DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AL94

Dependents and Survivors

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language general provisions applicable to its compensation and pension regulations, including those relating to dependents and survivors of veterans and other VA claimants and beneficiaries. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these provisions.

DATES: Comments must be received by VA on or before November 20, 2006.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov;* by mail or hand-delivery to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AL94—Dependents and Survivors.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bob White, Acting Chief, Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–9515.

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding dependents in general; the effect of dependency changes on benefits; and surviving spouse, child and parent status. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

Outline

Catalog of Federal Domestic Assistance Numbers

List of Subjects in 38 CFR Part 5

Overview of New Part 5 Organization

We plan to organize the part 5 regulations so that all provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will allow claimants, beneficiaries, and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be ''Subpart A—General Provisions.'' It would include information regarding the scope of the regulations in new part 5, general definitions and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

''Subpart B—Service Requirements for Veterans'' would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRM)s due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published as proposed on May 10, 2005. *See* 70 FR 24680.

''Subpart D—Dependents and Survivors'' would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations. This subpart is the subject of this document.

''Subpart E—Claims for Service Connection and Disability Compensation'' would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614.

''Subpart F—Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Improved Pension, Old-Law Pension, and Section 306 Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart will be published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578.

''Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, special rules applicable upon the death of a beneficiary, and several effective-date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published as proposed on October 21, 2005. *See* 70 FR 61326.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary benefits available, including benefits for children with various birth defects.

''Subpart I—Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans and their survivors.

''Subpart J—Burial Benefits'' would pertain to burial allowances.

''Subpart K—Matters Affecting the Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31062.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, proposed regulations in subpart L will be published in two separate NPRMs.

The final subpart, ''Subpart M—Apportionments and Payments to Fiduciaries and Incarcerated Beneficiaries,'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted ''[regulation that will be published in a future Notice of Proposed Rulemaking]'' where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both NPRMs.

Overview of Proposed Subpart D Organization

This NPRM pertains to regulations governing dependents and survivors of

veterans and of other claimants and beneficiaries. These regulations would be contained in proposed Subpart D of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive changes are proposed.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the current regulations in part 3 and the proposed regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.180(a)	3.213, 1st sentence.
5.180(b)	3.204(a)(1).
5.180(c)	3.204(a)(2).
5.180(d)	3.204(b).
5.180(e)	3.204(c).
5.181(a)	New.
5.181(b)	3.213(a) and (c).
5.181(c)	3.213(b).
5.182	New and 3.213(a), 3.277(b), and 3.660(a)(1).
5.183(a)	3.401(b)(1)(ii) and 3.660(c), second sentence.
5.183(b)(1)	3.401(b)(1)(i), 3.403(a)(5), 3.660(c) first sentence.
5.183(b)(2)	3.401(b)(3).
5.183(b)(3)	3.401(b)(4).
5.183(c)	3.401(b)(2).
5.184	3.500(g)(2)(ii) and 3.660(a)(2), last sentence.
5.190	3.50(a).
5.191	3.1(j).
5.192(a)	New.
5.192(b)	3.205(b).
5.192(c), except for (c)(6)(i).	3.205(a).
5.192(c)(6)(i)	New.
5.193	3.205(b), last sentence.
5.194(a)	First sentence of 3.206.
5.194(b)(1) and (2)	3.206(a).
5.194(b)(3)	New.
5.194(c)(1)	3.206(b).
5.194(c)(2)	3.206(c).
5.195	New.
5.196(a)	3.207(a).
5.196(b)	3.207(b).
5.197(a)	New.
5.197(b)(1)	3.500(n)(1).
5.197(b)(2)	3.500(n)(2)(ii).
5.198(a)	New.
5.198(b)	3.501(d)(2).
5.200(a)	3.50(b).
5.200(b)(1)(i)	3.53(a), first sentence.
5.200(b)(1)(ii)	New.
5.200(b)(2)	3.53(b), second sentence.
5.200(b)(3)	3.53(a), second sentence.
5.200(b)(4)	3.53(b), first sentence.
5.200(b)(5)	3.53(b), last sentence.
5.201(a)	Introduction to 3.52.
5.201(b)	3.52(a).
5.201(c), introduction	3.52(b).
5.201(c)(1) and (2)	New.
5.201(c)(3)	3.205(c).
5.201(d)	3.52(c).
5.201(e)	3.52(d).
5.202(a)	3.214.
5.202(b)	New.
5.203(a)	New.
5.203(b)	3.55(a)(1).
5.203(c)(1) through 3	3.55(a)(2).
5.203(c)(4)	3.55(a)(5) and (a)(8), 3.215.
5.203(d)(1), introduction, (i) and (ii).	3.55(a)(3).
5.203(d)(1)(iii)	3.55(a)(6).
5.203(d)(2)	3.55(a)(3).
5.203(e)	New.
5.204	3.500(n)(3).
5.205(a)	3.400(v)(1).
5.205(b)	3.400(v)(2).
5.205(c)	3.400(v)(4).
5.205(d)	3.400(v)(3).
5.206	3.400(w) .
5.220, except for 5.220(b)(2)(i).	3.57(a).
5.220(b)(2)(i)	3.57(a)(1)(ii) and first sentence of 3.356(b).
5.221	3.210(a) and (b).
5.222(a)	New.
5.222(b)(1), (3), and (4).	Introduction to 3.57(c), introduction to 3.210(c).
5.222(b)(2)	Introduction to 3.210(c)(1) and 3.210(c)(1)(i).
5.223(a)	3.57(c)(1) through (3).
5.223(b)	3.210(c)(2).
5.224(a)	3.58.
5.224(b)	Introduction to 3.210(c)(1) and 3.210(c)(1)(ii).
5.225(a)	3.57(e)(1).
5.225(b)(1)	3.57(e)(2).
5.225(b)(2)	3.57(e)(4).
5.225(c)	New.
5.225(d)	3.57(e)(3).
5.226(a) and (b)	3.57(b) and 3.210(d).
5.226(c) and (d)	New.
5.227(a)	3.356(a).
5.227(b)(1)(i)	3.356(b)(1).
5.227(b)(1)(ii)	3.356(b)(2), last sentence.
5.227(b)(1)(iii)	3.356(b)(4).
5.227(b)(1)(iv)	3.356(b)(3), last sentence.
5.227(b)(2)(i)	3.356(b)(3).
5.227(b)(2)(ii)	3.356(b) introduction, third sentence.
5.227(c)(1)	3.356(b)(3) and new.
5.227(c)(2)(i)	3.356(b) introduction, second sentence.
5.227(c)(2)(ii) and (iii)	New.
5.227(d), except for (d)(3).	New.
5.227(d)(3)	3.356(b)(2), first sentence.
5.228(a) and (b)	New.
5.228(c)	3.55(b).
5.229(a), introduction	3.204(b).
5.229(a)(1)	3.209(a), first sentence.
5.229(a)(2)	3.209(b), first sentence, and 3.209(g).
5.229(a)(3)	3.209(c).
5.229(a)(4)	3.209(d).
5.229(a)(5)	3.209(e).
5.229(a)(6)	3.209(f).
5.229(a)(7)	3.209(g).
5.229(b)(1)	3.209(a), last sentence.
5.229(b)(2)	3.209(b), last sentence.
5.230	3.403(a)(3).
5.231	3.503(a)(1).
5.232	3.503(a)(10).
5.233	3.503(a)(6).
5.234(a)	New.
5.234(b)	3.403(a)(1).
5.234(c)(1)	3.503(a)(3)(i).
5.234(c)(2)	3.503(a)(3)(ii).
5.235(a)	New.
5.235(b)	3.400(u).
5.240(a)	3.59(a) and the first sentence of (b).
5.240(b)	New.
5.240(c)	3.59(a), first sentence.
5.240(d)	New.
5.240(e)(1) and (2)(i)	3.59(b), second and third sentences.
5.240(e)(2)(ii) and (f)	New.

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be repeated in part 5. Such provisions are discussed

specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

A number of regulations in current part 3 refer to payment of various VA benefits to ''or for'' a veteran, a surviving spouse, or a child. The ''or for'' language is sometimes used as a shorthand way of indicating that a payment of benefits may be made to a fiduciary for a beneficiary. At other times, it refers to the fact that additional benefit payments may be made to a VA beneficiary based on the existence of a dependent (a dependent's allowance).

We believe that use of ''or for'' in these contexts may be confusing to many regulation users and propose not to repeat it in part 5. We propose not to include the ''or for'' qualifier in proposed regulations where the phrase refers to payments to a fiduciary on behalf of a beneficiary because it is unnecessary. Benefits are always potentially payable to a fiduciary on behalf of a beneficiary. We propose to replace the ''or for'' phrase with ''based on the existence of'' in situations where ''or for'' refers to payment of a dependent's allowance. We intend no substantive change by omission or replacement of the ''or for'' language.

Some current part 3 regulations by their terms limit their application to dependents of veterans when, in fact, they may be applicable to dependents of VA claimants or beneficiaries who are not veterans. For a specific example, see the supplementary information concerning proposed § 5.190 that appears later in this NPRM. Throughout this NPRM if a current regulation is too narrowly drawn in this way we have written its proposed part 5 counterpart to be more generally applicable.

General Dependency Provisions

5.180 Evidence of dependency—award of, or an increase in, VA benefits

Proposed § 5.180 provides rules for determining what evidence is required for a claimant to obtain VA benefits, or for a beneficiary to obtain additional VA benefits, based upon the existence of a dependent.

Proposed § 5.180(a), which explains the purpose of § 5.180, includes the type of general information contained in the first sentence of current § 3.213(a), but clarifies that the proposed section applies to claimants seeking new benefits based on the existence of a dependent as well as to beneficiaries seeking an increase in benefits based on the existence of a dependent. Proposed § 5.180(b) is based on § 3.204(a)(1), but clarifies that a statement submitted as proof of a relationship with another person must be in writing, as required by 38 U.S.C. 5124.

Proposed § 5.180(c) is based on current § 3.204(a)(2), which describes circumstances where a statement alone is not sufficient proof of relationship. We propose to add, in § 5.180(c)(1), that additional evidence is also required if the claimant's or beneficiary's statement does not contain all of the necessary information set out in § 5.180(b).

5.181 Evidence of dependency—reduction or discontinuance of VA benefits

Proposed § 5.181 addresses evidence requirements for establishing that changes in the status of a dependent that could reduce or discontinue benefits have occurred. Generally, under § 5.181(b), VA would accept the beneficiary's report under proposed § 5.182 of a change in a dependent's status. However, VA would require more formal proof if it has information contradicting the statement. This is consistent with provisions of current § 3.213(a) that state that a ''claimant or payee['s]'' statement will be accepted ''in the absence of contradictory information'' and of § 3.213(c) that state that VA will request formal proof of a change in dependency if it has reason to believe an event occurred earlier than reported.

Proposed § 5.181(c), derived from current § 3.213(b), states that if the beneficiary's statement and any additional proof is not sufficient to establish the necessary facts, VA will reduce or discontinue the dependency benefit effective the first day of the month that follows the month for which VA last paid benefits. This proposed paragraph includes a wording change consistent with our proposal to clarify effective dates for reductions and discontinuances. Rather than saying VA will reduce or discontinue benefits ''effective the date of the last payment,'' we propose to state that VA will reduce or discontinue benefits effective ''the first day of the month that follows the month for which VA last paid benefits.'' Including this change in part 5 will provide beneficiaries with the actual date when VA will stop paying benefits or pay benefits at a reduced rate.

Current § 3.213(b) also includes procedures for VA to request a statement of the date of a change in dependency if the date of that change was not reported, together with various related procedures. We propose not to repeat those provisions in subpart D of part 5. Proposed part 5 includes notice procedures that come into play when VA proposes an adverse action concerning benefits. These procedures would, among other things, require VA to give a beneficiary whose benefits are reduced or discontinued under proposed § 5.181(c) advance notice of the adverse action, and permit the beneficiary to request a hearing and to submit evidence concerning the matter. There are also provisions for restoring benefits following adverse action under some circumstances. *See* § 5.83, ''Right to notice of decisions and proposed adverse actions'' (70 CFR 24680, 24687), and § 5.84, ''Restoration of benefits following adverse action'' (70 CFR 24680, 24688). We believe that these provisions provide as much, if not more, protection to beneficiaries as the safeguards in § 3.213(b) that would not be included in § 5.181.

5.182 Beneficiary's responsibility to report changes in status of dependents

Proposed § 5.182 is new, although it is consistent with provisions found in current part 3 regulations (for example, see current §§ 3.256(a), 3.277(b), and 3.660(a)).

Proposed § 5.182(a) states that the section is applicable to beneficiaries who are receiving additional compensation, dependency and indemnity compensation, or pension based on the existence of a dependent. Proposed § 5.182(b) states the general rule that such a beneficiary must inform VA of the day, month, and year of a change in the status of a dependent that could reduce or discontinue the beneficiary's VA benefits when the beneficiary acquires knowledge of the change.

Proposed § 5.182(c) provides that only the month and year of the event need be reported if the change in the status of a dependent results from marriage, annulment of a marriage, divorce, death of a dependent, or discontinuance of school attendance by a person recognized by VA as a child on the basis of school attendance. VA does not need to know the specific day of those events, because under 38 U.S.C. 5112(b)(2) and (7) the effective date of reduction or discontinuance of benefits based on those events is the last day of the month in which the event occurred.

For the text of § 5.104, cross-referenced at the end of proposed § 5.182, see 70 FR 24680, 24691.

5.183 Effective date for additional benefits based on the existence of a dependent

Proposed § 5.183 is derived from current § 3.401(b), which states the effective date to be assigned to the award of additional benefits based on the existence of a dependent. Proposed § 5.183(b)(1) adds information, based on current § 3.403(a)(5), concerning how VA determines the date of adoptions for VA benefit purposes.

