U.S. Railroad Retirement Board
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Legal Opinion L-2004-01
February 20, 2004

TO : Claudia Walch, Chief of Reconsideration
Assessment and Training, Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Presumption of Validity of Subsequent Marriage – Utah
Validity of Divorce Decree – Utah

This is in reference to the informal inquiry from your staff for advice as to the status of the two spouse annuity applicants in the subject case. Given the nature of the issues involved, I have determined to provide a formal opinion. The information in file may be summarized as follows.

John, the railroad employee, was born December 19, 1932, and has been credited with less than 30 years of railroad service. He was awarded a reduced annuity under the Railroad Retirement Act at age 62, beginning January 1995. He stated on his application that he resided in Las Vegas, Nevada, and on July 18, 1984 had married his current wife Danean, who was born September 2, 1940. John also stated on his application that he had previously married Roselyn, but that the marriage had ended by divorce in 1981.

Roselyn applied for a spouse annuity under the Act on October 8, 1997, stating that she was born October 15, 1935, had married John in Las Vegas on November 20, 1965, and was currently separated but not divorced. She showed an apartment in Pasadena, California as her address. As part of her application, Roselyn provided a Board form with John's signature, stating that he was currently married to Roselyn.

Roselyn was awarded a spouse annuity at age 62 beginning November 1997. In January 1998 headquarters suspended payment to Roselyn and initiated an investigation in view of John's earlier statement on his application that he had divorced Roselyn and remarried. Although John maintained that he had divorced Roselyn, he provided neither a divorce decree, nor even proof that he had married Danean. After a period of 18 months, Roselyn's annuity payment was reinstated with full retroactive payment in June 1999 on advice from a staff attorney of the Office of General Counsel on grounds that the Board's records showed only that John had married the current spouse annuitant Roselyn in 1965.

Danean, who was born September 2, 1940, filed an application for a spouse annuity July 25, 2002. With that application she provided proof that she had married John on July 18, 1984 in Ely, Nevada, and that they were currently living together in Utah. Later, the Salt Lake City office of the Board independently obtained records from the Beaver County Utah District Court, which establish that John filed a petition for divorce from Roselyn in that Court on May 30, 2000, and the Court filed a decree of divorce September 20, 2000. The Board's Office of Operations denied Danean's spouse annuity application November 19, 2002, on grounds that when John married Danean in 1984, he remained married to Roselyn. Danean requested reconsideration of this determination November 21, 2002. Danean later filed a second spouse annuity application January 20, 2004. With her second application she provided proof that she had remarried John in Nevada on March 7, 2003.

Section 2(c) of Railroad Retirement Act provides annuities for both the spouse and divorced spouse of employee annuitants. A spouse applicant must have been married to the employee for one year prior to the date the spouse annuity application is filed, unless, insofar as relevant here, the spouse is the natural parent of the employee's child. A divorced spouse applicant must have been married to the employee for at least 10 years. See sections 2(c)(3), 2(c)(4) of the Act. In addition, section 2(d)(4) of the Act provides that the Board shall apply "the rules set forth in section 216(h) of the Social Security Act" (the SSA) to determine whether the applicant is a spouse of the railroad employee.

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Section 216(h) of the Social Security Act (42 U.S.C. 416(h)) provides in pertinent part:

> (1)(A)(i) An applicant is the wife [or] husband * * * of a fully * * * insured individual [employee] * * * if the courts of the State in which such insured individual [employee] is domiciled at the time such applicant files an application * * * would find that such applicant and such insured individual [employee] were validly married at the time such applicant files such application * * *.
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> (ii) If such courts would not find that such applicant and such insured individual [employee] were validly married at such time, such applicant shall, nevertheless be deemed to be the wife [or] husband * * * of such insured individual [employee] if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property , have the same status with respect to the taking of such property as a wife [or] husband * * * of such insured individual [employee].
>
> (B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife * * * [or] husband * * * of a fully * * * insured individual [employee] * * * but it is established to the satisfaction of the Commissioner of Social Security that such applicant in good faith went through a marriage ceremony with such individual [employee] resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, then, for purposes of subparagraph (A) * * * such purported marriage shall be deemed to be a valid marriage. Notwithstanding the preceding sentence, * * * such marriage shall not be deemed to be a valid marriage unless the applicant and the insured individual [employee] were living in the same household * * * at the time the applicant files the application.
>
> (ii) The provisions of clause (i) shall not apply if the Commissioner of Social Security determines, on the basis of information brought to the Commissioner's attention, that such applicant entered into such purported marriage * * * with knowledge that it would not be a valid marriage.

The evidence is that John married Roselyn in Nevada in 1965, married Danean in Nevada in 1984, divorced Roselyn in Utah in September 2000, and married Danean by a second ceremony in Nevada in 2003. A marriage ceremony is invalid in both Nevada, where John's 1984 marriage to Danean was contracted, and in Utah, the state in which he resided at the time she applied for a spouse annuity under the Act, if either party has a husband or wife living at the time of the ceremony. See: Nevada Revised Statutes section 122.020; Utah Code Annotated section 30-1-2(1). Effective April 27, 1987, Utah does recognize a marriage without solemnizing ceremony (i.e., a "common law marriage") but again the parties must be otherwise free to marry. See UT.C.A. § 30-1-4.5.[1] Moreover, Utah recognizes a presumption of validity in favor of the latest of a series of marriages. In Re Pilcher's Estate, 197 P. 2d 143 (Utah 1948); Martin v. Martin, 510 P. 2d 1102 (Utah 1973). The Utah Supreme Court has characterized the presumption as "one of the strongest disputable presumptions known in law. * * * It is not to be broken in upon or shaken by a mere balance of probability." Anderson v. Anderson, 240 P. 2d 966 (Utah 1952) at 967-68. To rebut the presumption requires "clear and convincing evidence." In Re Swan's Estate, 293 P. 2d 682, 688 (Utah 1956).

