

1996

Lynn Vincent Toone v. Roby Joan Toone : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

Lynn Vincent Toone,

Plaintiff/Appellee,

vs.

Ruby Joan Toone nka Ruby Joan Parkhurst,

Defendant/Appellant.

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Court of Appeals No. 960675A

District Court No. 19707
Priority Classification 15

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IN THE UTAH COURT OF APPEALS STATE OF UTAH

Lynn Vincent Toone,

Plaintiff/Appellee,

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Ruby Joan Toone nka Ruby Joan Parkhurst,

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Court of Appeals No. 960675A

District Court No. 19707

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BRIEF OF THE APPELLEE

JURISDICTION OF THE COURT

Jurisdiction of this Court is governed by the Utah Code Annotated 78-2a-3(2)(h,j).

ISSUES PRESENTED FOR REVIEW

Plaintiff/Appellee adopts the issues presented for review designated by the Appellant.

STANDARD OF REVIEW

The standard of review is one of correctness, granting no deference to either party, *Glover vs. Boy Scouts of America*, 923 P.2d 1383 (Utah 1996).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Uniform Services Former Spouses Protection Act 10 USCA 1408. See Appendix A for full text.

Statute of Limitations, Utah Code Annotated 78-12-1, 78-12-22. See Appendix B

for full text.

Utah Rules of Civil Procedure, Rule 60, Clerical Errors. See Appendix C for full text.

STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS

Appellant (Mrs. Toone/Parkhurst) brought this action to modify a divorce decree entered December 16, 1983, seeking to adjudicate Appellant's entitlement to Appellee's (Mr. Toone's) military retirement.

B. COURSE OF PROCEEDINGS

July 23, 1981. Divorce decree entered. The Court reserved issues of property division for future determination.

July 9, 1982. Trial to allocate real and personal property.

December 16, 1983. Trial Court enters "Corrected Supplemental Findings of Fact and Decree.

October 23, 1995. Defendant files a petition to divide Plaintiff's military retirement.

September 25, 1996. Trial Court entered Summary Judgement, denying Defendant's Petition.

C. DISPOSITION AT TRIAL COURT

The Trial Court granted Plaintiff/Appellee's Motion for Summary Judgement. Defendant/Appellant appealed.

FACTS

Appellant's statement of facts assumes facts which are not supported and draws conclusions not found in the record. The uncontested facts are as follows:

1. May, 1958. Plaintiff enters Navy Service.
2. June 20, 1958. The parties were married.
3. June 22, 1981. Plaintiff files for divorce. R-1.
4. June 26, 1981. U.S. Supreme Court decides McCarty vs. McCarty, 453 U.S. 210 (1981).
5. June 30, 1981. Defendant, Ruby Joan Toone files verified Answer and Counterclaim asking that the Navy Retirement be divided. R-4. See Appendix D, paragraph 9.
6. July 23, 1981. The parties were divorced. R-15. The Trial Court reserved issues of property settlement for future resolution.
7. July 9, 1982. The Trial Court hears testimony on the division of real and personal property.
8. September 8, 1982. Congress enacted Public Law 97-252, overturning the decision of McCarty vs. McCarty, retroactive to one day prior to McCarty on June 25, 1981.
9. November 4, 1982. Utah Supreme Court decides the case of Woodward vs. Woodward, 656 P.2d 431 (Utah 1982).
10. December 16, 1983. Trial Court enters Findings of Fact and Conclusions of Law together with a Judgement.

- a. Findings of Fact (R-50)(R-70) states, “Each of the parties has a retirement,” without detailing the sources.
- b. Judgement and Decree states, “Each of the parties has a retirement,” (R-52).
- c. The Corrected Supplemental Judgement and Decree states, “Plaintiff’s retirement is worth” \$10,000.
- d. No exhibits in the file show the worth of Mr. Toone’s retirement.

11. The transcript of the trial held July 9, 1982 is unavailable. The Court file fails to allocate Plaintiff’s \$10,000 retirement into one or more retirement plans.

12. The Judgement and Decree makes no mention of “Navy Retirement” nor “Utah State Retirement” nor “Civil Retirement”.

13. Lynn Toone entered the Service in May of 1958, and ultimately retired in 1976, thus accruing benefits. Military retirement is payable when Plaintiff/Appellee reaches age 60 on May 3, 1998 (R-240).

14. Defendant filed a petition seeking division of the benefits on October 23, 1995.

The Defendant’s/Appellant’s Brief contains several material false statements which should be brought to the attention of this Court.

1. Brief page 6, line 14 states that “Mr. Toone’s Utah State non-military retirement was worth approximately \$10,000...” No such statement appears in the Decree.

2. Brief page 6, line 17. “ The Court offset these two (2) civil retirements...”

No such statement appears in the Decree.

3. Brief page 6, line 20 states, “The Affidavits, subsequent exhibits and Findings and Decree show that the Court dealt only with the civil retirements...” Appellant assumes that the record refers only to civil retirement. Paragraph 10 of the signed Decree says only “net credit of retirement.”

4. Brief page 9, line 14. “Both parties admit for purposes of this appeal that the only retirements mentioned in the Decree of Divorce are Mr. Toone’s retirement of \$10,000 from UTAH STATE UNIVERSITY.” No such admission appears in the record. What is admitted is that the Decree fails to mention “Navy retirement.” It also fails to mention by name Utah State Retirement or any other “civil” retirement.

5. Brief page 9, line 18. “The parties admit for purposes of this Appeal that only two (2) ‘civil’ retirements were discussed in the Court’s Evidence and Findings.” This statement is false and is not borne out in the Motions nor Affidavits of the parties.

The Record on Appeal clearly shows that Appellant knew of the existence of the “Navy retirement” (Verified Answer and Counterclaim), and she is presumed to know of the existence of her rights under the Federal Statute.

