

1997

# Marion Marsh v. Scott Allan Marsh : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

MARION MARSH,

Plaintiff-Appellee,

vs.

SCOTT ALLAN MARSH,

Defendant-Appellant

BRIEF OF APPELLANT

Appeal No. 970696-CA  
Civil No. 894891070 DA  
Oral Argument Priority  
No:15

\* \* \* \* \*

Appeal from a Final Judgment  
of the Third Judicial District Court  
of Salt Lake County, Utah  
The Honorable Leslie A. Lewis

**UTAH COURT OF APPEALS  
BRIEF**

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**FILED**  
Utah Court of Appeals

JUN 12 3

Julia D'Alesandro  
Clerk of the Court

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**I. JURISDICTION**

The authority which confers jurisdiction on this Court to hear this appeal from the Third Judicial District Court of Salt Lake County is Section 78-2a-3(2)(h), Utah Code Annotated 1953, as amended, and the Utah Rules of Appellate Procedure No. 3(a).

**II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

This is an appeal from a April 17, 1997 decision of the Third Judicial District Court of Salt Lake County which requires Appellant Scott Allan Marsh, ("Mr. Marsh") to pay Marion Marsh, ("Mrs. Marsh") a percentage of the separation pay he received as a result of his involuntary separation from the U.S. Navy. In addition, Mr. Marsh appeals from a decision of the Trial Court which allowed Mrs. Marsh to default on her payments of a loan in which she agreed to hold Mr. Marsh harmless thus violating the Decree of Divorce dated August 16, 1989.

### III. QUESTIONS OF LAW AND FACT

A. SHOULD A MILITARY SEPARATION PAYMENT MADE UNDER 10 U.S.C. §1174 AND RELATED STATUTES BE TREATED AS A PENSION OR RETIREMENT PAYMENT WHEN STATUTORILY IT WAS NOT MADE SUCH A BENEFIT AND WAS INTENDED TO ASSIST THE DISCHARGED INDIVIDUAL IN HIS RE-ENTRY INTO CIVILIAN LIFE? This is a question of law reviewed for correctness. *Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989); *Lake Philgas Service v. Valley Bank*, 845 P.2d 955, (Utah App. 1993); *Marchant v. Park City*, 771 P.2d 677 (Utah App. 1989).

B. SINCE THE SEPARATION BENEFIT APPELLANT RECEIVED MUST BE REPAID IN THE EVENT THE DISCHARGED INDIVIDUAL BECOMES ELIGIBLE FOR RETIREMENT BENEFITS, MUST THE APPELLEE BE REQUIRED TO

**CONTRIBUTE TO THE REPAYMENT IF SHE RECEIVES ANY OF THE SEPARATION PAY?** This is a question of law which the Trial Court failed to properly decide and is reviewed for correctness. *Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989); *Lake Philgas Service v. Valley Bank*, 845 P.2d 955, (Ut. App. 1993); *Marchant v. Park City*, 771 P.2d 677 (Utah App. 1989).

**C. IS MRS. MARSH'S FAILURE TO HOLD MR. MARSH HARMLESS FROM DEBTS AGAINST THE MARITAL RESIDENCE IN VIOLATION OF HER OBLIGATIONS UNDER THE DEGREE OF DIVORCE JUSTIFYING AN AWARD OF SANCTIONS AGAINST HER?** This is a mixed question of law and fact to be reviewed factually and for correctness. *Marchant v. Park City*, 771 P.2d 677 (Utah App. 1989); *Lake Philgas Service v. Valley Bank*, 845 P.2d 955, (Ut. App. 1993); *Gillmor v. Wright*, 850 P.2d 422 (Utah 1993); *Matter of Estate of Bartell*, 776 P.2d 885 (Utah 1989).

#### **IV. STANDARD OF REVIEW AND SUPPORTING AUTHORITIES**

All of the foregoing issues for review on this Appeal present questions of law for determination by this Appeals Court. For the purposes of this appeal there are very limited factual disputes. This appeal is based on the Trial Court's order requiring Mr. Marsh to pay a percentage of his separation pay to Mrs. Marsh as though such pay were part of a Pension or

Retirement Benefit when according to the applicable statutes, Separation pay is not the same as a retirement benefit since the requirements for receiving Separation pay and the formula for calculating the payments are different. This appeal is also based on the Trial Court's order allowing Mrs. Marsh to avoid her obligations of the divorce decree by refusing to hold Mr. Marsh harmless in regard to the debt on the marital residence.

The standard for review (where the appeal as here presented is essentially on issues of law and interpretation of statutes) is that upon review, no deference is given to the trial court statements, conclusions, rulings, or interpretations and the Appellate Court is free to render its independent interpretation and review for Correctness. *Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884 (Utah 1988); *Faulkner v. Faulkner*, 714 P.2d 1149 (Utah 1986); *Arnold Machinery Co. v. Balls*, 624 P.2d 678 (Utah 1981).

In this case, the facts on both issues are not in dispute. Mr. Marsh received a separation payment upon his involuntary termination from the military. The Trial Court erred in considering this as a Retirement or Pension benefit. In such an instance the appellate court need not grant any deference to the trial court when "even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support

the findings." *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989).

In addition, the Trial Court erred in determining that the obligations of the divorce decree were contingent upon one another and that failure of one justified failure of another. Under U.C.A. §30-3-5(1)(c) the divorce decree must specify which party is responsible for the payment of joint debts and provisions for the enforcement of these orders. The Marsh's Divorce Decree provides that in the event Mr. Marsh fell 30 days or more in arrears on his support payments, Mrs. Marsh was entitled to mandatory income withholding relief. This is the only remedy permitted by the decree and the Trial Court erred in determining that Mr. Marsh's arrearage was justification for Mrs. Marsh's failure to maintain her obligation of holding him harmless from the mortgage.

#### **V. DETERMINATIVE STATUTES AND RULES**

Statutes determinative of Mr. Marsh's first issue are 10 U.S.C. §§627-1174 and §1408 (Exhibit A) which govern Separation Pay and Pension and Retirement Benefits from the U.S. Military. While no Utah Cases have been found on point, the California case of Kuzmiak v. Kuzmiak, 222 Cal. Rptr. 644 (CA 2nd, Calif 1986) is directly on point. (Exhibit B)



The statute determinative of Mr. Marsh's second issue is U.C.A. §30-3-5 which proscribes that upon divorce debts are to be divided, and the Decree of Divorce must contain provisions for failure to meet financial obligations. The Divorce Decree provides that if Mr. Marsh fails to pay child support, Mrs. Marsh is entitled to mandatory withholding to satisfy the payments.

## **VI. STATEMENT OF THE CASE**

On August 16, 1989, Marion Marsh and Scott Allan Marsh were divorced. (R. at 38, Exhibit C at 6). The relevant portions of the Divorce Decree awarded Marion Marsh "11/40ths of all pension and retirement benefits that the [Mr. Marsh] may receive upon his retirement from military service." (Divorce Decree, R. at 43, Exhibit C at 6; R. at 462, Exhibit D at 2). This included only retirement and pensions and was silent as to separation pay. In addition Mrs. Marsh was awarded the marital residence. (R. at 43, Exhibit C at 6). With the home, she assumed the debt of \$75,000 with Fleet Mortgage and the Veterans Administration and was ordered to hold Mr. Marsh harmless on the financial obligation. (R. at 44, Exhibit C at 7). In addition, Mr. Marsh was ordered to pay alimony and child support. (R. at 41-42, Exhibit C at 4-5).

