

DECISION



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

FILE: B-217739

DATE: December 19, 1985

MATTER OF: Brigadier General Fred A. Treyz, USAF,
Retired, Deceased

DIGEST:

1. A retired Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when in 1980 he was divorced. In the divorce settlement he agreed to provide survivor benefit coverage for his former spouse should the law ever be changed to allow it. He remarried, and a year later (1981) his new spouse was automatically covered under the SBP. In September 1983 Public Law 98-94 was enacted authorizing a person in this situation to elect SBP coverage for a former spouse. He did so in December 1983 stating that the election was made pursuant to the divorce settlement. Such an election is irrevocable; thus, a later attempt to revoke it is ineffective and the former spouse is the beneficiary of the SBP annuity upon his death.

2. A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in December 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his and his current spouse's attorney attempting to revoke the election on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse election was made in proper form, the member was never adjudicated incompetent, and the great weight of medical and other evidence presented supports the former spouse's

contention that he was mentally competent when he made the election. Thus, the election should be given effect.

3. An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In December 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in April 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse.

The primary question in this case is who, the current or the former spouse of a deceased Air Force officer, is entitled to his Survivor Benefit Plan annuity. The retired officer elected coverage for his former spouse when he was seriously ill. Later he attempted to revoke his election of coverage for his former spouse and obtain coverage for his current spouse on the basis that he had been too ill to realize the implications of his actions at the time he elected coverage for his former spouse.^{1/} We find that the former spouse rather than the spouse at the time of his death is the proper beneficiary of the annuity in this case.

^{1/} This matter was presented for an advance decision by Lieutenant Colonel J. N. Johnson, Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado. It has been assigned control number DO-AF-1451 by the Department of Defense Military Pay and Allowance Committee.

Also, an ancillary question is asked concerning whether delinquent premiums which were not deducted from the officer's retired pay may be collected from the former spouse's annuity. We find that they may be collected from her annuity.

Background

Brigadier General Fred A. Treyz, USAF, retired on September 1, 1978. At that time he began participation in the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, providing spouse coverage for his wife, Elva M. Treyz, to whom he was married in 1945. On May 27, 1980, the Superior Court of the State of Arizona, County of Pima, granted a divorce to Fred and Elva Treyz. The court's order incorporated a May 20, 1980 property settlement agreement which included a clause providing that General Treyz's military retired pay would be divided equally between him and Elva. It also included a clause providing:

"The Husband further agrees that in the event Congress shall hereafter enact legislation that would allow the Wife to receive any portion of his retirement benefits after his death through a survivor's benefit plan, the Husband shall take any and all actions necessary or appropriate to insure that the Wife qualifies for and receives such survival benefits upon his death, it being understood that if the Husband should re-marry, the amount of money the Wife would receive hereunder would lessen."

At the time of the divorce, there was no authority for a retiree to elect coverage for a former spouse under the military Survivor Benefit Plan. Thus, upon the divorce Elva lost her coverage under the Plan.

General Treyz subsequently married Carolyn H. Treyz and she became an eligible beneficiary under the Survivor Benefit Plan on July 26, 1981, 1 year after the marriage. 10 U.S.C. § 1447(3), and Master Sergeant Paul J. Metzler, 56 Comp. Gen. 1022 (1977).

Effective September 24, 1983, Public Law 98-94, was enacted, section 941 of which made changes in various

provisions of the Survivor Benefit Plan statutes to enable a retiree to elect coverage for a former spouse to the exclusion of the current spouse. On December 28, 1983, the Air Force Accounting and Finance Center received documents executed on December 15, 1983, by General Treyz electing coverage under the Survivor Benefit Plan for his former spouse, Elva M. Treyz. The documents included the required forms indicating that General Treyz was then married to Carolyn Treyz, that he was divorced from Elva Treyz, and that he was electing coverage for Elva pursuant to a voluntary written agreement he had previously entered into incident to and incorporated in the court's order in the divorce proceeding. Also included was a copy of the court's divorce order and the property settlement agreement. The documents were executed by General Treyz's mark (an X or his initials) witnessed by two persons, one of whom was a notary public. The Finance Center put the election into effect on January 1, 1984.

