

Forgotten Military Orphans: Legislative Proposals for Congress to Consider

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5.3 –Death Gratuity

Background:

During 2004 and 2005, I worked briefly on an Army contract assisting in the Army's Casualty Assistance Program. While there, I became aware of several statutory and regulatory problems that adversely affect many of the orphans of our deceased military personnel. The problems are the result of how our current federal laws are written and thus need congressional action to fix them. What follows will greatly help our military's orphans at little or no cost to the military.

Overview of Issues

1. Orphans who are not the children of the deceased and his or her current spouse do not receive any of the death gratuity (DG).
2. Where there are minor children, but no spouse, the guardian of the minor child must go into state court and be declared guardian of the minor's estate in order for the Defense Finance and Accounting Service (DFAS) to pay the DG.
3. Minor orphans who do not live in the deceased's household at death do not usually get commissary and exchange shopping privileges.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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Discussion and Solutions

1. Orphans who are not the children of the deceased and his or her current spouse do not receive any of the death gratuity (DG).

The purpose of the DG was to offset extra expenses that one's loved ones incur when there is a death *and* to bridge the gap between cessation of military pay and start-up in a month or two of other long-term benefits, such as Social Security, dependency indemnity compensation (DIC), and survivors' benefits. If one has a spouse and dies in the military, the DG is directed first to the surviving spouse. This is not a problem if the children of the deceased are from the current spouse. The deceased's children only get the DG if there is no spouse.

Until a few years ago, the DG was only \$6,000; then it was raised to \$12,000. Part of that amount should go to the orphans who are not in the widow's or widower's household. It is likely that the DG amount will soon be raised by Congress to \$100,000 and make this situation even more unfair.

It is not uncommon for a deceased soldier to have children from other relationships. When a soldier, sailor, or Marine (the deceased) dies, the child support these other children are receiving stops. They thus suffer the same income interruption as the spouse, but do not get any stopgap DG payment.

The current law on this is as follows: 10 U.S. Code Section 1477. Death gratuity: eligible survivors

(a) A death gratuity payable upon the death of a person covered by Section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:

- (1) The surviving spouse
- (2) His/her children, as prescribed by subsection (b), in equal shares....

Solution: Change the current law at Section 1477 (a) (1) to give all the DG to the spouse if the deceased does not have children fathered or mothered from people other than his or her current spouse. If there are children who are not issue of the current spouse, then the widow or widower gets half the DG and the deceased's children from relationships other than with the current spouse equally share the other half of the DG. Either amount—the current DG of \$6,000 or \$50,000, if the DG is raised—should be more than sufficient for the surviving spouse when one considers the needs of the other orphans.

2. Where there are minor orphan children, but no spouse, the guardian of the minor child must go into state court and be declared guardian of the minor's estate in order for the Defense Finance Accounting Service (DFAS) to pay the DG.

DG money that is paid out for the benefit of minor children must be paid into a trust account. This usually requires the hiring of an attorney to set up a "Guardianship of the Child's Estate," which is necessary to set up a trust account at a bank in the child's name. DFAS does not recognize the fact that the natural parent or someone else has custody of the child, even if it is the result of divorce or other legal proceeding.

DFAS requires an adult member, usually the person with physical custody of the minor child, to have a state court name them as the guardian of the minor child's assets/estate. After this is done, the guardian must open up a trustee bank account in the child's name. Only then will DFAS send a check on the child's behalf, payable to the child's trust account. In many cases, this requires the guardian/trustee to spend \$1,000 or more in legal fees to get the DG. Because this often takes months to do, it defeats the original purpose of the DG, which is to help with immediate expenses.

The legal assistance offices of the military branches or the local Legal Aid office could be required to do this if mandated by Congress. Some legal assistance offices will do it if they have the time and resources, but in many areas of the country, they are not able or willing to provide this service.

Solution: Add new wording to Title 10 U.S. Code, Section 1475 to 1477, stating that the person with physical custody of the minor child would have the right to go to one of these agencies for help: Legal Aid or the closest military operated legal assistance office. He or she could use any legal assistance office, even if the deceased was a member of a different branch of the armed forces. The assistance would include not only preparing the paperwork, but also appearing in state court, if necessary, on that matter.

Require that local Legal Aid offices, as a condition of their federal funding, provide the necessary legal services to satisfy what DFAS requires in these cases. The person seeking this service would not be required to meet the low-income standards Legal Aid's usual customers must establish to obtain these services.

If the person seeking "Guardianship of the Child's Estate" prefers, he/she can go to the legal assistance office closest to where the child resides. There, a Judge Advocate General's Corps Officer (JAGC) or civil service attorney working for the military will take the necessary steps to create the guardianship. Legal assistance offices would be able to use not only their active duty JAGC officers but also those drilling in the Reserve or National Guard. Services provided in those instances would qualify for drill credit.