In November, 1991, Mr. Marsh was involuntarily discharged from his employment with the United States Navy. (Tr. at 52,

Exhibit E at 52). Pursuant to 10 U.S.C. §1174, Mr. Marsh was given separation pay in the amount of \$30,000. Mr. Marsh treated the separation pay as such and not a pension or retirement payment and did not pay Mrs. Marsh 11/40ths of the payment. While the military referred to the payment as a pension plan on his W-2 form, Mr. Neil Crist, ("Mr. Crist"), a retired Air Force Colonel and the expert at the hearing on this matter, acknowledged that the W-2 form did not contain an appropriate place on the form to enter military separation pay. He indicated that under the circumstances, the Retirement/Pension line is where an individual would likely be instructed to enter the payment. (Tr. at 66, Exhibit E at 66).

Mrs. Marsh contends that she was entitled to 11/40ths of the separation pay as part of a pension or retirement plan. (R. at 283, Exhibit F at 3). Commissioner Michael Evans recommended a ruling in favor of Mrs. Marsh. At the trial, Mr. Crist, a retired colonel with the Air Force, testified as an expert witness. (Tr. at 25, Exhibit E at 25). He testified that separation pay and retirement were treated differently by the Military, but that in his opinion the separation pay was an "advancement on retirement". (Tr. at 48-50, Exhibit E at 48-50).

On June 9, 1997, the Honorable Leslie Lewis ordered that Mrs. Marsh be awarded 11/40ths of the disbursement received by Defendant in 1991, together with interest. (R. at 460, Exhibit G

at 7). Mr. Marsh appeals from that decision on the grounds that the payment he received was a separation payment and was not a pension or retirement benefit.

In addition, Mrs. Marsh breached her obligation under the Divorce Decree by failing to make the mortgage payments and allowing the mortgage company to foreclose on the marital residence. (Veterans Affairs Letter of August 25, 1993, R. at 200, Exhibit H at 1). Mrs. Marsh contends that her failure to make the mortgage payment was a direct result of Mr. Marsh's late support payments. (R. at 206, Exhibit I at 3). Commissioner Michael Evans recommended that Mrs. Marsh not be held in contempt for her failure to hold Mr. Marsh harmless on the debt. (Minute Entry, R. at 239, Exhibit J). Mr. Marsh objected to the commissioner's ruling.

The Trial Court found that since Appellant was in arrears in his support at the time Appellee permitted the foreclosure, the Appellee had not failed in her duty under the Decree of Divorce. (R. at 454, Exhibit G at 2-3). Mr. Marsh appeals from this order on the grounds that the elements of a divorce decree are treated individually and an arrearage in support on his part does not justify her breach of the order to hold him harmless on the mortgage payment.

The Decree of Divorce provides Mrs. Marsh a remedy in the event that Mr. Marsh gets behind on his support payments. The

Decree states "if the Defendant falls thirty (30) days or more in arrears in his child support obligation, the Plaintiff should be entitled to mandatory income withholding relief pursuant to Utah Code Annotated (78-45(d)-1 et. seq.) (1984 as amended). (Tr. at 41, Exhibit E at 41). This is her exclusive remedy and does not provide her the option of defaulting on her mortgage payment and allowing the mortgage company to foreclose on the house which is held jointly with Mr. Marsh.

Mr. Marsh appeals from this decision on the grounds that obligations of a divorce decree are individual obligations which are not contingent upon the other obligations. Mr. Marsh has made up payment of all arrearages. In addition, at the time of the hearing on this matter, Mr. Marsh was current on his child support obligations as acknowledged by Mrs. Marsh's attorney. (Tr. at 14, Exhibit E at 14).

#### **VII. SUMMARY OF APPELLANT'S ARGUMENT ON APPEAL**

A military separation payment made under 10 U.S.C. §1174 and related statutes should not be treated as a pension or retirement payment when statutorily it was not made such a benefit and was intended to assist the individual in his re-entry into civilian life. At the Commissioner's recommendation, the trial court ruled that the payment Mr. Marsh received when he was involuntarily terminated from his military service was divisible

as part of the retirement and pension described in the Divorce Decree.

Congress and the military have statutorily dealt with involuntary separations by creating a separation payment. This payment is different from a retirement or pension because retirement requires 20 years of service in the military while the separation pay requires only 6 years of service. While the expert testified that this separation was, in his opinion, an "advancement on retirement," that implies that everyone who receives a separation payment will receive retirement. That is clearly not the case. Mr. Marsh appeals the Trial Court's decision on the ground that the Court erred in considering the money a retirement benefit when it was, in fact, paid as a separation payment pursuant to 10 U.S.C. §1174.

If Mr. Marsh subsequently retires from the military, a portion of his retirement pay will be applied toward the amount he received upon his separation from the military. If Mrs. Marsh receives 11/40ths of the separation pay, Mr. Marsh will be paying her 11/40ths of the money he may later be required to pay back. If Mr. Marsh is currently required to pay Mrs. Marsh her 11/40ths of the separation pay, in equity she must be required to pay back 11/40ths out of her portion of the retirement in the event that the repayment becomes necessary.

Mr. Marsh also appeals the order of the trial court which holds him responsible for the foreclosure on the marital residence in spite of the fact that in the Divorce Decree orders Mrs. Marsh to hold him harmless on that mortgage. The Trial Court found that she was not in contempt for breaching her obligation based on the fact that Mr. Marsh was behind in his support payments. Mr. Marsh contends that the obligations in a divorce decree are separate and should not be contingent upon one another. In addition, at the time of the hearing on this matter, Mr. Marsh had repaid all arrearages and was current in his support obligations.

#### **VIII. APPELLANT'S ARGUMENTS**

##### **ARGUMENT I**

Under 10 U.S.C. §1174, Military Separation Payments are treated separate and apart from retirement and pensions and should be treated separately under a decree of divorce. Separation pay upon involuntary discharge or release from active duty is defined by §1174 to include termination of an individual "who has completed six or more but less than twenty, years of active service immediately before that discharge." It does not apply to those who have worked with the military in excess of 20 years who are entitled to retirement.

The separation pay is computed as "10 percent of the product of A) his years of active service, and B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty." The statute further provides that if the discharged employee eventually collects retirement benefits, a percentage of those benefits will be deducted until the amount of the separation pay has been repaid. (10 U.S.C. §1174 (h)). (Exhibit A ).

Pursuant to the Divorce Decree dated August 16, 1989, Mrs. Marsh is entitled to 11/40ths of Mr. Marsh's retirement benefits "upon his retirement from military service." (Tr. at 43, Exhibit E at 6.) Mrs. Marsh cites the case of Woodward v. Woodward, 456 P.2d 431, (considering retirement benefits a marital asset) as controlling in this matter. The Divorce Decree clearly addresses how retirement benefits should be divided. That division of retirement benefits is not applicable here since Congress specifically has determined the separation payment to not be a retirement benefit.

