

DECISION



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

FILE: B-208058

DATE: May 27, 1983

MATTER OF: James R. LeMay and Richard S. LeMay

DIGEST:

1. The son of a deceased Air Force member claims payments under the Retired Serviceman's Family Protection Plan, 10 U.S.C. § 1431 et seq., during the period his stepmother received payments on his behalf but, according to him, did not use the payments for his benefit. The claim is denied because there was no requirement under statute or regulation that payment be made directly to the surviving child and payment to the stepmother appears to have been in accordance with established procedures.
2. The son of a deceased Air Force member claims payment of annuity under the Retired Serviceman's Family Protection Plan, 10 U.S.C. § 1431 et seq., for the period that his stepmother advised the Air Force that he was not eligible for payments because he was not in school. The stepmother continued to receive the amount in question as increased payments on behalf of other surviving children. Where claimant has obtained a judgment in an Oklahoma State court against his stepmother for actual damages for withholding of benefits including such claim, the Air Force should not allow payment even if the claim is otherwise proper. Such claim may be satisfied by recovery of payments from the stepmother.

This decision is in response to a request for an advance decision from an Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado, as to the propriety of allowing payment of the claims of Richard S. LeMay and James R. LeMay, for annuity payments under the Retired Serviceman's Family Protection Plan (Plan), 10 U.S.C. § 1431 et seq., as surviving children of the late Lieutenant Colonel George G. LeMay, USAF

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(Retired). The claims include, in part, payment of an annuity under the Plan during the period that their step-mother, Odette LeMay, received annuity payments on behalf of James and Richard as surviving children, subsequent to the time that her guardianship of them had been revoked by a court of competent jurisdiction.

The claims may not be allowed since payments were made by the Air Force in accordance with established regulations and procedures and because the claimants have obtained judgments against Odette LeMay for amounts the court determined were paid to her for their benefit but were not used for that purpose.

Background

Colonel LeMay retired from the Air Force on December 8, 1970, and died on April 26, 1971. Prior to his retirement he had elected coverage under the Retired Serviceman's Family Protection Plan for his surviving children only. Four of these six children, including James and Richard, were the member's natural children by a previous marriage and two were the natural children of Odette LeMay by her previous marriage. The two older natural children of Colonel LeMay are not involved in these claims for payments under the Plan.

Section 1435 of title 10, United States Code, provides in pertinent part, that children are eligible beneficiaries under the Plan under the following conditions:

"(2) The children of the member who are--

"(A) unmarried;

"(B) under eighteen years of age * * *
or at least eighteen, but under twenty-three, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution;

"(C) legitimate or adopted children of, or stepchildren in fact dependent for their support upon, the member;"

Under the Plan where the member has elected an annuity for the surviving children, the total annuity payable is determined and this amount is paid in equal shares to, or on behalf of, each eligible child. See 10 U.S.C. § 1434.

Shortly after Colonel LeMay's death Odette was appointed guardian of her stepsons, James and Richard, by a court in Dade County, Florida. This guardianship was revoked on August 6, 1974, apparently without Odette's participation, because she had failed to comply with the court's reporting requirements. At this time, however, it appears that Odette had moved to Oklahoma, James, who was over 18, was attending school in New Mexico and Richard with Odette's two natural daughters were living with her.

Although the attorney for the claimants claims payment to his clients from the date of revocation of guardianship by the Florida court, we do not attach a great deal of significance to that action because, under the applicable regulations, a formal guardianship is not required in order to make payments to the "guardian or custodian" of eligible children whether they are considered minors under the law of the applicable jurisdiction or not. Further, that guardianship was in Florida and would not necessarily govern the relationship after the covered individual moved to another state.

Apparently James continued to live in New Mexico and Richard with Odette until September 15, 1976, when she executed an affidavit indicating that she was Richard's guardian and placing him in "the full temporary care, custody and control" of Mr. and Mrs. John V. Powell of Oklahoma City.

The Air Force has advised that it was not until May 21, 1981, that it became aware of the August 1974 revocation of guardianship and of Richard's subsequently being placed into the temporary care, custody and control of someone other than Odette.