SUMMARY OF THE ARGUMENT

POINT 1

Appellant claims that the Trial Court erred in concluding that the doctrine of Res Judicata barred the Appellant’s claim. Appellee contends that Appellant had knowledge of the existence of the military retirement and should have been aware of the Federal Statute, made retroactive to a date PRIOR TO the dates of the trial and signing of the

Judgement and Decree. In addition, the Judgement and Decree only states a retirement of \$10,000. Without a transcript of the Trial Court, it is impossible to tell whether or not the Trial Court considered the military retirement.

POINT II

Appellant claims that the ^{Navy}“(sic) retirement” can now be divided 12 years after the entry of the Decree allocating the parties property interests. Appellee answers stating that the right to partition military retirement is a statutory right under Uniform Services Former Spouses Protection Act. There is an eight year Statute of Limitations. Appellant’s claim is barred.

POINT III

Defendant claims laches cannot be a defense in this case because the Trial Court so held and no harm has occurred to Mr. Toone. Appellee disagrees with the Trial Court and Mrs. Parkhurst. There has been a 12 to 13 year delay in enforcing a statutory right by Mrs. Parkhurst. The parties and the Trial Court are without the benefit of the former Trial Court’s record and the assets of the parties have been divided. Mrs. Parkhurst knew of the military retirement from the outset of the case, during the trials and lengthy delays. She knew or should have know of her rights under the Uniform Services Former Spouse Protection Act. Mr. Toone relied upon the military retirement to plan his own retirement.

POINT IV

Mrs. Parkhurst claims that the Trial Court erred in holding that there was no change in circumstances when the Congress passed the Uniform Services Former Spouse Protection Act. Congress passed the USFSPA in 1982, effective February 1, 1983, and

made it retroactive to June 25, 1981. Mrs. Parkhurst could have and should have and may have litigated her rights under the Act at the time of the divorce. Woodward vs. Woodward was decided during the pendency of this case. There was no change in circumstances between the parties by the passage of the Act, only a right of action created by Federal Statute.

POINT V

Mrs. Parkhurst claims that the Supreme Court decision in McCarty barred her from litigating her right to the “(sic) retirement”. The facts of the case show that the McCarty decision was decided June 26, 1981. The parties were divorced on July 23, 1981, but the Court reserved its ruling for the division of property until a year later on July 9, 1982. The Findings and Decree were ultimately signed on December 16, 1983, about 18 months later. Congress passed the USFSPA on September 8, 1982. The effective date of the Act was February 1, 1983. However, Subsection (c)(1) contained a retroactive date to June 25, 1981. The time frame shows that Mrs. Parkhurst was not barred from asserting her rights. The lack of a record of the Trial and later proceedings leaves open to speculation the retirement actually considered by the Trial Court. The Trial Court in 1996 acknowledged the speculative nature of Mrs. Parkhurst’s argument (R-226).

POINT VI

Mrs. Parkhurst claims that the Trial Court erred when it did not divide the retirement benefits as all other property was divided on an equal basis. Mr. Toone responds by noting that the original Trial Court did not define the source of the retirement

benefits, and therefore, there is no evidence that the military benefits were or were not included in the \$10,000 lump sum figure used by the Court to calculate approximately the equal division of property. Mrs. Parkhurst's continual use of the phrase "civil retirement" does not alter the lack of specifics in the original Decree.

DETAILED ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PRINCIPLE OF "RES JUDICATA" BARRED APPELLANT'S CLAIM TO A DIVISION OF THE NAVY RETIREMENT WHERE THE NAVAL (sic) RETIREMENT WAS NOT EXPRESSLY ADJUDICATED BY THE TRIAL COURT.

The Appellant/Mrs. Parkhurst litigated the issues in her divorce from April of 1981 until December of 1983. During this period of time, the U.S. Supreme Court, on June 26, 1981, held that military retirement pay was not divisible by State Courts. Congress reacted and passed the Former Spouse Protection Act, making it retroactive to June 25, 1981. The Supreme Court of this State decided *Woodward vs. Woodward*, infra. The knowledge of these decisions are imputed to the Appellant. Further compounding the situation is the lack of a transcript from the original Trial Court and Findings of Fact and a Judgement, which are silent as to the source of the \$10,000 retirement owned by Mr. Toone.

The Trial Court Memorandum Decision (R-226) recognizes that 13 years have lapsed since the Judgement of the initial Trial Court.

In this case, certainly the value of the military retirement could have and may have been considered by the Court..... If the Court did not then address the issue with respect to military retirement, and should do so now, it would have to relitigate each of those other property and support issues which have been raised, litigated and ruled upon. In doing so, the rule of Res Judicata would be avoided. Page 2,

Memorandum Decision, September 10, 1996.

The Supreme Court decision of McCarty vs. McCarty did not prevent the litigation of this issue. Mrs. Parkhurst knew of the military retirement and could have litigated the matter. She, in fact, may have litigated the issue. The transcript is not available. In Throckmorton vs. Throckmorton, 767 P.2d 121 (Utah App 1988), this Court determined that subsequent recognition of retirement benefits is not a substantial change in circumstances, thus precluding the application of Res Judicata. The Court recognized that principle, noting that the Trial Court has continuing jurisdiction to make subsequent changes to property distribution, but that Courts are hesitant to disturb prior property distributions.

However, the application of Res Judicata is unique in divorce actions because of the equitable doctrine which allows Courts to reopen alimony, support or property distributions if the moving party can demonstrate a substantial change in circumstances, since the matter was previously considered by the Court, Thompson vs. Thompson, 709 P.2d 360 (Utah 1985).

The Texas cases cited by the Appellant are not pertinent unless this Court overturns

Throckmorton v. Throckmorton, *infra*.

POINT II

APPELLANT CLAIMS THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING THE EIGHT YEAR STATUTE OF LIMITATION TO BAR APPELLANT'S CLAIM FOR A DIVISION OF MILITARY RETIREMENT.

