

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60234
97663

FILE: B-185037

DATE: NOV 28 1975

MATTER OF: Petty Officer William E. Hamilton, USCG, Deceased

- DIGEST:
1. Where claimant obtained Mexican divorce from prior spouse, subsequently married member in California and claims death gratuity as his surviving spouse, the legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in the absence of declaratory decree from a court of competent jurisdiction in the United States recognizing validity of Mexican divorce so that any impediment to the validity of claimant's marriage to the member arising out of the divorce proceedings may be removed.
 2. Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, the fact that the Coast Guard paid her the member's unpaid pay and allowances as a designated beneficiary under clause (1) of 10 U. S. C. 2771(a), does not estop the Government from challenging the validity of the marriage since such payment was neither determinative of the question of her marital status nor was such question even in issue.
 3. Denial of claim for six months' death gratuity under 10 U. S. C. 1477 does not constitute a taking of the member's property without due process since the amount in question is not the property of the deceased member but rather a gratuity payable out of Federal funds specifically authorized by law.

This action is in response to a letter dated September 9, 1975, with enclosures, from C. Philip Nichols, Jr., Esq., on behalf of Peggy Lee Hamilton, concerning her entitlement to receive payment of the six months' death gratuity in the case of the late Petty Officer William E. Hamilton, USCG, 396 364, who died on July 23, 1974.

This matter was the subject of a settlement by our Transportation and Claims Division which disallowed the claim for the reason that since the claimant's marriage to the member was preceded by a Mexican divorce which had not been recognized by a court of competent jurisdiction in the United States, her marital status to the member was too doubtful to justify payment of the death gratuity.

In his letter, Mr. Nichols questions the propriety of such a ruling. He contends that since the Coast Guard paid the member's unpaid pay and allowances to her, the Government is estopped from challenging the validity of her marriage to the member. He contends further that the denial of her claim constitutes a taking of the member's property without due process.

The law governing final settlement and distribution of the unpaid pay and allowances of deceased members is contained in 10 U. S. C. 2771. Subsection (a) of that section provides in part that the amount shall be paid to the person highest on the following list living on the date of the member's death:

"(1) Beneficiary designated by him in writing to receive such amount * * *.

"(2) Surviving spouse."

Under the language of the before-quoted provisions, a member is permitted to designate the person or persons to receive the pay and allowances due him at the date of his death, without regard to consideration of family or dependency relationships.

The record shows that on August 29, 1973, the member executed a "Record of Emergency Data" wherein he specifically designated Peggy Lee Hamilton as his beneficiary to receive 100 percent of his unpaid pay and allowances in the event of his death. Thus, since the claimant, Peggy Lee Hamilton, was fully qualified under clause (1) of 10 U. S. C. 2771(a) and received payment on that basis, such payment to her was neither determinative of the question of her marital status nor was such question even in issue.

As to the contention that a denial of Peggy Lee Hamilton's claim to the six months' death gratuity constitutes a taking of the member's property without due process, the amount in question is not the

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property of the member. Rather, it is a gratuity payable out of Federal funds as specifically authorized by law.

An individual's right to receive such gratuity in the case of a deceased member of an armed force is contained in the provisions of 10 U. S. C. 1477, which provides in pertinent part:

"(a) A death gratuity payable upon the death of a person covered by section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:

"(1) His surviving spouse.

"(2) His children * * * .

"(3) If designated by him, any one or more of the following persons:

"(A) His parents * * * ."

The legislative history of that section shows that its purpose is to provide a readjustment benefit to those persons surviving a member who were dependent upon him, in order to enable them to resettle in civilian circumstances during the transitional period immediately following the member's death. However, proof of dependency alone is insufficient to qualify a person to receive the payment. Such dependency may only be recognized if the person claiming that dependency relationship is one of the classes authorized in that section. Therefore, in order for the claimant, Peggy Lee Hamilton, to be entitled to payment of the death gratuity in this case, it is necessary that she qualify as the member's surviving spouse.

The file shows that the claimant who had been previously married and divorced in California, married Tommy Eugene Hammond in California on April 8, 1973, and obtained a divorce from him on May 31, 1973, in the judicial district of Ocampo, State of Tlaxcala, Republic of Mexico. Following the issuance of the final divorce decree, the claimant married the member, William Edward Hamilton, in Long Beach, California, on July 13, 1973.

It is well established that unless a foreign court granting a divorce had jurisdiction over the subject matter of the divorce by reason of

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bona fide residence or domicile there of at least one of the parties, its decree of divorce will not, under the rules of international com-
ity, be recognized in one of the states of the United States, even
though the laws of such country do not make residence or domicile
a condition precedent to its courts taking jurisdiction. Annotation,
143 A. L. R. 1312.

While there is authority for the view that an individual who is
divorced by a foreign decree and who thereafter remarries, thus
accepting the benefits of the foreign divorce decree, is estopped to
deny the validity of the divorce, the Federal Government is not
estopped from challenging the validity of such divorce decree when
its interests might be adversely affected. See 25 Comp. Gen. 821
(1946) and 36 Comp. Gen. 121 (1956). Thus, as a general rule, we
have held that where the validity of a subsequent marriage is depen-
dent upon dissolution of the prior marriage by a divorce decree of
a Mexican court and such divorce has not been recognized by a court
of competent jurisdiction in the United States, the marital status of
the parties is considered to be of too doubtful legality for this Office
to approve payment of any funds predicated on such marital relation-
ship. See generally 47 Comp. Gen. 266 (1967), as modified by
49 Comp. Gen. 833 (1970).

It appears from the file that the claimant who was domiciled in
California prior to her Mexican divorce immediately returned to
California thereafter and married the member. It would therefore
appear that the claimant was only a temporary resident in Mexico
and did not establish a bona fide domicile in that country.

In addition to the question of domicile, it appears that the
divorce decree issued may be considered irregular on its face.
The decree states that the parties "have been separated for six
consecutive months," yet it is specifically recognized elsewhere
in that document that the parties were married April 8, 1973, and
were being divorced on May 31, 1973--a period of time considerably
less than six months.

In view of the foregoing, substantial doubt exists as to the
marital status of the claimant and the member at the time of his
death. Therefore, it must be concluded that in the absence of a
declaratory decree from a court of competent jurisdiction in the
United States recognizing the validity of the claimant's Mexican
divorce so that any impediment to the validity of her marriage to

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the member arising out of the divorce proceedings may be removed, the claimant may not be recognized as the deceased member's surviving spouse for the purpose of entitlement to payment of the six months' death gratuity.

Accordingly, the action taken by our Transportation and Claims Division is sustained.

PAUL G. DEMBLING

Acting Comptroller General
of the United States