5.184 Effective date of reduction or discontinuance of VA benefits due to the death of a beneficiary's dependent

Proposed § 5.184 is based on current § 3.500(g)(2)(ii) and applicable portions of the last sentence of § 3.660(a)(2) with one change. Under current § 3.500(g)(2)(ii), when a dependent dies, benefits (other than benefits under certain old pension programs) are reduced or discontinued ''the last day of the month in which death occurred.'' The same effective date is described in the last sentence of § 3.660(a)(2) as ''the last day of the month in which dependency ceased.'' The underlying statute, 38 U.S.C. 5112(b)(2), uses ''the last day of the month in which such * * * death occurs.'' VA interprets these rules as providing that benefits are paid through the last day of the month of death, but not for the first day of the month following the month of death and thereafter. We believe that this is more clearly expressed by stating that ''VA will pay a reduced rate or discontinue benefits based on the death of a beneficiary's dependent effective the first day of the month that follows the month in which death occurred.'' This same change of language is proposed in §§ 5.197(b) and 5.198(b).

We propose not to repeat in part 5 the language in current § 3.500(g)(2)(i) which refers to the effective date of reductions or discontinuances for the death of dependents who died before October 1, 1982, because such cases are unlikely to come before VA at this point in time. Should such a case arise, it could be processed under the controlling statute.

Marriage, Divorce, and Annulment

5.190 Status as a spouse

Proposed § 5.190 defines the term ''spouse'' for VA purposes. Current § 3.50(a) defines ''spouse'' as ''a person of the opposite sex whose marriage to the veteran meets the requirements of § 3.1(j).'' Proposed § 5.190 omits the phrase ''to the veteran.'' The term ''spouse'' has broader application in terms of VA benefit determinations. For example, see § 3.262(b)(1) concerning calculation of the income of a parent and the parent's spouse for purposes of income-tested VA benefits. We have also replaced the reference to § 3.1(j) with a reference to its part 5 equivalent.

5.191 Marriages VA recognizes as valid

Proposed § 5.191 is derived from current § 3.1(j) and addresses the marriages VA accepts as valid marriages for purposes of entitlement to VA benefits. We propose a change to make the proposed section state that a spouse must be a person of the opposite sex, consistent with long-standing VA practice and the requirements of 38 U.S.C. 101(31).

5.192 Evidence of marriage

Proposed § 5.192, based on current § 3.205(a) and (b), addresses evidence VA will accept as proof of marriage. We propose to add, in § 5.192(c)(6)(i), that VA will accept as proof of marriage a copy of the State's acknowledgement of registration of the marriage in States where common-law marriages are recognized.

5.193 Proof of marriage termination where evidence is in conflict or termination is protested

Proposed § 5.193 is based on the last sentence of current 3.205(b).

5.194 Acceptance of divorce decrees

Proposed § 5.194, derived from current § 3.206, states the criteria VA uses for determining whether a divorce decree is valid for VA purposes.

Section 3.206 says that VA will question the ''validity of a divorce decree regular on its face'' only if the validity is put into issue by a party to the divorce or by a person ''whose interest in a claim'' for VA benefits would be affected by the divorce decree's validity. We propose in § 5.194(a)(1) to add the term ''(proper)'' after ''regular'' and to describe the latter person as one ''whose entitlement to VA benefits would be affected if VA recognizes the decree as valid.'' These changes are intended only as clarifications of VA's current interpretation of section 3.206 and not as substantive changes from the current rule.

Both current § 3.206 and proposed § 5.194 use the term ''bona fide domicile.'' According to Black's Law Dictionary, a ''domicile'' is the ''true, fixed, principal and permanent home, to which [the] person intends to return and remain even though currently residing elsewhere.'' *Black's Law Dictionary,* 186 (8th ed. 2004). ''Bona fide'' is simply Latin for ''in good faith.'' The ''bona fide domicile'' is, for most individuals, their permanent home. Therefore, we have included this description of bona fide domicile in proposed § 5.194(b)(1) in order to clarify this technical term for the reader.

Proposed § 5.194(b) states the standards VA uses to determine whether a person is validly divorced if that person has not remarried. New proposed § 5.194(b)(3) adds a requirement that VA be provided with the original divorce decree, a court-certified copy, or a court-certified abstract of the original decree. This addition is necessary to insure that VA adjudicators have accurate information to assess a challenge to a divorce decree.

5.195 Void marriages

Current part 3 includes references to ''void'' marriages (*e.g., see* § 3.207(a)), but it does not explain the meaning of a ''void'' marriage. Proposed § 5.195 would provide that a marriage is void if at least one party to the marriage did not meet the legal requirements for entering into the marriage at the time the marriage took place. For example, such an illegality would exist if one of the parties was already married, or if one or both parties failed to meet the minimum-age requirement. We also propose to add a statement that VA determines whether a marriage was void in accordance with the law of the place that governs the marriage's validity, together with a cross reference to the regulation that identifies those places, § 5.191, ''Marriages VA recognizes as valid.''

5.196 Evidence of void or annulled marriages

Proposed § 5.196 is derived from current § 3.207, the regulation that describes the evidence needed to prove that a marriage is void or has been annulled.

5.197 Effective date of reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation due to marriage or remarriage

Proposed § 5.197 is based on current § 3.500(n). However, we propose in § 5.197(a) a new provision describing the scope of applicability of the effective date rules in § 5.197.

The last sentence of the introduction to § 3.500 states that ''[w]here an award is reduced, the reduced rate will be effective the day following the date of discontinuance of the greater benefit.'' However, the underlying statute, 38 U.S.C. 5112(b), applies to discontinuance of benefits as well as to reductions in benefits, and proposed

§ 5.197(b) is consistent with that approach.

We propose not to include the language in current § 3.500(n)(2)(i) that refers to the effective date of reductions or discontinuances because of the marriage or remarriage of dependents that occurred before October 1, 1982. We believe that, with the passage of time, this provision is now unnecessary. It is very unlikely that VA would now retroactively reduce or discontinue an award based on a dependent's marriage or remarriage that occurred more than 20 years in the past. However, should such a case arise, it could be processed under the controlling statute.

We have not included in proposed § 5.197 the special effective date rule in § 3.500(n)(ii) that applies to Old-Law and Section 306 Pension because that topic is addressed in another proposed part 5 regulation, § 5.477, Effective dates for Section 306 and Old-Law Pension reductions or discontinuances. Rather, we have simply cross referenced § 5.477 at the end of § 5.197. For the text of proposed § 5.477, see 70 FR 77578 at 77593.

5.198 Effective date of reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation due to divorce or annulment

Proposed § 5.198 is based on current § 3.501(d). Current § 3.501(d) is, by its terms, only applicable to the reduction or discontinuance of a veteran's benefits due to divorce or annulment. However, the underlying statute (38 U.S.C. 5112(b)(2)) applies more broadly to reductions and discontinuances of benefits based on the divorce or annulment of the marriage of any beneficiary. We have broadened proposed § 5.198 to conform with the statute and to make it clear that the proposed regulation applies to any beneficiary.

Other differences between the proposed and current regulation are similar to those occurring in proposed § 5.197. That is, the last sentence of the introduction to § 3.501 is similar to the last sentence of the introduction to § 3.500. The rule in proposed § 5.198 is also based on a paragraph of 38 U.S.C. 5112(b), and we therefore also propose to make § 5.198 applicable to discontinuances as well as reductions. For the same reasons we propose in § 5.197 not to include a rule applicable to marriage or remarriage of dependents that occurred before October 1, 1982, we propose not to repeat a rule in § 3.501(d)(1) concerning divorces and annulments that occurred prior to October 1, 1982. Finally, consistent with the approach in proposed § 5.197, we propose to simply cross reference § 5.477 at the end of § 5.198 rather than repeat a rule in § 3.501(d)(2) applicable to Section 306 and Old-Law Pension cases.

Surviving Spouse Status

5.200 Status as a surviving spouse

Proposed § 5.200 is based on current §§ 3.50(b) and 3.53. New § 5.200(b)(1)(ii) states that ''[i]n determining who was at fault in causing the separation, VA will consider the veteran's and the other person's conduct at the time the separation took place, but not conduct taking place after the separation.'' This rule is consistent with long-standing VA policy and with current §§ 3.50(b)(1) and 3.53, which focus on fault for marital separation. Events which occur later are not relevant to that assessment.

5.201 Surviving spouse status based on a deemed-valid marriage

Proposed § 5.201 is based on current §§ 3.52 and 3.205(c), except for new § 5.201(c)(1) and (2).

Current § 3.52(b) requires, as a condition of VA deeming an invalid marriage valid, that the claimant have entered into the purported marriage without knowledge of a legal impediment that prevented formation of a valid marriage. VA does not consider knowledge of a legal impediment that a claimant acquires after the marriage to be relevant. We propose to add § 5.201(c)(1) clarifying this point.

Proposed new § 5.201(c)(2) provides examples of legal impediments to marriage, namely one of the parties being underage, one of the parties having a prior undissolved marriage at the time of the attempted marriage, and, in a jurisdiction that does not recognize common-law marriages, the parties' failure to marry through a marriage ceremony. As to the latter, VA's General Counsel has interpreted the term ''legal impediment'' to include the lack of a marriage ceremony in those jurisdictions that do not recognize common-law marriages. *See* VAOPGCPREC 58–91, 56 FR 50149, October 3, 1991.

5.202 Effect of Federal court decisions on remarriage determinations

Proposed § 5.202 is derived from current § 3.214. We propose to add a new provision in § 5.202(b) stating that the provisions of this section do not apply to VA determinations regarding whether a surviving spouse has held himself or herself out openly to the public as the spouse of another person as described in § 5.200(a)(2). This change will clarify that the concept of holding oneself out to the public as a spouse of another is a separate and distinct concept from remarriage.

Finally, we propose not to repeat the provisions of current § 3.214 stating that the section is effective July 15, 1958. We believe that statement of the effective date has been rendered unnecessary due to the passage of time. We know of no affected claims pending from before that date.

5.203 Effect of remarriage on a surviving spouse's benefits

Proposed § 5.203 contains provisions from current §§ 3.55 and 3.215, as well as certain new regulatory provisions described below.

Proposed § 5.203(a) is new; however, it is not a substantive change. It restates a part of the statutory definition of ''surviving spouse'' in 38 U.S.C. 101(3), which precludes surviving spouse status for someone who has remarried or (in cases not involving remarriage) has, ''since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person.''

Proposed § 5.203(c) pertains to reinstatement of eligibility for surviving spouses who, because of remarriage, may have been ineligible for benefits under law in effect before 1971, whose remarriages ended before November 1, 1990. Included in this provision is proposed § 5.203(c)(4), which is a consolidation of rules in current §§ 3.55(a)(5), 3.55(a)(8), and 3.215. Under current § 3.215, benefits may be paid to a surviving spouse who stops living with another person and holding himself or herself out openly to the public as that person's spouse upon filing of an application and ''satisfactory evidence.'' In order to clarify what evidence is satisfactory, we propose to replace the phrase ''satisfactory evidence'' with ''competent, credible evidence.'' The definition of ''competent evidence'' will be proposed in a separate NPRM. ''Credible'' evidence is just evidence that is believable. (''Credible testimony is that which is plausible or capable of being believed.'' *Caluza* v. *Brown,* 7 Vet. App. 498, 511 (1995)). We also propose to make a consistent change to a similar provision in proposed § 5.203(d)(1)(iii), which is based on current § 3.55(a)(6).

Proposed § 5.203(d) is based on current § 3.55(a)(3) and (6), which authorizes reinstatement of eligibility for dependency and indemnity compensation for surviving spouses who, because of remarriage, may have been ineligible for benefits under laws

in effect before June 9, 1998. Section 3.55(a)(3) and (6) refer to an effective date of October 1, 1998. Those references are derived from section 8207(b) of Public Law 105–178, 112 Stat. 495, which prohibits payment by reason of the amendments made by section 8207(a) for any month before October 1998. Proposed § 5.203(d)(2) carries over that limitation. However, § 5.203(d)'s caption refers to law in effect before June 9, 1998, which is the date Public Law 105–178, was enacted. The difference in the effective dates is because the Public Law was effective on June 9, 1998, the date of enactment, with a provision prohibiting payments for any period before October 1, 1998.

Proposed new § 5.203(e) would implement section 101 of the Veterans Benefits Act of 2003 (the Act) as it applies to eligibility for DIC. (Sec. 101, Pub. L. 108–183, 117 Stat. 2651, 2652 (Dec. 16, 2003)). Under the Act, eligibility for DIC is extended to surviving spouses who remarry after December 15, 2003, and after they reach the age of 57.

We propose not to include a provision contained in section 101(e) of the Act in § 5.203 because the time to take advantage of that provision has now passed. Section 101(e) provides a special period during which a surviving spouse who had remarried after age 57, but before December 16, 2003 (the date of enactment of the Act), could apply for DIC. This category of surviving spouses must have filed an application for such benefits before December 16, 2004. We are not including this category of eligible beneficiaries in proposed § 5.203 because the period for filing a claim under those circumstances has already closed. VA would award benefits to those who qualify under section 101(e) under the authority of the statute, so this omission will not result in any loss of benefits to eligible claimants.

We have not included in proposed § 5.203 two provisions in current § 3.55, § 3.55(a)(4) and (a)(7). These provisions concern eligibility for certain medical care, educational assistance, and housing loans. As its title indicates, proposed part 5 deals with compensation, pension, burial and related benefits. Medical care, education, and housing loans are the subjects of other parts of title 38 of the Code of Federal Regulations. For the same reason, we have not included provisions of section 101 of the Veterans Benefits Act of 2003 concerning eligibility for educational assistance under 38 U.S.C. chapter 35 and housing loans under 38 U.S.C. chapter 37 for surviving spouses who remarry after reaching age 57.

Finally, we note that the authority citation for current § 3.55(a)(3) and (a)(6) is 38 U.S.C. 1311(e). However, section 502 of Public Law 106–117, 113 Stat. 1545, 1574 (Nov. 30, 1999), deleted 38 U.S.C. 1311(e) and moved those provisions to 38 U.S.C. 103(d). Therefore, we have updated this authority citation where applicable.

5.204 Effective date of discontinuance of VA benefits to a surviving spouse who holds himself, or herself, out as the spouse of another person

Proposed § 5.204 is derived from current § 3.500(n)(3). As with other proposed part 5 regulations concerning discontinuances, we propose to express the effective date in terms of the first day that benefits are stopped, rather than in terms of the last day for which benefits are paid. We intend no substantive change. We are also correcting the authority citation for § 3.500(n)(3).

