COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178114

MAY 25 1973

The Honorable William P. Rogers
The Secretary of State

Dear Mr. Secretary:

Reference is made to a letter from Mr. James F. Campbell, Assistant Administrator for Program and Management Services, Agency for International Development (AID), dated February 26, 1973, requesting a decision as to whether certain AID employees are entitled to a separate maintenance allowance (SMA), where pursuant to a divorce decree, joint custody of the minor children is vested in both parents. The factual circumstances of each of four AID employees who have requested SMA are summarized as follows:

Mr. Fred C. Nagel was transferred to Vietnam from USAID/Mogadiscio in December 1966 and began receiving SMA. His family moved from the United States to the Taipei, Taiwan safehaven in June 1967 and the SMA was continued. During the summer of 1969 Mr. and Mrs. Nagel returned to the United States and entered into a separation agreement on August 26, 1969, which was followed by a divorce decree on October 22, 1970, awarding both parties joint custody and control of their minor son. The SMA was terminated retroactively to the date of the separation agreement; however, the employee claims he was entitled to the allowance for his minor son until he departed Vietnam on a mid-tour transfer to Brazil on March 23, 1971. It is noted that the employee's son did not join him at his new post.

Mr. Alvin V. Miller received a final divorce decree on June 30, 1969, which ordered that the minor children of the marriage were to remain under custody of their parents. His minor son resided with him at his post in Monrovia after the divorce until he was transferred to Vietnam in December 1970. The child then joined his mother who has provided the employee with a signed affidavit that when allowed by the Government, the child has her permission to reside with his father again for an indefinite period of time. Mr. Miller claims he is entitled to SMA for his son for the period he has been stationed in Vietnam.

Mr. A. Maurice Pare received a final divorce decree in December 1968 which awarded the parents joint custody of their four minor children. The employee was transferred to Vietnam in June 1969. He claims he is

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entitled to SMA for his minor children residing with their mother, and has submitted an affidavit signed by her granting permission for the children to live with the employee for at least a one-year period.

Mr. William E. Wanamaker was transferred to Vietnam in August 1967 and began receiving SMA. He arranged for his wife and family to move to the Manila safehaven in August 1968. The employee and his family returned to the United States on home leave in November 1969 where the family remained when the employee returned to the post. Mr. Wanamaker and his wife entered into a property settlement agreement in September 1970 and SMA was terminated. Subsequently, the employee received an interlocutory divorce decree in October 1970 which awarded the husband and wife joint custody of the minor children. Mr. Wanamaker claims he is entitled to SMA for his children during the period he has been in Vietnam, since his divorce decree.

In recent years a new and innovative concept has emerged in awarding custody of a child upon separation or divorce of the parents. The essence of the concept is joint legal custody of the child and joint resolution of all custodial issues. This concept, based as it is on the agreement of the parents, is entirely different from conventional exclusive and divided or partial custody. Under the joint custody arrangement, upon separation or divorce, the parents agree that neither of them shall have an exclusive right to custody and that the best interest of the child is paramount. They accept the responsibility to mutually agree on all facets of the child's upbringing such as where the child is to live, with whom and for what duration. Should an impasse develop the parents agree to arbitrate the question. This flexible approach concerning the difficult question of child custody has found acceptance in many courts which have increasingly begun to award joint custody. Kubie, Provisions for the Care of Children of Divorced Parents: A New Legal Instrument, 73 Yale L. J. 1197 (1964).

Inasmuch as both divorced or separated parents remain in the same legal relationship to the child with respect to custody as before the divorce or separation, a question is raised as to whether entitlement of an employee-parent, with joint custody of a child, to allowances and other benefits under Government regulations would also remain unchanged. Specifically the problem presented by this case is whether the above-described USAID employees who are or were stationed in Vietnam, the only post where SMA is currently authorized, are entitled to SMA. The USAID Mission to

Vietnam has refused to pay separate maintenance allowances in joint custody cases pending authorization by USAID Washington. This authorization is being withheld until a decision can be secured from our Office.

Separate maintenance allowances are authorized by 5 U.S.C. 5924 which provides in pertinent part:

§ 5924. Cost-of-living allowances

The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:

* * * * *

(3) A separate maintenance allowance to assist an employee who is compelled, because of dangerous, notably unhealthful, or excessively adverse living conditions at his post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining, elsewhere than at the post, his wife or his dependents, or both.

The implementing regulations for this statute are in subchapter 260 of the Standardized Regulations (Government Civilians, Foreign Areas). Section 262.3 outlines the conditions not warranting a separate maintenance allowance which includes the situation where the child's legal custody is vested wholly, or in part, in a person other than the employee. We do not think the terms of this provision covers joint custody inasmuch as joint custody is an undivided equal right to custody in both parents which is the same right the parents enjoyed before the divorce, as distinguished from a divided or a partial right to custody in a particular parent. See 92 A. L. R. 2d 695 (1963) and 99 A. L. R. 2d 926 (1964).

Section 261.1(b) of the regulations states that "dependents", with certain exceptions not here applicable, for the purpose of the above-quoted statute are members of the family as set forth in section 040m of the Standardized Regulations, which section provides in pertinent part as follows:

m. "Family" means one or more of the following relatives of an employee residing at his post, or who would normally

reside with him at the post except for the existence of circumstances cited in section 262.1 warranting the grant of a separate maintenance allowance, but who does not receive from the Government an allowance similar to that granted to the employee and who is not deemed to be a dependent or a member of the family of another employee for the purpose of determining the amount of a similar allowance:

* * * * *

(2) Children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support. The term shall include, in addition to natural offspring, step and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian.

The above definition is sufficiently broad to include children whose custody, incident to a divorce decree, has been placed jointly in the employee and his former spouse. Therefore, provided that it could be reasonably established that such children would have resided with the employee at his post but for the circumstances warranting SMA, we would not be required to object to the payment of SMA to employees having joint custody of minor children. In our view an affidavit of the former spouse stating that the child would be residing with the employee at post were it not for the Government prohibition would ordinarily be sufficient to establish entitlement.

The cases described herein may be handled accordingly.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States