benefits. Administrative jurisdiction is limited to "all proceedings. . . in which the substantial interests of a party are determined by an agency." § 120.569(1), Fla. Stat. (2016). (All references to statutory sections without further identification are to Florida Statutes.)

20. Three conditions must be met for administrative jurisdiction: (1) substantial interests (2) are determined (3) by an agency. This proceeding does not satisfy the requirement of "substantial interests." A claim of right to money is a substantial interest, O'Connor v. Zane, 79 So. 3d 105 (Fla. 1st DCA 2012) (dictum), but not when the nonagency party is pursuing a unilateral expectation of receiving a benefit in a transaction that has not been statutorily recognized as a basis for an administrative hearing. See, e.g., Univ. of S. Fla. Coll. of Nursing v. Dep't of Health, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) (due to healthcare exemption to statutory bid law, as set forth in former section 287.057(4)(f)6. (now section 287.057(3)(e)5.), frustrated bidder with "mere unilateral expectation of receiving a benefit" lacks substantial interest); Herold v. Univ. of S. Fla., 2002 Fla. App. LEXIS 1449 (Fla. 2d

DCA 2002) (university professor's unilateral expectation of promotion to full professor does not constitute a substantial interest). The Florida legislature has not statutorily recognized a basis for an administrative hearing on the issues presented by this case. This case does not present the question of whether administrative jurisdiction attaches to a benefits claim arising under the Release, which was authorized by the district court's injunction, not any statute. This case presents the easier question of whether administrative jurisdiction attaches to a benefits claim arising out of a combination of constitutional law and equity that transcend the grounds for plan administration set forth in the statutes or even in the extra-statutory Release.

21. This proceeding probably does not satisfy the requirement of substantial interests that "are determined." Respondent has already determined any interests of Petitioner when Respondent discontinued the payment of benefits when Ms. Birch died. It is unnecessary to determine whether the ongoing withholding of benefits would satisfy this criterion.

22. This proceeding does not satisfy the requirement of substantial interests that are determined "by an agency"--i.e., Respondent. Within the meaning of section 120.569, substantial interests are determined by an agency only when the agency is substantially exercising its core regulatory duties. In Vincent

J. Fasano, Inc. v. School Board, 436 So. 2d 201 (Fla. 4th DCA 1983) (per curiam), a contractor and school board entered into a contract for the construction of a school, and the contractor failed to complete construction within the time specified in the contract. Following a formal administrative hearing conducted by the school board, the school board entered a final order assessing liquidated damages for tardy performance. Quashing the final order on the ground that the school board lacked jurisdiction, the court stated:

> A breach of contract is normally a matter for judicial rather than administrative or quasi-judicial consideration.
>
> What an agency may hear and determine must be within the framework of the powers conferred upon the agency. [citation omitted] An agency has no authority "to administratively adjudicate claims made against it by persons with whom it has contracted for the purchase of materials or the rendition of services. Disputes such as these are traditionally settled in the courts of this state by adversary proceedings in which the agency as a contracting party is treated as any other citizen." [citation omitted]

Id. at 202-03.

23. Even an insubstantial exercise of core regulatory duties may not suffice. In Diaz v. State, 65 So. 3d 78 (Fla. 3d DCA 2011), a provider agreement between an operator and Agency for Persons with Disabilities (APD) was terminable at any time without cause. Without cause, APD terminated the agreement

prior to its expiration, and the operator filed a request for a formal administrative hearing. APD declined the request, reasoning that, because the provider agreement was terminable without cause, a court, not an agency, was the forum for the adjudication of a dispute involving a voluntary contract. Sustaining APD's decision, the court stated that the relevant statute designated the provider agreement as a "voluntary contract" and that APD terminated the contract in accordance with its express conditions. The court rejected as irrelevant the operator's argument for administrative jurisdiction based on various statutory provisions specifying administrative hearings for the imposition of certain sanctions and the recovery of Medicaid overpayments by the Agency for Health Care Administration. The court's use of "voluntary" seems to have meant a contract with a term only as long as both parties desired, as distinguished from a binding contract that mandated the mutual performance of contractual undertakings over a preagreed term. Given the insubstantiality of the provider agreement, it represented an insubstantial exercise of APD's core regulatory duties.