In the presentation of James' and Richard's claims for annuity payments, their attorney alleges that neither James nor Richard received the benefit of any annuity payments made to Odette. He further alleged that until recently, neither of the claimants had been aware of the benefits payable under the Plan and that annuity payments due them had been paid to Odette on behalf of the other eligible children during periods for which James and/or Richard were erroneously considered ineligible for such payment.

Statute of Limitations

The claims of James and Richard were first received by this Office on July 16, 1981. A claim presented to the Comptroller General must be received by him within 6 years after the claim accrues. 31 U.S.C. § 3702(b). We have held that for the purpose of that statute, formerly 31 U.S.C. § 71a, a claim for continuing payments accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, that portion of these claims which accrued prior to July 16, 1975, is barred from consideration.

Richard

Richard, through his attorney, Mr. Powell, has claimed payment for an annuity under the Plan from August 6, 1974, the date that Odette's guardianship of Richard and James was revoked to September 8, 1977, the date he became 18 years of age. In addition, for the period subsequent to September 8, 1977, Richard has claimed an annuity for those periods during which he was enrolled as a full-time student. As stated above, Richard's claim for the period prior to July 16, 1975, is barred from consideration. The agency advises that Odette received payments of annuity on behalf of Richard until January 31, 1979. At that time payments to Odette for Richard's annuity were discontinued because verification of full-time school attendance had not been received for 1978 and 1979 and Odette had advised the agency in writing that Richard would not be enrolled in school during 1979. The agency further advises that payment of an annuity under the Plan was made directly to Richard for the period October 1, 1980, through May 30, 1981, and that Richard has continued to receive an annuity payment from June 1981 through the date of the Administrative Report,

June 3, 1982. We note that Richard became 23 years old on September 8, 1982, and under 10 U.S.C. § 1435 his eligibility for an annuity would have automatically terminated at that time.

Payments to Odette on Behalf of Richard

Richard became 18 years old on September 8, 1977. Beginning in 1973, 18 years was the legal age of majority in Oklahoma, Richard's apparent legal residence at that time. See Oklahoma Statutes Annotated, title 15, sections 13 and 14 (1983). As stated above, the Air Force was not aware of the revocation of Odette's guardianship of Richard until May 21, 1981. Furthermore, the agency advises that it also was not until May 21, 1981, that it became aware that Odette had surrendered temporary care, custody, and control of Richard in September 1976.

The regulation promulgated by the Department of Defense to carry out the Plan in effect at the time annuity payments were made to Odette on behalf of Richard provided:

"(a) Annuities for a child or children will be paid to the child's guardian, or if there is no guardian, to the person(s) who has care, custody, and control of the child or children." 32 C.F.R. § 48.504.

Since the Air Force had no knowledge until May 21, 1981, of the revocation of Odette's guardianship of Richard in August 1974 or of her subsequent surrender of temporary care, custody, and control of Richard in September 1976, we conclude that the agency's annuity payments to her on Richard's behalf during the period of his minority were proper.

For the period from September 8, 1977, his 18th birthday, to January 31, 1979, Odette continued to receive annuity payments on behalf of Richard. There is nothing in the language of the statutory authority for the Plan, 10 U.S.C. § 1431 et seq., or in the Department's implementing regulations which required that the Air Force make annuity payments directly to Richard after he became an adult. The Air Force Finance and Accounting Center has advised us that during this period it was their policy to make all payments

directly to the guardian or custodian of the child regardless of age unless a written request was received from the guardian or custodian to address the payments to the child annuitant only.

Section 80507 of the Department of Defense Military Retired Pay Manual, DoD 1340.12-M (September 5, 1979) provides as follows with regard to annuity payments under the Plan:

"(a) Annuities for a child or children are paid to the guardian, or if there is no guardian, to the person who has care, custody, and control of the child or children as the custodian.

"(b) Annuities may be paid direct to the child when the law governing the state of resident [sic] stipulates the child to be majority age. The child is then considered an adult for annuity payment purposes, and a custodian or legal fiduciary is not required * * *." (Emphasis supplied.)

