DATE: 07-18-90

CITATION: VAOPGCPREC 61-90
Vet. Aff. Op. Gen. Couns. Prec. 61-90

TEXT:

Subject: Reconsideration of General Counsel's Opinion 15-56 that Minor Stepchild Serving in Armed Forces not Considered Member of Veteran's Household

(This opinion, previously issued as General Counsel Opinion 7-63, dated May 14, 1963, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

1. It is the opinion of this office that where the relationship of stepchild has been established for the purposes of 38 U.S.C. § 101(4) the bare fact of the child's entrance into the Armed Forces of the United States does not in and of itself deprive such stepchild of continued status as a member of the veteran's household. Accordingly, in the above case, if factually justified otherwise, XXXXXXXXXX may be recognized as the veteran's stepchild for purposes of additional disability compensation pursuant to 38 U.S.C. § 315 notwithstanding XXXXXXXXXX's entrance into the Armed Forces on August 22, 1962. This opinion supersedes a different view heretofore expressed in Op. GC 15-56. Your memorandum of January 2, 1963 is answered accordingly.

2. We note that the veteran is 100% disabled by reason of a heart disorder and that payments of additional compensation because of a minor stepchild were heretofore discontinued, effective August 22, 1962, after the stepchild, XXXXXX, entered the Armed Forces on that date, notwithstanding that he will not become 18 years of age until July 2, 1963.

3. The term "child" for purposes which encompass the benefits authorized by 38 U.S.C. § 315 is currently defined by 38 U.S.C. § 101(4) so as to include "a stepchild who is a member of a veteran's household." This provision superseded similar ones in section 101(4) of PL 85-56 and prior thereto in paragraph VI, Veterans Regulation Numbered 10-Series, as amended by Public Law 144, 78th Congress, for benefits authorized by Public No. 2, 73d Congress. The provisions are also similar to those contained in section 3 of the former World War Veterans' Act, 1924.

4. In the usual situation, the stepchild is actually residing with the stepparent and may thus be said to be a member of his household within the strict dictionary and well-recognized general meaning of the word "household" as being those who dwell under the same roof and compose a family. See Ocean Accident and Guaranty Company v. Schmidt, 46 F.2d 269. But when there is a physical separation, the stepchild in the usual case ceases to be a member of the stepparent's household. See 42 Sol 230. While generally a stepchild is not a member of his stepparent's household when they

are not living under the same roof, the VA in the past has recognized several exceptions. Thus, a stepchild has been accepted a member of the stepparent's household while the latter is undergoing prolonged hospitalization. 39 GC 1837. The relationship has also been recognized when the separation is due to the stepparent's irrational act. 48 Sol 678. In several cases the stepchild has been considered as being a member of the stepparent's household when their separation has been because of the latter's service in the Armed Forces. See 79 Sol 7. In cases such as the one last mentioned, it has been said that the stepchild is in the constructive custody of the stepparent notwithstanding their physical separation. We regard the foregoing exceptions with respect to the language "who is a member of a veteran's household" generally as recognizing any situation where it may be reasonably assumed that the parties would be dwelling under one roof but for unusual or unavoidable circumstances, such as one temporary in nature or one beyond the control of the parties and wherein the family ties and relationship continue and the parties considered themselves morally bound to care for each other.

5. In AD 626 a liberal rule followed in life insurance cases was accepted as a basis for a departure from the generally recognized principle that the stepchild-stepparent relationship did not survive the death of one of the parents whose marriage created the relationship unless there is surviving issue of such marriage. Thus, it was held, in substance, that where the relationship by affinity is in fact continued beyond the death of one of the parties to the marriage which created the relationship and where the surviving parties continued the same family ties and relationships, considering themselves morally bound to care for each other, the relationship of stepchild and stepparent will not be regarded as having ended at the termination of the marriage. The reasoning used in AD 626 and the rule announced therein were applied in 79 Sol 7, supra, as the basis for concluding that the stepchild was a member of the stepfather's household when the other members of the family were living together but without the presence of the stepfather, who was then in the Armed Forces.