In the hearing on this matter, Mrs. Marsh's expert, Neil Crist, testified that the separation pay and retirement are handled differently since someone who receives the separation payment will not necessarily receive retirement. Among other possibilities, this would occur if the individual did not

complete 20 years of service in the Reserves or if the individual did not reach the age of 60.

Mr. Crist testified that in his opinion, based on the repayment plan, the separation pay was an "advancement on the retirement." (Tr. at 49, Exhibit E at 49). An advancement, however, implies that the individual would later receive retirement. As Mr. Crist admitted, this may not be the case. (Tr. at 67, Exhibit E at 67). In the instance that the individual does not reach retirement age, the money is not repaid. Mr. Crist also acknowledged that \$1174 relates to severance and separation pay and not retirement and pension.

Mr. Marsh was released from active duty in the Navy under 10 U.S.C. §632 commonly known as the "up or out" policy. Section 632 provides in part:

(a) Each officer. . .who holds the regular grade of captain or major. . .who has failed of selection for promotion to the next higher regular grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher regular grade shall be discharged on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time.

As a result of his involuntary discharge, Mr. Marsh was given a separation payment of \$30,000 (before taxes), as provided in 10 U.S.C. §1174. These benefits are provided for discharged employees who are not eligible for retirement because of their years of service.



Utah does not have any case law relating to military separation pay but the California case of Kuzmiak v. Kuzmiak, 222 Cal. Rptr. 644 (Cal.App.2Dist. 1986) is precisely on point. (Exhibit B). The facts of the Kuzmiak case are very similar to the present case. While California (like Utah) recognizes a marital interest in retirement benefits earned during the marriage, the court held "that unlike military benefits based upon longevity of service, separation pay does not serve to compensate for past services. Although longevity of service determines the amount of this one-time payment, the right to separation pay occurs only when there is an involuntary discharge of the service member." Id at 646. The court further went on to state that the legislative history of §1174 shows that:

the separation pay is a contingency payment for an officer who is career committed but to whom a full military career may be denied. It is designed to encourage him to pursue his service ambition, knowing that if he is denied a full career under the competitive system he can count on an adequate readjustment pay to ease his reentry into civilian life.

Id. at 646, (quoting House Rep. No. 96-1462, reprinted in 1980 U.S. Code Cong. & Admin. News. P. 6333, 6361.) The court concluded that it was "satisfied that Congress did not intend separation pay to be compensation for past services. . . the payment is the separate property of the service member." Id. at 647.

While Crist testified that it was clear in his mind that what Mr. Marsh received was severance or separation pay, Mrs. Marsh contends that it was a retirement benefit since Mr. Marsh indicated it as such on his W-2 form. The W-2 form does not contain a category for separation pay so as Mr. Crist indicated, the retirement line would be the appropriate place to include separation pay. (Tr. at 66, Exhibit E at 66).

The \$30,000 that Mr. Marsh received was compensation for his separation from the military under 10 U.S.C. §1174. (Exhibit A). It was designed to give him the opportunity to work back into civilian life. Although Mr. Marsh indicated on his tax form that the payment was retirement, the form did not provide an appropriate place for the entry of this figure. Since the amount paid to Mr. Marsh was separation pay as a part of his involuntary discharge, the reasoning used in the Kuzmiak case should be applied to determine that separation pay is not compensation for past services and is consequently not divisible in the divorce decree.

If Mrs. Marsh is awarded 11/40ths of the separation pay, the issue arises about the repayment. In the event that Mr. Marsh becomes eligible for retirement, he will be required to repay the separation pay, and Mrs. Marsh will receive 11/40ths of the retirement. Equity requires that Mrs. Marsh be required to participate in the repayment if she receives part of the

separation pay. If she receives her 11/40ths of the separation pay, she should be required to repay 11/40ths when and if she receives retirement benefits.

## ARGUMENT II

Mr. Marsh appeals the Trial Court's decision making Mrs. Marsh's obligation to hold him harmless on the mortgage contingent on his payment of child support. Each party's duties were separate under the Decree of Divorce but the Trial Court has refused to enforce Appellee's duty to hold Appellant harmless on the mortgage obligation. As a result, Mr. Marsh or someone on his behalf must repay the Department of Veteran's Affairs the sum of \$12,870.96 before the Appellant can once again be eligible for Veteran's loans. (Exhibit H).

Cases concerning the separate obligations of a divorce decree deal primarily with linking child support with visitation. The Utah Supreme Court in the case of Rohr v. Rohr, 709 P.2d 382 (Utah 1985) cited various jurisdictions and concluded that "A court may not deny the noncustodial parent visitation rights for the mere failure to pay child support, where the failure to pay is due to an inability to pay." The court in that case, however, ruled against the non-supporting parent because there was no evidence that he was unable to provide for the child, he had

abused his visitation rights and that his conduct was detrimental to the child. The court clearly indicated that the restrictions on the father's visitation rights were a result of plaintiff's "willful and intentional failure to support his child and his contumacy with respect to a court-ordered visitation schedule and attempt to forcefully remove the child from the custodial parent."

The Utah Court of Appeals in Dana v. Dana, 789 P.2d 726 (Utah App. 1990) further separated the obligations of child support and visitation by ruling that a father who did not meet his visitation schedule could not be required to pay additional child support. In child support and visitation cases, courts have treated each obligation as separate and not contingent upon one another. *Kane v. Kane*, 391 P.2d 361 (Colo. 1964); *Wilson v. Wilson*, 252 P.2d 197, (Idaho 1953); *Garris V. McDuffie*, 344 SE.2d 186 (SC App. 1986). This is similar to our present case where provisions of a Divorce Decree should not be conditional upon one another unless the decree specifically links them.

The Divorce Decree provided Mrs. Marsh a remedy in the event of an arrearage in support payments. The Decree states "if the Defendant falls thirty (30) days or more in arrears in his child support obligation, the Plaintiff should be entitled to mandatory income withholding relief pursuant to Utah Code Annotated (78-45(d)(1) et. seq.) (1984 as amended)." This provides her an

exclusive remedy for collecting support. It does not, however, provide her justification to evade her obligations under the Decree.

In the Affidavit of Scott Marsh, Dated October 7, 1997, Mr. Marsh testified that he has been current in the payment of his support obligations since 1992 except when the Court ordered retroactive support. At that time he quickly paid off any arrearages the court determined were owed. (Exhibit K). Mr. Marsh's arrearages were less than the debt Mrs. Marsh owes on the foreclosure of the home.

Even if Mr. Marsh had been totally delinquent in his support payments, which he was not, that does not justify Mrs. Marsh's delinquency on the mortgage payment since her obligation to hold him harmless was not contingent upon his duty to pay support. Because Mr. Marsh has repaid all his arrearages, including interest, and has made Mrs. Marsh whole, it is now her obligation to make Mr. Marsh whole by repaying the debt of \$12,870.96. Mr. Marsh has remained current in his support and has fulfilled his obligations under the Divorce Decree and is entitled to the same fulfillment of obligations from Mrs. Marsh.

