

May 18, 1998
L-98-12

TO : Joseph Drantz
Hearings Officer
Bureau of Hearings and Appeals

FROM : Steven A. Bartholow
Deputy General Counsel

SUBJECT : Surviving Grandchild's Annuity
Equitable Adoption - Virginia

This is in reply to your request for my opinion as to the conditions under which certain surviving grandchildren of the deceased railroad employee in a case which you have provided for my review may be entitled to annuities under the Railroad Retirement Act.

The railroad employee in the case presented was awarded a disability annuity beginning January 1, 1984, and ending with the month before his death on June 10, 1992. The employee's widow was then awarded a disabled widow's annuity beginning June 1, 1992. The widow filed for surviving grandchild's annuities on behalf of Bianca and James on December 11, 1996. Birth certificates show that Bianca, born in April 1983, and James, born in July 1988, are the children of the employee's daughter Sandra. The widow states that Bianca's father was a Mr. S.; James' father is unknown. A death certificate shows that Mr. S. died in January 1988. The widow further states that the employee provided 100 percent of the children's support throughout their lives, until his death. A letter from the principal of the children's elementary school states that since the 1991-1992 school year, the employee and the widow were listed as Bianca's, and later, as James' guardians in school records, and that they attended conferences and activities on the children's behalf. The Virginia District Court awarded custody of Bianca and James to the employee and his wife by an order dated February 20, 1991. However, the widow states that adoption proceedings were never concluded due to the expense and the employee's declining health. The deceased employee, the widow, and children have been residents of Virginia during this time.

Section 2(d)(1)(iii) of the Railroad Retirement Act provides a survivor annuity for an individual under age 18 who is the child of the deceased employee as defined in section 216(e) of the Social Security Act. Section 216(e), in turn, provides in part:

(e) Child

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild * * * and, (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 223(d)) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, * * * or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the date on which such individual died or (ii) August 28, 1958.

* * * * *

For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

In accord with section 2(d)(1)(iii) of the Railroad Retirement Act and section 216(e) of the Social Security Act, regulations of the Board provide that an individual may qualify for a child's annuity as the natural or adopted child of the employee, the stepchild of the employee, or the grandchild or step grandchild of the employee. See 20 CFR 222.31. Adoption may be accomplished by formal court proceedings (20 CFR 222.33), or by operation of equity if in accord with the law of the jurisdiction of the employee's domicile at death. See 20 CFR 222.34; and generally, George A. Locke, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 97 A.L.R.3d 347 (1980).

The widow has stated that formal adoption proceedings in this case were never concluded prior to the death of the employee or within the two year period following his death (20 CFR 222.33). Although the employee and the widow were granted legal custody of the children by the February 20, 1991 court order, there is no evidence that the rights of the natural parents were severed then or later. It therefore does not appear that the evidence would support a conclusion that Bianca and James qualify as formally adopted children or grandchildren of the employee with the meaning of section 222.33 of the Board's regulations.

As you note, this office has previously concluded that the courts of Virginia did not recognize informal, or "equitable" adoption by rule of law. See Legal Opinion L-53-267, citing Clarkson v. Bliley, 38 S.E.2d 22, (Virginia, 1946). My review of subsequent cases indicates Virginia law remains unchanged in this respect. Douglaris v. Babacus, 127 S.E.2d 145, 149, (Virginia, 1962) (Greek adoption proceedings which would not be recognized as a matter of public policy did not alternatively create a contractual right to inherit as an adopted child); and Moore v. Richardson, 345 F. Supp 75, 77, (U.S.D.C., W.D. Va, 1972), (legal adoption proceedings begun but not concluded within two years of the wage earner's death could not give rise to inheritance rights by equitable adoption under Virginia law for purposes of establishing entitlement to surviving child's social security benefits). Accordingly, even assuming appropriate evidence in this case would otherwise establish the general criteria for equitable adoption, it is my opinion that Bianca and James would not be recognized as the adopted children of the employee or the widow for purpose of inheriting intestate personal property under Virginia law. Virginia Code Annotated, section 64.1-5.1.

Finally, as noted earlier, a dependant grandchild of a deceased employee, who has not been adopted by the employee or the surviving spouse within two years of the employee's death, may nevertheless qualify as a surviving child for purposes of annuity entitlement under the Act, if the grandchild's natural parents are deceased or disabled as of the date of the employee's death. 20 CFR 222.36(b). In reaching a decision in this case, you must determine whether the evidence establishes that Sandra was disabled for all work within the meaning of the Social Security Act at the time of the employee's death; whether Mr. S. was Bianca's father; whether James' father was deceased or disabled as of the date of the employee's death; and whether James and Bianca were dependant on the deceased employee for the year prior to his death (20 CFR 222.56).

I trust that the foregoing discussion will be of assistance to you in rendering your decision.