Subsequently, the Finance Center received a letter dated March 2, 1984, from an attorney representing General Treyz and Carolyn Treyz indicating General Treyz was not competent to make the election in favor of his former spouse, and requesting that it be withdrawn. Enclosed with the attorney's letter was an affidavit the attorney indicated he had prepared at General Treyz's request. In the affidavit, dated February 17, 1984, General Treyz states that he had had brain surgery in May 1982, that he had received a series of cobalt treatments in June 1982 and in August 1983, and that he was taking strong dosages of medication. He stated that, in December 1983, his son and former wife, Elva, visited him. He also stated that his son indicated that General Treyz needed to update his Survivor Benefit Plan forms, and his son made the arrangements to have him sign the forms, which he did. He stated further that due to his illness, the treatments he received, and the medication he was receiving, he did not realize what was being signed or the implications of those documents as far as his wife, Carolyn, was concerned. General Treyz concluded by stating that he never at any time intended to eliminate his wife, Carolyn, as beneficiary for his military survivor benefits, that he never knew that he had signed any forms changing the beneficiary until he was recently advised of this fact, and that it was his desire that his wife, Carolyn, receive all of his survivor benefits.

On April 9, 1984, General Treyz died and the Survivor Benefit Plan annuity became payable.

The Disbursing Officer notes that the election forms General Treyz executed in December 1983 appear valid on their face, and such execution appears to have been done pursuant to the agreement made in the divorce property settlement. Also, there is no indication that General Treyz was ever adjudged incompetent by a court or through any administrative proceeding. Thus, the Disbursing Officer states that it does not appear proper to invalidate the election. He notes, however, that in addition to General Treyz's affidavit, a statement of Dr. Richard B. McAdam, who treated General Treyz, raises the question of whether General Treyz was capable of making a voluntary election at the time he executed the forms.

General Treyz's Competency

We are not empowered to render decisions on persons' mental competency. However, in determining whether an expenditure may be made we consider the record before us, and if that record raises extreme doubt as to the competency of a party at the time the party executed a document upon which our determination depends, we may find the matter too doubtful to authorize payment. That is our inquiry here.

The statement of Dr. McAdam referred to by the Disbursing Officer was forwarded by the attorney with General Treyz's February 17, 1984 affidavit. This was a letter dated February 14, 1984, from Dr. Richard B. McAdam indicating that he had been treating General Treyz since May 2, 1982, for brain tumors and stating further in part:

"In the last several months, General Treyz has exhibited evidence of recurrent metastatic disease, that is, he has evidence clinically and by computerized head scan of further metastatic brain tumors. He has also exhibited tremendous decline in intellectual function in the last number of months.

"Based on the objective findings of CAT scan and surgical procedure and my following the patient now for an extensive period of time, I can state with certainty that

General Treyz is totally unable to take care of any of his personal affairs. He is unable to make any decisions concerning himself or his economic status. I can further state with certainty that this has been the case now for several months."

In support of Elva's claim to the annuity, her attorney wrote to the Finance Center on July 10, 1984, stating that it is Elva's contention that at the time he executed the former spouse's election in her favor in December 1983, General Treyz was alert, cognizant of his situation, and mindful of his affairs. She contends that he was desirous of honoring the agreement he previously had made with her and that he was fully competent to make the election.