5.205 Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage

Proposed § 5.205 addresses the effective dates for the award of benefits to surviving spouses who are eligible for the restoration of benefits due to the termination of a remarriage. The proposed regulation is derived from current § 3.400(v). We propose not to repeat a provision in current § 3.400(v)(3) and (4). Those paragraphs specify that benefits are not payable unless the requirements for termination of a remarriage through death or divorce are met. We consider it unnecessary to specify that in proposed § 5.205 because a resumption of benefits would not be in order unless the termination of remarriage satisfied all applicable criteria.

5.206 Effective date of resumption of benefits to a surviving spouse who stops holding himself, or herself, out as the spouse of another

Proposed § 5.206 updates an effective date rule in current § 3.400(w) that was based on former 38 U.S.C. 5110(m). That statute stated that ''[t]he effective date of an award of benefits to a surviving spouse based upon termination of actions described in section 103(d)(3) of this title shall not be earlier than the date of receipt of application therefor filed after termination of such actions and after December 31, 1970.'' The ''actions described in section 103(d)(3) of this title'' are ''living with another person and holding himself or herself out openly to the public as that person's spouse.''

Congress repealed subsection (m) of 38 U.S.C. 5110 in section 1201(i)(8) of Public Law 103–446, the ''Veterans' Benefits Improvements Act of 1994,'' and does not appear to have enacted a specific substitute effective date provision. Consequently, the default effective date provision stated in 38 U.S.C. 5110(a) would apply. Under 38 U.S.C. 5110(a), ''the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.'' In line with 38 U.S.C. 103(d)(3) and 5110(a), we propose in § 5.206 to state that ''[t]he effective date of an award resumed because a surviving spouse no longer holds himself or herself out as the spouse of another is the date the surviving spouse stopped living with that person and holding himself or herself out openly to the public as that person's spouse, but not earlier than the date VA receives an application for benefits.''

Child Status

5.220 Status as a child for VA benefit purposes

Proposed § 5.220 pertains to status as a child for VA benefit purposes. It is based on current § 3.57(a).

Section 101(4)(A) of title 38, U.S.C., and 38 CFR 3.57 use the terms ''legitimate'' and ''illegitimate'' to distinguish between two categories of children: Children whose mothers were married when the children were born and children whose mothers were not married when the children were born. The distinction between the two categories for VA benefit purposes lies in differences in evidence required to establish a parent-child relationship. We propose to retain that distinction in proposed part 5. However, because use of the terms ''legitimate'' and ''illegitimate'' in describing children is becoming somewhat outmoded, we will no longer use those terms. We propose to use the term ''natural child'' to designate a child of either category and to maintain the distinction when necessary by describing the child's parents' marital status when the child was born. The proposed change in language is not intended to either diminish or enlarge the group of eligible claimants.

Proposed § 5.220(b)(2)(ii) relates to status as a child based on school

attendance. It is based on current § 3.57(a)(1)(iii), which states that ''[f]or the purposes of this section and § 3.667, the term 'educational institution' means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria. The term includes schools, colleges, academies, seminaries, technical institutes, and universities, but does not include home-school programs.''

In *Theiss* v. *Principi*, 18 Vet. App. 204, 214 (2004), the Court of Appeals for Veterans Claims invalidated the provision in current § 3.57(a)(1)(iii) that excludes home-school programs from the definition of ''educational institution;'' holding that an amendment that adopted the exclusion did not meet procedural notice and comment requirements of 5 U.S.C. 553.

Although the court invalidated the rule on procedural grounds and did not foreclose reinstating it through proper procedures, its opinion also supports the idea that an ''educational institution'' could equally as well be interpreted to include a home school. Particularly in view of the fact that home schooling is becoming more common and that many jurisdictions now have procedures in place for accrediting home schools, VA proposes to include home-school programs within the definition of an ''educational institution'' in § 5.220(b)(2)(ii). To help guard against possible abuses, we also propose to specify that any educational institution must operate in compliance with the compulsory attendance laws of the State in which it is located, whether treated as a private school or home school under State law, and that the term ''home schools'' is limited to courses of instruction for grades kindergarten through 12. (VA has previously proposed to make such amendments to 38 CFR 3.57. *See* 71 FR 39616 (July 13, 2006).

5.221 Evidence to establish a parent-natural child relationship

Proposed § 5.221 is based on the concepts in current § 3.210(a) and (b). It omits references to legitimacy or illegitimacy for the reasons noted above, but retains distinctions between the types of evidence required to establish a parent-natural child relationship when the child's parents were married to each other at the time of the child's birth and when they were not.

5.222 Adoption arrangements recognized by VA

New proposed § 5.222(a) states the scope of § 5.222: ''This section describes the types of adoption arrangements and evidence of those arrangements that VA will accept as proof of an adoption for purposes of establishing a person as a child under § 5.220, ''Status as a child for VA benefit purposes.''

Proposed paragraph (b) is based on portions of § 3.57(c) and § 3.210(c). We have added clarification of a term used in current § 3.57(c), ''interlocutory decree.'' *Black's Law Dictionary* defines ''interlocutory'' as ''interim or temporary, not constituting a final resolution of the whole controversy.'' *Black's Law Dictionary*, 832 (8th ed. 2004). Therefore, we have parenthetically added the word ''temporary'' after the word ''interlocutory'' in § 5.222(b)(3) in order to clarify the meaning of that term. Current § 3.57(c) also provides that VA will, subject to certain conditions, recognize an interlocutory decree that is ''unrescinded.'' We propose, also in § 5.222(b)(3), to provide instead that VA will recognize an interlocutory decree that has not been rescinded or rendered obsolete. Interlocutory awards may be rendered obsolete based on the passage of time or some other event.

5.223 Child adopted after a veteran's death recognized as the veteran's child

Proposed § 5.223, derived from current §§ 3.57(c)(1) through (3) and 3.210(c)(2), concerns conditions under which VA will recognize as the child of a deceased veteran a child adopted by the veteran's surviving spouse.

One of the requirements, as currently stated in current § 3.57(c)(2), is that the child must have been adopted ''under a decree issued within 2 years after August 25, 1959, or the veteran's death[,] whichever is later.'' The 1959 date was the date of an applicable amendment to the authorizing statute, 38 U.S.C. 101(4). Pub. L. 86–195, 73 Stat. 424 (1959). However, that portion of 38 U.S.C. 101(4) was subsequently amended again. Sec. 4(2), Pub. L. 97–295, 96 Stat. 1304 (1982). The requirement now is that the child must have been ''legally adopted by the veteran's surviving spouse before August 26, 1961, or within two years after the veteran's death.'' However, we propose to omit the date from proposed § 5.223 rather than correcting it. A new claim for VA benefits based on a person qualifying as a child by virtue of having been adopted by a surviving spouse before August 26, 1961, rather than within two years after the veteran's death, would now be extremely rare due to the passage of time. As a practical matter, it would require a claim that depended upon establishing status as a child through adoption by a surviving spouse after the veteran's death, but before August 26, 1961, in the case of a child who became permanently incapable of self-support before reaching 18 years of age. Should such a now rare case arise, it could be adjudicated under the controlling statute.

To be consistent with current 38 U.S.C. 101(4), we also propose to refer to ''regular contributions'' in § 5.223(a)(3), rather than to ''recurring contributions'' used in current §§ 3.57(c)(3) and 3.210(c)(2). While regular contribution will always be recurring contributions, recurring contributions might not be regular.

5.224 Child status despite adoption out of a veteran's family

Proposed § 5.224, based on §§ 3.58 and 3.210(c)(1), concerns continuing status as a veteran's child despite the child's adoption out of the veteran's family. Although 38 U.S.C. 101(4) does not provide whether a child adopted out of a veteran's family is still the veteran's ''child'' for VA benefits purposes, longstanding VA practice has been to continue to consider such a child as retaining status as the veteran's ''child'' as defined currently in § 3.57. This practice prevents a child from losing eligibility for benefits as a veteran's ''child'' based merely on adoption out of the veteran's family.

5.225 Child status based on adoption into a veteran's family under foreign law

Proposed § 5.225, based on current § 3.57(e), describes the requirements for status as a child based on adoption into a veteran's family under foreign law.

One of the requirements for recognizing a person adopted under foreign law as the legally adopted child of a living veteran when that person lives in a foreign country ''with such veteran (or in the case of divorce following adoption, with the divorced spouse who is also an adoptive or natural parent) except for periods during which such person is residing apart from such veteran (or such divorced spouse) for purposes of full-time attendance at an educational institution or during which such person or such veteran (or such divorced spouse) is confined in a hospital, nursing home, other health-care facility, or other institution * * *.'' *See* 38 U.S.C. 101(4)(B)(i)(IV).

Current § 3.57(e)(2)(iv) omits the information in the final parenthetical relating to the confinement in a hospital, nursing home, or other medical institution or health-care facility, of a divorced spouse. Proposed § 5.225(b)(1)(iv) corrects this omission.

Current § 3.57 provides rules for determining the validity of an adoption under foreign law in a case where the veteran is alive and the adopted person is living in a foreign country, but it does not indicate how that issue is resolved when the veteran is alive and the adopted person is not living in a foreign country. New proposed § 5.225(c) clarifies that in such cases VA will apply the rules in §§ 5.220 and 5.222 it normally applies to determine the validity of adoptions.

Current § 3.57(e)(3) also addresses the circumstances under which VA will recognize, as a child of the veteran, a person adopted after the veteran's death. Proposed § 5.225(d)(1) clarifies this provision by describing its applicability.

5.226 Child status based on being a veteran's stepchild

Proposed § 5.226 provides details about how child status is established for VA benefit purposes on the basis of a parent-stepchild relationship between a veteran and another person. Proposed § 5.226(a) and (b) consolidate concepts in current § 3.57(b), which defines a stepchild, and in current § 3.210(d), which describes the evidence necessary to establish child status by virtue of being a veteran's stepchild. Current § 3.57(b) defines a stepchild as ''a legitimate or an illegitimate child of the veteran's spouse.'' We propose to clarify in § 5.226(a)(1) that a veteran's stepchild can be either the natural or adopted child of the veteran's spouse. The applicable statute, 38 U.S.C. 101(4), does not constrain the meaning of ''stepchild'' to a natural child.

Proposed § 5.226(b) restates, with clarifying changes, language in current § 3.210(d), which describes what is needed to establish a veteran-stepchild relationship.

There is very little information concerning stepchildren in current part 3. In order to provide more guidance, we propose to include in proposed § 5.226(c) and (d) provisions derived from long-standing VA practice to fill gaps left by the current regulations.

As indicated in proposed § 5.220(c)(2), one factor in establishing a veteran-stepchild relationship is that the person must be a member of the veteran's household, or have been a member of the veteran's household at the time of the veteran's death. Proposed § 5.226(c) clarifies the term ''member of the veteran's household'' in this context. It explains that a stepchild is recognized as a member of the veteran's household when that stepchild resides with the veteran or when the veteran provides at least half of the stepchild's support. It provides examples of when the latter would apply, including a stepchild who lives apart from the veteran solely for medical, educational, or similar reasons and a stepchild whom the veteran supports who is living with another person who has legal custody of the stepchild. Proposed § 5.226(d) explains the effect of termination of a marriage between a veteran and the stepchild's parent on the veteran-stepchild relationship.

5.227 Child status based on permanent incapacity for self-support

Proposed § 5.227 would serve essentially the same function in proposed part 5 as § 3.356 does in current part 3. As stated in proposed § 5.220(b)(1), one of the requirements for status as a child for the purpose of VA benefits is that the person be under 18 years of age. However, this requirement is subject to two exceptions. One of these exceptions, which permits child status to continue beyond 18 years of age if the person became permanently incapable of self-support before reaching 18 years of age, is the subject of proposed § 5.227, as indicated in proposed § 5.227(a).

Proposed § 5.227(a) serves a function similar to the function of current § 3.356(a). However, we note that current § 3.356(a) states that the incapacity must be permanent ''at the date of attaining the age of 18 years'' (emphasis added), whereas the underlying statute 38 U.S.C. 101(4)(A)(ii), requires that the person became permanently incapable of self-support ''*before* attaining the age of eighteen years'' (emphasis added). Proposed § 5.220(b)(2)(i), cross-referenced in proposed § 5.227(a), more closely tracks the statute in this regard (as does current § 3.57(a)(1)(ii)). A person who becomes ''permanently'' incapable of self-support before the date that he or she turns 18 will of course continue to be incapable of self-support at the age of 18.

Proposed § 5.227(b) begins a new organization and simplification of other concepts contained in current § 3.356. Current § 3.356(b) discusses both ''permanence'' and ''incapacity for self-support'' in the same set of rules. The proposed reorganization separates the question of whether a person is incapable of self-support from the question of whether that incapacity is permanent. We propose this reorganization because the current rule may suggest that evidence of employment is of paramount importance in all respects, based on the fact that the current rule lists only four ''[p]rincipal factors for consideration'' and all of those factors discuss employment. Employment evidence is certainly relevant to a determination of permanent incapacity for self-support. However, employment evidence tends to reveal capacity or incapacity for economic self-support that existed at the time of the employment in question. It may not be sufficient to show whether the incapacity is permanent. In practice, VA evaluates whether incapacity is permanent based primarily on the nature of the disability itself. Yet, the current regulation does not list that factor as a ''[p]rincipal factor for consideration.'' The current rule stresses economic factors with comparatively little discussion of non-economic factors. Both are important in determinations of helpless child status. The proposed reorganization would correct the potential for improperly minimizing the importance of evidence of social and medical disability.

Proposed § 5.227(b) discusses the factors considered in determining whether a person is incapable of self-support. Proposed paragraph (b)(1) lists employment history as the first principal factor for consideration in a determination of incapacity for self-support. Proposed paragraphs (b)(1)(i) through (b)(1)(iv) list the types of employment history for consideration (productive employment, intermittent employment, charitable and therapeutic employment, and the lack of employment) and how they impact incapacity for self-support determinations.

Proposed § 5.227(b)(2) lists criteria for evaluating the nature and extent of a person's disability as the second factor in a determination of incapacity for self-support. Proposed criteria include whether the disability would render the average person incapable of self-support, the impact of the disability on self-care and performing tasks ordinarily expected of a person of the same age, and consideration of the person's educational accomplishments.

