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DEPARTMENT OF JUSTICE

28 CFR Part 32

[Docket No.: OJP (BJA) 1646]

RIN 1121-AA80

Public Safety Officers' Benefits Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Final rule.

SUMMARY: The Office of Justice Programs (OJP) of the U.S. Department of Justice is amending its regulation defining “Spouse” for purposes of implementing the Public Safety Officers’ Benefits (PSOB) Act, associated statutes, and Program. Prior to the Supreme Court invalidating section 3 of the Defense of Marriage Act (DOMA) DOMA prevented OJP from recognizing same-sex surviving spouses for the purposes of awarding PSOB Act benefits. As amended, the final regulation recognizes as a spouse, for purposes of the PSOB program, a person who lawfully enters into a marriage in one jurisdiction, even when living in another jurisdiction, and without regard to the law of the other jurisdiction.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Hope Janke, Bureau of Justice Assistance (BJA), OJP, at (202) 514-6278, or toll-free at 1 (888) 744-6153.

SUPPLEMENTARY INFORMATION:

I. Background

In a document published in the Federal Register on March 5, 2014 (79 FR 12434), OJP proposed to amend its regulation at 28 CFR 32.3, defining spouse for purposes of the PSOB Act and program. The comment period ended on April 4, 2014. OJP received four comments from interested individuals and organizations. Three of the commentators generally approved of the proposed amendments but suggested that OJP broaden its definition of spouse and child. One commentator stated that OJP's definition exceeded the federalism framework in *Windsor* and suggested that OJP revise the regulation to recognize only those marriages valid under the law of the individual's domicile. The comments are discussed below. Based on the rationale described in this document and in the notice of proposed rulemaking, OJP adopts the proposed rule as indicated in this document.

II. Comments

Definition of Spouse

We received several comments regarding the scope of the proposed definition of spouse. Concerned that the new rule would have no effect on states that do not allow same-sex marriage, or only allow common law marriages, one commentator suggested that OJP revise the rule to include in the definition of a spouse those persons in a same-sex relationship for ten or more years. Two commentators suggested that OJP expand the proposed definition of spouse to include persons in other "legally recognized" or "non-marriage legal unions" such as civil unions and domestic partnerships.

OJP's current and proposed definition of spouse are premised on its interpretation of the laws authorizing payment of benefits to surviving spouses, e.g., 42 U.S.C. 3796(a), as requiring that an individual must be in a valid marriage to be considered a spouse. Accordingly, we make no change to the proposed rule based on the comments.

Definition of Child

Citing various concerns that a legal relationship between a parent and child, as determined by state law, is often necessary to establish eligibility as a "child" for federal benefits, one commentator recommended that OJP expand its definition of "stepchild" to include the child of a parent standing *in loco parentis*, "where *in loco parentis* means those with day-to-day responsibilities to care for and financially support a child, with whom a biological or legal relationship is not necessary."

Current OJP regulations define an adopted child as an individual (1) legally adopted by the public safety officer (PSO), or (2) known by the PSO not to be his or her biological child, and in a parent-child relationship with the PSO despite such knowledge.¹ Because the regulatory definition provides eligibility based on a parent-child relationship that does not require the PSO to be or have been married to the biological or legally adoptive parent of the child or to have legally adopted the child, the existing definition satisfies the commentator's request. As a result, we make no changes to current regulations.

One commentator, citing concerns about possible bias of state-level claims processors, suggested that OJP revise § 32.3 by adding to the definition of parent-child

¹ "*Parent-child relationship* means a relationship between a public safety officer and another individual, in which the officer has the role of parent (other than biological or legally-adoptive), as shown by convincing evidence." 28 CFR 32.3.

relationship the following language: “A parent-child relationship should be assessed without regard to the sexual orientation or gender identity of the parties involved.”

OJP disagrees that such change is necessary. Apart from a hearing that may be conducted locally by OJP appointed hearing officers, *all* PSOB claims are processed in BJA’s Washington, DC, office, and reviewed by PSOB Counsel to ensure compliance with governing law. Moreover, nothing in the current regulatory definition of parent-child relationship, or OJP’s process for adjudicating claims requires that OJP assess the sexual orientation or gender identity of the PSO upon which a finding as to the existence of a parent-child relationship would be based. Because such information is not relevant to BJA finding whether a person acted as a parent to a child, we make no changes based on this comment.

