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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Constance L. Posner

File: B-245295.2

Date: August 3, 1992

DIGEST

1. A member who elected Survivor Benefit Plan (SBP) coverage for his wife when it became available in 1972, who was divorced in 1977 with a court order and incorporated agreement purporting to designate her as an SBP annuitant, and who failed to actually elect former spouse SBP annuity coverage when such coverage was authorized in 1983, cannot be "deemed" to have elected former spouse coverage if the Secretary did not receive a request for such an election from the former spouse before October 1, 1985, the statutory deadline.

2. An order from a state court in 1991 after the member's death that purports to enforce a 1977 court order and incorporated agreement designating a former spouse as the SBP annuitant, is without effect as a basis for a deemed election on behalf of the former spouse since it does not modify the prior court order. A modification of a prior court order must for the first time order SBP coverage for the former spouse. Where the former spouse already was entitled to coverage based on a voluntary agreement in the original decree, but neither the member nor the former spouse filed an election within the time periods allowed, the 1991 order does not give the former spouse a new 1 year period for filing for a deemed election.

DECISION

Constance L. Posner, the former spouse of Major George E. Posner, United States Army (Retired) (Deceased), claims an annuity under the Survivor Benefit Plan (SBP), 10 U.S.C. §§ 1447-1455. Our Claims Group and the Defense Finance and Accounting Service (DFAS) denied her claim. We affirm.

BACKGROUND

Major Posner retired from the Army on February 28, 1958, and on November 9, 1972, named Constance L. Posner, then his wife, as his SBP beneficiary. In 1976, Major Posner petitioned the Superior Court of California (San Mateo County) for a dissolution of his marriage with Constance.

Interlocutory and final judgments of dissolution were entered in 1977, and they are collectively referred to herein as the 1977 court order. A Marital Settlement Agreement was incorporated into the 1977 court order, and in Paragraph 7 thereof Major Posner designated Constance as "beneficiary under his military retirement pay," to remain in "full force and effect" and "be irrevocable." Major Posner also agreed "to execute such documents as shall, from time to time, be necessary to confirm and carry out this portion of the agreement. . . ." The Superior Court retained jurisdiction.

In January 1977, shortly after the entry of the interlocutory judgment, Major Posner wrote to the United States Army Finance & Accounting Center (predecessor to DFAS), and stated that his designation of Constance as his SBP beneficiary was "irrevocable." In February 1977, Constance Posner wrote to the Finance Center regarding Major Posner's January SBP letter, emphasizing that her designation as beneficiary was irrevocable. Neither Major Posner nor Constance Posner informed the Finance Center that they were dissolving their marriage.

Major Posner married Joy M. Posner on April 13, 1986, and on May 6, 1986, he telephoned the Finance Center to verify his SBP beneficiary designation. At that point, the Finance Center learned that Major Posner had divorced Constance Posner in 1977 and that he had married and divorced a second time prior to his marriage to Joy M. Posner. Major Posner was advised to send copies of all marriage certificates and divorce decrees so that his SBP account file could be updated, but he never submitted a copy of his decree of dissolution of marriage with Constance. In May 1987, the Finance Center again sought a copy of the decree of dissolution of Major Posner's marriage to Constance, but no reply was ever received from the service member. Major Posner died on April 23, 1990.

On July 30, 1991, with Joy M. Posner's concurrence, the Superior Court ratified the Marital Settlement Agreement, directing the decedent "to make and, therefore, is deemed to have made, an election to provide" an annuity to Constance Posner under the "Survivor Benefit Plan."

The claimant states that the 1991 order merely affirms Paragraph 7 of the Marital Settlement Agreement and that Joy M. Posner accepted that order. By contrast, our Claims Group found that Major Posner never agreed to keep Constance Posner as the SBP annuity beneficiary. They interpreted Paragraph 7 as a promise to retain her as the beneficiary for any unpaid retired pay due to him at the time of his death, but not necessarily as an agreement to provide SBP annuity coverage for her.

Constance Posner cannot prevail under either interpretation of Paragraph 7. We affirm the decision of the Claims Group for the reasons explained herein.