Proposed paragraph (c) describes how VA determines whether incapacity for self-support is ''permanent.'' The proposed factors in paragraph (c)(1) add detail to the requirement in § 3.356(b) and in proposed § 5.220(b)(2)(i) that determinations will be based on whether the child is permanently incapable of self-support through his own efforts by reason of physical or mental disability. Proposed factors include the following: the nature and extent of disability, whether the disability has worsened or improved over time, and whether there is a reasonable possibility that the disability will improve in the future.

Proposed § 5.227(c)(2)(i) restates concepts in the second sentence of the introduction to current § 3.356(b), which essentially provides that a determination of permanent incapacity for self-support is a case-by-case question of fact based on the evidence of record. Additional material in proposed paragraph (c)(2)(ii) governs the types of evidence most commonly used to support a claim that a child is permanently incapable of self-support. This would include various medical evidence and statements from persons who have observed the child's condition, such as statements from teachers, social workers, or tutors having knowledge of the facts. We believe that this should be included so that claimants will be aware of the types of evidence that they may submit, as well as making adjudicators aware that such evidence is particularly relevant in determinations under this rule.

Proposed § 5.227(d) addresses revision of previous VA determinations that child status is warranted for a person after reaching 18 years of age because of permanent incapacity for self-support.

New proposed § 5.227(d)(1) clarifies that a VA determination that a child is permanently incapable of self-support is not subject to protection under current § 3.951(b) or § 3.952. This is consistent with provisions of the introduction to current § 3.356(b) and proposed § 5.227(b)(2)(ii) that specify that rating criteria applicable to disabled veterans are not controlling.

New proposed § 5.227(d)(2) states that VA will order a reexamination in such cases only in unusual circumstances. Inasmuch as VA would necessarily have found that incapacity for self-support was permanent when making the initial determination, a need for reexamination later should rarely be necessary. This new provision protects a helpless child from needless reexamination while at the same time recognizing that rare cases do occur in which updated medical information may be warranted.

Proposed new § 5.227(d)(4) states that when a child who was formerly found by VA to have been permanently incapable of self-support based on mental incompetency is later found competent by a court, VA will determine whether the child continues to be permanently incapable of self-support. This would help to ensure that VA does not consider as children people who are capable of self-support. This reflects current VA practice, but it is not currently stated in our regulations.

We propose not to repeat the rules in current § 3.950 in part 5. Current § 3.950, which is titled ''Helpless children; Spanish American and prior wars,'' states that ''[m]arriage is not a bar to the payment of pension or compensation to a helpless child under an award approved prior to April 1, 1944. The presumption, arising from the fact of marriage, that helplessness has ceased may be overcome by positive proof of continuing helplessness. As to awards approved on or after April 1, 1944, pension or compensation may not be paid to a helpless child who has married.''

Current § 3.950 was added to 38 CFR in 1961 as part of the codification of a large number of VA rules. In particular, § 3.950 was a codification of VA Rule 1950, which, in turn, was a restatement of VA Regulation (VAR) 2502(B)(1). The current rule has not been amended since that 1961 codification.

We acknowledge that current § 3.950 protects persons who had been found to be helpless children prior to April 1, 1944, by establishing a rebuttable presumption, as opposed to a complete bar, against payment to a married ''helpless'' child. However, we do not believe that this potential protection has application to any existing or potential claimants because of the passage of time. Therefore, removing § 3.950 would not harm any person potentially benefited by the provision.

5.228 Exceptions applicable to termination of child status based on marriage of the child

Proposed § 5.228 is based on current § 3.55(b), but includes two new clarifying provisions.

Proposed new § 5.228(a), an applicability paragraph, explains that the section states exceptions to the requirement in § 5.220(a) (and in 38 U.S.C. 101(4)(A)) that, for a person to have status as a ''child'' for VA benefit purposes, that person must be unmarried.

Proposed new § 5.228(b) clarifies that the requirement that a person be unmarried to be recognized as a ''child'' for VA benefit purposes does not extend to benefits under 38 U.S.C. chapter 18, which provides benefits based upon birth defects suffered by certain children of Vietnam Era veterans and children of certain veterans who served in Korea. *See* 38 U.S.C. 1821 and 1831. (The requirement is also inapplicable to certain insurance benefits and to a statutory provision relating to the disposition of unclaimed personal property. *See* 38 U.S.C. 101(4)(A). However, that is beyond the scope of proposed part 5.)

Current § 3.55(b)(2) states that ''[o]n or after January 1, 1975, marriage of a child terminated prior to November 1, 1990, shall not bar the furnishing of benefits to or for such child provided that the marriage: (i) [h]as been terminated by death, or (ii) [h]as been dissolved by a court with basic authority to render divorce decrees unless the Department of Veterans Affairs determines that the divorce was secured through fraud by either party or by collusion.''

Proposed § 5.228(c)(3) and (4) retain the basic rules in current § 3.55(b)(2), but we have omitted the January 1, 1975, effective date, which is now unnecessary due to the passage of time. (January 1, 1975, was the effective date of the Veterans and Survivors Pension Adjustment Act of 1974, Pub. L. 93–527, 88 Stat. 1702.)

5.229 Proof of age and birth

Proposed § 5.229 is derived from current §§ 3.204(b) and 3.209(a) through (g).

5.230 Effective date of award of pension or dependency and indemnity compensation to, or based on the existence of, a child born after the veteran's death

Proposed § 5.230 is based on current § 3.403(a)(3). The current regulation refers, in part, to a ''notice of the expected or actual birth meeting the requirements of an informal claim.'' In this particular context, ''an informal claim'' means a ''communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs.'' *See* current § 3.155(a). Therefore, in § 5.230, we propose to refer to the notice in question as being one that ''is sufficient to indicate an intent to apply for pension or DIC benefits'' for, or based on the existence of, a child born after the death of the parent-veteran.

The introduction to current § 3.403(a) states that it applies to awards of pension, compensation, or dependency and indemnity compensation. In the context of § 3.403(a)(3), compensation would be death compensation. However, we have not included death compensation provisions in proposed § 5.230. Death compensation is only payable based upon the death of a veteran who died before January 1, 1957. *See* 38 U.S.C. 1121 and 1141. VA does not anticipate receiving any more claims for death compensation that would fall within the scope of proposed § 5.230.

5.231 Effective date of reduction or discontinuance—child reaches age 18 or 23

Proposed § 5.231 is based on current § 3.503(a)(1). Current § 3.503(a)(1)

provides that the effective date for a reduction or discontinuance of benefits that occurs when a child reaches age 18 or 23, as applicable, is ''[d]ay before 18th (or 23d birthday) [sic]''. However, the introduction to § 3.503(a) states that ''[w]here an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.'' To simplify this rule, and in keeping with the approach used generally in proposed part 5 to state effective dates for reductions and discontinues in terms of the first day that payments are reduced or discontinued rather than the last day of payment at the old rate, we propose to state in § 5.231(b) that ''VA will pay a reduced rate or discontinue benefits effective on the child's 18th or 23rd birthday, as applicable.'' We intend no substantive change.

5.232 Effective date of reduction or discontinuance—terminated adoptions

Proposed § 5.232 is based on current § 3.503(a)(10). For the same reasons noted with respect to proposed § 5.230 (*i.e.*, because of the way current 3.503(a) is structured and the way effective dates are framed in proposed part 5), we propose to state that the effective date of reduction or discontinuance is the day after the day the child left the custody of the adopting parent, etc., rather than the date the child left the custody of the adopting parent. In other words, benefits would continue to be paid at the old rate for the day the child left, but would be discontinued or paid at the reduced rate the day after the child left. We intend no substantive change.

5.233 Effective date of reduction or discontinuance '' stepchild no longer a member of the veteran's household

Proposed § 5.233 is based on current § 3.503(a)(6). For the same reasons noted with respect to proposed §§ 5.231 and 5.232 (*i.e.*, because of the way current 3.503(a) is structured and the way effective dates are framed in proposed part 5), we propose to state that the effective date of reduction or discontinuance is the day following the date the child ceased being a member of the veteran's household, rather than the last day the child was a member of the veteran's household. In other words, benefits would continue to be paid at the old rate for the day the child left the veteran's household, but would be discontinued or paid at the reduced rate the day after the child left. We intend no substantive change.

5.234 Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support

Proposed § 5.234 is based on current §§ 3.403(a)(1) and 3.503(a)(3). New § 5.234(a) states when the section is applicable. Proposed paragraph (c) includes wording changes consistent with our previously described proposal to state effective dates for reductions and discontinuances of benefits in terms of the day the reduction or discontinuance actually goes into effect, rather than in terms of the last day old rates are paid. The text of § 5.83, referenced in proposed § 5.234(c)(2), may be found at 70 FR 24680 at 24687–88.

5.235 Effective date of an award of benefits due to termination of a child's marriage

Proposed § 5.235 is based on current § 3.400(u). A new applicability provision, § 5.235(a), clarifies that the section states the effective dates of awards to, or based upon the existence of, a child when status as a child for the purpose of VA benefits has been restored due to termination of the child's marriage.

Proposed § 5.235(b)(3) consolidates provisions of current § 3.400(u)(3) and (4) by stating that ''[a]wards under § 5.228(c)(3) or (4) (pertaining to marriages terminated by death or divorce prior to November 1, 1990) are effective on the date VA receives an application for benefits.'' Current § 3.400(u)(3) and (4) provide earlier alternate effective dates where claims are received within 1 year of the date of death or date the divorce decree became final. We have omitted those provisions inasmuch as the death or divorce in question must have occurred prior to November 1, 1990. Therefore, no new applications for benefits could meet the criteria for the earlier alternate effective date.

Parent Status

5.240 Status as a veteran's parent

Proposed § 5.240 contains the rules in current § 3.59, which defines whom VA considers to be a parent of a veteran. We also propose to add additional guidance as to how VA determines status as a parent, based on long-standing VA practice. Throughout this section the term ''child'' refers to the person who later became the veteran.

Proposed § 5.240(a) is based on current § 3.59(a) and the first sentence of § 3.59(b). We propose two clarifying changes as to the latter, which reads: ''Foster relationship must have begun prior to the veteran's 21st birthday.''

First, we propose to omit the term ''foster relationship.'' It was an unnecessary addition to the regulation that is now § 3.59(b) and it could be subject to misinterpretation.

The relevant relationship in the underlying statute, 38 U.S.C. 101(5), is not a ''foster relationship,'' but a relationship between a veteran and an individual who ''stood in the relationship of a parent to a veteran.'' The traditional legal term is ''*in loco parentis*'' (Latin meaning ''in the place of a parent''). The first sentence of § 3.59(b) has its origins in an October 1948 amendment to one of several predecessor regulations eventually consolidated into § 3.59, VAR 2514(D). That amendment, in turn, resulted from a series of decisions by the Administrator of Veterans Affairs, A.D. No. 536, October 22, 1943; A.D. No. 675, November 27, 1945; and A.D. No. 793, September 14, 1948. Cumulatively, these decisions essentially held that an *in loco parentis* relationship with a veteran must have begun while the veteran was still a minor and that the common law definition of the age of majority (age 21) prevails over State statutes establishing ages of majority. The last of these decisions, A.D. No. 793, happened to arise in a case in which the person who was claiming to be in an *in loco parentis* relationship to a deceased veteran had ''satisfactorily established foster parentage,'' but ''foster'' parentage was only incidental to the facts of the particular case and not a ground for the holding. Therefore, ''foster relationship'' was a debatable addition to what is now § 3.59(b) in the first instance.

In addition, ''foster relationship'' could be misinterpreted in this context. VA has not traditionally applied it in the technical sense of a foster parent. A ''foster parent'' is ''[a]n adult who, though without blood ties or legal ties, cares for and rears a child.'' *Black's Law Dictionary* 1145 (8th ed. 2004). That definition excludes persons such as grandparents, aunts, uncles, or even adult siblings who may care for and rear a minor child. VA does not exclude such persons from being considered a veteran's parents for VA benefit purposes in appropriate circumstances.

The second change is in proposed § 5.240(a)(3)(ii), which shows more clearly that while such a relationship must have begun before the veteran's 21st birthday, the relationship may have ended at any time (subject to the requirement in § 5.240(a)(3)(i) that the relationship must have existed for at least one year at sometime before the

veteran's entry into active military service). This is implicit in the current regulation, and we intend no substantive change.

New proposed § 5.240(b) clarifies that VA will not recognize an institution as a ''parent'' for VA purposes, even though the institution may be providing care for a veteran. This reflects current VA practice and, we believe, appropriately provides for the allocation of VA benefits to or on behalf of persons and not institutions. Further, interpreting ''parent'' to mean an institution would be inconsistent with the requirements of 38 U.S.C. 101(5): ''The term 'parent' means * * * a father, a mother, a father through adoption, a mother through adoption, or an individual who for a period of not less than one year stood in the relationship of a parent to a veteran * * *.''

Proposed § 5.240(c) clarifies a rule in the first sentence of current § 3.59(a) that states that the term ''parent'' includes a natural mother or father of an illegitimate child ''if the usual family relationship existed.'' Proposed § 5.240(c) provides VA will recognize a natural parent who was not married to the veteran's other natural parent when the veteran was born if that parent accepted the child as a member of his or her household and/or provided ''substantial financial support to the veteran consistently from the date of the veteran's birth until the veteran reached the age of 21, married, or entered active military service.'' Through a reference to § 5.221, proposed § 5.240(c) makes it clear that meeting one or both of these criteria does not replace the basic requirement that there be evidence to establish the parent-veteran relationship.

Proposed § 5.240(d) provides that a natural or adoptive parent who had abandoned a child is not eligible for VA benefits based on being the parent of that child and defines the term ''abandoned'' for purposes of this provision. This discourages the allocation of VA benefits to a parent who did not fulfill that role. However, consistent with VA practice, the rule permits recognition as a parent if that parent subsequently assumes parental obligations with respect to the abandoned child.

Proposed § 5.240(e)(1) and (2)(i) are based on rules in the second and third sentences of current 3.59(b). Under the third sentence of § 3.59(b), if two persons stood in the relationship of father or mother for one year or more, VA recognizes as the parent the person who last stood is such relationship before the veteran last entered active military service. Proposed § 5.240(e)(2) generalizes the rule of recognizing as the parent the last person who qualified as a parent through any of the means listed in § 5.240(a). New proposed § 5.240(e)(2)(ii) states that ''VA will recognize a veteran's natural parent who was the last person to have a parental relationship to the veteran before the veteran last entered active military service as the mother or father of the veteran even though that parent's rights have been terminated by a court.'' This rule, which represents current VA practice, makes a natural parent the ''default'' parent in cases where parental rights have been terminated but there is no other person who assumed the parental relationship with the veteran prior to service.