Since the word "may" is usually permissive in nature and not mandatory, and in view of the absence of a statute or other regulation which would have required that the Air Force pay Richard's share of the annuity directly to him, the payments made by the Air Force to Odette on his behalf were made in accordance with the existing procedures. We will not substitute our judgment for that of the agency regarding the payment of these annuities. Therefore, we do not conclude that payments to Odette were improper or erroneous so as to require Richard's claim for annuity payments for the period September 8, 1977, through January 31, 1979, to be allowable.

Improper removal of beneficiary

As stated above, Richard has also claimed annuity payments for the period when no annuity payments were received either directly by him or by Odette LeMay on his behalf-- February 1, 1979, through September 30, 1980. There were no annuity payments paid to Richard, either directly or on his behalf to Odette during this period since the Air Force

suspended annuity payments on behalf of Richard as a result of Odette's advising the Air Force early in 1979, upon its written request for verification of Richard's attendance at school, that Richard would not be enrolled in school during 1979. By letter dated March 14, 1979, the Air Force advised Odette that it was terminating Richard's account but transferred his portion of the annuity to Kerry and Holly Fuller, her children by a prior marriage. She was further advised that if Richard remained unmarried and returned to school before he reached age 23, his annuity could be reinstated. Apparently, neither Odette nor Richard advised the Air Force that he was a full-time student during the period from February 1, 1979, through September 30, 1980, although the Air Force has determined, on the basis of college records furnished them, that he was a full-time student throughout this period. However, in a letter to the Air Force dated November 21, 1980, Richard indicated that he had not previously known of his entitlement to an annuity under the Plan. It does appear that from February 1, 1979, Richard should have received a share of the annuity whereas payments were made to or on behalf of Holly and Kerry Fuller only.

James

James became 18 years old on June 30, 1974, and Odette received annuity payments on his behalf through December 1974. The annuity payments to Odette on behalf of James were terminated when she advised the Air Force by letter dated January 1, 1975, that James had dropped out of school. James has, in effect, claimed annuity payments for the period July 1, 1974, the day after his eighteenth birthday up to June 30, 1979, the date he reached 23 years of age except for those periods during which he was not enrolled as a full-time student.

As stated above, that portion of James' claim for annuity payments for the period prior to July 16, 1975, which includes the entire period during which Odette received annuity payments on his behalf, is barred from consideration by 31 U.S.C. § 3702(b). The agency advises that entitlement to an annuity would not appear to exist for the period from July 16, 1975, through December 1975 since the required certificates verifying full-time school attendance have not been provided. See 32 C.F.R. § 48.505(c) (1982). The agency further advises that an

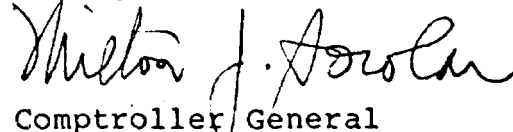
annuity under the Plan for the period July 1, 1977, through May 31, 1979, has been paid directly to James since he was not a minor and since there was no doubt as to his entitlement to the annuity, based on a certification of full-time school attendance dated April 21, 1981, from Eastern New Mexico University. The agency asks whether a voucher may be processed for payment of the annuity to James for the period January 1, 1976, when he returned to school, through June 30, 1977, the day before direct payments were begun.

It appears that James might have been entitled to a share of the annuity for the period January 1, 1976, through June 30, 1977, when the full annuity was divided among Richard, Holly and Kerry.

Judgment on behalf of James and Richard

On April 16, 1982, James and Richard filed an action against Odette in the District Court in and for Oklahoma County, State of Oklahoma. In the petition, the plaintiffs allege, in part, that they never received the benefit of any of the distributions of annuity which had been paid to Odette. Judgment was entered in this action on February 17, 1983, against Odette and for Richard for actual damages in the amount of \$24,830.49 and for James in the amount of \$100. Since the judgment apparently includes all actual damages which resulted from Odette's failure to use the annuities received for the support of Richard and which resulted because she failed to keep the Air Force advised of James' and Richard's eligibility to share in the annuity, the Air Force should not pay James' or Richard's claims for the periods in question even though such claims may otherwise be proper. James and Richard have a right to recover the payments from Odette and the Government need not take action to pay Richard or James and recover the amount involved from Odette.

In accordance with the above, payment may not be allowed on the vouchers presented.

for 
Comptroller General
of the United States