DATE: January 30, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 96070219

CLAIMS APPEALS BOARD DECISION

DIGEST

1. As a general proposition, the validity of a marriage is for determination under the laws of the jurisdiction where the marriage is performed. Doubts concerning the validity of a marriage may properly be resolved by a final judgment of a court of competent jurisdiction.

2. If a spouse was not married to the member at the time of initial election into the SBP, he or she must have been married to the member for at least 1 year immediately before the member's death or be the parent of issue born of that marriage in order to become an eligible widow or widower beneficiary. However, if a member who was married at the time of retirement and initial election into SBP, elects coverage for that spouse, divorces that spouse and later remarries that spouse, the spouse on remarriage is exempt from the 1- year waiting period before becoming an eligible beneficiary.

3. When divorce documents show that the marital status of a couple is terminated, this Office cannot conclude, based on that document, that the couple was married after that date, regardless of the fact that the judgment was not entered until several months later.

4. If a couple divorces and remarries, a child born of the first marriage of the parties does not qualify as "issue of that marriage" for purposes of qualifying the claimant for an SBP annuity.

DECISION

This is in response to an appeal of the U.S. General Accounting Office's (GAO) Settlement Certificate Z-2869611, May 4, 1995, which denied the claim of the widow of a service member for a Survivor Benefit Plan annuity. Pursuant to Public Law No. 104-316, October 19, 1996, title 31 of the United States Code, Section 3702, which provides for settlement of claims against the United States, was amended to provide that the Secretary of Defense shall settle claims involving uniformed service members' pay, allowances, travel, transportation, retired pay and survivor's benefits. The Secretary of Defense further delegated settlement authority to this Office.

Background

The claimant was married to Chief Warrant Officer Third Class [Redacted], USN (Retired) (Deceased) (hereafter referred to as the member.) They were married in Trenton, New Jersey, on October 12, 1963. They were separated in the fall of 1988 and subsequently divorced in 1991. On September 18, 1991, the member executed his Survivor Benefit Plan (SBP) election. He apparently listed the claimant as his spouse and elected coverage based on his full gross pay. The member retired on October 1, 1991, and appropriate SBP deductions were made from his retired pay. The claimant and the member were remarried on July 3, 1993. The member died on June 18, 1994, from injuries suffered in a car accident. The claimant submitted a claim for the SBP annuity to the Defense Finance and Accounting Service (DFAS).

The claim was forwarded to GAO, where a Settlement Certificate was issued. GAO denied the claim. Since the member had died less than one year after the remarriage, and the claimant and member had apparently been divorced at the time the member elected SBP coverage for the claimant, GAO found that the claimant did not qualify for an SBP annuity.

The claimant, through her attorney, has appealed the case arguing that she and the member were married at the time of the member's election, and therefore, the one year restriction does not apply to her. She also indicates that there are children born during the first marriage and asks whether she therefore qualifies for an SBP annuity based on the "issue of that marriage" provision.

Discussion

The legislative history of the SBP shows that the congressional purpose of the plan was to establish an income maintenance program for families of deceased service members. To that end, a military retiree may elect to provide an annuity at death to an eligible beneficiary in exchange for contributions to the program during his lifetime. Congress sought to prevent spouses who become widows or widowers of SBP participants only by virtue of a short-term marriage after retirement from automatically receiving an annuity. As a result, Congress established conditions precedent to receiving an annuity.

Title 10 of the United States Code, Section 1450 (a) (1), directs payment of the SBP annuity to the "eligible widow" upon the death of the member. "Widow" is defined in pertinent part by 10 U.S.C. 1447(3) as:

"The surviving wife of a person who, if not married to the person at the time he became eligible for retired pay--

"(A) was married to him for at least one year immediately before his death or

"(B) is the mother of issue by that marriage."

Thus, if the spouse was not married to the member at the time of initial election into the plan, he or she must have been married to the member for at least 1 year immediately before the member's death or be the parent of issue born of that marriage in order to become an eligible widow or widower beneficiary. However, if a member who was married at the time of retirement and initial election into SBP elects coverage for that spouse, divorces that spouse and later remarries that spouse, the spouse on remarriage is exempt from the 1- year waiting period before becoming an eligible beneficiary. Colonel Arthur W. Hyland, USAF, Retired, and Major Harry R. Park, USAF, Retired, B-195349, Jan. 10, 1980.

The issue in this case is whether or not the claimant is an eligible beneficiary. A petition for dissolution of marriage had been filed and a trial had been completed at the time of the election. The Notice of Entry of Judgment and the Judgment issued by the Superior Court of California state that the marital status was terminated on May 31, 1991, even though the Judgment was not filed and entered until October 1991.

Based on these documents, GAO disallowed the claim, concluding that in October, the Superior Court of California apparently exercised its power to enter the divorce decree retroactively (nunc pro tunc) to May 31, 1991, pursuant to California Family Code 2346.[(1)] That section provides that if the court determines that a decree of dissolution ought to be granted but by mistake, negligence or inadvertence, the judgment has not been signed, filed and entered, the court may cause the judgment to be signed, dated, filed and entered therein as of the date when the same could have been signed, dated, filed and entered originally. If that assumption is correct, then the claimant and member were divorced on May 31, 1991, and the claimant does not qualify as an eligible widow for SBP.