The obligations of the Divorce Decree are separate obligations and should be treated as such. The mere fact that Mr. Marsh was behind in his child support payments does not justify Mrs. Marsh's refusal to pay the mortgage payment and the

subsequent foreclosure on the marital home. Under the Divorce Decree, Mrs. Marsh had an exclusive remedy for income holding relief in the event of an arrearage on the payments. This is the remedy which should have been allowed to her. Mr. Marsh was current on his support payments at the time of the hearing on this matter but is subject to a payment of \$12,870.96 before he will again be eligible for a loan from the department of Veteran's Affairs. Payment of this should be the responsibility of Mrs. Marsh since the Divorce Decree ordered her to hold Mr. Marsh harmless on the mortgage.

#### **IX. CONCLUSION**

Pursuant to the Decree of Divorce Mrs. Marsh was to receive 11/40ths of Mr. Marsh's retirement from the military. The money he received as separation pay from his involuntary discharge by statute was separation pay and not retirement. As such, the trial court erred in requiring Mr. Marsh to pay Mrs. Marsh 11/40ths of the military separation pay. The separation pay is not compensation for past service (as retirement is) but is instead a payment to help the individual work back into the civilian work force. As the court ruled in Kuzmiak, the separation payment should be considered separate property and awarded to Mr. Marsh in its entirety.

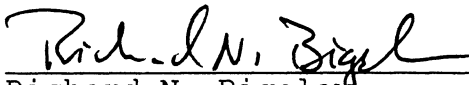
In the event Mr. Marsh is required to give Mrs. Marsh 11/40ths of the payment, she should be required to participate in the repayment plan. While it is uncertain that Mr. Marsh will ever receive his military retirement, if he does so, he will be required to repay the amount of the separation pay. If Mrs. Marsh is awarded a percentage of the separation pay, in equity, she should be required to repay that same percentage in the event she receives the military retirement.

Finally, the trial court erred in allowing Mrs. Marsh to breach her duties under the Decree of Divorce requiring her to hold Mr. Marsh harmless on the Mortgage. The foreclosure created a debt for Mr. Marsh of \$12,870.96 which must be repaid, and has clouded his credit record. Duties of a divorce decree are separate and should not be contingent upon one another unless the divorce decree expressly links them.

Based on the law and facts, the judgment of the Trial Court should be reversed to allow Mr. Marsh to keep the entire separation payment and to require Mrs. Marsh to be responsible for the repayment of the Veteran's Affairs loan.

DATED this 12<sup>th</sup> day of June, 1998.

Respectfully submitted,

  
Richard N. Bigelow  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of June, 1998 a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to:

Kellie F. Williams  
CORPORON & WILLIAMS  
808 East South Temple  
Salt Lake City, Utah 84102

Richard N. Bigal



Tab A

# Exhibit A

- Sec  
630 Discharge of regular commissioned officers with less than five years of active commissioned service or found not qualified for promotion for first lieutenant or lieutenant (junior grade).
631. Effect of failure of selection for promotion: regular first lieutenants and lieutenants (junior grade).
632. Effect of failure of selection for promotion: regular captains and majors of the Army, Air Force, and Marine Corps and regular lieutenants and lieutenant commanders of the Navy.
633. Retirement for years of service: regular lieutenant colonels and commanders
634. Retirement for years of service: regular colonels and Navy captains.
635. Retirement for years of service: regular brigadier generals and rear admirals (lower half).
636. Retirement for years of service: regular major generals and rear admirals.

## AMENDMENTS

1985—Pub. L. 99-145, title V, § 514(b)(5)(B), Nov. 8, 1985, 99 Stat. 628, substituted "rear admirals (lower half)" for "commodores" in item 635.

1981—Pub. L. 97-86, title IV, § 405(b)(5)(B), Dec. 1, 1981, 95 Stat. 1106, substituted "commodores" for "commodore admirals" in item 635.

## § 627. Failure of selection for promotion

An officer in a grade below the grade of colonel or, in the case of an officer of the Navy, captain who is in or above the promotion zone established for his grade and competitive category under section 623 of this title and is considered but not selected for promotion by a selection board convened under section 611(a) of this title shall be considered to have failed of selection for promotion.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2859.)

## EFFECTIVE DATE

Subchapter effective Sept. 15, 1981, but the authority to prescribe regulations under this subchapter 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.

## TRANSITION PROVISIONS UNDER DEFENSE OFFICER PERSONNEL MANAGEMENT ACT

For provisions to prevent extinction or premature termination of rights, duties, penalties, or proceedings that existed or were begun prior to the effective date of Pub. L. 96-513 and otherwise to allow for an orderly transition to the system of officer personnel management put in place under Pub. L. 96-513, see section 601 et seq. of Pub. L. 96-513, set out as a note under section 611 of this title.

## § 628. Special selection boards

(a)(1) In the case of an officer who is eligible for promotion who the Secretary of the military department concerned determines was not considered for selection for promotion by a selection board because of administrative error, the Secretary concerned, under regulations prescribed by the Secretary of Defense, shall convene a special selection board under this subsection (composed in accordance with section 612 of this title or, in the case of a warrant officer, composed in accordance with section 573 of this

title and regulations prescribed by the Secretary of the military department concerned) to determine whether such officer should be recommended for promotion.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record would have appeared to the board that should have considered him. That record shall be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer in a grade below the grade of colonel or, in the case of an officer of the Navy, captain whose name was referred to it for consideration, the officer shall be considered to have failed of selection for promotion.

(b)(1) In the case of an officer who is eligible for promotion who was considered for selection for promotion by a selection board but was not selected, the Secretary of the military department concerned, under regulations prescribed by the Secretary of Defense, may convene a special selection board under this subsection (composed in accordance with section 612 of this title or, in the case of a warrant officer, composed in accordance with section 573 of this title and regulations prescribed by the Secretary of the military department concerned) to determine whether such officer should be recommended for promotion if the Secretary concerned determines that—

(A) the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer whose name was referred to it for consideration, the officer incurs no additional failure of selection for promotion.

(c)(1) Each special selection board convened under this section shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing the name of each officer it recommends for promotion and certifying that the board has carefully considered the record of each officer whose name was referred to it.

(2) The provisions of sections 617(b) and 618 of this title apply to the report and proceedings of a special selection board convened under this section in the same manner as they apply to

the report and proceedings of a selection board convened under section 611(a) of this title.

(d)(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer whose name was referred to it for consideration, such officer shall, as soon as practicable, be appointed to the next higher grade in accordance with subsections (b), (c), and (d) of section 624 of this title.

(2) An officer who is promoted to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon such promotion, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him.

(e) The provisions of section 613 of this title apply to members of special selection boards convened under this section.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2859; amended Pub. L. 98-525, title V, § 527(a), Oct. 19, 1984, 98 Stat. 2525; Pub. L. 102-190, div. A, title XI, § 1131(4), Dec. 5, 1991, 105 Stat. 1506; Pub. L. 102-484, div. A, title X, § 1052(10), Oct. 23, 1992, 106 Stat. 2499.)

#### AMENDMENTS

1992—Subsec. (b)(1). Pub. L. 102-484 substituted “section 573” for “section 558”.

1991—Subsec. (a)(1). Pub. L. 102-190 substituted “section 573” for “section 558”.

1984—Subsecs. (a)(1), (b)(1). Pub. L. 98-525 substituted “(composed in accordance with section 612 of this title or, in the case of a warrant officer, composed in accordance with section 558 of this title and regulations prescribed by the Secretary of the military department concerned)” for “(composed in accordance with section 612 of this title)”.

#### EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-190 effective Feb. 1, 1992, see section 1132 of Pub. L. 102-190, set out as a note under section 521 of this title.

#### DELEGATION OF FUNCTIONS

Functions of President under subsec. (d)(1) to approve, modify, or disapprove report of a selection board delegated to Secretary of Defense to perform, without approval, ratification, or other action by President, and with authority for Secretary to redelegate, see Ex. Ord. No. 12396, §§ 1(a), 3, Dec. 9, 1982, 47 F.R. 55897, 55898, set out as a note under section 301 of Title 3, The President.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 618, 641 of this title.

#### § 629. Removal from a list of officers recommended for promotion

(a) The President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.

(b) If, after consideration of a list of officers approved for promotion by the President, the Senate does not give its advice and consent to

the appointment of an officer whose name is on the list, that officer's name shall be removed from the list.

(c)(1) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. If he is recommended for promotion by the next selection board convened for his grade and competitive category and he is promoted, the Secretary of the military department concerned may, upon such promotion, grant him the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been so removed.

(2) If such an officer who is in a grade below the grade of colonel or, in the case of the Navy, captain is not recommended for promotion by the next selection board convened for his grade and competitive category, or if his name is again removed from the list of officers recommended for promotion, of if the Senate again does not give its advice and consent to his promotion, he shall be considered for all purposes to have twice failed of selection for promotion.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2860.)

#### DELEGATION OF FUNCTIONS

Functions of President under subsec. (a) to remove name of any officer from a promotion list to any grade below commodore or brigadier general delegated to Secretary of Defense to perform, without approval, ratification, or other action by President, and with authority for Secretary to redelegate, see Ex. Ord. No. 12396, §§ 1(b), 3, Dec. 9, 1982, 47 F.R. 55897, 55898, set out as a note under section 301 of Title 3, The President.

#### § 630. Discharge of regular commissioned officers with less than five years of active commissioned service or found not qualified for promotion for first lieutenant or lieutenant (junior grade)

The Secretary of the military department concerned, under regulations prescribed by the Secretary of Defense—

(1) may discharge any regular officer on the active-duty list who—

(A) has less than five years of active commissioned service; or

(B) is serving in the grade of second lieutenant or ensign and has been found not qualified for promotion to the regular grade of first lieutenant or lieutenant (junior grade); and

(2) shall, unless the officer has been promoted, discharge any officer described in clause (1)(B) at the end of the 18-month period beginning on the date on which the officer is first found not qualified for promotion.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2861; amended Pub. L. 98-525, title XIV, § 1405(11), Oct. 19, 1984, 98 Stat. 2622.)

#### AMENDMENTS

1984 Par. (2) Pub. L. 98-525 substituted “18 month” for “eighteen month”.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1174 of this title.

**§ 631. Effect of failure of selection for promotion: regular first lieutenants and lieutenants (junior grade)**

(a) Except an officer of the Navy and Marine Corps who is an officer designated for limited duty (to whom section 5596(e) or 6383 of this title applies), each officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of first lieutenant and has failed of selection for promotion to the regular grade of captain for the second time, and each officer of the Regular Navy who holds the regular grade of lieutenant (junior grade) and has failed of selection for promotion to the regular grade of lieutenant for the second time, whose name is not on a list of officers recommended for promotion to the next higher regular grade shall—

(1) be discharged on the date requested by him and approved by the Secretary of the military department concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time;

(2) if he is eligible for retirement under any provision of law, be retired under that law on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time; or

(3) if on the date on which he is to be discharged under clause (1) he is within two years of qualifying for retirement under section 3911, 6323, or 8911 of this title, be retained on active duty until he is qualified for retirement and then be retired under that section, unless he is sooner retired or discharged under another provision of law.

(b) The retirement or discharge of an officer pursuant to this section shall be considered to be an involuntary retirement or discharge for purposes of any other provision of law.

(c) An officer who is subject to discharge under subsection (a)(1) is not eligible for further consideration for promotion.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2861; amended Pub. L. 98-525, title V, § 525(c), Oct. 19, 1984, 98 Stat. 2525.)

## AMENDMENTS

1984—Subsec. (c). Pub. L. 98-525 added subsec. (c).

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 619 of this title.

**§ 632. Effect of failure of selection for promotion: regular captains and majors of the Army, Air Force, and Marine Corps and regular lieutenants and lieutenant commanders of the Navy**

(a) Except an officer of the Navy and Marine Corps who is an officer designated for limited

duty (to whom section 5596(e) or 6383 of this title applies) and except as provided under section 637(a) of this title, each officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of captain or major, and each officer of the Regular Navy who holds the regular grade of lieutenant or lieutenant commander, who has failed of selection for promotion to the next higher regular grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher regular grade shall—

(1) be discharged on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time;

(2) if he is eligible for retirement under any provision of law, be retired under that law on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time; or

(3) if on the date on which he is to be discharged under clause (1) he is within two years of qualifying for retirement under section 3911, 6323, or 8911 of this title, be retained on active duty until he is qualified for retirement and then retired under that section, unless he is sooner retired or discharged under another provision of law.

(b) The retirement or discharge of an officer pursuant to this section shall be considered to be an involuntary retirement or discharge for purposes of any other provision of law.

(Added Pub. L. 96-513, title I, § 105, Dec. 12, 1980, 94 Stat. 2862.)

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 637 of this title.

**§ 633. Retirement for years of service: regular lieutenant colonels and commanders**

Except an officer of the Navy designated for limited duty to whom section 5596(e) of this title applies and an officer of the Marine Corps designated for limited duty to whom section 5596(e) or section 6383 of this title applies and except as provided under section 637(b) of this title, each officer of the Regular Army, Regular Air Force, or Regular Marine Corps who holds the regular grade of lieutenant colonel, and each officer of the Regular Navy who holds the regular grade of commander, who is not on a list of officers recommended for promotion to the regular grade of colonel or captain, respectively, shall, if not earlier retired, be retired on the first day of the month after the month in which he completes 28 years of active commissioned service. During the period beginning on July 1, 1993, and ending on October 1, 1999, the preceding sentence shall not apply to an officer

(1) there is evidence satisfactory to the Secretary concerned that the member is under eighteen years of age; and

(2) the member enlisted without the written consent of his parent or guardian.

(Added Pub. L. 90-235, § 3(a)(1)(A), Jan. 2, 1968, 81 Stat. 757.)

#### **§ 1171. Regular enlisted members: early discharge**

Under regulations prescribed by the Secretary concerned and approved by the President, any regular enlisted member of an armed force may be discharged within three months before the expiration of the term of his enlistment or extended enlistment. A discharge under this section does not affect any right, privilege, or benefit that a member would have had if he completed his enlistment or extended enlistment, except that the member is not entitled to pay and allowances for the period not served.

(Added Pub. L. 90-235, § 3(a)(1)(A), Jan. 2, 1968, 81 Stat. 757.)

#### **EX. ORD. NO. 11498. DELEGATION OF AUTHORITY TO SECRETARY OF DEFENSE**

Ex. Ord. No. 11498, Dec. 1, 1969, 34 F.R. 19125, provided:

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, it is ordered that the Secretary of Defense is hereby designated and empowered to approve regulations issued by the Secretaries concerned under section 1171 of title 10, United States Code, effective January 2, 1968, which relate to the early discharge of regular enlisted members of the armed forces.

