

DECISION



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

FILE B-184314

DATE: APR 20 1976

MATTER O

, USAFR, Retired (Deceased)

DIGEST:

Member obtained Nevada divorce in proceeding in which wife neither appeared nor was represented. Upon member's death partial payment of unpaid retired pay was made to two of five children under 10 U. S. C. 2771(a) on basis that there was no designated beneficiary and no spouse. It was later found that a New York court in a proceeding brought by wife for separation and support, in which both parties appeared, had refused to recognize Nevada divorce. Thus, remaining unpaid pay may be paid to wife but 10 U. S. C. 2771(d) bars recovery of amount paid to children on evidence then of record.

This action is in response to a letter dated June 10, 1975, with enclosures, from _____, in which she requests reconsideration of our Transportation and Claims Division settlement dated June 2, 1975, which disallowed her claim for the arrears of retired pay in the amount of \$561.80 due the late _____ (also known as _____), USAFR, Retired, _____, on the date of his death, November 28, 1973.

The record shows that _____ married the claimant in Phoenix City, Alabama, on April 10, 1940, and they were subsequently married in a religious ceremony in New York City on June 10, 1940, at which time it appears that both parties were residents of the State of New York. Two daughters were born of that marriage, _____ and _____.

On November 19, 1946, the Second Judicial District Court of the State of Nevada issued a decree of divorce which purportedly terminated the marriage of _____ and _____. In that decree it is stated that the plaintiff, _____, appeared in person and by his attorney; that the defendant, _____, was duly and regularly served with a certified copy of the complaint and summons in New York; that she failed to answer within the time allowed by law; and that default was duly and regularly entered. It is also stated that _____ residence in the State of Nevada for the time required by law was proven to the satisfaction of the court.

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On December 8, 1940, the Family Court, County of Kings, State of New York, issued a judgment of separation in which was the plaintiff and _____ was the defendant, and in which it is stated that " * * * there is no judgment or decree in any court of the State of competent jurisdiction against the plaintiff in favor of the defendant for separation on the grounds of abandonment and non support * * *." It was also stated that the defendant was personally served with a copy of the summons and complaint, "without the State of New York."

The record also contains a Certificate of Records from the Clerk of the Family Court of the County of Kings, State of New York, which states that on September 10, 1965, _____ filed a petition alleging nonsupport against _____ and on October 27, 1965, the court ordered support in the amount of \$23 per week. It was also stated that _____ went to Reno, Nevada, only to get a divorce and that _____ did not appear in said action.

The record indicates that _____ was married and was divorced twice since 1947 (subsequent to his marriage to _____). However, the record indicates that _____ has maintained continuously that she is married to _____.

The record indicates that _____ retired from the Air Force on March 31, 1958, with over 25 years' service.

Subsequent to _____ death, this Office received claims for his unpaid retired pay from _____, and from his two daughters _____ and _____. There was also received information indicating that _____ had three sons by one of his marriages subsequent to his marriage to _____; however, it was indicated that the mother of the sons had remarried and that her new husband had adopted the three sons. Attempts by the Air Force and this Office to locate the sons were unsuccessful and no claims have been received from them.

By settlement dated June 2, 1975, our Transportation and Claims Division disallowed _____ claims under 10 U. S. C. 2771 (1970) because _____ had designated no beneficiary of his unpaid pay and, based on the Nevada divorce decree, she and the deceased member appeared to have been divorced on November 19, 1946. Also on June 2, 1975, settlements in the amount of \$112.58 each were made in favor of _____ and _____ as daughters of _____.

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The remainder of _____ unpaid pay was held pending clarification of the status of the three sons.

By her June 10, 1975 letter _____ requested reconsideration of the June 2, 1975 settlement and stated that the New York Family Court refused to recognize the validity of _____ Nevada divorce decree obtained in 1948. Enclosed with that letter were the following documents: (1) _____ death certificate, wherein she is named as the surviving spouse; (2) a copy of a will executed on December 20, 1943, which she says is _____ last will and testament, by which he bequeathed to her his entire estate; (3) evidence of a statement made by _____ when he was admitted to a Veterans Hospital on November 23, 1973, that he was "separated" from his wife; and (4) a copy of a letter dated September 11, 1969, from _____ to the Air Force requesting dependency status for _____ who he stated is his wife and who is dependent upon him for full support. He also stated that he is a resident of New York.