The claimant argues that the court did not enter a nunc pro tunc judgment. She argues that nothing in the file substantiates that conclusion. We have found nothing in the record which affirmatively indicates that the court entered a nunc pro tunc judgment. However, based on the record before us, neither can we assume that the parties were married at the time of the election.

The Comptroller General has held as a general proposition that the validity of a marriage is for determination under the laws of the jurisdiction where the marriage is performed. See, 47 Comp. Gen. 286 (1967). Similarly, we look to the laws of the jurisdiction where the dissolution or divorce is performed.

California Civil Code 4501, in effect at the time of the dissolution, states in pertinent part that the effect of a judgment decreeing a dissolution of the marriage is to restore the parties to the state of unmarried persons. Civil Code 4514

provides in pertinent part that a decree declaring a marriage dissolved shall specify the date on which the decree becomes finally effective for the purposes of terminating the marriage relationship of the parties.

Documents in the file indicate that despite the fact that the judgment was not entered until October 1991, marital status ended May 31, 1991. The Notice of Entry of Judgment, dated October 21, 1991, specifies that the effective date of termination of marital status is May 31, 1991. It further states that neither party may remarry until the effective date of the termination of marital status as shown, which is May 31, 1991.

The Orders and Attachment to the Judgment of Dissolution, which were apparently signed and dated on October 10, 1991, indicate that the hearing on October 8 was for the court to review the issue of spousal support. A stipulation order dated October 8 states that spousal support was to be paid for October, then suspended until the hearing on December 3, 1991. In addition, that document indicates that spousal support was to begin on June 1, 1991, until such time as the claimant died, or remarried or until further order of the court, implying that the claimant was free to remarry.

Even after the dissolution became final, the case was continued to December 3, 1991, February 10, 1992, March 9, 1992, April 14, 1992, May 12, 1992 and May 21, 1992, at which time a different stipulation order settling spousal support was signed. Thus the fact that the court reviewed spousal support in October of 1991 is not inconsistent with the conclusion that the effective date of termination of the marital status was May 31, 1991. In addition, all of the documents filed and entered into judgment in October indicate that the marital status ended in May 1991.

In addition, this office contacted the Superior Court of San Diego, Family Law Division. We were informally advised that the date the marital status of the parties ended was May 31, 1991. Thus it appears that although the divorce may not have been final until judgment was entered on October 11, 1991, the marital status of the parties ended, and the parties were free to remarry in May.

Accordingly, although the claimant argues that she was married at the time the member elected participation, based on the record before us, we cannot conclude that the claimant was married to the member at the time the member retired and elected to participate in SBP. Thus, we cannot allow payment of an SBP annuity on that basis.

However, we note that the Comptroller General repeatedly expressed the view that doubts concerning the validity of a marriage may properly be resolved by a final judgment of a court of competent jurisdiction. He further held that doubts may be resolved to the satisfaction of the accounting officers of the government if a court of competent jurisdiction renders a judgment declaring the marriage valid. Lieutenant Commander Joseph Eugene Smith, USN (Retired) (Deceased), B-217743, July 15, 1985. We agree. If a court of competent jurisdiction were to render a judgment that the parties were validly married, the Board would not question the status of the marriage.

The claimant also questions whether she is eligible for an SBP annuity based on the fact that she has at least one child that is issue from her marriage to the member. We note that the child in question appears to be the issue of her first marriage to the member, rather than issue of the marriage which took place in 1993. It is our view that since the couple was legally divorced and returned to the status of unmarried persons under California law, then legally remarried, the child born of the first marriage of the parties does not qualify as "issue of that marriage" for purposes of qualifying the claimant for an SBP annuity.

The Comptroller General apparently never specifically addressed this issue, however, he has held that a child born to the two parties prior to the time they were legally married does not qualify as "issue of that marriage." See, e.g., Clarence W. Braxton, USA (Retired)(Deceased), B-189133, Sept. 21, 1977.[(2)] In MacConnell v. United States, 217 Ct. Cl. 33 (1978), a member was married in 1949, elected to participate in the Retired Servicemen's Family Protection Plan (RSFPP), divorced in 1968, attempted to participate in SBP, and remarried in 1974. The member died two months after the remarriage. The couple had two children born of the first marriage. The Claims Court held that although the initial marriage produced two children, there was no issue of the second marriage. We are unable to conclude that a child of the couple, born to them during the first marriage, is "issue" of the second marriage.

Conclusion

Accordingly, we are unable to conclude that the claimant was an "eligible widow" for purposes of receiving an SBP

annuity.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Joyce N. Maguire

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Joyce N. Maguire

Member, Claims Appeals Board

Signed: Jean E. Smallin

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Jean Smallin

Member, Claims Appeals Board

1. During the applicable time period, this section was 4513 of the California Civil Code.

2. But see Munson v. United States, 30 Fed. Cl. 830 (1994).