A. Neither this Court nor the Supreme Court of this State has held that former spouses are tenant in common of retirement funds, which is contrary to the assertion in the Appellant's Brief. UCA 30-3-5 grants Courts jurisdiction to make orders in relation to property. Mr. Toone's military retirement is in his name alone. Woodward determines

that an asset accrued during marriage is subject to equitable distribution and not tenants in common ownership, (Woodward vs. Woodward, 656 P.2d 431 at page 433). This retirement could have been or was distributed.

The cases of Iverson vs. Iverson, 526 P.2d 1126 (Utah 1974) and Booth vs. Booth, 722 P.2d 771 (Utah 1986) do not stand for the proposition suggested by Appellant, as they deal with joint tenant ownership of real property. Nor does Massey vs. Protagro, 664 P.2d 1176 (Utah 1983) apply, as it deals with tax titles.

B. The Appellant claims the Statute of Limitations does not apply in this equitable action. The Appellant's right to divide military retirement is governed by statutory law. The USFSPA created the right, which is a legal remedy. Utah's Divorce Law requires an equitable distribution. Therefore, the Trial Courts are obligated to equitably distribute those assets divisible by statute. The Judgement in this case dated December 16, 1983, is a Decree. The Petition case dated October 23, 1995, in this case seeks to modify the Corrected Supplemental Divorce Decree. Eight years has expired since the rendition of the Judgement, UCA 78-12-1, 78-12-22.

C. The Appellant claims that the Statute of Limitations is not applicable because Congress made the USFSPA retroactive to a day before the McCarty decision. The retroactive provision of the Act provided the Appellant an opportunity to fully and completely litigate her claim for military retirement. The effective date of the statute was June 26, 1981, and the Decree was signed on December 16, 1983. The record shows no attempt to alter the general terms of the Decree to specify the type of retirement considered.

D. Appellant claims that a reservation by the Trial Court of jurisdiction tolls the Statute of Limitations. This argument is made without citation of statute or cases. Throckmorton, infra, provides an answer. The reservation of continuing jurisdiction found in the Statute (30-3-5 UCA) and as recited in the decree does not toll the Statute. A substantial change in circumstances, giving rise to a new claim for relief is not barred by Res Judicata. Where an issue was or could have been litigated and wasn't, under Throckmorton Res Judicata applies. If there is or could have been a judgment, and a judgement is prepared, that commences the running of the Statute of Limitations.

E. Defendant/Appellant claims that the Court has continuing jurisdiction to review property matters under UCA 30-3-5.

Not so. If that were the case, there would never be an end to divorce litigation, (rarely is there an end now). Again, Mr. Toone reiterates that the "retirement" was not designated. This Court has no transcript. UCA 30-3-5 does not allow a subsequent Court to arbitrarily relitigate the issue without a substantial change in circumstances, Iverson vs. Iverson, 526 P.2d 1126.

Notwithstanding the equitable powers of the District Court in inter-family controversies in divorce matters and the acknowledged broad latitude of discretion allowed therein, the Court cannot act arbitrarily, or on supposition or conjecture as to facts upon which to justify its order.

In the absence of any proceeding in which evidence was taken relating to the equities of the parties; and in the absence of a transcript of any evidence of that character, we do not see in this record any justification for the granting of a Motion for Summary Judgement...

Rule 60 allows amendment of "clerical errors" not substantive matters.

POINT III

APPELLANT CLAIMS THAT LACHES CANNOT BE A DEFENSE IN THE CASE BECAUSE THE TRIAL COURT SO HELD AND NOT HARM HAS OCCURRED TO MR. TOONE.

It should be noted that this Court is not bound by an erroneous ruling of law of the Trial Court. See Standard of Review, Page 4, Appellant's Brief.

Laches may, in fact, be the appropriate legal and equitable doctrine in this case. Laches required that there be an unreasonable delay in bringing the action. In this case, there is at least a 13 year delay. That delay has not only faded the memories of the parties but occasioned usage of attorneys not privy to the initial proceedings. No transcript is available to determine what, in fact, the Court considered as "retirement". The nonspecific Decree, drawn by Appellant's attorney complicates determination of "retirement". Therefore, the Appellant's delay has been unreasonable and has deprived both parties of needed recollection and evidence.

The second prong in the test for laches is that the Plaintiff/Appellee has been prejudiced by the delay. The Trial Court recognized the problem when it stated in the Memorandum Decision that if the Court litigated the issue of retirement, it may have to modify all other property matters that were considered by the Court. It can be reasonably assumed that Mr. Toone relied on the Judgement and Decree for the past 13 years in planning his future. His Utah State Retirement was cashed in to pay Mrs. Parkhurst her equity in the home. To now divide military retirement would be a substantial burden on him. Nothing in the record reveals a need on Appellant's part for the retirement money.

Appellant cites the case of *Openshaw vs Openshaw*, 144 P.2d 528 (Utah 1943) for the proposition that laches cannot be imputed to one who is ignorant of the facts and for

that reason, failed to assert her rights. An additional citation from that case might be beneficial.

Page 531. But mere inaction or delay, short of the period of limitations, in enforcement of payment of an obligation already accrued, without more, is insufficient upon which to predicate laches.

Sheppard's Utah Citations reflects many cases decided after Openshaw, but none overruling the case law established. Therefore, Appellant having taken no action within the period of limitations under the Openshaw decision, the doctrine of laches should apply.

