Description of document:	Correspondence between Social Security Administration and the Department of Justice Office of Legal Counsel (OLC) re: Interpretation of the Defense of Marriage Act (DOMA), 2007
Requested date:	25-September-2010
Released date:	12-May-2011
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Source of document:	Social Security Administration Principal Public FOIA Liaison Room 3-A-6 Operations 6401 Security Boulevard Baltimore, MD 21235 Fax: (410) 966-0869 Online FOIA request form

SOCIAL SECURITY

Refer to:
S9H: AE9489

MAY 12 2011

This is in response to your September 24, 2010 Freedom of Information Act (FOIA) appeal regarding Ms. Dawn Wiggins' decision to withhold the following two documents in their entirety:

1. Letter to Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel (OLC), from Thomas W. Crawley, Acting General Counsel, Social Security Administration (SSA), dated June 6, 2007, and
2. E-mail to John P. Elwood, Deputy Assistant Attorney General, OLC, from Thomas W. Crawley, Acting General Counsel, SSA, dated June 29, 2007, at 12:16 EST.

Initially, we withheld five pages in their entirety pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)). Specifically, we asserted that the requested documents were protected by the attorney-client and attorney work-product privileges. You appealed our decision on the following three grounds:

1. "the SSA initial denial authority made no attempt to release segregable releasable portions of otherwise exempt records, as required under the law,"
2. "the attorney client privilege and attorney work product privilege may not properly fall in this case because the entities are federal agencies and there is a higher responsibility and duty to the citizens of the United States," and
3. "it is not clear that foreseeable harm would actually accrue in this instance, and the agency should not decline to release records if there would not be foreseeable harm."

After considering all of the facts, I have decided to release these documents in part. However, I am withholding portions of four pages pursuant to FOIA Exemption 6 (5 U.S.C. § 552(b)(6)), which protects personal privacy. Thus, the agency has redacted names and other personal identifiers in order to protect personal privacy.

The agency has decided to waive the attorney-client privilege as it applies to the two documents that you requested. The agency is waiving the privilege as to these two documents only and no other documents regarding the particular issue contained in these documents.

Therefore, I am reversing Ms. Wiggins' initial determination to withhold the requested documents in their entirety, but withholding portions to protect personal privacy.

This is our final decision in this matter. However, if you still believe the decision is incorrect, the law permits you to seek review in a district court of the United States. In lieu of seeking review in district court, you may contact the Office of Government Information Services (OGIS) for mediation services. Using OGIS services does not affect your right to pursue litigation.

As part of the 2007 FOIA amendments, Congress created OGIS to offer mediation services as a non-exclusive alternative to litigation to resolve disputes between FOIA requesters and Federal agencies. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-Free: 1-877-684-6448

Sincerely,

Daniel F. Callahan
Acting Executive Director
Office of Privacy and Disclosure

SOCIAL SECURITY

Office of the General Counsel

June 6, 2007

Mr. Steven G. Bradbury
Principal Deputy Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
Washington, D.C. 20530

Re: Interpretation of the Defense of Marriage Act

Dear Mr. Bradbury:

We are currently considering whether the child of one member of a same-sex civil union can be eligible for social security benefits on the account of the second member of the civil union. As this question could implicate provisions of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, we would appreciate the views of your office on the issues raised. Specifically, would DOMA preclude the child from qualifying as the beneficiary's child for purposes of entitlement to child's insurance benefits (CIB)?

Factual Background

Two women, [b(6)] entered into a civil union under Vermont law in 2002. [b6] gave birth to a child, [b6] in 2003. There is no evidence to indicate that [b(6)] donated ova or served as a gestational surrogate. Thus, [b(6)] relationship to [b(6)] not biological. [b(6)] did not adopt or attempt to adopt [b(6)] On [b(6)] birth certificate, [b(6)] is identified as [b(6)] mother and [b(6)] listed as his "2nd parent." On documents filed with the Social Security Administration (Agency), [b(6)] is identified as [b(6)] "natural mother," and [b(6)] is named as his "civil union parent." In 2005, the Agency found [b(6)] eligible for Social Security disability benefits. [b(6)] then filed an application for CIB on [b(6)] behalf.

