

## TJAGLCS Practice Notes

### *Legal Assistance Notes*

#### **Person Authorized to Designate Disposition (PADD) Update**

*Major Dana Chase\**

This note explains recent policy changes affecting the designation of servicemembers' remains. It is important for legal assistance attorneys to understand these changes so that they may properly advise their servicemember clients on the mortuary planning aspect of estate planning.

United States Code, title 10, section 1482, provides an order of precedence for persons authorized to designate disposition of a servicemember's remains.<sup>1</sup> Paragraph 4-4, *Army Regulation 638-2, Care and Disposition of Remains and Disposition of Personal Effects*, further delineates, in order of precedence, who can receive a servicemember's remains for disposition.<sup>2</sup> Neither the statute nor the regulation, however, requires servicemembers to designate the person as to whom their remains are to be given.<sup>3</sup> This oversight has posed several recent dilemmas between surviving family members of servicemembers.<sup>4</sup>

Pursuant to the Under Secretary of Defense and a military personnel (MILPER) policy message, servicemembers must now designate someone to direct disposition of their remains.<sup>5</sup> Servicemembers can designate someone by using Department of Defense (DOD) Form 93, Record of Emergency Data.<sup>6</sup> Servicemembers are, however, limited as to whom they can select as their designee. Servicemembers may only designate a blood relative or spouse, if married.<sup>7</sup> In the event the person designated by the servicemember declines to be the PADD or predeceases the servicemember, an order of precedence as described in MILPER message number 06-020 will control who is designated the PADD.<sup>8</sup>

The Army will incorporate these changes into the next revision of *Army Regulation 600-8-1, Army Casualty Operation/Assistance/Insurance* and DD Form 93, Record of Emergency Data.<sup>9</sup> Until then, legal assistance attorneys should assist servicemembers and personnel offices by making sure that servicemembers use DD Form 93, block 13 to designate the PADD, including, the person's name, relationship, address and telephone number.<sup>10</sup>

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<sup>1</sup> 10 U.S.C. § 1482 (2000).

<sup>2</sup> U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS para. 4-4 (22 Dec. 2000).

<sup>3</sup> 10 U.S.C. § 1482; AR 638-2, *supra* note 2, para. 4-4.

<sup>4</sup> *See Divorced Father Wins Case Over Son's Remains*, N.Y. TIMES, Nov. 2, 2005; *Parents End Burial Dispute, Pick Spot Soldier Loved*, LANSING ST. J. (Lansing, MI), Feb. 10, 2006.

<sup>5</sup> Memorandum, Office of the Under Secretary of Defense, to Deputy Assistant Secretary of the Army (Human Resource), Deputy Assistance Secretary of the Navy (Military Personnel Policy), Deputy Assistant Secretary of the Air Force (Force Management Integration), subject: Service Member Designation of a Person Authorized to Direct Disposition (14 July 2005) [hereinafter Servicemember Designation Memo]; Message, Army Human Resources Command, MILPER Message Number 06-020, subject: Implementing Guidance for Service Member Designation of a Person Authorized to Direct Disposition (PADD) (19 Jan. 2006) [hereinafter Implementing Guidance Message].

<sup>6</sup> Servicemember Designation Memo, *supra* note 5; U.S. Dep't of Defense, DD Form 93, Record of Emergency Data (Aug. 1998) (inserting the designee's name in block 13, remarks).

<sup>7</sup> Implementing Guidance Message, *supra* note 5, para. 4A.