Proposed new § 5.240(f) defines the phrase ''relinquished parental control'' and expresses a preference for a natural or adoptive parent by requiring a person asserting to be a veteran's parent under § 5.240(a)(3) to prove that a natural or adoptive parent had relinquished parental control. As proposed § 5.240(f) states, relinquishment of parental control means that a parent ceased to provide for the veteran and that the parent-veteran relationship has been broken.

Note Concerning § 3.503(a)(2)

We propose not to include in part 5 the last sentence of current § 3.503(a)(2), which contains the following rule relating to the effective date of a reduction or discontinuance to or for a child when that child enters services. The rules state: ''Date of last payment of apportioned disability benefits for child not in custody of estranged spouse. Full rate payable to veteran. No change where payments are being made for the child to the veteran, his (her) estranged spouse, his (her) surviving spouse, or to the fiduciary of a child not in the surviving spouse's custody.''

The first two sentences of this rule will be addressed in another NPRM pertaining to apportionments. We do not need to state that VA will not reduce or discontinue payments being made on behalf of a child since there is no general rule that VA will reduce such payments when the child enters service.

Note Concerning § 3.400(w)

We are not including paragraph (w) of current § 3.400 because the statutory authority for that provision no longer exists. The substantive rule restated by paragraph (w) originally derived from 38 U.S.C. 5110(m). The provision was repealed in section 1201(i)(8) of Pub. L. 103–446.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act

Although this document contains provisions constituting a collection of information at §§ 5.180, 5.181, 5.182, 5.192, 5.193, 5.194, 5.196, 5.221, and 5.229 under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new or proposed revised collections of information are associated with this proposed rule. The information collection requirements for §§ 5.180, 5.181, 5.182, 5.192, 5.193, 5.194, 5.196, 5.221, and 5.229 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0043, 2900–0089, 2900–0115, and 2900–0624.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action

because it may raise novel legal or policy issues.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Veterans.

Approved: June 12, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5 as proposed to be added at 69 FR 4832, January 30, 2004, by adding subpart D to read as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart D—Dependents and Survivors

General Dependency Provisions

Sec.

Marriage, Divorce, And Annulment

Surviving Spouse Status

Child Status

Parent Status

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart D—Dependents and Survivors

General Dependency Provisions

§ 5.180 Evidence of dependency—award of, or an increase in, VA benefits.

(a) *Purpose.* Eligibility for a claimant to receive VA benefits, or for a beneficiary to receive an increase in VA benefits, based on the existence of a dependent requires that the claimant or beneficiary show his or her relationship to the dependent. This section describes the types of evidence VA will accept as proof of the claimant's or beneficiary's relationship to another person in such cases.

(b) *When a written statement alone is sufficient.* Except as noted in paragraph (c) of this section, in determining whether a claimant is entitled to benefits, or a beneficiary is entitled to additional benefits, based on acquiring one or more dependents, VA will accept a claimant's or a beneficiary's written statement as sufficient proof of marriage, termination of marriage, birth of a child, or death of a dependent. The statement must contain all of the applicable information described in paragraphs (b)(1) through (b)(4) of this section.

(1) The date (month and year) and place of the marriage, marriage termination, birth, or death.

(2) The full name and relationship of the other person to the claimant or beneficiary.

(3) The Social Security number of the person who the claimant or beneficiary asserts is a dependent and on whose behalf the claimant or beneficiary is claiming benefits. *See* § 5.102, ''Requirement to report Social Security numbers.''

(4) The name and address of the person who has custody of any child who the claimant or beneficiary asserts is a dependent, if the dependent does not reside with the claimant or beneficiary.

(c) *When a written statement alone is not sufficient.* Additional supporting evidence will be required in the following cases:

(1) When the statement does not contain all of the applicable information required by paragraphs (b)(1) through (b)(4) of this section.

(2) When the claimant or beneficiary does not reside in a State, as that term is defined in § 3.1(i) of this chapter.

(3) When something in the statement raises a question as to its validity.

(4) When the statement conflicts with other evidence in the record.

(5) When there is a reasonable indication, either in the statement or in the other evidence in the record, of fraud or misrepresentation of the relationship in question.

(d) *Evidence listed by order of preference.* The types of additional supporting evidence required by paragraph (c) of this section are set forth in §§ 5.192 through 5.194, 5.221, 5.229 and 3.211 of this chapter. Where evidence is set forth in a particular section in the order of preference, VA may accept evidence from a lower class of preference if it is sufficient to prove the fact at issue.

(e) *Acceptability of photocopies.* VA will accept photocopies of documents supporting the relationship if it is satisfied that the photocopies are authentic and free from alteration. Otherwise, VA may require certified copies of documents from the custodian of the documents, bearing the custodian's signature and official seal.

(Authority: 38 U.S.C. 501(a), 5124)

§ 5.181 Evidence of dependency—reduction or discontinuance of VA benefits.

(a) *Scope.* This section describes the types of evidence VA will accept as proof of a change in the status of a dependent that would result in reduction or discontinuation of pension, compensation, or dependency and indemnity compensation. It also states the actions VA takes if the required evidence is not received.

(b) *Evidence of changes.* VA will accept a beneficiary's statement of a change in the status of a dependent described in § 5.182 as proof of the change if VA has no information contradicting the statement. (See § 3.217 of this chapter, ''Submission of statements or information affecting entitlement to benefits,'' for information concerning acceptable statements.) Otherwise, VA will require formal proof regarding the matter.

(c) *Information not reported.* If neither the statement described in, nor any additional proof required under, paragraph (b) of this section is sufficient to establish the necessary facts, VA will reduce or discontinue benefits, as appropriate, effective the first day of the month that follows the month for which VA last paid benefits.

(Authority: 38 U.S.C. 501(a), 5112)

Cross Reference: § 5.83, ''Right to notice of decisions and adverse actions;'' § 5.84, ''Restoration of benefits following adverse action;'' and § 5.104, ''Certifying continuing eligibility to receive benefits.''

§ 5.182 Beneficiary's responsibility to report changes in status of dependents.

(a) *Applicability.* This section applies to VA beneficiaries who are receiving additional compensation, dependency and indemnity compensation, or pension based on the existence of a dependent.

(b) *General rule.* Except as provided in paragraph (c) of this section, a beneficiary must inform VA of the day, month, and year of a change in the status of a dependent that could reduce or discontinue his or her benefits. The change must be reported when the beneficiary acquires knowledge of the change.

(c) *Marriage, annulment, divorce, death, or discontinuance of school attendance.* With respect to the date, the beneficiary need only report the month and year of any of the following:

(1) The marriage, annulment of marriage, divorce, or death of a dependent, or

(2) Discontinuation of school attendance by a person recognized by VA as a child on the basis of attendance at an approved educational institution. *See* § 5.220(b)(2)(ii) (concerning status as a child based on attendance at an approved educational institution).

(Authority: 38 U.S.C. 501(a), 5112)

Cross Reference: § 5.104, ''Certifying continuing eligibility to receive benefits.''

§ 5.183 Effective date for additional benefits based on the existence of a dependent.

(a) *General rule.* Unless specifically provided otherwise in this part, the effective date for the award or increased award of additional benefits based on the existence of a dependent will be the date VA received written notice of the existence of the dependent, if evidence of dependency is received within one year of VA's request for such evidence. If VA does not receive evidence of the dependency within one year of VA's request for such evidence, the effective date for the award or increased award of additional benefits based on the existence of a dependent will be the date VA received the claim.

(b) *Specific applications and exceptions.* The effective date for the award or increased award of additional benefits based on the existence of a dependent in the following circumstances will be:

(1) The date of marriage or of the birth or adoption of a child, if VA receives written evidence of the event within one year of the event. With respect to adoption, the date of the event is the earliest of the following, as applicable:

(i) The date of the adoption placement agreement;

(ii) The date of the interlocutory (temporary) adoption decree; or

(iii) The date of the final adoption decree.

(2) The effective date of the qualifying disability rating, if VA receives written evidence of dependency within one year of the date VA sent notice of the rating action.

(3) The same day as the effective date of an award of benefits other than benefits based on the existence of a dependent (the primary benefits), if:

(i) Benefits based on the existence of a dependent are claimed on the same benefit application as the claim for the primary benefits, or

(ii) VA receives an application for benefits based on the existence of a dependent within one year of the effective date of the award of the primary benefits.

(c) *Limitation.* (1) In no case will VA award additional benefits based on the existence of a dependent effective before dependency for VA purposes arose.

(2) In no case will VA award additional benefits for dependency effective before the date of an original claim.

(Authority: 38 U.S.C. 5103(b), 5110(a), (f), (n))

Cross Reference: § 5.235, ''Effective date of an award of benefits due to termination of a child's marriage.''

§ 5.184 Effective date of reduction or discontinuance of VA benefits due to the death of a beneficiary's dependent.

Except as provided in § 5.477(a) (applicable to section 306 and old-law pension), VA will pay a reduced rate or discontinue benefits based on the death of a beneficiary's dependent effective the first day of the month that follows the month in which death occurred.

(Authority: 38 U.S.C. 5112(b)(2))

§§ 5.185–5.189 [Reserved]

Marriage, Divorce, and Annulment

§ 5.190 Status as a spouse.

For VA purposes, a ''spouse'' is a person of the opposite sex whose marriage meets the requirements for a valid marriage under § 5.191, ''Marriages VA recognizes as valid.''

(Authority: 1 U.S.C. 7; 38 U.S.C. 101(31))

§ 5.191 Marriages VA recognizes as valid.

Except as provided in § 5.201, ''Surviving spouse status based on a deemed-valid marriage,'' a valid marriage for VA purposes is one between persons of the opposite sex that

exists in either of the following circumstances:

(a) The marriage is valid under the law of the place where the parties lived at the time of the union; or

(b) The marriage is valid under the law of the place where the parties lived at the time the right to benefits arose.

(Authority: 38 U.S.C. 101(31), 103(c))

§ 5.192 Evidence of marriage.

(a) *Applicability.* This section describes the evidence of marriage VA will accept when more is required than the statement of a claimant or beneficiary described in § 5.180, ''Evidence of dependency—award of, or an increase in, VA benefits,'' or § 5.181, ''Evidence of dependency—reduction or discontinuance of VA benefits.''

(b) *Evidence of a valid marriage.* In the absence of contrary evidence, VA will accept a marriage as valid when the claimant or beneficiary provides VA with any of the evidence described in paragraph (c) of this section and the facts established by such evidence are sufficient to establish a valid marriage under § 5.191, ''Marriages VA recognizes as valid.'' If one or both parties to the marriage were previously married, VA must also receive the claimant's or beneficiary's certified statement giving the date, place, and circumstances under which such prior marriages ended.

(c) *Acceptable evidence of marriage.* VA will accept any of the following as proof of marriage.

(1) A copy or abstract of the public record of marriage, or a copy of the church record of marriage. The copy or abstract must include the names of the persons married, the date and place of the marriage, and the number of any prior marriages if shown on the official record.

(2) An official report from the service department if the veteran is a party to the marriage and the marriage took place during the veteran's military service.

(3) An affidavit from the official or clergyman who performed the ceremony.

(4) The original marriage certificate if VA is satisfied that it is genuine and free from alteration.

(5) The affidavits or certified statements of two or more eyewitnesses to the ceremony.

(6) For informal or common-law marriages in jurisdictions where marriages other than by ceremony are recognized:

(i) A copy of the State's acknowledgement of registration, if the State has a procedure for registering informal or common-law marriages, or

(ii) The affidavit or certified statement of one of the parties to the marriage, giving all the facts and circumstances concerning the alleged marriage. This includes details of the agreement made by the parties at the time they began living together, the length of time in months and years they have lived together, the location of each residence and the dates the parties lived there, and whether children were born as the result of the relationship. Such affidavits or certified statements must be accompanied by affidavits or certified statements from two or more persons who know from personal observation the relationship that existed between the parties. The affidavits or statements of these persons must include when the parties lived together, the places of the parties' residence, whether they referred to themselves as married in the communities they lived in, and whether those communities generally accepted them as being married.

(7) Any other evidence that would reasonably allow a VA decision maker to conclude that a valid marriage did occur.

(Authority: 38 U.S.C. 103(c), 501(a))

Cross Reference: § 5.201, ''Surviving spouse status based on a deemed-valid marriage.''

§ 5.193 Proof of marriage termination where evidence is in conflict or termination is protested.

When there is conflicting evidence on file, or there is a protest from an interested party, VA will accept any of the following as proof of the termination of a prior marriage:

(a) Proof of the former spouse's death.

(b) Proof of divorce as specified in § 5.194(b) or (c), as applicable.

(c) A court-certified copy of the final decree of annulment or a court-certified abstract of such a decree.

(Authority: 38 U.S.C. 501(a))

§ 5.194 Acceptance of divorce decrees.

(a) *General rule.*—(1) VA will accept as valid a divorce decree that is regular (proper) on its face unless its validity is challenged by either of the following:

(i) One of the parties named in the divorce decree, or

(ii) Any person whose entitlement to VA benefits would be affected if VA recognizes the decree as valid.

(2) In case of such a challenge, VA will make an independent decision about the validity of the divorce decree based on the criteria in paragraph (b) or (c) of this section, as applicable.

(b) *Challenged divorce decree—party to the divorce has not remarried.* If the issue is whether a person is validly divorced and that person has not remarried, VA will accept the divorce decree as valid if all the following conditions are met:

(1) The person who obtained the divorce had a bona-fide domicile (permanent home) in the place where the divorce decree was issued;

(2) The person satisfied all the legal requirements for obtaining a divorce in the place in which the divorce decree was issued; and

(3) VA has been provided with the original divorce decree, a court-certified copy of the original decree, or a court-certified abstract of the original decree.

(c) *Challenged divorce decree—party to the divorce has remarried.*—(1) *General rule.* Except as provided in paragraph (c)(2) of this section, if the issue is whether a person who has remarried was validly divorced from a prior spouse, then VA will accept the validity of the prior divorce decree if either:

(i) The law of the place where the parties were living when they were married recognizes the validity of the divorce decree; or

(ii) The law of the place where the parties were living when the right to VA benefits arose recognizes the validity of the divorce decree.