24. By statute, as relevant to this case, the core regulatory duties of Respondent include the calculation and payment of pension benefits. §§ 121.025 and 121.031. It is questionable whether Respondent's core regulatory duties extend

to administering rights and responsibilities under the Release, which responds to an injunction, not a statute. There can be little doubt that Respondent's core regulatory duties do not extend to a request for benefits that does not fall within the scope of the Release, but instead depends on Respondent's recognition of rights that transcend the Release, the IRS ruling and notices discussed below, and arguably even the four federal decisions mentioned above. If legislative relief proves unavailable, the sole source for relief then must be judicial.

25. In an abundance of caution, the following Conclusions of Law assume that DOAH and Respondent have subject-matter jurisdiction over Petitioner's request for benefits. Even so, as noted below, there is one claim over which DOAH and Respondent lack jurisdiction and other claims that Petitioner lacks standing to raise.

26. As an applicant, Petitioner bears the burden of proving her entitlement to benefits from Ms. Birch's FRS account. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner must prove her entitlement to benefits by a preponderance of the evidence. § 120.57(1)(j).

27. An FRS member choosing to participate in DROP retires when she enters DROP. § 121.091(13)(b)3. The member is required to elect a payment option prior to receiving her first retirement payment. § 121.091(6)(a). The election of a payment

option is irrevocable once the member cashes a payment or a payment is deposited into a DROP account. § 121.091(6)(h). A lawful spouse of an FRS member has a right only to "acknowledge" the member's selection of Option 1 or 2. § 121.091(6)(a).

28. An FRS member has four options for the payment of benefits. Option 1 is the maximum retirement benefit payable to the FRS member during her lifetime. Option 2 is a decreased retirement benefit payable until the FRS member's death, but for not less than ten years; if the FRS member dies within ten years after retiring, the payment continues to a beneficiary until the expiration of ten years. Option 3 is a decreased retirement benefit payable until the latter death of the FRS member or her "joint annuitant." Option 4 is a decreased retirement benefit payable until the latter death of the FRS member or her "joint annuitant," except that the survivor receives two-thirds of the benefit paid when both persons were alive. § 121.091(6)(a)1.-4. A "joint annuitant" in Options 3 and 4 includes a member's spouse. § 121.021(28).

29. In Windsor, supra, two persons entered into a lawful same-sex marriage in Ontario, Canada in 2007. Two years later, one of the spouses died and left her estate to the surviving spouse, who claimed the federal estate tax deduction for a surviving spouse. When the Internal Revenue Service (IRS) denied the claim due to the federal DOMA, the Court held that

the operative provisions of the federal DOMA violated the Due Process Clause of the Fifth Amendment of the United States Constitution.

30. In Brenner I, supra, the court held that the Florida DOMA and related constitutional and statutory authority that barred the allowance or recognition of a same-sex marriage violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution. Due to the number of plaintiffs, it is difficult to determine if any of the claims sought, as here, marital rights prior to the commencement of a lawful same-sex marriage, but it appears not. The court enjoined Respondent, the Florida Surgeon General, and one court clerk from applying or enforcing the Florida DOMA to same-sex marriages, but stayed the injunction.

31. In Obergefell, supra, the Court held that various state DOMAs violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution by not allowing or recognizing a same-sex marriage. None of the claims sought marital rights prior to the commencement of a lawful same-sex marriage.

32. In Brenner II, supra, the court rejected a mootness defense. Acknowledging the ongoing resistance of defendants to compliance with Brenner I, the court noted the existence of other statutes, not challenged by the Brenner plaintiffs, that

continued not to recognize same-sex marriage and the legislature's choice "not to pass legislation to bring Florida law into compliance[, which] does not help the defendants."