Appellant contends that laches does not apply to retirement benefits received prospectively because there is not prejudice to the serviceman. Thereafter, the Appellant cites two Arizona cases, Beltran vs. Razo, 788 P.2d 1256 (Ariz App. 1990) and Flynn vs. Rogers, 834 P.2d 148 (Ariz 1992). At the expense of sounding over simplistic, these cases are not relevant. First, they are from a neighbor state that is a community property state. Arizona has a statute which creates a tenancy in common in retirement assets, A.R.S. Section 25-318 (B). Utah has no similar statute. Second, the case was brought within the period of limitations. The serviceman/husband claimed laches. The argument was rejected by the Arizona Court. Under Arizona law, the military benefits were, after USFSPA held by the parties as tenants in common, and therefore, the division by the Court was merely procedural.

Utah does not have a statute similar to the Arizona statute making the parties tenants in common. Utah Courts have not held that the parties are tenants in common. Such a ruling is inconsistent with present common law principles in Utah. Appellant

mixes common law principles and community property law principles. Such a mix is necessary for the Appellant to rationalize the result suggested.

POINT IV

APPELLANT CLAIMS THE TRIAL COURT ERRED IN HOLDING NO CHANGE IN CIRCUMSTANCES OCCURRED JUSTIFYING REOPENING THE DECREE.

Appellant claims that the enactment of the USFSPA created a change in circumstances. Throckmorton, infra, sets forth the distinction between a change in circumstances as it relates to factual circumstances. This is distinguished from a change in legal precedent or statute which Throckmorton, infra, held not to be a substantial change in circumstances.

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 in circumstances (at page 124).

McCarty may have changed Utah Law for a brief period of time, but the enactment of the USFSPA nullified the decision. The Decree allocating property rights in this case was signed after enactment of the USFSPA without objection by Appellant. Appellant continues to miscite the date of the entry of the property settlement. Entry of a divorce without more is not a final decree and that date has no relevance. Copier vs. Copier, 318 Ut. Adv. Rep. 9 states that the date of the final decree is the date concluding the divorce. Therefore, the pertinent date in this case is December 16, 1983.

POINT V

APPELLANT CLAIMS THAT MILITARY RETIREMENT EARNED DURING THE MARRIAGE IS CONSIDERED MARITAL PROPERTY UNDER UTAH LAW AND CAPABLE OF DIVISION WERE IT NOT FOR THE McCarthy DECISION.

The reply to this issue is found in the facts. McCarthy was decided on June 26,

1981. The parties were divorced in July of 1981. The Trial Court decided only the issue of the divorce and left until a future date the issues of property settlement. The case lingered on, and one year later in July of 1982, a hearing was held dividing the real and personal property. In November, the Supreme Court decided Woodward, infra. In September of that year, Congress passed the USFSPA with an effective date of February 1, 1993. The ruling in McCarthy was effectively voided by the retroactive provision. This case still languished in the Utah Court System until December of 1983 when Findings of Fact, Conclusions of Law and a Decree were presented to the District Judge. No party before or after entry of the Decree filed a Motion to Amend the Findings specifying which retirements the Trial Court referenced, nor did either party cite Woodward or the USFSPA as dictating a clarification of the Findings and Decree.

Appellee has no quarrel with the proposition that military retirement is a marital asset and that the retirement is capable of division. The plain and simple fact is that Appellant knew of the military retirement and had an opportunity to litigate retirement and did so in such nonspecific terms that the Trial Court now is unable to make a decision without readjudicating the entire case in the absence of a transcript. Appellant's attorney drew the Findings and Decree, and the same law firm now seeks a second hearing 13 years later to litigate military retirement separately from the prior division of assets. Appellant is barred not only by laches, but by the Statute of Limitations.

POINT VI

THE APPELLANT CLAIMS THAT THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGEMENT.

In this discussion, Appellant continues to assume that the "retirement" mentioned

in the Findings and Decree are “civil” retirements only. The Trial Court did not make that assumption in the Memorandum Decision. Nor can anyone without a transcript. Appellant’s use of the phrase “civil retirement” does not create a fact, but it does tend to enforce her position if his Court were to believe that fact.

Appellant cites the cases of Bailey vs. Bailey, 745 P.2d 830 (Utah App. 1987) and Marchant vs. Marchant, 743 P.2d 199 (Utah App. 1987). It is not clear how those cases relate to this case, as in each instance the Trial Court at the time of the entry of the Decree divided the retirement, (although incorrectly). The appeals dealt with the date and manner of distribution, not the date of the adjudication.

The Bailey case, *infra*, relates to the allocation of liquid assets (house) with a present value offset by future valued assets (retirement). This case has no bearing on the issue presented by Appellant.

Likewise, the Marchant case, *infra*, deals with the failure of the Trial Court to properly address the division of retirement, as set forth in Woodward vs. Woodward, *infra*.

CONCLUSION

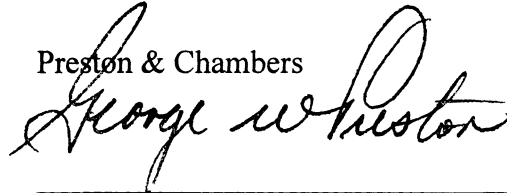
This is not a case of first impression. The decision in this case is controlled by Federal Statute and pre-existing case law decided by the two Appellate courts of this State.

The important facts are the dates of the events, showing that the Appellant could have, should have, and may have litigated the issue of military retirement. Time bars Appellant’s claim.

This decision of the Trial Court should be affirmed.

DATED this 2 day of July, 1997.

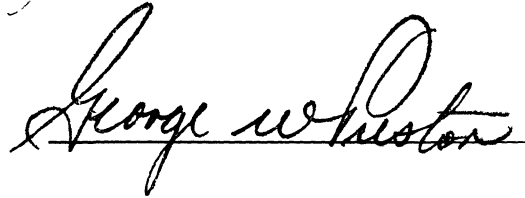
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF THE APPELLEE to Mr. Marlin J. Grant, Attorney for Appellant, 88 West Center, P.O. Box 525, Logan, Utah 84321, on this 2 day of July, 1997.