We have informally contacted officials of the Veterans Administration and obtained a copy of a letter dated March 27, 1970, from the Legal Officer, Naval Station, Brooklyn, New York, to the ID Office, Fort Hamilton, New York, relative to _____ application for a dependent's identification card. In consideration of that application, reference was made to the record of the New York Family Court proceedings. It was stated in part as follows:

"Enclosures (2) and (3) are records of proceedings brought by _____ for support due to _____ a abandonment of her in which _____ argued in his defense that he had a Nevada divorce. The New York Family Court however stated * * * to _____ 'You have no divorce. You thought you went there to get a divorce; that divorce isn't worth the paper ... (it's printed on).' * * * JUDGE KAPLAN * * * states explicitly, 'I have already found that the divorce is invalid as far as we are concerned. I have made that finding.'"

We also have obtained a copy of the Veterans Administration determination dated December 12, 1974, that _____ was the surviving spouse of _____. We were also advised that the Veterans Administration awarded nonservice-connected death benefits to _____.

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Under the provisions of 10 U. S. C. 2771(a) (1970), which governs the settlement of the accounts of deceased members of the armed forces, such as an amount due from the armed force of which he was a member shall be paid to the person highest on the list prescribed by that statute living at the date of death. The first three categories of beneficiaries are:

- (1) beneficiary designated by the member in writing;
- (2) surviving spouse;
- (3) children.

The record shows that the member did not designate a beneficiary under 10 U. S. C. 2774. His last will and testament, in which is designated as the beneficiary of all of his estate does not satisfy the requirements imposed by 10 U. S. C. 2771(a)(1), as implemented by Air Force regulations. See B-170515, December 18, 1973.

Since in this case there is no designated beneficiary, the next person who could be entitled to receive the unpaid retired pay would be if she is the surviving spouse. The circumstances of our decision at 40 Comp. Gen. 116 (1968) are similar to the circumstances of the instant case. In that decision we considered the situation in which a member married in North Carolina in 1961, resided in Nevada for about six months in 1965, and while he was stationed in Arizona and his spouse was residing in North Carolina, he obtained a decree of divorce from a Nevada State court in 1968. That Nevada decree stated that the member's spouse was personally served but the record showed that she made no appearance nor was she represented by counsel. In 1969, in an action for alimony, child support, custody and reasonable attorney's fees, the member contended that the Nevada decree terminated their marriage. The North Carolina State court determined that the Nevada decree was invalid and not entitled to full faith and consideration because the parties were not residents nor were they domiciled in Nevada at the time the action was instituted, and the spouse was never personally served. In view of the conclusion reached by the North Carolina court and the numerous cases and authorities cited in support thereof, and the fact that the officer consented to its decree, it was believed that the Government would receive a good acquittance by payment of the six months' death gratuity to the deceased member's spouse.

In the present case, the record indicates that the deceased member appeared in the New York State court action and argued that his marriage was terminated by the Nevada divorce decree. The record shows that

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the New York State court refused to recognize the validity of that Nevada decree apparently because in its view neither of the parties were residents or domiciliaries of Nevada when the action was instituted and [redacted] did not appear in that action nor was she represented by counsel. Thus, based on all the information now before us, it appears that [redacted] may be recognized as the surviving spouse of [redacted] and is entitled to his remaining unpaid retired pay.

Concerning the settlements of \$112.58 each previously made in favor of [redacted] daughters, [redacted] and [redacted] such settlements were made on the basis of the information then before this Office which indicated that [redacted] had no spouse at the time of his death. Since 10 U. S. C. 2771(d)(1)(1970) provides that a payment made under section 2771 bars recovery by any other person of the amount paid, the recovery of the amounts paid to [redacted] and [redacted] is barred. Accordingly, the amount payable to [redacted] must be limited to the remaining unpaid retired pay due at the date of death (\$336.68). Joanna Puma will receive a settlement on that basis in due course.

R. F. KELLER

Deputy Comptroller General
of the United States