<sup>8</sup> *Id.* para. 4B. The order of precedence is as follows: (1) surviving spouse, even if he or she is a minor; (2) sons or daughters who have reached the age of majority with the oldest being the PADD; (3) parents, not including step parents, in order of age, unless one parent was granted custody by court order or statute; (4) blood or adoptive relative of the service member if they were granted legal custody by court order or statute; (5) oldest sibling that has reached the age of majority; (6) grandparents in order of age; (7) other adult blood relative in order of relationship to the service member under the laws of the state of domicile; (8) remarried surviving spouse; (9) person in loco parentis; (10) legal representative of the estate; (11) personal friend of the deceased service member; and (12) CDR HRC. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## Survivor Benefits Update

Major Dana Chase\*

Recent significant changes in survivor benefits have resulted in the increase of benefits for eligible surviving beneficiaries of servicemembers. This note highlights those changes so that legal assistance attorneys can help clients create an overall estate plan as well as assist surviving spouses and family members of deceased Soldiers in understanding how these changes affect them.

Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their servicemember provider. These allowances include Dependent Indemnity Compensation (DIC),<sup>1</sup> Service Member's Group Life Insurance (SGLI),<sup>2</sup> Survivor Benefit Program (SBP),<sup>3</sup> Dependent Education Assistance (DEA),<sup>4</sup> Social Security, death gratuity,<sup>5</sup> and other benefits<sup>6</sup>.

### 2004 Changes

After the tragic events of 11 September 2001, the National Defense Authorization Act for Fiscal Year 2002 authorized survivor benefits to surviving family members of any servicemember who dies on active duty while in the line of duty.<sup>7</sup> In the event the servicemember had a surviving spouse and surviving children, this change only allowed the surviving spouse to receive SBP payments that were offset by DIC, rather than allowing the SBP to pass to the children.<sup>8</sup> The National Defense Authorization Act for Fiscal Year 2004 rectified this issue by authorizing the "Secretary concerned in consultation with the surviving spouse" to determine whether the servicemember's surviving children should receive SBP instead of the surviving spouse.<sup>9</sup> After this change, the Department of Defense eliminated imminent death retirement as the need to retire servicemembers in order to obtain SBP for the surviving spouse and children was no longer necessary.<sup>10</sup>

### 2005 Changes

The year 2005 saw even more changes to survivor benefits. Prior to the National Defense Authorization Act for Fiscal Year 2005, survivor benefit annuity payments decreased from fifty-five percent to thirty-five percent of the base amount selected by the retiree once the surviving beneficiary reached age 62.<sup>11</sup> The National Defense Authorization Act for Fiscal Year 2005 created a phase-out of the benefit decrease and allowed retirees to increase the percentage of the base amount of the annuity back to fifty-five percent.<sup>12</sup> To enroll in the phase-out program, retirees must pay back premiums with interest to

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<sup>1</sup> 38 U.S.C.S. §§ 1301-23 (LEXIS 2006).

<sup>2</sup> 38 U.S.C.S. §§ 1965-80.

<sup>3</sup> 10 U.S.C.S. §§ 1447-60B.

<sup>4</sup> 38 U.S.C.S. §§ 3501-67.

<sup>5</sup> 10 U.S.C.S. §§ 1475-80.

<sup>6</sup> Other benefits include, death gratuity, 10 U.S.C.S. § 1475 (unpaid pay and allowances), 37 U.S.C.S. § 501 (burial benefits), 10 U.S.C.S. § 1482; 38 U.S.C.S. §§ 2301-08; and 2402 (relocation); 37 U.S.C.S. § 403 and 406 (medical care, emergency money, and exchange and commissary privileges); U.S. DEP'T OF ARMY, DA PAM. 608-4, A GUIDE FOR THE SURVIVORS OF DECEASED ARMY MEMBERS (23 Feb. 1999).

<sup>7</sup> National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001) (codified at 10 U.S.C. § 1448(d)).

<sup>8</sup> 10 U.S.C.S. § 1450 (c).

<sup>9</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003) (amending 10 U.S.C. § 1448(d) (2000)).