(2) *Foreign decree granted to residents of a State.* VA will accept as valid a divorce decree obtained outside of a State by residents of that State if both of the following conditions are met:

(i) The State in which the parties to the divorce lived at the time they obtained the decree recognizes the decree as valid, and

(ii) No court of last resort in the places where the parties lived when they were married or when the right to VA benefits arose has found the divorce decree invalid.

(Authority: 38 U.S.C. 103(c), 501(a))

§ 5.195 Void marriages.

A marriage is void if at least one party to the marriage did not meet the legal requirements for entering into the marriage at the time the marriage took place. Examples of void marriages include marriages in which at least one party was already married and marriages in which at least one party failed to meet the minimum age requirement for marriage. Whether a marriage is void will be determined under the law of the place that governs the marriage's validity. *See* § 5.191, ''Marriages VA recognizes as valid.''

(Authority: 38 U.S.C. 103(c), (d), (e); 501(a))

§ 5.196 Evidence of void or annulled marriages.

(a) *Void marriage.* To establish that a marriage was void, VA must receive a

certified statement from the claimant or beneficiary describing the facts that made the marriage void. VA may require the claimant or beneficiary to submit additional evidence as the individual circumstances may require. *See also* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining ''certified statement'').

(b) *Annulled marriage.* To establish that a marriage has been annulled, VA must receive a copy or abstract of the court's annulment decree. VA will accept the decree as valid unless one of the following conditions applies:

(1) The copy or abstract of the decree discloses irregularities.

(2) VA has reason to question the court's authority to issue the annulment decree.

(3) There is evidence to show that the annulment might have been obtained by fraud of either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(d), (e), 501(a))

§ 5.197 Effective date of reduction or discontinuance of improved pension, compensation, or dependency and indemnity compensation due to marriage or remarriage.

(a) *Scope.* This section provides effective date rules applicable when VA determines that a reduction or discontinuance of improved pension, compensation, or dependency and indemnity compensation is required based on the marriage or remarriage of a beneficiary, an apportionee of a beneficiary's VA benefits, or a beneficiary's dependent.

(b) *Effective date of reduction or discontinuance.* (1) *Beneficiary or apportionee.* VA will pay the reduced rate or discontinue benefits effective the first day of the month in which the marriage or remarriage occurred.

(2) *Dependent of a beneficiary.* VA will pay the reduced rate or discontinue benefits effective the first day of the month that follows the month in which the marriage or remarriage occurred.

(Authority: 38 U.S.C. 5112(b)(1))

Cross Reference: § 5.477, ''Effective dates for section 306 and old-law pension reductions or discontinuances.''

§ 5.198 Effective date of reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation due to divorce or annulment.

(a) *Scope.* This section provides effective date rules applicable when VA determines that a reduction or discontinuance of Improved Pension, compensation, or dependency and indemnity compensation is required based on termination of the marriage of a beneficiary due to divorce or annulment of the marriage.

(b) *Effective date of reduction or discontinuance.* VA will pay the reduced rate or discontinue benefits effective the first day of the month that follows the month in which the divorce or annulment occurred.

(Authority: 38 U.S.C. 5112(b)(2))

Cross Reference: § 5.477, Effective dates for section 306 and old-law pension reductions or discontinuances.

§ 5.199 [Reserved]

Surviving Spouse Status

§ 5.200 Status as a surviving spouse.

(a) *General.* A ''surviving spouse'' is a person who meets the following requirements:

(1) Subject to § 5.201, ''Surviving spouse status based on a deemed-valid marriage,'' the person met the requirements in § 5.190, ''Status as a spouse,'' for being the veteran's ''spouse'' at the time the veteran died;

(2) Except as otherwise provided in § 5.203, ''Effect of remarriage on a surviving spouse's benefits,'' the person has neither remarried nor, since the death of the veteran and after September 19, 1962, held himself or herself out to the public, through a pattern or course of conduct, as the spouse of another person of the opposite sex with whom he or she has lived; and

(3) Subject to paragraph (b) of this section, the person lived continuously with the veteran from the date of marriage to the date of the veteran's death.

(b) *Continuous cohabitation.* The following considerations apply, as applicable, in determining whether the requirement of paragraph (a)(3) of this section is met:

(1) *Person not at fault in the separation.* (i) *Criteria.* Even if the veteran and the person separated during the marriage, the continuous cohabitation requirement of paragraph (a)(3) of this section will be considered met if the following requirements are met:

(A) The person was not at fault in causing the separation, and

(B) The veteran brought about the separation or the veteran's misconduct caused the separation.

(ii) *When misconduct occurred.* In determining who was at fault in causing the separation, VA will consider the veteran's and the other person's conduct at the time the separation took place, but not conduct taking place after the separation.

(2) *Separation by mutual consent.* If the evidence shows that the veteran and the other person both consented to the separation, and that the intent of the person was not to desert the veteran or to abandon the marriage, but to accomplish some other purpose such as convenience, health, or business, then VA will not consider the separation to have broken the continuity of cohabitation.

(3) *Temporary separations.* Temporary separations that ordinarily occur, regardless of who is at fault in bringing about the separation, do not break the continuity of cohabitation.

(4) *Statement as evidence.* VA will accept the person's statement explaining the reason for the separation from the veteran in the absence of contradictory information.

(5) *State law not controlling.* State laws do not control VA's assessment of whether separation has resulted from desertion. VA will, however, give due consideration to findings of fact made in court decisions dealing with this issue that were made during the lifetime of the veteran.

(Authority: 38 U.S.C. 101(3), 501(a))

§ 5.201 Surviving spouse status based on a deemed-valid marriage.

(a) *Marriages deemed valid.* VA will recognize a marriage to a veteran that does not meet the requirements of § 5.191, ''Marriages VA recognizes as valid,'' as valid for the purposes of entitlement to VA death benefits if all the criteria in paragraphs (b) through (e) of this section are met.

(b) *Marriage requirement.* The person and the veteran were purportedly married for at least one year before the veteran died, unless the person and the veteran had a child during or before the marriage. If a child was born of or before the marriage, the marriage could have existed for any length of time when the veteran died. *See* § 3.54(d) of this chapter (definition of ''child born of the marriage'').

(c) *No knowledge of legal impediment.* At the time of the attempted marriage, the person did not know that there was a legal impediment to the marriage. VA follows these guidelines:

(1) Only the person's knowledge at the time of the attempted marriage, but not knowledge acquired after the marriage, is relevant.

(2) Legal impediments include one of the parties being underage, one of the parties having a prior undissolved marriage at the time of the attempted marriage, and, in a jurisdiction that does not recognize common-law marriages, the parties' failure to marry through a marriage ceremony.

(3) If the person submits as proof of the marriage one of the kinds of

evidence listed in § 5.192(c), and satisfies the other requirements in this section, then VA will accept a signed statement from the person that he or she had no knowledge of the impediment to the marriage as proof of that fact, unless there is evidence showing otherwise.

(d) *Continuous cohabitation.* The person lived with the veteran continuously from the day of the marriage to the day of the veteran's death. The considerations for application in determining whether this requirement is satisfied are the same as those in § 5.200(b).

(e) *No other legal surviving spouse.* No legal surviving spouse (one who qualifies as a ''surviving spouse'' under § 5.200) has already filed a claim for death benefits for which that person meets all the legal and factual criteria and to which he or she has been determined by VA to be entitled. However, a legal surviving spouse's entitlement to accrued benefits or benefits awarded, but unpaid at death, does not prevent another claimant from being considered the veteran's surviving spouse through a marriage deemed valid under this section.

(Authority: 38 U.S.C. 103(a), 501(a))

Cross References: [regulation that will be published in a future Notice of Proposed Rulemaking] (concerning deemed-valid marriages and Improved Death Pension adjusted annual income determinations); §§ 5.550 through 5.559 (concerning accrued benefits and benefits awarded, but unpaid at death).

§ 5.202 Effect of Federal court decisions on remarriage determinations.

(a) *General rule.* In determining eligibility for pension, death compensation, or dependency and indemnity compensation, VA will accept the decision of a Federal court that a surviving spouse has not remarried if the U.S. Government was a party to the case in which that decision was rendered.

(b) *Application to § 5.200(a)(2).* This section does not apply to VA determinations regarding whether a surviving spouse has held himself or herself out openly to the public as the spouse of another person under § 5.200(a)(2).

(Authority: 38 U.S.C. 501(a))

§ 5.203 Effect of remarriage on a surviving spouse's benefits.

(a) *General rule.* Except as otherwise provided in this section, VA will not provide benefits governed by this part to a person as the surviving spouse of a veteran if either of the following applies:

(1) The person has remarried.

(2) The person has held himself or herself out as the spouse of another as described in § 5.200(a)(2).

(Authority: 38 U.S.C. 101(3))

(b) *Void or annulled remarriages.* Remarriage will not prevent a surviving spouse from receiving VA benefits if the remarriage was either:

(1) Void (*see* § 5.195, ''Void marriages''); or

(2) Annulled by a court having authority to annul marriages, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 103(d)(1))

(c) *Reinstatement of eligibility for benefits for surviving spouses who, because of remarriage, may have been ineligible for benefits under laws in effect before January 1, 1971, and whose remarriages ended before November 1, 1990.* After December 31, 1970, none of the following will prevent a surviving spouse who may have been ineligible for VA benefits under laws in effect before January 1, 1971, because of remarriage from receiving benefits:

(1) Remarriage that ended by death before November 1, 1990.

(2) Remarriage that ended by divorce provided that proceedings began before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties.

(3) Remarriage that was dissolved by a court with authority to render divorce decrees in legal proceedings begun by the surviving spouse before November 1, 1990, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties.

(4) The fact that the surviving spouse has lived with another person and has held himself or herself out openly to the public as the spouse of that person, provided that competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out openly to the public as that person's spouse before November 1, 1990. Such evidence may consist of the surviving spouse's certified statement of the fact.

(Authority: 38 U.S.C. 501(a); Sec. 4, Pub. L. 91–376, 84 Stat. 789; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388–343; Sec. 502, Pub. L. 102–86, 105 Stat. 424; Sec. 103, Pub. L. 102–568, 106 Stat. 4322)

(d) *Reinstatement of eligibility for dependency and indemnity compensation (DIC) for surviving spouses who, because of remarriage, may have been ineligible for DIC under laws in effect before June 9, 1998*—(1) *Termination of remarriage.* None of the following will prevent a surviving spouse who may have been ineligible for DIC under laws in effect before June 9, 1998, because of remarriage from receiving benefits:

(i) Remarriage ended by death;

(ii) Remarriage ended by divorce, unless VA determines that the divorce was obtained through fraud by the surviving spouse or by collusion of the parties; or

(iii) The fact that the surviving spouse has lived with another person and has held himself or herself out openly to the public as the spouse of that person, provided that competent, credible evidence shows that the surviving spouse stopped living with that person and holding himself or herself out openly to the public as that person's spouse. Such evidence may consist of the surviving spouse's certified statement of the fact.

(2) *Limitation.* No payment may be made under this paragraph (d) for any month before October 1998.

(Authority: 38 U.S.C. 103(d)(2); Sec. 8207, Pub. L. 105–178, 112 Stat. 495)

(e) *Remarriages after age 57.*—(1) A surviving spouse's remarriage after reaching the age of 57 will not prevent the surviving spouse from receiving DIC if the surviving spouse remarried after December 15, 2003.

(2) No payment may be made under this paragraph (e) for any month before January 2004.

(Authority: 38 U.S.C. 103(d)(2)(B); Sec. 101, Pub. L. 108–183, 117 Stat. 2652)

§ 5.204 Effective date of discontinuance of VA benefits to a surviving spouse who holds himself, or herself, out as the spouse of another person.

When a surviving spouse lives with another person of the opposite sex and holds himself or herself out openly to the public as the spouse of that person, VA will discontinue that surviving spouse's benefits effective the first day of the month that the relationship began.

(Authority: 38 U.S.C. 101(3), 5112(b)(1))

§ 5.205 Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage.

(a) *Void remarriage.* The effective date of an award resumed because a surviving spouse's remarriage is void is the later of the following dates:

(1) The date the surviving spouse and the other person stopped living together; or

(2) The date VA receives an application from the surviving spouse for resumption of benefits.

(b) *Annulment.* The effective date of an award resumed because a surviving spouse's remarriage is annulled is:

(1) The date the annulment decree became final, if the surviving spouse files an application for resumption of benefits within one year of that date; otherwise,

(2) The date VA receives an application for resumption of benefits.

(c) *Divorce.* The effective date of an award resumed because a surviving spouse's remarriage ends in divorce, provided the surviving spouse meets the requirements of § 5.203(c) and (d) for reinstatement, is:

(1) The date the divorce decree became final if the surviving spouse files an application for resumption of benefits within one year of that date; otherwise,

(2) The date VA receives an application for resumption of benefits.

(d) *Death.* The effective date of an award resumed because a surviving spouse's remarriage ends due to a death, provided the surviving spouse meets the requirements of § 5.203 is:

(1) The date of death, if the surviving spouse files an application for resumption of benefits within one year of that date; otherwise,

(2) The date VA receives an application for resumption of benefits.

(Authority: 38 U.S.C. 5110(a), (k), (l))

§ 5.206 Effective date of resumption of benefits to a surviving spouse who stops holding himself, or herself, out as the spouse of another.

The effective date of an award resumed because a surviving spouse no longer holds himself or herself out as the spouse of another is the date the surviving spouse stopped living with that person and holding himself or herself out openly to the public as that person's spouse, but not earlier than the date VA receives an application for benefits.

(Authority: 38 U.S.C. 103(d)(3), 5110(a))

§§ 5.207–5.219 [Reserved]

Child Status

§ 5.220 Status as a child for VA benefit purposes.

The following criteria must be met for a person to be recognized as a ''child'' for the purpose of VA benefits governed by this part:

(a) *Marital status.* Except as provided in § 5.228, ''Exceptions applicable to termination of child status based on marriage of the child,'' the person must be unmarried.

(b) *Age.* (1) *General rule.* The person must be under 18 years of age.

