

### 4.6.1 Living With Defined

A spouse of widow(er) is "living with" if:

- (S)he and the employee are members of the same household; or
- The employee is contributing to the spouse's or widow(er)'s support; or
- The employee is under court order to contribute to the spouse's or widow(er)'s support.

### 4.6.2 When "Living With" Is Required

- A. Life Cases - The 1983 Railroad Retirement amendments eliminated the living with requirement except when:
- the spouse is filing as a de facto (deemed)
  - the spouse's entitlement may begin prior to 8-12-83.
- B. Survivor Cases - "Living with" is required for a widow(er) to qualify for an accrued employee annuity due but unpaid at death, LSDP or RLS on the basis of that relationship. For eligibility to an LSDP in cases where the employee acquired his 120<sup>th</sup> railroad service month after 1974, or 60-119 months after 1995, the widow must meet the "living with" requirement by "living in the same household" as the employee at the time of the employee's death. For further information about eligibility for an LSDP, [see FOM I 605](#). For a definition of "living in the same household", [see FOM I 605.35.1](#).

Effective 11-1-66, "Living with" is usually not required in order for a legal widow(er) to qualify for an insurance annuity. The only case in which a legal widow(er) must be "Living with" is that of a deceased employee not insured under the SS Act at death. However, a de facto widow(er) must always be living in the same household with the employee at the time of the employee's death in order to qualify for an insurance annuity.

### 4.6.3 Point In Time When "Living With" Requirement Must Be Met

- A. Members of Same Household
1. Life Case - In the case of a de facto spouse or a spouse entitled before 8-12-83, the employee and spouse must be members of the same household on the date on which the spouse annuity application is filed.
  2. Survivor Case - The employee and widow(er) must be members of the same household at the time of the employee's death.

## B. Contributions Towards Support

1. Life Case - In the case of a spouse entitled before 8-12-83, the employee must have been contributing to the spouse's support as of the day on which the application for a spouse annuity was filed. This was broadly interpreted as any day within the 12-month retroactivity of the application as of which the spouse was other-wise qualified. Even though the contributions may have been discontinued before the actual filing date of the spouse's application, the requirement was met if it was established that the employee was making regular contributions at a time in the retroactive period as of which the spouse applicant met all other requirements.

When a spouse annuity was denied for not meeting this requirement, the spouse may have qualified at a later date upon establishing that the employee made regular contributions after the denial. The spouse annuity, if otherwise payable, could have begun as early as the month following the sixth consecutive month of substantial contributions.

2. Survivor Case - The employee must be contributing to the widow(er)'s support at the time of the employee's death.

## C. Court Order for Support

1. Life Case - In the case of a spouse entitled before 8-12-83, the court order for support must have been in effect on the date on which the application for a spouse annuity is filed.
2. Survivor Case - The court order for support must be in effect at the time of the employee's death.

### **4.6.4 Effect Of Employee's Place Of Death Of "Living With" Development**

The fact that the employee died away from the family household is not in itself reason for full development of "living with." Many deaths occur away from the family residence. When there is an allegation of "living with," but the file indicates that death occurred away from the family residence, an explanation showing that the employee died at a hospital, at work, on a business trip or vacation, is usually sufficient. This is not true, of course, when other evidence casts doubt on the "living with" allegation. In such case, develop the "living with," allegation fully.

### **4.6.10 Members Of Same Household**

A husband and wife are considered "members of the same household" if they customarily live together as husband and wife in the same abode. If they are living at

the same address, assume they are living together in the absence of evidence to the contrary.

A husband and wife are also considered members of the same household if they have shared and again intend to share the same abode, even though:

- They live apart temporarily because of circumstances beyond their control (such as financial difficulties, ill health, working away from home, service in the Armed Forces, etc.); or
- They live apart temporarily because one spouse is in a curative, custodial, or penal institution.

While temporarily living apart as described above does not defeat "living with," the facts must establish that there is an intent to resume living together and that the living apart is temporary in nature.

If the employee and spouse were separated solely for medical reasons, consider them to be living in the same household, even if the separation was likely to be permanent and there was little or no expectation of them living together again. As long as the spouse continued to demonstrate strong personal and/or financial concern for the employee, assume they would have lived together (absent evidence to the contrary) had the medical reasons not necessitated their separation.

#### **4.6.11 Proof Required**

Ordinarily, proof that the husband and wife are members of the same household consists of a statement made by the applicant on the application form; in a life case, the employee must answer item 2 of the G-346 whenever the spouse applies as a de facto spouse or qualifies for payment prior to 8-12-83. These statements are acceptable to establish that the husband and wife are members of the same household unless information received in the course of development raises doubt. However, if the required information is not furnished on the application, or on G-346 in a life case, or if additional information is required, a sworn statement may be submitted.

#### **4.6.12 Effect Of Temporary Separations**

Statements of intent to live together again from the husband and wife (or survivor) will prove "living with" unless the evidence shows other than temporary causes for separation. However, the intent to resume living together must be present at the time of the separation. Consider the reason for the separation and its duration in determining whether the intent existed or changed. Whether a separation is temporary or not is governed by the circumstances at the time of the separation, duration of the separation and what occurred during the living apart, as well as by the intention of the parties.

When the temporary separation resulted from domestic difficulties or when a permanent separation was the initial intent, handle in accordance with the following sections.

### 4.6.13 Separation Due To Domestic Trouble Or Incompatibility

When the separation is due to incompatibility, ill treatment, or other domestic difficulty, do not assume the separation is temporary without proof that it is. When there is a history of separation due to domestic difficulties, the fact that the parties resumed living together on prior occasions does not necessarily mean that the last separation is a temporary one. The single fact that on previous occasions the parties did resume living together does not justify an assumption that they would resume living together on the last occasion. However, consider the history of those prior separations and resummptions of living together in determining whether or not the last separation was temporary.

### 4.6.14 Reconciliation

- A. Effect of Reconciliation - The fact that a separation may have been permanent initially does not prevent a finding of "living together" if at a later time the parties become reconciled AND perform some overt act evidencing a resumption living together. Consider the separation ended at that point unless one of the parties subsequently did something to disavow the reconciliation. However, both of the above factors must be present, i.e., neither an agreement to resume living together nor an alleged overt act standing alone will suffice. Thus, when the parties have been permanently separated, a mere unexecuted intention to resume living together cannot reasonably justify a finding that the parties were members of the same household on either the application filing date or the date of the reconciliation agreement.

A conditional agreement to resume living together does not become a reconciliation agreement until the condition is fulfilled. However, the fulfillment of the condition is not an overt act since it merely relates to the completion of the conditional reconciliation agreement but not to the execution of such agreement. For example, the parties agree to resume living together if the husband goes to work. The securing of a job fulfills the condition of the agreement but the parties must also perform an overt act (e.g., rent an apartment) to complete the reconciliation.

- B. Development of Reconciliation - Secure evidence of acts showing that there is a reconciliation with an intent to resume living together again. This may include receipts for rent, furniture, etc., combined with evidence of their actually living together again. Obtain statements from the applicant, the employee (if living), and from one other person who knows the facts, as to:
- The date and cause of the separation;
  - The history of other separations'
  - The action of the parties while separated;

- Remarks made by either spouse to the witness (or in his presence) showing whether there is an intent to resume living together and the conditions under which the remarks are made;
- Whether the husband or wife performed an act preparatory to living together again, and the basis for the witness' knowledge of this act.

In a survivor case, if the widow(er) did not pay the employee's burial expenses, secure a statement from the widow(er) as to why (s)he did not pay such expenses. Also obtain a statement from the person(s) who did pay such expenses as to their knowledge of the separation and whether there had been a reconciliation. (This statement is not required of an organization which pays B/E.)

#### 4.6.15 Separation Due To Confinement Of One Spouse

A. General - Consider a husband and wife members of the same household even though one party is confined in a curative, custodial, or penal institution if:

- They are living together at the time one of them is confined; and
- There is a continuing intent to resume living together.

Base the decision as to whether there is a continuing intent to resume living together by both parties upon all the facts.

See [RCM 4.6.10](#) for further information concerning confinement of a spouse in a hospital or other curative institution.

B. Party Committed to Penal Institution - A finding of "living together" when one party is in a penal institution is not justified if (s)he is committed:

- For life; or
- For a period of years exceeding life expectancy; or
- Under a sentence of death.

Evidence showing that the other party is living with someone else in a marital or meretricious relationship also rebuts the intention to resume living together.

#### 4.6.25 Contributions Toward Support

Contributions by the employee to the spouse may be in cash or in kind, but they must be regular and substantial. No fixed amount has been set. The test is whether the employee recognizes an obligation to contribute to the support of the spouse and does so contribute. For example, contributions are proved if a husband lets his wife live rent-

free in a house that he owns. However, if they own the house jointly, the employee's contribution is equal to one-half of the amount by which the fair rental value exceeds the cost of maintenance. (Maintenance costs include repairs, taxes, mortgage payments and interest, etc.) This factor merely establishes regularity; it is still necessary to determine whether the contribution is substantial.

#### 4.6.26 Proof Required

Generally, the statements by the applicant on the application (or, prior to 8-12-83, by the employee on G-346 in a life case) are sufficient to establish contributions toward support.

Obtain a sworn statement to establish contributions toward support if:

- The information required is not furnished by either the applicant on the application or by the employee on G-346; or
- Reasonable doubt exists about the accuracy of the statements in view of other information in file; or
- Additional information is needed before making a determination.

The above rules apply in both life and survivor cases regardless of whether the applicant lives in this country or in a foreign country.

#### 4.6.27 Monthly Social Security Benefits

- A. General - The receipt of a monthly spouse benefit under the SS Act constitutes "contributions toward support" if the spouse met one of the "living with" requirements on the date (s)he filed the SS benefit application. In these cases, the spouse can be "deemed" to have filed an RR Act application on the date the SS benefit application was filed for the purpose of establishing "living with."

Prior to 9-1957, "living with" was requirement for entitlement to a monthly spouse benefit under the SS Act. Therefore, if a monthly spouse benefit was awarded before 9-1957, it can be assumed that the spouse was "living with" the employee on the date (s)he filed the SS benefit application.

The 1957 SS Act amendments eliminated "living with" as a requirement for entitlement to a monthly spouse benefit for months after 8-1957. Therefore, if a monthly spouse benefit was awarded after 8-1957, further development may be necessary to determine if the spouse was "living with" the employee on the date (s)he filed the SS benefit application. If the date on which the SS benefit application was filed is not in the claim folder, obtain such date from SSA if it is required to establish "living with".

If the SS benefit awarded before 8-1957 was erroneous, however, "living with" cannot be established on the basis of receiving the benefit.

If the monthly spouse benefit was reduced because of the spouse's entitlement to another SS benefit, determine whether the reduced amount is still a substantial contribution.

B. Life Cases - A monthly spouse benefit properly paid or payable and continuing through the RR Act entitlement date can be considered contributions toward support in determining "living with" if:

- The SS benefit was awarded before 9-1957; or
- The SS benefit was awarded after 8-1957 and the spouse met one of the "living with" requirements on the date (s)he filed the SS benefit application.

However, if the monthly spouse benefit is in suspense for any reason "as of the day on which the application for a spouse annuity if filed" (see sec. 4.6.3B), do not consider it contributions toward support.

C. Survivor Cases - A monthly spouse benefit properly paid or payable and continuing through the month before the employee died can be considered contributions toward support if:

- The SS benefit was awarded before 9-1957; or
- The SS benefit was awarded after 8-1957 and the spouse met one of the "living with" requirements on the date (s)he filed the SS benefit application.

However, if the monthly spouse benefit is in suspense for any reason when the employee dies, do not consider it contributions toward support.

#### **4.6.28 RR Act Spouse Annuity**

An RR Act spouse annuity properly paid or payable prior to 8-12-83 on the employee's compensation record for the month before the month the employee died is a contribution toward support and establishes "living with" for the purpose of paying the widow(er) survivor benefits.

A spouse annuity payable 8-12-83 or later is a contribution toward support only if the spouse met one of the living with requirements in [RCM 4.6.1](#) on the filing date of the spouse annuity application.

NOTE: A payment not legally due the spouse for the month preceding the employee's death cannot be considered a contribution toward support.

### 4.6.29 Veterans Administration Payment

VA payments to a wife based on her husband's entitlement to veterans' payments are deemed to be contributions by him if they are paid or payable before his death. It is immaterial whether or not he agreed to such payments

### 4.6.30 Prorating Contributions Made By Employee

When the employee contributes to the support of his wife and children and there is no evidence as to the amount intended for each, assume that three parts of each contribution are for the spouse and two parts are for each child. For example, when the employee contributes \$180 to his wife and three children, prorate the amount as shown below:

Wife	(3 parts)	=	\$ 60.00
Child	(2 parts)	=	40.00
Child	(2 parts)	=	40.00
Child	(2 parts)	=	40.00
	(9 parts)		\$180.00

### 4.6.31 Presumption Of "Living With" When Employee Unable To Continue Contributions

- A. General - When the employee is making regular and substantial contributions but is unable to continue due to causes beyond his control, presume "Living with" unless:
- There is information already in file or obtained during development which raises doubt as to whether the employee would have continued contributing even if he could have; or
  - The failure to contribute has lasted for an unreasonable period of time.
- B. Unreasonable Period - Whether or not a certain period is unreasonable depends on the employee's efforts and ability to contribute. However, a period of more than one year is usually considered unreasonable.

### 4.6.40 Court Order For Support

The term "court order for support" refers to a court issued document which provides for support payments to the spouse by the employee. If children are involved in the support payments, the court order must specifically provide for the spouse's support in

order to establish "living with." Provision for the support of the children alone does not establish "living with" for the spouse.

#### **4.6.41 Proof Required**

When the employee is ordered by a court to contribute to the applicant's support, a certified copy of the order or decree must be submitted. Any such court order must be certified by the court clerk or custodian of the records as not having expired or been vacated. The court order must be in force before the actual date on which the spouse annuity application is filed, or, in a survivor case, before the date of the employee's death. A court order which has been "suspended" is considered in effect as long as it has not expired or been vacated.

#### **4.6.42 Separation Agreement**

A separation agreement providing for contributions to the spouse's support which is not included in a court order is not sufficient under this provision; however, "living with" may be proved if it is shown that regular and substantial contributions are actually made to the spouse under such an agreement.

#### **4.6.43 Verifying Applicant's Statement Of Non-Support**

When an applicant is apparently ineligible because (s)he is not living with the employee, is not receiving contributions toward support, and (s)he claims that only the children are named in a court order for support, ask the applicant to submit a copy of the court order in order to verify the statement that (s)he is not included.