33. In Revenue Ruling 2013-17, the IRS advised that, effective September 16, 2013, for federal tax purposes, same-sex persons could qualify as spouses if they had been married in a state that allowed same-sex marriage at the time of the marriage. However, for substantial reasons,[12/] the IRS declined to recognize as married those persons who had entered into a registered domestic partnerships, civil unions, or other formal relationships that, under state law, were not recognized as a marriage. The IRS also announced that it would construe gender specific language in the Internal Revenue Code (IRC), such as "husband" or "wife," to include same-sex persons who are lawfully married.

34. The IRS later required that all qualified plans conform to Windsor by corrective amendments effective no later than June 26, 2013, although plan sponsors could adopt amendments recognizing lawful same-sex marriages "for some or all purposes" earlier than June 26, 2013. The IRS recognized that plan sponsors were not required to amend plans that did not affirmatively differentiate between same-sex and opposite-sex spouses. The deadline for any required amendment for a government plan was the close of the first legislative session

after December 31, 2014. IRS Notice 2014-19. Accord IRS Notice 2015-86. Significantly, these notices maintained the requirement that the plan participant be in a lawful same-sex marriage at the relevant time; in other words, these notices did not require that a plan sponsor relate back a same-sex marriage, such as to the date of retirement. Although the Release is not so limited, these notices did not require that a plan sponsor retroactively accommodate persons in same-sex marriages earlier than June 26, 2013--the date of Windsor.

35. In her proposed recommended order, Petitioner makes four arguments. Petitioner describes the second pair as more to the point, in the context of the present case, than the first pair, Petitioner's proposed recommended order, ¶ 33, but the first pair of arguments are noteworthy. If successful, the first argument would invalidate the Release, at least in the present case, and the second argument would disqualify the FRS defined benefit plan.

36. Petitioner's first argument is that the Release is an invalid rule, evidently because it is unadopted. Neither the Administrative Law Judge or Respondent may rely on an unadopted rule in determining whether to sustain proposed agency action. § 120.57(1)(e)1. Section 120.57(1)(e)2.a. applies the procedures of section 120.56(1)(b), and section 120.57(1)(e)2.c.

applies section 120.56(4)(c) to a challenge alleging an unadopted rule.

37. Section 120.56(1)(b) provides that Petitioner must show that she is substantially affected by an unadopted rule and state the grounds for determining that the rule is invalid. Petitioner has failed to carry either of these burdens. Petitioner is not substantially affected by the Release: the invalidation of the Release, in whole or in part, would provide Petitioner with no relief whatsoever in this case.

38. Petitioner has also failed in her challenge of the Release as an unadopted rule. First, Petitioner never alleged this matter. Second, Petitioner failed to prove that the Release is a rule. A rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy . . .." § 120.52(16). An agency's interpretation of a statute that is "readily apparent" from a literal reading of the statute is not a rule. St. Francis Hosp. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989) (dictum). An agency is not engaging in policymaking when it performs a literal reading of a statute, nor is it engaged in policymaking when it complies strictly with a court injunction, so, for the same reason, this exercise is not a rule.

39. Additionally, section 120.56(4)(c) authorizes an agency's reliance on an agency statement that would otherwise be

an unadopted rule if rulemaking is not feasible and practicable. Rulemaking is not feasible because "[r]elated matters are not sufficiently resolved to enable the agency to address a statement by rulemaking." § 120.54(1)(a)1.b. The related matter that is not sufficiently resolved is the legislature's response to Brenner I and II: rulemaking awaits the enactment of statutes to be implemented.

