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MARITAL STATUS AND ELIGIBILITY FOR FEDERAL STATUTORY INCOME BENEFITS: A HISTORICAL SURVEY

Marjorie Dick Rombauer*

In an era when attitudes toward marriage institutions are changing and it has become a truism that governmentally dispensed benefits constitute "the new property," the extent to which marital status is a determinant of the right to receive such benefits is a subject of particular interest. The purpose of this article is to survey that subject.

More specifically, this article will trace congressional and administrative efforts to arrive at acceptable definitions of who should be treated as a wife/widow (or husband/widower), so as to be entitled to particular statutory benefits, and similar efforts to define when the status-relationship has become so attenuated or remote as to justify suspension or termination of the benefit payments. Considered in detail will be definitions under veterans' compensation and pension laws, under the so-called "insurance" provisions of the Social Security Act, and under the Railroad Retirement Act, statutes which represent a range of types of income maintenance legislation and funding sources. Substantial emphasis will be placed on the historical development of the definitions for each of these laws and on the stated reasons for particular inclusions or exclusions. The approach will frequently be uncritical, the primary objective being to determine what the law has been and is rather than to suggest what it should be. While the benefits and eligibility requirements of these laws will be summarized, the summaries are provided for background purposes only and are not intended to be exhaustive. Other laws will be discussed summarily for comparative purposes.

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The article is confined to discussion of marital status as it affects receipt of benefits by a spouse or, more often, by a surviving spouse. The existence of spousal status or of a recognized marital relationship may also affect whether or upon what proof a "child" or a "parent" will be entitled to similar benefits, but no attempt has been made to identify the interrelation. In particular, no attempt has been made to discuss problems of discrimination between legitimate and illegitimate children and between male and female spouses, questions that only recently have been addressed by Congress and the courts. The ultimate focus will be on situations where failure to enter into a traditional marriage relationship may result in spouses' loss or "gain" of federal statutory benefits and on the variant results possible under the different benefit laws reviewed. Finally, the directions of change in the last two decades will be summarized.

I. VETERANS' INCOME BENEFITS

Veterans' benefit legislation preceded other social welfare legislation in the United States by more than a century. One of the early resolutions of the first Congress in 1776 provided for monthly payments of up to half pay to officers, soldiers, and seamen disabled in the line of duty and importuned the Colonies' legislative bodies to make pay-
ments on behalf of the United States. Then in 1789 one of the early acts of the Congress under the new Constitution provided for continuance of these payments to the disabled veterans of the Revolutionary Army. Monthly payments to veterans for service-connected disabilities have since been provided for veterans of all our country's wars and conflicts as well as for veterans with peacetime service. Although protection for survivors of all those who died from service-connected causes came more slowly, Congress early provided for continuation of half pay to the widows or children of officers who died as a result of service-connected wounds while in the service of the new country's military establishment or navy or marines. Similar benefits were extended to the widows and children of seamen and marines in 1814 and ultimately to classes of survivors of all those who died from service-connected causes.

Those who had not suffered service-connected disabilities were not completely neglected. By 1818 enough aged veterans of the Revolutionary Army were suffering economic hardships without regard to service-connected causes to prompt Congress to provide a pension for any veteran who, "by reason of his reduced circumstances in life, shall be, in need of assistance from his country for support." In 1832 a pension without a need requirement was enacted for the benefit of Revolutionary veterans not otherwise provided for; subsequent legislation provided for continuation of such pension payments to certain widows of veterans eligible under the 1832 act. Thus began a tradition of providing pensions for veterans or their survivors on the basis of a period of service and need, old age, or non-service-connected disability or death. Such payments are still characterized as "pensions," while payments based on service-connected disability or

has begun a process of substituting the gender-neutral terms "spouse" and "surviving spouse" for "wife" and "widow," see 38 U.S.C. § 101(3), (31) (Supp. V 1975), but basic entitlement and other relevant statutes have not yet been similarly neutralized.


10. Act of Mar. 18, 1818, ch. 19, § 1, 3 Stat. 410.
death are called “compensation.”” This distinction is similar to the distinction between workers’ compensation plans and need-based public assistance plans; its occasional significance in relation to the subject of this article will be noted at appropriate points.

Under statutes currently in force, marital status may affect the amount of or eligibility for veterans’ income benefits in different ways. Compensation payments are provided for veterans who are partially or totally disabled from injury suffered or disease contracted in the line of duty during either war or peacetime. Such monthly compensation is increased if a veteran has qualifying dependents, with certain spouses and children under age eighteen presumed to be dependent. For example, under the 1975 formula, compensation may be increased by $40 a month for a totally disabled veteran who has a qualifying spouse. Statutes currently in force also provide for payment of dependency and indemnity compensation (DIC) to qualified surviving spouses of veterans who die from a service-connected disability. The amounts of the monthly payments range from $241 to $615 under the 1975 formula. Pensions based on need and on non-service-connected permanent and total disability (defined as including attainment of age sixty-five) are also provided for veterans of the modern wars.

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13. See 38 U.S.C. § 101(13)-(15) (Supp. V 1975). Prior to 1917 the term “pension” was used indiscriminately to describe any regular payments to veterans. Beginning in 1917, though with some vacillation thereafter. Congress began to use the more descriptive term “compensation” for service-connected disability or death payments. 38 U.S.C.A. note at 24–25 (1959), and the term is now formally defined in the Code with such a limitation, while “pension” is defined as meaning monthly payments to a veteran because of service, age, or non-service-connected disability, or to a survivor because of a non-service-connected death of the veteran. To distinguish pre-1957 benefits from current benefits, a further distinction is made in the above cited definitions sections between (1) payments to a veteran because of a service-connected disability and to a survivor because of some service-connected death occurring before January 1, 1957 (“compensation”), and (2) other payments to survivors because of a service-connected death (“dependency and indemnity compensation” (DIC)). See, e.g., id. § 416 (Supp. Dec. 1976). That refinement is disregarded herein, “compensation” being used in the more general sense stated in the accompanying text.

For a fuller overview of the early legislation for the war-disabled, see Helm, Federal Legislation for the Relief of World War Disabled, 12 Ky. L.J. 185 (1924). For more comprehensive early history of veterans’ benefits legislation generally, see 38 U.S.C.A. note at 1–25 (1959); President’s Commission on Veterans’ Pensions, Veterans’ Benefits in the United States 33–46 (1956).

14. 38 U.S.C. §§ 310 (wartime), 331 (peacetime) (1970) (discharge must not have been dishonorable and disability must not result from the veteran’s wilful misconduct).

15. Id. § 410 (covering deaths subsequent to December 31, 1956; veteran’s discharge must not have been dishonorable).

The amount of these pensions may be increased in some circumstances if the veteran is married and may be decreased by attribution of the spouse's income to the veteran. Needy surviving spouses of veterans who die of causes not related to service may also qualify for pensions.

The foregoing examples sufficiently illustrate the present significance of establishing the existence of a qualifying spousal or marital relationship under veterans' benefit laws. If such a relationship can be proved, the date on which it came into existence may also be significant, because the phrase "surviving spouse" is defined in terms of time or duration of marriage (unless a child was born to the parties either before or after the marriage) and continuity of cohabitation from date of marriage to death of the veteran for both compensation and pension eligibility purposes.

The starting point for identifying a qualifying spousal or marital relationship is the existence of a "valid" marriage to a veteran. A statute currently identifies the law which is to govern whether a marriage is valid and attempts to define those invalid marriages that may nevertheless be treated as valid for some purposes. Statutes also define "surviving spouse" to exclude one who has remarried or who has established a meretricious relationship with another of the oppo-

18. Id. § 521(c) (Supp. V 1975). To qualify, in general, the veteran must satisfy a service requirement of at least 90 days during one or more of the 20th century wars or conflicts in which this country has been involved. Id. § 521(g) (1970 & Supp. V 1975). The pension is payable only if the veteran's income is below the annual limit imposed by id. § 521(c) (Supp. V 1975) (under 1976 rates, $4,500 for a married veteran), with a possible net worth limitation, id. § 522 (1970).
19. Id. § 521(f).
20. Id. § 541 (Supp. V 1975). In general, the veteran must have satisfied the 90-day service requirement or must have been receiving or entitled to receive service-connected disability compensation, and the surviving spouse must satisfy annual income and net worth limitations. Id. § 521.
21. See id. § 101(3) (defining "surviving spouse" as a spouse who has lived with a veteran "continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse)")); id. § 101(31) (defining "surviving spouse" as including a widow or widower); id. §§ 302, 404 (1970) (requiring for compensation eligibility marriage within 15 years after veteran's qualifying service terminated or marriage for one year before veteran's death); id. § 541(c) (Supp. V 1975) (requiring for pension eligibility, for Mexican border or World War I veterans, marriage before December 14, 1944; for World War II veterans, marriage before January 1, 1957; for Korean conflict veterans, marriage before February 1, 1965; or, for Vietnam era veterans, marriage before May 8, 1985; or, in the alternative for any veteran, marriage for one year before the veteran's death).
22. Id. § 103(c) (1970).
23. Id. § 103(a).
site sex\textsuperscript{24} and define the effect to be given termination of either type of relationship.\textsuperscript{25} The origin, purposes, and interpretation of these provisions will be the subject of the remainder of this part.

A. \textit{Determining Whether a Marriage Is or Was Valid—Proof and Governing Law}

The presently controlling statute provides:

In determining whether or not a woman is or was the wife of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Veterans' Administration according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.\textsuperscript{26}

Early legislation provided no similar guiding rule, nor did it prescribe how a marriage should be proved. Because early legislation providing compensation for disabled veterans did not vary the amount payable on the basis of whether a particular claimant had one or more dependents,\textsuperscript{27} that a veteran had a "wife" was not significant until after he died. The question then was whether he left a "widow" surviving, since the standard approach in the early legislation providing for survivors was to make the widow the primary recipient and to continue payments to the veteran's children, if any, should the widow die or remarry.

The first rule of evidence relating to proof of marriage was established by the President under the Revolutionary War widows' pension act of 1836\textsuperscript{28} and published by the War Department. It provided simply that "[t]he legality of the marriage may be ascertained by the certificate of the clergyman who joined them in wedlock, or the testi-

\textsuperscript{24} \textit{Id.} § 101(3) (Supp. V 1975).
\textsuperscript{25} \textit{Id.} § 103(d).
\textsuperscript{26} \textit{Id.} § 103(c) (1970).
\textsuperscript{27} The first variable compensation for veterans was provided in the act that established the compensation system for the World War I service personnel. Act of Oct. 6, 1917, ch. 105, § 302. 40 Stat. 398 (providing $30 monthly compensation for a single veteran, $45 for a veteran with a wife but no children). The same act also provided variable compensation for widows of veterans, but such provision for dependents had been made as early as 1866, in the Act of July 25, 1866, ch. 235, § 2. 14 Stat. 230 (an additional $2 per month per child under age 16).
\textsuperscript{28} \textit{Act of July 4, 1836}, ch. 362, 5 Stat. 127.
mony of respectable persons having knowledge of the fact.29 The rule was applicable to proof of marriages contracted prior to 1783 (the cut-off date for marriages covered by the 1836 act),30 and the singularity of documentary proof mentioned may reflect an assumption that marriage ceremonies in colonial times were commonly performed by clergymen.31 In an Attorney General's opinion dated August 18, 1837, however, the Secretary of War was advised that formal solemnization of a marriage by a minister of religion was not required in New York during the Revolutionary War (or in the State of New York thereafter); in fact, marriage, being a civil contract under the laws of New York, could be contracted in the presence of any competent witness.32 Given the Secretary's solicitation of advice with respect to the law of a particular colony, it would seem that the first administrator of the pension laws had moved rather quickly to application of differing laws of the different colonies for the determination of marital status in particular cases. In any event, the rules of evidence prescribed by the President for determinations under the 1838 pension law (providing for Revolutionary War widows whose marriages might have taken place as late as 1794)33 called for record proof whenever it could be obtained, but recognized that it might be found in town, county, parish, church, or family records.34

In the 1846 appropriations act for payment of the Revolutionary War pensions, Congress itself finally legislated a rule of proof requiring "such proof as would be sufficient to establish the marriage between the applicant and the deceased pensioner in civil personal actions in a court of justice."35 Twelve days after the enactment the Commissioner of Pensions requested an interpretation, and the At-

30. For a description of the 1836 and 1838 acts providing pensions for widows of certain Revolutionary War veteran-pensioners, see notes 68–73 and accompanying text infra.
31. If so, the assumption was inaccurate. For a survey of colonial marriage laws, see O. Koegel, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES ch. 5 (1922).
32. 3 Op. ATT'Y GEN. 287 (1852).
33. See notes 68–73 and accompanying text infra.
35. Act of May 7, 1846, ch. 13, § 2, 9 Stat. 5. This provision appears not to have been discussed in either the House or Senate at the time of adoption of the appropriations bill. See CONG. GLOBE, 29th Cong., 1st Sess. 388, 401, 667, 753 (1846).
torney General's Office supplied it: The Commissioner could not require "proof of a marriage in fact."36 In all civil personal actions general reputation and cohabitation were sufficient evidence of marriage; but as this was presumptive evidence only, it could be rebutted.37 Primary reliance on the presumption of marriage based on reputation and cohabitation could have gone a long way toward minimizing the variant treatment of similar cases that was to be produced by developing differences among the state laws on marriage, particularly in treatment of nonceremonial (common law) marriages.38 Unfortunately the congressional directive respecting proof was not repeated for other pension or compensation laws, and the administrators returned to looking first for record proof of marriage.39

In 1882 Congress provided a rule as to the governing law that parallels the current rule for determining the validity of veterans' marriages: "That marriages . . . shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued . . . ."40 The 1882 enactment appears to have been intended primarily to clarify what law should be applied in determining whether there was a remarriage that would result in disqualification of

36. That is, proof of the fact of marriage by direct testimony, by the marriage register, or by any other evidence not derived from the presumed innocence of a cohabitation reputed to be matrimonial was not required. 1 J. Bishop, Commentaries on the Law of Marriage and Divorce § 485 (6th ed. 1881). See also id. (4th ed. 1864).


39. See, e.g., A. Browning, A Treatise on the Law Relating to Pensions. Patents, Bounties and Other Applications Before the Executive Departments 17-18 (1893) (elaborate listing of possible records for Civil War general pension law); id. at 46 (requiring verified transcript from church or public record or evidence of two eyewitnesses to marriage for Civil War non-service-connected pension); Manual of the Pension Laws of the United States of America 96 (1862) (Commissioner's instructions for proof of marriage under Civil War general pension law, requiring certificate of clergyman or testimony of respectable persons having knowledge of fact).

40. Act of Aug. 7, 1882, ch. 438, § 2, 22 Stat. 345. A widow's pension "accrued" upon death of the husband. See Stella A. Mellen. 15 Interior Dec. Pension & Bounty Land Claims 459, 461 (1905). Excepted were marriages "such as are mentioned in section 4705 of the Revised Statutes." The reference is to a section adopted originally in 1864 to provide for "colored" soldiers who had been married in states wherein slaves' relationships could not be legally solemnized. Extended to Indians also in 1873, the section provided that their marriages could be evidenced by "satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory.
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a former widow for a pension, but it also directly stated for the first time what law should be applied in determining whether a widow-applicant was the "widow" of the deceased veteran. By 1882 leading American authorities agreed that state courts generally looked to the law of the place where a marriage was celebrated in deciding questions of status—capacity to marry and validity of marriage—except, perhaps, in incest and polygamy cases and other cases involving intentional evasion of significant domiciliary restrictions. There is no reason to believe that the 1882 enactment was intended to negate

or habitually recognized each other as man and wife, and were so recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to date of death . . . .”