The Social Security Act and Regulations

An individual may be eligible for CIB if, among other things, he is the "child" of an insured disability beneficiary as defined in 42 U.S.C. § 416(e) and was dependent on the insured at the time the application was filed. See 42 U.S.C. § 402(d)(1). The Social Security Act (Act) defines a "child" as "the child or legally adopted child of an individual," 42 U.S.C. § 416(e)(1), and § 416(h) provides the analytical framework the Agency must follow in making that determination. The Act provides:

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

42 U.S.C. § 416(h)(2)(A) (emphasis added).[1] See also 20 C.F.R. § 404.355(a)(1). If the child does not qualify for CIB under the State law that was in effect at the time of adjudication of the claim, the Agency will look at all versions of State intestacy law that were in effect from the first month the child could be entitled until the time of final adjudication and apply the version most beneficial to the child. 20 C.F.R. § 404.355(b)(3).

In defining the parent-child relationship, the relevant provisions of the Act and regulations do not expressly require that the insured person and the child's biological parent be "married." See 42 U.S.C. § 416(h)(2)(A) and 20 C.F.R. § 404.355(a)(1). Nor does the Act refer to a child's parent in gender-specific terms, as it does when defining "spouse," "wife," "husband," "widow," or widower." See 42 U.S.C. § 416(a)-(d), (f)-(g). Thus, neither the Act nor regulations require that [b(6)] have a "spousal" relationship to [b(6)] in order for [b(6)] to qualify as [b(6)] child for CIB purposes.

The Law of Vermont

[b(6)] was domiciled in Vermont at the time she applied for benefits on [b(6)] behalf. Accordingly, the question is whether the courts of that State would find that [b(6)] could inherit personal property as her natural child under Vermont's intestacy laws. We believe that the Vermont court would find that [b(6)] personal property would pass through intestacy to [b(6)] as her child.

The Vermont intestacy statute provides that when an individual dies intestate, leaving a spouse and children, the decedent's spouse is entitled to a statutory share of the estate, with the remainder of the estate passing to the decedent's children. Vt. Stat. Ann., tit. 14, § 551. Under Vermont law, a same-sex civil union is a relationship separate and distinct from a marriage, and parties to a civil union are not "spouses" or "husband" and "wife." However, "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under the law . . . as are granted to spouses in a marriage." Vt. Stat. Ann., tit. 15, § 1204(a) (emphasis added). The statute provides "a nonexclusive list of legal benefits, protections and responsibilities of spouses" that "apply in like manner to parties to a civil union," including those relating to intestate succession. Vt. Stat. Ann., tit. 15, § 1204(e)(1).

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1 There are other circumstances under which a claimant may be considered the child of an insured individual. See 42 U.S.C. § 416(e); 20 C.F.R. §§ 404.356 - .359. However, these provisions do not apply to the relationship between [b(6)] and [b(6)]

Significantly, the Vermont civil union statute also states that:

> [t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

Vt. Stat . Ann., tit. 15, § 1204(f). The right of parties to a civil union to pass property by the laws of intestate succession to the child of that union would seem to be the same as a right of parties to a marriage with respect to a child of the marriage. Thus, if the facts establish that [b(6)] is [b(6)] parent under Vermont law, we believe that Vermont law would secure the right of [b(6)] to inherit property from [b(6)] by intestate succession. Vt. Stat . Ann., tit. 15, § 1204.

On August 4, 2006, the Vermont Supreme Court confirmed that a parent-child relationship existed between a child and the former civil union partner of the child's biological mother when the child was conceived by artificial insemination and was born during the civil union. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006). Under facts similar to those here, the court declined to find that a biological connection to the child born during the civil union is necessary to establish parentage under Vermont law. Id. at 967. Citing Vt. Stat. Ann., tit. 15, §1204, the court concluded that if the parties had been married, certain factors [2] would have made the non-biological partner (husband) a parent and that "[b]ecause of the equality of treatment of partners in civil unions, the same result applies" in the case of a civil union. Id.

