

KEYWORDS: claim of payment of death gratuity under 10 U.S.C. §§ 1475-1480

DIGEST: At the time of a service member's death, the member's effective DD Form 93(E), *Record of Emergency Data*, indicated that for purposes of payment of a death gratuity under 10 U.S.C. §§1475-1480, his mother was the designated beneficiary in the absence of a spouse or child. Upon his death, the member had a spouse, who was statutorily higher in precedence for payment of the death gratuity than the member's mother, and the member failed to designate the mother as an optional beneficiary in accordance with the procedures specified in 10 U.S.C. § 1477. Therefore, the claim of the member's mother for the proceeds of the death gratuity cannot prevail over the claim of the spouse.

CASENO: 09091701

DATE: 9/24/2009

DATE: September 24, 2009

	)	
In Re:	)	
REDACTED	)	Claims Case No. 09091701
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

At the time of a service member's death, the member's effective DD Form 93(E), *Record of Emergency Data*, indicated that for purposes of payment of a death gratuity under 10 U.S.C. §§1475-1480, his mother was the designated beneficiary in the absence of a spouse or child. Upon his death, the member had a spouse, who was statutorily higher in precedence for payment of the death gratuity than the member's mother, and the member failed to designate the mother as an optional beneficiary in accordance with the procedures specified in 10 U.S.C. § 1477. Therefore, the claim of the member's mother for the proceeds of the death gratuity cannot prevail over the claim of the spouse.

## DECISION

The mother of a deceased soldier requests reconsideration of the August 27, 2009, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09030501. In that decision, DOHA disallowed the claim of the mother of the service member for part or all of the death gratuity that was payable incident to his death; the member's spouse was the proper recipient.

### Background

The record shows that the service member executed a DD Form 93(E), *Record of Emergency Data*, on June 14, 2006. On it, he designated his mother as the beneficiary for 100 percent of the death gratuity. The form also listed his marital status as divorced. The claimant also provided a copy of a letter dated June 19, 2006, that she states was from the member and stated "Mom . . . If I die you should get +\$100k (death gratuity etc) . . ." This letter also indicated that it was transmitting to the claimant copies of the member's will, living will, and documents related to his Service Member's Group Life Insurance (SGLI). In a DD Form 93(E) dated January 17, 2007, the member again designated the claimant for 100 percent of his death gratuity, and he continued to indicate his marital status as divorced.

At some point afterward, the member married the spouse. The adjudicator noted that the record does not state the date and place of the marriage or include any documentation of it. Prior to this request for reconsideration, neither the claimant nor the government (the Army or the Defense Finance and Accounting Service (DFAS)) questioned the existence or validity of the marriage; therefore, the adjudicator properly accepted it as a fact in the case.<sup>1</sup> The record does not show that the member executed any additional DD Form 93s, although the record does show two premarital designations of the spouse as a partial beneficiary for SGLI purposes.<sup>2</sup> On May 25, 2007, Congress amended the death gratuity law to allow a service member to designate a person other than his/her spouse to receive up to 50 percent of the death gratuity, but the record does not show that the member executed a new written designation incident to this change. The member was killed in action in Operation Enduring Freedom in August 2007.

The claimant filed a claim for the entire death gratuity (\$100,000). In denying that claim, AHRC concluded that payment to the spouse was proper because at the time of death the member was married and had not executed an other-than-spouse designation in accordance with the May 2007 amendment to the death gratuity statute. AHRC also noted that it was not until July 2008, almost a year after the member's death, that a service member could designate a

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<sup>1</sup>The administrative report in this case includes copies of official correspondence dated July 25, 2008, from the Army Human Resource Command (AHRC), which states that a specified person, whose name is redacted from this decision to protect her privacy, was, in fact, the spouse of the member at the time of his death.

<sup>2</sup>The following percentages are noted on the SGLI beneficiary designation on January 17, 2007: 25 percent for the claimant, 15 percent for an aunt, and 60 percent for the person who eventually became the spouse.

person other than his spouse to receive 100 percent of the death gratuity. The decision of AHRC was upheld by DFAS in its initial determination of the claim.

