



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tiffany A. Russell—Survivor Benefit Plan Annuity

File: B-261962

Date: February 16, 1996

DIGEST

Widow of deceased member is proper Survivor Benefit Plan annuitant rather than child adopted during prior marriage because under 10 U.S.C. § 1450(a), widow has superior claim over dependent children.

DECISION

Ms. Willie M. Russell, on behalf of Tiffany A. Russell, a minor, appeals the settlement of our Claims Group which found Tiffany, as the adopted daughter of Staff Sergeant David S. Russell III, USAF (Retired) (Deceased) not entitled to a Survivor Benefit Plan (SBP) annuity.

Sergeant Russell married Willie M. Russell on August 23, 1969, and they adopted Tiffany at a later date. Sergeant Russell retired on July 1, 1988, at which time he elected SBP child only coverage. However, because an election of less than full spousal coverage required concurrence of the member's spouse and Willie Russell did not sign the spousal notification, maximum spouse and child coverage was established.

On February 27, 1989, the marriage was dissolved by divorce and the divorce decree did not mention SBP coverage. On August 26, 1989, Sergeant Russell married Carolyn F. Russell. Sergeant Russell died on February 1, 1994.

On July 13, 1989, the Defense Finance and Accounting Service received a copy of the divorce decree and complied with the provisions of the decree regarding the payment of the portion of Sergeant Russell's retired pay awarded to Willie Russell and the award of child support. However, at that time, deductions were not stopped for spousal SBP coverage. On July 3, 1990, Sergeant Russell wrote to DFAS requesting that the SBP deductions be stopped. The spousal deductions were stopped and a refund was made of the costs collected from June 1, 1989, through July 31, 1990. The cost of child only coverage continued to be deducted.

After Sergeant Russell's death, DFAS received claims for the SBP annuity from Carolyn Russell and from Willie Russell on behalf of Tiffany Russell. DFAS was unaware of Sergeant Russell's marriage to Carolyn until receipt of her claim. She subsequently submitted a copy of their marriage certificate showing that the marriage had lasted more than 1 year prior to his death.

DFAS found that Carolyn Russell was the proper SBP annuitant, established an annuity for her on April 22, 1994, and collected the delinquent SBP costs of \$1,892.27 for September 1, 1990, to February 1, 1994, from the annuity. DFAS submitted the matter to our Office in view of Willie Russell's claim on behalf of Tiffany, and by settlement dated December 8, 1994, our Claims Group agreed with DFAS that Carolyn Russell was the proper annuitant because under 10 U.S.C. § 1450(a), a surviving spouse has a superior claim to the annuity over surviving dependent children.

In her appeal, Willie Russell argues she was not advised that she needed to concur in Sergeant Russell's election for child only coverage in July 1988 and was not aware of the existence of the SBP coverage at the time of the divorce because Sergeant Russell indicated he had no insurance coverage. If she had been aware of the coverage, she states, she would have asked the divorce court to order former spouse and child coverage for herself and Tiffany. She also argues that by his actions in July 1990, requesting that spouse coverage be stopped because of the divorce, Sergeant Russell was showing his intent to revert to child only coverage for Tiffany.

DFAS records show that a letter was sent to Sergeant Russell at the address listed on the election form in August 1988, regarding the need for spousal concurrence for his election of child only coverage to be effective. No reply was received to this letter, resulting in maximum spouse and child coverage. Therefore, at that time, as Sergeant Russell's spouse, Willie Russell was covered by the SBP by operation of statute and regulations.

While we do not know what information concerning the SBP Sergeant Russell may have provided at the time of the divorce proceeding, other than Willie Russell's statement in her appeal that he said he had no insurance coverage, an inquiry by either Willie Russell or her attorney to DFAS could have revealed the existence of the SBP coverage. Steps then could have been taken to obtain former spouse coverage for Willie. However, none of these actions were taken, and when Sergeant Russell submitted a copy of the divorce decree which did not provide for former spouse coverage in July 1990, DFAS took the proper action by continuing child only coverage.

Since there was no former spouse coverage in effect, when Carolyn Russell demonstrated that she was Sergeant Russell's widow and that the marriage had met

the 1-year requirement of 10 U.S.C. § 1447(a), she became the eligible widow of the member under the SBP. As stated by the Claims Group, she therefore had a superior claim to that of the member's dependent children. See Staff Sergeant Martin P. Roberts, 60 Comp. Gen. 240 (1981).

Accordingly, the Claims Group's settlement, which determined that Carolyn Russell is the proper SBP annuitant, is sustained. If she should lose her eligibility for the annuity (death, or remarriage before the age of 55 years), the annuity would be payable to Sergeant Russell's dependent children. 10 U.S.C. § 1450(b), and 60 Comp. Gen. 240 at 243 (1981).

/s/ Seymour Efros
for Robert P. Murphy
General Counsel