



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lieutenant Commander Donald R. Mason, USN--
Dependency of Adopted Children

File: B-240697.2

Date: December 16, 1991

DECISION

This is in response to a request for an advance decision as to whether the adopted children of Lieutenant Commander Donald R. Mason, USN, who have substantial income in their own right, are his dependents under 37 U.S.C. § 401(2).¹ For the reasons presented below, they are not considered his dependents for the purposes of that statute.

In March 1990 Lieutenant Commander Mason adopted his wife's children. Because their natural father was a service member who died on active duty, the children receive \$2,147 per month in Social Security and Veterans' Administration benefits. The benefits currently are deposited in irrevocable trusts on behalf of the children, although funds can be withdrawn from the trust upon approval of the trustees. The Navy Family Allowance Activity has determined that the children are not his dependents for pay and allowance purposes, and Lieutenant Commander Mason disputes their determination.

Section 401(2) of title 37 of the United States Code contains the definition of a "dependent child" of a military member. If the child is a stepchild or an adopted or acknowledged illegitimate child, he or she must be "in fact dependent on the member."

In Lieutenant Commander Albert Dick, B-199433, December 29, 1980, we dealt with the dependency status of stepchildren who received substantial Social Security and Veterans' Administration benefits which were deposited in trust accounts. We said that since the children received support adequate for their care from another source, they were not dependents under 37 U.S.C. § 401(2).

¹The Defense Finance and Accounting Service has assigned the number 91-3-M to the request for control purposes.

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Lieutenant Commander Mason states that the Florida adoption decree holds that the children are now his legal children and are "entitled to all rights and privileges" of a child born to him in lawful wedlock and therefore, we should adopt the statement of the Florida court. Since entitlement to military pay and allowances and other benefits is a matter of federal law, those seeking benefits must satisfy the requirements of applicable laws and regulations. General Ira C. Eaker, USAF (Retired) and General James H. Doolittle, USAF (Retired), VB-224142, November 28, 1986. Therefore, notwithstanding the Florida adoption decree which Lieutenant Commander Mason cites, we must apply federal law and regulations to the situation before us.

Lieutenant Commander Mason argues that the definition of "dependent" is unconstitutional because it requires a more stringent standard for adopted children than for natural ones. Our Office presumes the constitutionality of the laws enacted by Congress. Inter-Con Security Systems, Inc., B-186347, VB-185495, March 7, 1977.

Lieutenant Commander Mason suggests that we should not focus only on monetary support but should take into account the guidance and emotional support he provides. While we do not deny the importance of such contributions, we cannot base our decision on them. B-199433, supra.

Lieutenant Commander Mason points out that over the years we have allowed dependency status based on different percentages of support in different situations. That is not an issue in this situation because the outside benefits provided for the Mason children are adequate for their support, as was the situation in B-199433, supra, which discussed how adequate support is to be calculated. Items provided in excess of basic support do not bring about dependency. Captain Roger E. Box, USN, VB-193161, February 22, 1979.

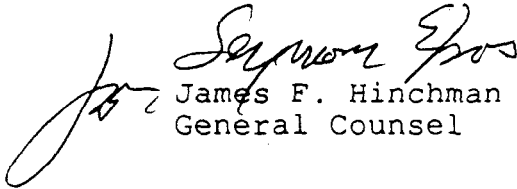
Because Lieutenant Commander Mason may be transferred to Spain, he is concerned that the children might not be allowed under Spanish law to accompany him if they are not his military dependents. That is a matter over which this Office has no jurisdiction.

If the children are able to accompany him, he is also concerned about the tuition policy at Department of Defense (DOD) Schools. The DOD schools for dependents overseas are governed by 20 U.S.C. §§ 921-32, as implemented by 32 C.F.R. Part 71. Section 71.3(f) states that a free education will be provided for all minor dependents living with a military member stationed overseas if the minors receive at least half of their support from the member. There is a tuition charge for students who do not meet that test. The benefits

the Mason children receive are intended in part to cover educational costs. Even though the benefits are deposited in trusts, we must consider the funds available for that purpose. See B-199433, supra. Moreover, in the present instance, money could be withdrawn from the trust for that purpose.

The Defense Finance and Accounting Service has asked whether DOD tuition fees may be included in the amount the member spends in support of his children to determine dependency and if therefore the children could be considered dependents only for the period that the member is stationed overseas. We note that 32 C.F.R. § 71.4(a)(1) states that DOD dependent students may be enrolled in the schools under certain conditions. Therefore, it appears that dependency under section 71.3(f) must be determined before tuition status is determined.

The Navy Family Allowance Activity is primarily responsible for determining whether adopted children are in fact dependent upon a Navy member for pay and allowance purposes. In view of the facts of this situation and our prior decisions, we find no basis for questioning their finding that Kevin and Sarah Mason are not "in fact dependent" on Lieutenant Commander Mason for pay and allowance purposes.


James F. Hinchman
General Counsel