

*Jordan - PHM*



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Chief Petty Officer Robert W. McEachern (Retired)  
(Deceased) - Survivor Benefit Plan Annuity

File: B-229157

Date: January 11, 1988

### DIGEST

1. A claim for Survivor Benefit Plan (SBP) annuity submitted by the first wife of a recently deceased, retired service member is authorized by our Office since the record indicates that the member never obtained a divorce from his first wife before entering into a ceremonial marriage with another woman. With no evidence of a marriage prior to that entered into with his first wife and no evidence of a divorce from his first wife, the member's first wife remains his legal widow. As such, she is entitled to an SBP annuity when the member made an election for his surviving spouse.

2. The legal widow of a retired service member is entitled to a Survivor Benefit Plan (SBP) annuity even though the member named another woman as his spouse on his SBP election form. Since the member retired after September 21, 1972, the effective date of the SBP, the listing of his spouse on the election form is for administrative convenience. The fact that the woman named was not actually the member's spouse does not preclude his surviving spouse from benefiting from the plan.

### DECISION

This decision is in response to an appeal on behalf of Rose McEachern from our Claims Group's settlement of August 18, 1987, which denied her claim as widow of Robert McEachern, a retired service member, for payments under the deceased member's survivor benefit plan (SBP). We conclude that Rose McEachern is Robert McEachern's widow, and as his widow, she is the rightful beneficiary of Mr. McEachern's SBP under 10 U.S.C. §§ 1447 et seq. Therefore, we reverse the Claims Group's denial of her claim.

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## BACKGROUND

The facts of this case as presented in the record are as follows. On March 31, 1945, Robert McEachern married Rose Connors McEachern in New York City. The record before us does not include any documentation of a divorce between Rose and Robert McEachern. However, according to Mr. McEachern's SBP election form, dated December 31, 1983, he had subsequently married Lillie McEachern in White Plains, New York on August 15, 1971. Mr. McEachern elected SBP coverage for his surviving spouse only, and named Lillie as his spouse. Mr. McEachern retired from military duty effective February 24, 1984.

On April 9, 1984, Lillie McEachern died in a house fire. No personal family information is provided on her death certificate. Her marital status is listed as unknown. Also, her full name is listed as Lillian Jewel, not Lillian McEachern. A public administrator provided this information for the death record. These facts would suggest that Robert McEachern was not available for questioning at that time; however, a newspaper account of the fire, listing the victim's full name as Lillian Jewel McEachern, states that her husband, Robert McEachern, and a neighbor tried to rescue Lillian. The discrepancy between the facts in the newspaper article and the coroner's report is not explained in the record.

On July 9, 1986, Robert McEachern died in Peekskill, New York. Information on his death certificate was furnished by Rose McEachern, who identified herself as his spouse. Rose subsequently filed an application for an annuity under the SBP as Robert McEachern's surviving spouse. The Navy Finance Center forwarded her application and other relevant information to our Claims Group, which determined that doubt existed as to whether Rose remained married to Robert at the time of Robert's death. Without evidence that Rose and Robert were not divorced and without a court decree affirmatively naming Rose as Robert's legal widow, the Claims Group declined to authorize payment to Rose McEachern.

In her appeal, Rose McEachern notes that she has submitted a marriage certificate evidencing the fact that she and Robert were married in New York City in 1945. In support of her

contention that they never divorced, she recalls Robert McEachern initiating divorce proceedings in 1972, but when she made a request for child support, he dropped the action. She states that while Lillie and Robert may have lived together, they could not have entered into a valid marriage because Robert remained married to her.

#### ANALYSIS

The SBP, authorized under sections 1447-1455 of title 10, United States Code, provides for spouses and dependent children of a retired service member to receive an annuity under the Plan automatically unless the retiree elects not to participate prior to the first day that he is eligible to receive retired pay. Moreover, Mr. McEachern affirmatively elected to provide SBP coverage for his spouse. Therefore, his eligible widow, defined in 10 U.S.C. § 1447(3) as the "surviving wife," is entitled to the annuity.