Tab A

(f) In the case of a member who is retired under any section of title 14, the monthly retired pay base is one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service.

(g) In the case of a member whose retired pay is computed under section 16 of the Coast and Geodetic Survey Commissioned Officers' Act of 1948 (33 U.S.C. 853o), the monthly retired pay base is one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service.

(h) In the case of a member who is retired under section 210(g) or 211(a) of the Public Health Service Act (42 U.S.C. 211(g) and 212(a)), the monthly retired pay base is one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service.

(Added Pub.L. 96-342, Title VIII, § 813(a)(1), Sept. 8, 1980, 94 Stat. 1100, and amended Pub.L. 96-513, Title I, § 113(c), Title V, §§ 501(21), 511(53), Dec. 12, 1980, 94 Stat. 2877, 2908, 2925.)

Historical Note

References in Text. Section 16 of the Coast and Geodetic Survey Commissioned Officers' Act of 1948 (33 U.S.C. 853o), referred to in subsec. (g), is section 16 of Act June 3, 1948, c. 390, 62 Stat. 299, which is classified to section 853o of Title 33, Navigation and Navigable Waters.

Section 210(g) and 211(a) of the Public Health Service Act (42 U.S.C. 211(g) and 212(a)), referred to in subsec. (h), are sections 210(g) and 211(a) of Act July 1, 1944, c. 373, Title II, 58 Stat. 687, 688, which are classified to sections 211(g) and 212(a) of Title 42, The Public Health and Welfare, respectively.

1980 Amendment. Subsec. (a)(1). Pub.L. 96-513, § 511(53), substituted "after September 7, 1980" for "on or after the date of the enactment of the Department of Defense Authorization Act, 1981".

Subsec. (b)(4). Pub.L. 96-513, § 113(c), added references to sections 633, 634, 635, 636, and 1251.

Cross References

Computation of retired pay of personnel of—

Air Force, see section 8991 of this title.

Army, see section 3991 of this title.

Coast Guard, see section 423 of Title 14, Coast Guard

National Oceanic and Atmospheric Administration, see section 853o of Title 33, Navigation and Navigable Waters.

Computation of retired pay of personnel of Public Health Service—

Commissioned officers, see section 212 of Title 42, The Public Health and Welfare.

Officers of Regular Corps in full grade twice failing selection for promotion, see section 211 of Title 42.

Subsec. (d)(1). Pub.L. 96-513, § 501(21), substituted "or 6383" for "6381, 6383, 6390, 6394, 6396, 6398, or 6400".

Effective Date of 1980 Amendment. Amendment by sections 113(c) and 501(21) of Pub.L. 96-513 effective Sept. 15, 1981, but the authority to prescribe regulations under the amendment by section 113(c) of Pub.L. 96-513 effective on Dec. 12, 1980, see section 701 of Pub.L. 96-513, set out as an Effective Date of 1980 Amendment note under section 101 of this title.

Amendment by section 511(53) of Pub.L. 96-513 effective Dec. 12, 1980, see section 701(b)(3) of Pub.L. 96-513, set out as an Effective Date of 1980 Amendment note under section 101 of this title.

Legislative History. For legislative history and purpose of Pub.L. 96-342, see 1980 U.S. Code Cong. and Adm. News, p. 2612. See, also, Pub.L. 96-513, 1980 U.S. Code Cong. and Adm. News, p. 6333.

Higher retired pay for members of Navy or Marine Corps who serve satisfactorily under temporary appointments, see section 6151 of this title

Recomputation of retired pay to reflect advancement on retired list—

Air Force, see section 8992 of this title.

Army, see section 3992 of this title.

Retainee pay of member transferred to Fleet Reserve or Fleet Marine Corps Reserve when not on active duty, see section 6330 of this title.

Retired grade and pay of—

Enlisted members of Regular Navy or Marine Corps with thirty or more years of service, see section 6326 of this title.

Officers with forty and thirty years of service in Regular Navy or Marine Corps or retired while serving as admiral, vice admiral, general, or lieutenant general by virtue of temporary appointment, see section 6325 of this title.

Officers with thirty years of service in Regular Navy or Marine Corps, see section 6322 of this title.

Officers with twenty years of service in Navy or Marine Corps, see section 6323 of this title.

Retired pay of regular officers of Navy or Marine Corps designated for limited duty—

In grades of lieutenant commander in Navy and of major in Marine Corps for failure of selection for promotion, see section 6383 of this title.

Upon completion of thirty years of service, see section 6383 of this title.

Library References

Armed Services ⚡23.4.

C.J.S. Armed Services §§ 80, 114 to 120.

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

(a) In this section:

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

(3) "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) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) 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 or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "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.

(b) 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 (h) 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 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.

(e)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer 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.

(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.

(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 or retainer 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)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer 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 or retainer 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 or retainer 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 or retainer 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 or retainer 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 cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer 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 disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay 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 or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer 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 from the disposable retired or retainer pay of a member, such pay 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 or retainer 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 from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer 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 ~~or retainer pay that is~~ equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay 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 or retainer 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 or retainer 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 or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer 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 retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve 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 or retainer 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 disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such 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 of disposable retired or retainer pay 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 or retainer 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 or retainer 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.

(D)(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 or retainer 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 (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), 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 by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) 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) 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.)

Historical Note

References in Text. Section 462 of the Social Security Act, referred to in subsec. (a)(2) (B)(i), (ii), and section 459 of that Act, referred to in subsec. (e)(3)(A)(iii), (4)(A), (B), (5) and (6), are sections 462 of Act Aug. 14, 1935, c. 531, Title IV, as added May 23, 1977, Pub L. 95-30, Title V, § 501(d), 91 Stat. 159, and 459 of Act Aug. 14, 1935, c.

531, Title IV, as added Jan. 4, 1975, Pub L. 93-647, § 101(a), 88 Stat. 2357, and amended, and are classified to sections 662 and 659, respectively, of Title 42, The Public Health and Welfare.