40. More ambitious, Petitioner's second argument is to disqualify the FRS defined benefit plan, which is a qualified plan,[13/] from the federal income tax benefits accorded to the plan's trust and FRS members.[14/] IRC § 401(a), 26 U.S.C. § 401(a). The above-discussed IRS ruling and notices require a qualified plan to conform to the decisional law as to the treatment of same-sex spouses, so, if the plan affirmatively precluded the recognition of same-sex spouses, the sponsor had to amend the plan, effective June 2013, to document that same-sex spouses would be treated as spouses for all purposes.[15/] Effectively, the Florida DOMA was eliminated from the plan when the Supreme Court lifted the stay in Brenner I and Respondent could no longer enforce or apply the Florida DOMA: at this point, the only purpose to be served by an amendment would be to address the treatment of same-sex spouses prior to the lifting of the stay.

41. The Release serves as the amendment required to address the treatment of same-sex spouses prior to the lifting of the stay in Brenner I. There is no requirement that an amendment of a qualified government plan be by statute or rule. Among other requirements, a qualified plan is required only to be a "definite written program and arrangement." 26 C.F.R. § 1.401-1(a)(2). This language "should be broadly construed to encompass various formats, including a collection of writings which creates a specific permanent plan." Engineered Timber Sales, Inc. v. Comm'r, 74 Tax Ct. 808, 827 (1980) (dictum).

42. Additionally, Petitioner lacks standing to challenge the qualified status of the plan because, were her claim successful, she would be entitled to no relief. Lastly, DOAH and Respondent lack subject matter jurisdiction over a claim that the FRS defined benefit plan is not qualified under IRC § 401(a). Such a determination emanates from the IRS or a court, see, e.g., In re Gilbraith, 523 B.R. 198 (Bank. Ct. D. Ariz. 2014), not from the state agency serving as the plan sponsor.

43. Petitioner's third argument is that Respondent is equitably estopped from rejecting Petitioner's request to allow Ms. Birch to change to Option 3 because Respondent had granted Ms. Birch's request in May 2015, and Ms. Birch and Petitioner

had detrimentally relied on Respondent's acceptance of Ms. Birch's second election.

44. The elements of equitable estoppel are "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that misrepresentation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." (citations omitted) Hamilton Downs Horsetrack, LLC v. Dep't of Bus. & Prof'l Reg., 226 So. 2d 1046, 1051 (Fla. 1st DCA 2017) (citations omitted). "Generally, estoppel may only be applied in cases of misrepresentations of fact, not misstatements of law." (citation omitted) Id. When invoked against the government, the person claiming that the government is estopped "must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the government misconduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest." (citations omitted) Id. at 1052.

45. Petitioner has proved neither a misstatement nor detrimental reliance. As stated in the Findings of Fact, none of Respondent's representatives misstated or misrepresented any fact or law, and Ms. Birch and Petitioner never took any action and never failed to take any action due to their "knowledge" that Ms. Birch would be allowed to elect Option 3.

Additionally, equitable estoppel typically may not be invoked offensively, except to avoid an opposing party's defense; equitable estoppel is essentially a defensive tool. Bair v. City of Clearwater, 196 So. 3d 577, 584-85 (Fla. 2d DCA 2016).

46. Petitioner's fourth argument is for the retroactive application of the above-discussed case law. Petitioner cites Schuett v. FedEx Corp., 119 F. Supp. 3d 1155 (N.D. Cal. 2016). In Schuett, a same-sex couple who had lived together for 27 years and raised two children were married in a civil ceremony in California at a time that same-sex marriage was not allowed. The following day, one member of the couple, Ms. Taboada-Hall, died. She had been a vested participant in a defined benefit plan sponsored by her employer, which did not allow her to elect a joint and survivor annuity on the ground that she was not in a lawful marriage. Six days after the ceremony, the U.S. Supreme Court decided Windsor, and, days later, judicial decisions applied the Windsor ruling to pending California cases. The surviving spouse then filed a judicial action to obtain a ruling that the ceremony constituted the commencement of a lawful marriage. After obtaining a favorable ruling, the surviving spouse filed a claim for a joint and survivor annuity with the sponsor of Ms. Taboada-Hall's defined benefit plan. The sponsor denied the claim on the ground that, at the time of the death of Ms. Taboada-Hall, the plan

incorporated the federal DOMA's definition of spouse. The court declined to issue a judgment on the pleadings in favor of the plan sponsor on one count of the three-count complaint. The count alleged that the plan sponsor violated the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. (ERISA), by failing to administer the plan in accordance with applicable law--thus breaching a fiduciary duty, as prohibited by ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

