

**June 1, 2000**  
**L-2000-20**

TO: Penny J. Gillen  
Hearings Officer  
Bureau of Hearings and Appeals

FROM: Steven A. Bartholow  
General Counsel

SUBJECT: Presumed Validity of Subsequent Marriage – South Carolina  
Presumed Continuing Validity of Prior Marriage - Ohio

This is in reply to your memorandum of April 20, 2000, requesting my opinion as to the validity of the subsequent marriage of the widow annuity applicant in the case you submitted. For the reasons discussed below, I conclude that you may determine that the applicant is the widow of the deceased railroad employee.

The file reflects that the widow annuity applicant, Nancy, married the railroad employee, Willie, in Ohio on November 27, 1958. They moved to Philadelphia, Pennsylvania shortly afterward, and resided there as husband and wife until sometime in 1967, when Willie abruptly left. Nancy states she never heard from Willie again.

Nancy moved to South Carolina in 1968, where she met Hugh. Nancy and Hugh married in South Carolina in 1969. At that time, Hugh informed Nancy that his prior marriage had ended in divorce. Nancy also believed herself free to remarry due to Willie's desertion and disappearance.

Willie applied for an age and service annuity under the Railroad Retirement Act in May 1981. He stated on his application that he was divorced from an earlier wife named Marion, and that he was currently separated from Nancy rather than divorced. The Board's payment records show that Willie continued to reside in Philadelphia from 1981 until approximately December 1990, when he moved to Ohio. He died in Ohio in January 1991. No spouse annuity application was ever filed through the date of Willie's death.

In mid-1997, Nancy sought to divorce Hugh, and in June 1997 was assigned an attorney through South Carolina's pro bono representation program. However, when the attorney searched the court records, he found no record that Hugh had divorced his prior wife. Accordingly, the attorney advised Nancy no divorce was necessary because her marriage to Hugh was invalid under South Carolina law.

Nancy filed an application for an annuity under the Railroad Retirement Act as the widow of Willie in March 1999. In connection with her application, court records for Philadelphia and neighboring New Jersey were searched for the period January 1960 through December 1991. No record of a divorce between Willie and Nancy was located in either jurisdiction.

Nancy's relationship to the employee for purposes of entitlement to an annuity under the Railroad Retirement Act is determined in accordance with section 2(d)(4) of the Act, which provides, in part, as follows:

In determining for purposes of this subsection \* \* \* whether an applicant is the wife, husband, widow, widower, child, or parent of a deceased employee as claimed, the rules set forth in section 216(h) of the Social Security Act shall be applied deeming, for this purpose, \* \* \* individuals entitled to an annuity under paragraph (i) or (ii) of subsection (d)(1) of this section to be entitled to a benefit under subsection (e), (f), or (g) of section 202 of the Social Security Act.

Section 216(h)(1)(A) of the Social Security Act 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.

It appears that the deceased employee had established domicile in Ohio at the time of his death; so Ohio law governs the determination of Nancy's relationship to Willie. However, Nancy's remarriage to Hugh occurred in South Carolina, where she continues to reside. Ohio courts have held that a marriage not valid in the place where it is contracted is not valid anywhere. Dennis v. Railroad Retirement Board, 585 F. 2d 151 (6<sup>th</sup> Cir., 1978) (Ohio court would refer to Georgia law to determine applicant's status as widow pursuant to section 216(h)(1)(A)). In my opinion, an Ohio court would therefore look to South Carolina law to determine the validity of Nancy's marriage to Hugh.

Section 20-1-80 of the South Carolina Code provides with respect to validity of marriage as follows:

20-1-80. Bigamous marriages shall be void; exceptions.

All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, nor to an person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

South Carolina courts will apply a presumption of divorce to validate a later marriage under section 20-1-80. See Hallums v. Hallums, 54 S.E. 613 (S.C. 1905). However, this office has noted in the past that South Carolina courts seldom apply the rule, requiring validity of a marriage to be established by evidence rather than presumed by operation of law; and further appear to consider the rule not applicable at all in cases where one of the parties to the marriage has a living spouse. See Legal Opinion L-74-329, citing Day v. Day, 58 S.E. 2d 83, (S.C., 1950) and Scheper v. Scheper, 118 S.E. 178 (S.C., 1923). My review of recent cases

supports this conclusion as well. See: Splawn v. Splawn, 429 S.E. 2d 805, (S.C. , 1993)(second marriage is bigamous where husband remarried without knowledge that a divorce decree had not been entered ending his first marriage); Johns v. Johns, 420 S.E. 2d 856, (S.C. App., 1992) (husband's second marriage is bigamous even though second wife married in good faith without knowledge of husband's prior undissolved marriage); but see: Yarbrough v. Yarbrough, 314 S.E. 2d 16, (S.C. App., 1984)(second wife was entitled to divorce and equitable distribution of property, where husband failed to rebut presumption that his first marriage was terminated by divorce or death); Cf. Day v. Secretary of Health and Human Services, 519 F. Supp. 872, (D.C., D. of S. C., 1981)(applicant found entitled to wife's benefits under Social Security Act on third husband's earnings record even though marriage took place before death of her second husband).

In the current case, even assuming Nancy's belief that she was free to marry Hugh within two years of the date Willie deserted her constitutes good faith, in my opinion the court searches for records of divorce between Willie and Nancy, and for records of a divorce ending Hugh's earlier marriage, would support a finding that both Nancy and Hugh's earlier marriages continued throughout the time she lived with him. Johns v. Johns, *supra*, and Day v. Day, *supra*. Accordingly, I believe that you may conclude that Nancy's marriage to Hugh was invalid under South Carolina law as bigamous, and she remains the widow of Willie.

In addition, I note that this office has previously found that Ohio courts hold that once a marriage is established by evidence, and the record is silent as to whether there has been a divorce of the parties, the marriage relationship is presumed to continue. See Legal Opinion L-79-72, citing In Re Clark's Estate, 128 N.E. 2d 437, (Oh. App., 1954), and Evans v. Industrial Commission, 143 N.E. 2d 705, (Oh., 1957). The evidence in this case shows Willie and Nancy were married by ceremony in Ohio after he divorced Marion. The record further shows no divorce occurred between Willie and Nancy in the jurisdiction where they lived as husband and wife. Even if the law of Ohio is considered as controlling because it was his domicile at death, I believe the record supports a conclusion that Willie's marriage to Nancy would be presumed under Ohio law to continue despite Nancy's attempted marriage to Hugh.

Attachments