As further support for her contention that General Treyz was mentally competent when he executed the election forms in December 1983, her attorney forwarded a second letter, dated September 25, 1984, from Dr. McAdam clarifying the statements made in his February 14 letter. In the September 25 letter Dr. McAdam indicates that he reviewed his records concerning General Treyz, including notes he made on November 28, 1983. Those notes indicate that while General Treyz walked in a slow shuffling gait and generally was declining, he seemed to be mentally competent. Dr. McAdam went on to state in part:

"I have enclosed copies of my office notes, November 28, 1983, and also a letter that I dictated on February 14, 1984. As you can see based on my examination of November 28, 1983, I did state that the patient seemed to be mentally competent. However on February 14, 1984, I stated that the patient was unable to make any decision concerning himself or his economic status which means that I felt that he was not mentally competent.

"Based on this record, I would have to state that General Treyz was most probably competent in December of 1983."

Reading these two statements of Dr. McAdam together, we are drawn to the conclusion that he found General Treyz was

"most probably competent" to handle his affairs in December 1983 when he executed the election forms, but by February 1984, when he executed the affidavit attempting to withdraw the election, he had declined to the point where he was no longer able to make "any decisions concerning himself or his economic status."

In addition to Dr. McAdam's statements, the record also includes statements from four other physicians who treated General Treyz for his brain tumors. One physician, Dr. John Mattern II, indicates that he first saw General Treyz on May 12, 1982 (and apparently at other times thereafter), and that it was his opinion that General Treyz was not "totally mentally competent" from the time of his original surgery until his death. The other three physicians, however, state differently. Dr. Michael A. Savin and Dr. J. Joseph Regan, who indicate they saw General Treyz in their clinic at various times during the period of November 1982 through May 1983, state that at the times they saw General Treyz he was "always fully oriented" and "able to make sound decisions" (Dr. Savin), and in "full possession of his mental capacities" (Dr. Regan). Dr. J. A. Wassum, who indicates he administered radiation therapy to General Treyz during August 16 through 27, 1983, and saw him for a follow-up visit on October 11, 1983, states that while his condition was quite poor, "I do feel that he was oriented and mentally competent at that time." Thus, Dr. Mattern's general statement that General Treyz was not "totally" mentally competent is rebutted by the statements of the other four physicians who treated him.

The record also contains affidavits of several other persons submitted on behalf of Mrs. Elva Treyz testifying to General Treyz's mental competency. Some of these affidavits may be summarized as follows:

1. General Treyz's son, Major Fred A. Treyz III, testifies in part that he was stationed in Norfolk, Virginia, near his father's residence, during the period of July 1983 through February 1984, during which time he visited his father for several hours each day. He states that General Treyz was aware that he was terminally ill, and that in the Fall of 1983 he became increasingly concerned about the financial status of his former wife, Elva (Major Treyz's mother). When General Treyz was made aware of the September 1983 change in the survivor benefit law, he asked Major Treyz to obtain more information from the Air

Force, which he did. Due to his father's physical infirmity, Major Treyz obtained the necessary forms from the Air Force, and arranged to have Judge Advocate General's Corps officers discuss the matter with his father. He also states that at the suggestion of one of these officers and at his father's request, he made an appointment for his father to see Mr. Felix Hatchett, a civilian lawyer, on December 15, 1983. Mr. Hatchett went over the forms with his father and witnessed his mark thereon after Major Treyz had reminded his father that he did not have to sign the forms if he did not want to. To this, Major Treyz states, his father responded, "I know it, but I want to." Major Treyz states that without a doubt, his father's health was poor in December 1983, but equally without a doubt his mental health was excellent. He further states that--

"There is no doubt that my father was competent. At all times during the period prior to and including his execution of the SBP beneficiary change on December 15, 1983, my father had full comprehension of the meaning and effect of his act. His mind was sound and alert. To the best of my knowledge, my father was never adjudicated mentally incompetent nor did Carolyn Treyz take any steps to have him so adjudged or to have herself appointed as the guardian of his property. * * *

"Neither my mother nor I took any advantage of my father's infirmity to secure the SBP change. We engaged in no artifice. My father's change of the SBP beneficiary was the result of his deliberate judgment."