ANALYSIS AND DISCUSSION

At the time that Major Posner and Constance Posner divorced there was no authority for former spouse SBP annuity coverage. Constance Posner lost SBP annuity coverage upon actual dissolution of her marriage despite Major Posner's January 1977 letter to the Finance Center, Billie J. Howard, B-238540, Aug. 30, 1990. Accordingly, Constance Posner had to become a beneficiary either through an actual or a "deemed" election by Major Posner once authority for a former spouse election was created by Congress.

On September 24, 1983, the Department of Defense Authorization Act amended the SBP to permit service members like Major Posner who entered retirement prior to September 24, 1983, to voluntarily elect former spouse coverage within 1 year after enactment of the amendment.¹

On October 19, 1984, Congress amended the SBP to provide for a "deemed" election if: the member voluntarily agreed in writing to cover a former spouse under SBP; the agreement was incorporated, ratified or approved by a court order; the member then refused or failed to make the election as agreed; and the Secretary concerned receives a request for a deemed election from the former spouse before October 1, 1985, or within 1 year of the date of the court order, whichever was later.²

An open season from November 8, 1985 to November 7, 1986, provided another window through which a former spouse election could have been accomplished due to a change in the amount of retired pay reduction when a former spouse is designated as a beneficiary.³

Finally, on November 14, 1986, the law was further amended to provide, for the first time, that a court could order a

¹See Pub. L. No. 98-94, title IX, § 941, 97 Stat. 614, 652-654 (1983).

²See Pub. L. No. 98-525, title VI, § 644, 98 Stat. 2492, 2548 (1984).

³Pub. L. No. 99-145, title VII, § 723(d), 99 Stat. 583, 677 (1985).

member to elect coverage for a former spouse.⁴ The "deemed election" provisions were also amended at the same time so that if the former spouse could demonstrate that the member was required by court order to make a former spouse election he would be "deemed" to have done so.⁵

Since Major Posner did not provide an actual written election to the Secretary of the Army on behalf of Constance Posner within 1 year of September 24, 1983, or November 8, 1985, we restrict our analysis to the application of the two "deemed" election provisions.

We have held that a court order which predates the effective date of the authorizing statute may serve as the basis of a deemed election where the order specifically ratifies, approves or incorporates a voluntary agreement by the member to provide SBP annuity coverage for the former spouse, and the request for a deemed election is received by the Secretary within 1 year of the order or before October 1, 1985, whichever is later. 66 Comp. Gen. 687, 695 (1987). No request for a deemed election was made within this deadline.

The 1991 order attempts to enforce the 1977 court order and incorporated Marital Settlement Agreement. However, it is not a proper basis on which to deem an election.

We have held that a court order other than the original decree of dissolution can be used as a basis for a deemed election under 10 U.S.C. § 1450(f)(3). However, in Nawanna Driggers, B-244101, dated today, we concluded that an order that merely reiterated an earlier order that SBP be elected for a former spouse did not qualify as a modifying court order under the statute for purposes of beginning a new 1 year period for electing SBP coverage. In that case, we stated as follows:

"In our view, the definition of a 'court order' includes modification of a previous order to make clear that the substantive obligation to elect former spouse coverage may be imposed as a change to an existing order. What matters is the substantive obligation to elect coverage, and the 1-year period for a request to the Secretary

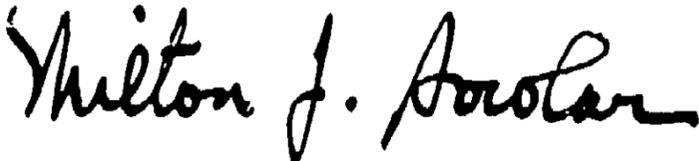
⁴Pub. L. No. 99-661, Div. A, title IV, § 641(a), 100 Stat. 3816, 3885 (1986), codified at 10 U.S.C. § 1450(f)(4).

⁵Pub. L. No. 99-661, Div. A, title IV, § 641(b), 100 Stat. 3816, 3885-3886 (1986), codified at 10 U.S.C. § 1450(f)(3)(A).

begins when a court order initially imposes that obligation on a member."

Assuming there was a 1977 agreement and order concerning SBP coverage, then as noted above both the member and Constance Posner had numerous opportunities to implement their 1977 agreement by requesting that coverage, but never took the necessary action. A new court order which merely reaffirms the substance of the 1977 order concerning SBP coverage cannot provide the basis for a new 1 year period for filing with the Secretary.

The settlement of the Claims Group is affirmed.

for 
Comptroller General
of the United States