Although the current statute parallels the 1882 statute except as currently limited to determining the validity of veterans' marriages, the same provision has not applied to all cases throughout the intervening period. Essentially the same provision was initially adopted for the compensation cases of World War I widows under Act of Oct. 6, 1917, ch. 105, § 22(5), 40 Stat. 398, but the 1924 law, World War Veterans' Act, 1924, ch. 320, tit. II, 43 Stat. 607, which repealed and replaced the 1917 law, contained no parallel provision with respect to governing substantive law, although it did provide for proof of marriage by "such testimony as the director [of the newly created United States Veterans' Bureau] may prescribe by regulations.” Id. § 20. By Act of Aug. 16, 1937, ch. 659, § 4(c), 50 Stat. 660, the definition of "widow of World War veteran" was amended to include a three-pronged test of validity: "All marriages shall be proven as valid marriages according to the law of the place where the parties resided at the time of marriage, or of the law of the place where the ceremony was performed at the time thereof, or of the law of the place where the parties resided when the right to pension hereunder accrued.” Reference to the law of the place of marriage was removed in the 1938 version, Act of May 13, 1938, ch. 214, § 2, 52 Stat. 352. Under the consolidation and revision of the Veterans' Benefits Act of 1957, Pub. L. No. 85–56–, § 101(5), 71 Stat. 83, the marriage relationship to a veteran was determined under "the law of the place where the parties resided when the marital relationship began or ended.” The current language as quoted in the text was incorporated in the 1958 consolidation and enactment of title 38, Act of Sept. 2, 1958, Pub. L. No. 85–857, § 103(c), 72 Stat. 1105, with no express provision for remarriage cases. No explanation or acknowledgement of the changes was found. The primary effect of removal of the law of the place of ceremony as a reference is to put in question the validity, for veterans' law purposes, of marriages celebrated in other than the state of residence of the parties in order to evade marriage restrictions evidencing strong policies of that state. See, e.g., H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.9, at 84–86 (1968) (discussion of choice of law when restriction being evaded is an age restriction). See also notes 42–43 infra.

41. At least one authority so concluded, influenced by the second clause of the section, which provided for termination because of open and notorious adulterous cohabitation, see notes 116–18 and accompanying text infra, Mary E. Miller, I Interior Dec. Pension Claims 171, 173 (1887). The explanation in the House of Representatives of the bill containing the section supports this conclusion, though it is somewhat garbled. 13 CONG. REC. 6963 (1882) (remarks of Rep. Browne). For discussion of the circumstances that required statement of a rule for remarriages, see notes 112–15 and accompanying text infra.

42. 1 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE §§ 370–389 (6th ed. 1881) (also noting Massachusetts statute making void those marriages contracted elsewhere in order to evade Massachusetts marriage restrictions); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 89, 113–113a (7th ed. 1872).
the basic choice of law principle; therefore, the law of the place of celebration, if other than the place of residence, was regarded as part of the controlling law of residence.  
From a long-range viewpoint, the 1882 enactment put to rest the possibility that an exclusively federal rule could be fashioned for determining relationships for federal veterans' income benefit laws. The twin evils of primary reliance on state law—lack of clarity in the laws of the many states and lack of consistency among the laws of the several states—became more apparent with the passing years. In particular, whether and under what circumstances nonceremonial (common law) marriages were recognized under the laws of particular states became troublesome questions for those charged with administration of the veterans' compensation and pension laws—questions that were not quickly settled with passing years. The questions may be more easily answered today, because the number of states in which nonceremonial marriages are recognized has diminished substantially in the last three decades. A recent count identified only fourteen states (and the District of Columbia) in which such marriages are still recognized, and the courts are now in general agreement as to the necessary requirements for recognition. Although state courts are not similarly

43. Wright, Marriage and Divorce, in 19 Interior Dec. Pensions & Bounty Land Claims 327, 331 (1905) ("Of course, as a general proposition, the courts of the place of domicil will decide the issue according to the lex loci contractus."). "Resided" was construed to mean "domiciled." Id. at 331-32.

44. For an index to the many decisions of the Administrator respecting the law of the various states, see id. at 343-74.

45. One of the early discussions of guiding principles under the 1882 statute appears in an opinion rendered by an Assistant Secretary of the Interior in the case of Thankful Morse, 1 Interior Dec. Pension Claims 56 (1887):

In many, if not all the states of the Union, statutes have been adopted providing in what manner and by whom the marriage contract may be solemnized ... But these statutes do not confer the right, they simply provide for the mode of entering into such contracts; and, unless it is expressly provided by statute that marriage not entered into in conformity therewith shall be void, all marriages entered into in accordance with the common law per verba de presenti [that is, by present agreement], although not in conformity with such statutes, or solemnized by persons therein mentioned, are valid and binding. This has become the settled doctrine of the American courts with but few cases of dissent. Id. at 57. Today the majority rule appears to be the contrary: Statutes establishing a scheme of licensing, solemnization, and other regulations are viewed as mandatory. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.4, at 46-47 (1968).

The frequency with which questions about common law marriages arose in connection with applications to the United States Veterans' Bureau during World War I led an associate counsel in the Bureau to write a book on the subject. See O. KOEGEL COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 8 (1922).

46. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.4, at 45-46, 48-49 (1968). In 1931 it was asserted that such marriages were still recognized

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in agreement with respect to the type of evidence that will suffice to establish the elements of nonceremonial marriages, the evidentiary variations probably do not have significant impact, given administrative power to prescribe by regulation what evidence is acceptable to establish marriage. Nevertheless, continuing variations in state laws governing marriages cast continuing doubt on the wisdom of a rule that makes eligibility for, or the amount of, veterans' income benefits dependent on the law of domicile at two possible operative times or, in most cases, on the law of the place of marriage. The possibilities for unequal treatment have, however, been substantially mitigated by an exception written into the veterans' compensation and pension laws. This exception will now be examined.

B. When an Invalid Marriage Will Be Treated As Valid

If a nonceremonial marriage is not recognized for benefit purposes, it can at least be said that the parties exercised choice in deciding not to follow traditional formalities. The more difficult cases are those in which the parties have participated in a ceremony that would ordinarily result in a valid marriage, but does not because of a reason unknown to one or both of the parties—the so-called "impediment" cases. The most common impediment to a valid marriage is nondissolution of a prior marriage. The already married party may justifiably believe that a divorce terminated the former marriage or may simply conceal the former undissolved marriage from the other party. Other common impediments include limitations on remarriage under divorce laws (such as restrictions on remarriage within a specified time period), limitations on who may marry (such as age restrictions), and restrictions on marriage between related parties (such as prohibitions on marriage between cousins).

The Veterans' Administration conducted a study of such cases and concluded that the hardship on individual widows who had been denied benefits justified an exception to the rule requiring a valid marriage. Although Congress had previously made exceptions to the valid

in more than half the states. J. Madden, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS §§ 20–22, at 51–53 (1931).

47. H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.4, at 48 (1968).

marriage rule only in very limited circumstances, it accepted the Administration's recommendation and in 1957 adopted a "legal impediment" exception. This exception required "a marriage . . . which, but for a legal impediment, would have been valid," entered into by the claimant "without knowledge of any legal impediment," followed by cohabitation with the veteran for five or more years immediately before the death of the veteran (or for any period of time if a child was born of the purported marriage). If these requirements were met, then the purported marriage would be deemed to be a valid marriage, provided that no claim was filed by a legal widow found to be entitled to such benefits. In 1967 the required period of cohabitation was reduced to one year, but otherwise the requirements are as summarized. The exception applies to claims for "gratuitous death benefits," a term not defined in the statutes, but intended to include both compensation and pension payments to widows.

The provision has been liberally construed. Because in all hardship cases discussed in the Veterans' Administration study the impediment had been a prior valid and undissolved marriage, it was subsequently argued that the impediment provision should be limited to validating marriages only in such cases. The Attorney General rejected this argument in an interpretation of the provision rendered in 1961 and also rejected the argument that the phrase "without knowledge of any legal impediment" should be restricted to lack of knowledge of the factual circumstances which caused the impediment. In the case reviewed by the Attorney General, the parties to the marriage had been first cousins. Under the laws of the two states in which the claimant had lived with the veteran, such a marriage was incestuous and subjected the participants to possible criminal penalties. It was argued, therefore, that validating the marriage for any purpose would do violence

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49. E.g., Act of Oct. 6, 1917, ch. 105, § 22(5), 40 Stat. 398 (providing conclusive presumption of marriage if a man and woman had lived together in openly acknowledged husband-and-wife relationship during the two years preceding declaration of war in World War I or, if later, the date of a veteran's enlistment, absent proof of a living legal spouse) (repealed 1924).
51. 38 U.S.C. § 103(a) (1970). For a comparison with the legal impediment provision of the OASDI title of the Social Security Act, see notes 207-10 and accompanying text infra. For a description of the origins of such provisions, see notes 211-12 infra.
53. 42 Op. ATT'Y GEN. No. 3 (June 1, 1961).
54. Id. at 4.
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to state marriage laws and public morality. This argument was rejected with the reasoning that "[p]ublic morality as defined in State laws varies, and for the Federal government to defer to the State standard would, in all such cases, fly in the face of the statutory policy with regard to uniform benefits."55 In the following year, the Administrator considered a case in which a claimant had entered into a religious marriage with a veteran in France, but had failed to participate in the civil ceremony required under French law. The civil ceremony requirement was found to be a "legal impediment," and the following broad interpretation was adopted:

The term "legal impediment" . . . must be construed as including not only (1) particular substantive conditions for validity which may exist in certain jurisdictions such as those respecting age, race, mental capacity, marital status, and consanguinity, but also, with respect to one of the commonly accepted forms for creating a marriage (i.e., civil, religious, common-law, and tribal), (2) the special formalities, or external conduct required of the parties or of third persons, such as public officers, for the formation of a valid marriage by the laws of a particular jurisdiction.56

The Administrator's interpretation is so broadly phrased as to justify a finding that failure to participate in a ceremony required by state law could be a legal impediment within the exception if the claimant had in good faith believed that no ceremony was required. Although the published regulation relating to proof of marriage does not clearly support this conclusion,57 an interpretation circulated for internal administrative purposes identifies as one possible effect of the Administrator's interpretation the "possible recognition of a 'common-law' marriage consummated in good faith in one of the several States that do not recognize [such marriages]."58 The claimant's statement of lack of knowledge of an impediment will be accepted as proof of that fact, absent information to the contrary.59

55. Id. at 5.
57. See 38 C.F.R. § 3.205 (1975). This regulation requires a signed statement by the claimant that she had no knowledge of an impediment, in addition to one of several described types of proof of marriage. Id. § 3.205(c). However, the regulation seems to permit proof of a nonceremonial marriage for only those jurisdictions that recognize marriages other than by ceremony. Id. § 3.205(a)(6).
59. 38 C.F.R. § 3.205(c) (1975).
Even though the impediment exception to the valid marriage requirement does not negate the effect of all state law variations, the exception as presently interpreted does go far to protect the good faith expectations of those surviving spouses who may have failed to effect a valid marriage because of ignorance of local marriage laws or lack of knowledge of other factual or legal impediments. Further, it may directly support the good faith expectations of the veteran in those cases in which the veteran has asserted his belief in the existence of a marriage in a statement made in connection with a claim for veterans' benefits, because such a statement will be accepted as sufficient to corroborate a surviving spouse’s certified statement of facts relating to a “marriage.”

Thus, on balance, the basic rules governing eligibility for veterans’ income benefits appear to be fair despite primary reliance on diverse state laws. One possible exception should, however, be noted. Although a “widow” may become eligible for compensation or pension payments even though her purported marriage was not valid, the same “marriage” cannot make her the “wife” of the veteran before his death—an anomalous result indeed. The legal impediment exception being applicable only to claims for death benefits, a veteran must still establish a valid marriage to be entitled to the increased compensation or pension and income limits provided for a veteran with a qualifying spouse. It has been argued that in the interests of uniformity and “fair play” treatment should be the same both before and after the veteran’s death.

C. The Effects of Remarriage—Valid, Void, Voidable, or Presumed—and of Termination Thereof

One of the most consistent features of legislation providing for survivors of veterans has been identification of the widow as the primary recipient, with payments to be continued to children of the veteran, if any, “in cases of the death or intermarriage of such widow.” Interpreting such language in 1814 legislation, the Attorney General early ruled that the remarriage provision was not intended to work a forfeiture; thus, a woman who did not apply for a pension on account of

60. Id. § 3.205(a).
her first husband's death in the line of duty until after she had remarried was found to be entitled to the pension for the interval between the death of her former husband and her second marriage. Considered and rejected was the argument that widows' pensions were intended for present support of the widow, a necessity that was supposed to exist during widowhood and terminate with remarriage, and that failure to apply for a pension evidenced absence of necessity. The response was that a widow's right to a pension did not depend on actual necessity, but rather, "[i]t is in the nature of an absolute engagement or promise made to those officers and men, that if they fall in the service of their country, so much shall be paid to their wives and children, without inquiry into the fact whether they stand in need of it or not." Whether one accepts the premise of the argument or of the response as the rationale for providing widows' pensions, it is difficult to justify a termination of the payments because of remarriage without some consideration of the circumstances of the widow's marriage to the veteran and of the remarriage (for example, the duration of each). Termination on remarriage seems even less justified if, as has sometimes been argued, a widow has a claim to a pension in her own right. Nevertheless, remarriage has consistently been made a termi-

62. 2 Op. ATT'Y GEN. 1 (1852). As was typical of the early legislation, the act did not expressly require an application and was therefore construed as creating a vested right, subject to termination only as of time of remarriage. This reasoning was ultimately carried to its logical limits when the Attorney General concluded that a pension accrued to the date of remarriage was payable even though the "widow" had died after remarrying without applying for the pension. Opinion of Attorney General (Apr. 5, 1835), reprinted in Manual of the Pension Laws of the United States of America 167 (1862). Ironically, under the rules of law then governing the right of a husband in property of a wife, it was the second husband who was the appropriate claimant, id. at 168, even when the widow-wife was still living, 2 Op. ATT'Y GEN. 95, 96 (1852). The rule that the husband could claim the pension on death of the widow-wife was changed by Act of June 19, 1840, ch. 39, § 2, 5 Stat. 385. This act was construed as precluding payment of pension arrears to any person if the widow left no children. 4 Op. ATT'Y GEN. 504 (1852). Currently, under 38 U.S.C. § 3021(a)(3) (1970), accrued benefits would be payable to the children of the deceased veteran on death of the widow.

63. 2 Op. ATT'Y GEN. 3–4 (1852). In a seeming reversal of position, on February 9, 1836, a successor advised the Secretary of the Navy to the contrary with respect to the same pension law: "[T]he pension was intended exclusively for the personal benefit of the widow during her widowhood; and if she neglects to apply for it before her remarriage, I think it cannot afterwards be claimed . . ." 3 Op. ATT'Y GEN. 36–37 (1852). This opinion was quickly withdrawn, however, the author admitting to having overlooked the earlier 1825 construction. 3 Op. ATT'Y GEN. 68 (1852). In this new opinion, there was complaint that, as on several prior occasions, the earlier decision seemed to have been based on usage of the Navy Department rather than on the language of Congress, but the author, Attorney General Butler, bowed to precedent to obtain uniformity of judgment.

64. See notes 83–84 and accompanying text infra. See also 13 CONG. DEB. 1174
nating event, and the question around which controversy has swirled is the effect to be given to the termination of a widow's remarriage by death, divorce, or other form of dissolution.

1. **Valid remarriage terminated by death or divorce**

In 1970 Congress enacted a provision for restoration of compensation or pension to a veteran's "widow" upon termination of her remarriage by either death or dissolution by a court with authority to render divorce decrees, restricted only by the proviso that the divorce must not have been secured through "fraud by the widow or collusion." The House committee's justification for the provision was that the remarriage requirements with respect to veterans' benefits were considerably more restrictive than those found in other federally administered programs such as social security and civil service retirement. The Administrator's justification for restoring compensation was more elaborate:

[H]ardship results if the remarriage is short lived and the widow emerges from the subsequent marriage in a worse economic position than before. In many instances, the widow has spent most of her life as the wife of the veteran, as a housewife and mother, and has been unable to engage in any outside employment to establish entitlement to retirement or other old age benefits in her own right. The permanent termination of Veterans' Administration benefits upon her remarriage at an advanced age frequently places her in precarious circumstances when death or divorce follows. In these and similar circumstances, it is reasonable to assume that the veteran would have intended that a measure of support be provided for the widow during any period in which she is not married.