2. Mr. Hatchett, the attorney at whose office General Treyz executed the former spouse election forms, states that on December 15, 1983, General Treyz came to his office in a wheel chair accompanied by his son, Fred. He further states that at that time he was the attorney for the former spouse, Mrs. Elva Treyz. He states that during the conference, General Treyz "freely and voluntarily, and with apparent knowledge and understanding of the consequences," executed the election forms.

3. Captain Mark A. Exley, an Army Reserve Judge Advocate General's Corps officer, indicates that Major Fred Treyz was a client of his. At Major Treyz's request, he met with General Treyz at the General's home in early December 1983 to discuss the Survivor Benefit Plan. Captain Exley indicates that after advising the General that he was Major Treyz's lawyer, not the General's, he advised him to talk with a lawyer representing his own interest. Captain Exley states that General Treyz indicated that he wanted to and had a duty to make the election change in favor of his former wife if the law had been changed to allow it. Captain Exley further states that there was no indication whatsoever that General Treyz was under any duress or suffered from any sort of diminished mental capacity, that his words were clear and his thoughts were logical, that he knew what he was preparing to do, and that he was capable of managing his own affairs.

4. Ms. Mary DiPaola, an attorney, who at the time was a captain in the Army Judge Advocate General's Corps, states that in late November 1983 she visited the Treyz family for 4 days during which she spent several hours each day with General Treyz. She indicates that he spoke to her about many topics with coherence and wit, that his opinions were sensible and resolute, that his memory was excellent, and that although his speech was slow and he was physically frail, his mental facilities appeared to be sound.

The weight of evidence before us, therefore, falls heavily on the side of Elva's contention that General Treyz was mentally competent in December 1983 when he executed the election forms, and that he did so to carry out the agreement he had made in the 1980 divorce settlement. Accordingly, we find insufficient basis for us to question his December 1983 execution of the election forms which appear valid on their face.

Law

The Survivor Benefit Plan provisions applicable here, as modified by Public Law 98-94, effective September 24, 1983, are found in 10 U.S.C. §§ 1448(b) and 1450. Sections 1448(b)(3) and (4), governing application of the Plan, provide in pertinent part

"(3)(A) A person--

"(i) who is a participant in the Plan and is providing coverage for a spouse * * * and

"(ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan,

"may * * * elect to provide an annuity to that former spouse. Any such election terminates any previous coverage under the Plan and must be written, signed by the person, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.

* * * * *

"(C) An election under this paragraph may not be revoked except in accordance with section 1450(f) of this title and is effective as of the first day of the first calendar month following the month in which it is received by the Secretary concerned.
* * *

* * * * *

"(4) A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) shall, at the time of making the election, provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by such person and the former spouse) setting forth whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as a part of or incident to a proceeding of divorce, dissolution, or annulment and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by a court order."

Under section 941(b) of Public Law 98-94, a person who on the date of enactment of the law, September 24, 1983, was a participant in the Plan providing coverage for a spouse, was given 1 year from that date of enactment to elect coverage for a former spouse. The 1 year allowed in subsection (b)(3)(A) as quoted above began to run not from the date of divorce but from the date of enactment. This provision was included to allow persons such as General Treyz, who prior to the enactment of the law had been married, retired and divorced, the opportunity to elect coverage for their former spouses.

Elva was General Treyz's former spouse in December 1983, but she was not his former spouse when he became eligible to participate in the Plan upon his retirement in 1978 since, at that time, she was still married to him. Accordingly, when General Treyz elected coverage for Elva in December 1983, he was a person described in section 1448(b)(3)(A), and he made the election within the prescribed 1-year period as modified by section 941(b) of Public Law 98-94.

Also, General Treyz's election was made on the forms prescribed by the service and included the statements that the election was being made pursuant to a voluntary written agreement previously entered into incident to a divorce proceeding and that such agreement had been incorporated in or ratified by court order. Thus, the election complied with the provisions of 10 U.S.C. § 1448(b)(4).

