

Date: July 1, 1994

O.G.C. Precedent 16-94

From: General Counsel (022)

Subj: Apportionment of Benefits -- []

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

(a) Under 38 C.F.R. § 3.458(d), may only certain compensation benefits be apportioned to a child of a veteran adopted out of the veteran's family, or should this regulation be read to permit apportionment of the portion of improved-pension benefits payable to a veteran on the basis of the existence of the child?

(b) Does adoption outside the family divest a veteran of legal custody of a child for improved-pension purposes?

(c) If adoption outside the family does not divest the veteran of legal custody of a child, would the child be considered in the custody of the veteran for purposes of determining the rate of improved-pension payable to the veteran?

DISCUSSION:

1. The questions presented arose from the following situation. The veteran is in receipt of nonservice-connected improved-pension benefits. An apportionment of the veteran's benefits for the veteran's natural child was established effective June 1, 1981. In May 1993, the child, who remains under age 18, was adopted by a third-party couple pursuant to a state-court adoption decree.

2. The first question presented is whether 38 C.F.R. § 3.458(d) permits the apportionment of the additional improved-pension benefits payable to a veteran for his or her children to a child adopted out of the veteran's family. As discussed below, there may be no additional improved-pension benefits payable on behalf of a veteran's child adopted out of the veteran's family. However, assuming for purposes of discussion that there may be in some cases, we will address the general issue of the meaning of section 3.458(d).

3. Section 3.458(d) provides that veterans' benefits will not be apportioned "[w]here the child of the disabled person has been legally adopted by another person, except the additional compensation payable for the child." (Emphasis added). Compensation is defined as "a monthly payment made by the Secretary to a veteran because of service-connected disability." 38 U.S.C. § 101(13) (emphasis added); see also 38 C.F.R. § 3.4(a). Since the term compensation only refers to benefits for service-connected disability, the exception in section 3.458(d) for additional "compensation" payable for a child is not applicable to benefits such as improved pension, which are based on nonservice-connected disability.

4. This conclusion is consistent with the history of the regulation, earlier forms of which referred to specific statutes authorizing payment of compensation for service-connected disability. See, e.g., former 38 C.F.R. § 3.312(b)(1) (1956) (referring to the Act of July 2, 1948, ch. 805, 62 Stat. 1219 (Pub. L. 877, 80th Cong.)), as amended by the Act of October 10, 1949, ch. 654, § 4, 63 Stat. 731, 732 (Pub. L. 339, 81st Cong.)). Further, internal VA documents indicate that, in 1968, the then Chief Benefits Director initiated a proposal to amend 38 C.F.R. § 3.458(d) by striking out the word "compensation" and replacing it with the word "amount". A draft transmittal sheet explaining the contemplated revision stated that the purpose of the change was to include pension and dependency and indemnity compensation, in addition to compensation, as benefits subject to apportionment for a child adopted out of a veteran's family. The clear implication of this initiative is that such benefits were not considered subject to apportionment under the regulation as in effect. This revision to the regulation was not adopted.

5. We note that, where hardship is shown, 38 C.F.R. § 3.451 authorizes special apportionment of pension and certain other benefits between a veteran and his or her dependents "[w]ithout regard to any other provision regarding apportionment," including, by implication, 38 C.F.R. § 3.458(d). However, before such an apportionment could be made, the individual seeking the apportionment would have to establish that he or she is the dependent of the veteran, as discussed below.

6. Turning to the second and third questions, the request for opinion refers to 38 C.F.R. § 3.23(d)(1), which defines the term dependent for purposes of a regulation governing improved-pension rates. Section 3.23(d)(1) defines "dependent" as "[a] veteran's spouse or child" and further provides that "[a] child of a veteran not in custody of the veteran and to whose support the veteran is not reasonably contributing, may not be considered the veteran's dependent."

