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DECISION

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

FILE: B-217040 **DATE:** March 11, 1985

MATTER OF: Captain Kathy A. Montgomery, USAF

DIGEST:

> A member of the uniformed services who adopted her 26-year old disabled brother who is incapable of self-support may claim him as her dependent to receive basic allowance for quarters at the with dependent rate. In this case the "child" is legally adopted, is in fact dependent upon the member for support, and resides with the member; thus, a bona fide parent and child relationship exists. 42 Comp. Gen. 578 (1963), amplified.

The question presented in this case is whether a member of the uniformed services may receive basic allowance for quarters on behalf of an adopted child when that child is a legally adopted blood relative, over the age of 21, who is in fact dependent upon the member for support and resides with the member. We hold that under circumstances such as these, the member may receive basic allowance for quarters at the "with dependent" rate.[1]

BACKGROUND

Captain Kathy A. Montgomery, USAF, has requested basic allowance for quarters at the "with dependent" rate on account of her adopted son, Steven, whom she legally adopted in 1983 at age 26. Steven is also her blood relative, a twin brother, who is quadraplegic and incapable of self-support. Captain Montgomery explains that her brother and adopted son was severely injured in an automobile accident

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1/ This decision is in response to a request submitted by Major T. H. Cuevas, USAF, Chief, Accounting and Finance Branch, Comptroller, Headquarters San Antonio Air Logistics Center, Kelly Air Force Base, Texas. The submission was approved by the Department of Defense Military Pay and Allowance Committee as Air Force Submission DO-AF-1447.

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at the age of 19 in 1976 and in addition to being quadraplegic, is brain damaged, and has vision, hearing and a variety of other medical problems. He must be closely supervised and relies on Captain Montgomery for everything. He has resided with her for 4 years, and will continue to reside with her since their father is dead and their mother is incapable of caring for him. Other than Captain Montgomery, his only means of support is a $235 per month social security disability payment.

The Air Force has not allowed payment of the increased allowance pending our decision because of 42 Comp. Gen. 578 (1963). In that case, we held that an officer of the uniformed services who adopted her unemployable older brother and sister over 21 years of age, who did not reside with the officer, did not have an established parental relationship with the adopted children to have them considered as her children under 37 U.S.C. § 401. Thus, we held that the officer was not entitled to the basic allowance for quarters on their account.

ANALYSIS

Section 401 of title 37 defines "dependent" as it is used in 37 U.S.C. § 403, the statute authorizing basic allowance for quarters, stating in pertinent part:

> "**401. Definitions**
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> "In this chapter, 'dependent', with respect to a member of a uniformed service, means--
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> * * * * *
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> "(2) his unmarried child (including any of the following categories of children if such child is in fact dependent on the member: * * * an adopted child; * * *) who either--
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> "(A) is under 21 years of age; or
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> "(B) is incapable of self-support because of a mental or

> physical incapacity, and in fact dependent on the member for over one-half of his support; * * * "

As is indicated above, we have held that certain adoptions by members of the uniformed services did not create a *bona fide* parental relationship and members could not receive the increased allowance based on those dependents. See 42 Comp. Gen. 578, *supra*, where the member adopted her older brother and sister, who did not reside with her, and B-150929, May 21, 1973, where the member adopted his elder sister who did not reside with him. In another case we found that a *bona fide* relationship did not exist between the member and his adopted child since the child, although a minor, was the member's brother who lived with his natural parents rather than with the member. The child was dependent financially upon his natural parents rather than the member, and it appeared that the member had merely "adopted" the child for purposes of making the child his heir. 7 Comp. Gen. 6 (1927).

The law has not always recognized adopted children under the definition of a dependent for quarters allowance purposes. See 9 Comp. Gen. 299 (1930) where we discussed the effect of the Act of February 21, 1929, 45 Stat. 1254, which amended section 4 of the Act of June 10, 1922, 42 Stat. 627, to include an adopted child. In discussing the language used in the 1929 Act, we noted that it was intended to prevent payments of increased allowances in situations where a member adopts a near relative, but the "child" remains in the custody of its natural parent or parents, and *prima facie*, no purpose is served other than to give the member a basis for claiming increased allowances on the basis of having an adopted child. See also B-150929, *supra*.

This concern is not applicable to the case before us. Here, Captain Montgomery has complete responsibility for the care, maintenance and support of her adopted son. He cannot function as an adult since he is both mentally and physically disabled. He resides with the member and has resided with her for a number of years. Also, from the dependency statement submitted, it appears he is dependent upon her for over one-half of his financial support. Thus, the adopted child in this case is dependent upon the member as completely as, or perhaps more than, any other adopted child would be upon his parents.2/

As is indicated above, in denying payment, the Air Force has relied upon our holding in 42 Comp. Gen. 578, supra, where we stated at page 580:

> "* * * We do not believe that by including adopted children within the meaning of the term 'children' it was intended to broaden the scope of the law to cover situations where the parent and child relationship did not exist when the children reached the age of 21 and the disability existed at the time of adoption. * * *"

While generally this is true, particularly when considered in connection with all the facts of that case, we think that the holding in the case has been too broadly construed. In that case, a member had adopted her older "unemployable" siblings. Although she had a technical status as a parent, the "children" lived independently elsewhere. In considering these cases, the age of the adoptee, the existence of a disability and the living arrangements should be reviewed to determine whether a bona fide parent and child relationship exists for the purpose of the additional quarters allowance.

That is what should be the determinative factor, as is indicated in the next sentence of that case where we went on to state:

> "* * * In any event, it appears extremely doubtful that the Congress contemplated the extension of the benefits of the law to an officer who adopts a brother, sister, or other relative over the age of 21

2/ We note that adoption of an adult is authorized under Tennessee law. Tenn. Code Ann. §§ 36-116, 36-139. In Coker v. Celebrezze, 241 F. Supp. 783 (E.D. Tenn. 1965), a grandfather's adoption of his disabled adult grandson, who lived with the grandfather and who was dependent upon him, was held to establish a valid parent-child relationship for Social Security purposes.

> where no bona fide relationship of parent and child exists. * * *"

When read as a whole, the case makes the existence of a bona fide parent and child relationship a determinative factor in the decision to allow or deny the additional quarters allowance. In determining whether or not a bona fide parent and child relationship exists, the service should consider all the circumstances, including the age of the adoptee, the existence of a disability at the time of the adoption, and whether the adopted child remains with his natural parents or actually lives with and is dependent upon the member for at least half his support.

The purpose of the increased allowance is to at least partially reimburse members for the expense of providing quarters for their dependents when Government quarters are unavailable, but not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. See 42 Comp. Gen. 642 (1963). Therefore, in cases such as the present where an adopted child who has reached the age of 21 is being considered, the actual dependence of the child on the member, and the existence of a bona fide parent and child relationship should be considered. In the circumstances of this case, the age of the adopted child and the existence of his disability at the time of adoption should not bar receipt of the additional allowance when a bona fide parent and child relationship exists.

As mentioned above, Captain Montgomery's child was disabled at the age of 19 and is completely unable to care for himself. She has parental control over and responsibility for all matters concerning him including medical, financial and legal matters, and his daily supervision and activity. Thus, the facts provide reasonable grounds to conclude that a bona fide parent and child relationship exists between the member and her adopted son.

Accordingly, Captain Montgomery may be paid basic allowance for quarters at the "with dependent" rate on account of her adopted son.

Milton J. Socolar

Comptroller General
of the United States