(2) *Exceptions.* The person may be 18 years of age or older under either of the following conditions:

(i) The person, before reaching 18 years of age, became permanently incapable of self-support through his or her own efforts by reason of physical or mental disability (*see* § 5.227, ''Child status based on permanent incapacity for self-support'') or

(ii) The person is under 23 years of age and is pursuing a course o of instruction at an educational institution approved by the Department of Veterans Affairs. For the purposes of this section, the term ''educational institution'' means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria. The term includes schools, colleges, academies, seminaries, technical institutes, and universities. The term also includes home schools that operate in compliance with the compulsory attendance laws of the States in which they are located, whether treated as private schools or home schools under State law. The term ''home schools'' is limited to courses of instruction for grades kindergarten through 12.

(c) *Relationship.* The person must bear one of the following relationships to the veteran:

(1) The veteran's natural child.

(2) The veteran's stepchild who became a stepchild under one of the following conditions:

(i) The person became the veteran's stepchild before reaching 18 years of age and is a member of the veteran's household, or was a member of the veteran's household at the time of the veteran's death, or

(ii) The person is a person described in paragraph (b)(2)(ii) of this section who became the veteran's stepchild after reaching 18 years of age, but before reaching 23 years of age, and who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death.

(3) The veteran's legally adopted child. *See* § 5.222, ''Adoption arrangements recognized by VA.'' The person must have been adopted by the veteran before the person reached 18 years of age, except for the following persons:

(i) A person who became permanently incapable of self-support before reaching 18 years of age and was a member of the veteran's household at the time he or she became 18 years of age, or

(ii) A person described in paragraph (b)(2)(ii) of this section who was adopted after reaching 18 years of age, but before reaching 23 years of age.

(Authority: 38 U.S.C. 101(4)(A), 104, 501(a))

§ 5.221 Evidence to establish a parent-natural child relationship.

(a) *Parents married at date of child's birth.* If additional evidence of relationship is required under § 5.180(c) and the parents were married to each other at the time of the child's birth, a claimant or beneficiary may prove a parent-natural child relationship as follows:

(1) *Mother.* Any of the evidence described in § 5.229, ''Proof of age and birth,'' that shows a mother-natural child relationship may be used to establish such a relationship.

(2) *Father.* Any of the evidence described in § 5.229, ''Proof of age and birth,'' that shows a father-natural child relationship may be used to establish such a relationship. If such evidence does not show that a male who was married to the child's mother when the child was born is the child's father, or shows someone else as the child's father, VA will evaluate the facts surrounding the case, make any necessary requests for evidence and information, and then determine whether or not the male is the child's natural parent.

Note to paragraph (a)(2): The fact that the evidence does not establish a father-natural child relationship between a child and a male married to the child's mother at the time of the child's birth does not preclude VA recognition of that child as that male's stepchild under the provisions of § 5.226, ''Child status based on being a veteran's stepchild,'' where applicable.

(b) *Parents unmarried at date of child's birth.* If additional evidence of relationship is required under § 5.180(c) and the parents were not married to each other at the time of the child's birth, a claimant or beneficiary may prove a parent-natural child relationship as follows:

(1) *Mother.* Any of the evidence described in § 5.229, ''Proof of age and birth,'' that shows a mother-natural child relationship may be used to establish such a relationship.

(2) *Father.* Any one of the following may be used to establish a father-natural child relationship:

(i) A male's statement in writing and signed by him acknowledging himself as the natural father of the child;

(ii) Evidence showing that a specific male has been identified as the child's father by judicial decree; or

(iii) Other competent evidence showing that a child is the natural child of a specific male, including any of the following:

(A) A copy of the public record of birth or a church record of baptism showing that a specific male was the informant and was named as the parent of the child,

(B) Statements from individuals who know that a specific male accepted the child as his own, or

(C) Service department records or public records, such as records from schools or welfare agencies, showing that, with his knowledge, a specific male was named as the child's father.

(Authority: 38 U.S.C. 101(4), 501(a))

§ 5.222 Adoption arrangements recognized by VA.

(a) *Scope.* This section describes the types of adoption arrangements and evidence of those arrangements that VA will accept as proof of an adoption for purposes of establishing a person as a child under § 5.220, ''Status as a child for VA benefit purposes.''

(b) *Establishing a legal adoption.* Any one of the following establishes a child's adoption into a family:

(1) A final adoption decree.

(2) A revised birth certificate showing the child as the child of the adopting parent(s) in cases where release of adoption documents or information is prohibited or requires petition to a court (records sealed by a court, for example).

(3) An interlocutory (temporary) adoption decree, provided that the decree has not been rescinded or superseded and the child remains in the custody of the adopting parent(s) during the interlocutory period.

(4) An adoption placement agreement between a parent, or parents, and an agency authorized by law to arrange adoptions. VA will recognize such an agreement for the duration of its term, provided that the adoptive parent(s) maintain custody of the child.

(Authority: 38 U.S.C. 101(4))

§ 5.223 Child adopted after a veteran's death recognized as the veteran's child.

(a) *Circumstances under which adoption will be recognized.* VA will recognize a person adopted by a veteran's surviving spouse as the veteran's child as of the date of the veteran's death if all of the following conditions are met:

(1) The adoption took place under a decree issued within two years of the veteran's death;

(2) The person adopted was living in the veteran's household at the time of the veteran's death; and

(3) At the time of the veteran's death the person adopted was not receiving regular contributions sufficient to provide for the major portion of the child's support, from any public or private welfare organization that furnishes services or assistance for children or from a person other than the veteran or the veteran's spouse.

(b) *Evidence.* In the absence of information to the contrary, VA will accept the statement of the surviving spouse or the custodian of the child that the requirements described in paragraphs (a)(2) and (a)(3) of this section have been met.

(Authority: 38 U.S.C. 101(4))

§ 5.224 Child status despite adoption out of a veteran's family.

(a) *Retention of eligibility for VA benefits.* The adoption of a veteran's child out of the veteran's family, whether before or after the veteran's death, does not terminate that person's status as the veteran's child for purposes of eligibility for VA benefits.

(b) *Evidence.*—(1) *Evidence of adoption where release of adoption records is restricted or prohibited.* To establish status as a veteran's child for a child who was adopted out of a veteran's family, in those jurisdictions where a petition must be made to a court for release of documents or information or when release of such documents or information is prohibited, either of the following will be accepted as proof of status as the veteran's child:

(i) A statement over the signature of the judge or the clerk of the court setting forth the child's former name and the date of adoption.

(ii) A certified statement by the veteran, the veteran's surviving spouse, a person receiving an apportionment of benefits, or their fiduciaries setting forth the child's former name, the child's date of birth, and the date and fact of adoption together with evidence indicating that the child's original public record of birth has been removed from such records.

(2) *Evidence of child-natural parent relationship in apportionment cases.* If VA receives an application for an apportionment under § 3.458(d) of this chapter on behalf of a child adopted out of a veteran's family, the evidence must be sufficient to establish the veteran as the natural parent of the child. *See* § 5.221, ''Evidence to establish a parent-natural child relationship.''

(Authority: 38 U.S.C. 501(a))

§ 5.225 Child status based on adoption into a veteran's family under foreign law.

(a) *General.*—(1) *Purpose.* VA will apply the provisions of this section to determine the validity of an adoption for VA benefit purposes when a person was adopted into a veteran's family under the laws of a foreign country.

(2) *Foreign country.* For purposes of this section, the term ''foreign country'' means a place other than a State as defined in § 3.1(i) of this chapter and other than the Commonwealth of the Northern Mariana Islands.

(3) *Inclusion of certain Philippine veterans.* For purposes of this section, the term ''veteran'' includes a Commonwealth Army veteran or new Philippine Scout as defined in 38 U.S.C. 3566.

(b) *Living veteran—adopted person living in a foreign country.*—(1) *Requirements for recognition of adoption.* If the veteran is alive and the person adopted under the law of a foreign country lives in a foreign country, VA will recognize the person's adoption as valid if all of the following conditions are met:

(i) The person was under age 18 when adopted;

(ii) The veteran provides one-half or more of the person's support;

(iii) The person's natural parent does not have custody of the person (this requirement does not apply if the natural parent is also the veteran's spouse); and

(iv) The person lives with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing home, other institution, or other health-care facility.

(2) *Continuing requirements.* The requirements noted in paragraphs (b)(1)(ii) through (iv) of this section must continue to be met following the adoption. VA may from time to time verify that these requirements are being met after the initial award of benefits to or based on the existence of the child. A beneficiary's failure to provide verifying information or documents upon VA's request may result in suspension or discontinuance of payments until VA receives proof that the requirements are still met.

(c) *Living veteran—adopted person not living in a foreign country.* If the veteran is alive and the person adopted under foreign law does not live in a foreign country, VA will determine the validity of the adoption under §§ 5.220, ''Status as a child for VA benefit purposes,'' and 5.222, ''Adoption arrangements recognized by VA.''

(d) *Deceased veteran and surviving spouse adoptions.* (1) *Applicability.* This paragraph (d) applies if a veteran adopted a person under the laws of a foreign country, but the parent-child

relationship had not been established for VA purposes during the veteran's lifetime. This paragraph (d) also applies if a surviving spouse adopted a person under the laws of a foreign country after the veteran's death.

(2) *Requirements for recognition of adoption.* VA will recognize the person's adoption as valid if the veteran was entitled to and was receiving a VA dependent's allowance or similar VA monetary benefit for the person at any time within one year before the veteran's death or if all of the following conditions are met:

(i) The person was under age 18 when adopted, and

(ii) All of the following conditions were met for at least one year before the veteran's death:

(A) The veteran provided one half or more of the person's support,

(B) The person's natural parent did not have custody of the person unless the natural parent is the veteran's surviving spouse, and

(C) The person lived with the veteran or with the divorced spouse of the veteran if the divorced spouse is also the natural or adoptive parent. This requirement does not apply when the person is attending an educational institution full-time, or when the person, the veteran, or the divorced spouse is confined in a hospital, nursing home, other institution, or other health-care facility.

(3) *Additional requirements when the person was adopted by a surviving spouse after the veteran's death.* In the case of adoption by a surviving spouse after the veteran's death, the adoption must also meet the requirements of § 5.223, ''Child adopted after a veteran's death recognized as the veteran's child.''

(Authority: 38 U.S.C. 101(4), 501(a))

§ 5.226 Child status based on being a veteran's stepchild.

(a) *Definitions.* The following definitions apply for purposes of this section:

(1) *Stepchild* means a natural or adopted child of a veteran's spouse, but not of the veteran, to include the child of a surviving spouse whose marriage to the veteran is deemed valid under the provisions of § 5.201, ''Surviving spouse status based on a deemed-valid marriage.''

(2) *Veteran-stepchild relationship* means a relationship between the veteran and the stepchild that meets the requirements of § 5.220(c)(2).

(b) *Proof of veteran-stepchild relationship.* Proof of the veteran-stepchild relationship must include, in addition to evidence that the criteria described in § 5.220(c)(2) are met, evidence of both of the following:

(1) The child is related to the spouse of the veteran by birth or adoption; and

(2) The veteran is or, in the case of a deceased veteran, was at the time of his or her death married to the natural or adoptive parent of the child.

(c) *Member of veteran's household.* VA will consider a stepchild as being or having been a member of the veteran's household for purposes of § 5.220(c)(2) when either of the following conditions are met:

(1) The child resides with the veteran or resided with the veteran on the date the veteran died; or

(2) The stepchild does not reside with the veteran or did not reside with the veteran on the date the veteran died, but the stepchild receives or received at least half of his or her support from the veteran. This includes a stepchild living apart from the veteran solely for medical, school, or similar reasons and a stepchild who is living with another person who has legal custody of the child.

(d) *Effect of termination of marriage or legal separation on stepchild relationship*—(1) *General rule.* Termination of a marriage, or formal legal separation, between a veteran and a stepchild's natural or adoptive parent terminates the veteran-stepchild relationship.

(2) *Exception.* The veteran-stepchild relationship remains intact if either:

(i) The stepchild continues to live with the veteran, or

(ii) The veteran continues to provide at least half of the stepchild's support.

(3) If the marriage between a veteran and a stepchild's natural or adoptive parent ended, or they legally separated, before the date of the veteran's entitlement to VA benefits, the stepchild can still be established as the veteran's child provided the validity of the marriage can be proved and the stepchild continues after termination of the marriage to be a member of the veteran's household as defined in paragraph (c) of this section.

(Authority: 38 U.S.C. 101(4), 501(a))

§ 5.227 Child status based on permanent incapacity for self-support.

(a) *Applicability.* This section sets out criteria VA uses to determine whether a person can be recognized as a ''child'' for VA benefit purposes under § 5.220(b)(2)(i) after reaching 18 years of age because the person became permanently incapable of self-support before reaching the age of 18.

(b) *Determining incapacity for self-support.* The principal factors VA considers in determining whether a person is capable of self-support are:

(1) *Employment history.* (i) *Productive employment.* A person who by his or her own efforts earns sufficient income for his or her reasonable support is not incapable of self-support.

(ii) *Intermittent employment.* Employment that is only part of a tryout or that is casual, intermittent, unsuccessful, or terminated after a short period by reason of disability does not preclude a finding of incapacity of self-support due to mental or physical disability that is otherwise established under this section.

(iii) *Charitable or therapeutic employment.* VA will not find capacity for self-support based on employment afforded solely upon sympathetic, therapeutic, or charitable considerations and that involves no actual or substantial provision of services.

(iv) *Lack of employment.* Evidence that a person was not employed before or after reaching 18 years old tends to show incapacity for self-support when the lack of employment was due to the person's physical or mental disabilities and not due to unwillingness to work or other factors unrelated to the person's disability.

(2) *Nature and extent of disability.* (i) In cases where the person is not provided with sufficient income for his or her reasonable support by his or her own efforts, VA will consider the following:

(A) Whether the extent and nature of disability would render the average person incapable of self-support;

(B) The impact of the disability on the person's ability to care for himself or herself and to perform the ordinary tasks expected of a person of the same age; and

(C) Whether the person attended school, and the highest grade completed.

(ii) Rating criteria applicable to disabled veterans set out in part 4 of this chapter are not controlling.

(c) *Determining permanence of incapacity.* (1) *Principal factors.* The principal factors for determining whether incapacity is permanent include the following:

(i) The nature and extent of disability;

(ii) Whether the disability has worsened or improved over time; and

(iii) Whether there is a reasonable possibility that the disability will improve in the future.

