U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

Legal Opinion L-2002-08
April 29, 2002

TO : Thomas W. Sadler
Director of Hearings and Appeals

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Relationship Determinations under Intestate Succession (Foreign Domiciles)

This is in response to your March 13, 2002 inquiry as to whether the Board should apply provincial law governing intestate succession or the law of the District of Columbia for purposes of making a relationship determination under section 216(h) of the Social Security Act (42 U.S.C. § 416(h)) (hereinafter, sometimes referred to as the Act), where an employee dies while domiciled in Ontario, Canada. Section 216(h) of the Social Security Act is incorporated by reference into section 2(d)(4) of the Railroad Retirement Act (45 U.S.C. § 231a(d)(4)). For the reasons outlined below, it is my opinion that the Board should apply the intestate law of the District of Columbia. The conclusion in this opinion applies not merely to cases where the employee dies while domiciled in Ontario, but applies to all cases where the employee dies while domiciled outside of the United States.[1]

There are two methods under section 216(h) of the Act by which an applicant can establish the relationship of a legal widow to an insured individual.[2] The provisions governing such a determination are outlined in section 216(h)(1)(A) of the Act (42 U.S.C. § 416(h)(1)(A)), which provides as follows:

> (i) An applicant is the wife, husband, widow or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.
>
> (ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual 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, husband, widow or widower of such insured individual.

---

[1] For purposes of this opinion, an individual dies while domiciled outside of the United States if his permanent home was not in one of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam or American Samoa.

[2] Section 216(h) also includes provisions whereby an individual may establish the relationship of a "deemed widow" if she went through a marriage ceremony in good faith, but because of a legal impediment unknown to her at the time of the ceremony, the marriage was invalid. (See 42 U.S.C. § 416(h)(1)(B)).

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

As indicated above, to determine whether an applicant would qualify as a legal widow of an insured individual under section 216(h)(1)(A)(ii) of the Act, where the insured dies domiciled outside of the States, a determination must be made as to whether the applicant would have the same status with respect to the taking of intestate personal property as that of a widow of the employee, under the laws applied by the District of Columbia courts. In making such a determination, the question arises as to what is meant by the phrase "under the laws applied by such courts" as that phrase is used in section 216(h)(1)(A)(ii), where the insured dies while domiciled outside of the States. That is, does the phrase refer to the intestate succession laws of the District of Columbia, or does the phrase require a choice of law analysis, taking into consideration not only the intestate succession laws of the District of Columbia, but also the intestate succession laws of the place of domicile at the time of death.

When attempting to discern the legislative intent of a statutory provision, the first question is whether Congress has directly spoken to the question at issue. If the intent of Congress is clear, the statutory provision must be
interpreted so as to achieve the unambiguous intent of Congress. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Our efforts to identify congressional intent have included a review of the history of the statutory provision at issue. Prior to the 1950 Amendments, language similar to that found today in section 216(h)(1)(A)(ii) of the Act (42 U.S.C. § 416(h)(1)(A)(ii)) was found in section 209(m) of the Act, which provided as follows:

> In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual for purposes of this title, the Board shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled at the time of his death, or if such insured individual * * * was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a wife, widow, child, or parent shall be deemed such.

In 1950, the Act was amended and the provisions previously found in section 209(m) were transferred to section 216(h). However, rather than address children and parents in the same subsection, section 216(h) was subdivided into paragraphs (1) and (2), with paragraph (1) addressing the status of wife, husband, widow and widower, and paragraph (2) addressing the status of child and parent. In 1957, paragraph (1) was amended to add provisions to require a finding as to the existence of a valid marriage, before taking into consideration the intestate succession provision. In 1960, paragraph (1) was relabeled paragraph (1)(A).[3] Thirty years later, paragraph 1(A) was divided into subparagraphs (i) and (ii), arriving at the present statutory construction, with subparagraph (i) containing the valid marriage language and subparagraph (ii) containing the intestate succession language.

Extensive research of reports related to all of the above-noted amendments has failed to shed any light on whether Congress envisioned merely the application of the intestate succession rules of the District of Columbia when an individual died while domiciled outside of the States, or instead, intended for a choice of law analysis to take place. Where, as in the case at hand, Congress has not directly addressed the precise question at issue, the question then becomes whether there is an administrative interpretation by the agency responsible for administering the statute. Chevron, at 843. If so, such interpretation is given deference if such interpretation is

[3] Provisions governing "good faith" marriages were added as paragraph (1)(B).

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

reasonable. Id., at 845. Where the agency's interpretation is long-standing, even greater deference is due it.