<sup>10</sup> Memorandum, Office of the Under Secretary of Defense, to Assistant Secretary of Defense (Reserve Affairs), Assistant Secretary of the Army (Manpower and Reserve Affairs), Assistant Secretary of the Navy (Manpower and Reserve Affairs), and Assistant Secretary of the Air Force (Manpower and Reserve Affairs), subject: Change to Imminent Death Processing Policy in DoD Instruction 1332.38 (23 Dec. 2003).

<sup>11</sup> 10 U.S.C. § 1451(a)(1)(B)(i).

<sup>12</sup> National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004). With this phase-out program, survivor benefits will increase each year at the following rate: forty percent on 1 October 2005, forty-five percent on 1 April 2006, fifty percent on 1 April 2007, and fifty-five percent on 1 April 2008. *Id.*

the date of retirement.<sup>13</sup> The open enrollment period for the phase-out program, however, expires 30 September 2006 and if the retiree dies within two years of making the election, the election becomes void.<sup>14</sup>

Service Member's Group Life Insurance increased to \$400,000 effective 1 September 2005.<sup>15</sup> This change was due to expire 30 September 2005, however, the Servicemember's Group Life Insurance Enhancement Act of 2005 made the increase in benefit to \$400,000 permanent.<sup>16</sup> In addition to the increase in benefits, servicemembers must notify their spouse if the servicemember selects other than full coverage for the spouse or if the spouse is not a beneficiary of the SGLI.<sup>17</sup>

Also added in 2005 as a rider to SGLI coverage, was the Traumatic Injury Protection Insurance Program (T-SGLI).<sup>18</sup> Coverage for all servicemembers under T-SGLI began on 1 December 2005 at a cost of one dollar per month.<sup>19</sup> This program provides payments ranging from \$25,000 to \$100,000 for servicemembers who suffer a traumatic injury such as loss of sight, hearing, speech, or limb.<sup>20</sup> The T-SGLI includes a provision that is retroactive for servicemembers who suffered a traumatic injury as a direct result of injuries incurred in Operation Enduring Freedom or Operation Iraqi Freedom between 7 October 2001 and 11 May 2005.<sup>21</sup>

The death gratuity was also changed in 2005. Previously, the designated beneficiary of a servicemember who died on active duty would receive a lump sum payment of \$12,420.<sup>22</sup> The death gratuity was increased to \$100,000 for any servicemember who died on or after 7 October 2001 as a result of wounds, injuries, or illness incurred in Operation Iraqi Freedom, Operation Enduring Freedom, or as a "direct result of armed conflict; while engaged in hazardous service; in the performance of duty under conditions simulating war; or through and instrumentality of war."<sup>23</sup>

## 2006 Changes

The death gratuity was further modified by the National Defense Authorization Act for Fiscal Year 2006.<sup>24</sup> Signed by President Bush on 6 January 2006, section 664 of the Act increases the amount of the death gratuity to \$100,000 for all servicemembers who died on active duty or after 7 October 2001.<sup>25</sup> The Act effectively changes the language of 10 U.S.C. § 1478(a), by striking \$12,000 and inserting \$100,000 and eliminates the previous conditions requiring death as a result of wounds, illness, or injury occurring in Operation Iraqi Freedom, Operation Enduring Freedom, or other armed conflicts.<sup>26</sup>

Section 611 of the National Defense Authorization Act for Fiscal Year 2006 increases the amount of time dependent family members can receive housing allowances or occupy government quarters to 365 days following the death of their servicemember sponsor.<sup>27</sup> Previously, dependent family members could only receive housing allowances or occupy government quarters for 180 days after the death of the servicemember.<sup>28</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

<sup>16</sup> Servicemember's Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045 (2005).

<sup>17</sup> *Id.*

<sup>18</sup> 10 U.S.C.S. § 1980A (LEXIS 2006).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 10 U.S.C. § 1478(a) (2000).

<sup>23</sup> Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>24</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 37 U.S.C. § 403(1) (2000).

For more information on survivor benefits, visit the Department of Veterans Affairs website at <http://www.vba.va.gov/Survivors>.