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(1837) (remarks of Rep. Taylor):
And why, sir, have you extended your pension system to the widows of those who were entitled to a pension? It is because they, too, have made sacrifices in the cause of their country; it is because they have endured hardships and encountered dangers for their country's freedom; it is because they have united their fortunes and identified their interests, from early life, with those who fought your battles. It is because of the encouragement which they gave and the influence which they exerted . . . .

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The legislative trail to acceptance of this position is long and winding. When Congress extended pension rights to certain Revolutionary War widows in 1836, it provided for continuance of a pension only during the time that a widow remained unmarried.\textsuperscript{68} Within less than a year, however, Congress adopted an "explanatory" act, providing that the benefits of the 1836 act should not be withheld because a widow had remarried, provided that she was a widow at the time the 1836 act was passed.\textsuperscript{69} In the following year, Congress resolved that the benefits of the 1836 act "shall not be withheld from any widow whose husband has died since the passage of the said act, or who shall hereafter die, if said widow shall otherwise be entitled to the same."\textsuperscript{70} In a painstakingly logical opinion that reviewed the progressive expansion of the class of widows benefited by the act, the Attorney General construed the resolution as permitting payment of pensions to widows who had remarried but had again become "widows" by the deaths of their new husbands.\textsuperscript{71} In 1838 Congress extended the benefits of the 1836 act to another class of Revolutionary War widows,\textsuperscript{72} again providing for termination in the event of remarriage. In due course, in 1842 Congress provided that remarriage of a widow "shall be no bar" to a claim for a pension under the 1838 act, provided that she was a widow at the time of making application.\textsuperscript{73}

Having thoroughly obscured the meaning of "widow" by the series of enactments just described, Congress returned to its earliest pattern of legislating. In compensation and pension acts enacted for the benefit of survivors of veterans of other nineteenth century wars, Con-

\textsuperscript{68} Act of July 4, 1836, ch. 362, § 3, 5 Stat. 127 (providing for only those widows whose marriage to a veteran had taken place before the end of his last period of service).

\textsuperscript{69} Act of Mar. 3, 1837, ch. 42, § 1, 5 Stat. 187. The benefits of the 1836 act were extended to widows of persons who had continued in the service until November 3, 1783, and were married prior to that date while the husband was still in the service.\textit{Id.} § 2.


\textsuperscript{71} 3 Op. ATT'Y GEN. 477 (1852).

\textsuperscript{72} Act of July 7, 1838, ch. 189, § 1, 5 Stat. 303 (extending benefits to widows whose marriages had occurred after the veterans' last periods of service but before 1794).

\textsuperscript{73} Act of Aug. 23, 1842, ch. 191, 5 Stat. 521. This provision was, at one point, apparently interpreted as having no effect on removing the bar to remarriage. See Pension Office Opinion (Nov. 14, 1842), \textit{reprinted in Army and Navy Pension Laws, and Bounty Land Laws of the United States} app. II, at 525 (4th ed. R. Mayo 1861). The 1838 act had provided pensions for only five years. It was renewed and finally extended for life by Act of Feb. 2, 1848, ch. 8, 9 Stat. 210.
gress provided monthly payments for only those widows “who have not remarried” or “during widowhood.”

The earliest attempt to deal directly with the effect of divorce following remarriage apparently came in 1864. Following the onset of the Civil War, Congress in 1862 adopted the first comprehensive general law, providing for payment of a “pension” to a widow only “during her widowhood.” Within two years it was asserted that differing interpretations of the phrase “during her widowhood” were being attached for purposes of Army and Navy pension cases. It was alleged that in Army pension cases payments to widows were merely suspended during a remarriage and restored should the new husband die, leaving the claimant a “widow” again, while in Navy cases the pension payments were not resumed after a remarriage was terminated by death. The belief that such variant treatment existed prompted a proposal that remarried widows be restored to the pension

74. Acts providing compensation (i.e., for service-connected deaths) include the following: Act of July 4, 1836, ch. 362. § 1. 5 Stat. 127 (those dying subsequent to April 20, 1818), as amended by Act of July 21, 1848, ch. 104. 9 Stat. 249 (extending coverage to those serving in War with Mexico); Act of Apr. 16, 1816, ch. 55. § 1. 3 Stat. 285 (War of 1812). All the foregoing were extended for widow’s life by Act of June 3, 1858, ch. 85. 11 Stat. 309. For the Civil War compensation legislation, see notes 75–80 & 86 and accompanying text infra.

Acts providing pensions (i.e., for non-service-connected deaths) include the following: Act of June 22, 1890, ch. 634. § 3. 26 Stat. 182 (Civil War pension enactment imposing need requirement on widows for the first time); Act of Jan. 29, 1887, ch. 70. § 1. 24 Stat. 371 (War with Mexico); Act of Feb. 14, 1871, ch. 50. § 1. 16 Stat. 411 (War of 1812).

75. Act of July 14, 1862, ch. 166. 12 Stat. 566 (governing payment of compensation for service-connected disability and death for veterans injured or dying after March 4, 1861).

76. Id. § 2.

77. Cong. Globe, 38th Cong., 1st Sess. 3369 (1864) (remarks of Sen. Hendricks). The asserted difference was apparently disputed by the chairman of the Committee on Pensions. See id. (remarks of Sen. Grimes). It is difficult to understand how such variant treatment could have developed, if indeed it did. The Office of Commissioner of Pensions had been created in 1833 and was placed under the direction of the Secretary of War in 1835. Navy pension affairs being under the authority of the Secretary of the Navy only until 1840, when they too were transferred to the Office of the Commissioner. In 1849, with the creation of the Department of the Interior, the Pension Office was transferred to that Department. See Legal History of the Pension Office and Its Clerical Force Above the Grade of Fourth-Class Clerks, in A Digest of the Laws of the United States Governing the Granting of Army and Navy Pensions and Bounty-Land Warrants; Decisions of the Secretary of the Interior, and Rulings and Orders of the Commissioner of Pensions Thereunder 7–8 (F. Curtis & W. Webster eds. 1885). Given administration of both Army and Navy pensions within the same department under the same law, one would expect the same interpretation; but the pre-1862 history of administering different pension laws for the Army and the Navy could have led to continuation of variations, or the variations in treatment may actually have been confined to cases under the former variant laws.

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rolls not only upon death of the second husband, but also in some cases of remarriage ending in divorce. The proposal came during debate on a bill to amend the new general pension law in the form of a proposed amendment to that bill.\textsuperscript{78} The proposed amendment was hardly discussed, however, and the provision for the divorced former widows was not discussed at all, because it was pointed out that the proposed amendment was inconsistent with an overlooked section of the bill as originally proposed: "That on the remarriage of any widow receiving a pension, such pension shall terminate, and shall not be renewed should she again become a widow."\textsuperscript{79} The bill as originally proposed was in due course adopted.\textsuperscript{80} The language expressly forbidding restoration of a widow's pension after remarriage disappeared in the comprehensive revision and consolidation of 1873, wherein Congress continued widows' pensions "during her widowhood,"\textsuperscript{81} providing that "remarriage of any widow . . . shall not bar her right to such pension to the date of her remarriage . . . [but] on the remarriage . . . such pension shall cease."\textsuperscript{82} This language became section 4708 of the Revised Statutes of 1875.

The effect of divorce following remarriage was finally dealt with expressly in 1901 in an amendment to section 4708 of the Revised Statutes. The new provision originated in the House as part of a narrow proposal for the relief of Civil War service widows—that is, those who had been wives during the Civil War fighting. The rationale was that such a woman had stayed at home to take care of the family and hence "did as loyal service to the Government as the man who bore the brunt on the battlefield"\textsuperscript{83} and thus had "some claim in her own rights."\textsuperscript{84} The Senate broadened the provision to include service widows of other wars.\textsuperscript{85} The exception remained narrow, however, covering only widows (1) whose remarriages ended with the death of

\begin{itemize}
\item \textsuperscript{78} \textit{Cong. Globe}, 38th Cong., 1st Sess. 3369 (1864) (amendment to H.R. 406, proposed by Sen. Hendricks) ("That in all cases of second marriage the same construction shall be given to the Navy as is given to the Army pension laws; and divorce for fault of the husband shall be no bar to the claim of any applicant if she be otherwise entitled.").
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} Act of July 4, 1864, ch. 247, § 7, 13 Stat. 387.
\item \textsuperscript{81} Act of Mar. 3, 1873, ch. 234, § 8, 17 Stat. 566 (codified at REV. STAT. § 4702 (1875)).
\item \textsuperscript{82} \textit{Id.} § 14.
\item \textsuperscript{83} 34 \textit{Cong. Rec.} 2150 (1901) (remarks of Rep. Miers).
\item \textsuperscript{84} \textit{Id.} (remarks of Rep. Hull).
\item \textsuperscript{85} \textit{Id.} at 3505.
\end{itemize}
the new husband or in divorce on the wife’s application, “without fault on her part,” and (2) who were without means of support “other than their daily labor.” There appeared to be some question as to the propriety of benefiting any divorced former widows, but apparently persuasive was the argument that a widow who had married some “worthless” man and then had been divorced ought to have her pension restored. A similarly narrow provision was ultimately adopted for the compensation benefits of widows of service personnel of the Spanish-American War, the Chinese Boxer Rebellion, and the Philippine Insurrection.

Narrow though the exception seems, it was not extended to the remarriage cases of surviving spouses of World War I veterans, for whom a new compensation system was legislated. Passage of time brought for them only an express provision that “where compensation is properly discontinued by reason of remarriage it shall not thereafter be recommenced.” The World War I system was extended to the veterans of later wars. The differing manner of treatment of the widows of the earlier and later wars continued until 1957, when compensation, pension, and other benefit laws administered by the Veterans’ Administration were revised and consolidated into the Veterans’ 

86. Act of Mar. 3, 1901, ch. 865, § 1, 31 Stat. 1445. as amended by Act of Feb. 28, 1903, ch. 858, 32 Stat. 920 (technical amendment only). Even in their very old age, Civil War widows were not to escape the consequences of having been adjudged at fault in a divorce action. In providing service pensions for Civil War widows who had attained age 70, Congress included remarried widows only if their subsequent or successive remarriages had been dissolved by death or “by divorce on any ground except adultery on the part of the wife.” Act of June 9, 1930, ch. 420, § 3, 46 Stat. 529.

87. 34 Cong. Rec. 2150 (1901) (remarks of Rep. Cannon). In the Senate the stated justification was that the bill would relieve Congress from passing 25-30 private bills each year to aid those who had become widows again and were in “utter destitution.” Id. at 3506 (remarks of Sen. Gallinger).

88. Act of Sept. 1, 1922, ch. 302, § 1, 42 Stat. 834. Pensions for these widows were ultimately conditioned in the same way as were the pensions for Civil War widows, see note 86 supra. Act of May 1, 1926, ch. 209, § 2. 44 Stat. 382.


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Benefits Act of 1957.\textsuperscript{92} In this consolidated Act, the term "widow" was defined, in part, as one "who has not remarried (unless the purported remarriage is void)."\textsuperscript{93} There was no provision for restoration of payments in the event of divorce or of death of the new husband until the 1970 amendment of the Act quoted at the beginning of this section.

As the foregoing historical review suggests, modifications of the rule that benefits terminate absolutely on remarriage have tended to come as the widows of veterans of particular wars have reached old age. The 1970 provision is an exception, since it extends not only to the aged spouses of World War I veterans, but to the aging spouses of World War II veterans and the younger spouses of veterans of the more recent conflicts. The Administrator's expansive justifications for the 1970 provision, quoted at the beginning of this section, seem out of place in the veterans' benefits setting. For example, if a primary objective of restoring benefits after termination of a remarriage by death or divorce is to provide for needy aged persons, then benefits can be provided through a more limited provision for the aged former spouses of veterans, as under prior laws. Yet, there appears to be no compelling reason why a limited class composed of such former spouses should be singled out from among the larger class of aged persons for special treatment, except perhaps a feeling that there is something unseemly about having a former spouse (generally a widow) of a veteran dependent on public assistance. Similarly, if a primary purpose is to protect against the consequences of unfortunate remarriages generally or to compensate for a stay-at-home spouse's contributions to a marriage, it is difficult to explain why the former spouses of veterans should be singled out for such protection. There is a recognized need for some method of providing for those divorced persons who have not provided for themselves because of commitment to traditional spousal or parental roles. This need has also been recognized in relation to the "insurance" benefit provisions of the Social Security Act; the problem will therefore again be discussed in connection therewith.


2. The effect of a void or a voidable remarriage and of termination thereof by annulment

A "remarried" surviving spouse was included in the definition of "widow" incorporated in the 1957 consolidation of veterans' benefit laws only if the purported remarriage was void. This new definition merely expressly adopted an exception that had been appreciated from early times. The Veterans' Administration recognized an even broader exception, having worked out an elaborately justified position statement with respect to both void and voidable marriages by 1940. The statement acknowledged the distinction between void and voidable marriages—that the former creates no marital status, while the latter creates a marital status that exists until the marriage is annulled. Nevertheless, under appropriate circumstances, a widow who was party to a voidable marriage as well as a widow who was party to a void marriage could have her pension restored, on the reasoning that an award which had been discontinued because of a validly annulled "remarriage" had not been "properly" discontinued as required by the statute. A distinction, however, was made as to the date of restoration of the compensation or pension award: In voidable remarriage cases, restoration to the rolls could not antedate the date of a decree of nullity, whereas in void remarriage cases, restoration might be made as of the date of separation from the "husband" following discovery that the marriage was void, given a decree of nullity from a court of competent jurisdiction. When Congress incorporated the void remarriage provision in the statute, a summary of the Veterans' Administration position was published in the Code of Fed-

94. See, e.g., 2 Digests of Legal Opinions Relating to the United States Veterans' Bureau, Digest No. 336 (1926) (precedent file dated 3-7-25; right to compensation is not permanently terminated if marriage is annulled and declared void ab initio); 14 Op. Att'y Gen. 220 (1875) (recognizing that marriage to man already validly married would be void, but finding insufficient evidence of such circumstance in the particular case); A. Browning, A Treatise on the Laws Relating to Pensions, Patents, Bounties and Other Applications Before the Executive Departments 91-92 (1893) (if prior wife of second husband is discovered, supposed remarriage is null and void, and pensioner is entitled to have her pension, with arrears, restored).

95. The original Veterans' Administration was created in 1930 with the authority to administer the veterans' benefit laws. For a discussion of the 20th century Administration history, including creation of the new Administration, see 38 U.S.C.A. at 4-5 (1959).


97. Id. at 379.

98. Id. at 381.

99. Id. at 387.
eral Regulations, yet no reference to it was made in either the House or Senate reports describing the effect of the incorporation. In both reports the explanation for the incorporation of the exception was that the limited remarriage privileges of widows of the Civil War, Indian wars, and Spanish-American War should be restricted "in the interest of uniformity."  

Within five years, in 1962, the inadequacies of the summary congressional statement of the effect of a void marriage had become apparent, and it was expanded to provide as follows:

The remarriage of the widow of a veteran shall not bar the furnishing of benefits to her as the widow of the veteran if the remarriage is void, or has been annulled by a court with basic authority to render annulment decrees unless the Veterans' Administration determines that the annulment was secured through fraud by either party or collusion.