We have held that a person who has contracted a valid marriage does not have the capacity to contract a subsequent marriage while the first marriage remains undissolved by death or divorce. The subsequent marriage in such cases is a nullity. Chief Petty Officer Howard E. Moore, USN, B-194469, May 14, 1979. This is the rule under New York law where the events in this case took place. See Domestic Relations Law § 6, McKinney's Consolidated Laws of New York. Therefore, if Robert remained married to Rose at the time he entered into a marriage with Lillie, the marriage to Lillie was not valid, making Rose his surviving wife.

In the case of multiple marriages by the same individual, there is a presumption that the second marriage is valid and that the first marriage was legally terminated. John E. Jones, USN (Ret) (Dec), B-222678, Nov. 28, 1986; James A. Smalls, B-212148, July 23, 1984. "However, the presumption of the dissolution of a prior marriage, whether by death or divorce, should be indulged with caution. Thus, there is no unbending presumption in favor of a second marriage. The decision in any particular case rests on its own attending facts and circumstances." James A. Smalls, supra.

It is not clear that a presumption of validity should attach in the first instance to a marriage between Robert McEachern and Lillie since there is no formal documentation or direct

evidence of such a marriage in the record before us. In any event, we conclude that the possibility of a subsequent valid marriage to Lillie is insufficient to defeat Rose's claim in this case. As noted previously, Rose has produced a record of her marriage to Robert McEachern in 1945. There is no indication of any question as to the validity of this marriage.<sup>1/</sup> It is true that her assertion that her marriage to Robert was never validly terminated is not affirmatively substantiated by the record. Moreover, in view of Lillie's death, there appears to be no party having an interest in contesting it. Nevertheless, these are factors beyond Rose's control and, in our view, do not provide a basis for rejecting her assertion. Additionally, we believe it would be unreasonable to require Rose to prove a negative, i.e., that Robert did not divorce her. Therefore, while the record is sparse, we accept Rose's claim that she is Robert's surviving widow.

Finally, the fact that Robert McEachern named Lillie as his spouse on his SBP election form, while his legal widow in fact is Rose, does not preclude Rose from receiving the annuity as Robert's surviving spouse. The incorrect listing of a spouse's name on an SBP form by a member automatically covered by the SBP is not ordinarily sufficient to remove the member from coverage, nor does it affect the legal spouse's right to an annuity under the SBP since listing the spouse's name on the form is primarily for administrative convenience. 57 Comp. Gen. 426, 428 (1978).<sup>2/</sup> Therefore, since Robert McEachern elected SBP coverage for his surviving spouse, his legal widow is

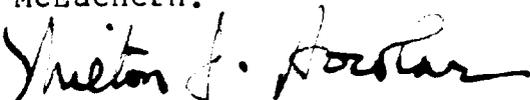
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<sup>1/</sup> Compare Frances Jackson, B-189296, Nov. 16, 1977, a multiple marriage case in which it appeared that the deceased service member had another spouse before as well as after his marriage to the claimant and it was unclear whether the marriage prior to the claimant's had been validly terminated.

<sup>2/</sup> In the case of a service member who retired prior to September 21, 1972, the effective date of the SBP statute, an affirmative election must be made to participate in the SBP. Completion of the SBP form is evidence of the member's election to participate. If such an election designates an individual as a spouse who in law is not the retired member's spouse, the entire election to participate is defective and must be considered invalid. See Shaff v. United States, 695 F.2d 1138 (9th Cir. 1983); 57 Comp. Gen. 426, supra; Petty Officer First Class Bonnie B. Paradise, USN (Ret) (Dec), B-204367, Aug. 1, 1986.

entitled to receive the annuity despite the fact that someone else is named on the form as his spouse.

In accordance with the above, we reverse the Claims Group's settlement and authorize payment of the SBP annuity to Rose McEachern.

*for*   
Comptroller General  
of the United States