DOHA's adjudicator concluded that the member did not designate the claimant as the beneficiary in accordance with the statutory provisions in effect in August 2007, and that the statute contained no language that made an existing designation otherwise applicable to it. The adjudicator also noted that the designation of a beneficiary on the member's two DD Form 93(E)s was specifically contingent on there being no spouse at the time of death.<sup>3</sup>

In her reconsideration request, the claimant argues that the adjudicator overlooked the following "legal considerations:" (a) claimant would have been a designated beneficiary of the member if he had designated her on the DD Form 93 as an "optional beneficiary;" he "always intended" that she receive either the full amount of the death gratuity or the maximum amount permitted to her by law as evidenced by his never amending his DD Form 93s and his letter of June 19, 2006; (b) when the amendment to 10 U.S.C. § 1477 became effective, the member was deployed in the field, and there is no indication he became aware of the change in the law or was given an opportunity to amend his DD Form 93 to make it conform to his intent; (c) in applying 10 U.S.C. § 1477 to the circumstances of this case, the following "considerations" are determinative: the law changed, a soldier deployed, a new version of the DD Form 93 became effective, the government did not demonstrate that the soldier knew what to do to effectuate his intentions, and the claimant was the intended beneficiary. The claimant also contends that she never "tacitly nor implicitly accepted the legal validity" of her son's marriage; therefore, the government must demonstrate the validity of the marriage as a "condition precedent to any finding that she is not entitled to the Death Gratuity payment."

### **Discussion**

Preliminarily, the claimant's assertions that her son's marriage may not have been valid, and therefore that the government must prove that the marriage was valid as a "condition precedent" before paying the death gratuity to any person other than claimant, is unsupported. As indicated above, the administrative report in this case states that the spouse was married to the member at the time of his death. Even when the facts in a claim are properly in dispute, and they are not here,<sup>4</sup> we accept the statement of facts furnished by the administrative office, in the absence of clear and convincing contrary evidence offered by the claimant. This is based on the well-established rule that the administrative office, here AHRC, is in a better position to consider and evaluate such facts. *See* DOHA Claims Case No. 06061225 (June 19, 2006), *citing* the

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<sup>3</sup>Line 9a on the two forms signed by the member states: "BENEFICIARY(IES) FOR DEATH GRATUITY (If no surviving spouse or child)." The name of the claimant follows.

<sup>4</sup>If claimant wanted to challenge payment of the death gratuity to the spouse based on any alleged invalidity of the marriage, she had to do so when she first submitted her claim. *See* Department of Defense Instruction 1340.21 (hereafter referenced as Instruction) ¶ E5.7 (May 12, 2004).

decision of the Comptroller General in 57 Comp. Gen. 415, 419 (1978). Claimant failed to offer any evidence demonstrating the invalidity of the marriage.

The death gratuity is established by title 10, United States Code (U.S.C.), Sections 1475 through 1480 (10 U.S.C. §§ 1475-1480). Payment to the eligible survivor is determined by 10 U.S.C. § 1477. At all relevant times up until May 2007, subsection (a) of 10 U.S.C. § 1477 stated that a death gratuity payable upon the death of a person covered by section 1475 or 1476 shall be paid to the living survivor highest in the following precedence: (1) the surviving spouse; (2) the children; (3) if designated, any one or more of the parents or siblings; (4) if no designation exists, the parents in equal shares; and then (5) the siblings in equal shares.

Members were allowed for the first time to designate a beneficiary, despite the existence of a spouse and/or children, under Public Law 110-28,<sup>5</sup> which added a new subsection (d) to 10 U.S.C. § 1477(emphasis added):

(d) During the period beginning on the date of the enactment of this subsection [May 25, 2007] and ending on September 30, 2007, a person covered by section 1475 or 1476 of this title **may designate another person to receive not more than 50 percent** of the amount payable under section 1478 of this title. **The designation shall indicate the percentage of the amount**, to be specified only in 10 percent increments up to the maximum of 50 percent, that the designated person may receive. The balance of the amount of the death gratuity shall be paid to or for the living survivors of the person concerned in accordance with paragraphs (1) through (5) of subsection (a).