To determine the Social Security Administration's interpretation of section 216(h)(1)(A)(ii), we have reviewed that agency's regulations. As the language at issue is not new to the Act, we have looked to the regulatory language in effect when family relationship determinations were governed solely by the intestate succession provision. That is, we have looked to the regulations in effect prior to the 1957 Amendments. The regulations provided as follows:

> 403.829 *Applicable State law and status – (a) Applicable State law defined.* "Applicable State law" is the law which the courts of the domicile of the wage earner * * * would apply in deciding who is a wife, widow or widower, child, or parent, when determining the devolution of intestate personal property. A living wage earner's domicile is determined as of the time the applicant filed his claim for benefits or a lump sum. A deceased wage earner's domicile is determined as of the time of such wage earner's death. ***If the wage earner was not domiciled in any State, applicable State law is the law which the courts of the District of Columbia would apply when determining the devolution of such property***. [Emphasis added.] [20 CFR 403.829 (1947)]

The above regulatory provision remained in effect until 1962. At that time, the intestate succession provision quoted above was moved to section 404.1101(a) of the regulations. In addition, the regulations were revised to incorporate the 1957 Amendments by adding the following provision:

> 404.1101 *Determination of relationship.* * * * (b)(2) The claimant bears the relationship of wife, husband, widow, or widower of such insured individual if the courts of the State in which such insured individual is domiciled, * * * (or, if not domiciled in any State at the appropriate date, the courts of the District of Columbia), would find that the claimant and such insured individual were validly married at the time of
> filing such application, or if such insured individual is dead, at the time he died. If such courts would not find the claimant and such insured individual validly married at such time, the claimant nevertheless is deemed to bear the relationship of wife, husband, widow, or widower, as the case may be, of such insured individual, if the claimant has the status of such relative as determined in accordance with paragraph (a) of this section.

(As previously noted, paragraph (a) referenced above contained the intestate succession provisions.)

The regulations of the Social Security Administration regarding relationship determinations were most recently revised in 1979, relocating the relevant relationship provisions to section 404.345, where they are found today. Section 404.345 states, in relevant part, as follows:

> 404.345. *Your relationship as wife, husband, widow, or widower under State law.* To decide your relationship as the insured's wife, or husband, we look to the laws of the State where the insured had a permanent home when you applied for wife's or husband's benefits. To decide your relationship as the insured's widow or widower, we look to the laws of the State where the insured had a permanent home when he or she died. If the insured's permanent home is not or was not in one of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or American Samoa, we look to the laws of the District of

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

> Columbia. * * * If you and the insured were validly married under State law at the time you apply for wife's or husband's benefits or at the time the insured died if you apply for widow's, widower's, mother's or father's benefits, the relationship requirement will be met. The relationship requirement will also be met if under State law you would be able to inherit a wife's, husband's, widow's, or widower's share of the insured's personal property if he or she were to die without leaving a will. [20 CFR 404.345]

The above-quoted regulations of the Social Security Administration suggest that, where an individual dies while domiciled outside of the States, the Act calls for the application of the intestate succession laws of the District of Columbia only and does not require consideration of the intestate succession laws of the place of domicile at the time of death. We were unable to locate any preamble language to the regulatory changes which clearly stated such interpretation. However, a social security ruling issued in 1969 illustrates the Social Security Administration's interpretation of the phrase "under the laws applied by such courts," where the individual dies while domiciled outside of the States.

In SSR-69-21a, the Administration was presented with the question of whether an individual was the widow of an insured worker who died domiciled in Mexico, where the individual had not ceremonially married the insured. The ruling indicates that the alleged widow could acquire the status of widow of the worker for benefit purposes if one of the following two conditions was satisfied: (1) the courts of the District of Columbia would find that the worker and the applicant were validly married, or (2) the applicant would have the same status as the worker's widow in determining the devolution of his intestate personal property under the law of intestate succession of the District of Columbia. After noting that the courts of the District would not find that the applicant was validly married to the insured, because the parties would not be validly married under the law of Guanajuato, Mexico, the ruling continues with the following: "Moreover, since under the law of the District only a valid marriage gives rise to status as a spouse for inheritance purposes, the applicant would not have the same status as a widow to take [the insured's] intestate personal property. Accordingly, [the applicant] does not have the status as [the insured's] widow for benefit purposes."

This ruling clearly demonstrates that, since at least as early as 1969, the Social Security Administration has interpreted the phrase "under the laws applied by the [District of Columbia] courts" when making relationship determinations under the Act, to require the application of the intestate law of the District of Columbia, without any choice of law analysis. Case law also establishes the above administrative interpretation. In Gonzalez v. Hobby, 110 F. Supp. 893 (D.C.P.R. 1953), at issue was the entitlement of illegitimate children of an insured individual domiciled in Puerto Rico at the time of his death. When the administrative decision was made as to the entitlement of the children, Puerto Rico was not yet included within the term "State." The court summarized the processing of the case at the lower level as follows:

> [The] Administrator * * * concluded that plaintiffs' status as legitimate or illegitimate children had to be ascertained as provided for in Section 216(h)(1) of the Act, Title 42 U.S.C.A.
> § 416(h)(1)[4] and that, inasmuch as the insured individual at the date of his death, was domiciled in Puerto Rico and that Puerto Rico did not figure in the term "State", as defined in Section 210(h) of the Act, Title 42 U.S.C.A. § 410(h), plaintiff's rights under the Act had to be determined by applying such law as

[4] It appears the correct citation should have been 216(h)(2), rather than 216(h)(1) as subparagraph(1) addresses determinations regarding widows and subparagraph (2) addresses determinations regarding children.

