OGC 70-0632

24 April 1970

MEMORANDUM FOR: Director of Personnel

SUBJECT: Mexican Divorce Problem

1. Attached is a commentary on the Mexican divorce problem. This is based on the earlier OGC opinion but is put in a format suitable for publication in some appropriate form, either in the Support Bulletin or possibly even an Agency notice. We leave it to you as to what should be done about publication.

2. We would like to point out that just recently we uncovered another Mexican divorce situation in the Agency with both husband and wife being employees of the Agency. Their divorce was obtained within the last few weeks and on the advice of a Virginia attorney. It would seem that possibly publication could forestall at least some of the future cases. Also please note that in its present form this is unclassified and it is to be hoped that it would be published in such fashion to be of maximum usefulness.

STATINTL

[redacted]

Deputy General Counsel

Att.

MEXICAN DIVORCE - A HOST OF UNFAVORABLE CONSEQUENCES

The following commentary treats with the actual and potential consequences and problems confronting employees who obtain foreign divorces, in particular a "Mexican divorce."

The term "Mexican divorce" is generally understood to include a decree procured by any one of the following three methods:

- The first method hereinafter termed the "Bi-party Divorce" is one in which the plaintiff personally appears in Mexico and where the defendant appears either in person in Mexico or through an attorney, duly appointed by the defendant to appear in the action for him or her.

- Next is the so-called "One-Party Divorce" where the plaintiff appears personally in Mexico, institutes an action for divorce and where the defendant does not appear in person or through an attorney, but is given notice of the proceeding by personal service or by publication in the United States.

- The third method is the so-called "Mail Order Divorce"in which either one or both parties appear in the action, but neither party is physically present in Mexico at any time. The parties appear through attorneys, whom they appoint by mail, and in due course receive a decree from Mexico, also by mail.

It can be stated unequivocally that the "mail order divorce" is not recognized by any American jurisdiction. The overwhelming majority of states having ruled on the validity of the "one-party divorce" have held the decrees to be invalid. Lastly, even the "bi-party divorce" has been invalidated by some states having ruled on them. New York appears to be the most notable exception, generally recognizing the validity of the "bi-party" Mexican divorce.

The Mexican divorce has been the subject of considerable litigation. This litigation can arise not only during the lifetime of the parties to the divorce, but particularly upon the death of either party when determining the lawful heirs to the decedent's estate. In addition to potential litigation problems, the Agency employee who is a party to a Mexican divorce and subsequently remarries is confronted with serious problems affecting his or her entitlement to various government benefits while living and also the distribution of benefits in the event of his or her death.

Increased Allowances on Account of Marital Relationship

The Comptroller General has repeatedly held that the federal Government is not estopped from challenging the validity of a foreign divorce decree when its interests might be adversely affected. In numerous decisions the Comptroller General has consistently held that until a court of competent jurisdiction in the United States determines the validity of the particular Mexican divorce decree, a subsequent marriage is of too doubtful legality to permit the Government to approve increased allowances on account of such marital relationship. These cases have involved entitlement to increased quarters and subsistence allowances. Furthermore, these decisions have been the same whether the Mexican divorce was of the "mail order," "one-party," or "bi-party" variety. Even in the case of a "bi-party" decree obtained by domiciliaries of New York, the Comptroller General has said that after September 1, 1967, because of uncertainty raised by new sections of the Domestic Relations Law of New York, the New York cases no longer will be viewed as constituting a judicial determination of the validity of a Mexican divorce.

As to the question of a competent court in the U. S. determining the validity of the particular Mexican divorce, the Comptroller General has recognized that a state court would not grant a declaratory judgment on the validity of the divorce, and therefore has advised the interested parties of their right to have their entitlement to increased allowances on account of a lawful spouse litigated in the Court of Claims of the United States and the United States District Courts. It is evident, however, that even this recourse is unavailable to many Agency employees.

Distribution of Death Benefits

The next problem area involves the distribution of death benefits of a deceased employee who remarried after a Mexican divorce. The Comptroller General, using the same rationale applied in the "increased allowances" situation, recently disallowed a claim for a death gratuity as "surviving spouse" of decedent. The decedent's previous marriage had been dissolved by a Mexican divorce granted to his former wife.

The question raised is who is the lawful "surviving spouse" entitled to decedent-employee's death benefits? The following are instances in which this question is likely to arise:

• Bureau of Employees' Compensation death benefits are payable first to "the widow who was living with or dependent for support upon the deceased employee at the time of his death," or "the widower who was dependent upon the deceased employee at the time of her death." The claim for BEC compensation on account of death inquires not only as to the decedent's prior marriages, but when and how they were terminated. It would appear, therefore, that the claim itself would flag the fact of a Mexican divorce.

• Under Social Security even a divorced wife can get widow's benefits under certain specified conditions and restrictions. If the legality of the divorce is disputed, a wife may be able to collect benefits without the specific conditions or restrictions if the courts of the state in which her husband lived would hold that the couple were still validly married.

• An employee may designate any beneficiary he desires with regard to "unpaid compensation of a deceased civilian employee" and also insurance benefits under FEGLI, UBLIC and WAEPA. However, if there is no such designation, then as to the "unpaid compensation" the "surviving spouse" takes the benefits. In the case of FEGLI, the "widow or widower of the insured" takes the insurance benefits. The FEGLI claim elicits information concerning prior marriages of the decedent and how and when such marriages were terminated. In the case of UBLIC and WAEPA, the estate of the decedent receives the insurance benefits if there is no designated beneficiary. The estate of a decedent is distributed either by the will of decedent or if there is no will, pursuant to state statutory precedence which generally begins with the "surviving spouse" of decedent.

• The application for death benefits under the Civil Service Retirement System elicits information concerning the decedent's prior marriages and how and when said marriages were terminated. Once again the question arises as to who is the lawful "widow" or "widower" for a survivor annuity? The same question arises under the CIA Retirement Act.

Immigration and Naturalization of Subsequent Foreign National Spouse

An additional problem area arises when the employee, after obtaining a Mexican divorce, marries a foreign national. It is possible that the alien spouse will be confronted with immigration problems, especially where the Mexican divorce was of the "mail order" variety. Even assuming that the alien-spouse clears immigration, it can be stated unequivocally, in the case of a "mail order" decree, that the preferential naturalization procedures available to a spouse of a U. S. citizen will not be available to the alien-spouse. While there is some doubt, it would appear that naturalization can eventually take place, but only after five years of continuous domicile in the United States, being physically present at least one-half of that time.

SUMMARY

In summation, the foreign divorce decree, in particular the Mexican divorce, is fraught with a host of unfavorable consequences which continue even after the death of the party or parties to the divorce. In the first instance, there is the prospect of outside litigation for reasons totally unrelated to any benefits derived from Government employment. In the second instance, the Agency employee who remarries is confronted with the possible loss of increased allowances on account of such marital relationship. In the third instance, there is raised the problem of who is entitled to the employee-decedent's death benefits as surviving spouse. Finally, there are problems associated with the immigration and naturalization of an alien-spouse of an employee who has received a foreign divorce decree to dissolve a prior marriage. In the final analysis, an employee would be well advised to avoid procuring a divorce decree that presents so many unfavorable consequences.