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**DECISION**



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

**FILE:** B-221545

**DATE:** June 3, 1986

**MATTER OF:** Survivor Benefit Plan--Mentally  
Incapacitated Annuitants

**DIGEST:**

Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the dependents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a duty to obtain an acquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision.

The question presented in this matter is whether an agent appointed under a power of attorney by a Survivor Benefit Plan annuitant may receive the annuity on the basis of the appointment after the annuitant becomes mentally incapacitated, if an applicable state statute provides that the authority conferred by the power of attorney shall be exercisable notwithstanding the annuitant's incompetency.<sup>1/</sup>

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<sup>1/</sup> This action is in response to a request for an advance decision submitted by the Disbursing Officer, Centralized Pay Division, Marine Corps Finance Center. The request was cleared through the Department of Defense Military Pay and Allowance Committee with submission number DO-MC-1461, and forwarded here by the Fiscal Director of the Marine Corps, Headquarters United States Marine Corps.

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We conclude that annuity payments should not be made to an agent acting under a power of attorney in those circumstances.

#### Background

This matter concerns the widow of a retired member of the United States Marine Corps who elected to participate in the Survivor Benefit Plan. The retired marine thus elected to receive military retired pay at a reduced rate in order to provide a survivor's annuity for his wife if she survived him. Following his death, the Marine Corps Finance Center commenced making the annuity payments to his widow.

On August 17, 1982, the widow signed a document styled as a "durable power of attorney" in which she appointed her daughter as her "true and lawful attorney to \* \* \* manage \* \* \* my affairs." It specifically authorized the daughter to "receive, endorse, and collect checks \* \* \* drawn on the Treasurer or other fiscal officer or depository of the United States." The document also provided that the daughter's authority to act "shall not be affected by disability, incompetency, or incapacity of the principal."

In September 1985 the daughter sent a copy of this power of attorney to the Marine Corps Finance Center. The daughter advised that her mother was in a nursing home and had become mentally incapacitated, and requested that the monthly annuity payments be remitted to her in the full amount.

The Marine Corps Finance Center then suspended payment of the annuity on the basis of decisions of our Office in which we expressed the view that payments due mentally incapacitated annuitants under the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan should be reserved for remittance to a guardian, custodian, or other fiduciary appointed by state court order.

The daughter disagreed with the position taken by the Marine Corps Finance Center because her mother had provided her with a "durable" power of attorney. The prevailing statutory law of the State of Alabama, her mother's place of domicile, defines a durable power of attorney as follows:

"(a) A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact or agent in writing and the writing contains \* \* \* words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability, incompetency or incapacity."  
Ala. Code § 26-1-2(a).

The Alabama statute further states that "all acts done by an attorney during any period of disability, incompetency or incapacity of the principal \* \* \* bind the principal and his successors in interest as if the principal were competent." Ala. Code § 26-1-2(b). The daughter has apparently suggested that on the basis of these provisions of the Alabama Code, the Marine Corps Finance Center should be required to remit her mother's annuity payments to her.

In requesting an advance decision on the question of whether continued annuity payments should be made to the payee's personally appointed agent in this case, the concerned Marine Corps officials observe that while all 50 of the states have enacted statutes in one form or another which allow powers of attorney to remain in effect under certain conditions even if the principal becomes mentally incapacitated, agents are without authority to compel third parties to transact business on the basis of a power of attorney. The Marine Corps officials also add these observations concerning the safeguards afforded in making disbursements to a court-appointed fiduciary rather than to an agent acting under a power of attorney:

"There remain serious differences between a State fiduciary proceeding based upon the incompetency or incapacity of an individual and durable power of attorney which empowers the agent to act for the incapacitated or incompetent principal. \* \* \* (T)he Alabama Curators statute is submitted as an example \* \* \*. In the fiduciary proceeding, the fiduciary's power emanates from the court in accordance with State law. See Ala. Code § 26-7A-2. The scope of the fiduciary's power is governed by State statute. In the durable power of

attorney, the source of the agent's power is the voluntary delegation or assignment by the principal. The scope of the agent's power is governed by the instrument, the power of attorney itself. A State fiduciary is judicially supervised. See Ala. Code § 26-7A-9. The agent under a durable power of attorney is not. A State fiduciary is required to account for receipts and expenditures to the court. See Ala. Code § 26-7A-11. An agent under a durable power of attorney is not required to account. State law normally requires that a State fiduciary be bonded. See Ala. Code § 26-7A-8. The agent under a durable power of attorney is not required to be bonded. State fiduciary statutes prescribe that moneys must be expended for the benefit of the incompetent or incapacitated person. See Ala. Code § 26-7A-9. Statutes authorizing durable powers of attorney contain no such requirement. \* \* \*

The Marine Corps officials consequently indicate that because of the relative lack of safeguards involved, they have reservations concerning the propriety of disbursing annuity payments to annuitants' agents acting under powers of attorney after the annuitants have become mentally incapacitated.

#### Analysis and Conclusion

In 1972 Congress established the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, as an income maintenance program for the dependents of deceased service members. It was designed to provide better benefits at less cost than were available under the then current military survivor annuity program contained in the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-1446.<sup>2/</sup>

Neither the Survivor Benefit Plan nor the Retired Serviceman's Family Protection Plan contains any provision

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<sup>2/</sup> See, generally, S. Rep. No. 1089, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 3288; H.R. Rep. No. 481, 92d Cong., 1st Sess. (1971).

prescribing procedures for making annuity payments to persons incapable of handling their own financial affairs. In the decisions referred to by the Marine Corps officials, we expressed the view that in the absence of any express provision of Federal statute or regulation on the subject, such payments should generally be made only to a representative payee duly appointed by a state court, since court-appointed representatives ordinarily act under judicial supervision and have a requirement to provide financial accounting statements periodically to the court.<sup>3/</sup> Hence, we disapproved the making of such payments to agents or trustees acting without court appointment or supervision.

These decisions were predicated on the fundamental principle that the accounting officers of the uniformed services have a duty to obtain a good acquittance when payments are made by their direction under Federal law.<sup>4/</sup> In that connection, we note that the rules governing the use of the durable power of attorney in Alabama, as applicable here, recognize that such a power of attorney is subservient to the rights and duties of a court-appointed "guardian, curator or other fiduciary." See Ala. Code § 26-1-2(c)(1). Thus, the durable power of attorney provides an agent with limited powers over the assets of the principal which may be superseded by a formal court appointment. In view of the substantial amounts of money involved in payments under the military survivor annuity programs, and the fact that the payments may continue for years, it would seem appropriate for the accounting officers of the uniformed services to insist on a court approved guardianship before payment is

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<sup>3/</sup> See, generally, 62 Comp. Gen. 302, 306-308 (1983); 51 Comp. Gen. 437, 438 (1972).

<sup>4/</sup> See, e.g., 62 Comp. Gen., supra, at page 307.

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made on behalf of an incompetent annuitant, to assure that a good acquittance is obtained.<sup>5/</sup>

Accordingly, we conclude that the Survivor Benefit Plan annuity at issue here should not be paid on the basis of the power of attorney in question.

*for Milton J. Jordan*  
Comptroller General  
of the United States

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<sup>5/</sup> In a proper case, we might have no objection to the disbursement of a nonperiodic payment to the personally appointed agent or trustee of an incompetent payee, provided that the laws of the payee's state of domicile authorized that procedure as a means of obtaining a good acquittance, the expense of obtaining a court-appointed guardianship would be disproportionate to the amount due from the United States, and the matter was otherwise free from doubt. Compare 47 Comp. Gen. 209, 211 (1967).