RICHARD NIXON.

#### **SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in title 38 section 5303A.

#### **§ 1172. Enlisted members: during war or emergency; discharge**

A person enlisted under section 518 of this title may be discharged at any time by the President, or otherwise according to law.

(Added Pub. L. 90-235, § 3(a)(1)(A), Jan. 2, 1968, 81 Stat. 757.)

#### **§ 1173. Enlisted members: discharge for hardship**

Under regulations prescribed by the Secretary concerned, a regular enlisted member of an armed force who has dependents may be discharged for hardship.

(Added Pub. L. 93-64, title I, § 102, July 9, 1973, 87 Stat. 147.)

#### **EFFECTIVE DATE**

Section effective July 1, 1973, see section 206 of Pub. L. 93-64, set out as a note under section 401 of Title 37, Pay and Allowances of the Uniformed Services.

#### **SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in title 37 sections 404, 406; title 38 section 5303A.

#### **§ 1174. Separation pay upon involuntary discharge or release from active duty**

(a) **REGULAR OFFICERS.**—(1) A regular officer who is discharged under chapter 36 of this title

(except under section 630(1)(A) or 643 of such chapter) or under section 580, 1177, or 6383 of this title and who has completed six or more, but less than twenty, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d)(1).

(2) A regular commissioned officer of the Army, Navy, Air Force, or Marine Corps who is discharged under section 630(1)(A), 643, or 1186 of this title, and a regular warrant officer of the Army, Navy, Air Force, or Marine Corps who is separated under section 1165 or 1166 of this title, who has completed six or more, but less than twenty, years of active service immediately before that discharge or separation is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary of the military department concerned, unless the Secretary concerned determines that the conditions under which the officer is discharged or separated do not warrant payment of such pay.

(b) **REGULAR ENLISTED MEMBERS.**—(1) A regular enlisted member of an armed force who is discharged involuntarily or as the result of the denial of the reenlistment of the member and who has completed six or more, but less than 20, years of active service immediately before that discharge is entitled to separation pay computed under subsection (d) unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

(2) Separation pay of an enlisted member shall be computed under paragraph (1) of subsection (d), except that such pay shall be computed under paragraph (2) of such subsection in the case of a member who is discharged under criteria prescribed by the Secretary of Defense.

(c) **OTHER MEMBERS.**—(1) Except as provided in paragraphs (2) and (3), a member of an armed force other than a regular member who is discharged or released from active duty and who has completed six or more, but fewer than 20, years of active service immediately before that discharge or release is entitled to separation pay computed under subsection (d)(1) or (d)(2), as determined by the Secretary concerned, if—

(A) the member's discharge or release from active duty is involuntary; or

(B) the member was not accepted for an additional tour of active duty for which he volunteered.

(2) If the Secretary concerned determines that the conditions under which a member described in paragraph (1) is discharged or separated do not warrant separation pay under this section, that member is not entitled to that pay.

(3) A member described in paragraph (1) who was not on the active-duty list when discharged or separated is not entitled to separation pay under this section unless such member had completed at least six years of continuous active duty immediately before such discharge or release. For purposes of this paragraph, a period of active duty is continuous if it is not

interrupted by a break in service of more than 30 days.

(d) **AMOUNT OF SEPARATION PAY.**—The amount of separation pay which may be paid to a member under this section is—

(1) 10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty; or

(2) one-half of the amount computed under clause (1).

(e) **REQUIREMENT FOR SERVICE IN READY RESERVE; EXCEPTIONS TO ELIGIBILITY.**—(1)(A) As a condition of receiving separation pay under this section, a person otherwise eligible for that pay shall be required to enter into a written agreement with the Secretary concerned to serve in the Ready Reserve of a reserve component for a period of not less than three years following the person's discharge or release from active duty. If the person has a service obligation under section 651 of this title or under any other provision of law that is not completed at the time the person is discharged or released from active duty, the three-year obligation under this subsection shall begin on the day after the date on which the person completes the person's obligation under such section or other provision of law.

(B) Each person who enters into an agreement referred to in subparagraph (A) who is not already a Reserve of an armed force and who is qualified shall, upon such person's discharge or release from active duty, be enlisted or appointed, as appropriate, as a Reserve and be transferred to a reserve component.

(2) A member who is discharged or released from active duty is not eligible for separation pay under this section if the member—

(A) is discharged or released from active duty at his request;

(B) is discharged or released from active duty during an initial term of enlistment or an initial period of obligated service;

(C) is released from active duty for training; or

(D) upon discharge or release from active duty, is immediately eligible for retired or retainer pay based on his military service.

(f) **COUNTING FRACTIONAL YEARS OF SERVICE.**—In determining a member's years of active service for the purpose of computing separation pay under this section, each full month of service that is in addition to the number of full years of service creditable to the member is counted as one-twelfth of a year and any remaining fractional part of a month is disregarded.

(g) **COORDINATION WITH OTHER SEPARATION OR SEVERANCE PAY BENEFITS.**—A period for which a member has previously received separation pay under this section or severance pay or readjustment pay under any other provision of law based on service in the armed forces may not be included in determining the years of service that may be counted in computing the separation pay of the member under this section.

(h) **COORDINATION WITH RETIRED OR RETAINER PAY AND DISABILITY COMPENSATION.**—(1) A

member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received separation pay under this section or separation pay, severance pay, or readjustment pay under any other provision of law until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay received.

(2) A member who has received separation pay under this section, or severance pay or readjustment pay under any other provision of law, based on service in the armed forces shall not be deprived, by reason of his receipt of such separation pay, severance pay, or readjustment pay, of any disability compensation to which he is entitled under the laws administered by the Department of Veterans Affairs, but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay, severance pay, and readjustment pay received. Notwithstanding the preceding sentence, no deduction may be made from disability compensation for the amount of any separation pay, severance pay, or readjustment pay received because of an earlier discharge or release from a period of active duty if the disability which is the basis for that disability compensation was incurred or aggravated during a later period of active duty.

(i) **REGULATIONS; CREDITING OF OTHER COMMISSIONED SERVICE.**—(1) The Secretary of Defense shall prescribe regulations, which shall be uniform for the Army, Navy, Air Force, and Marine Corps, for the administration of this section.

(2) Active commissioned service in the National Oceanic and Atmospheric Administration or the Public Health Service shall be credited as active service in the armed forces for the purposes of this section.

(Added Pub. L. 96-513, title I, § 109(c), Dec. 12, 1980, 94 Stat. 2870; amended Pub. L. 97-22, § 10(b)(10)(A), July 10, 1981, 95 Stat. 137; Pub. L. 98-94, title IX, §§ 911(a), (b), 923(b), title X, § 1007(c)(2), Sept. 24, 1983, 97 Stat. 639, 640, 643, 662; Pub. L. 98-498, title III, § 320(a)(2), Oct. 19, 1984, 98 Stat. 2308; Pub. L. 101-189, div. A, title XVI, § 1621(a)(1), Nov. 29, 1989, 103 Stat. 1602; Pub. L. 101-510, div. A, title V, § 501(a)-(d), (g), (h), Nov. 5, 1990, 104 Stat. 1549-1551; Pub. L. 102-190, div. A, title XI, § 1131(6), Dec. 5, 1991, 105 Stat. 1506; Pub. L. 103-160, div. A, title V, § 501(a), Nov. 30, 1993, 107 Stat. 1644; Pub. L. 103-337, div. A, title V, § 560(c), Oct. 5, 1994, 108 Stat. 2778.)

#### AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103-337 inserted “, 1177,” after “section 580”.

1993—Subsec. (a)(1). Pub. L. 103-160 substituted “six” for “five”.

1991—Subsec. (a)(1). Pub. L. 102-190 substituted “section 580” for “section 564”.

1990—Subsec. (a). Pub. L. 101-510, § 501(a)(1), inserted heading.

Subsec. (a)(1). Pub. L. 101-510, § 501(g)(1), substituted "or under section 564 or 6383 of this title" for "under section 564 or 6383 of this title, or under section 603 or 604 of the Defense Officer Personnel Management Act" and struck out "or release" after "that discharge".

Subsec. (a)(2). Pub. L. 101-510, § 501(b)(1), substituted "six or more" for "five or more".

Pub. L. 101-510, § 501(a)(2), redesignated subsec. (b) as subsec. (a)(2).

Subsec. (b). Pub. L. 101-510, § 501(a)(3), added subsec. (b). Former subsec. (b) redesignated (a)(2).

Subsec. (c). Pub. L. 101-510, § 501(h)(1), inserted heading.

Subsec. (c)(1). Pub. L. 101-510, § 501(g)(2), struck out "after September 14, 1981," after "member who" in introductory provisions.

Pub. L. 101-510, § 501(b)(1), substituted "six or more" for "five or more" in introductory provisions.

Subsec. (c)(3). Pub. L. 101-510, § 501(b)(2), substituted "at least six years" for "at least five years".

Subsec. (d). Pub. L. 101-510, § 501(h)(2), inserted heading.

Subsec. (d)(1). Pub. L. 101-510, § 501(c)(1)(A), struck out "or \$30,000, whichever is less" after "active duty".

Subsec. (d)(2). Pub. L. 101-510, § 501(c)(1)(B), struck out "but in no event more than \$15,000" after "under clause (1)".

Subsec. (e). Pub. L. 101-510, § 501(d), amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "A member who—

"(1) is discharged or released from active duty at his request;

"(2) is released from active duty for training; or

"(3) upon discharge or release from active duty, is immediately eligible for retired or retainer pay based on his military service;

is not eligible for separation pay under this section." Subsec. (f). Pub. L. 101-510, § 501(h)(3), inserted heading.

Subsec. (g). Pub. L. 101-510, § 501(h)(4), inserted heading.

Pub. L. 101-510, § 501(c)(2), struck out "(1)" after "(g)" and struck out par. (2) which read as follows: "The total amount that a member may receive in separation pay under this section and severance pay and readjustment pay under any other provision of law, other than section 1212 of this title, based on service in the armed forces may not exceed \$30,000."

Subsec. (h). Pub. L. 101-510, § 501(h)(5), inserted heading.

Subsec. (i). Pub. L. 101-510, § 501(h)(6), inserted heading.

1989—Subsec. (h)(2). Pub. L. 101-189 substituted "Department of Veterans Affairs" for "Veterans' Administration".

1984—Subsec. (h)(1). Pub. L. 98-498 substituted "separation pay, severance pay," for "severance pay" before "or readjustment pay" in two places.

1983—Subsec. (c). Pub. L. 98-94, § 911(a), amended subsec. (c) generally, designating existing provisions as par. (1) and existing pars. (1) and (2) as subpars. (A) and (B), respectively, and in provisions preceding subpar. (A) substituted "Except as provided in paragraphs (2) and (3), a member" for "A member" and "fewer than 20, years of active service immediately before that discharge or release is entitled to separation pay" for "less than twenty, years of active service immediately before that discharge or release is entitled, unless the Secretary concerned determines that the conditions under which the member is discharged or separated do not warrant such pay, to separation pay", and added pars. (2) and (3).

Subsec. (f). Pub. L. 98-94, § 923(b), amended subsec. (f) generally, substituting "each full month of service that is in addition to the number of full years of service creditable to the member is counted as one-twelfth of a year and any remaining fractional part of a

month is disregarded" for "a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded".

Subsec. (g)(2). Pub. L. 98-94, § 911(b), inserted "other than section 1212 of this title," after "any other provision of law".

Subsec. (i). Pub. L. 98-94, § 1007(c)(2), designated existing provisions as par. (1) and added par. (2).

1981—Subsec. (c). Pub. L. 97-22 substituted "after September 14, 1981," for "on or after the effective date of the Defense Officer Personnel Management Act".

#### EFFECTIVE DATE OF 1993 AMENDMENT

Section 501(b) of Pub. L. 103-160 provided that:

"(1) Except as provided in paragraph (2), the amendment made by subsection (a) [amending this section] shall apply with respect to any regular officer who is discharged after the date of the enactment of this Act [Nov. 30, 1993].

"(2) The amendment made by subsection (a) shall not apply with respect to an officer who on the date of the enactment of this Act has five or more, but less than six, years of active service in the Armed Forces."

#### EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-190 effective Feb. 1, 1992, see section 1132 of Pub. L. 102-190, set out as a note under section 521 of this title.

#### EFFECTIVE DATE OF 1990 AMENDMENT

Section 501(e) of Pub. L. 101-510 provided that:

"(1) Except as provided in paragraph (2), subsection (b) of section 1174 of title 10, United States Code, as added by subsection (a), and the amendments made by subsections (b), (c), and (d) [amending this section] shall apply with respect to a member of the Armed Forces who is discharged, or released from active duty, after the date of the enactment of this Act [Nov. 5, 1990].

"(2) The amendments made by subsection (b) [amending this section] shall not apply in the case of a member (other than a regular enlisted member) of the Armed Forces who (A) is serving on active duty on the date of the enactment of this Act, (B) is discharged, or released from active duty, after that date; and (C) on that date has five or more, but less than six, years of active service in the Armed Forces."

#### EFFECTIVE DATE OF 1983 AMENDMENT

Section 911(c) of Pub. L. 98-94 provided that: "The amendments made by this section [amending this section] shall take effect on October 1, 1983."

Section 923(g) of Pub. L. 98-94 provided that: "The amendments made by this section [amending this section and sections 1401, 1402, 1402a, 3991, 3992, 6151, 6328, 6330, 6404, 8991, and 8992 of this title, section 423 of Title 14, Coast Guard, section 853o of Title 33, Navigation and Navigable Waters, and section 212 of Title 42, The Public Health and Welfare] shall apply with respect to (1) the computation of retired or retainer pay of any individual who becomes entitled to that pay after September 30, 1983, and (2) the computation of retired pay under section 1402, 1402a, 3992, or 8992 of title 10, United States Code, of any individual who after September 30, 1983, becomes entitled to recompute retired pay under any such section."

#### EFFECTIVE DATE OF 1981 AMENDMENT

Section 10(b) of Pub. L. 97-22 provided that the amendment made by that section is effective Sept. 15, 1981.