The Proposed Rule is Inconsistent with Windsor

Asserting that the proposed definition of spouse was contrary to the federalism framework in *U.S. v. Windsor*, one commentator stated that OJP should have conducted a Federalism Assessment before publishing the proposed rule and requested that OJP revise the final rule to determine marital status based on the law of the PSO’s domicile.

The Federalism Assessment contemplated by Executive Order 13132 (1999) involves a determination as to whether a proposed rule would have *substantial direct* effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed rule, governing the identification of who is a proper beneficiary in a relatively small federal program (700 claims annually) paying benefits to

individuals has no substantial direct effect on the States or on a particular State.

Moreover, the rule does not change the relationship between state and federal governments, or alter the distribution of power between such governments. Accordingly, OJP's position that no Federalism Assessment was necessary remains unchanged.

The *Windsor* decision held that it was unconstitutional for the federal government to treat unequally a subset of state-sanctioned marriages. With the Court's invalidation of section 3 of the Defense of Marriage Act, OJP sought to fashion a rule that enables it to efficiently and fairly provide benefits to the surviving spouses and children of fallen PSOs in an increasingly mobile workforce that often marries in one state and resides in another. OJP is authorized to prescribe regulations necessary to carry out the PSOB program, e.g., 42 U.S.C. 3796c(a), and a regulation reflecting a policy choice to pay benefits based on the law of the place in which a valid marriage was entered is consistent with *Windsor*'s dictate against federal discrimination against a subset of marriages. As a result, we make no change based on the comments.

III. Regulatory Requirements

Executive Order 12866 and 13563—Regulatory Planning and Review

This rule has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1(b), General Principles of Regulation. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The costs of implementing this rule would be minimal, as it would impose no costs on state, local, or tribal governments, or on the private sector.

The Office of Justice Programs has determined that this rule is not a “significant regulatory action” under section 3(f) of the Executive Order, and accordingly this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This rule would not have substantial direct effects on the States, on the relationship between the federal government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB program provides benefits to individuals and does not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, OJP has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to section 3(b)(1)(I) of the Executive Order, nothing in this rule or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States, except as may be contained within part 32 of title 28 of the Code of Federal Regulations.

Regulatory Flexibility Act

This rule would not have a significant economic impact on a substantial number of small entities for the following reasons: this rule addresses federal agency procedures; furthermore, this rule would make amendments to clarify existing regulations and agency practice concerning public safety officers' death, disability, and education benefits and would do nothing to increase the financial burden on any small entities. Therefore, an analysis of the impact of this rule on such entities is not required under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act of 1995

This rule would not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Unfunded Mandates Reform Act of 1995

This rule would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The PSOB program is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 28 CFR Part 32

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 32--PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFITS CLAIMS

1. The authority citation for 28 CFR Part 32 continues to read as follows:

Authority: 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) & (b), 3795a, 3796c-1, 3796c-2; sec. 1601, title XI, Public Law 90-351, 82 Stat. 239; secs. 4 through 6, Public Law 94-430, 90 Stat. 1348; secs. 1 and 2, Public Law 107-37, 115 Stat. 219.

2. Amend § 32.3 by revising the definition of “Spouse” to read as follows:

§ 32.3 Definitions.

* * * * *

Spouse means someone with whom an individual entered into marriage lawfully under the law of the jurisdiction in which it was entered into and from whom the individual is not divorced, and includes a spouse living apart from the individual, other than pursuant to divorce, except that, notwithstanding any other provision of law, to determine whether an individual is a spouse of a public safety officer within the meaning of this definition when more than one individual is purported to be such a spouse, the PSOB Program will apply the law of the jurisdiction that it determines has the most significant interest in the marital status of the public safety officer:

(1) On the date of the officer's death, with respect to a claim under subpart B of this part or by virtue of such death; or

(2) As of the injury date, with respect to a claim not under subpart B of this part
or by virtue of the officer's death.

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Dated: June, 13 2014. _____

Mason

_____ Karol V.

Assistant Attorney General

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