7. We note that section 3.23(d)(1) is obsolete in light of a 1987 amendment to 38 C.F.R. § 3.23(a), 52 Fed. Reg. 34,906, 34,907 (1987), which eliminated use of the term dependent with reference to determination of maximum annual rates of improved pension. However, section 3.23(d)(1) does reflect the provisions of 38 U.S.C. § 1521(c), which authorizes payment of improved pension to a veteran at a higher rate "if there is a child of the veteran in the custody of the veteran or to whose support the veteran is reasonably contributing." See also 38 U.S.C. § 1521(b).

8. A child adopted out of a veteran's family is generally eligible for VA benefits as the child of the veteran notwithstanding the adoption. 38 C.F.R. § 3.58. VA and its predecessor agencies have long recognized the right of a child adopted out of a veteran's family to receive benefits as the veteran's child. See, e.g., 35 Op. Att'y Gen. 385 (1927); A.D. No. 951 (1954); A.D. No. 280 (1934). However, section 1521(b) and (c) makes clear that no additional improved-pension will be payable for a child of a veteran not in the veteran's custody and to whose support the veteran is not reasonably contributing. Thus, while pursuant to 38 C.F.R. § 3.58 a child adopted out of a veteran's family may remain a child of the veteran for VA purposes, VA lacks authority to pay additional improved-pension benefits to a veteran on the basis of such a child, where the child is not in the veteran's custody and the veteran is not reasonably contributing to the child's support.

9. Section 3.57(d) of title 38, Code of Federal Regulations, governs determinations regarding child custody for improved-pension purposes. Paragraph (1) of section 3.57(d) provides that "[c]ustody of a child shall be considered to rest with a veteran, . . . if that person

has the legal right to exercise parental control and responsibility for the welfare and care of the child." Under that provision, even if a child of a veteran is not residing with the veteran, the child will be considered in the veteran's custody if the veteran has not been divested of legal custody. Accordingly, in order to determine whether improved pension is payable to a veteran for a child adopted out of the veteran's family, a determination must be made as to whether the adoption divested the veteran of legal custody for the child and the accompanying legal right to exercise parental control and responsibility for the child's care and welfare.

10. State law is generally controlling with respect to domestic-relations issues, unless the state law is preempted by Federal law in a particular instance. Since Federal law does not address the issue of divestment of child custody, state law is the proper authority for resolution of that issue. In the present case, the adoption decree was issued by a Utah county district court. Therefore, Utah law is controlling. Utah law provides that "[t]he birth parents of an adopted child are, from the time the final decree of adoption is entered, released from all parental duties toward and all responsibilities for the adopted child, and have no further rights with regard to that child." Utah Code Ann. § 78-30-11 (Supp. 1991); see also Riding v. Riding, 329 P.2d 878, 880 (Utah 1958) (adoption statute authorizes permanent release of natural parent from support obligation); Kasper v. Nordfelt, 815 P.2d 747, 749 (Utah Ct. App. 1991) (natural parents' rights and duties are dissolved at time of adoption); Utah Code Ann. § 78-30-9 (Supp. 1991) (an adopted child "shall be regarded and treated in all respects as the child of the adoptive parent or parents."); Utah Code Ann. § 78-30-10 (Supp. 1991) (after an adoption decree is entered, "the adoptive parent or parents and the child shall sustain the legal relationship of parent and child, and have all the rights and be subject to all the duties of that relationship").

11. Thus, under Utah law, adoption out of a family clearly divests the natural parents of all parental duties and responsibilities for the child and any right to exercise parental control over the child. The adoptive parents have the legal right to exercise parental control and responsibility for the care and welfare of the child. Therefore, the natural parent must be considered divested of legal

custody of the child for improved-pension purposes upon entry of the decree of adoption.

HELD:

(a) Under 38 C.F.R. § 3.458(d), improved-pension benefits generally may not be apportioned to a child of the veteran who has been adopted out of the veteran's family.

(b) Under Utah law, adoption of a veteran's child outside the veteran's family divests the veteran of legal custody of the child for improved-pension purposes.

(c) In light of the holding in paragraph (b), above, the third question presented is moot.

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