February 1, 1995 O.G.C. Precedent 3-95

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Subj: Payment of Death Benefits to Remarried Spouse--Effect of Annulment

QUESTION PRESENTED:

What is the effect on entitlement to Department of Veterans Affairs (VA) dependency and indemnity compensation (DIC) during a period of remarriage, where a remarried spouse obtains an annulment which, under state law, renders the remarriage void ab initio?

COMMENTS:

1. The beneficiary was in receipt of DIC benefits as the surviving spouse of a veteran. The beneficiary remarried on May 6, 1985. The marriage was annulled by a court in Bexar County, Texas on April 1, 1986. Although the annulment decree did not specifically state the grounds for the annulment, the decree did state that the marriage was "voidable" and subject to annulment under Tex. Fam. Code Ann. § 2.44 (West 1993). That statute provides that a marriage is "voidable" and subject to annulment if the other party used fraud, duress, or force to induce the petitioner to enter the marriage. The decree declared the marriage null and void. Apparently, the beneficiary did not notify VA of the remarriage and continued to receive DIC benefits during the period of the remarriage and following the annulment. VA learned of the remarriage and annulment in May 1992, when the beneficiary submitted a copy of the decree of annulment. An overpayment was created against the beneficiary in the amount of $7,058.20, which represents benefits paid during the period of the remarriage. Counsel for the beneficiary contends that the annulment made the marriage a legal "non-event" and that the beneficiary is entitled to payment for all periods following the remarriage. You have asked our

opinion as to the legal effect of the remarriage and annulment on the beneficiary's entitlement to DIC benefits during the period of the remarriage.

2. Pursuant to 38 U.S.C. § 1310(a), when a veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary is authorized to pay DIC benefits to such veteran's surviving spouse, children, and parents. For purposes of DIC, the term "surviving spouse" is defined in pertinent part as "a person of the opposite sex who was the spouse of a veteran at the time of the veteran's death . . . and who has not remarried." 38 U.S.C. § 101(3) (emphasis added). Should the surviving spouse remarry, 38 U.S.C. § 5112(b)(1) provides that the effective date of
discontinuance of DIC benefits shall be the last day of the month before such remarriage. See also 38 C.F.R. § 3.500(n). Thus, when a DIC beneficiary remarries, the beneficiary no longer meets the criteria of a surviving spouse and is no longer entitled to DIC benefits. Further, the provisions of 38 U.S.C. § 5112(b)(1) require that benefits be terminated effective the last day of the month before the remarriage.

3. Pursuant to 38 U.S.C. § 103(d), the remarriage of the surviving spouse of a veteran does not bar the furnishing of benefits to such person as the surviving spouse of the veteran "if the remarriage is void, or has been annulled by a court with basic authority to render annulment decrees unless the Secretary determines that the annulment was secured through fraud by either party or collusion." The effective date of restoration of benefits where the remarriage is annulled is the date the judicial decree of annulment becomes final, if a claim for restoration is filed within one year from the date the judicial decree of annulment becomes final; otherwise, the effective date is the date the claim is filed. 38 U.S.C. § 5110(k); 38 C.F.R. § 3.400(v).

4. VA has previously addressed legal issues relating to restoration of benefits to spouses who remarried and whose remarriages were void or voidable. The legal distinction between a marriage that is void and a marriage that is voidable was described at length in Administrator's Decision No. 824 (9-1-49), which drew a distinction between

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marriages for purposes of the effective date for restoration of benefits. The decision stated:

> In a voidable marriage there is a marital status resulting and in existence until the marriage is annulled. In the absence of a decree of annulment the marriage is valid, and it may not be annulled for the cause which rendered it voidable after the death of either of the parties thereto. On the other hand, a void marriage is no marriage at all. No marital status is created thereby, and a decree of nullity, if desired by either of the parties thereto, may be procured at any time, and generally, such a decree may be obtained to establish, for record purposes, the fact that the marriage was null and void even after the death of one of the parties.

Administrator's Decision No. 824 (9-1-49).

5. The distinction between void and voidable took on greater importance with the enactment of statutes, Servicemen's and Veterans' Survivor Benefits Act, ch. 837, § 209(e), 70 Stat. 857, 867 (1956); Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83, 88; Pub. L. No. 85-857, 72 Stat. 1105, 1106 (1958), which provided, in effect, that benefits to the surviving spouse of a veteran which had been terminated upon remarriage could only be restored if the remarriage was "void." It was determined in Administrator's Decision No. 962 (3-16-59) that, based on analysis of the history of the above-referenced statutory provisions referring to "void" remarriages, the term as used in those statutes did not include remarriages which were "voidable."