(2) *Case-by-case determinations.* (i) VA will determine the person's permanent incapacity for self-support on a case-by-case basis based on the evidence of record.

(ii) Evidence VA will consider may include:

(A) A VA examination if deemed necessary.

(B) Medical or psychiatric examination or treatment records.

(C) Statements of persons having knowledge of the facts who have observed the child's condition, such as teachers, tutors, or social workers, or statements from institutions where the child received care, schooling, or other related services.

(iii) VA may consider relevant evidence dated before or after the child reached 18 years of age.

(d) *Revision of child status determinations.*—(1) *Certain protection provisions inapplicable.* A VA determination that a child is permanently incapable of self-support is not subject to protection under § 3.951(b) or § 3.952 of this chapter.

(2) *Reexamination.* Only in unusual cases will VA request reexamination after it has found that a child is permanently incapable of self-support.

(3) *Intermittent employment.* A child previously shown by competent evidence to have been permanently incapable of self-support before reaching 18 years of age may be held to remain so at a later date even though there may have been a short intervening period or periods of employment of the type described in paragraph (b)(1)(ii) of this section, provided the cause of the incapacity is the same as that upon which VA previously found permanent incapacity and there was no intervening disease or injury that could be considered a major factor in current incapacity.

(4) *Court competency findings.* If VA receives evidence that shows that a child formerly found by VA to have been permanently incapable of self-support before reaching 18 years of age based on mental incompetency has been found competent by a court, VA will determine whether the child continues to be permanently incapable of self-support under this section. Such court determinations are not binding upon VA.

(Authority: 38 U.S.C. 101(4)(A)(ii); 501(a))

§ 5.228 Exceptions applicable to termination of child status based on marriage of the child.

(a) *Applicability.* This section states exceptions to the requirement in § 5.220(a) that for a person to have status as a ''child'' for VA benefit purposes that person must be unmarried.

(b) *Rule inapplicable to chapter 18 benefits.* The requirement that the child of a veteran be unmarried does not apply to benefits for birth defects of the children of certain veterans under 38 U.S.C. chapter 18 (Benefits for Children of Vietnam Veterans).

(c) *Termination of marriage.* A child's marriage will not prevent a child from receiving benefits or a claimant or beneficiary from receiving benefits based on the existence of a child if the child's marriage:

(1) Was void (for a definition of a ''void'' marriage, see § 5.195, ''Void marriages'');

(2) Was annulled by a court having authority to annul marriages, unless VA determines that the annulment was obtained through fraud by either party or by collusion of the parties (*see* § 5.196, ''Evidence of void or annulled marriages'');

(3) Ended by death before November 1, 1990; or

(4) Ended by divorce before November 1, 1990, by a court with authority to render divorce decrees, unless VA determines that the divorce was obtained through fraud by either party or by collusion of the parties.

(Authority: 38 U.S.C. 101(4), 103(e), 501(a), 1821, 1831; Sec. 9, Pub. L. 93–527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388, 1388–343)

§ 5.229 Proof of age and birth.

(a) *Proof of birth in preferred order.* The classes of evidence to be furnished for the purpose of establishing age or birth are listed below in the order of preference. Failure to furnish more preferred evidence, however, does not preclude the acceptance of less preferred evidence if the evidence furnished is sufficient to prove the point involved. *See also* § 5.180(e), ''Acceptability of photocopies.''

(1) A birth certificate (copy or abstract), subject to paragraph (b) of this section;

(2) Church record of baptism (original or copy), subject to paragraph (b) of this section;

(3) Service department records of birth;

(4) An affidavit or certified statement from a physician or midwife present during the birth;

(5) A copy of a Bible or other family record containing reference to the birth. The copy must be accompanied by a statement from a notary public, or other officer who has authority to administer oaths, certifying all the following criteria:

(i) The year the Bible or other family record was printed;

(ii) Whether it appears the record has been erased or changed in any way;

(iii) Whether it appears the entries were made on the date noted in the record.

(6) Affidavits or certified statements from two or more persons, preferably disinterested, who have knowledge of the name of the person born; the month, year, and place of birth of that person; and the parents' names. These persons must also provide VA with their own ages and an explanation as to how they came to know the facts surrounding the birth; or

(7) Other reliable and convincing evidence that provides relevant information. This includes any of the following:

(i) Census records.

(ii) Hospital records.

(iii) Insurance policies.

(iv) School records.

(v) Employment records.

(vi) Naturalization records.

(vii) Immigration records.

(b) *Overcoming lack of contemporaneous evidence.* VA will accept as proof of age or relationship:

(1) A copy or abstract of the public record of birth established more than 4 years after the birth if it is consistent with material on file with VA, or if it shows on its face that it is based upon evidence that would be acceptable under this section.

(2) An original or a copy of a church record of baptism performed more than 4 years after the birth if it is consistent with material on file with VA. Such material must include at least one reference to age or relationship made when such a reference was not essential to establishing entitlement to the benefit claimed.

(Authority: 38 U.S.C. 501(a))

§ 5.230 Effective date of award of pension or dependency and indemnity compensation to, or based on the existence of, a child born after the veteran's death.

(a) *Applicability.* The section provides the effective date of an award of pension or dependency and indemnity compensation (DIC) to, or an increase in such an award based on the existence of, a child born after the death of the parent-veteran upon whom eligibility for the award is based.

(b) *Effective date.* (1) The effective date is the date the child was born, if VA receives either of the following within the time specified:

(i) Proof of birth received within one year of the date of birth; or

(ii) Notification of the expected or actual birth received within one year after the veteran's death, provided that the notice is sufficient to indicate an intent to apply for pension or DIC benefits described in paragraph (a) of this section.

(2) In all other cases, the effective date of the award or increase is the date VA

receives an application for pension or DIC benefits described in paragraph (a) of this section.

(Authority: 38 U.S.C. 5110(a), (n))

§ 5.231 Effective date of reduction or discontinuance—child reaches age 18 or 23.

(a) *Applicability.* The effective date rule in this section applies to the reduction or discontinuance of pension, compensation, or dependency and indemnity compensation required when a person no longer qualifies as a child for VA benefit purposes under § 5.220(b) because the person has reached 18 years of age or is attending an approved educational institution and has reached 23 years of age.

(b) *Effective date.* VA will pay a reduced rate or discontinue benefits effective on the child's 18th or 23rd birthday, as applicable.

(Authority: 38 U.S.C. 5112(a))

Note to § 5.231: For effective dates of reductions or discontinuance applicable when a child completes the course of education or otherwise terminates school attendance prior to his or her 23rd birthday, see § 3.667 of this chapter.

§ 5.232 Effective date of reduction or discontinuance—terminated adoptions.

(a) *Applicability.* The effective date rule in this section applies to the reduction or discontinuance of pension, compensation, or dependency and indemnity compensation required when a person no longer qualifies as a child for VA benefit purposes as an adopted child under §§ 5.220(c)(3) and § 5.222, ''Adoption arrangements recognized by VA.''

(b) *Effective date.* When an adoption terminates, VA will pay a reduced rate or discontinue benefits on the earliest of the following dates, as applicable:

(1) The day after the day the child left the custody of the adopting parent during the interlocutory period;

(2) The day after the day the child left the custody of the adopting parent during the term of an adoption placement agreement;

(3) The day after the date of rescission of the adoption decree; or

(4) The day after the date of termination of the adoption placement agreement.

(Authority: 38 U.S.C. 5112(a))

§ 5.233 Effective date of reduction or discontinuance—stepchild no longer a member of the veteran's household.

(a) *Applicability.* The effective date rule in this section applies to the reduction or discontinuance of pension, compensation, or dependency and indemnity compensation required when a person no longer qualifies as a child for VA benefit purposes as a stepchild under § 5.220(c)(2) because the person is no longer a member of the veteran's household. *See* § 5.226(c) (defining ''member of the veteran's household'').

(b) *Effective date.* VA will pay a reduced rate or discontinue benefits when a stepchild is no longer a member of the veteran's household effective the day following the date the child ceased being a member of the household.

(Authority: 38 U.S.C. 5112(a))

§ 5.234 Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self-support.

(a) *Applicability.* This section provides the effective dates for an award, a reduction, or a discontinuance of pension, compensation, or dependency and indemnity compensation to, or based upon the existence of, a person who is a ''child'' for VA benefit purposes under § 5.220(b)(2)(i) because the person became permanently incapable of self-support before reaching the age of 18 or due to termination of such child status because the person is no longer incapable of self-support.

(b) *Awards.*—(1) *Initial awards.* The effective dates of initial awards are governed by applicable effective date rules in § 5.183, ''Effective date for additional benefits based on the existence of a dependent.''

(2) *Claim for continuation of benefits.* The effective date of a continuation of benefits previously awarded to, or based upon the existence of, a child after the child reaches 18 years of age is the date of the child's 18th birthday if VA receives an application for the continuation of such benefits based upon the child's permanent incapacity for self-support not later than one year after the child's 18th birthday. Otherwise, the effective date is the date VA receives an application for benefits.

(c) *Reduction or discontinuance of VA benefits.* (1) *Pension benefits.* VA will pay the reduced rate or discontinue pension benefits because the person recognized as a child is no longer incapable of self-support effective the first day of the month that follows the month in which VA last paid benefits.

(2) *Compensation or dependency and indemnity compensation benefits.* VA will pay the reduced rate or discontinue compensation or dependency and indemnity compensation benefits because the person recognized as a child is no longer incapable of self-support effective the first day of the month following expiration of the 60-day notice period described in § 5.83, ''Right to notice of decisions and proposed adverse actions.''

(Authority: 38 U.S.C. 5110, 5112)

§ 5.235 Effective date of an award of benefits due to termination of a child's marriage.

(a) *Applicability.* This section states the effective dates of awards to, or based upon the existence of, a child when status as a child for the purpose of VA benefits has been restored due to termination of the child's marriage. *See* § 5.228. ''Exceptions applicable to termination of child status based on marriage of the child.''

(b) *Effective date.*—(1) *Void marriages.* If a child's marriage is void, the effective date of an award of benefits is the later of the following dates:

(i) The date the child and the other person stopped living together; or

(ii) The date VA receives an application for benefits.

(2) *Annulled marriages.* If a child's marriage is annulled, the effective date for an award of benefits is:

(i) The date the annulment decree became final, if VA receives an application for benefits within one year of that date; otherwise,

(ii) The date VA receives an application for benefits.

(3) *Marriage terminated by death or divorce before November 1, 1990.* Awards under § 5.228(c)(3) or (4) (pertaining to marriages terminated by death or divorce prior to November 1, 1990) are effective on the date VA receives an application for benefits.

(Authority: 38 U.S.C. 501(a), 5110(a), (k), (l); Sec. 9, Pub. L. 93–527, 88 Stat. 1702, 1705; Sec. 8004, Pub. L. 101–508, 104 Stat. 1388, 1388–343)

§§ 5.236–5.239 [Reserved]

Parent Status

§ 5.240 Status as a veteran's parent.

(a) *Persons who qualify as a veteran's parent for VA purposes.* Except as otherwise provided in this section and subject to the requirements of this subpart concerning proof of the relationship described, a parent of a veteran is one of the following:

(1) A veteran's natural mother or father,

(2) A veteran's mother or father through adoption, or

(3) A person who stands in the relationship of a parent to a veteran, subject to the following requirements:

(i) The person must have stood in the relationship of a parent to the veteran for a period of not less than 1 year at any time before the veteran's entry into active military service, and

(ii) Such a relationship must have begun prior to the veteran's 21st

birthday, although it may have ended before, on, or after that birthday.

(b) *Institutions do not qualify.* VA will not recognize an institution as a veteran's parent, even if the institution is providing care for the veteran in place of a parent.

(c) *Natural parent who was not married to the other natural parent at the time of the veteran's birth.* VA will recognize a natural parent who was not married to the veteran's other natural parent at the time of birth as a veteran's parent for VA purposes if the requirements of § 5.221, ''Evidence to establish a parent-natural child relationship,'' are met and that natural parent did one or both of the following:

(1) Accepted the veteran as a member of his or her household.

(2) Provided substantial financial support to the veteran consistently from the date of the veteran's birth until the veteran reached the age of 21, married, or entered active military service.

(d) *Abandonment.* VA will not provide benefits to a person based on that person's status as a veteran's natural or adoptive parent if that person abandoned the veteran unless that person subsequently assumed the legal and moral obligations of a parent with respect to the veteran. For purposes of this paragraph, abandoned means that a veteran's natural or adoptive parent did not assume the legal and moral obligations of a parent with respect to the veteran. Abandonment implies not just a failure to provide support, but a refusal to do so. It is not necessary to show that someone else assumed the parental relationship for abandonment to occur.

(e) *Not more than one mother and one father recognized.*—(1) *General rule.* VA will recognize not more than one father and not more than one mother as parents of a veteran.

(2) *Different persons qualified as a veteran's mother or father at different times.* (i) If two or more persons qualified as a veteran's mother or father under this section at different points in time, VA will recognize the person who last qualified before the veteran's last entry into active military service as the veteran's mother or father.

(ii) VA will recognize a veteran's natural parent who was the last person to have a parental relationship to the veteran before the veteran last entered active military service as the mother or father of the veteran even though that parent's parental rights have been terminated by a court.

(f) *A person claims status as a veteran's mother or father under paragraph (a)(3) of this section while the veteran's natural or adoptive mother or father is still living.* VA will not recognize a person as the veteran's mother or father under paragraph (a)(3) of this section if the veteran's natural or adoptive mother or father was living at the time the person claims to have stood in the relationship of a mother or father to the veteran unless the natural or adoptive mother or father had relinquished parental control of the veteran. For purposes of this paragraph, *relinquished parental control* means that a veteran's natural or adoptive parent ceased to provide for the child and that the parent and child relationship was broken. It is not necessary that a court have terminated parental rights. Relinquishment of control does not necessarily mean abandonment by the parent. However, a finding of abandonment would automatically establish relinquishment of control.

(Authority: 38 U.S.C. 101(5), 501(a))

§§ 5.241–5.249 [Reserved]

[FR Doc. 06–7759 Filed 9–19–06; 8:45 am]
BILLING CODE 8320–01–P