This amendment not only restored the Administration's pre-1957 treatment of voidable marriages in a manner similar to void marriages, but also incorporated another part of the Administration's treatment of the problem area that had been overlooked in the earlier amendment—a possible administrative option to ignore a state court's decree of nullity if it appeared to have been obtained through fraud or collusion. Earlier the Administrator had detailed the magnitude of the problem created by a propensity on the part of some state courts to grant decrees of nullity when there was no possible basis therefor and had discussed the "appalling number of cases" in which parties had used annulment proceedings collusively to secure the restoration of a widow claimant to the rolls and for other purposes. The Administrator had also had published the views of the Office of the Solicitor on the responsibility of the Veterans' Administration to refuse to recognize a decree of nullity where investigation established unmistakable evidence of collusion or fraud. By the 1962 amendment, then, Congress essentially adopted the former position of the Administra-

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100. 38 C.F.R. §§ 4.64(c), 13.402 (1956).
103. 2 DEc. ADM'R VET. AFF. 380 (1940) (apparently relying on Address by Judge Charles Desmond, Siena College Forum, reprinted as The Annulment Problem, 20 N.Y. ST. B.A. BULL. 59 (1948)).
104. Id.
105. Id. at 382–84.
tion except with respect to the time of restoration of a claimant to the compensation or pension rolls.106

The legislative history does not reflect that this adoption of the pre-1957 position of the Administration is what the 1962 amendment accomplishes. Rather, committee reports and debate reveal an emphasis on the need for uniform treatment in an area of law wherein state laws differ very substantially.107 It is correct that the amendment will again permit a more nearly uniform treatment of those similar cases wherein inconsistency under the prior law had been caused by variance in treatment of the same defect as resulting in a void marriage in some states and a voidable marriage in other states.108 It does not, however, address the lack of uniformity created by variance in treatment of the same defect as resulting in a void or voidable marriage in some states but neither in other states,109 or by variance in general availability of annulment proceedings in different states.110 The amendment as originally proposed would have provided more precise guidelines as to the types of annulment decrees (of voidable marriages) that would be recognized, by requiring an annulment by a court of competent jurisdiction, granted "on a ground going to the essentials of the marriage relationship" to a "woman" who was either "the aggrieved party or was mentally incompetent at the time of the remarriage."111 A House committee amendment removed the guidelines in order to simplify administrative procedures by making it

106. Under the language of the statutory provision it would seem that a party to a void marriage should never be deprived of benefits, but the Administrator construed the 1962 amendments as effecting no change from the former administrative practice of restoring benefits no earlier than the date on which the parties cease to cohabit. S. REP. NO. 1842, 87th Cong., 2d Sess. 2, reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2589, 2590. In voidable marriage cases, restoration of benefits is effective as of the date the annulment decree becomes final only if claim therefor is filed within one year; otherwise, benefits are restored as of the date of claim. 38 U.S.C. § 3010(k) (1970).


108. See, e.g., H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.9, at 81-82 (1968) (discussion of variety of approaches with respect to marriages of underaged persons).

109. See, e.g., id. §§ 2.15 (discussion of effect of mental incompetence), .17 (discussion of effect of fraud).


unnecessary to conduct investigations and other inquiries on difficult questions. The committee amendment also resulted in rejection of the attempt to limit restoration of benefits by a fault test, but the thrust of the original drafting—identification of a few federally recognized grounds for avoidance of marriage from among the many variant state grounds and, thus, much of the desired uniformity—was lost.

3. The effect of a meretricious relationship and of termination thereof

Although intentional failure to conform to ceremonial or other formalities required to perfect a marriage under controlling laws may disqualify a surviving spouse for compensation or pension purposes, entering into a meretricious relationship rather than an effective remarriage could have beneficial results if "remarriage" were the only basis for terminating a living widow's benefits. This possibility had apparently been recognized well before the end of the nineteenth century. The Commissioner of Pensions attempted to deal with the problem by terminating the pensions of those widows found to be living in a meretricious relationship: "It clearly has been the intent of Congress at all times . . . to discountenance the claims of a certain class of soldiers' widows who dishonor the dead by living in adulterous cohabitation while drawing the pension allowed for the loss of the husband's support." The Secretary of the Interior reportedly disagreed, deciding that such cohabitation did not terminate the pension under existing law, though his office may have sanctioned cutting off pensions on questionable estoppel reasoning or by manipulation of the presumption of marriage based on cohabitation and reputation. Congressional response was to provide that the validity of

112. See, e.g., 13 Cong. Rec. 6963 (1882) (remarks of Rep. Browne) ("[I]n many instances it is said . . . that widows do not marry, but live in . . . improper relations simply because they know that a marriage suspends the payment of the money.").

113. Commissioner's Ruling No. 113 (June 3, 1885) (denying claim to restoration of pension), in A Digest of the Laws of the United States Governing the Granting of Army and Navy Pensions and Bounty-Land Warrants; Decisions of the Secretary of Interior, and Rulings and Orders of the Commissioner of Pensions Thereunder 19 (F. Curtis & W. Webster eds. 1885), See also A. Browning, A Treatise on the Laws Relating to Pensions, Patents, Bounties and Other Applications Before the Executive Departments 92 (1893) (counseling applications for restoration of pension by widows so terminated).


115. No fully reported opinions found adopt these bases for termination of wid-
marriages should be determined by the law of specified places of residence\textsuperscript{116} and that "the open and notorious adulterous cohabitation of a widow shall operate to terminate her pension from the commencement of such cohabitation."\textsuperscript{117} In the House of Representatives the proponent of the enactment observed that if cohabitation suspended the pension, "that obstruction to marriage [fear of loss of pension] will be removed;" also evidenced was a strong sense of indignation over the possibility of a widow and her paramour living on the pension given the widow "in consequence of the death of the soldier husband."\textsuperscript{118} An administrator later advanced a less moralistic rationale for the provision: Assuming that the reason for granting a pension to a widow was to substitute for the husband's presence and support, forfeiture of the pension upon proof of an adulterous cohabitation was "\textit{not} merely a penalty to be inflicted [but] is based upon the assumption that the widow has voluntarily, openly, and notoriously \textit{substituted a paramour for her deceased husband and is supported by him}."\textsuperscript{119}

The provision terminating benefits for adulterous cohabitation continued to apply to widows of pre-World War I veterans until repealed as part of the 1957 revision and consolidation of veterans' laws.\textsuperscript{120} A similar provision had been adopted as part of the early World War I compensation legislation,\textsuperscript{121} but was repealed and was not replaced in 1924;\textsuperscript{122} consequently it did not immediately become part of the law

\textsuperscript{116}See \textit{notes 40–41} and accompanying text \textit{supra}.
\textsuperscript{119}Sarah E. West, 3 Interior Dec. Pension Claims 115, 119 (1890) (emphasis in original).
\textsuperscript{122}World War Veterans' Act, 1924, ch. 320, § 600(5), 43 Stat. 607.
governing payment of compensation to widows of veterans of the later wars. But history sometimes repeats itself—and so it did in this problem area.

On the rationale that widows could conceal the record of their ceremonial marriage in order to continue to receive benefits, the Veterans' Administration adopted an administrative rule that presumed remarriage, thus placing the burden on the widow to prove continued eligibility when there was proof (1) that she was cohabiting with a man as his wife, (2) that they were holding themselves out to the general community as husband and wife (generally established by the requisite cohabitation), and (3) that they had a general reputation in the community of being married to each other.\textsuperscript{123} Faced in 1959 with an unusual court challenge to its application of the presumption to terminate the pension of a widow,\textsuperscript{124} the Administration advanced estoppel reasoning in support of its position. Observing that neither the Administrator nor the United States had been damaged by reliance on appellant's conduct or representation, the court brushed aside this reasoning in a dictum, stating that the Administrator's position could not be reconciled with the intention of Congress.\textsuperscript{125}

The Veterans' Administration promptly sought congressional confirmation of its position. Congress responded in 1962 by adopting the Administration's proposed restriction of the definition of "widow" to require that she be one who "(in cases not involving remarriage) has not since the death of the veteran, [and after the date of this enactment on September 9, 1962], lived with another man and held herself out openly to the public to be the wife of such other man."\textsuperscript{126} The justification asserted on behalf of the proposal again related to the difficulties of proof: Although the law requires discontinuance of benefits upon proof of remarriage, it is sometimes impossible to determine whether there has been a remarriage, as when the woman denies that

\begin{footnotes}
\footnote{123. H.R. Rep. No. 1459, 87th Cong., 2d Sess. 5 (1962).}
\footnote{125. Sinlao v. United States, 271 F.2d 846 (D.C. Cir. 1959) (per curiam).}
\end{footnotes}
she has remarried, but lives with or has lived with a man under cir-
cumstances giving rise to an inference of marriage; information that
would lead to proving or disproving the inference is peculiarly within
the knowledge and possession of the parties involved so that it may be
impossible for the Administration to obtain the information.\textsuperscript{127} The
restriction was considered to be applicable to a relationship "irrespec-
tive of its period of duration, and notwithstanding that it existed in the
past and has been terminated," excepting only secretive relationships
or those which consist of "occasional short interludes (such as over-
night or over a weekend), or which [are] otherwise ostensibly illicit in
nature."\textsuperscript{128} The restriction differs from the Administration's presump-
tion-of-remarriage approach in not requiring a reputation of marriage
in the community. More significantly, the statutory restriction does
not incorporate an exception that the Administration had followed,
that is, the administrative presumption had not been applied in cases
wherein there could not be a legal "marriage" because of an existing
impediment such as consanguinity or a prior spouse.\textsuperscript{129} In order to
avoid retroactive application of the foregoing changes, the statutory
restriction was made applicable only to conduct occurring after the
date of enactment.\textsuperscript{130} Nevertheless, the Administrator provided assur-
ance that the Administration would continue to apply its presumption-
of-remarriage rule to cases involving husband-and-wife relationships
existing before the enactment; the Senate report acknowledged this
understanding.\textsuperscript{131}

Still a problem persisted. A 1967 court decision opened the path to
judicial review of termination cases.\textsuperscript{132} In a series of suits, widows of
World War II servicemen whose benefit payments had been termi-
nated under the administrative presumption-of-remarriage rule ob-

\textsuperscript{127} Letter from J.S. Gleason, Jr., Veterans' Administrator, to Representative Olin
2, 5 (1962).

\textsuperscript{128} \textit{Id.}, \textit{reprinted in} H.R. Rep. No. 1459, 87th Cong., 2d Sess. 2, 6 (1962). \textit{See}
38 C.F.R. \textsection 3.1574(c) (1975).

\textsuperscript{129} 38 C.F.R. \textsection 3.1574 (1975); Letter from J.S. Gleason, Veterans' Administra-

Cong. & Ad. News} 2590.


\textsuperscript{132} Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967) (overruling, \textit{inter alia}, Sin-
lao v. United States, 271 F.2d 846 (D.C. Cir. 1959)).
tained judgments for restoration.\textsuperscript{133} Slamming the door on such judicial review of the Administration’s decisions as forcefully as it could, Congress in 1970 also expressly endorsed application of the presumption in pre-1962 cases.\textsuperscript{134} In the same enactment, however, Congress also provided for restoration to the rolls of any widow who “ceases living with another man and holding herself out openly to the public as his wife.”\textsuperscript{135} This provision, together with the parallel provision restoring to the rolls those widows whose remarriages have been terminated by death or divorce, had been endorsed by the Administrator, who reasoned that the same considerations made it equitable to restore benefits in both types of cases.\textsuperscript{136}

By providing for restoration of benefits upon proof of termination of a meretricious relationship, Congress has removed the most punitive feature of the restriction on receipt of compensation or a pension that began with forfeiture of a widow’s pension upon proof of “adulterous cohabitation.” It has also, in its most recent round with the problem, avoided moralizing justifications. But do the justifications advanced—the difficulties of a nonparty to a marriage proving a remarriage—support the provision adopted? A tentative answer can be suggested at this point: The congressional provision goes further than necessary to meet the proof problem. The administrative presumption approach seems both substantively and semantically preferable. In the end, one must face the moral issue posed by the estoppel reasoning on which the Administration at one point relied: If a person holds himself or herself out to the community to be the spouse of a person with whom he or she lives, should he or she be permitted to deny that relationship in order to benefit in private? An alternative to answering that question—or perhaps an unemotional basis for answering that question—may lie in identifying the reason or reasons for providing survivors’ benefits. If the reason is to provide financial support, then arguably the pension should be terminated only upon proof of a rela-


\textsuperscript{134} See 38 U.S.C. \textsection 3111 (1970) (prohibiting compensation or pension payments in cases wherein such payments would not have been made under the Administration’s standard prior to the 1962 statement).

\textsuperscript{135} Id. \textsection 103(d)(3).

\textsuperscript{136} See note 67 and accompanying text \textit{supra}.
relationship that provides some basis for an assumption that substitute support will be provided.137

No similar provision for treatment of meretricious relationships as remarriages has been incorporated in the insurance provisions of the Social Security Act or the Railroad Retirement Act, discussed hereafter. Such relationships may be treated as marriages, however, for eligibility and benefit-amount determinations under the Supplemental Security Income title of the Social Security Act, the recently adopted federal program providing public assistance (need-based) payments for aged, blind, and disabled adults.138 Strangely enough, under the veterans’ laws the marriage presumption is not similarly applied for eligibility and benefit-amount determinations under the need-related, non-service-connected disability pension program for veterans.

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137. The rationale suggested in the text is explored in Lewis v. Martin, 397 U.S. 552 (1970) (upholding HEW regulation governing state plans for Aid to Families with Dependent Children that prohibited assumption of availability to child of income of persons other than natural or adoptive parent or stepparent ceremonially married to child's natural or adoptive parent and legally obligated to support under law of general applicability), but application of the rationale in this setting would be a congressional policy decision. Although the effect of the presumed remarriage provision is to establish a conclusive presumption of remarriage, there appears to be small possibility of attacking it under the due process clause of the fifth amendment. See Weinberger v. Salfi, 422 U.S. 749, 767–75 (1975) (reviewing Court's treatment of conclusive presumptions). Given the restrictive view evidenced in the Weinberger opinion and the broad any-reasonable-basis test established in Dandridge v. Williams, 397 U.S. 471 (1970), for review of due process challenges to social legislation discriminations based on equal protection standards, there seems to be no basis for constitutional challenge to many of the marginally irrational discriminations not based on sex or illegitimacy that appear in the beneficiary definitions of federal income maintenance legislation.

138. 42 U.S.C. § 1382c(d) (Supp. V 1975). Section 1382c(d) provides in part as follows:

In determining whether two individuals are husband and wife for purposes of this subchapter, appropriate State law shall be applied; except that . . . (2) if a man and woman are found to be holding themselves out to the community in which they reside as husband and wife, they shall be so considered for purposes of this subchapter . . . .

Existence of a presumed marriage may have substantial impact on the amount of SSI assistance available to a couple. For example, under the original payment formula, an eligible individual was entitled to receive a maximum of $1,752, while an eligible individual with an eligible spouse was entitled to a maximum of $2,628, id. § 1382(b), so that the increase in income to the couple attributable to the spouse is only half that that it would be if the “eligible spouse” were instead treated as an “eligible individual.” If a person treated as a spouse is not an “eligible” spouse, that person’s income and resources may be treated as included within the eligible individual’s income and resources for eligibility and benefit-amount determination. Id. § 1382c(f)(l).
II. OASDI—THE "INSURANCE" PROVISIONS OF THE SOCIAL SECURITY ACT

The "insurance" title (OASDI) of the Social Security Act provides monthly benefits for certain dependents of individuals who are entitled to retirement or disability benefits (primary benefits) and for certain survivors of individuals who are "fully insured" at the time of death.

The original old-age insurance title included no provision for such secondary benefits. Based on an individual equity approach (benefits directly related to contributions), the Act did provide for lump-sum rebates to assure approximate return of contributions for which the contributing worker would have otherwise received no benefit. Thus, if a person who had been required to make contributions under the Act died before attaining the age of sixty-five, a lump-sum payment was paid to his or her estate. A person who attained age sixty-five without having made sufficient contributions to qualify for old-age benefits was entitled to a lump-sum rebate.