Section 3402(i) of the Internal Revenue Code of 1954, referred to in subsec. (a)(4)(D),

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is classified to section 3402(i) of Title 26, Internal Revenue Code.

The Soldiers' and Sailors' Civil Relief Act of 1940, referred to in subsec. (b)(1)(D), is Act Oct. 17, 1940, c. 888, 54 Stat. 1178, which is classified generally to section 501 et seq. of the Appendix to Title 30, War and National Defense. For complete classification of this Act to the Code, see section 501 of the Appendix to Title 30, and Tables volume.

Effective Date: Transition Provisions. Section 1006 of Pub L. 97-252 provided that:

"(a) The amendments made by this title [enacting this section and sections 1072(2)(F), 1086(c)(3), and 1447(6)-(10) and amending sections 1448(a)(3)(A), (B), (b), and 1450(a)(4), (f) of this title and enacting provisions set out as notes under section 1401 of this title and this section] shall take effect on the first day of the first month [Feb. 1, 1983] which begins more than one hundred and twenty days after the date of the enactment of this title [Sept. 8, 1982].

"(b) Subsection (d) of section 1408 of title 10, United States Code [subsec. (d) of this section], as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title [Feb. 1, 1983, provided in subsec. (a)], but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

"(c) The amendments made by section 1003 of this title [enacting section 1447(6) to (10) and amending sections 1448(a)(3)(A), (B), (b) and 1450(a)(4), (f) of this title] shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, [section 1447 et seq. of this title], before, on, or after the effective date of such amendments [Feb. 1, 1983, provided in subsec. (a)].

Notes of Decisions

Offsets against retired pay 2

Retroactive effect of court decisions 1

1 Retroactive effect of court decisions

Even if this section should be given prospective application only where event which

"(d) The amendments made by section 1004 of this title [enacting sections 1072(2)(F) and 1086(c)(3) and amending section 1076(b) of this title] and the provisions of section 1005 of this title [set out as a note under section 1408 of this title] shall apply in the case of any former spouse of a member or former member of the uniformed services only if the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated on or after the effective date [Feb. 1, 1983, provided in subsec. (a)] of such amendments.

"(e) For the purposes of this section—

"(1) the term 'court order' has the same meaning as provided in section 1408(a)(2) of title 10, United States Code [subsec. (a)(2) of this section] (as added by section 1002 of this title),

"(2) the term 'former spouse' has the same meaning as provided in section 1408(a)(6) of such title [subsec. (a)(6) of this section] (as added by section 1002 of this title), and

"(3) the term 'uniformed services' has the same meaning as provided in section 1408(a)(7) of such title [subsec. (a)(7) of this section] (as added by section 1002 of this title)."

Short Title. For Short Title of Pub L. 97-252, Title X, Sept. 8, 1982, 96 Stat. 730, constituting "FORMER SPOUSES' PROTECTION" provisions, see Short Title of 1982 Amendments note set out under section 1401 of this title.

Commissary and Exchange Privileges. Section 1005 of Pub L. 97-252 provided that:

"The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unmarried former spouse described in subparagraph (F)(i) of section 1072(2) of title 10, United States Code [section 1072(2)(F)(i) of this title] (as added by section 1004), is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."

triggered trial court's granting of relief, granting of certiorari in case in which Supreme Court had held that military retirement pensions were not subject to division as community property, was not itself change in law, at time motion to set aside interlocutory judgment was before trial court there was no change of law sufficient to permit husband to

10 § 1408
Note 1

GENERAL MILITARY LAW SUBT. A

evade effects of his own stipulation dividing husband's military pension, thus, trial court abused its discretion in setting aside that portion of interlocutory decree dividing husband's military pension. In re Marriage of Frederick, Cal App 1983, 190 Cal Rptr 588.

Use by Congress of date that Supreme Court decided that military retirement pensions were not subject to division as community property upon dissolution of marriage as reference in this section evidenced legislative intent that law relative to community property treatment of military retirement pensions be as though Supreme Court holding did not exist, that is, that such pensions would be subject to division as community property before and after Supreme Court decision. Id.

Although Superior Court awarded wife a one-half community interest in portion of husband's military retirement pension which accrued during years of marriage, and although, three months after final judgment of dissolution was entered, United States Supreme Court decided *McCarty v. McCarty*, Cal 1981, 101 S Ct 2728, 453 U S 210, 69 L Ed 2d 589, holding that federal law prohibits division of military retirement pensions and preempts state community property law, the award of a community interest in hus-

band's pension to his wife would not be reversed under a retroactive application of *McCarty*, since Congress, subsequent to *McCarty*, enacted this section whose purpose was to overrule *McCarty*, and since the law as it now stands thus supports the Superior Court's award. In re Marriage of Buikema, 1983, 188 Cal Rptr 856, 139 Cal App 3d 689.

Arizona community property law could be applied in determining divisibility of interest in military retirement benefits earned during marriage, at least in cases still pending in trial court or on appeal at time of enactment of this section removing federal preemption of state community property laws, with regard to military retirement benefits, found by United States Supreme Court to exist under prior law. *Steczo v. Steczo*, 1983, 659 P 2d 1344, 135 Ariz 199.

2. Offsets against retired pay

In divorce proceeding, trial court did not err in awarding wife entire unpaid balance due on parties' home, which had been sold, although husband contended balance on house was awarded to wife as offset against husband's military retirement pay. *Matter of Marriage of Smedley*, 1982, 653 P 2d 267, 60 Or App 249.

