

PLM 2

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DECISION



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

10,079

FILE: B-194457

DATE: May 9, 1979

MATTER OF: Chief Petty Officer [redacted], USN
(Retired) (Deceased)

DIGEST: After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the husband immediately resumed marital status and were husband and wife under the common law of Colorado when husband died on November 21, 1975. Wife, therefore, claims entitlement to survivor benefits of the deceased husband which the Navy declined to pay on the basis she was not the surviving spouse. While common-law remarriage after divorce is possible in Colorado, on record presented the existence of a common-law marriage is too doubtful to authorize payment.

By letter of February 16, 1979, the Disbursing Officer, Retired Pay Department, Navy Finance Center, has requested an advance decision as to whether [redacted] can be considered the surviving wife of the late Chief Petty Officer [redacted], USN (Retired) [redacted], for purposes of being paid his arrears in retired pay and a Survivor Benefit Plan annuity. The request was assigned No. DO-N-1316 by the Department of Defense Military Pay and Allowance Committee.

Mr. [redacted], who was retired at the time the Survivor Benefit Plan was enacted, elected spouse coverage under the Plan for [redacted] on September 14, 1973.

On November 6, 1975, [redacted] and [redacted] were granted a final divorce by the District Court of Denver, Colorado. On November 21, 1975, Mr. [redacted] died in Denver, Colorado. Since the parties were granted a final divorce prior to Mr. [redacted] death, Mrs. [redacted] would normally be precluded from receiving the arrears of pay (10 U.S.C. 2771(a)) or the annuity (10 U.S.C. 1450(a)) as a surviving spouse. Accordingly, in the absence of any named beneficiary, the Navy Finance Center remitted the deceased's arrears of retired pay to his four children and has refused to pay Mrs. [redacted] a Survivor Benefit Plan annuity. Mrs. [redacted] claims entitlement by alleging that although she and Mr. [redacted] were divorced on November 6, 1975,

from that date until November 21, 1975, she and Mr. [redacted] were husband and wife under a common-law marriage.

The parties were residents of Colorado during the period in question and therefore their status must be determined under that State's law. Common-law marriages are recognized in Colorado and are considered contracts with the one essential requirement for their validity being that the parties have consented to be married to each other. [redacted] v. [redacted], 274 P. 2d 605 (Colo. 1954); [redacted] v. [redacted], 50 P. 1049 (Colo. App. 1897). The requirement of consent is generally proven by evidence of the parties cohabitating as husband and wife and general repute. In re [redacted] Estate, 365 P. 2d 254, 255 (Colo. 1961), dealt specifically with a divorced woman alleging that she was an heir of her husband because they had remarried under the common law. Also, Colorado has a policy of favoring remarriage of divorced couples and holds that the evidence to sustain a common-law remarriage "may be less than the positive and convincing proof necessary to establish a common law marriage." [redacted] v. [redacted], 386 P. 2d 352, 355 (Colo. 1963), discussing In re [redacted] Estate, supra.

In the instant case, there is no dispute that Mr. [redacted] was living apart from his wife for a period prior to the divorce. However, Mrs. [redacted] has stated in her "Application for Arrears in Pay" that Mr. [redacted] returned to the family home shortly before the divorce and lived there until his death. While Mr. [redacted] died in the residence he rented apart from his wife, Mrs. [redacted] indicates that he kept this residence on the advice of his doctor so that he could rest during his lunch time at work (this residence was considerably closer to his work than was the family residence) and have a quiet workplace to perform his organizational activities for the local Masonic Lodge.

Additionally, the claimant contends that Mr. [redacted] continued to refer to her as his wife and she cites specific instances of this including a Masons' event on November 16, 1975, and a conversation with their child, [redacted], on November 21, 1975. Conflicting with these indications of the marital status of the parties is the fact that Mrs. [redacted] was referred to as the deceased's ex-wife on the death certificate and more importantly, on various forms and communications that she filled out and sent to the Navy. Mrs. [redacted] says that she referred to herself as an "ex-wife" on her attorney's advice that to do otherwise would be fraudulent.

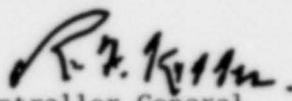
Mrs. [redacted] points out that throughout the mourning period for her husband she was always referred to as his wife and received many cards so addressed. Since the couple's divorce was only granted 2 weeks previous to the death of Mr. [redacted], we cannot find this fact to conclusively establish the remarriage of the parties. It may be that the divorce was not generally made known.

Regarding their reason for divorce, Mrs. [redacted] has alleged, through her attorney, that this was due to Mr. [redacted] desire to transfer all his assets to Mrs. [redacted] through the divorce settlement and thereby avoid any estate or inheritance taxes on his estate. At the time of his divorce, Mr. [redacted] filed a financial affairs affidavit which indicated that his assets were not sufficient for Mrs. [redacted] to have had to pay estate or inheritance taxes. Having been concerned about this problem of taxes, it seems inconsistent that Mr. [redacted] would not have checked Federal and Colorado law and discovered that fact. See 26 U.S.C. § 2052 (1970); Colo. Rev. Stat. (1973) §§ 39-23-106, -107, and -113 (1973). Also, we note that Mrs. [redacted] was the petitioner in the divorce action, not Mr. [redacted].

Moreover, in the settlement agreement executed by the parties and incorporated into the divorce decree, the parties agreed that Mrs. [redacted] would be entitled to any and all benefits Mr. [redacted] received from the Navy "until such time as either of the parties die, or the husband remarries." This clause is clearly inconsistent with the premise that Mr. [redacted] divorced Mrs. [redacted] so that she could fare better financially upon his death.

Finally, the claimant has set forth various other instances of behavior on the part of the deceased and third parties which she feels are evidence of the fact that the couple had remarried under the common law. We have examined them and find that they do not aid in resolving the various inconsistencies as pointed out.

Accordingly, upon the record before us, we find that there is too much doubt to warrant any payment to Mrs. [redacted] regarding the marital status of the parties. See 55 Comp. Gen. 533 (1975); 45 Comp. Gen. 155 (1965); and 36 Comp. Gen. 574 (1957). In such a case we must leave the claimant to pursue her remedy in court.


Deputy Comptroller General
of the United States