

# LAW REVIEW 744

(September 2007)

**CATEGORY: Miscellaneous**

**How the Death Gratuity Could Be Better Handled for Forgotten Military Orphans: Legislative Proposals for Congress to Consider**

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I wrote an article for the July/August 2005 issue of *THE OFFICER* magazine on the subject of military orphans and how the death gratuity (DG) is currently distributed by the military per federal law. The article can be found on the ROA web site at [http://www.roa.org/site/PageServer?pagename=law\\_review\\_182](http://www.roa.org/site/PageServer?pagename=law_review_182). That article also dealt with the problems and costs guardians endure creating the required trusts to hold the DG money for orphaned minors, and how many of these orphans do not qualify for exchange and commissary privileges.

Since 2005, there has been renewed interest in the DG area as evidenced by the *Washington Post* newspaper's front-page article Feb. 16 on this subject with quotes from officials with the National Military Family Association. As a result I would like to offer some additional solutions for paying out the DG.

During 2004 and 2005, I worked for a contractor in the Army's Casualty and Memorial Affairs Operations Center, Casualty Operations Division (CMAOC-COD), in Alexandria, Va. One of my functions was to survey casualty assistance officers and get their recommendations on improving the system. I became aware of several statutory and regulatory problems that adversely affect many of the orphans of our deceased military personnel. The problems can be traced to how current federal laws are written and thus need congressional action to fix them.

## **The Current State of the Law**

Minors who are not the children of the deceased servicemember and his or her current spouse do not receive any of the death gratuity. Instead, all of the DG goes to the surviving spouse without any consideration of the needs of the minor children or the spouse. The military member does not have the power to select who gets the DG.

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

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

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

The purpose of the DG as originally created in 1908 was to offset extra expenses that one's loved ones incur when there is a death and to bridge the gap between cessation of military pay and start-up in a month or two of other long-term benefits, such as Social Security, dependency indemnity compensation, survivors' benefits, and any life insurance. The money is paid, tax-free, within 72 hours of death. If one has a spouse and dies in the military, the DG is directed first to the surviving spouse. This is not a problem if the children of the deceased are from the current spouse. The deceased's children only get the DG if there is no spouse.

In 2005, Congress raised the DG amount from \$12,000 to \$100,000. The DG is now more than \$100,000, as the amount is adjusted each year with the cost of living. It is my contention that part of the DG should go to the minor orphans who are not in the widow's or widower's household.

It is not uncommon for a deceased Soldier to have children from other relationships. When a Soldier, Sailor, or Marine dies, the child support these other children are receiving stops. They thus suffer the same income interruption as the spouse, but their guardian does not get any stopgap DG payment. In most cases, I am talking about a loving and caring Soldier father (or mother) who regularly paid child support to the custodial parent, which

stops immediately at death, along with the military pay, and thus creates a money crisis until the other federal benefits and Servicemembers Group Life Insurance kick in. These forgotten orphans are being doubly penalized if the military member also did not provide for them under his SGLI or other life insurance.

There are some who feel that if military members want to take care of their minor children, they should do it via their will or life insurance. Following that logic, Congress should not provide any DG at all because the military member could do the same for his or her spouse through life insurance. Remember, the original purpose of the DG was to provide immediate cash to one's primary dependent to make up for the immediate loss of income. Only if there is no widow are these minor children considered "family" under the current law. It is my belief that these orphans, even if there is a widow, be considered "family" also and thus get some share of the DG along with the widow. The military is only complying with current federal law.

### **Solutions**

My original recommendation was to give all the DG to the spouse if the deceased does not have children fathered or mothered from people other than his or her current spouse. If there are children who are not issue of the current spouse, then the widow or widower gets a set percentage of the DG and the deceased's children from relationships other than with the current spouse equally share the rest.

Another option would be that instead of the current DG have all military pay (including combat, overseas, and sea pay) and allowances continue for six month after death tax-free. All allotments to dependents and court-ordered support would be paid as they had been previously. Any funds not so allocated would be distributed the same way as the DG is currently paid out.

The advantage here is there is no income interruption, there is a slight increase in pay since there are no taxes, and it would also be cheaper for the government since we are talking about a lot less money than \$100,000. Still another consideration is to give the servicemember the option of directing some or all of the DG to whomever he or she chooses.

### **Conclusion**

The DG is a political decision. When Congress created the DG in 1908, the majority of children were from one's current spouse, and society openly discriminated against out-of-wedlock births. It also frowned on divorce. Since then, the Supreme Court has made discrimination based on one's parents' marital status illegal. It is time the DG was brought into the 21st century.

*The views expressed are those of the author and not necessarily those of the Departments of Defense, Army, or Navy, or the federal government.*