



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Claims by illegitimate children of deceased
Air Force members

File: B-238463

Date: October 15, 1990

DIGEST

Claims for Survivor Benefit Plan annuities submitted by the mothers of illegitimate children of two deceased retired service members are denied because neither child lived with her father in a regular parent-child relationship, as required by 10 U.S.C. § 1447(5).

DECISION

We have been asked to render an advance decision on the propriety of paying Survivor Benefit Plan (SBP) annuities to two illegitimate children of deceased Air Force retired members.^{1/} The question arises because of various court cases interpreting the statutory language requiring such children to have lived with the member in a regular parent-child relationship. Additionally, we are asked if the fact that the member's assignments prevented him from living with the child has any bearing on entitlement to an annuity. For the reasons presented below, annuities may not be paid to these children.

BACKGROUND

The record submitted to us indicates that the first child, who was born September 25, 1983, is the illegitimate daughter of a deceased retired member of the Air Force. The member entered on active duty in 1979. He was retired with a disability on April 5, 1988, and died soon thereafter. He designated the child to receive as his daughter the arrears of his pay, but on his SBP election form he indicated that he had no spouse or children and declined SBP coverage. However, the SBP form was executed after he became entitled to retired pay and therefore any eligible beneficiaries would be covered as soon as he retired. The child is receiving both Social Security benefits and benefits from the Department of Veterans Affairs. The

^{1/} The Department of Defense Military Pay and Allowance Committee has assigned the number DO-AF-1497 to the request.

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mother of the child maintains that the member would have elected coverage for the child if he had believed that he could and claims an annuity on her behalf. The mother of the child has submitted statements by the deceased member's relatives indicating that the member had acknowledged that he was the father of the child. However, the mother indicates in a letter that the child had not lived with the member and only visited him briefly while he was in the hospital. She also points out that following the birth of the child his various military assignments prevented him from seeing the child.

The second case involves a child who was born January 24, 1978, and is the illegitimate daughter of another deceased retired Air Force member. When the member retired from the Air Force in 1977, he elected "child only" coverage for another daughter who was the only one of his children then eligible for coverage. He named his illegitimate child, who was born after he retired, as his daughter in his will. After he died in 1986, the child's mother obtained a court order adjudicating him to be the father. Additionally, many statements have been submitted by individuals indicating that the member acknowledged paternity of the child, that a parental relationship existed between the member and child, and that the member and child spent occasional weekends at his home and spent vacations together. It appears, however, that the child regularly resided with her mother. The mother claims an SBP annuity on the child's behalf.

ANALYSIS

Congress enacted the SBP in 1972 as an income maintenance program for the surviving dependents of retired service members. See Pub. L. No. 92-425, 86 Stat. 706, 10 U.S.C. §§ 1447-55. Section 1450(a) title 10 provides for the payment of an SBP annuity to a "dependent child" in appropriate circumstances. Section 1447(5) defines a "dependent child" as one who is:

- "(A) unmarried;
- "(B) (i) under 18 years of age, . . . and
- "(C) the child of a person to whom the plan applies, including (i) an adopted child, and (ii) a stepchild, foster child or recognized natural child who lived with that person in a regular parent-child relationship."

Our decision involves subsection (C)(ii), supra. For the purpose of the statute, both children in this case are "natural children," and it appears from the record that both were "recognized" by their fathers. The requirement that each child must have lived with her father in a regular parent-child relationship is the point at issue here.

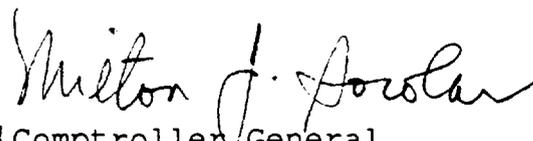
In this regard the submission points out that at the time the SBP was enacted, the definition of a "child" in the civilian employees' survivor annuity system was similar to the SBP's definition--i.e., a recognized natural child had to have lived with the employee or member in a regular parent-child relationship. See 5 U.S.C. § 8341(a)(4) (1976). In January 1980, after several court rulings concluding that the "lived with" requirement was unconstitutional, Congress removed that requirement from the civilian survivor annuity program but has not removed the requirement from the SBP. See Pub. L. No. 96-179, 93 Stat. 1299 (1980).

It has long been the position of this Office that whether a law is constitutional is a question for the courts. Intra-Con Security Systems Inc., B-186437, B-185495, March 7, 1977. While several lower courts found the "lived with" requirement in title 5 unconstitutional, the Supreme Court expressly refused to address that issue, United States v. Clark, 445 U.S. 23 (1980), and we are aware of no decision holding the title 10 provision unconstitutional. Under these circumstances we must view 10 U.S.C. § 1447 as the applicable law in this case.

The submission also questions the meaning of the phrase "lived with in a regular parent-child relationship" as used in 10 U.S.C. § 1447(5), since quite often a member's assignments prevent him from living with his family. We view this phrase as contemplating that the child live in the household of the member as part of the family unit. The parent-child relationship requirement is met if the child lives in that household even when the member is away from the household as a result of his or her military assignment. However, in the two situations before us, we find no indication that the children ever lived with their fathers or in their households.

The record reveals that the first child visited her father for a few days while he was in the hospital, but there is no indication that they had ever lived together in a parent-child relationship. The second child apparently had frequent contact with her father and spent brief periods of time in his residence or with him on vacation. However, the statements in the record indicate they lived in separate households.

Accordingly, we must deny the claims of the children for SBP annuities.



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