



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Elizabeth R. Haviland—Survivor Benefit Plan—Former Spouse Annuity

File: B-270502

Date: May 24, 1996

DIGEST

In a property settlement incorporated into a divorce decree, a retired Air Force member agreed to maintain his former wife as beneficiary under the Survivor Benefit Plan (SBP). He filed a former-spouse SBP election with the Air Force, indicating that it was made pursuant to court order, but the election did not include the required signature of the former spouse. The Air Force accepted the election without notifying the member or former spouse of the discrepancy in the election. The member remarried and later wrote to the Air Force requesting that his new wife be provided coverage under the SBP. Although an election made pursuant to court order may not be changed or revoked without an authorizing court order, the Air Force, without requesting clarification, established coverage for the second wife to whom it awarded the annuity upon the member's death. In view of apparent administrative error, the Air Force should consider the matter for correction pursuant to 10 U.S.C. § 1454. If appropriate correction is made, payment to the former spouse may be made.

DECISION

This decision is in response to Mrs. Elizabeth R. Haviland's appeal of our Claims Group's denial of her claim for a Survivor Benefit Plan (SBP) annuity based on the service of her former husband, Colonel George P. Haviland, USAF (Retired) (Deceased).¹ Mrs. Haviland's claim was denied because the SBP election Colonel Haviland submitted on her behalf lacked Mrs. Haviland's signature. As explained below, it is our view that the Air Force should review the entire record in the case, including information submitted with Mrs. Haviland's appeal, to determine whether the invalid election resulted from administrative error. If the Air Force finds that the invalidity resulted from administrative error, it may make the appropriate correction to validate the election pursuant to authority provided by 10 U.S.C. § 1454.

¹The Claims Group denied Mrs. Haviland's claim by settlement Z-2869622, June 8, 1995.

BACKGROUND

Elizabeth and George Haviland were married in 1945. Colonel Haviland retired from the Air Force in 1973 and elected SBP coverage for Elizabeth as his spouse. They were divorced in Monterey, California, on January 2, 1988. As a part of the property settlement agreement they executed in October 1987 in anticipation of the divorce, Elizabeth was to receive one half of the community amount of Colonel Haviland's Air Force retired pay, and she was to continue to be maintained as the beneficiary under the SBP for which they agreed to jointly bear the cost.² This property settlement agreement was incorporated into the divorce decree.

On January 16, 1988, Colonel Haviland married Marsue Haviland. In December 1988, Colonel Haviland submitted the appropriate form to the Air Force Finance and Accounting Center to elect former spouse coverage for Elizabeth under the SBP. This was necessary to carry out the requirement of the property settlement agreement since Elizabeth no longer qualified for SBP spouse coverage. On the form Colonel Haviland submitted, he completed the provisions applicable to him, listed Elizabeth as his former spouse, and checked the block indicating that the election was being made pursuant to a court order. However, the space provided for the former spouse's signature was left blank. The form was accepted by the Air Force and retained on file, apparently without any official notification to either Colonel Haviland or Elizabeth that the required signature of the former spouse had not been provided.

In May 1989, Colonel Haviland wrote to the finance center to elect SBP coverage for his current spouse, Marsue. In doing so, he noted that he had enrolled in the SBP for his former spouse when he retired in 1973, that he was later divorced from her and that he was remarried in January 1988 to Marsue. He also stated that it was his understanding that Marsue "will have the same SBP as my ex-wife." In reporting on the matter to our Claims Group, the Defense Finance and Accounting Service (DFAS) noted that from this statement by Colonel Haviland, it is unclear whether he believed that Marsue would have the same SBP benefits that Elizabeth would have had if she had remained his SBP beneficiary, or whether he believed that both Elizabeth and Marsue could be SBP beneficiaries. In any event, DFAS reports that because of the incomplete application for former spouse coverage for Elizabeth, it appears that a determination was made that Marsue was the proper beneficiary, and she was established as the spouse beneficiary as of the first anniversary of their marriage, January 2, 1989. DFAS further stated that their records do not disclose

²It is not entirely clear from the record as to how the SBP cost sharing was to take place, but it appears to have been by computing each party's share of Colonel Haviland's retired pay based on the amount of such pay after deduction of the SBP premiums.

any correspondence attempting to clarify the confusion as to Colonel Haviland's election desires. While DFAS acknowledged that Colonel Haviland attempted to establish former spouse coverage for Elizabeth, they were uncertain that the election form he submitted is sufficient to establish her as the beneficiary since the statute provides that the election is to be signed by both the member and the former spouse.³ As is indicated above, based on this record, our Claims Group denied Elizabeth's claim for the annuity.

