DATE: 09-10-90

CITATION: VAOPGCPREC 90-90
Vet. Aff. Op. Gen. Couns. Prec. 90-90

TEXT:

SUBJECT: Inference of Marriage of a Veteran's Child

QUESTION PRESENTED:

Does 38 C.F.R. § 3.500(n)(3) provide a basis for denial of additional compensation benefits for a veteran's child when marriage of the child may be inferred from available facts?

COMMENTS:

1. This is in response to your request that we undertake a review of a Board of Veterans Appeals (BVA) decision which found that a veteran's compensation had been improperly reduced based on an inference that the veteran's child had married. The BVA observed that no provision of law authorizes applying an inference of marriage in the case of the child of a veteran. You have forwarded to us a copy of an opinion from the VA District Counsel in Honolulu, Hawaii which concludes that the BVA decision was wrongly decided. You have also noted that the BVA failed to discuss 38 C.F.R. § 3.500(n)(3) in its decision.

2. The veteran, who resides in the Philippines, served on active duty from September 1946 to September 1950. The veteran receives disability compensation at the 50 percent rate for a service-connected disability. Since 1972, the veteran's monthly compensation has included an additional sum for a child born in August 1969. The child, who also resides in the Philippines, submitted a request for approval of school attendance, VA Form 21-674, in August 1987, for the academic term beginning in June 1987. The child reported living with an individual with whom the child had two children. A VA field examination disclosed that the veteran's child had been living with this individual since November 15, 1985, as husband and wife, without benefit of marriage.

3. After obtaining an opinion from the VA District Counsel in Honolulu, the Adjudication Officer determined that the child's conduct warranted an inference of marriage and the veteran's award of additional benefits for the child was retroactively discontinued effective December 1, 1985.

The veteran, in January 1988, filed a notice of disagreement. In a decision dated October 5, 1988, the BVA concluded that, as the child was not legally married, the veteran's award of additional compensation for the child had been improperly terminated. The BVA also stated:

Although a surviving spouse of a veteran may not qualify for Veterans Administration death benefits in certain cases where the surviving spouse has not remarried but is living with another person of the opposite sex and holding out to the public as the spouse of such other person, the law includes no comparable provision for application in cases of children of a veteran.

4. Section 101(4) of title 38 of the United States Code and 38 C.F.R. § 3.57(a) provide that to qualify as a "child" for VA benefit purposes an individual must be unmarried. The legislative history accompanying the Veterans' Benefits Act of 1957, Pub.L. No. 85-56, 71 Stat 83, which codified the longstanding requirement of Vet.Reg. 10 that a child be unmarried, does not indicate that anything other than a legal marriage was ontemplated by this statute, nor had any other construction been placed on the term "child" administratively prior to that time. With one exception, all subsequent amendments to 38 U.S.C. § 101 (4) added requirements concerning recognition of adoptions. The exception, Public Law No. 89-311, 79 Stat 1154 (1965), substituted twenty-three years for twenty-one years as the age limit for an individual attending an approved school to be considered a child.

5. The presumption or inference of marriage of children of a veteran has its origins in VA's application of such an inference in claims involving widows of veterans. Prior to September 19, 1962, 38 U.S.C. § 101(3) provided that a "widow" for VA benefit purposes must be unremarried, but included no reference to inferred marriage. However, in response to situations where widows were cohabiting with men as husband and wife while in receipt of VA death benefits, VA had long before adopted an administrative interpretation under which it was presumed that, despite the fact that no legal marriage had been contracted, where certain facts existed, the widow of a veteran would be considered remarried and, therefore, no longer a "widow" for VA death benefit purposes. The "widow" was considered estopped by her conduct from receiving death benefits as the widow of a veteran. See 24 Op.Sol. 439 (2-17-36) (approved by the Administrator).

Commencing in 1946, there was a gradual departure from the "estoppel" theory. As indicated in Op.Sol. 116-50 (3-8-50), and subsequent Solicitor and General Counsel opinions, VA considered that evidence of cohabitation and reputation in the community as husband and wife gave rise to a presumption of remarriage and that the widow was then required to assume the burden of adducing convincing credible evidence rebutting such presumption as a prerequisite to allowance of her claim for continuation of benefits.