**CHAPTER 73—ANNUITIES BASED ON
RETIRED OR RETAINER PAY**

Subchapter	Sec.
I. Retired Serviceman's Family Protection Plan	1431
II. Survivor Benefit Plan	1447

Historical Note

Codification. Pub L 92-425 amended the chapter heading without reference to the earlier amendment by Pub L 87-381, § 1(1), Oct 4, 1961, 75 Stat 810, which substituted "Retired Serviceman's Family Protection Plan" for "Annuities Based on Retired or Retainer Pay". Amendment by Pub L 92-425, § 1(1), Sept 21, 1972, 86 Stat 706, has been executed to chapter heading as originally enacted.

1980 Amendments. Pub L 96-513, Title V, § 511(54)(A), Dec 12, 1980, 94 Stat

2925, in chapter heading struck out ", Survivor Benefit Plan" following "Pay".

1972 Amendment. Pub L 92-425, § 1(1), Sept 21, 1972, 86 Stat 706, added subchapter analysis.

1961 Amendment. Pub L 87-381, § 1(1), Oct 4, 1961, 75 Stat 810, substituted "Retired Serviceman's Family Protection Plan" for "Annuities Based on Retired or Retainer Pay" in chapter heading.

Cross References

Commissioned officers of Public Health Service, applicability of this chapter to, see section 213a of Title 42, The Public Health and Welfare.
Exclusion from gross income, see sections 72, 101, 122 and 2039 of Title 26, Internal Revenue Code.
Exemption for levy for collection of taxes, see section 6334 of Title 26.
Gift tax transfers, payments to beneficiary after death, see section 2517 of Title 26.
National Oceanic and Atmospheric Administration, applicability of this chapter to, see section 857a of Title 33, Navigation and Navigable Waters.
Repayment of retired pay by beneficiary, see section 8317 of Title 5, Government Organization and Employees.
Retired or retainer pay defined to exclude annuity payable to eligible beneficiary under this chapter for purposes of dual pay and dual employment provisions, see section 5531 of Title 5.
Retired pay defined, see section 8311 of Title 5.

**SUBCHAPTER I—RETIRED SERVICEMAN'S
FAMILY PROTECTION PLAN**

Sec.	
1431	Election of annuity: members of armed forces
1432	Election of annuity: former members of armed forces.
1433	Mental incompetency of member
1434	Kinds of annuities that may be elected
1435	Eligible beneficiaries
1436	Computation of reduction in retired pay; withdrawal for severe financial hardship
1437	Payment of annuity
1438	Deposits for amounts not deducted
1439	Refund of amounts deducted from retired pay.
1440	Annuities not subject to legal process.

Tab B

Section 78-12-44.	Effect of payment, acknowledgment, or promise to pay.	Section 78-12-47.	Separate trial of statute of limitations issue in malpractice actions.
78-12-45.	Action barred in another state barred here.	78-12-48.	Statute of limitations — Asbestos damages.
78-12-46.	"Action" includes special proceeding.		

78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-1; 1987, ch. 19, § 1.

Cross-References. — Affirmative defense, statute of limitations as, Rule 8(c), U.R.C.P. Antitrust Act actions, § 76-10-925.

Cities and towns, claims and actions against, §§ 11-14-21, 63-30-13, 63-30-15, 78-12-29, 78-12-30.

Collection agency bond, actions on, § 12-1-3. Common carriers, claims and actions for loss or damage to freight, § 54-3-16.

Contracts for sale of goods, § 70A-2-725. Counties, claims and actions against, §§ 17-15-10, 17-15-12, 63-30-13, 63-30-15, 78-12-30.

Governmental Immunity Act, § 63-30-1 et seq.

Improvement district proceedings, § 17A-3-330.

Insurance contracts, actions on, § 31A-21-313.

Marketable record titles, § 57-9-1 et seq.

Municipal bond proceedings, § 11-14-21.

Pleading statute of limitations, Rule 9(h), U.R.C.P.

Product Liability Act, statute of limitations, § 78-15-3.

Protest of solicitation or award of public contract, § 63-56-55.

Public works programs, contesting ordinances and bonds, § 55-3-16.

Securities Act, §§ 61-1-4, 61-1-22.

State, actions against, §§ 63-30-12, 63-30-15.

NOTES TO DECISIONS

ANALYSIS

Applicability of section.

—Administrative discipline.

Discovery.

Escheat proceedings.

—Applicable foreign law.

Nature and extent of right.

—Legal.

—Renewal of barred action.

—Vested.

Trust estate.

Waiver.

—Failure to plead.

When statute begins to run.

—Commencement of another action.

—Existence of cause of action.

—Particular proceedings.

—Relation back.

—Amendment to complaint.

—Remediability of claim.

—Service of summons.

Applicability of section.

—Administrative discipline.

In the absence of specific legislative author-

ity, civil statutes of limitation are inapplicable to administrative disciplinary proceedings. *Rogers v. Division of Real Estate*, 790 P.2d 102 (Utah Ct. App. 1990).

Discovery.

The discovery rule has no application when an action easily could have been filed between the date of discovery and the end of the limitation period. *Brigham Young Univ. v. Paulsen Constr. Co.*, 744 P.2d 1370 (Utah 1987).

Escheat proceedings.

—Applicable foreign law.

Five-year limitation period within which heirs must claim estate to prevent its escheat after death of intestate without apparent heirs is subject to provisions of treaty between United States and country of alien intestate, requiring actual notice to consular authorities of intestate's death without apparent heirs. In *re Apostolopoulos' Estate*, 68 Utah 344, 250 P. 469, 253 P. 1117, 48 A.L.R. 1322 (1926).

Nature and extent of right.

—Legal.

The statute of limitations governs legal title,

lapse of time, heirs are also barred, had no application where property had been distributed in accordance with statute, and heir seeking to recover such property distributed to him while he was minor within two years after he attained majority was not barred from maintaining action, since limitation did not start to run against plaintiff until he had attained majority under this section *Robbins v Duggins*, 61 Utah 542, 216 P 232 (1923) (decided under prior law)

Purchaser at tax sale.