In view of the Vermont Supreme Court's reasoning in the Miller-Jenkins case, we believe that the Vermont courts would apply Vt. Stat. Ann., tit. 15, § 1204 to determine that [b(6)] is the child of [b(6)] and would allow [b(6)] to inherit from [b(6)] intestate estate. Vt. Stat, Ann., tit. 14. § 551.

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[2] The court considered several factors in that case supporting the finding of parentage under the Parentage Proceedings Act, Vt. Stat. Ann., tit. 15, §§ 301-308, including:

- the alleged parent and the biological mother of the child were in a valid Vermont civil union at the time of the child's birth;
- those parties intended for the civil union partner of the child's mother to be the child's parent;
- the civil union partner participated in the decision-making process with respect to artificial insemination of the child's biological mother and participated actively in prenatal care and in the child's birth;
- the parties treated the civil union partner of the child's biological mother as the child's parent during the course of the civil union.

912 A 2d at 970.

The Defense of Marriage Act

As pertinent here, the DOMA provides the following definitions of "marriage" and "spouse:"

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (emphasis added). On its face, the DOMA focuses on the interpretation of specific words that appear in the listed federal legal authorities. It does not refer to the terms that appear in state law that must be reviewed in the process of interpreting those federal authorities. [3] As previously noted, the term "marriage" and terms describing a "spousal" relationship do not appear in 42 U.S.C. § 416(h)(2)(A) or 20 C.F.R. § 404.355(a)(1) and (b). Furthermore, the DOMA does not purport to define "child" for federal law purposes. Thus, the DOMA does not appear to address the relationship of [b(6)] to [b(6)] under 42 U.S.C. § 416(h)(2)(A) and 20 C.F.R. § 404.355(a)(1) and (b).

We are seeking the views of your Office as to whether the DOMA would preclude [b(6)] from being eligible for benefits on [b(6)] earnings record, if [b(6)] would otherwise meet the requirements of the Social Security Act and regulations. We appreciate any advice or guidance you can provide. Staff questions can be directed to [b(6)] of the Office of Program Law at [b(6)] Thank you in advance for your assistance.

Sincerely,

Thomas W. Crawley

Thomas W. Crawley
Acting General Counsel

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[3] The legislative report of the Judiciary Committee, House of Representatives, on the bill that became the DOMA noted that the Federal Government should adopt federal definitions for the words "spouse" and "marriage." 1996 U.S. Code Cong. & Ad. News 2905, 2934. The Committee explained further that the provision which became 1 U.S.C. § 7 "will provide the meaning of these two words only insofar as they are used in federal law" and "merely restates the current understanding of what those terms mean for purposes of federal law." Id. (emphasis added).

Non-
Responsive

From: Crawley, Thomas [mailto:Thomas.Crawley@ssa.gov]
Sent: Friday, June 29, 2007 12:16 PM
To: Elwood, John
Cc: Winn, Jim
Subject: Request for Opinion

John: We appreciate your assistance in resolving the questions that we raised in our June 6 letter to your office. In your e-mail, you explained that when you are issuing an opinion to an agency whose head does not serve at the pleasure of the President, your practice is to receive from the agency a written agreement to be bound by the opinion. You also explained that for SSA, the Acting General Counsel could submit to you an e-mail stating that SSA agrees to be bound by the opinion. The Commissioner has authorized me, as Acting General Counsel, to state that the Agency agrees to be bound by the opinion that you will issue.

You correctly note that our opinion request focuses primarily on the application of the Defense of Marriage Act to the particular situation at issue, but we understand that your opinion might have to consider the meaning of certain sections of the Social Security Act. We look forward to seeing your draft opinion and appreciate our opportunity to review fully and to comment on it.

If you have any further questions, please feel free to contact me at (410-965-0600) or e-mail (thomas.crawley@ssa.gov.).

Tom Crawley
Acting General Counsel