6. Liberal rules have also been applied in some court decisions in determining status of a person as a member of a household and there are opinions in liability insurance cases to the effect that absence solely because of service in the Armed Forces by a person otherwise a part of the household does not deprive him of status as a member thereof. See American Service Mutual Insurance Company v. Pugh, 271 F.2d 174 wherein the United States Court of Appeals, Eighth Circuit, said in part:

"The term 'family' or 'household' cannot be so limited and strait jacketed as always to mean, regardless of facts and circumstances, a collective body of persons who live in one house under one common head or manager. In the instant case, the Allen brothers had never established or lived in any other home than the one occupied by them at the time of their enlistment in the military service. They had always been members of the same household."

As to Harry Allen, the person concerned, the Court said in part:

"It can scarcely be argued that he was actually residing at a military post as that could not in the nature of things constitute his permanent residence."

Also, to the same effect, is the case of Central Manufacturers' Mutual Insuance Company v. Friedman, 209 SW2d 102, 1 ALR2d 557, where the Court held in construing the provisions of a floater insurance policy that a minor son was a member of the father's household notwithstanding his absence therefrom in the armed services. It is conceded, however, that the authorities are not entirely harmonious and there are decided cases with views different from those expressed in the cases cited above. See Island v. Firemen's Fund Indemnity Co., 184 P2d 153, affirming 172 P2d 520.

7. It is true, of course, as was stated in Op. GC 15-56, that a child may be emancipated by entrance into the Armed Forces. That principle was applied earlier in VA decisions which denied death benefits on account of a minor child following his entrance in the service. See 20 Sol 383. However, in 53 Sol 172, which had the approval of a former VA Administrator, in an opinion seeking to make uniform the VA rule with respect to the effect upon VA benefits of a minor's entrance into service, it was held that the emancipation principle theretofore applied did not provide a justifiable basis for a rule in death cases different from the one in cases of disability compensation. In our opinion, departure from the emancipation principle in 53 Sol 172 for the reasons stated therein, should make the rule inapplicable elsewhere for any other related purpose. As was suggested in language used in Op GC 15-56, if the emancipation rule is applicable in the case of a child, it should be in the case of a stepchild and vice versa. It should be noted here that it is not necessary to establish the dependence of a stepchild if such stepchild is a member of the veteran's household. That rule has been followed consistently since it was promulgated by the then Director of the Veterans Bureau in Director's Decision No. 284 promulgated February 25, 1927. In that decision it was stated in part:

"The law presumes dependency in the case of a minor child and by the express provisions of the statute, the stepchild is brought within the term 'child' as used in the Act, providing such child is a member of the soldier's household. A stepchild is therefore placed in identically the same position as the natural child of the soldier."

Moreover, as being analogous in our view that mere entrance in the Armed Forces is not such an emancipation as terminates status as a member of a household, is the opinion of the United States Court of Appeals, Eighth Circuit, in the case of American Service Mutual Insurance Company v. Pugh, supra, to the effect that the marriage of the person concerned did not as a matter of law emancipate the person from the household of his parent.

HELD:

8. Since the question whether the stepchild is a member of the stepparent's household must be determined in each instance on the basis of the facts in the individual case, it is

not feasible to state any inflexible rules. As was noted, however, in AD 626, legislation such as that here considered is beneficial in character and should be liberally construed. While the bare relationship of stepchild and stepparent does not provide eligibility, we regard our precedents and those in decided cases where the courts have given a broader meaning to the applicable language respecting household, as justifying considerable liberally based on the intent of the parties in determining status as a member of a veteran's household. Accordingly, it would not be unreasonable to assume that status as a member of a veteran's household, once established, will be considered as continuing the absence of affirmative evidence to the contrary.

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