Section 1450(f)(2) of title 10, United States Code, provides in part:

"(2) A person who, incident to a proceeding of divorce, dissolution, or annulment, enters into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election
* * * unless--

* * * * *

"(A) in a case in which such agreement has been incorporated in or

ratified or approved by a court order,
the person--

"(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

"(ii) certifies to the Secretary concerned that the court order is valid and in effect; * * *

There is some ambiguity in the language of the clause of the 1980 separation agreement in which General Treyz agreed to provide survivor benefit coverage for Elva should the law be changed to permit it in that it indicates that, if he should remarry, Elva might expect not to receive the full annuity. Such ambiguity is understandable since at the time of the agreement the law had not been changed and the parties did not know the provisions of the future change. As it turned out, the modification to the law made no provision for dividing the annuity between wives, and the election form General Treyz executed clearly so indicates. In addition it seems clear that in executing the election in favor of Elva, he considered himself to be carrying out an obligation he had assumed under the 1980 divorce settlement. Also, as is noted previously, Congress made specific provision in Public Law 98-94 to enable a person in General Treyz's situation to provide former spouse coverage although he had been retired and divorced before the law was enacted. Thus, General Treyz's election may be revoked only to the extent authorized by 10 U.S.C. § 1450(f)(2). Since the 1980 separation agreement provision requiring him to elect survivor benefit coverage for Elva apparently was never modified by court order to permit him to disregard that requirement, under 10 U.S.C. § 1450(f)(2) the revocation would be of no effect. This is so even if he had been competent at the time he executed the February 1984 affidavit attempting to revoke the election.

Accordingly, we find that Elva Treyz is the proper beneficiary for General Treyz's Survivor Benefit Plan annuity.

Delinquent Premiums

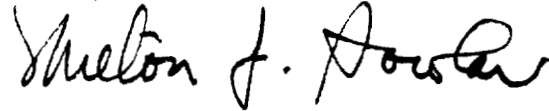
The Disbursing Officer also advises us that at the time of his death General Treyz had an outstanding debt of \$3,695.14 for the cost of Survivor Benefit Plan coverage which accumulated during the time Carolyn Treyz was the named beneficiary under the Plan. This debt accrued because upon his divorce from Elva the deductions from his monthly retired pay for the cost of her coverage ceased since he then had no eligible beneficiary. 10 U.S.C. § 1450(a). General Treyz did not give prompt notice to the Air Force Accounting and Finance Center of his marriage to Carolyn, so when she became the eligible beneficiary on July 26, 1981, the deductions were not reinstated as they should have been.

The Disbursing Officer notes that regulations require that, upon the death of a retiree, delinquent costs are to be collected from the annuitant's benefits before the annuitant can receive payment. He questions, however, whether this requirement is applicable in a case such as this where the delinquent costs were accumulated during a period when a spouse who is not the ultimate beneficiary because of a changed election would have been the beneficiary.

The Survivor Benefit Plan was designed on an actuarial basis as a contributory plan. That is, generally, in return for protection of their dependents upon the retirees' deaths, the retirees contribute premiums usually in the form of deductions from their retired pay. 10 U.S.C. § 1452. These deductions are calculated as provided by statute regardless of who may be the potential spouse beneficiary. We have held that where the required deductions to cover the cost of the annuity were not made from a member's retired pay, the annuity is to be reduced or withheld to make up the amount due. See 54 Comp. Gen. 493, 497 (1974). The changes in the law to allow a member to shift coverage from a current spouse to a former spouse did not change this. General Treyz participated in the Plan for which he was required to contribute specified premiums as the cost of his participation. While the premiums which were not collected in this case should have been collected when Carolyn would have been the beneficiary had General Treyz died during that

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period, they are due as a part of the total cost of General Treyz's participation in the Survivor Benefit Plan and Elva has become the sole and full beneficiary of the Plan. Accordingly, the amount due should be collected from the annuity payable upon his death.



Acting Comptroller General
of the United States