6. In Op. G.C. 4-59 (3-3-59), the General Counsel addressed the issue of whether a voidable marriage which is determined by a court decree to have been void from the beginning may be considered a void marriage for purposes of VA benefits. In that opinion, the General Counsel concluded that the term "void" as used in 38 U.S.C. § 101(3) relates to the status of the relationship at the time it was entered into. Citing the principle recognized in Administrator's Decision No. 824 that a voidable marriage is valid

for all purposes until annulled in a proper proceeding during the lifetime of the parties, the General Counsel concluded that, under a statute authorizing restoration of benefits in the case of a "void" marriage, benefits could not be restored despite the fact that a voidable marriage had been declared void ab initio. The legal principles relied upon in Administrator's Decision No. 824 and Op. G.C. 4-59 remain valid. See, e.g., Holbert v. West, 730 F.Supp. 50, 52-53 (E.D. Ky. 1990); Woods v. Woods, 638 S.W.2d 403, 405 (Tenn. Ct. App. 1982); Davidson v. Davidson, 151 N.W.2d 53, 55 (Wis. 1967).

7. Pub. L. No. 87-674, 76 Stat. 558 (1962), liberalized the requirements for restoration of benefits so that benefits may be restored not only if a marriage is void at its inception but also if it is declared void by an annulment decree. The amendments made by this statute remain in effect today in substantially similar form in 38 U.S.C. §§ 1O3(d) and 5110(k). In spite of the liberalization of the law with respect to eligibility for restoration of benefits in the case of remarriage, the distinction between a void marriage and one that is voidable, which originated in Administrator's Decision No. 824, is still recognized for purposes of determining the effective date for restoration of benefits under 38 C.F.R. § 3.400(v). [1]

8. The language of 38 U.S.C. § 103(d) distinguishes between void and voidable marriages, noting that benefits will not be barred "if the remarriage is void or has been annulled." The language of the statute referring to a remarriage which

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[1] Where a spouse's remarriage is void, the effective date of restoration of benefits is the date the parties ceased to cohabit or date of receipt of claim, whichever is later. 38 C.F.R. 3.400(v)(1). In contrast, where a voidable marriage is annulled, the effective date of restoration is the date the annulment decree becomes final, if the claim is filed within one year from that date. 38 C.F.R. § 3.400(v)(2).

"has been annulled" indicates that entitlement is to be restored prospectively and that there is no entitlement during the period when a voidable marriage remains in effect.

9. In enacting Pub. L. No. 87-674, Congress demonstrated an awareness of the distinction between void marriages and those that are voidable. The Senate committee report on the legislation noted that voidable marriages "require judicial action to declare their nonexistence." S. Rep. No. 1842, 87th Cong., 2d Sess. 1 (1962), reprinted in 1962 U.S.C.C.A.N. 2589. The report further noted that, in some states, an annulment is considered to relate back to the date the relationship was entered into. Id. Although Congress was aware that in some states, upon annulment of a voidable marriage, the marriage is considered to be void ab initio, it did not choose to restore benefits retroactively, to the date of the remarriage. Instead, Congress included in section 3 of Pub. L. No. 87-674, 76 Stat. 558, a provision setting the effective date for restoration of benefits upon annulment of a marriage as "the date the judicial decree of annulment becomes final if a claim therefor is filed within one year from the date the judicial decree of annulment becomes final; in all other cases the effective date shall be the date the claim is filed." [2] The

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[2] In commenting on the effective date provision, then Administrator of Veterans Affairs J.S. Gleason, Jr. pointed out that VA recognizes the invalidity of a clearly void marriage in a case in which no annulment decree has been obtained and will make an award in such a case based on the receipt of evidence establishing the void nature of the marriage, but with an effective date no earlier than the date the parties ceased to cohabit. Letter from J.S. Gleason, Jr., Administrator of Veterans Affairs, to Harry F. Byrd, Chairman, Committee on Finance (July 30, 1962), reprinted in 1962 U.S.C.C.A.N. 2591, 2592. He pointed out that the new provision did not appear to apply to that type case and would not affect VA's current practice, id., as reflected in current 38 C.F.R. § 3.400(v)(1). In the instant case, even if the beneficiary's marriage had been void at the time it was entered into, the beneficiary would be barred by the provisions of section 3.400(v) from being paid benefits for the period that she cohabited with the purported spouse.

quoted language is currently codified at 38 U.S.C. § 5110(k).

10. The language of section 5110(k) is clear with respect to when benefits are to be restored where a marriage is annulled. Under that statute, the effective date for restoration of benefits may be no earlier than the date on which the judicial decree of annulment became final. The statute is uniform in its application and makes no distinction for voidable marriages declared void ab initio by an annulment decree.