The first major amendments to the Social Security Act, adopted in 1939, began to erode both the individual equity base of the old-age insurance provisions and the rebate features of the Act. The provision for lump-sum rebates to contributors who failed to qualify for old-age benefits by age sixty-five was removed; lump-sum death payments

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140. Retirement benefits may be payable to an individual who is fully insured, has attained age 62, and has filed application for the benefits or was entitled to disability insurance benefits for the month preceding the month in which he or she attains age 65. Id. § 402(a). Disability benefits may be payable to an individual who is insured for such benefits and is under a "disability" as defined in the Act. Id. § 423(a). Amounts payable are subject to reduction for earnings in excess of permitted amounts. Id. § 403(b), (f). Different rules may govern eligibility for persons aged 72 and older. Id. §§ 427-428. For the definition of "fully insured," see note 141 infra. The definition of insured status for disability benefit purposes is more complex because it also incorporates less demanding alternative coverage possibilities. Id. § 423(c).

141. A "fully insured" individual is one who had not less than one quarter of coverage for each calendar year elapsing after the later of 1950 or the year in which the individual attained age 21 and the earlier of the year of death or of attaining age 62, but at least six quarters of coverage or 40 quarters of coverage or, for a person who died before 1951, six quarters of coverage. Id. § 414(a).


144. Id. § 204(a).
were reduced.\textsuperscript{145} Substituted were payments to specified dependents of individuals entitled to primary benefits and to specified survivors of individuals who died fully insured.\textsuperscript{146} Benefit changes had been recommended by both the administering Social Security Board and by the Advisory Council on Social Security for two stated purposes: (1) To increase benefits for individuals retiring in the early years of the program without substantially increasing the cost of the program; and (2) to advance what these groups had concluded should be the primary purpose of social legislation—"to pay benefits in accordance with the presumptive needs of the beneficiaries, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents"\textsuperscript{147}—and thus to reduce the possibility that a surviving wife or children would have to resort to public assistance or general relief.\textsuperscript{148} The first purpose—to increase the soon-to-be-paid benefits—was accomplished by providing monthly benefits for aged wives and young children of retired workers.\textsuperscript{149} The second purpose was to be achieved by substituting monthly benefits for aged widows, orphans, and dependent parents of deceased workers for the prospectively large lump-sum death payments to the workers' estates.\textsuperscript{150} The same amendments also changed the basis for old-age benefits for insured workers from a percentage of total wage credits\textsuperscript{1}\textsuperscript{5}\textsuperscript{1} to a percentage of the average monthly wage, thereby effectively reducing the maximum monthly benefit for the insured from $85 to

\textsuperscript{145} Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360. The 1939 amendments provided for a lump-sum death payment equal to only six times the primary insurance benefit amount or PIA, that is, the maximum retirement or other benefit (maximum PIA = $60). \textit{Id.} § 202(g). In 1950 the payment was reduced to three times the PIA (maximum PIA = $80). Social Security Act Amendments of 1950, ch. 809, § 202(i). 64 Stat. 477. By Social Security Act Amendments of 1954, ch. 1206, § 102(ii)(2), 68 Stat. 1052, the death payment was reduced to the lesser of three times the PIA (maximum = $522.80) or $255. The maximum death payment currently remains at $255. 42 U.S.C. § 402(i) (1970).

\textsuperscript{146} Social Security Act Amendments of 1939, ch. 666, § 202, 53 Stat. 1360.


\textsuperscript{148} 4 SOCIAL SECURITY BUL. ANN. REP. 168 (1939).

\textsuperscript{149} H.R. REP. No. 728, 76th Cong., 1st Sess. 7 (1939).

\textsuperscript{150} \textit{Id.}, S. REP. No. 734, 76th Cong., 1st Sess. 11 (1939).

\textsuperscript{151} Social Security Act of 1935, ch. 331, § 202(a), 49 Stat. 620.
$60.\textsuperscript{152} Thus, the effect of the benefit changes in the 1939 amendments was to create a pattern of family protection with some sacrifice of individual protection. In the words of one of the influential shapers of the social security pattern, "the new pattern of benefits had the basic social advantage of relating the benefits to the probable need as indicated by the existence of dependents."\textsuperscript{153}

Dependents' benefits presently include wife's, husband's, and child's benefits.\textsuperscript{154} Survivors' benefits include widow's or surviving divorced wife's benefits; widower's benefits; child's benefits; mother's, surviving divorced mother's, or father's benefits (that is, for the mother or father of a deceased worker's child); and parent's benefits (that is, for the mother or father of the deceased worker).\textsuperscript{155} The Act provides detailed definitions for each of the relationships on which a claim for secondary benefits may be based.\textsuperscript{156} Although the definitions present several possible bases for establishing the necessary relationship,\textsuperscript{157} one common possibility is a marriage relationship or a former marriage relationship.\textsuperscript{158} The eligibility definitions also require, with
varying exceptions to be discussed, that an applicant for or recipient of dependents’ or survivors’ benefits be unmarried.\textsuperscript{159}

The Act now provides three basic tests for determining whether a necessary marriage relationship to an insured worker exists for OASDI purposes. In the order in which they should be applied, they are as follows: The valid marriage test, the intestacy devolution test, and the legal impediment test.\textsuperscript{160} The intestacy devolution test will be discussed first, however, because it was the test adopted in 1939 when secondary benefits were first added to the Act.

\section*{A. The Intestacy Devolution Test of Marital Status}

After defining the various relationships of persons entitled to receive the newly created dependents’ and survivors’ benefits, the 1939 amendatory act provided:

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 \textsuperscript{[in which the insured individual was domiciled at the time of filing, for dependent’s benefits; or at the time the insured individual held against due process challenge. See Weinberger v. Salfi, 422 U.S. 749, 776–85 (1975) (6–3). The “divorced wife” and “surviving divorced wife” categories require marriage to the individual for 20 years preceding the effective date of the divorce. 42 U.S.C. § 416(d)(1)-(2) (1970).

\textsuperscript{159} Other common requirements that will not be discussed include the following:

1. A dependency or support requirement for secondary benefits other than those payable exclusively for the benefit of certain female beneficiaries (wife’s, widow’s, and mother’s benefits), though by court and administrative extension, father’s benefits have also been created and drawn into this category. See note 155 \textsuperscript{supra}. Thus, a child must have been “dependent” on the insured individual at one of the times identified in the statute to qualify for child’s benefits. 42 U.S.C. § 402(d)(1)-(C) (1970). Whether a child is dependent at one of the applicable times depends on the character of the relationship of the child to the insured individual (for example, natural or adoptive parent or stepparent). \textit{Id.} § 402(d)(3)-(4), (8)-(9) (1970 & Supp. V 1975); 20 C.F.R. § 404.324–327a (1976). A husband, widower, or parent (whether male or female) must have been receiving at least half of his or her support from the insured individual at specified possible times. \textit{Id.} § 402(c)(1)(C) (husband). (f)(1)(D) (widower). (h) (1)(B) (parent) (1970).

2. Age limits for all benefits except those based on the beneficiary having in his or her care a child entitled to OASDI benefits, for example, age 62 for wife, husband, or parent, \textit{id.} § 402(b)(1)(B). (c)(1)(B). (h)(1)(A); age 60 for widow or widower or, if under a disability, age 50–60, \textit{id.} § 402(e)(1)(B). (f)(1)(B) (1970 & Supp. V 1975); for a child, under age 18, or under age 22 and a full-time student, or under a disability before attaining age 22, \textit{id.} § 402(d)(1)(B).

died, for survivor's benefits; or if the insured lacked a state domicile, 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.\textsuperscript{161}

Why the intestate devolution test was chosen was not discussed in either the Board's or Council's reports recommending the changes,\textsuperscript{162} nor was it discussed in the congressional reports or debates other than in the form of paraphrases of the language of the bill.\textsuperscript{163} It may, however, have been derived from the Board's background of experience with administration of the lump-sum rebates under the original Act.

The lump-sum rebate of contributions required by the original Social Security Act was made to the worker's estate.\textsuperscript{164} If the amount of such a payment was $500 or less, the Board was empowered to pay it "to the persons found by the Board to be entitled thereto under the law of the State in which the deceased was domiciled, without the necessity of compliance with the requirements of law with respect to the administration of such estate."\textsuperscript{165} Because the early claims for lump-sum payments were necessarily for small amounts,\textsuperscript{166} the Board was immediately thrust into the problems of determining the relationships of applicants to deceased workers—for example, whether a "wi-
dow" claimant would be treated as the "widow" in the state of the
decedent's domicile for the purpose of intestate devolution of personal
property of the decedent.\textsuperscript{167} "Plentifully sprinkled" among the appli-
cations from "widows" were those asserting that status by virtue of a
common law marriage with the deceased.\textsuperscript{168} The problem of deter-
mining whether such claims should be granted was of sufficient pro-
portion to lead attorneys in the Office of the General Counsel to the
Board to conduct an intensive study of the law of common law mar-
rriages in several states.\textsuperscript{169} Furthermore, the Board was often required
to obtain opinions of the General Counsel as to the application of
state laws of inheritance, exemptions, and priorities.\textsuperscript{170}

Given the decisional complications engendered by reliance on the
variant state laws governing distribution of decedents' estates, it is
strange that the Board did not recommend some other approach for
use in identifying the beneficiaries of the new social security benefits.
This omission is particularly strange in light of the fact that the Board
had proposed resort to another approach in the event Congress did
not accept the recommendation to substitute payments to survivors for
the lump-sum rebates. The Board had requested that in that event the
precedent of the veterans' laws be followed—that is, the recipients of
the lump-sum payments should be expressly identified—thus elimi-

\textsuperscript{167} The grant of power was broad enough to have permitted payment in accord-
ance with a will of the decedent, but the Board excluded that possibility in its early
regulations covering lump-sum death payments. 2 Fed. Reg. 1282-83 (1937) (requir-
ing affirmation by applicant, if deceased left will, that law of state would not require
probate of such will and payment could lawfully be made under the intestacy law of
the state). Although the Board expressly reserved discretion not to make a payment
even though all its conditions had been met, it was undoubtedly under substantial
pressure to make such payments to save probate expenses for estates having little or
no other assets. At one point the President recommended that death payments always
be made directly to a wife or dependent children in order to save the expense of pro-
was criticism of the "complicated and expensive requirements made necessary by the
law." C. McKinley & R. Frase, \textit{Launching Social Security} 35 (1970), but ap-
parently the Board never seriously considered asking Congress to change the law—at
least not for 1937 and 1938. \textit{Id.} at 377.

\textsuperscript{168} Billig & Lynch, \textit{Common-Law Marriage in Minnesota: A Problem in Social
Security}, 22 \textit{Minn. L. Rev.} 177 (1938).

\textsuperscript{169} \textit{Id.} at 179. The authors of this article were the Senior Attorney and the Claims
Attorney of the Office of the General Counsel. \textit{See also Lynch, Social Security Encoun-

\textsuperscript{170} Some 2,500 opinions on such points were obtained in 1938. 3 \textit{Social Security
nating the need for the Board to make determinations about application of the state inheritance laws.\footnote{171} To have followed the precedent of the veterans' laws in this respect would have been the simpler course, as the Board seems to have recognized. For example, identification of the recipients of the new benefits through a "valid" marital status (or, for children and parents, through relationships derived therefrom) would have been in the tradition of the veterans' laws. The test adopted instead seems to have been directed toward more precise identification of those persons probably dependent on an insured worker and, perhaps, possible identification of those persons whom an insured worker would probably want to receive this new "asset," thereby partaking of a property approach as well as of a status approach. Thus viewed, the intestacy devolution test may be regarded as a compromise between treatment of the new social security benefits as a form of property subject to the insured worker's control and treatment as a form of social benefit indirectly subject to the government's control. A model for each approach was available to the drafters of the 1939 amendments—the property-like annuity model of the Civil Service Retirement Act\footnote{173} and the need-based welfare model of the public assistance provisions of the Social Security Act.\footnote{174}

Under the 1934 amendments of the Civil Service Retirement Act, rebates of contributions not exhausted in annuity payments to a federal civil service employee were payable to the person or persons designated by the employee or, in the alternative, to the deceased employee's legal representative, or to his or her estate only if the employee failed to record such a beneficiary designation in his or her record.\footnote{175} Similar but more limited control over beneficiary designa-

\footnote{171. Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 2286 (1939).}

\footnote{172. In Mathews v. Lucas, 96 S. Ct. 2755 (1976), the Court stated as follows: [A state's intestacy law is an] embodiment of the popular view within the jurisdiction of how a parent would have his property devolved among his children in the event of death, without specific directions [and] also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation . . . in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life. \textit{Id.} at 2766–67.}


\footnote{175. See note 165 \textit{supra}.}
tion had been permitted under the World War I war risk insurance provisions, which were originally intended as a substitute for service and survivors’ pensions. There would have been administrative complications in adapting such a scheme to the new social “insurance.” Nevertheless, a board and agency that could handle the gigantic task of planning and setting up accounts for and registering and issuing employee account numbers and cards to an estimated 26 million workers could surely have provided a workable record system for such an approach. On the other hand, the ultimate purpose of the 1939 amendments and the substantial redirection from the insurance concepts of the original Social Security Act embodied in the 1939 amendments militated against an approach that would have permitted the working contributors a measure of control over their contributions, thereby resulting in possible detriment to the social objective to provide for presumed dependents. The risk of such subversion of the social objective could have been negated by limitation of who could be designated as beneficiary, as was done under the insurance provisions for service personnel and veterans.

Under the welfare model of the public assistance provisions of the Social Security Act, a dependency or need test would have been used. There is a hint that the Social Security Board may have considered that an actual dependency test might be appropriate, given the objective of providing benefits more in line with the needs of beneficiaries, but chose to rely on need presumed from relationship, which would “take account of greater presumptive need of the married couple without requiring investigation of individual need.” Rejection of a need test might properly have been based on the dichotomy in the

176. Act of Aug. 9, 1921, ch. 57. § 26, 42 Stat. 147 (providing for payments to estate should no person within the permitted class of beneficiaries survive the insured or for escheat to the United States if it would otherwise escheat to a state); Act of Oct. 6, 1917, ch. 105, art. IV, 40 Stat. 398 (right to designate beneficiary limited to designation of spouse, child, grandchild, parent, brother, or sister, any or all; right of designation could be exercised in will), as amended by Act of Dec. 24, 1919, ch. 16, § 13, 41 Stat. 371 (expanding permitted class of beneficiaries to include uncles, aunts, nephews, nieces, brothers-in-law, and sisters-in-law of the insured). The Act of Oct. 6, 1917, as amended, was repealed and replaced by the consolidation, revision, and codification known as the World War Veterans’ Act, 1924, ch. 320. 43 Stat. 607, and the insurance provisions were incorporated in title III thereof.


179. See note 176 supra.

Social Security Act between the “insurance,” employer-employee-funded approach of title II and the public assistance, government-funded approach of titles I (old-age assistance) and IV (aid for dependent children) of the Social Security Act.

In any event, the intestacy devolution test was adopted; the next question to be answered was what it meant. Did it perpetuate the right-to-inherit test inherent in the original provisions for payment of lump-sum rebates to deceased veterans' estates, or was it intended to establish a status test for dependents and survivors? Given a status test, whether an applicant for OASDI dependents' or survivors' benefits would actually be entitled to share in the distribution of the deceased worker's personal estate would be irrelevant, the question instead being whether the applicant would have the required status to so participate under some factual circumstance that need not actually exist. In its first regulations under the 1939 amendments, the Board appeared to interpret the intestacy devolution test as establishing a status test. Its regulations incorporated an example indicating that a wife's waiver of a right to share in her husband's property on his decease would be immaterial in determining whether she was his widow. This “status” interpretation was promptly challenged and rejected by both the trial and appellate courts in Kandelin v. Kandelin. Mrs. Kandelin, concededly the “widow” of a deceased worker, had not lived with the decedent for at least twelve years prior to his death. Therefore, as an “abandoning spouse” under New York law, she was disqualified to inherit from him. She applied for and was granted the lump-sum death payment, also payable under the intestacy devolution test at that time; this ruling was challenged on behalf of the decedent's child. The Government argued that the 1939 amendments had been adopted to eliminate the need for factual determinations as to the right to share in a decedent's estate, permitting determinations to be made on the basis of evidence about the relationship alone. The lower court rejected this argument, reasoning in part from the policy anomaly that under that interpretation a woman would be entitled to benefits as a widow even if she had murdered her husband and was “civilly dead.”