47. Schuett is not applicable to Petitioner's claim. The court that related the marriage back was a state court construing California law, not the Schuett court. Also, the FRS defined benefit plan is a government plan, ERISA § 3(32), 29 U.S.C. § 1002(32), and ERISA does not apply to a government plan. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1).[16/]

48. Likewise, Petitioner's reliance on decisions from jurisdictions that recognize common law marriage is misplaced. Florida has not recognized common law marriage for 50 years. § 741.211.

49. More generally, Petitioner contends that her marriage should relate back to the date of Ms. Birch's retirement on the ground that U.S. Supreme Court decisions invalidating statutes on constitutional grounds are retroactive. See, e.g., Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993); see generally Peter Nicolas, "Backdating Marriage," 105 Cal. L. Rev. 395 (2017).

The law review article cites limited instances of administrative action to backdate a marriage, but only at the federal level; no Florida agency has implicit authority to perform this act, and, as noted above, the IRS declined to do so for substantial legal reasons.

50. The present facts support a backdating of the marriage, if a court determines that this relief is available, but this, alone, would not justify granting Petitioner's request for the Option 3 benefit. As noted above, the facts do not support the finding that Ms. Birch would have selected Option 3, if she had been allowed to select any of the four options when she retired in October 2012, and the actuarial considerations discussed in connection with the focus of the Release on living FRS retirees would militate against an unconditional[17/] determination that Petitioner may now, after the death of Ms. Birch, elect Option 3 benefits.

RECOMMENDATION

It is

RECOMMENDED that Respondent enter a final order denying Petitioner's request for benefits under Option 3 from Ms. Birch's FRS account and dismissing Petitioner's Request for Administrative Hearing.

DONE AND ENTERED this 16th day of January, 2018, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of January, 2018.

ENDNOTES

[1/] The record does not indicate whether Petitioner was ever appointed to serve as the personal representative of the estate of Ms. Birch.

[2/] Certain persons besides a surviving spouse may qualify as the joint annuitant under Options 3 and 4, but, because these alternatives are irrelevant to the present case, this recommended order will refer to the joint annuitant as a surviving spouse.

[3/] The record does not disclose the amount of the Option 3 benefit at the time of Ms. Birch's retirement. However, effective June 1, 2015, when Mr. Birch's monthly Option 1 benefit had risen to $3218.71, her monthly Option 3 benefit, which, as described below, would pay a reduced amount from Option 1 for the longer period of the life of the retiree or her spouse, would have been $2357.64 and her monthly Option 4 benefit would have been $2623.53, which would have been reduced to $1749.02 upon the death of Ms. Birch or Petitioner, whoever was the first to die.

[4/] Related provisions of Florida law challenged in Brenner I were Article 1, section 27 of the Florida Constitution, and

section 741.04(1), Florida Statutes. Like section 741.212, these provisions remain "on the books."

[5/] Brenner II does not indicate when or in what decision the U.S. Supreme Court lifted the stay in Brenner I.

[6/] https://www.rol.frs.state.fl.us/forms/ir15-184.pdf.

[7/] Textually, the Release provides retirees the opportunity to change "their" elections from Option 1 or 2 to Option 3 or 4, describes the opportunity as impacting retirees, and provides retirees with the right to elect an option to provide continuing benefits to their spouses.

[8/] The date of January 2, 2015, in a document dated three months later implies that, from January 2, 2015, forward, Respondent complied with the injunction and treated same-sex marriages the same as opposite-sex marriages. Obviously, Respondent's compliance with the Brenner I injunction required the recognition of same-sex marriages on a prospective basis.