6. Op.G.C. 7-61 (3-20-61) specified that:

A properly established presumption of marriage exists only when there is proof of each one of these facts: (1) a cohabitation by the widow with a man as man and wife; and (2) a "holding out" by the two persons to the general community in which they reside that they are husband and wife (which generally is embraced in the requisite

cohabitation); and (3) a general reputation in such community that they are married to each other.

The presumption and the standards set forth in Op.G.C. 7-61 were held for the first time to be equally applicable to children of veterans in an unpublished opinion of the Chief Attorney, Washington, D.C., approved by the General Counsel on April 28, 1961. This opinion, however, lacked any reference to or discussion of 38 U.S.C. § 101(4) or its legislative history. It merely recited the pertinent facts, noted that Op.G.C. 7-61 specified the requisites for determining whether a widow may be presumed to have remarried, and concluded these same standards were equally applicable to children of veterans. In our view, this nonprecedential opinion wholly failed to provide an adequate rationale for this conclusion.

7. Statutory confirmation of VA's practice, under which it was presumed that, where certain facts existed, a widow had remarried, was deemed necessary because the validity of this practice had been called into question in the case *Sinlao v. United States*, 271 F.2d 846 (D.C.Cir.1959). Noting in dicta that VA had ceased payments to a widow on the theory that, because the appellant had lived with a man and had represented herself as his wife, she was "estopped to deny remarriage," the court stated that the rejection of the appellant's compensation claim could not be reconciled with the intention Congress expressed to pay death compensation unless a widow remarried. *Sinlao*, 271 F.2d at 847-848.

8. Section 1 of Public Law No. 87-674, 76 Stat. 558 (1962), added the requirement to 38 U.S.C. § 101(3) that a widow, in cases not involving remarriage, must not have since the death of the veteran and after September 19, 1962, lived with another man and held herself out openly to the public to be the wife of such other man. Despite extensive discussions of the then current practice regarding remarriage of widows in the House and Senate Committee reports and in VA's report on the legislation, and inclusion in the bill of a provision pertaining to annulment of a child's marriage, there was no mention at all of inference of marriage of children. See H.R.Rep. No. 1459, 87th Cong., 2d Sess. 2-6 (1962); S.Rep. No. 1842, 87th Cong., 2d Sess. 2-6, reprinted in 1962 U.S.Code Cong. & Admin.News 2589, 2590-93. A review of VA's legislative file on Public Law No. 87-674 disclosed that the Office of the General Counsel, on November 28, 1961, suggested that VA seek to amend the subject legislation (H.R. 5234, 87th Cong.) to extend application of the inference of marriage provision to children by amendment of 38 U.S.C. § 101(4). However, there is no indication that such an amendment was ever offered to or considered by Congress. Under these circumstances, we cannot conclude that Congress evidenced any intention that an inference of marriage be applied to children of veterans.

9. Pursuant to section 1 of Public Law No. 87-674, a regulation governing the denial of benefits because of conduct of a widow, 38 C.F.R. § 3.1574, was promulgated. This regulation, which became effective September 19, 1962, stated that an identical rule to that stated in the newly amended 38 U.S.C. § 101(3) would be applied in determining whether there is an inference of marriage of the child of a veteran. The

regulation also stated that section 1 of Public Law No. 87-674 effected no change in the administrative rule and practice in cases involving an inference of marriage of the child of a veteran.

10. Pursuant to the provisions of Public Law No. 87-674 and Public Law No. 87-825, 76 Stat. 948 (1962) (which revised effective date rules for benefit awards), 38 C.F.R. § 3.500(n) was amended effective December 1, 1962. Newly promulgated paragraph (3) of 38 C.F.R. § 3.500(n) provided that the effective date of reduction or discontinuance of an award of pension, compensation, or dependency and indemnity compensation in cases involving inferred marriage of a child would be the last day of the month before the marriage, if the child was the payee, or the last day of the month in which the marriage occurred, if the child was a dependent of the payee. However, the legislation underlying this regulation contained no reference to inference of marriage of children.