183. Id. at 343–44.
184. Id. at 344.
understand the Government's argument and emphasizing the statutory language: "Applicants who according to such law [of intestate devolution] would have the same status relative to taking intestate personal property as a wife, widow, child or parent shall be deemed such."185

Under the Kandelin decision then, an applicant for dependents' or survivors' benefits would have to be entitled to share in the distribution of at least some part of the deceased worker's personal property. The next question to be answered was whether the applicant had to be entitled to share in exactly the same manner as those normally occupying the status that the applicant wished to assume. The question was answered affirmatively by a referee of the Social Security Administration, but negatively by the federal district court that reviewed the case. A putative spouse was thus found, in Aubrey v. Folsom,186 to have widow status for social security purposes even though she would not share in the decedent's estate to the same extent as would a "widow" who had been validly married to the decedent.187

If the Government's position in Kandelin was correct, and the intestacy devolution test was intended to eliminate questions about the right of a prospective beneficiary of the Social Security Act to share in the deceased worker's estate, then it is difficult to imagine a more obscure way to say that than in the language used in the statute. The Administration found it possible to use direct language in its first regu-

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185. 136 F.2d at 328 (emphasis added). In a 1957 amendment the "relative to" language emphasized by the court of appeals in Kandelin was changed to "with respect to" in Act of Aug. 30, 1957, Pub. L. No. 85-238, § 3(h), 71 Stat. 518 (codified at 42 U.S.C. § 416(h)(1)(A) (1970)), but no possible reason or explanation for the change can be found. It is assumed that no substantive change was intended by the rephrasing.

186. 151 F. Supp. 836 (N.D. Cal. 1957).

187. Under California law a putative spouse (a good faith participant in an invalid marriage) may be accorded spousal status for some purposes. In Aubrey, the putative spouse could share in distribution of property acquired by the parties during their putative marriage, but not in any separately acquired property of the decedent. In an earlier similar case, the court reversed denial of benefits because there was no separate property in the estate; hence, the question did not need to be decided. Speedling v. Hobby, 132 F. Supp. 833 (N.D. Cal. 1955). Whether there was or was not separate property in the Aubrey estate was considered irrelevant. 151 F. Supp. at 839–40. For discussions of the California putative spouse concepts, see Comment, Rights of the Putative and Meretricious Spouse in California, 50 CALIF. L. REV. 866 (1962); Comment, Effect of State Marital Laws on "Widow's" Benefits Under the Social Security Act, 1 SAN DIEGO L. REV. 76 (1964). In Aubrey the court also rejected a Government argument that because the rule that a putative spouse was entitled to share in the estate of the intestate putative spouse was based on equitable reasons, it was not a rule of intestate succession within the meaning of the statute. The court concluded that California law gave the putative spouse a right of "inheritance," not an equitable right. 151 F. Supp. at 839. But see note 212 infra.
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lation interpreting the statutory provision, incorporating an example and the statement that "[i]t is immaterial . . . whether she is actually entitled to inherit." 188 In 1951 the Administration adopted a new explanation of the statute: "Whether an applicant . . . has the status of such relative of such individual for the purpose of sharing in the latter's intestate personal property, is determined by 'applicable State law.'" 189 The Aubrey court relied on the "sharing" language. In 1962, however, the Administration amended the regulation to remove that language 190 and added the statement that appears in the current regulation, according necessary status on the basis of "right to share in [the insured worker's] estate." 191

The intestacy devolution test is of continuing significance despite the addition of the two tests of marriage now incorporated in the Act, hereinafter discussed. It may, for example, be substantively significant only in making eligible for benefits those putative spouses whose cases are not reached by the "legal impediment" test added in 1960. 192 Unfortunately the legal impediment test is expressly made applicable only after a determination that the valid marriage and intestacy devolution tests do not lead to the conclusion that an applicant has or had the necessary relationship to the insured individual. Furthermore, by the express language of that section, given competing applicants for spousal benefits, one eligible under the intestacy devolution test would prevail over one eligible under the legal impediment test.

B. The Valid Marriage Test

Within two years of the creation of the new dependents' and survivors' benefits, the Social Security Board was cataloging the problems flowing from the use of state law under the intestacy devolution test:

Because of the wide variation in the provisions, interpretation, and application of such State laws, consideration of the claims of dependents or survivors of insured workers has involved administrative complexities. These differences sometimes have made it necessary for the Board to make opposite decisions in the cases of claimants who

190. 27 id. 10,677 (1962).
lived in different States though other factors affecting family relationships were substantially similar.193

Thus began a series of annual recommendations for change for "greater uniformity in defining, for purposes of the insurance system, family relations qualifying members of a worker’s family for benefits."194

The hardship cases discussed in support of the recommendations tended to be the "impediment" cases, those in which there was no valid marriage, particularly wherein the parties had been ignorant of the irregularity.195 Under the laws of many states, no relief from such invalidity was available through the intestacy laws:

Technical defects in marital status have denied benefits to some women long accepted as wives by the communities in which they live. The Board recommends that any woman who has been thus accepted as the worker’s wife receive benefits on the same basis as a legal wife or widow, provided there is no impediment to a valid marriage at the time she applies for benefits or at the time of her husband’s death. This provision would avoid raising issues of validity in a common-law marriage of long duration.196

These recommendations thus looked to validation, for purposes of the Social Security Act, of invalid marriages. When Congress finally responded in 1957, however, it was with a provision that an applicant would have the necessary status for benefit purposes “if the courts [of the state of the insured worker’s domicile, or of the District of Columbia if there is no state domicile] would find that such applicant and such insured individual were validly married” at the time the applicant files for benefits (dependent) or at the time the insured individual died (survivor).197

No formal legislative history of the reasons for the amendment exists, in the sense of explaining the choice of the more restrictive approach than had earlier been recommended. The amendment was

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193. 6 SOCIAL SECURITY Bd. ANN. REP. 45 (1941). See also 8 SOCIAL SECURITY Bd. ANN. REP. 52 (1942) (“In the absence of Federal law defining the status of common-law wife, adopted children, divorcées, separated couples, and parents, the Board must apply the diverse provisions of the laws of 51 jurisdictions.”).
195. [1945] id. at 402.
196. [1946] id. at 463.
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added as part of a floor amendment in the Senate, with ultimate House concurrence, to a bill proposed for the purpose of correcting inequities in the application of the Social Security Act to certain members of the Armed Forces. It was represented as having been "discussed by the [Senate Finance] Committee," and was supported by a statement prepared "by the Department" that merely paraphrased the language of the amendment. Explanatory statements made on the floors of both the Senate and the House were limited to assertions that the amendment would clarify the status of widows under the Act with respect to OASDI benefit entitlement. In fact, the primary purpose of the floor amendment appears to have been to remove a restriction on availability of benefits for spouses and surviving spouses, that is, the requirement that a spouse have been "living with" the insured worker.

The total substantive effect of the new marriage test appears to have been only a clear rejection of the Kandelin decision, which had made ineligible for benefits a spouse who was validly married to an insured worker, but totally disqualified to share in the worker's estate under the controlling state intestacy laws. It had (and has) also the advantage of conceptual simplicity in comparison with the prior law, even though the questions relating to validity of marriage are the same as those faced under the original test. Only if a valid marriage to the

199. Id. at 15301.
200. Id. at 15301, 15534.
201. For discussion of the "living with" requirement, see notes 219–20 and accompanying text infra.
202. See discussion at notes 182–85 and accompanying text supra. See, e.g., Social Security Ruling No. 64–41, 1964 Social Security Rulings Cum. Bull. 35 (under state law, widow claimant estopped to assert invalidity of divorce for purpose of sharing in interstate estate, but not in establishing marriage status). Currently, the valid marriage test may also cast doubt on the application to a "valid" spouse of the administrative rule adopted in 1971 that denies benefits to any person who has been convicted of the felonious and intentional homicide of the insured individual. 20 C.F.R. § 404.364 (1976). See 42 U.S.C. § 405(a) (1970) (rulemaking power limited to making rules not inconsistent with subchapter). Application of the regulation to deny benefits to a widow-mother because of the wilful homicide of her husband has recently been upheld, Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975), but without challenge of the kind here suggested.
203. Other questions litigated under the intestacy devolution test would undoubtedly have been litigated under other marital status definitions. Such questions include the following:
1. The validity of dissolution of a preexisting marriage. See, e.g., Magner v. Hobby, 215 F.2d 190 (2d Cir. 1954) (no valid marriage because Mexican divorce not recognized under New York law); Sherman v. Federal Security Agency, 166 F.2d 451 (3d Cir. 1948) (New Jersey courts could properly find that clearly invalid divorce, pro-
insured worker cannot be established is it necessary to go on to the intestacy devolution test.

C. The Legal Impediment Test

Reform, when it finally came in 1960, was anticlimactic. In justificatory language reminiscent of the Administration's earlier statements in support of recommendations for change, both the House and Senate committees observed: "Since the State laws governing marriage and divorce are sometimes complex and subject to differing interpretations, a person may believe that he is validly married when he is not." The proposed change merited only passing reference in the House and no mention in the Senate, perhaps because attention was focused on the controversial addition of grants-in-aid for medical services to the aged.

The 1960 amendment provides that if an applicant for benefits based on a spousal relationship (wife, widow, husband, or widower) "in good faith went through a marriage ceremony with [the insured 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," that marriage shall be deemed to be valid, if the parties were "living in the same cured before parties became New Jersey residents, preceded marriage of applicant to deceased worker)."

2. Standing to attack the validity of a divorce. See, e.g., Trivanovitch v. Hobby, 219 F.2d 762 (D.C. Cir. 1955) (applying Massachusetts estoppel theory against former wife who had accepted benefits of invalid Mexican mail order divorce).


4. Effect of removal of an impediment to valid marriage for parties who have in good faith participated in an otherwise valid ceremony. See, e.g., Scalzi v. Folsom, 156 F. Supp. 838 (D.R.I. 1957) (factual question as to wife's willingness to participate in ceremonial marriage after impediment removed); Carr v. Hobby, 125 F. Supp. 545 (D. Mass. 1954) (factual question as to whether parties had been living together at time of removal of impediment).

5. Whether particular states recognize nonceremonial marriage as "common law" marriage or "marriage by estoppel." See, e.g., Sanders v. Altymeyer, 58 F. Supp. 67 (W.D. Tenn. 1944) (Tennessee law did not recognize former, and latter was doctrine applied to determine dependency rather than relationship for workmen's compensation purposes).


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household" at the time of the death of the insured individual (survivor's benefits) or of the application (dependent's benefits), but only if another person is not entitled to spousal benefits under the valid marriage test or the intestacy devolution test.206

There are parallels between this 1960 amendment and the legal impediment provisions of the veterans' benefit law.207 Both require a marriage which would have been valid but for a legal impediment not known to the person claiming benefits. Both require an absence of another eligible claimant of the same class (except that only a "legal" spouse may defeat the claimant under the veterans' laws, while under the OASDI provision either a spouse through a valid marriage or a person deemed to be a spouse under the intestacy devolution test may defeat a claimant). Similarity also exists between the veterans' law requirement of birth of a child or one year of cohabitation immediately before the death of the veteran and the OASDI requirement that the parties have been living in the same household at the death of the insured individual,208 but there the parallels end.

The OASDI provision introduces limitations not present in the veterans' law. It expressly requires a marriage "ceremony" and expressly defines a "legal impediment" in a manner that leads to a much narrower definition than that attached to the term as used in the veterans' law. The OASDI definition of "legal impediment" limits the term to include only those impediments "(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."209 Further, the OASDI expressly requires "good faith" and adds a seemingly

206. 42 U.S.C. § 416(h)(1)(B) (1970). Entitlement under the legal impediment provision will end upon the Secretary's certification that another person is entitled to spousal benefits. Id. § 405(i) (1970 & Supp. V 1975). One court has held that entitlement under the legal impediment provisions may continue to the extent the certification is not for the total spousal benefits available under the deceased worker's account, relying on liberal construction. Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976) (legal widow entitled only to $1.40 in widow's benefits, excess over amount of old-age benefits she was receiving under her own account).

207. See Part I-B supra.

208. In a more complex way, the OASDI provision becomes conditioned on birth of a child or child adoption or, in the alternative, nine months of marriage, through the definitions of "widow" and "widower." 42 U.S.C. § 416(c), (g) (1970 & Supp. V 1975). The "wife" and "husband" definitions (for dependents' benefits) are even more similar to the veterans' law provision in requiring, essentially, birth of a child or one year of marriage, id., § 416(b), (f), but the veterans' law provision applies only for purposes of survivors' benefits.

repetitious statement that the provision shall not apply if the Secretary
determines that the applicant “entered into such purported marriage
with such insured individual with knowledge that it would not be a
valid marriage.” 210

According some effect to invalid marriages entered into in good
faith is a practice derived in part from the Spanish civil law and its
“putative marriage” doctrine 211 and in part from a mixture of equita-
ble, community property, and partnership principles. 212 The OASDI
approach does not follow any of these models. In requiring a cere-
mony, the OASDI provision is consistent with the civil law; but the
basis for requiring a ceremony—the Roman Catholic canon law back-
ground of the civil law 213—has no direct relevance to the concept in
another setting, 214 except perhaps to evidence the required good

210. Id. It would seem that any definition of “good faith” would require lack of
knowledge of the impediment or of the consequent invalidity of the marriage or both.
The parallel provision for establishing the “child” relationship, id. § 416(h)(1)(A),
includes none of these requirements. Eisenhauer v. Mathews, 535 F.2d 681 (2d Cir.
1976).

211. See generally, Comment, The Putative Marriage Doctrine in Louisiana, 12
LOY. L. REV. 89 (1965). The Texas court derived putative spouse concepts from an
interpretation of fragmentary reports on the Spanish Civil Code, extending the “spirit”
of a provision that legitimatized children of a good faith null marriage to import the
“civil effects of true marriages” to invalid marriages. See Smith v. Smith, 1 Tex. 621
(1846) (ceremony occurred while Spanish law was governing law). Following adop-
tion of the common law in 1840, the rights of the putative spouse were limited, per-
haps only to a presumption that property is acquired by the joint labors and equally
owned by such putative spouse, see Comment, The Rights of Parties to a Putative
Marriage in Property Acquired by Their Joint Efforts, 1 TEX. L. REV. 469 (1923),
without a right to inherit or to administer the other putative spouse’s estate. 11 SW.
L.J. 245, 246 (1957) (arguing that the law of Texas in this area is now based on a
presumed partnership rather than on true putative spouse doctrine).

212. See UNIFORM MARRIAGE AND DIVORCE ACT § 209 note. For a discussion of
the doctrine as developed in California, see Comment, Rights of the Putative and
Meretricious Spouse in California, 30 CALIF. L. REV. 866 (1962); Comment, Domes-
tic Relations: Rights and Remedies of the Putative Spouse, 37 CALIF. L. REV. 671
(1949). The California courts have recognized a broader range of rights accruing to
putative spouses than have the Texas courts, but perhaps not the right to intestate
succession in a technical sense. Compare In re Estate of Levie, 50 Cal. App. 3d 572,
123 Cal. Rptr. 445 (1975), with In re Krone’s Estate, 83 Cal. App. 2d 766, 189 P.2d
note 187 supra. For the approach taken by the Washington court, see Latham v. Hen-
nnessey, 87 Wn. 2d 550, 554 P.2d 1057 (1976) (in dicta, signalling willingness to adopt
approach of California courts for disposition of property acquired during meretricious
relationship); In re Estate of Thornton, 81 Wn. 2d 72, 499 P.2d 864 (1972); Knoll v.
Knoll, 104 Wash. 110, 176 P. 22 (1918). For a discussion of the problems generally
faced in dividing property jointly acquired by an “unmarried” couple, see Comment,

213. Comment, The Requirements of a Marriage Ceremony for a Putative Rela-
tionship, 4 BAYLOR L. REV. 343, 345 (1952).

214. The Texas court seems to have taken this view. Having originally required a
ceremonial marriage “attended by the formalities prescribed by law,” Papoutsis v.
faith. In otherwise restricting "legal impediment" to defects related to prior marriages and procedures, however, the OASDI provision departs from the civil law model, which extends to good faith attempted marriages nullified by other restrictions on ability to marry. More significantly, so restricting the legal impediment test made it fall short of solving the problem identified as the justification for the 1960 amendment—the complexity of state laws governing marriage and divorce with consequent mistaken conclusions as to the validity of marriages. It seems that the drafters of the OASDI provision lacked the courage to "fly in the face" of the state laws restricting ability to marry for widely variant reasons. Such courage is necessary if a federal policy of providing more nearly uniform treatment of persons under the Social Security Act is to be achieved.