11. Generally, under Texas law, annulment of a voidable marriage [3] voids the marriage ab initio. E.g., Bruni v. State, 669 S.W.2d 829, 835 (Tex. Ct. App. 1984). However, this relation-back doctrine is not an absolute in Texas. E.g., Harris v. R.R. Retirement Bd., 3 F.3d 131, 134 (5th Cir. 1993). In Home of Holy Infancy v. Kaska, 397 S.W.2d 208, 212 (Tex. 1965), the Supreme Court of Texas noted that "the courts have recognized that the doctrine of relation back is a legal fiction which must be utilized with some discrimination where the annulment of a marriage is involved." (Citations omitted.) The Texas courts have recognized that, although a voidable marriage is rendered void ab initio as a result of the entry of a decree of annulment, there is a marital status in effect prior to the annulment, creating rights which can be enforced; thus, the marriage is not void for all purposes and may affect matters such as division of property and legitimacy of children. See, e.g., Fernandez v. Fernandez, 717 S.W.2d 781, 782 (Tex. Ct. App. 1986); Home of Holy Infancy, 397 S.W.2d at 212-13. As stated in Fernandez, 771 S.W.2d at 782, "it is apparent that although a voidable marriage is void ab initio, it is really not void for all purposes." [4] In Home

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[3] Texas law makes a distinction between void and voidable marriages. See Coulter v. Melady, 489 S.W.2d 156 (Tex. Civ. App. 1972), cert. denied, 414 U.S. 823 (1973).

[4] Administrator's Decision No. 824 cited and quoted from De Grummond v. Smith, 168 S.W.2d 899, 902 (Tex. Civ. App. 1943), in support of the proposition that, in the case of a voidable marriage, a marital status is in effect creating

of Holy Infancy, 397 S.W.2d at 212, the Texas Supreme Court noted with approval authority indicating that the test for determining the applicability of the relation-back doctrine as applied to voidable marriages is whether it effects a result which conforms to the sanctions of sound policy and justice with regard to the immediate parties thereto, property rights acquired during the marriage, and the parties' offspring.

12. In Harris, the United States Court of Appeals for the Fifth Circuit considered the effect of a widow's remarriage, voided under Texas law, on the widow's entitlement to benefits under the Railroad Retirement Act. The Fifth Circuit adopted the position that it would "look through the legal fiction of annulment and recognize that [the claimant's] marital status that actually existed before the annulment determines her entitlement to . . . benefits during those months." 3 F.3d at 135. The court, id., adopted the reasoning in Purganan v. Schweiker, 665 F.2d 269, 271 (9th Cir. 1982), which had stated that "[w]hen the rights of third parties or entitlement to public benefits are involved the [relation-back] rule is applied only when it promotes sound policy." The court also noted with approval the district court's action in Gartland v. Schweiker, No. CIV-80-339-TUC-RMB, 1982 WL 171060 (D. Ariz. Mar. 29, 1982), applying Texas law in finding that a voidable marriage is valid until it is annulled and that Social Security benefits paid prior to the annulment of the marriage were overpayments. The Third Circuit has observed, in reference to Social Security benefits, that "[w]hen [a] widow remarries she becomes, at least during the existence of that remarriage, entitled to support from her new husband. An additional award of . . . benefits for the period would be inequitable." Legory v. Finch, 424 F.2d 406, 411 (3d Cir. 1970). This same policy consideration underlies the statutory restriction on provision of VA death benefits to remarried survivors of veterans. Op. G.C. 7-61 (3-20-61). Accordingly, the cited authorities suggest that, as a matter of public policy, the relation-back doctrine under Tex-

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enforceable rights until an annulment decree is entered. The court in Fernandez, 717 S.W.2d at 782, relied on De Grummond for the proposition that a voidable marriage declared void ab initio is not really void for all purposes.

as law would not apply to determination of entitlement to DIC for the period of a remarriage.

13. By the language of the annulment decree, the beneficiary's voidable marriage was declared void. The effective date of restoration of benefits upon annulment of the marriage is set by statute and cannot be earlier than the date the annulment decree became final. The effective-date limitation is not abated by the fact that Texas generally considers voidable marriages void ab initio once they are annulled. Texas law recognizes that such annulled marriages are not void ab initio for all purposes. The relation-back doctrine may not be applied where, as here, public policy considerations weigh against its application. Thus, there is no basis on which the beneficiary in the instant case can claim entitlement to DIC for the period between the date of the remarriage and the date of the decree annulling that remarriage.

HELD:

For purposes of entitlement to dependency and indemnity compensation, a voidable marriage may be considered to have been valid until the date on which it was declared void by judicial action, even though under state law the annulment renders the marriage void ab initio. Thus, although entitlement to dependency and indemnity compensation may be restored upon annulment of the remarriage of the surviving spouse of a veteran, the annulment does not give rise to entitlement for the period of the remarriage.

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