11. Between 1976 and 1979, the Director, Management and Operations Staff, Office of the General Counsel, issued five unpublished opinions involving the application of the inference of marriage to children of veterans. Two of these unpublished opinions, dated December 9, 1976, and September 13, 1979, cited 38 C.F.R. § 3.1574 in support of their conclusions. Two others, dated June 1, 1977, and June 27, 1977, cited Op.G.C. 7-61, 38 U.S.C. § 101(4), and 38 C.F.R. § 3.57 (without discussion) in support of their conclusions. The fifth, dated December 15, 1977, cited only 38 U.S.C. §§ 101(4) and 103 and 38 C.F.R. § 3.57 in support of its conclusion. We are unaware of any opinion by the General Counsel's office after 1979 which involved the application of the inference of marriage to children of veterans.

12. VA revoked a number of regulations, including 38 C.F.R. § 3.1574, effective December 1, 1981, 46 Fed. Reg. 59971 (1981). The preamble to the notice removing these regulations explained that the provisions had been either incorporated into other regulations or had been made obsolete by subsequently enacted legislation. It appears that section 3.1574 was thought to have been subsumed in 38 C.F.R. § 3.50 which defined the terms "wife," "widow," and "spouse" and reflected the provisions of section 1 of Pub.L. No. 87-674. Consistent with Pub.L. No. 87-674, section 3.50 contains no mention of inference of marriage of children. We construe this regulatory change as an abandonment of the administrative rule of applying an inference of marriage to children of veterans.

13. This case also raises the question of whether Congress ratified VA's administrative practice of applying an inference of marriage in determining the status of children of veterans by not amending the law to overcome that practice. Simple amendments by Congress for limited purposes will not be considered sufficient for application of the ratification doctrine. See, e.g., *Lukhard v. Reed*, 481 U.S. 368 (1987). An amendment which deals specifically with the point in question can be held as adopting the interpretation placed on a statute by a court or administrative entity. See *Lindahl v. O.P.M.,* 470 U.S. 768 (1985); *National Lead Co. v. United States*, 252 U.S. 140, 146 (1920). However, Congress must generally have been made aware of the interpretation before it can be considered to have implicitly accepted it upon reenactment of a statute.

See *S.E.C. v. Sloan*, 436 U.S. 103 (1978); *International Union, U.A.W. v. Brock*, 816 F.2d 761, 767 (D.C.Cir.1987). Further, mere congressional inaction is of little consequence where an agency interpretation has not been called to Congress' attention. 2A Singer, N.J., Sutherland Statutory Construction s 49.10 (4th ed. 1984).

14. In our view, Congress may not be considered to have "enacted" into law VA's administrative practice involving inference of marriage of the child of a veteran. There is no indication that VA's interpretation, as it relates to children, was ever called to Congress' attention at any time or considered in connection with enactment of Pub.L. No. 85-56. Further, Congress has not, since passage of Pub.L. No. 85-56, revised section 101(4) as it relates to marriage of children. Thus, we find no basis for application of the ratification doctrine in this instance.

15. The only remaining regulatory vestige of the application of the interpretation in question is found in 38 C.F.R. § 3.500(n)(3), which sets forth the effective date of termination of an award of VA benefits based on inferred marriage of a child. It appears that this provision was merely overlooked at the time of revocation of 38 C.F.R. § 3.1574. Standing alone, it is of no substantive effect. Thus, we do not believe that this provision may serve as a basis for denying benefits for or to a child. Also, the manual provision which addresses the application of an inference of marriage to children of veterans, found in M21-1, section 8.06(a)(2), is not regulatory and, therefore, is without legal effect. Further, as the preceding analysis demonstrates, this manual provision has no legal basis in statute or regulation.

HELD:

An individual who is living with a person of the opposite sex and holding himself or herself out to the public to be the spouse of such person remains a "child" within the meaning of statutes and regulations defining that term for compensation purposes (38 U.S.C. § 101(4) and 38 C.F.R. § 3.57(a)), as long as the individual does not contract a valid marriage. Section 3.500(n)(3) of title 38, Code of Federal Regulations, which sets forth an effective date for reduction or discontinuance of an award of pension, compensation, or dependency and indemnity compensation based upon a finding of an inferred marriage of a child does not provide a basis for such a reduction or discontinuance, as there is no provision in the law which authorizes the application of an inference of marriage to children of veterans.

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