June 19, 1998
L-98-17

TO **:** Thomas M. McCarthy
Debt Recovery Manager

FROM **:** Steven A. Bartholow
Deputy General Counsel

SUBJECT **:** Spouse Annuity
Presumption of Validity of Subsequent Marriage - Missouri

This is in reply to your request for my opinion as to whether the railroad employee's second marriage may be considered valid for purposes of determining entitlement to a spouse annuity under the Railroad Retirement Act. For the reasons discussed below, it is my opinion that while the employee's second marriage may be invalid, the spouse by the second marriage may nevertheless be entitled to an annuity as the defacto spouse of the employee.

The railroad employee in the case presented filed an application for an age and service annuity on January 24, 1997. On his application, he stated that he had married his current wife, Alexis, on June 14, 1975, in Jackson County Missouri, and that his previous marriage to Johnnie ended in divorce on July 15, 1970. Alexis concurrently filed for a spouse annuity under the Act as the wife of the employee with minor children of the employee (born August 1983 and February 1982) in her care. The employee was awarded a full annuity at age 65 under section 2(a)(1)(i) of the Act on April 25, 1997, and Alexis was awarded a full spouse annuity under section 2(c)(1)(ii)(C) of the Act on April 28, 1997.

On April 24, 1997, Johnnie filed an application for a reduced spouse annuity under Act on the basis of age. In support of her application, Johnnie provided a copy of a marriage licence showing that she and the employee were married in Hale County, Texas, on June 29, 1950. She also provided a written statement that she never obtained a divorce and never remarried. The railroad employee also provided a written statement that he separated from Johnnie in 1953. In 1971, his two daughters by his first marriage had informed him that Johnnie had obtained a divorce from him in the city of Hobbs, in Lee County, New Mexico, and had remarried. Although the employee states he never received any documentation of the divorce, he assumed based upon this information from his daughters that he was also free to remarry. The employee's brother and sister later submitted written statements that Johnnie left the employee's home in Kansas in 1954 to move to Texas, and that the employee was told by his children while visiting them in Texas that Johnnie had obtained a divorce from him; both of these statements place the visit in 1963, and the

sister states the divorce occurred in Mexico. The employee's nephew also provided a letter to similar effect. However, the Lee County court clerk reported to the Albuquerque district office of the Board that there is no record of a divorce between Johnnie and the employee in that jurisdiction. Finally, the employee has submitted an April 22, 1998, account statement from a "clerical and legal form preparation" firm which invoices a "divorce document pro se lit (sic)" form to be picked up on April 28, 1998. On the basis of this information, payment to Alexis as wife of the employee has been terminated, and the case has been referred to you for recovery of payments previously made to her.

Section 2(d)(4) of the Railroad Retirement Act provides that for purposes of determining whether an applicant is the wife of the employee, the Board shall apply the rules set forth in section 216(h) of the Social Security Act. Section 216(h), in turn, provides in part:

> (1)(A)(i) An applicant is the wife * * * of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application * * * would find that such applicant and such insured individual 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 were validly married at such time, such applicant shall, nevertheless be deemed to be the wife * * * 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 * * * of such insured individual.
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> (B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife * * * of a[n] * * * insured individual * * * 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 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 * * * such purported marriage shall be deemed to be a valid marriage.
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> (iv) For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the

procedure followed in connection with such purported marriage.

In accord with section 2(d)(4) of the Railroad Retirement Act and section 216(h) of the Social Security Act, regulations of the Board provide that an individual may qualify for a spouse's annuity as the wife of the employee if the State of the employee's domicile would recognize that the claimant and the employee were validly married, or if a deemed marriage is established. See 20 CFR 222.11, 222.12, and 222.14.

The railroad employee was domiciled in Missouri at the time both Alexis and Johnnie filed their respective applications. Missouri courts apply a presumption that a second or subsequent marriage is valid. Carr v. Carr, 232 S.W. 2d 488, 489 (Mo., 1950). The presumption may be rebutted "only by the most cogent and satisfactory evidence * * * ." Id. However, the presumption may be rebutted where the decedent's first wife had never obtained a divorce and had never been served with divorce papers, and where the second wife testified that she had no knowledge of a divorce action by the decedent. Derrell v. United States, 82 F. Supp. 18 (U.SD.C. Mo., 1949) (claim for insurance proceeds under National Service Life Insurance awarded to first wife) . Further, the presumption may be overcome by evidence of a written instrument, executed after the husband's second marriage, which recognizes the continuity of his legal relationship to his first wife. Dinkelman v. Hoverkamp, 80 S.W. 2d 681 (Mo., 1935).

In the current case, both parties to the first marriage are currently living. Each party states that they did not initiate and obtain a divorce from the other. The only jurisdiction in which a party alleges a divorce occurred reports no record of a suit filed. Finally, it appears that the employee may now have initiated a divorce proceeding, thereby recognizing the validity of his first marriage as a condition precedent to dissolution. Cf. Fowler v. Fowler, 79 A. 2d 24 (N.H., 1951)(presumption overcome by proof that the prior marriage was dissolved after the second marriage). In my opinion, the foregoing constitutes cogent and satisfactory evidence sufficient to rebut the presumption that the railroad employee and Johnnie were divorced prior to his marriage to Alexis. See Legal Opinion L-69-175 (presumption rebutted where search of court records reveals no divorce) and see generally, J. E. Keefe, Jr., Annotation, Presumption as to Validity of Second Marriage, 14 A.L.R.2d 7 (1950).

As you know, section 5119 of the Omnibus Budget Reconciliation Act of 1990 amended section 216(h)(1)(B) of the Social Security Act to provide that a spouse who married the employee in good faith without knowledge of the impediment of a prior undissolved marriage may be "deemed" to be entitled to spouse benefits pursuant to that section, regardless of the entitlement of another individual recognized as the "legal" spouse under appropriate State law. The effect of this amendment is to allow payment of spouse annuities to both claimants. See Legal Opinion L-91-134.[1] Although the railroad employee in the case submitted has stated his good faith belief

[1] I note that section 222.14(d) of the Board's regulations, which states that an individual may not be recognized as a "deemed" spouse where another individual is currently recognized as the spouse under State law, was promulgated in 1989 prior to the 1990 amendment, and is now obsolete.

that Johnnie had obtained a divorce before he entered into his marriage to Alexis, the file does not contain a statement by Alexis herself. Accordingly, if evidence is obtained showing that Alexis married the employee in good faith without knowledge of the employee's pre-existing marriage to Johnnie, payment of her spouse annuity under the Railroad Retirement Act may be reinstated, and no prior payments would have been rendered erroneous.

I trust that the foregoing discussion will be of assistance to you.

cc: Director of Policy & Systems