Elizabeth has appealed, arguing that it was clearly her former husband's intent to provide the annuity for her, and despite ample opportunity in personal telephone calls she made in 1988 and 1989 to the Finance Center, it was never mentioned to her that it was necessary for her to take action to secure the annuity. In support of her position, she provided additional information. Included are copies of correspondence from the attorney who represented her during the divorce proceedings. Among other things, the attorney refers to correspondence dated September 15, 1988, he received from an attorney who represented Colonel Haviland stating that while Colonel Haviland then had no documentation on hand showing that Elizabeth was the designated SBP beneficiary, he provided assurance that Elizabeth was designated as beneficiary, that she had always been so-designated, and no changes had ever been made. He further stated that these facts could be verified by calling the Air Force Finance Center at a telephone number he provided. Also provided is a copy of a handwritten note from Colonel Haviland, stated to have been received in February 1988, assuring Elizabeth that her name was then carried as his SBP beneficiary on Air Force records. In addition, Elizabeth's attorney provided a copy of a "Qualified Domestic Relations Order" dated October 7, 1988, entered by the Superior Court of California, County of Monterey, which Elizabeth's attorney says was served by certified mail on the Air Force. This order states the agreed terms included in the settlement agreement concerning the division of Colonel Haviland's retired pay between him and Elizabeth during his lifetime, and Elizabeth's entitlement to all survivor benefits the cost of which was to be shared equally by the two parties.

ANALYSIS

The SBP, 10 U.S.C. §§ 1447-1460b, was established by Congress as an income maintenance program for dependents of deceased members of the uniformed

³DFAS also noted that the election was not witnessed as provided for on the form. However, that is not a specific statutory requirement, and in this case there appears to be no doubt that the form was completed, signed and sent to the service by Colonel Haviland. We also note that Colonel Haviland's handwritten letter requesting SBP coverage for Marsue was not witnessed but was given effect by the service.

services, and it includes provisions whereby a member may elect coverage for a former spouse. 10 U.S.C. § 1448(b)(3). In recognition of the fact that coverage under the SBP could become an item of negotiation in a divorce settlement, it was concluded that a former spouse should be entitled to rely on a written agreement to provide such coverage. See 66 Comp. Gen. 687, 691 (1987), and legislative history cited therein. As a result, statutory provisions have been included to provide that, if a member elects to provide coverage for a former spouse, the member shall, at the time of making the election, provide the Secretary concerned with a written statement (signed by the member and the former spouse) setting forth (A) whether the election is being made pursuant to the requirements of a court order, or (B) whether the election is being made pursuant to a written agreement previously entered into voluntarily by the member as a part of or incident to a divorce, and if so, whether such agreement has been incorporated in, or ratified or approved by, a court order. 10 U.S.C. § 1448(b)(5). If a member who is required by court order to make such an election, or who has entered into such an agreement which has been incorporated in, or ratified or approved by, a court order, then refuses or fails to make the election as agreed, the former spouse may make a request to the appropriate service Secretary within a year of the court order, and the service shall then "deem" an election to have been made by the member. 10 U.S.C. § 1450(f)(3). An election of former spouse coverage made pursuant to a court order or to an agreement incorporated in, ratified or approved by court order may not be changed unless the member provides a proper court order modifying any prior court orders so as to allow the change requested. 10 U.S.C. § 1450(f)(2).