—**Right to title.**

Where defendant purchased tax deed from county, and immediately thereafter entered into possession of property, paid taxes on property for statutory time, made valuable improvements on property, and held property openly and notoriously, he was entitled to have title to property in controversy against all parties except those under disability *Baker v Goodman*, 57 Utah 349, 194 P 117 (1920)

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am Jur 2d Limitation of Actions § 178 et seq

C.J.S. — 54 C.J.S Limitation of Actions § 105 et seq

Key Numbers. — Limitation of Actions 70 et seq

ARTICLE 2 OTHER THAN REAL PROPERTY

78-12-22. Within eight years.

Within eight years:

An action upon a judgment or decree of any court of the United States or of any state or territory within the United States.

An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-22; L. 1975, ch. 96, § 26.

Cross-References. — Execution to issue within eight years, Rule 69(a), U R C P
Judgment a lien for eight years, § 78-22-1

Uniform Act on Paternity, § 78-45a-1 et seq
Uniform Civil Liability for Support Act, § 78-45-1 et seq

Uniform Reciprocal Enforcement of Support Act § 77-31-1 et seq

NOTES TO DECISIONS

ANALYSIS

Judgments or decrees
Paternity proceedings
Pleadings
Renewal of judgment
Stipulations
Support or maintenance
Tolling
Cited

Judgments or decrees.

Statute of limitations begins to run from time of the rendition and entry of judgment or decree *Sweetser v Fox*, 43 Utah 40, 134 P 599, 47 L R A (n s) 145, 1916C Ann Cas 620 (1913)

Where judgment payable in installments provided that plaintiff could have execution for

total amount due if default in payments should be made, plain intent was that execution should issue for only such amounts as were due at time of default so that statute did not begin to run from date of default *Buell v Duchesne Mercantile Co*, 64 Utah 391, 231 P 123 (1924)

In case of a judgment payable in installments, statute runs from time fixed for payment of each installment for the part then payable, and not from date of the judgment *Buell v Duchesne Mercantile Co*, 64 Utah 391, 231 P 123 (1924)

In actions for fraud, statute does not begin to run until fraud is discovered or could have been reasonably discovered, but even when action is not based on fraud, in equity where cause of action is concealed from one in whom it resides by the one against whom it lies, the

Tab C

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same cases, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Key Numbers. — New Trial ⇐ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for

obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

"Any other reason justifying relief."
 —Default judgment.
 —Impossibility of compliance with order.
 —Incompetent counsel.
 —Lack of due process.
 —Merits of case.
 —Mistake or inadvertence.
 —Mutual mistake.
 —Real party in interest.
 —Refund of fine after dismissal.
 Appeals.
 Clerical mistakes.
 —Computation of damages.
 —Correction after appeal.
 —Date of judgment.
 —Void judgment.
 —Estate record.
 —Inherent power of courts.
 —Intent of court and parties.
 —Judicial error distinguished.
 —Order prepared by counsel.
 —Predating of new trial motion.
 Court's discretion.
 Default judgment.
 Effect of set-aside judgment.
 —Admissions.
 Form of motion.
 Fraud.
 —Burden of proof.
 —Divorce action.
 Independent action.
 —Constitutionality of taxes.
 —Divorce decree.
 —Fraud or duress.
 —Motion distinguished.
 Invalid summons.
 —Amendment without notice.
 Inequity of prospective application.
 Jurisdiction.
 Mistake, inadvertence, surprise or excusable neglect.
 —Default judgment.
 —Illness.
 —Inconvenience.
 —Meritorious.
 —Merits of claim.
 —Negligence of attorney.
 —No claim for relief.
 —Delayed motion for new trial.
 —Factual error.
 —Failure to file cost bill.
 —Failure to file notice of appeal.
 —Nonreceipt of notice and findings.
 —Trial court's discretion.
 —Unemployment compensation appeal.
 —Workmen's compensation appeal.
 Newly discovered evidence.
 —Burden of proof.
 —Discretion not abused.
 Procedure.
 —Notice to parties.
 Res judicata.

Reversal of judgment.
 —Invalidation of sale.
 Satisfaction, release or discharge.
 —Accord and satisfaction.
 —Discharging representative of estate from further demand.
 —Erroneously included damages.
 —Prospective application of judgment.
 Timeliness of motion.
 —Confused mental condition of party.
 —Dismissal for lack of prosecution.
 —Fraud.
 —Invalid service.
 —Judicial error.
 —Jurisdiction.
 —Mistake, inadvertence and neglect.
 —Newly discovered evidence.
 —Order entered upon erroneous assumption.
 —"Reasonable time."
 —Reconsideration of previously denied motion.
 —Satisfaction.
 Unauthorized appearance.
 Void judgment.
 —Basis.
 —Lack of jurisdiction.
 Cited.

"Any other reason justifying relief."

Subdivision (7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable time. *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304 (Utah 1982); *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).

Where a defendant's motion to set aside judgment based on Subdivisions (b)(1) and (7) and his motion for a new trial claimed that plaintiff violated Rule 5(a) on several occasions by not providing defendant with a copy of pleadings, thereby causing surprise, centering on plaintiff's failure to provide a copy of his motion for summary judgment to defendant, which the latter claimed was a clear showing of fraud on plaintiff's part, the trial court could have believed in denying defendant's motion, that fraud was not present in what could be considered a lapse in procedure by plaintiff's counsel. *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987).

Defendant's claim that he mistakenly entered into an ill-advised stipulation without fully understanding its consequences was correctly characterized by trial court as mistake, inadvertence, surprise or neglect under Subdivision (b)(1); because Subdivision (b)(1) applied, Subdivision (b)(7) could not apply and could not be used to circumvent the three-month filing period. *Richins v. Delbert Chipman & Sons*, 817 P.2d 382 (Utah Ct. App. 1991).