D. Effect of Divorce or Separation from Insured Individual

Under the current veterans' compensation and pension laws, no provision is made for a divorced spouse of a veteran; and provision is made for a surviving spouse who was separated from a deceased veteran only in the limited circumstance that the separation "was due to the misconduct of, or procured by, the veteran without the fault" of the spouse. A restrictive approach was also taken under the Social

Trevino, 167 S.W.2d 777, 779 (Tex. Civ. App. 1942), the court later held that a putative spouse would be recognized where there had been an attempted but invalid common law marriage, Hupp v. Hupp, 235 S.W.2d 753 (Tex. Civ. App. 1950).


217. Cf. 42 Op. ATT'Y GEN. No. 3 (June 1, 1961) (construing parallel provision in the veterans' laws).

218. 38 U.S.C. § 101(3) (1970 & Supp. V 1975). The provision is apparently directly derived from Act of May 13, 1938, ch. 214, § 3, 52 Stat. 353. At one point it was held that separation and abandonment were equivalent to divorce, Mary A. Garman, 3 Interior Dec. Pension Claims 179 (1889), but this was later overruled, La- vanchia L. Salisbury, 7 Interior Dec. Pension Claims 247 (1894). It was early held that a divorced wife could not be a widow. Mary C. Stacey, 1 Interior Dec. Pension Claims 435 (1887); 11 Op. ATT'Y GEN. 1 (1869).

See also Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §
Security Act when dependents’ and survivors’ benefits were first created, the 1939 amendments defining “wife” as one who was “living with” the insured individual at the time of filing an application for benefits and “widow” as one who was “living with” the insured individual at his death.\textsuperscript{219} This requirement was removed without explanation in 1957 by floor amendment.\textsuperscript{220} A “living with” requirement, though difficult to administer, does not seem inappropriate as one test to determine whether a legal spouse continued to have such a relationship to a primary beneficiary as to justify payment of a dependent’s or a survivor’s benefit, but the fault test of the veterans’ law definition is an anachronism.

Congress first addressed the problems created by divorce in relation to OASDI benefits in 1950, when provision was made for payment of mother’s benefits to a “former wife divorced”—that is, a divorced wife who is the mother or adoptive mother of a deceased worker’s child in her care.\textsuperscript{221} Finally, in 1965 Congress provided for payment of wife’s or widow’s benefits to a divorced wife who was married to an insured individual for a period of at least twenty years immediately prior to the effective date of the divorce, payable even though there is another eligible wife or widow.\textsuperscript{222} The extension of benefits was explained ex-

\footnotesize{\textsuperscript{902(16) (1970 & Supp. V 1975) (defining “widow or widower” as “decedent’s wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time”). “Justifiable cause” was given a broad interpretation in Thompson v. Lawson, 347 U.S. 334 (1954) (6–3), although compensation was therein denied. See also Matthews v. Walter, 512 F.2d 941 (D.C. Cir. 1975); Annot., 98 L. Ed. 739 (1954).}
\footnotesize{\textsuperscript{\textsuperscript{220. See notes 198–99 and accompanying text supra. The supporting statement provided by the “Department” merely reviewed the law as defining “living with” to require that a spouse have been living in the same household with the worker or have been receiving regular contributions from the insured individual or that the insured individual have been under court order to contribute to her support. 103 CONG. Rec. 15301 (1957). For discussions of the experience under the requirement, see R. LEVY, T. LEWIS & P. MARTIN, SOCIAL WELFARE AND THE INDIVIDUAL 176 (1971); Annot., 60 A.L.R.2d 1082 (1958).}}
clusively in terms of the needs of a divorcée who had been a housewife:

It is not uncommon for a marriage to end in divorce after many years, when the wife is too old to build up a substantial social security earnings record even if she can find a job.

These changes would provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years—especially housewives who have not been able to work and earn social security benefit protection of their own.

The accuracy of these statements for some cases cannot be disputed. What the explanations ignore, however, is the stronger justification flowing from the fact that contributions establishing the husband's "insurance" account are in part attributable to the wife's contributions. This conclusion is more readily seen in the context of community property law, which treats income of either spouse as income of both spouses, so that half of all social security contributions for one spouse are derived from the other spouse's interest. Although this interest of a wife divorced after a long period of marriage may be recognized in property or alimony provisions of a divorce or other decree, this possibility provides small consolation for a divorced wife whose former husband refuses to pay or has insufficient income or property to provide the equivalent of social security dependency or survivorship benefits. Under either or both explanations for providing for divorced wives, there is difficulty in trying to justify the all-after-twenty-years-or-nothing-before result incorporated in the present statutory provision.

E. Effect of Marriage or Remarriage and of Terminations Thereof

1. Effect of marriage or remarriage

OASDI eligibility definitions require that an applicant for or recipient of secondary benefits, other than a wife or husband, has not remarried or is not married, with varying exceptions for remarriages to persons entitled to specified types of OASDI benefits. For example, a widow or a surviving divorced wife is not made ineligible for widow's

benefits by reason of marriage to an individual entitled to a widower's, father's, or parent's benefits, or in most cases to an individual who has attained age eighteen but is entitled to child's benefits because of a disability. Nor is a divorced wife made ineligible for wife's benefits by reason of marriage to someone in one of the same benefit categories. A widower's benefits are similarly protected in the event of his remarriage. After age sixty, a widow or widower may marry anyone without termination of benefits, but payments will be reduced, as will be explained hereafter.

The complex network of protected remarriages among recipients of secondary benefits was added in 1958 to put an end to the hardship that had resulted from the marriage of two secondary beneficiaries under the previous law, which had required that the benefits of both be terminated. Another justification has been advanced by a federal district court. The court assumed that termination of secondary

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224. 42 U.S.C. § 402(e)(3) (1970). Section 402(e)(3) is limited with respect to marriage to a disabled recipient of child's benefits. Id. § 402(s). Reference to marriage to an individual entitled to father's benefits is supplied by regulation at 20 C.F.R. § 404.329(b) (1976). The statutory language excepting marriage to an individual receiving child's benefits "(an individual who has attained the age of 18 and is entitled to [child's insurance] benefits" appears to include a child over age 18 who is receiving benefits because a full-time student, but the controlling regulation states the more limited exception stated in the text accompanying this footnote. The regulation appears to be correct. The discrepancy in the language of the statute appears to result from the legislative amendment sequence. The marriage exception was adopted in 1956, when only disability-based benefits were available to a "child" over 18. Social Security Amendments of 1956, ch. 836, § 101(a), 70 Stat. 807. The provision for child's benefits for full-time students, aged 18-22, was added in 1965, without express extension of the marriage exception to the newly eligible recipients of child's benefits. See Act of July 30, 1965, Pub. L. No. 89-97, § 306, 79 Stat. 286. A discrepancy with respect to a disabled child's marriage is that a marriage may require denial of benefits even though it would not have required termination of benefits already being received. See Judkins v. Richardson, Civ. No. 72-62 (D. Ore. 1972), reprinted in Social Security Ruling No. 73-18c, 1973 Social Security Rulings Cum. Bull. 28. See also note 229 infra.

225. 42 U.S.C. § 402(b)(3) (1970); 20 C.F.R. § 404.314 (1976). See also 42 U.S.C. § 402(d)(5) (an individual, age 18 or older, receiving child's benefits because of disability may continue to receive benefits after marriage to any individual receiving either of the primary insurance benefits—old-age or disability—as well as any of the survivors' or dependents' benefits except husband's benefits and child's benefits not based on disability), (g)(3) (same for recipients of mother's benefits) (1970). Individuals receiving child's benefits other than by reason of disability must remain unmarried to maintain continued eligibility. 20 C.F.R. § 404.321(d) (1976).


benefits upon marriage of the recipient was based on the conclusion that the new spouse would support the former benefit recipient. If the new spouse is also receiving benefits, the court pointed out that it would then seem unlikely that he or she would have a source of support other than the benefits.

Nevertheless, loss of benefits through remarriage to other than secondary OASDI beneficiaries continued to work hardship, particularly on those recipients of widow’s and widower’s benefits “who would like to remarry [but] do not do so because if they did they would lose their social security benefits.”

Troubling to congressional committee members, however, was the possibility that if benefits were not terminated upon remarriage, a person receiving widow’s (survivor’s) benefits—which tend to be higher than a wife’s (dependent’s) benefits—could marry a person receiving primary OASDI benefits, so that the couple would then be receiving “more than other couples would get where the husbands had an identical record of covered earnings.”

Therefore, in 1965 when Congress adopted the provision permitting remarriage after age sixty without complete loss of benefits, it provided for a reduction in benefits intended to put older couples on a par.

Overall, the rules relating to marriage and remarriage are more complex for OASDI benefits than for veterans’ benefits, a complexity suffered from cerebral palsy but who was receiving welfare benefits rather than OASDI benefits. The lower court found a violation of the equal protection standards of the fifth amendment due process clause. The Supreme Court vacated and remanded with directions to reconsider in light of the recently adopted Supplemental Security Income provisions of the Social Security Act, providing federal benefit payments for disabled, blind, and aged persons. On remand, the original judgment was reinstated, the district court finding that the Supplemental Security Income provisions do not relate to the purposes supporting child’s insurance benefits and that significant actions in the Jobst case had been taken before the effective date of the new provisions. Jobst v. Mathews, 1A Unempl. Ins. Rep. (CCH) ¶ 14,849 (W.D. Mo. 1976).


231. Id. Secondary benefits are computed as a percentage of the primary insurance amount (PIA), the maximum amount of retirement or other benefit. A widow’s or widower’s benefit may be 82.5% or 100% of the PIA, 42 U.S.C. § 402(e)(2)(B) (widow), (f)(3)(B) (widower) (1970 & Supp. V 1975), while a wife’s or husband’s benefit is 50% of the PIA, id. § 402(b)(2) (wife), (c)(3) (husband) (1970).

232. See id. § 402(e)(4) (widow’s benefits), (f)(5) (widower’s benefits) (1970 & Supp. V 1975). Such marriages shall be “deemed not to have occurred,” but the monthly benefit will be reduced to 50% of the PIA of the deceased spouse on whose account the widow’s or widower’s benefits were based. If the new spouse’s PIA is greater than the deceased spouse’s PIA, she or he would be entitled to receive an amount equal to 50% of the new spouse’s PIA. Remarriages may still be inhibited in those cases wherein the PIA of the prospective spouse is not substantially greater than that of the deceased spouse.
that invites mistakes and misinformation about a beneficiary's rights. The potential for inequities is demonstrated in recent cases wherein OASDI beneficiaries have remarried on the mistaken assurances of Administration employees that marriage would not affect their eligibility for benefits—one remarrying twenty-six days before her sixtieth birthday,233 and another remarrying fifty-five days before her sixtieth birthday,234 both with loss of benefits that could have been avoided by delaying marriage until after the sixtieth birthday. In both cases, the courts rejected estoppel arguments advanced as a basis for restoring the lost benefits.

2. Effect of termination of remarriage

Without giving reasons for the change, Congress in 1965 provided for the restoration of widow's and mother's benefits and of "wife's" benefits for divorced wives upon termination of any remarriage. The change was effected by substituting "is not married" for "has not remarried" as an eligibility condition.235 By 1965, federal courts had already reached contrary conclusions about the effect of termination of a "marriage" that had resulted in total loss of secondary benefits. If a marriage ended with the divorce or death of the new spouse, absent the amendment permitting restoration of eligibility, there was no basis for arguing for such restoration. Given an annulment, however, it was inevitable that the Administration and the courts would be faced with the argument that the marriage had been void ab initio, thereby requiring restoration of benefits from the date of termination of eligibility. The courts' decisions and the Administration's rulings continue to affect remarriage cases not covered by the 1965 amendment.

The Court of Appeals for the Ninth Circuit first faced the problem and concluded that state law must determine the content of the word "remarried" as used in the OASDI eligibility definition.236 Under the

236. Folsom v. Pearsall. 245 F.2d 562 (9th Cir. 1957).
controlling California law, an annulment decree meant that no valid marriage had ever existed, even if the marriage had been merely voidable, but the relation-back doctrine was not applied to every merely voidable marriage. In each case the question was whether relation back of a decree of nullity to the date of the purported marriage conformed to sound policy. Finding workmen's compensation cases to be most analogous, the court directed reinstatement of benefits in conformity with workmen's compensation decisions that treated an annulled marriage as invalid from the beginning. The Court of Appeals for the Second Circuit also determined that the relation-back doctrine was not, under New York law, to be applied for all purposes.  

Rather than look for analogous situations in the state law, however, the court concluded that there could be no body of state law on the question of whether the relation-back doctrine should be applied to determinations relating to social security, because questions about such determinations must always come before federal courts. Widow's benefits, the court assumed, were provided to assure continuance of a minimum level of support upon death of the insured husband. The court then reasoned that by remarrying, a widow elected to accept financial support from another husband, and Congress must therefore have concluded that she should not thereafter be entitled to supplemental support from the social security fund. Under New York law, a woman whose marriage was annulled could still receive alimony. Because the relationship entitled the former widow to support from the purported "husband," the court concluded that widow's benefits should not be restored. The Court of Appeals for the Fifth Circuit, looking at Connecticut law, concluded to the contrary: The state court had, through an annulment decree, declared a purported marriage void ab initio; acceptance of the argument that the state court's power to award alimony should be determinative, when the court had not awarded alimony, would always lead to refusal to recognize the nullity of a purported marriage.  

Sorting through the issues, the Administration initially decided to accept the basic rationale of the Ninth Circuit court. In a ruling issued in 1961, it concluded that (1) benefits would not be reinstated if a remarriage was merely voidable under applicable state law and the marriage was annulled effective only from the date of the decree; (2)
benefits would be reinstated beginning with the month of issuance of an annulment decree, even though the marriage was merely voidable, if the decree voided the marriage from the beginning, or ab initio; and (3) benefits would be reinstated as of the time they were terminated if the remarriage was proved to be void under applicable state law, with or without a judicial decree of nullity. In 1965, drawing in part on the rationale of the Second Circuit court, the Administration superseded that ruling with another, which provides that (1) a void marriage will not preclude or terminate entitlement to benefits; and (2) a voidable marriage will ordinarily preclude or terminate benefits from the date of marriage to the month in which the marriage is annulled, but if the annulling court awards alimony or retains jurisdiction under state law to award alimony, then entitlement to benefits terminated because of the marriage cannot be reinstated.

If one accepts the support rationale for survivors’ benefits and the new-spouse-will-support rationale for termination of benefits upon remarriage, then the 1965 Administration ruling seems to be based on an equitable balancing of relevant factors. The 1965 ruling fails, however, to address expressly a problem previously identified by the Veterans’ Administration: The laxity of some courts in granting annulment decrees and the possible fraud by some persons in seeking such decrees. Nevertheless, the 1965 ruling does not require a decree of nullity for void marriages, and it appears to reserve to the Administration a reconsideration of a state court’s characterization of a marriage as “voidable” through its definition of that term as denoting “a marriage which is contracted under circumstances justifying issuance of a decree of annulment by a court of competent jurisdiction.” This interpretation is given support by the Administration’s recent adoption as a ruling of a federal court of appeals opinion upholding rejection of a state court annulment ab initio that had been entered under questionable circumstances.