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

> would be applied in determining the *devolution of intestate personal property* [emphasis supplied] by the courts of the District of Columbia.

The final administrative decision was that the illegitimate children were not entitled to children's benefits, notwithstanding the fact that the children had enjoyed the right to use the insured's family name since birth, had received support and maintenance from him, and had the right to share in the devolution of the intestate personal property of the insured under the law of the Commonwealth of Puerto Rico.[5]

We have been unable to locate any cases decided after the 1957 Amendments which are directly on point. However, a recent case in the Ninth Circuit is consistent with the interpretation that a choice of law analysis is not required by section 216(h)(1)(A)(ii). In Campbell ex rel.Campbell v Apfel, 177 F.3d. 890 (9th Cir. 1999), the United States Court of Appeals of the Ninth Circuit was presented with the question as to whether a choice of law analysis was involved, in applying section 216(h)(2)(A), the parallel provision to section 216(h)(1)(A)(ii). At issue was the entitlement of an alleged surviving child of an insured individual who died while domiciled in California. The court was presented with the question of whether section 216(h)(2)(A)(ii) called for the application of the California Probate Code, or required a conflict of law analysis, taking into consideration Oregon intestacy laws. The conditions for intestate succession under California law were not satisfied, but the child would be entitled to inherit from the insured under Oregon intestate laws. The court affirmed the district court's decision, upholding the denial of social security benefits. The court held that, when determining whether the insured is the parent of a child, section 216(h)(2)(A) does not entail a "complex conflict of law analysis. Rather, determining parental status is as simple as it appears to be on the face of the statute – we must merely look to the *intestacy laws* of the state "in which [the insured] was domiciled at the time of his death", 42 U.S.C. § 416(h)(2)(A), in this case, California." Campbell, at 892. [Emphasis supplied.] Extending the court's analysis to cases where an individual dies while domiciled outside of the States, making a relationship determination is as simple as it appears on the face of the statute – simply look to the intestacy laws of the District of Columbia.

It is my opinion that the Administration's interpretation as discussed above is consistent with the language of the statute. While similar in content, it is significant that the language in subparagraph (ii) of section 416(h)(1)(A) is not identical to the language in subparagraph (i). This office has repeatedly held that the provisions of subparagraph (i) require the application of the law of the place of domicile. This is because subparagraph (i) requires a determination of the appropriate court and then a determination as to the *finding* that court would make regarding the existence of a valid marriage. Such language clearly calls for a choice of law analysis, as it is not possible to determine what the court would find, without making such an analysis. While subparagraph (ii) refers to the tribunal determined in subparagraph (i), it does not call for a finding by that court. Rather, subparagraph (ii) calls for a determination *under the laws applied* by that court.

Finally, the failure of Congress to revise or repeal an agency's interpretation of a statute when amending that statute is persuasive evidence that the interpretation is the one intended by Congress. See Young v. Community Nutrition Institute, 476 US 974, 90 L.Ed 2d 959, 106 S.Ct. 2360 (1986). On several occasions, Congress amended section 216(h), without amending the

---

[5] In Gonzalez, the District Court of Puerto Rico reversed the Administrator's denial of benefits. However, such reversal was clearly predicated upon the court's deference to the laws of Puerto Rico, rather than an analysis of the statutory intent of the language at issue. Also see Vazquez v. Ribicoff, 196 F.Supp. 596 (D.C.P.R. 1961) and Flores v. Secretary of Health, Education and Welfare, 228 F. Supp. 877 (D.C.P.R. 1964).

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

intestate succession language. To the contrary, Congress opted to retain the language originally found in section 209(m) of the Act. If Congress intended the application of the law of the place of domicile at the time of death, even where the insured died while domiciled outside of the States, the question remains as to why Congress directed the application of the laws of the District of Columbia.

In summary, it is my opinion that, where the insured individual's domicile at the time of death is not one of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam or American Samoa, the Board should apply the law of the District of Columbia governing intestate succession, without a choice of law analysis, for purposes of making relationship determinations under section 216(h)(1)(A)(ii) of the Social Security Act. (Also see Legal Opinions L-49-641, L-52-325 and L-76-164.)