Thus, 10 U.S.C. § 1477, as amended by Public Law 110-28, applied at the time of the member's death.<sup>6</sup> As explained in the Appeal Decision, a claim is adjudicated on the basis of the statutes in effect at the time it accrues. A claim accrues when all of the events have occurred which fix the liability, if any, of the Federal Government and entitles the potential beneficiary to the claim. In the case of a claim for a death gratuity, that date is the date of the service member's death. *See* the decision of the Comptroller General in 42 Comp. Gen. 622 (1963).

The member had designated his mother in line 9a on his last DD Form 93(E) on record

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<sup>5</sup>See Pub. L. No. 110-28, title III, § 3306, 121 Stat. 112, 136-137 (2007).

<sup>6</sup>The statute was again amended in 2008, after the member's death. *See* Pub. L. No. 110-181, Div. A, title VI, § 645, 122 Stat. 3, 158-160 (2008). Among other things, starting on or after July 1, 2008, the amendment allowed an optional beneficiary to take up to 100 percent of the death gratuity to the exclusion of a person who would be higher in the statutory order of precedence, but also included a provision requiring notice to the spouse if an optional beneficiary receives any payment. *See also* Volume 7A of DoD 7000.14-R, the DoD Financial Management Regulation, Military Pay Policy and Procedures-Active Duty and Reserve Pay, ¶ 3601.

(January 17, 2007). But in signing the January 17, 2007, DD Form 93(E), the member acknowledged on line 9a that if he had a spouse and/or a child(ren) at the time of his death, the selection of the beneficiary on line 9a would not prevail. The statute did not permit an optional beneficiary in January 2007, and payment has to be made in accordance with the statute. To the extent that the member's "intent" was a factor at all, the member's signature on the DD Form 93(E) with the language on line 9a must also be considered as evidence of intent that his mother would not prevail as a beneficiary if he had a spouse when he died. The claimant has failed to establish that the member always intended that she be the beneficiary for the death gratuity.

The claimant places a great deal of reliance on the fact that the law changed while the member was deployed and that he was not advised on the change in the law and given an opportunity to execute a new DD Form 93(E) naming his mother as the optional beneficiary. The claimant did not introduce any evidence to demonstrate whether the member was aware or not aware of any change in the law, and that he wanted to execute a new DD Form 93(E) with claimant as the optional beneficiary but was not afforded the opportunity to do so. The claimant's argument is based entirely on speculation and conjecture, and as explained above, it is also predicated on the unsupported assumption that the member intended that his mother be the death gratuity beneficiary to the exclusion of any spouse and/or child. The May 2007 amendment essentially continued the same statutory scheme, but, for the first time, it did allow an opportunity for an optional beneficiary to receive up to 50 percent of the death gratuity, to the exclusion of someone higher in the statutory precedence, if that choice was made in accordance with the statute. But the fact is that the member, for whatever reason, did not change his DD Form 93(E) to make his mother an optional beneficiary for up to 50 percent of the death gratuity. Whatever the reason, the death gratuity is a statutory entitlement, and the member's failure to comply with statutory requirements in designating his mother as an optional beneficiary (among other things, specifying a percentage in 10 percent increments), if that is what he intended, precludes further consideration. The January 17, 2007, DD Form 93(E), acknowledging that any spouse or child would prevail over the claimant, is the member's last and effective beneficiary designation in this matter.

### **Conclusion**

For the reasons stated herein, we affirm the Appeal Decision's disallowance of the claim by the member's mother for the proceeds of the death gratuity payable on account of the member's death. In accordance with ¶E7.15.2 of the Instruction, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: William S. Fields

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William S. Fields  
Member, Claims Appeals Board