241. See notes 103–05 and accompanying text supra.
243. Cairns v. Richardson, 457 F.2d 1145 (10th Cir. 1972), published as Social Security Ruling No. 73–3c. 1973 Social Security Rulings Cum. Bull. 22. The court held that a state court non pro tunc order that purported to change rather than to explain an annulment decree could not be given effect. In consequence, benefits could not be reinstated for a woman who had entered into a purported marriage with a man who, unknown to her, was still married to another. After separating from him, she learned about his “former” wife and that his divorce had not become effective until
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III. THE RAILROAD RETIREMENT ACT OF 1974

The Railroad Retirement Act, both a precursor and a follower of the Social Security Act,\(^244\) tends to follow the relevant OASDI provisions of the Social Security Act very closely. In fact, the retirement credits of railroad employees who have less than ten years of creditable railroad service and of such employees who are no longer connected with the railroad industry at the time of death are transferred to the social security system and combined with any OASDI credits for benefit determinations under the provisions of the Social Security Act.\(^245\) Further, a substantial tier of benefits payable to qualified railroad employees or their survivors under the Railroad Retirement Act of 1974\(^246\) is equivalent to what would be payable under the OASDI provisions of the Social Security Act.\(^247\)

The 1937 Railroad Retirement Act did not directly provide monthly benefits for dependents of retired railroad employees or for survivors of deceased employees. Instead, it permitted an employee to two years after her “remarriage,” but three years before her separation from the man. Under controlling state law, however, a valid common law marriage had commenced from the time the divorce became effective. The state court had attempted to “annul” that marriage also ab initio, but its attempt was rejected by the administrators and the federal court. The court cited 42 U.S.C. § 416(h)(1)(A) as authority for application of state law to determine the status of the claimant as a widow, but section 416 does not specify the law to be referred to in determining the validity of a remarriage as a terminating event. The Administration has, by ruling, adopted the general choice of law principle that the validity of a remarriage is to be determined by the law of the place where the marriage was contracted, “at least where such marriage takes place in the United States.” Social Security Ruling No. 64-4, 1964 Social Security Rulings Cum. Bull. 11, 11-12.


elect a joint-survivor annuity for the benefit of a spouse, irrevocable unless the spouse predeceased the employee or the marriage was dissolved. If a joint annuity should not be elected, the Act provided for a lump-sum death payment, essentially refunding the employee's contributions with interest, payable to the person designated in writing by the employee or to his or her representative. The guaranteed refund provision, the joint-survivor election, and the provision for employee designation of recipient of benefits under the Act were all indicative of the extent to which the Act was regarded as establishing a traditional industry pension plan rather than "social insurance." That, of course, was its purpose. The railroad industry had been among the leaders of the private pension movement until the Depression pushed the unfunded pension plans into financial trouble and pressures became great to retire older workers to permit unemployed younger persons to take their places. Persons covered by the new federally administered plan were removed from coverage under the Social Security Act in 1935 because immediate payment of benefits was considered necessary and payment of retirement benefits under the new Social Security Act was not to begin until 1942. When benefits under the Social Security Act began to outstrip those under the Railroad Retirement Act, there was pressure to provide the same kinds of survivors' benefits to the same classes of survivors under substantially the same conditions as under the Social Security Act. Since 1946, "[p]hilosophically and structurally the railroad retirement system has tried to straddle both the social security and the staff retirement concepts."

Under the 1974 Act the system has been restructured to provide two tiers of benefits for employees with at least ten years of creditable railroad service and a current connection to the industry at death. The first tier provides benefits equivalent to those under the OASDI provisions of the Social Security Act. The second tier of benefits is gov-

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249. Id. § 5.
251. Id. at 6, 51, 148.
erned by the provisions of the Railroad Retirement Act; it is in relation to these benefits that the discrepancies between the OASDI coverage and the Railroad Retirement Act are significant.

The tier of benefits available under the Act itself includes retirement and disability benefits for the employees. It also provides benefits for spouses of annuitants, widows and widowers, children of deceased employees, and parents of employees who do not leave a widow or widower or a child on essentially the same basis as the Social Security Act. The Act expressly incorporates the OASDI tests for determination of family status and the OASDI definitions for the respective survivors, but not the OASDI definitions of "wife" and "husband." Incorporation of the OASDI family status tests has been a feature of the Act since 1946, when it first directly provided full annuity benefits for persons other than the employees.

The most significant differences from the provisions of the Social Security Act are the absence of provisions for dependent's benefits for children of a living employee or for a divorced spouse and the existence of an express condition of eligibility for widow's or widower's benefits that the applicant "has not remarried." Failure to conform all the benefits to those of the Social Security Act undoubtedly results from cost consideration.

The provision for absolute termination of the Railroad Retirement Act tier of benefits upon remarriage of a widow or widower makes that Act, in this respect, the most restrictive of the major federal statutes providing survivorship income benefits. For example, the Civil Service Retirement Act provides for continuation of a widow's or widower's annuity until death or remarriage before age sixty, with restoration of annuity payments upon dissolution of the remarriage by death, annulment, or divorce. Similar provisions were incorporated

255. Id. § 231a(a), (d)(1).
256. Id. § 231a(d)(1), (4).
257. The Railroad Retirement Act definition of "spouse" parallels the OASDI definitions of "wife" and "husband" in requiring marriage to the covered employee for not less than one year, but exceptions to this requirement differ. See id. § 231a(c)(3).
262. Id. § 8341(g) (also expressly providing for restoration of payments at age 60). An employee may direct, however, that his or her spouse not receive an annuity. Id. § 8339(j).
in the Armed Forces Survivor Benefit Plan, which was adopted in 1972.\textsuperscript{263} In 1974 the Federal Employees' Compensation Act\textsuperscript{264} was amended to replace an absolute termination of compensation upon remarriage with a provision for termination only for remarriages occurring before the surviving spouse reaches age sixty,\textsuperscript{265} with continuation of the provision for a lump-sum payment equal to twenty-four times the monthly compensation upon a remarriage not so protected. Although the Longshoremen's and Harbor Workers' Compensation Act\textsuperscript{266} does not provide for continuation of monthly benefits to a remarried widow or dependent widower, since enactment in 1927 it has provided for payment of two years' compensation in a lump sum upon remarriage.\textsuperscript{267}

**IV. SUMMARY AND CONCLUSION**

The four types of income maintenance legislation chosen for detailed review herein were chosen for three reasons. First, they represent a range of basic types of income maintenance legislation—from the pre-retirement, income-replacement provisions of the veterans' compensation laws, through the private-retirement-plan-oriented provisions of the Railroad Retirement Act and the floor-of-protection provisions of the OASDI, to the need-based provisions of the veterans' pension laws. Second, they rest on three basic sources of funding: The private, employer-employee funding of the Railroad Retirement Act; the same funding scheme for OASDI, but backed by the credit and, potentially, the general revenues of the federal government; and the governmental, general revenue funding of the veterans' benefits laws. Third, Congress has recognized and occasionally attempted to take account of the interrelation of the benefits provided under these statutes.

Given the variant objectives and funding sources of the laws chosen for detailed examination, variations in the basic eligibility definitions were expected—and were found. It was also anticipated that the liber-

\textsuperscript{263} 10 id. § 1450(b) (Supp. V 1975). For an explanation of the integration of the new Survivor Benefit Plan with social security benefits, see H.R. REP. No. 92-481, 92d Cong., 1st Sess. 14-15 (1971). For a comparison with the civil service system, see id. at 11, 16.
\textsuperscript{265} id. § 8133(b)(1).
\textsuperscript{266} 33 id. §§ 901-950 (1970).
\textsuperscript{267} id. § 909(b).
ality of particular legislation in defining potential beneficiaries would be directly related to the availability of governmental financing; this hypothesis was confirmed, since the privately funded Railroad Retirement eligibility definitions are most restrictive, while the governmentally funded veterans’ laws are most expansive, reflecting the strong lobby for the beneficiaries and the absence of a private interest counter-lobby. Not fully anticipated, however, was the extent to which there has been, within the last two decades, a consistent trend toward liberalization of eligibility definitions for all the legislation discussed in detail, as well as for the legislation discussed summarily for comparative purposes, excepting only the Longshoremen’s and Harbor Workers’ Compensation Act.

The starting point for eligibility determinations based on spousal relationship (as distinguished from a relationship through a child) is the same under all the legislation reviewed. All begin with a status test, requiring an extant valid marriage to a primary beneficiary of the legislation at the benefit accrual time (although Congress backed into this requirement for OASDI after starting with the slightly broader intestacy devolution test). With or without express congressional guidance, administrators and courts have looked to the law of the place of marriage—usually state law—for determinations as to validity of marriages.

The veterans’ benefit laws depart most substantially from the valid marriage requirement with the liberal impediment exception, which

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268. Even more restrictive is the Longshoremen’s and Harbor Workers’ Compensation Act, the only other privately financed benefit plan that was reviewed, though only summarily. See note 218 and note 267 and accompanying text supra.

269. See note 268 supra.

270. For the Civil Service Retirement Act, see Yarbrough v. United States, 341 F.2d 621, 623 (Ct. Cl. 1965) (“In enacting [definition section], Congress undoubtedly left the determination of whether an employee was married or not up to the laws of the individual states.”); 5 U.S.C. § 8341(a) (1970 & Supp. V 1975) (defining “widow” and “widower”). For the Armed Forces Survivor Benefit Plan, see 10 id. § 1447(3), (4) (Supp. V 1975) (defining “widow” and “widower”). Although these definitions have not yet been construed, the interpretation should be the same as that given the Civil Service Retirement Act definitions, given that the Survivor Benefit Plan was patterned after the survivorship provisions of that Act. For the Federal Employees’ Compensation Act, see 5 id. §§ 8101(6), (11) (defining “widow” and “widower”), 8110(a) (defining “wife” and “husband”) (1970 & Supp. V 1975) (no interpretation found). For the Longshoremen’s and Harbor Workers’ Compensation Act, see Powell v. Rogers, 496 F.2d 1248, 1250 (9th Cir. 1974); Albina Engine & Mach. Works v. O’Leary, 328 F.2d 877, 878 (9th Cir. 1964) (“[S]ince the statute does not define the term ‘surviving wife,’ and since marital status is ordinarily determined by local law, it has been assumed that Congress intended the term to have the meaning which it is given by local law.”); 33 U.S.C. § 902(16) (1970 & Supp. V 1975).
recognizes good faith but imperfect "marriages" to veterans for survivors' benefit purposes. OASDI and, by incorporation of the OASDI provisions, the Railroad Retirement Act and the Supplemental Security Income title of the Social Security Act\(^\text{271}\) permit minor departures from the valid marriage requirement, while other statutes summarily discussed incorporate no express exceptions. Not even the liberal veterans' benefit laws expressly validate a meretricious relationship with a veteran that has been established despite awareness of noncompliance with marriage laws.\(^\text{272}\) Thus, those persons who experiment with the "new" forms of marriage\(^\text{273}\) cannot become entitled to the "new property" through that relationship alone. The one statutory recognition of such a relationship to a primary beneficiary for benefit determination purposes appears in the Supplemental Security Income provisions of the Social Security Act, and here the consequence is to reduce benefits or perhaps even to foreclose eligibility.\(^\text{274}\) Nothing found evidences congressional inclination to recognize such relationships for beneficient purposes in connection with income maintenance legislation. Given the continuing emotional reactions and resistance to change in state marriage laws and family relationships,\(^\text{275}\) there is no reason to suppose that Congress will recognize meretricious relationships for such beneficient purposes in the foreseeable future.

Little concern has been evidenced for divorced spouses of primary beneficiaries. Only OASDI provides for divorced wives of primary beneficiaries, and then only in cases of divorce after an extended marriage. Given an increasing incidence of divorce among older couples,\(^\text{276}\) the provision is a useful means of protecting those older women whose commitment to traditional roles in the marriage rela-


\(^{272}.\) The relaxed rules of proof followed by the Veterans' Administration, however, see note 59 and accompanying text supra, may permit dishonest persons to bring such relationships within the impediment exception.


\(^{274}.\) See note 138 and accompanying text supra. The benefit-denying effect of the remarriage presumption under the veterans' laws, see Part I-C–3 supra, should be compared.

\(^{275}.\) See UNIFORM MARRIAGE AND DIVORCE ACT, Commissioners' Prefatory Note; Levy, Introduction to A Symposium on the Uniform Marriage and Divorce Act, 18 S.D.L. REV. 1, 1–2 (1973).

\(^{276}.\) Foster, Marriage and Divorce in the Twilight Zone, 17 ARIZ. L. REV. 462 (1975).
relationship has kept them from building their own OASDI accounts for retirement and other benefits.\textsuperscript{277}

All the legislation discussed, both in detail and summarily, continues to provide for termination of survivors’ benefits upon a surviving spouse’s remarriage, but there are complex exceptions under OASDI and a strong trend in the last decade toward abating the termination requirement when a surviving spouse reaches age sixty. Not surprisingly, Congress has not extended this trend to the laws with the most restrictive eligibility definitions, the Railroad Retirement Act and the Longshoremen’s and Harbor Workers’ Compensation Act. Surprisingly, however, Congress has also not extended it to the more expansive veterans’ benefit laws, despite a recommendation for such abatement of the remarriage termination rule made in connection with recommendations, subsequently adopted, for restoration of benefits after termination of a remarriage.\textsuperscript{278}

Another strong trend in the legislation reviewed is apparent in the provisions for restoration of benefits lost as a consequence of a remarriage, upon termination of the remarriage by divorce, annulment, or otherwise. Consistent with the trend toward no-fault divorce,\textsuperscript{279} recently enacted provisions for restoration of benefits have not been conditioned on absence of fault. In general, Congress has in fact tended recently to avoid eligibility tests expressly based on absence of fault or moralistic considerations, although the approval of application of the presumed remarriage rule of the Veterans’ Administration upon proof of certain meretricious relationships may evidence continuing moralistic concerns.\textsuperscript{280}

Justifications advanced on behalf of some recently liberalized eligibility definitions have tended to focus on the desirability of extension

\begin{itemize}
\item \textsuperscript{277} This is a class of women for whom concern has been expressed in other contexts. See, e.g., text accompanying note 67 supra (termination of remarriage of veteran’s widow). See Weiztman, \textit{Legal Regulation of Marriage: Tradition and Change}, 62 \textit{Calif. L. Rev.} 1169, 1190–93 (1974).
\item \textsuperscript{280} For a discussion of the fault tests incorporated in the separation provisions of the veterans’ benefit laws and the Longshoremen’s and Harbor Workers’ Compensation Act, both provisions dating to an earlier period when Congress evidenced greater willingness to impose moralistic conditions on receipt of governmental benefits, see note 218 and accompanying text \textit{supra}.
\end{itemize}

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of benefits to a particular class of persons rather than on how such extension relates to the particular form of benefit being extended. One consequence is that some necessarily arbitrary distinctions are made to seem more arbitrary and irrational, producing constitutional challenges that seem foredoomed to failure.281

Statutory income eligibility definitions based on marital status have been increasingly refined in the past two decades, but further refinements will be necessary. Two assumptions underlie use of marital status as the basis for determining eligibility for statutory income benefits—that support obligations and, hence, monetary support are necessary concomitants of the status, and that replacement of lost monetary support is the basic justification for such legislation. All law-educated persons and most lay persons will recognize that the first assumption is not justified in fact in a large number of cases. As a consequence, income benefits under the federal legislation reviewed herein may be paid to persons no longer having any real relationship, emotional or financial, to a primary beneficiary, yet may be denied to a person completely dependent, emotionally and financially, on the primary beneficiary. With changing mores and changing attitudes toward marriage institutions, the number of these aberrational cases may increase. The challenge for the future will be to discover how to adjust the benefit eligibility definitions to reduce the number of aberrational cases without injecting a prospectively offensive case-by-case review of dependency or a new impetus for beneficiaries to form non-traditional relationships. Of equal significance and challenge, however, will be reexamination of the second assumption. What is needed is more precise identification of the justifications for and the objectives of each form of legislation to guide the definition of benefits and eligibility therefor.

281. See note 137 supra.