



Comptroller General

of the United States

Washington, D.C. 20438

Decision

Matter of: Request for Advance Decision--Survivor Benefit Plan Beneficiary of Technical Sergeant Weldon C. Sikes, U.S. Air Force, Retired

File: B-252787

Date: November 8, 1993

DIGEST

Where within 1 year of divorce decree, neither member nor ex-wife filed for former spouse coverage or a "deemed election", respectively, even though divorce decree stated that member was to maintain Survivor Benefit Plan for ex-wife, subsequent nunc pro tunc order which declares marriage dissolved (phrase which was omitted from original decree), does not give a new 1 year period for "deemed election" request.

DECISION

This is in response to a request for an advance decision from the Defense Finance and Accounting Service (DFAS) regarding the proper beneficiary of the Survivor Benefit Plan (SBP) of Technical Sergeant Weldon C. Sikes, U.S. Air Force, Retired.¹

The issue presented is whether the date of an imperfect divorce decree or the date of the nunc pro tunc order which corrected the defect begins the running of the 1 year period in which a former spouse can obtain a deemed election of SBP coverage.

In 1957, Sergeant Sikes married Virginia Sikes. He retired in 1975 and at that time elected the maximum spouse and child SBP coverage. In March 1989, the District Court, El Paso County, Colorado, issued an order entitled "Final Orders and Dissolution of Marriage" which awarded Virginia Sikes 42 percent of Sergeant Sikes retired pay and stated that the member should keep the SBP coverage for Virginia in effect. During the 1 year from the date of the order, the member did not file a former spouse election request as required by 10 U.S.C. § 1448 (b)(3) and Virginia did not file a request for a deemed election under 10 U.S.C. § 1450

¹The request has been assigned DFAS control number 93-15-M.

(f) (3) (A) and (B). Virginia did apply in February 1991 for the direct payment of the portion of the member's retired pay awarded her as allowed under the provisions of the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408).

The member did not notify DFAS, Denver, Colorado of his divorce until December 1990 at which time the SBP deductions were discontinued and the amount collected from April 1989 through December 1990 were refunded to the member.

On October 28, 1990, the member married Linda Sikes and she became an eligible SBP spouse beneficiary on their first anniversary on October 28, 1991; at which time the SBP deductions resumed from the member's retired pay.

In April 1991, Virginia Sikes' attorney advised DFAS that a review of the March 15, 1989 court order, though titled "Final Orders and Dissolution of Marriage", did not actually declare the marriage dissolved. Therefore, the attorney argued, the marriage was still valid and Virginia should remain the member's SBP spouse beneficiary.

On February 6, 1992, the El Paso County District Court issued an order that dissolved the marriage "nunc pro tunc March 6, 1989."

By letter of August 24, 1992, Virginia Sikes requested that an election of former spouse coverage be deemed for her. DFAS found that since the status of the marriage was in doubt until the nunc pro tunc order, the 1 year period to request a deemed election should begin to run from the date of that order and therefore, the request for the deemed election was granted and the beneficiary was changed from the member's current spouse to Virginia Sikes.

By letter of January 26, 1993, the member protested the change in beneficiary to his former spouse contending that the divorce was final in March 1989 and that the request for the deemed election by Virginia was therefore made over 1 year from the date of the divorce and should not have been honored.

Nunc pro tunc refers to acts allowed to be done after the time when they should have been done, with a retroactive effect, as if regularly done. Black's Law Dictionary (Rev. 4th Ed.). A judgment entered nunc pro tunc may be given effect from different dates for different purposes. For some purposes, the judgment may be given effect from the actual date of its nunc pro tunc entry (Borer v. Chapman, 119 U.S. 587 (1887)), but generally, a nunc pro tunc entry is given a retrospective operation as between the parties

thereto, so as to take effect from the time of the original judgment. 46 Am. Jur. 2d Judgments § 223 (1969).

In any event, here both parties to the divorce treated it as final until it became evident that timely action to maintain former spouse coverage had not been taken. The member had remarried and Virginia had applied for a distribution of the retired pay of the member. It appears the sole reason for obtaining the nunc pro tunc order was to gain another 1 year "deemed election" period. To give effect to the order for this purpose and allow a new 1 year period for a deemed election beginning on the date of the order would, in our view, be an improper circumvention of the specific statutory time limit on a deemed election for the benefit of Virginia.

Accordingly, no new 1 year period for a "deemed election" was created by the nunc pro tunc order, and Linda is the proper SBP beneficiary.

Milton J. Rosman
for Comptroller General
of the United States