#### EFFECTIVE DATE

Section effective Sept. 15, 1981, but the authority to prescribe regulations under this section 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

**TRANSITION PROVISIONS UNDER DEFENSE OFFICER  
PERSONNEL MANAGEMENT ACT**

For provisions to prevent extinction or premature termination of rights, duties, penalties, or proceedings that existed or were begun prior to the effective date of Pub. L. 96-513 and otherwise to allow for an orderly transition to the system of officer personnel management put in place under Pub. L. 96-513, see section 601 et seq. of Pub. L. 96-513, set out as a note under section 611 of this title.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 580, 642, 1165, 1166, 1174a, 1186, 6383, 14517, 14905 of this title.

**§ 1174a. Special separation benefits programs**

(a) **REQUIREMENT FOR PROGRAMS.**—The Secretary concerned shall carry out a special separation benefits program under this section. An eligible member of the armed forces may request separation under the program. The request shall be subject to the approval of the Secretary.

(b) **BENEFITS.**—Upon the approval of the request of an eligible member, the member shall—

(1) be released from active duty or full-time National Guard duty or discharged, as the case may be; and

(2) be entitled to—

(A) separation pay equal to 15 percent of the product of (i) the member's years of active service, and (ii) 12 times the monthly basic pay to which the member is entitled at the time of his discharge or release from active duty; and

(B) the same benefits and services as are provided under chapter 58 of this title, sections 404 and 406 of title 37, and section 503(c) of the National Defense Authorization Act for Fiscal Year 1991 (104 Stat. 1558; 37 U.S.C. 406 note) for members of the armed forces who are involuntarily separated within the meaning of section 1141 of this title.

(c) **ELIGIBILITY.**—Subject to subsections (d) and (e), a member of an armed force is eligible for voluntary separation under a program established for that armed force pursuant to this section if the member—

(1) has not been approved for payment of a voluntary separation incentive under section 1175 of this title;

(2) has served on active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty for more than 6 years;

(3) has served on active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty for not more than 20 years;

(4) has served at least 5 years of continuous active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty immediately preceding the date of the member's separation from active duty; and

(5) meets such other requirements as the Secretary may prescribe, which may include requirements relating to—

(A) years of service;

(B) skill or rating;

(C) grade or rank; and

(D) remaining period of obligated service.

(d) **PROGRAM APPLICABILITY.**—The Secretary concerned may provide for the program under this section to apply to any of the following members:

(1) A regular officer or warrant officer of an armed force.

(2) A regular enlisted member of an armed force.

(3) A member of an armed force other than a regular member.

(e) **APPLICABILITY SUBJECT TO NEEDS OF THE SERVICE.**—(1) Subject to paragraphs (2) and (3), the Secretary concerned may limit the applicability of a program under this section to any category of personnel defined by the Secretary in order to meet a need of the armed force under the Secretary's jurisdiction to reduce the number of members in certain grades, the number of members who have completed a certain number of years of active service, or the number of members who possess certain military skills or are serving in designated competitive categories.

(2) Any category prescribed by the Secretary concerned for regular officers, regular enlisted members, or other members pursuant to paragraph (1) shall be consistent with the categories applicable to regular officers, regular enlisted members, or other members, respectively, under the voluntary separation incentive program under section 1175 of this title or any other program established by law or by that Secretary for the involuntary separation of such members in the administration of a reduction in force.

(3) A member of the armed forces offered a voluntary separation incentive under section 1175 of this title shall also be offered the opportunity to request separation under a program established pursuant to this section. If the Secretary concerned approves a request for separation under either such section, the member shall be separated under the authority of the section selected by such member.

(f) **APPLICATION REQUIREMENTS.**—(1) In order to be separated under a program established pursuant to this section—

(A) a regular enlisted member eligible for separation under that program shall—

(i) submit a request for separation under the program before the expiration of the member's term of enlistment; or

(ii) upon discharge at the end of such term, enter into a written agreement (pursuant to regulations prescribed by the Secretary concerned) not to request reenlistment in a regular component; and

(B) a member referred to in subsection (d)(3) eligible for separation under that program shall submit a request for separation to the Secretary concerned before the expiration of the member's established term of active service.

## REFERENCES IN TEXT

Section 1331 of this title, referred to in subsec. (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<sup>1</sup> 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 cycles for retired pay in order to comply with a court order.

<sup>1</sup> See References in Text note below.

(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 involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Sec-

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 be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The re-

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 con-

cerned 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".



Subsec. (h)(8). Pub. L. 103-160, § 555(b)(2), inserted before period at end "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".

Subsec. (h)(10), (11). Pub. L. 103-160, § 555(a), added par. (10) and redesignated former par. (10) as (11).

1992—Subsecs. (h), (i). Pub. L. 102-484 added subsec. (h) and redesignated former subsec. (h) as (i).

1991—Pub. L. 102-190 inserted "or retainer" after "retired" in section catchline.

1990—Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" in section catchline.

Subsec. (a). Pub. L. 101-510, § 555(g)(1), inserted heading.

Subsec. (a)(2)(C). Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" wherever appearing.

Subsec. (a)(4). Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" wherever appearing in introductory provisions and in subpar. (D).

Subsec. (a)(4)(A). Pub. L. 101-510, § 555(b)(1), inserted before semicolon at end "for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay".

Subsec. (a)(4)(B). Pub. L. 101-510, § 555(b)(2), added subpar. (B) and struck out former subpar. (B) which read as follows: "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".

Subsec. (a)(4)(C) to (F). Pub. L. 101-510, § 555(b)(3), (4), redesignated subpars. (E) and (F) as (C) and (D), respectively, and struck out former subpars. (C) and (D) which read as follows:

"(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 1986 if such member presents evidence of a tax obligation which supports such withholding;"

Subsec. (a)(7). Pub. L. 101-510, § 555(f)(1), added par. (7).

Subsec. (b). Pub. L. 101-510, § 555(g)(2), inserted heading.

Subsec. (c). Pub. L. 101-510, § 555(g)(3), inserted heading.

Subsec. (c)(1). Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay".

Pub. L. 101-510, § 555(a), inserted at end "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."

Subsec. (c)(2). Pub. L. 101-510, § 555(c), inserted at end "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."

Subsec. (c)(4). Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay".

Subsec. (d). Pub. L. 101-510, § 555(g)(4), inserted heading.

Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" wherever appearing.

Subsec. (e). Pub. L. 101-510, § 555(g)(5), inserted heading.

Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" wherever appearing.

Subsec. (e)(1). Pub. L. 101-510, § 555(d)(1), substituted "payable under all court orders pursuant to subsection (c)" for "payable under subsection (d)".

Subsec. (e)(4)(B). Pub. L. 101-510, § 555(d)(2), substituted "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" for "the disposable retired or retainer pay payable to such member".

Subsec. (f). Pub. L. 101-510, § 555(g)(6), inserted heading.

Subsec. (f)(1). Pub. L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay".

Subsec. (g). Pub. L. 101-510, § 555(g)(7), inserted heading.

Subsec. (h). Pub. L. 101-510, § 555(g)(8), inserted heading.

1989—Subsec. (a)(1), (2). Pub. L. 101-189, § 1622(e)(6), substituted "The term 'court' for 'Court'" in introductory provisions.

Subsec. (a)(3). