2000

Diana Childs v. William K. Callahan : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

IN THE UTAH SUPREME COURT

DIANA CHILDS, (fka Diane Callahan) Petitioner/Appellant, vs. WILLIAM K. CALLAHAN, Respondent/Appellee.	)	20000028-SC Court of Appeals Case No. 990051-CA Priority 15

PETITION FOR WRIT OF CERTIORARI

Appeal from the Judgment of the
Utah Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

The Appellant, Diana Childs, pursuant to Rule 49 of the Utah Rules of Appellate Procedure, respectfully submits this Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

Questions Presented for Review

Appellant presents the following questions for this Court's review:

1. Did the Utah Court of Appeals err in affirming the trial court's ruling that Toone v. Toone, 952 P.2d 112 (Utah App. 1998), relying on its prior ruling in Throckmorton v. Throckmorton, 767 P.2d 121 (Utah Ct. App. 1988) precluded a modification of the Decree of Divorce to award Petitioner a share of that portion of Respondent's military retirement which accrued to him during the marriage in spite of the

implementation language of the Uniform Services Former Spouse's Protection Act (hereinafter "USFSPA") 10 USCA §1401?

2. Did the Utah Court of Appeals err in affirming the trial court's holding that Respondent's post-decree return to military service and subsequent entitlement to a military retirement, which utilized thirteen (13) years of active duty service that had accrued to him during the parties' marriage, was not a substantial factual change in circumstances which warranted a modification of the Decree?

3. Did the Utah Court of Appeals err in failing to find factual changes of circumstances where Petitioner's allegations of those changes were unopposed by Respondent?

Reference to official and unofficial reports of any opinions issued by Court of Appeals

A copy of the Court of Appeals opinion is set forth in Appendix "A". The opinion was reported at 384 Ut. Adv. Rep. 3 (1999).

Statement of Grounds upon Which Jurisdiction of Supreme Court is Invoked

The Utah Court of Appeals entered its opinion on December 9, 1999.

1. There have been no orders respecting either a rehearing or an extension of time in this matter.

2. There is no reliance made upon Rule 47(c) of the Utah Rules of Appellate Procedure, since this is not a cross-petition.

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §78-2-2(3)(a) 1953, as amended. This Writ of Certiorari is sought in order to review an order of the Utah Court of Appeals affirming the final order of the trial court disposing of all claims of the parties.

Controlling and Determinative Authorities

Controlling statutory provisions are set forth in their entirety in Appendix "B" hereto.

A. Federal Statutes: The Uniform Services Former Spouse's Protection Act, (hereinafter "USFSPA") 10 USCA §1401, *et seq.*, legislatively overrides the U.S. Supreme Court decision in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2 583 (U.S. 1981), which precluded the division of military retirements in State divorce proceedings. The relevant portion of USFSPA is 10 USCA §1401(c)(1) which relates to modification of divorce decrees that were entered between June 26, 1981, and February 1, 1983, the effective date of USFSPA. That period is generally known as the "gap" period of the USFSPA.

B. Utah Statutes: The primary statutory provision regarding the allocation of property in a divorce action is U.C.A. §30-3-5, *et seq.*, (1953), as amended.

Statement of Case

A. Nature of Case. This is a Petition for Writ of Certiorari from an order of the Utah Court of Appeals affirming the Second Judicial District Court,

Honorable Roger Dutson, which granted Respondent's Motion to Dismiss a petition to modify the parties' divorce decree.

B. Course of Proceedings and Disposition Below. Petitioner filed a Petition to Modify the Decree of Divorce, based upon substantially changed circumstances, which included the vesting of Respondent's military retirement subsequent to the divorce, as well as the enactment of the USFSPA which removed the prior prohibition against a division of that military retirement.

Respondent filed a Motion to Dismiss pursuant to Rules 12(b)(6), or in the alternative, 12(c) of the Utah Rules of Civil Procedure.

The trial court, over Petitioner's objections and her unopposed affidavits, granted Respondent's Motion to Dismiss.

On December 9, 1999, the Utah Court of Appeals affirmed the trial court's dismissal of Petitioner's Petition to Modify.

C. Statement of Relevant Facts.

1. The Decree of Divorce was issued on March 10, 1982.

2. The Decree addressed the issues of custody, alimony and property, but the issue of Respondent's military retirement was not, and in fact could not be, addressed at the time of the Decree because: a) the U.S. Supreme Court decision of McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed2 589 (U.S. 1981), precluded allocation of military retirement by state courts in divorce cases; and, b) Respondent was not vested in and, because of his non-affiliation with any military

reserve unit, apparently had no foreseeable possibility of becoming vested in a military retirement at the time the Decree of Divorce was granted. (R.001, R.033, R.051, R.058, Court of Appeals opinion, ¶4)

3. At the time the Decree of Divorce was entered, Respondent had separated from the U.S. Marine Corps after having accumulated thirteen (13) years towards the minimum of twenty (20) years of service required before he could retire from the military. (R.002, R.057, Court of Appeals opinion ¶1)

4. At the time of the divorce Respondent had no affiliation with the Marine Corps nor any reserve component, nor had he had any such affiliation for more than three years prior to the divorce. (R.003, R.058)

5. Petitioner did not know when Respondent entered the reserve component and began to accrue the additional seven years which would entitle him to a reserve component retirement that was based in large part upon the 13 years active duty which accrued during the parties' marriage. (R.003)

6. In 1985, the parties returned to court to have Respondent's child support obligation modified. At that time, Respondent did not disclose any income from a reserve forces assignment, nor any participation in any reserve activities. (R. 028, R.034)

7. From the date of the Decree of Divorce until January 1998, Petitioner was unaware that Respondent's additional military service would vest him with

a retirement benefit or that she might be entitled to one-half of the portion of that benefit which had accrued during the parties' marriage. (R.002, R.028)

8. After having become aware, through reading a newspaper article, that she might be entitled to a portion of Respondent's military retirement, and learning from her children that Respondent was participating in a reserve unit, Petitioner made efforts to contact an attorney who might be qualified to represent her in this matter. After speaking with three attorneys who did not feel qualified to deal with such a specialized matter, Petitioner was referred to her current attorneys, all of whom are military reservists and familiar with military retirement issues. (R.002, R.058, R.059, Court of Appeals opinion ¶6)

9. Although the trial court never permitted discovery or evidence from Respondent, it appears that he is now qualified to receive military retirement benefits. While Respondent will not actually receive military retirement benefits until his 60th birthday, in June 2003, it appears that he is now vested in that retirement program as a result of now having completed service that totals at least twenty (20) years. (R.051, R.058)

10. Because Petitioner's Motion to Modify the Decree was summarily dismissed by the Court, she was denied the opportunity to further develop through discovery the factual basis for this and other relevant changes of circumstances which would entitle her to a modification of the Decree of Divorce. (R.141-145)

11. Although Respondent produced no evidence nor affidavits to contradict Petitioner's affidavits, the Court of Appeals held that there had been no substantial change of circumstances, either in the law or factually, sufficient to justify reopening the divorce decree. (Court of Appeals Opinion, ¶¶11, 13)

ARGUMENT FOR ISSUANCE OF WRIT OF CERTIORARI

First Issue

Writ of Certiorari should issue because the Utah Court of Appeals erred in affirming the trial court's ruling that Toone v. Toone, 952 P.2d 112 (Utah App. 1998), relying on its prior ruling in Throckmorton v. Throckmorton, 767 P.2d 121 (Utah Ct. App. 1988) precluded a modification of the Decree of Divorce to award the Petitioner a share of that portion of the military retirement which accrued to Respondent during the marriage in spite of the implementation language of the Uniform Services Former Spouse's Protection Act (hereinafter "USFSPA") 10 USCA §1401.

For reasons shown below, this Court should grant *certiorari* under either subparagraphs (2) or (3) of Rule 46(a) of the Utah Rules of Appellate Procedure.

In McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2 583 (U.S. 1981), the U.S. Supreme Court held that a state court could not award an interest in a military retirement to a former spouse as a division of property in a divorce action. The Court based its ruling on public policy and stated that "the application of community property law conflicts with the Federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." 453 U.S. 223, 69 L.Ed 2d at 600.

In response to McCarty, Congress passed the Uniform Services Former Spouse's Protection Act which legislatively reversed McCarty and permitted states to divide and distribute military retirement benefits in divorce actions according to state law. 10 USCA §1408(c)(1); S.Rep. No. 97-502, U.S. Code, Cong. & Admin. News 1982 (July 22, 1982). Section 1408(c)(1) of the Act specifically provides for retroactive application of the Act with respect to divorce decrees entered during the period between McCarty (June 8, 1981) and the date that the Act became effective (February 1, 1983).

Petitioner in this matter was divorced squarely within the period of time for which retroactive application was intended by Congress - the so-called "gap" period.

Utah state law, as set forth in Woodward v. Woodward, 656 P.2d 431 (Utah 1982) allows for the division of retirement benefits that accrued during a marriage. As such, but for the McCarty decision, Petitioner should have been granted a portion of Respondent's military retirement which accrued during the marriage.

At the time that this Court, in Woodward changed the law to allow our courts to divide retirement benefits, it made no provision for the retroactive application of the concept. As a result, in Throckmorton, the Court of Appeals held that Mrs. Throckmorton could not retroactively modify her decree of divorce to obtain a share of Mr. Throckmorton's civil service retirement which had accrued during their marriage.

Since the Civil Service Retirement Spouse Equity Act of 1984 (Public Law 98-615, effective May 7, 1985) did not provide for any retroactive application of its provisions, the logic of Throckmorton was clearly appropriate to the facts of that case.

Citing Guffey v. LaChance, 127 Ariz. 140, 618 P.2d 634 (Az.Ct.App. 1980), Judge Billings in Throckmorton wrote that:

> . . . 'there is a compelling policy interest favoring the finality of property settlements' and this policy would be 'greatly undermined if the court were to allow the potential for re-examination of every military divorce prior to enactment of the [Arizona] rule'. 767 P.2d at 124.

In Guffey the Arizona court was actually dealing with a military retirement, but it was a pre-McCarthy and pre-USFSPA Arizona divorce decree. The analysis was based strictly upon Arizona law, and the public policy underlying that law at that time. In Throckmorton, the Court of Appeals clearly felt that this policy consideration applied to Civil Service Retirement or other retirements addressed by Woodward, where there was no contrary expression of public policy.

Unfortunately, when the Court of Appeals applied this principal to the post-USFSPA military retirement in Toone, it implied a public policy position that was diametrically opposed to the explicit public policy set forth by Congress in the USFSPA. That Act specifically provides for the retroactive modification of those decrees of divorce that were entered during the "gap". The decree in this case, unlike that in Toone, fits squarely into this "gap" and Petitioner is clearly a member of the class of people which Congress intended to benefit by this provision.

It is unfortunate that the Court of Appeals applied the Throckmorton analysis to the Toone case because it did not need to dispose of the case on that basis. It could have denied Mrs. Parkhurst's (Toone's) modification on two grounds that were totally

consistent with the USFSPA: 1) As Judge Greenwood states in Toone, that divorce did not take place during the "gap" period. In fact, "USFSPA became effective prior to the 1983 final divorce decree of Toone and Parkhurst". 952 P.2d at 114; 2) The trial court in Toone had considered and had allocated retirement benefits in the original decree, even though it had not specified whether a particular value or consideration had been given to Mr. Toone's military pension. 952 P.2d at 113.

Toone can be specifically distinguished from the present case in a number of ways:

1. In Toone, the Decree of Divorce was entered on December 16, 1983, some *ten months after the effective date of the USFSPA* and after the closure of the "gap" for which retroactive application of the statute was provided.

In this case, the Decree of Divorce was granted on March 10, 1982 - squarely within that "gap" period.

2. In Toone, the petitioner raised the issue of retirement at trial, but did not address the military retirement specifically.

In this case, because McCarty was the Federal law at the time, Petitioner was precluded from raising the issue of military retirement.

3. In Toone, Mr. Toone was eligible for military retirement at the time of the divorce.

In this case, not only was Respondent not eligible for military retirement at the time of the divorce, he had never indicated any intent to obtain the additional service necessary for him to vest in such a retirement.

4. In Toone, the Court of Appeals held that a change in the law was not a substantial change of circumstance which would justify the modification of a decree of divorce. In making its decision it relied upon its own decision in Throckmorton which had interpreted the Woodward opinion of this Court as not being subject to retroactive application. The logic of the opinion was that Woodward had not provided for retroactive application and it would be against public policy for the Court of Appeals to do so with respect to the Throckmorton civil service retirement.

In this case, the USFSPA contains an explicit expression of public policy with a provision which allows for retroactive application of the statute for decrees that were entered within the "gap" period. Petitioner is a member of the class of persons which Congress intended to benefit from this retroactive application clause.

5. In Toone the petitioner, in spite of the timing of her divorce, apparently relied solely upon the change of law under the USFSPA as her "substantial change of circumstances" to justify a modification of the decree. Mr. Toone was already vested in and receiving his retirement when the decree was entered.

In this case, Petitioner is relying on two "substantially changed circumstances" - 1) a change in the law which now specifically allows her claim; and 2) a separate factual change of circumstances.

Second Issue

Writ of Certiorari should issue because the Utah Court of Appeals erred in affirming the trial court's holding that the Respondent's post-decree return to military service and subsequent entitlement to a previously non-existent military retirement, which utilized thirteen (13) years of active duty service that had accrued to him during the parties' marriage, was not a substantial factual change in circumstances which warranted a modification of the Decree.

In order for members of the military to be vested with non-disability retirement benefits, they must have completed a minimum of twenty (20) years of creditable military service, either through full-time active duty service or part-time reserve service. McCarty, 453 U.S. at 214.

In 1979 Respondent separated from the U.S. Marine Corps after serving on active duty for thirteen years. At the time that he separated from the military, he had not accrued enough creditable years to vest in any retirement benefits. When the parties in this action divorced in 1982, Respondent had not been affiliated with the military in any capacity for more than three years and had never indicated any intention of returning to any form of military duty.

Even if the Decree in this matter had been entered after USFSPA, Petitioner would not have had any right to a portion of Respondent's military retirement at the time of the divorce because Respondent himself had no rights to a pension nor any foreseeable expectation of getting any. At the time of the divorce, Respondent had only a fragment of service that had no value to him and from which Petitioner could not receive any value.

However, at some time since 1985 Respondent re-affiliated with the military and now appears to have reached the rank of Lieutenant Colonel in a branch of the military reserve forces. While the lower court's decision dismissing the Petition to Modify precluded discovery on the issue, it appears, because of the rank that Respondent has attained, that he now has at least twenty (20) years of creditable service toward a retirement. At a minimum, even if he has not earned the retirement to date, there is now a substantial likelihood that he will vest in the retirement in the future.

The fact that Respondent had no prospect of reaching twenty (20) years of creditable military service at the time of the divorce, but has reached that milestone subsequent to the divorce is, in itself, a "substantial factual change in circumstances" which would allow the trial court to modify the Decree of Divorce and award one-half of the marital portion of that retirement to Petitioner.

Although the Court of Appeals held that the "compelling policy interest favoring the finality of property settlements" precluded a re-examination of the retirement issue in this case, the implied policy upon which that holding is based is in direct conflict with the explicit policy set forth by Congress in USFSPA. That Act specifically provides for retroactive application in cases such as this.

In Jacobsen v. Jacobsen, 723 P.2d 303 (Utah 1985) this Court addressed the policy implications referred to in the Court of Appeals below when it addressed the applicability of the doctrine of res judicata to divorce cases and held that:

> "When there has been an adjudication, it becomes res judicata to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding." Id. at 305.

In this case, Petitioner had no "fair opportunity" to litigate the issue of dividing the retirement asset because it had no value and was not foreseeably likely to mature or vest into something of value.[1]

The only way for Petitioner to receive a portion of the asset which now has a value attributable to the marriage is to allow her to modify the Decree.

Third Issue

Writ of Certiorari should issue because the Court of Appeals erred in failing to find factual changes of circumstances where Petitioner's allegations of those changes were unopposed by Respondent.

In its opinion, the Court of Appeals affirms the trial court's finding that Petitioner "presented no evidence of a substantial change in circumstances factually." Childs v. Callahan, 384 Utah Adv. Rep. 4. However, to reach this conclusion the lower court ignored the unrebutted allegations of those changes that were set out in Petitioner's affidavits. Specifically, in her affidavit dated November 25, 1998, Petitioner states that at the time of the divorce Respondent had been out of the Marine Corps for over 3 years,

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[1] Petitioner does not claim that a retirement must be vested to be divisible, and acknowledges that the courts routinely divide retirements that are actually potential future assets at the time of the divorce. The difference here is that at the time of the Appellant's divorce, there was no reasonably foreseeable likelihood that the retirement fragment earned during the marriage would mature into an asset that could ever be divided. However, now that it has matured, by far the largest component of its value is the "fragment" that accrued during the marriage of the parties.

that he had 13 years service when he separated, that he did not participate in any military or reserve duty between 1979 and the divorce in 1982 and that she had no idea at the time of the divorce that Respondent had any intention of returning to some form of duty which would result in his qualification for a retirement that ultimately utilized the 13 years of service which accrued during the marriage. She further alleged that she had only recently learned from her children that Respondent had been promoted to Lt. Colonel in the Reserves and, on that basis, she believed that he had either accrued 20 years towards retirement or, at least, now intended to do so.

Although the Court of Appeals claims to have construed the facts most favorably to Petitioner, and cites Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985) as the precedent for its not disturbing the findings of the trial court, there is a vast difference between the factual determinations in this case and those found in Shioji. The findings in Shioji were made after extensive litigation and two appeals. In fact, the findings in the second Shioji case cited by the Court of Appeals were initially sent back by this Court for better findings of fact. (Shioji v. Shioji, 671 P.2d 135) By comparison, the facts in this case are based upon unopposed affidavits and no testimony, documentary or other contradictory evidence was even presented to the court for consideration.

In Shioji, Chief Justice Hall did state that the trial court should be given "particularly broad discretion". Id. at 201. However, Chief Justice went on to cite Jorgensen v. Jorgensen, 599 P.2d 510, 511-512 (Utah 1979) for the proposition that this court will "interpose its own judgment . . . where the trial court's judgment is so

flagrantly unjust as to be an abuse of discretion." Id. at 201 and 207. Clearly, to find contrary to unopposed affidavits constitutes such an abuse of discretion.

CONCLUSION

By extrapolating an implied public policy that directly conflicts with the explicit policy set forth by the U.S. Congress, the Court of Appeals erred its application of this Court's holding in Woodward v. Woodward. Intervention via *certiarori* by this Court is necessary to correct this error and rectify the inequity which it has generated. Petitioner should be allowed to conduct discovery and fully present all facts that substantiate a change of circumstances that would clearly lead to the result intended by Congress when it enacted USFSPA.

DATED this 10th day of January, 2000.

NEIL B. CRIST & ASSOCIATES
Attorneys for Petitioner/Appellant

By: _____
NEIL B. CRIST

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI to the following individual at the address shown, via First Class U.S. mail, postage prepaid, on this 10 day of January, 2000:

David S. Dolowitz
Attorney for Respondent/Appellee
Cohne, Rappaport & Segal
525 East 100 South, 5th Floor
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_____

ADDENDUM

Appendix A:	Court of Appeals Opinion dated December 9, 1999 Ruling by Judge Roger S. Dutson
Appendix B:	10 USCA §1401 10 USCA §1408 UCA §30-3-5

IN THE UTAH COURT OF APPEALS

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Diana Childs fka Diane Callahan, Petitioner and Appellant, v. William K. Callahan, Respondent and Appellee.	OPINION (For Official Publication) Case No. 990051-CA F I L E D (December 9, 1999) 1999 UT App 359

Second District, Ogden Department
The Honorable Roger S. Dutson

Attorneys: Leonard E. McGee and Neil B. Crist, Bountiful, for Petitioner
David S. Dolowitz, Salt Lake City, for Respondent

Before Judges Wilkins, Billings, and Davis.

WILKINS, Presiding Judge:

¶1 Diana Childs appeals from an order denying her request for modification of a divorce decree to permit her to share in William Callahan's military retirement pay. We affirm.

BACKGROUND

¶2 Childs and Callahan were married in March 1965, and had two children during the course of their marriage. In 1966 Callahan joined the military on a full-time basis. In 1979, after nearly thirteen years of active duty, Callahan left the military.

¶3 In June 1981, the United States Supreme Court decided McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981), holding that federal law precluded state courts from dividing military retirement benefits under state community property laws. However, in 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. §§ 1401-1408 (amended 1990), to address the McCarty decision. USFSPA permits the former spouse of a military service member to receive up to fifty

percent of the service member's retirement benefits. See id. § 1408(c)(1). USFSPA became effective in 1983, and affords individuals who were divorced between June 26, 1981 and February 1, 1983 (the McCarty gap), the opportunity to return to court for the purpose of claiming a share in their former spouse's military retirement benefits.

¶4 The parties in this case were divorced in March 1982 and therefore, fall squarely within the McCarty gap. However, at the time of the divorce, Callahan was ineligible for military retirement benefits because he had accumulated only thirteen years of creditable military service. In order to qualify for retirement benefits, the military requires its members to accumulate at least twenty years of creditable military service, either through full-time active duty service or part-time reserve service.

¶5 In 1984, Childs issued a subpoena to Callahan inquiring about his income, including his "military reserve service." Thereafter, Childs filed a Petition to Modify the Decree of Divorce, requesting an order increasing Callahan's child support obligation which the trial court ultimately granted. Sometime after the divorce was finalized, Callahan re-affiliated with the military reserves. Childs alleges that Callahan became eligible to qualify for military retirement benefits by including the thirteen years he served while the parties were married with the time he spent in the reserves after the parties divorced.

¶6 In January 1998, Childs read an article that led her to believe that she may be entitled to one-half of Callahan's military retirement benefits which accrued during the parties' marriage. After reading the article, Childs contacted an attorney to represent her in this matter. In April 1998, more than sixteen years after the divorce was finalized, Childs filed a Petition to Modify the Decree of Divorce, claiming she had only recently discovered she was entitled to a share of Callahan's military retirement. Childs asserted that the enactment of the USFSPA, which nullified McCarty, now entitled her to a share of Callahan's military retirement benefits.

¶7 Callahan filed a motion to dismiss arguing that the subsequent legal recognition of pension benefits as marital property is not a substantial change of circumstances that would justify reopening the parties' divorce decree. The trial court agreed and granted Callahan's motion on the basis that "a change in law is not enough to constitute a substantial change of circumstances justifying the reopening of a decree of divorce." The trial court further concluded that Childs had failed to demonstrate a factual change in circumstances that would warrant a modification of the decree. Callahan subsequently requested

attorney fees on the basis that Childs's claims were without merit and asserted in bad faith. The trial court denied Callahan's fee request. This appeal followed.

ISSUES AND STANDARDS OF REVIEW

¶8 We address two issues on appeal. First, we consider whether the trial court erred in holding there had been no substantial change of circumstances sufficient to justify reopening the divorce decree. Second, we address whether the trial court erred in denying Callahan's request for attorney fees. Because both claims are questions of law, we review them under a correction of error standard, giving no deference to the trial court. See Toone v. Toone, 952 P.2d 112, 114 (Utah Ct. App. 1998) (stating whether a divorce decree should be reopened to divide a military pension is a question of law); Selvage v. J.J. Johnson & Assocs., 910 P.2d 1252, 1257 (Utah Ct. App. 1996) ("Whether attorney fees are recoverable in an action is a question of law, which is reviewed for correctness.").

ANALYSIS

I. Military Retirement Benefits

¶9 Childs argues that she is entitled to a modification of the parties' divorce decree because: (1) USFSPA was enacted in order to allow a former spouse of a military service member to receive a portion of the service member's retirement benefits; and (2) the vesting of Callahan's military retirement benefits constitutes a substantial change in circumstances which justifies a modification of the divorce decree. We disagree.

A. Change in Law

¶10 Childs first argues that she is entitled to a share of Callahan's military retirement benefits under USFSPA because Callahan accumulated a portion of his benefits during the parties' marriage and their divorce occurred during the McCarty gap. However, this argument alone does not support Childs's request for modification of the divorce decree. In order to justify a change or modification of the original divorce decree, Childs must demonstrate that "a substantial change in circumstances has occurred since the entry of the decree." Thompson v. Thompson, 709 P.2d 360, 362 (Utah 1985) (citations omitted).

¶11 In the present case, Childs has failed to show how the change in law from McCarty to USFSPA constitutes a substantial

change in circumstances. Indeed, this court recently held that passage of USFSPA does not constitute a substantial change of circumstances that would allow a former wife to reopen a divorce decree and obtain a share of her former husband's military retirement benefits. See Toone, 952 P.2d at 114; see also Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah Ct. App. 1988) (stating "legal recognition of a new category of property rights after a divorce decree has been entered, is not itself sufficient to establish a substantial change of circumstances justifying a revaluation of a prior property division"). Thus, although the parties' divorce was granted in the McCarty gap, and could have been reconsidered under USFSPA, the trial court was correct in granting Callahan's motion to dismiss in the absence of a showing of a material change of circumstances.

B. Change in Factual Circumstances

¶12 Childs further argues that the vesting of Callahan's military retirement benefits is a sufficient factual change of circumstances to justify modification of the divorce decree. We disagree.

¶13 In this case, the trial court reviewed the "purported factual changes, construing them most favorably to [Childs], and did not find any material change of circumstances, even by including consideration of the changes in law jointly with other material facts that had occurred between 1982 and 1998." In fact, the trial court specifically found that Childs "presented no evidence of a substantial change in circumstances factually." The trial court's factual findings underlying its conclusion that there was no material change of circumstances are entitled to deference. See Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985) (stating "[i]n divorce proceedings . . . the trial court is accorded particularly broad discretion"). Because these factual findings support the conclusion that no material change of circumstances existed, we affirm the trial court's decision on this issue.

¶14 Furthermore, public policy supports the trial court's denial of Childs's request for modification of the divorce decree. Under Utah law there is a "compelling policy interest favoring the finality of property settlements." Toone, 952 P.2d at 114 (citations omitted); see also Bailey v. Bailey, 745 P.2d 830, 832 (Utah Ct. App. 1987) (stating "potential for long lasting financial entanglement is a valid concern in divorce cases"). Although the right to seek modification of a divorce decree is well settled in Utah, the finality of property settlements is a counter-balancing interest that must be considered. Such considerations will be highly fact intensive and must be examined on a case-by-case basis.

¶15 Here, more than thirteen years had passed since the last hearing on the parties' divorce decree. The trial court found that Childs was "aware that [Callahan] was actively involved in the military reserves as early as 1984." Although Childs did not learn of her potential entitlement to Callahan's retirement benefits until 1998, the length of time that has passed since the parties' divorce weighs heavily in favor of denying Childs's request for modification. We therefore affirm the trial court's order with respect to retirement benefits.

II. Attorney Fees

¶16 Finally, Callahan asks this court to award him attorney fees and costs incurred at trial and on appeal.[1] Under section 78-27-56, attorney fees may be awarded if the court determines that an action is meritless and brought in bad faith. See Utah Code Ann. § 78-27-56 (1996). In order to find that a party acted in bad faith, the trial court must determine that at least one of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. See Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983).

¶17 In this case, the trial court specifically found that Childs "brought her action believing that she was legally entitled to some of [Callahan's] military retirement benefits." The trial court also stated that Childs "honestly felt the facts [in this case] were substantially distinguishable from the Toone case." Callahan does not dispute these factual findings and therefore, we accept them as true. See C & Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 52 (Utah Ct. App. 1995) ("Because appellants do not challenge the trial court's factual findings, we must accept . . . [them] as true.").

¶18 Furthermore, the record does not support a finding that Childs pursued her claim to hinder, delay, defraud, or take unconscionable advantage of Callahan. See Cady, 671 P.2d at 151 (holding ill-formed belief in claim does not prove bad faith). We hold that Childs's claim was not asserted in bad faith and Callahan is not entitled to attorney fees on appeal as a result,

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1. Having not filed a cross appeal on the denial of attorney fees below, Appellee has not properly presented the issue here. However, the denial of fees below supplies the basis for the denial of fees on appeal. As a result, we review the action of the trial court regarding attorney fees for that limited purpose only.

and also "because attorney fees were not awarded below." Baker v. Baker, 866 P.2d 540, 547 (Utah Ct. App. 1993).

CONCLUSION

¶19 Because a change in law does not constitute a substantial change of circumstances and because Childs has failed to demonstrate a substantial change of circumstances factually, we conclude the trial court did not err in refusing to reopen the issue of Callahan's military retirement benefits. Also, we hold that Childs's claim was not asserted in bad faith and therefore, refuse to award Callahan attorney fees incurred at trial and on appeal.

¶20 Affirmed.

Michael J. Wilkins,
Presiding Judge

¶21 WE CONCUR:

Judith M. Billings, Judge

James Z. Davis, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of December, 1999, a true and correct copy of the attached OPINION was deposited in the United States mail to:

NEIL B. CRIST
LEONARD E. MCGEE
NEIL CRIST & ASSOCIATES
380 N 200 W #260
BOUNTIFUL UT 84010

DAVID S. DOLOWITZ
COHNE RAPPAPORT & SEGAL
525 E 100 S STE 500
PO BOX 11008
SALT LAKE CITY UT 84147-0008

and a true and correct copy of the attached OPINION was deposited in the United States mail to the judge listed below:

Honorable ROGER S. DUTSON
SECOND DISTRICT, OGDEN DEPT
2525 GRANT AVE
OGDEN UT 84401

Judicial Secretary

TRIAL COURT: SECOND DISTRICT, OGDEN DEPT , 820980786
APPEALS CASE NO.: 990051-CA

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

DIANA CHILDS
fka Diane Callahan,

Plaintiff,

vs.

WILLIAM K. CALLAHAN,

Defendant.

RULING

Case No. 820980786 DA
Honorable Roger S. Dutson

This case is before the court for the purpose of determining whether or not Respondent should be awarded attorneys fees pursuant to Utah Code Annotated 78-27-56 in an action brought by Petitioner to have the court amend a decree of divorce by awarding a share of post-divorce perfected military retirement. Also, because this is a domestic action, equitable principles could be considered in reviewing attorneys fees but because of the courts decision herein, that was not necessary.

The court denied the Petitioners Motion to Amend the Decree of Divorce pursuant to the law, including the recent case of *Toone v Toone,* 952 P.2d 112 (1998).

The parties were divorced in 1982. At that time the Respondent had completed about 13 years of active military service but was not then eligible for any retirement benefits. About two years later in 1984, the Petitioner took Respondent back to court and obtained an increase in child support. After the divorce the Respondent purportedly became involved in the military reserves and was purportedly able to obtain or is in the process of obtaining retirement benefits by including the 13

years of active military service while the parties were married. Subsequently the Petitioner became aware that the federal law had changed regarding military benefits partially earned during a marriage and her potential entitlement to some of those benefits and she sought counsel to attempt to obtain what she felt was her portion of the retirement earned during the 13 year they were married and he was on active duty.

The Utah Court of Appeals reviewed the laws regarding partially earned military retirements in *Toone, Ibid* in its decision of January 29, 1998, and determined that the change in the laws did not amount to a substantial change of circumstances which would justify reopening the divorce decree in that case. This court ruled in it's decision dated December 18, 1998 that the law of *Toone* controlled the facts of the present case and dismissed the Motion to Amend the Decree of Divorce of 1982.

Petitioner argued that in addition to the change in law discussed in *Toone, Ibid,* there were substantial evidentiary facts that showed a substantial change of circumstances. This court reviewed those purported factual changes, construing them most favorably to Petitioner, and did not find any material change of circumstances, even by including consideration of the changes in law jointly with the other material facts that had occurred between 1982 and 1998. Therefore the court ruled that there was not justification to reopen the retirement benefit issues.

The question now before the court is whether or not attorneys fees should be awarded Respondent who asserts the law is so clear as to the issues raised by Petitioner that they amount to the raising of issues that are "....without merit and not brought or asserted in good faith, ..." (UCA

78-27-56)

This court finds that the claims of Petitioner are clearly without merit and that the legal issues were clearly resolved by the Utah Court of Appeals decision in *Toone, Ibid,* issued on January 29, 1998, some 3 months before the present action was filed. It does not necessarily follow however, that because the legal issues were without merit, the action was brought in "bad faith". This latter issue requires consideration of additional factors because it is both a factual and legal issue.

Petitioner asserts that she was totally unaware of certain potential legal rights to military retirement benefits she possessed until about January 1998 and then began searching for counsel who could competently handle this issue. She asserts that the attorney representing her in the 1982 divorce advised her she had no rights to the 13 years potential retirement benefits as there was a U.S. Supreme Court preventing her from any benefit therefrom. At the time of the divorce, he was not serving in the active military nor military reserves. After contacting several attorneys unsuccessfully, she hired Attorney Neil Crist who is a Retired Air Force Colonel who represented he knew about the law regarding military retirement benefits as they relate to divorce cases. Prior to the hearing on Respondents Motion to Dismiss, the Petitioner and her attorney went over the facts of *Toone, Ibid* and concluded that the facts of that case were distinguishable from her case and therefore, they concluded they wanted this court to make a decision in this matter. The court notes that it is apparent that Petitioner was previously aware that Respondent was actively involved in the military reserves as early as 1984 because at that time when she was getting the child support increased she issued a subpoena to Respondent asking about his income, including his "...military reserve service." The

court further finds that it would not have been difficult for her to determine that the 13 years of active military service during their marriage would have counted for any retirement benefits he might obtain through additional reserve involvement and the court can take judicial notice of the law governing that fact. However, it would have been more difficult for her to obtain information regarding and an understanding of her legal right to claim any such retirement benefits.

For purposes of the record this court has carefully reviewed the evidence submitted by Respondent concerning reasonable attorneys fees incurred by him and finds them to be reasonable. Further, the court has not considered the financial positions of either party as it relates to the ability to pay attorneys fees nor any equitable factors relating thereto.

The court does find from the foregoing facts and a full review of the affidavits submitted in this case that the Petitioner brought her action believing that she was legally entitled to some of the military retirement benefits the Respondent could potentially receive. The court finds that she honestly felt the facts were substantially distinguishable from the *Toone* case, even though the court does not so find. On the other hand, because the present state of the law in Utah does clearly preclude the claims presented, application of the clear rule of law to the facts of this case make it a very close issue, though that issue is resolved in favor of Petitioner and attorneys fees are denied. Of course, the appellate courts will be left to determine costs and attorneys fees on any appeal that might be pursued.

DATED this 15 day of March, 1999.

ROGER S. DUTSON
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I HEREBY certify that I mailed a true and correct copy of the foregoing Ruling to the following parties by first class mail, postage pre-paid, this 15th day of March, 1999:

NEIL B. CRIST
Attorney for Petitioner
380 North 200 West
Suite 260
Bountiful, UT 84010

DAVID S. DOLOWITZ
Attorney for Respondent
525 East 100 South
Fifth Floor
Salt Lake City. UT 84102

Dale Wood
DEPUTY COURT CLERK

In subsection (a), the words "who are in the Retired Reserve" are substituted for 50:927(a) (last 11 words), since section 271 of this title prescribes the conditions for being placed in the Retired Reserve. 50:927(b) (last sentence) is omitted, since the revised section provides that both lists be maintained.

In subsection (b), the words "containing the names placed thereon under section 1202 or 1205 of this title" are substituted for the words "upon which shall be placed the names of all members of his service entitled to such placement pursuant to the provisions of this subchapter".

1958 ACT

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1376	[Uncodified].	July 24, 1956, ch. 677, § 2 (less clauses (a)-(l), as applicable to 10:1376), 70 Stat. 623.

AMENDMENTS

1994—Pub. L. 103-337 substituted "Temporary disability retired lists" for "Retired lists" as section catchline, struck out "(b)" before "The Secretary concerned", and struck out subsec. (a) which read as follows: "Under regulations prescribed by the Secretary concerned, there shall be maintained retired lists containing the names of the Reserves of the armed forces under his jurisdiction who are in the Retired Reserve." See section 12774 of this title.

1958—Subsec. (b). Pub. L. 85-861 struck out provisions requiring publication of the temporary disability retired list annually in the official register or other official publication of the armed force concerned.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-337 effective Dec. 1, 1994, except as otherwise provided, see section 1691 of Pub. L. 103-337, set out as an Effective Date note under section 10001 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1431 of this title; title 33 section 857a; title 42 section 213a.

CHAPTER 71—COMPUTATION OF RETIRED PAY

Sec.

AMENDMENTS

1987—Pub. L. 100-26, § 7(h)(2)(B), Apr. 21, 1987, 101 Stat. 282, substituted colon for semicolon and "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954" in item 1403.

1986—Pub. L. 99-348, title III, § 304(b)(2), July 1, 1986, 100 Stat. 703, inserted "of members who first became members before September 8, 1980" in item 1402, substituted "Retired pay base for members who first became members before September 8, 1980: final basic pay" for "Limitations on revocation of retired pay" in item 1406 and "Retired pay base for members who first became members after September 7, 1980: high-36 month average" for "Retired pay base" in item 1407, and added items 1409 to 1412.

1982—Pub. L. 97-252, title X, § 1002(b), Sept. 8, 1982, 96 Stat. 735, added item 1408.

1980—Pub. L. 96-513, title V, § 511(51)(C), (52)(C), Dec. 12, 1980, 94 Stat. 2924, 2925, substituted "of members who first became members after September 7, 1980" for "in case of members who first became members after the enactment of the Department of Defense Authorization Act, 1981" in item 1402a, and substituted "Internal Revenue Code of 1954" for "title 26" in item 1403.

Pub. L. 96-342, title VIII, § 813(a)(2), (b)(3)(B), 94 Stat. 1101, 1104, added items 1402a and 1407.

1966—Pub. L. 89-718, § 3, Nov. 2, 1966, 80 Stat. 1115, substituted "8301" for "47a" in item 1404.

Pub. L. 89-652, § 2(2), Oct. 14, 1966, 80 Stat. 902, added item 1406.

1963—Pub. L. 88-132, § 5(g)(2), Oct. 2, 1963, 77 Stat. 214, added item 1401a.

1958—Pub. L. 85-422, § 11(a)(1)(B), May 20, 1958, 72 Stat. 131, added item 1405.

CROSS REFERENCES

Length of service retirement, computation of retired pay, see section 1315 of this title.

Physical disability retirement or separation, computation of retired pay, see section 1275 of this title.

Transfer to inactive status list instead of separation, see section 1209 of this title.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 642, 1209, 1275, 1315 of this title; title 33 section 857a; title 42 section 213a.

§ 1401. Computation of retired pay

(a) DISABILITY, NON-REGULAR SERVICE, WARRANT OFFICER, AND DOPMA RETIREMENT.—The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes.

[1] Section catchline amended by Pub. L. 102-190 without corresponding amendment of chapter analysis.

For-mula No.	For sec-tions	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
1	1201 1204	Retired pay base as computed under section 1406(b) or 1407.	As member elects— (1) 2½% of years of service credited to him under section 1208; [1] or (2) the percentage of disability on date when retired.		Excess over 75% of retired pay base upon which computation is based.
2	1202 1205	Retired pay base as computed under section 1406(b) or 1407.	As member elects— (1) 2½% of years of service credited to him under section 1208; [1] or (2) the percentage of disability on date when his name was placed on temporary disability retired list.	Amount necessary to increase product of columns 1 and 2 to 50% of retired pay base upon which computation is based.	Excess over 75% of retired pay base upon which computation is based.
4	580 1263 1293 1305	Retired pay base as computed under section 1406(b) or 1407.	The retired pay multiplier prescribed in section 1409(a) for the years of service credited to him under section 1405.		
5	633 634 635 636 1251	Retired pay base as computed under section 1406(b) or 1407.	The retired pay multiplier prescribed in section 1409(a) for the years of service credited to him under section 1405.		

[1] Before applying percentage factor, credit each full month of service that is in addition to the number of full years of service creditable to the member as one-twelfth of a year and disregard any remaining fractional part of a month.

(b) USE OF MOST FAVORABLE FORMULA.—If a person would otherwise be entitled to retired pay computed under more than one formula of the table in subsection (a) or of any other provision of law, the person is entitled to be paid under the applicable formula that is most favorable to him.

(Aug. 10, 1956, ch. 1041, 70A Stat. 106; May 20, 1958, Pub. L. 85-422, §§ 6(7), 11(a)(2), 72 Stat. 129, 131; Oct. 2, 1963, Pub. L. 88-132, § 5(h)(1), 77 Stat. 214; Aug. 21, 1965, Pub. L. 89-132, § 6, 79 Stat. 547; Dec. 16, 1967, Pub. L. 90-207, § 3(1), 81 Stat. 653; Oct. 2, 1972, Pub. L. 92-455, § 1, 86 Stat. 761; Sept. 8, 1980, Pub. L. 96-342, title VIII, § 813(b)(1), 94 Stat. 1102; Dec. 12, 1980, Pub. L. 96-513, title I, § 113(a), title V, § 511(49), 94 Stat. 2876, 2924; Sept. 24, 1983, Pub. L. 98-94, title IX, §§ 922(a)(1), 923(a)(1), (2)(A), 97 Stat. 641, 642; Oct. 30, 1984, Pub. L. 98-557, § 35(b), 98 Stat. 2877; July 1, 1986, Pub. L. 99-348, title II, § 201(a), 100 Stat. 691; Oct. 23, 1992, Pub. L. 102-484, div. A, title X, § 1052(18), 106 Stat. 2500; Oct. 5, 1994, Pub. L. 103-337, div. A, title XVI, § 1662(j)(2), 108 Stat. 3004.)

HISTORICAL AND REVISION NOTES

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1401 Introductory clause.	10:600*l*(f) (1st sentence, less applicability to retired grade). 34:430(f) (1st sentence, less applicability to retired grade).	June 29, 1948, ch. 708, § 303 (1st 91 words and 1st proviso), 62 Stat. 1088. Oct. 12, 1949, ch. 681, §§ 402(d) (less 30th through 55th words; less 104th through 128th words, as applicable to retired grade; and less 2d, 5th, and
1401(1)	37:272(d) (less 1st 55 words; less 104th through 128th words, as applicable to retired grade; and less 1st, 2d, 4th, 5th, and last provisos).	402(e) (1st proviso of last

HISTORICAL AND REVISION NOTES—Continued

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1401(2)	37:272(d) (1st 29, and 51st through 55th, words, and 4th proviso).	May 29, 1954, ch. 249, § 14(d) (less 1st sentence), (f) (1st sentence, less applicability to retired grade; and last sentence), 68 Stat. 163, 164.
1401(3)	10:1036b (1st 91 words and 1st proviso). 34:440j (1st 91 words and 1st proviso).	
1401(4)	10:600*l*(d) (2d sentence). 10:600*l*(f) (last sentence). 34:430(d) (2d sentence). 34:430(f) (last sentence).	
1401, footnote 1.	[No source].	
1401, footnote 2.	[No source].	
1401, footnote 3.	37:272(d) (1st proviso); 10:600*l*(d) (less 1st and 2d sentences). 34:430(d) (less 1st and 2d sentences).	

In the introductory paragraph, the applicability of the rule stated in the third sentence to situations not expressly covered by the laws named in the source statutes above is a practical construction that the rule must be reciprocally applied in all cases.

In formula No. 1, the words "whichever is earlier", in 37:272(d) (clause (2)), are omitted, since they are contrary to the rule stated in 37:272(e) (1st proviso of last sentence).

In formula No. 3, the computation is based on monthly pay instead of annual pay to conform to the other formulas of the revised section. The words "basic pay" are substituted for the words "base and longevity pay" to conform to the terminology of the Career Compensation Act of 1949 (37 U.S.C. 231 et seq.). The words "which he would receive if serving, at the time granted such pay, on active duty" are omitted as surplusage and to conform to the other formulas of the revised section, since the effect of these words is covered by footnote 1. The words "at any time" are substituted for the words "during his entire period of service".

REFERENCES IN TEXT

Section 1331 of this title, referred to in subsecs. (c)(1) and (d)(1), was renumbered section 12731 of this title and amended generally by Pub. L. 103-337, div. A, title XVI, § 1662(j)(1), Oct. 5, 1994, 108 Stat. 2998, 2999. A new section 1331 was added by section 1662(j)(7) of Pub. L. 103-337.

Chapter 67 of this title, referred to in subsec. (d)(1), was transferred to part II of subtitle E of this title, renumbered as chapter 1223, and amended generally by Pub. L. 103-337, div. A, title XVI, § 1662(j)(1), Oct. 5, 1994, 108 Stat. 2998. A new chapter 67 (§ 1331) of this title was added by section 1662(j)(7) of Pub. L. 103-337.

PRIOR PROVISIONS

A prior section 1407, added Pub. L. 96-342, title VIII, § 813(a)(1), Sept. 8, 1980, 94 Stat. 1100; amended Pub. L. 96-513, title I, § 113(c), title V, §§ 501(21), 511(53), Dec. 12, 1980, 94 Stat. 2877, 2908, 2925, related to determination of retired base pay, prior to repeal by Pub. L. 99-348, § 104(b).

AMENDMENTS

1994—Subsec. (c)(2)(B). Pub. L. 103-337, § 1662(j)(5)(A), which directed substitution of "chapter 1223" for "chapter 67", could not be executed because the words "chapter 67" did not appear subsequent to amendment by Pub. L. 101-189, § 651(a)(2), (4). See 1989 Amendment note below.

Subsec. (f)(2). Pub. L. 103-337, § 1662(j)(5)(B), which directed amendment of subsec. (f)(2) by substituting "Chapter 1223" for "Chapter 67" in heading and "section 12731" for "section 1331" in text, could not be executed because of previous repeal of subsec. (f) by Pub. L. 101-189, § 651(a)(2). See 1989 Amendment note below.

1989—Subsec. (b). Pub. L. 101-189, § 651(a)(1), (b)(2), substituted "person" for "member", "person's" for "member's", and "subsection (c) or (d)" for "subsection (c)".

Subsec. (c). Pub. L. 101-189, § 651(a)(2), (4), added subsec. (c) and struck out former subsec. (c) which related to computation of high-three average.

Subsec. (d). Pub. L. 101-189, § 651(a)(4), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101-189, § 651(a)(2), (3), redesignated subsec. (d) as (e) and struck out former subsec. (e) which related to special rules for short-term disability retirees.

Subsecs. (f), (g). Pub. L. 101-189, § 651(a)(2), struck out subsec. (f) which related to special rule for members retiring with non-regular service, and subsec. (g) which defined the term "years of creditable service".

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-337 effective Dec. 1, 1994, except as otherwise provided, see section 1691 of Pub. L. 103-337, set out as an Effective Date note under section 10001 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1401, 1402a, 3991, 3992, 6151, 6333, 6334, 8991, 8992, 12739 of this title; title 14 sections 357, 423, 424; title 33 section 853o; title 42 sections 211, 212.

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) DEFINITIONS.—In this section:

(1) The term "court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an

annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 [1] of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS.—For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE MEMBER AND SPOUSE.—(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE.—(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) LIMITATIONS.—(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall—

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of—

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES.—(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED.—A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) BENEFITS FOR DEPENDENTS WHO ARE VICTIMS OF ABUSE BY MEMBERS LOSING RIGHT TO RETIRED PAY.—(1) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if—

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member [illegible] retary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation); and

(B) the spouse or former spouse—

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification—

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse of the member or former member.

(7)(A) If a former spouse receiving payments under this subsection with respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall

sumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard.

(9)(A) A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provision of law instead of this paragraph.

(10)(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who—

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) REGULATIONS.—The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Pub. L. 97-252, title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730; amended Pub. L. 98-525, title VI, § 643(a)-(d), Oct. 19, 1984, 98 Stat. 2547; Pub. L. 99-661, div. A, title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub. L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub. L. 101-189, div. A, title VI, § 653(a)(5), title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub. L. 101-510, div. A, title V, § 555(a)-(d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub. L. 102-190, div. A, title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub. L. 102-484, div. A, title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub. L. 103-160, div. A, title V, § 555(a), (b), title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771.)

REFERENCES IN TEXT

Section 1331 of this title, referred to in subsec. (a)(5), was renumbered section 12731 of this title and amended generally by Pub. L. 103-337, div. A, title XVI, § 1662(j)(1), Oct. 5, 1994, 108 Stat. 2998, 2999. A new section 1331 was added by section 1662(j)(7) of Pub. L. 103-337.

The Soldiers' and Sailors' Civil Relief Act, referred to in subsec. (b)(1)(D), is act Oct. 17, 1940, ch. 888, 54 Stat. 1178, as amended, which is classified to section 501 et seq. of the Appendix to Title 50, War and National Defense. For complete classification of this Act to the Code, see section 501 of the Appendix to Title 50 and Tables.

AMENDMENTS

1993—Subsecs. (b)(1)(A), (f)(1), (2). Pub. L. 103-160, § 1182(a)(2)(A), substituted "subsection (i)" for "subsection (h)".

Subsec. (h)(2)(A). Pub. L. 103-160, § 555(b)(1), inserted "or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation" after "Secretary of Defense".

Subsec. (h)(4)(B). Pub. L. 103-160, § 1182(a)(2)(B), inserted "of" after "of that termination".

Utah Code § 30-3-5

WEST'S UTAH CODE
TITLE 30. HUSBAND AND WIFE
CHAPTER 3. DIVORCE

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

Current through End of 1998 General Sess.

§ 30-3-5. Disposition of property--Maintenance and health care of parties and children--Division of debts--Court to have continuing jurisdiction--Custody and visitation--Determination of alimony--Nonmeritorious petition for modification

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

***8559** (4)(a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the

petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7)(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

***8560** (f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the

payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Laws 1994, c. 284; Laws 1995, c. 330, § 1, eff. May 1, 1995; Laws 1997, c. 232, § 4, eff. July 1, 1997.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Section 2 of Laws 1995, c. 330 provides:

"It is not the intent of the Legislature that termination of alimony based on cohabitation with another person in accordance with Subsection 30-3-5(9), be interpreted in any way to condone such a relationship for any purpose."

Search this disc for cases citing this section.