Lastly, before the full DG is paid out, the child's guardian should be given \$6,000 of the DG immediately upon proof of legal custody, e.g., court order or divorce decree issued before the servicemember died. This payment would offset the immediate loss of child support until benefits can be started.

3. Minor orphans who do not live in the deceased's household at death do not usually get commissary and exchange shopping privileges.

This paragraph is followed by a summary of the current DoD rules based on current federal law. Briefly, the minor children of a deceased's current spouse or those who were living in the deceased's household, automatically get full commissary and exchange privileges. Other orphans qualify for these two privileges only *if* they can establish at the time of death that the deceased was providing *more than* 50 percent of their support. This unfairly penalizes the minor children from prior marriages and those born out of wedlock. These same children automatically qualify for all other federal benefits.

The Military Identification regulation (DODI 1000.13, DECEMBER 5, 1997—Par. E4.A1.3.) states: "Surviving dependents of members who died while on active duty (over 30 days) do have commissary privileges if at the time of death of the sponsor, the person was living in a home provided by, or for, an authorized sponsor and was dependent on the sponsor for over 50 percent of his or her support. Children residing in the household of the authorized sponsor at time of death, but not the household of the sponsor's former spouse, are entitled to commissary privileges."

The Armed Services Commissary Regulations (ASCR-DODI 1330.17-R) define dependents as children who are under 21 years old, unmarried, and who are, in fact, dependent for more than half of their support from the sponsor (C1.2.6.3); an orphan is defined as the surviving child, including one who is adopted, of a deceased uniformed service member, retired uniformed service member, recipient of the Medal of Honor, or totally (100 percent) disabled former member. The child must be under the age of 21; or, if 21 or older, incapable of self-support because of a mental or physical incapacity; or under 23 and enrolled in a full-time course of study at an approved institute of higher learning. The surviving child must have been a dependent under definition (C1.2.6) above at the time of the parent's death.

Solution: Change current federal law and DoD policies to state that all minor children of deceased military personnel receive full commissary and exchange privileges. There is no need to establish any level of support being provided before the death of the servicemember.

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Update – April 2022³

1. Orphans who are not the children of the deceased and his or her current spouse do not receive any of the death gratuity (DG).

In 2008, 10 U.S.C. § 1477 was amended to allow a service member to designate the beneficiary for the, now, \$100,00 death gratuity. The new law reads as followed:

(a) Designation of Recipients.—

(1) On and after July 1, 2008, or such earlier date as the Secretary of Defense may prescribe, a person covered by section 1475 or 1476 of this title may designate one or more persons to receive all or a portion of the amount payable under section 1478 of this title. The designation of a person to receive a portion of the amount shall indicate the percentage of the amount, to be specified only in 10 percent increments, that the designated person may receive. The balance of the amount of the death gratuity, if any, shall be paid in accordance with subsection (b).

(2) If a person covered by section 1475 or 1476 of this title has a spouse, but designates a person other than the spouse to receive all or a portion of the amount payable under section 1478 of this title, the Secretary concerned shall provide notice of the designation to the spouse.

(b) Distribution of Remainder; Distribution in Absence of Designated Recipient.—If a person covered by section 1475 or 1476 of this title does not make a designation under subsection (a) or designates only a portion of the amount payable under section 1478 of this title, the amount of the death gratuity not covered by a designation shall be paid as follows:

(1) To the surviving spouse of the person, if any.

(2) If there is no surviving spouse, to any surviving children (as prescribed by subsection (d)) of the person and the descendants of any deceased children by representation.

(3) If there is none of the above, to the surviving parents (as prescribed by subsection (c)) of the person or the survivor of them.

(4) If there is none of the above, to the duly-appointed executor or administrator of the estate of the person.

(5) If there is none of the above, to other next of kin of the person entitled under the laws of domicile of the person at the time of the person's death.

10 U.S.C. § 1477(a), (b).

³By Second Lieutenant Lauren Walker, USMC.

Therefore, a servicemember may designate a child of a previous marriage to receive all or part of the death gratuity.

2. Where there are minor orphan children, but no spouse, the guardian of the minor child must go into state court and be declared guardian of the minor's estate in order for the Defense Finance Accounting Service (DFAS) to pay the DG.

To this date, the changes suggested in this section have not been adopted. Therefore, the guardian of the minor child must go through the tedious process of being declared guardian of the minor's estate in order for the DFAS to pay the death gratuity.

3. Minor orphans who do not live in the deceased's household at death do not usually get commissary and exchange shopping privileges.

To this date, current federal law and DoD policies have not been amended to state "all" minor children of the deceased military personnel. Therefore, the dependent must meet the definition as laid out in the article to receive death gratuity.