In the case under consideration, Roselyn states she has never divorced John. In the complaint John filed in Utah on May 30 2000, counsel stated on his behalf that "parties are husband and wife" but "have been separated for over 30 years". A petition for service by mail filed the same day further states that "Petitioner (John) erroneously believed that Respondent (Roselyn) filed for divorce 21 years ago and only recently found out she hadn't when he discovered that retirement benefits were being sent by the

[1] Although the a contact representative of the Board has informed John and Danean they may present evidence that they have married without solemnizing ceremony, they have declined to do so. A statement of marriage in good faith pursuant to section 216(h)(1)(B) has also not been submitted.

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Railroad Retirement Board to her." Although there are no Utah cases directly on point, courts from other States have held that the presumption in favor of the later marriage may be rebutted by showing a divorce ending the first marriage after entering the second marriage. See: Anno. Presumption as to Validity of Second Marriage, 14 A.L.R. 2d 7, at 57. This is particularly true where, as in the present situation, both parties are alive and state there was no prior divorce action. Compare, Matlock v. Railroad Retirement Board, 166 F. 3d 347 (10th Cir. 1998), 1998 U.S. App. LEXIS 37239 (unpublished)(presumption in favor of later marriage under Nevada law not rebutted where both widow claimant and the railroad employee had married again, but employee was now deceased). Accordingly, in my opinion the evidence supports a conclusion that the presumption of validity under Utah law in favor of John's 1984 marriage to Dadean is rebutted.

Moreover, in my opinion, John's divorce from Roselyn in 2000 does not prospectively render valid his 1984 marriage to Danean. Some states provide by statute that where parties to a marriage continue cohabitation after a prior marriage of the husband or wife ends by divorce or death of the first spouse, the second marriage is valid from that time forward as long as at least one party had remarried in good faith. See 52 AM JUR Marriage § 70. The Utah Code does not have such a provision. Cf. Utah Code Anno. § 30-3-8 (prohibiting remarriage until divorce becomes absolute). Absent formation of a valid "common law" marriage, in such a case no marriage exists. Van Der Stappen v. Van Der Stappen, 815 P. 2d 1335, 1338 (Court of Appeals of Utah, 1991)(ceremonial remarriage was invalid because it was before divorce ending prior marriage became final, and no evidence of common law marriage). As noted above in connection with SSA section 216(h)(1)(B), no evidence has been submitted regarding either good faith in the 1984 marriage ceremony or a formation of a common law marriage between John and Danean. Consequently, on the evidence available, John and Danean became husband and wife effective with the date of the second marriage ceremony March 7, 2003.

Roselyn has also protested the decision by the Board's Office of Programs that because she is entitled to a divorced wife's annuity effective August 1, 2000, her annuity calculation may only include a tier I annuity component pursuant to section 4(a) of the Act. Roselyn claims that she never received a copy of the 2000 divorce decree, and consequently remains entitled as a spouse to receive a tier II annuity component as well pursuant to section 4(b) of the Act. In essence, Roselyn argues that the Board should disregard the September 2000 decree of divorce by the Utah court.

The United States Court of Appeals for the Sixth Circuit has identified four points which the Board should consider when determining the effect of a state court decision on the status of family members of the employee pursuant to section 216(h) of the Social Security Act:

> 1) An issue in a claim for social security benefits previously has been determined by a State court of competent jurisdiction; 2) this issue was genuinely contested before the State court by parties with opposing interests; 3) the issue falls with the general category of domestic relations law; and 4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State. Dennis v. Railroad Retirement Board, 585 F. 2d 151, 154, (6th Cir. 1978).

This Office has found the Dennis analysis useful to resolve cases involving residents of other Circuits as well. See Legal Opinions L-79-70 (ex parte Arizona order determining heir ship did not determine widow); L-90-13 (Oklahoma annulment invalid as inconsistent with Oklahoma law).

Considering the validity of the Utah divorce in light of Dennis, the Utah court had jurisdiction for the divorce action, which is clearly a domestic relations matter. Although the court issued the divorce decree without hearing and Roselyn did not appear, the Utah court records show a return of personal service of the complaint upon Roselyn at her California address on July 24, 2000 at 8:35 AM.

Roselyn's opportunity to appear and contest the divorce differentiates the resulting default from an ex parte order of heir ship. Granting the divorce on grounds of desertion following an at least twenty year

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separation is consistent with Utah law. Accordingly, in my opinion the Board should recognize the September 2000 Utah divorce as ending Roselyn's marriage to John. Further, John was free to enter into his 2003 ceremonial marriage to Danean, who may be paid a spouse annuity on that basis.

I trust the foregoing discussion will be of assistance in further adjudication of this case.

cc: Director of Programs
Director of Policy and Systems