In this case, as noted above, Elizabeth was covered under the SBP as Colonel Haviland's spouse beneficiary from the time he retired in 1973 until such coverage ended with their divorce in January 1988. Colonel Haviland agreed to provide SBP coverage for her in their property settlement, which was incorporated into the divorce decree, and he and his attorney assured Elizabeth and her attorney that she was his SBP beneficiary. In October 1988, the Qualified Domestic Relations Order, in which Elizabeth was the petitioner, was entered and, according to her attorney, was served on the Air Force. This order restated the terms of their agreement as to the division of Colonel Haviland's retired pay and Elizabeth's entitlement to be covered as his SBP beneficiary. In December 1988 the Air Force received Colonel Haviland's election of former spouse coverage for Elizabeth which stated that the election was being made pursuant to court order, but as noted above, lacked Elizabeth's signature. At this point, with the information it had received, if the Air Force considered the election of coverage insufficient, it appears that Colonel Haviland, and Elizabeth, should have been advised so that action could be taken to provide the necessary signature, or so that Elizabeth could file a request for a deemed election. This was not done; the election form was apparently accepted and retained on file, and according to Elizabeth, she was never advised of the signature requirement in her telephone conversations with Air Force Finance Center personnel during this time period, but was advised that she was covered

under the SBP. There appears to be no doubt that Elizabeth would have provided the signature since the coverage Colonel Haviland elected was what they had agreed to and what she thought she had.

Subsequently, in May 1989, Colonel Haviland sent the somewhat ambiguous letter to the Air Force seeking to elect SBP coverage for Marsue, which also apparently was accepted and filed by the Air Force. Why no inquiry was made to Colonel Haviland about this questionable election, in light of the earlier election made pursuant to court order, is unexplained. In any event, it appears to us that since Colonel Haviland knew he was obligated under the divorce settlement adopted by court order to provide SBP coverage for Elizabeth (for which she apparently was sharing the cost), and for whom he had elected coverage just 6 months previously, when he sent the May 1989 letter he was seeking to provide spouse coverage for Marsue in addition to (not in place of) the former spouse coverage provided for Elizabeth. As noted above, the SBP makes no provision for providing such dual coverage, but apparently Colonel Haviland was not notified of this fact.

In view of these facts, it appears clear to us that Colonel Haviland intended to honor his obligation to provide SBP coverage for Elizabeth when he filed the election in December 1988, and that Elizabeth would have signed the form had it been presented to her.⁴ Their situation was exactly the type of situation Congress contemplated when it enacted the provisions discussed above authorizing elections of SBP coverage for former spouses pursuant to court orders or agreements incorporated in divorce decrees, and we understand that it is the services' view that the purpose of having the former spouse sign the election is to protect the service in cases where the election is made pursuant to court order but the member fails to so indicate on the form. Presumably in such a case, the former spouse would note the discrepancy and take action to have it corrected so that the election could not later be changed without a court order authorizing the change. That problem is not present in this case since Colonel Haviland indicated on the form that the election was made pursuant to a court order.

In our view, this case is appropriate for consideration under the authority provided the Secretary concerned by 10 U.S.C. § 1454 to "correct or revoke any election"

⁴We understand that in 1994, the services adopted a policy (previously followed by some services) to accept former spouse elections that have not been signed by the former spouse, and then attempt to notify the former spouse of the terms of the election. If no response is received from the former spouse within a reasonable time, the former spouse is then notified that the terms of the election have become final. While in the present case the Air Force accepted the form, it did not follow the notification provisions of the present policy which presumably would have led to a prompt resolution of the lack of Elizabeth's signature.

under the SBP "when he considers it necessary to correct an administrative error." Compare B-174552, July 10, 1972.⁵ If the Air Force finds that the discrepancy with the election of SBP coverage for Elizabeth was the result of administrative error and takes appropriate corrective action pursuant to section 1454, payment of the annuity to her may be made.⁶

/s/ Lowell Dodge
for Robert P. Murphy
General Counsel

⁵This decision applies 10 U.S.C. § 1445, a similar provision applicable to the Retired Serviceman's Family Protection Plan, after which section 1454 was patterned.

⁶A correction or revocation pursuant to 10 U.S.C. § 1454, except when procured by fraud, is "final and conclusive on all officers of the United States." Such a correction in favor of Elizabeth in this case would, in effect, render the payments received by Marsue erroneous. However, the resulting debt would be subject to waiver under 10 U.S.C. § 1453, and in such a case, we would concur in waiver of the debt.