[9/] The Release confers a slight advantage upon the same-sex couple by allowing the FRS retiree to make the second election based on additional knowledge that she may have acquired since retiring as to her health and the health of her spouse.

[10/] The Release does not address the contingency of a lawful same-sex spouse at the time of the retirement of the FRS member, the termination of the marriage by death (or divorce), and a remarriage.

[11/] The June 26 note documenting the telephone conversation is hearsay--actually, double hearsay--so it has not been received for the truth of Ms. Birch's statement, but only as evidence tending to impeach Petitioner's testimony that Respondent informed Ms. Birch that she could change her election or that Ms. Birch would have elected Option 3, if this option had been available in October 2012.

[12/] In an introduction to new Treasury regulations covering lawful same-sex marriages, the IRS explained why it did not treat domestic partnerships like lawful marriages:

> Some couples have chosen to enter into a civil union or registered domestic partnership even when they could have married, and some couples who are in a civil

> union or registered domestic partnership have chosen not to convert those relationships into a marriage even when they have had the opportunity to do so. In many cases, this choice was deliberate, and couples who enter into civil unions or registered domestic partnerships may have done so with the expectation that their relationship will not be treated as a marriage for purposes of federal law. For some of these couples, there are benefits to being in a relationship that provides some, but not all, of the protections and responsibilities of marriage. For example, some individuals who were previously married and receive Social Security benefits as a result of their previous marriage may choose to enter into a civil union or registered domestic partnership (instead of a marriage) so that they do not lose their Social Security benefits. More generally, the rates at which some couples' income is taxed may increase if they are considered married and thus required to file a married-filing-separately or married-filing-jointly federal income tax return. Treating couples in civil unions and registered domestic partnerships the same as married couples who are in a relationship denominated as marriage under state law could undermine the expectations certain couples have regarding the scope of their relationship. Further, no provision of the Code indicates that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships. Accordingly, the IRS will not treat civil unions, registered domestic partnerships, or other similar relationships as marriages for federal tax purposes.

80 Fed. Reg. No. 205, pp. 64378, 64379 (Oct. 23, 2015).

[13/] § 121.30.

[14/] See, e.g., Citrus Valley Estates v. Comm'r, 99 T.C. 379, 397-98 (1992). Here, the main benefits would be the nonrecognition

of income by FRS members until the receipt of benefits and the tax-exempt status of the trust that holds the plan assets.

[15/] It is assumed that the FRS defined benefit plan is subject to such provisions. As a government plan, though, the FRS defined benefit plan is exempt from various requirements imposed on qualified plans sponsored by other types of sponsors, such as the requirement of the payment of benefits in a joint and survivor annuity. I.R.C. § 401(a)(37) (last sentence).

[16/] Typically, ERISA preempts state-law claims of equitable estoppel concerning qualified plans. See, e.g., Salomon v. Transamerica Occidental Life Ins. Co., 801 F.2d 659 (4th Cir. 1989). But ERISA equitable estoppel does not apply to this case because the FRS defined benefit plan is not subject to ERISA.

[17/] These cascading contingencies reinforce the essential nature of Petitioner's claim as judicial, not administrative. If a court were to get this far, it could fashion a remedy that would mitigate the effects of adverse selection by, for instance, calculating the benefit based on the weighted averages of the elections of similarly situated persons. In other words, if, among 10 FRS members, 6 chose Option 3 and 4 chose Option 1, and Option 3 paid $2000 per month and Option 1 paid $3000 per month, Petitioner could be deemed to be entitled to a monthly benefit of $1200, rather than the full $2000 due under Option 3. (The calculation is $12,000 (6 x $2000) plus $0 (4 x $0) equals $12,000, which, divided by 10, yields a monthly benefit of $1200. Such calculations would likely constitute nonquantifiable damages, which cannot be awarded administratively. See Laborers' Internat'l Union v. Burroughs, 541 So. 2d 1160, 1162 (Fla. 1989) (citing Broward Cnty. v. LaRosa, 505 So. 2d 422 (Fla. 1987)).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.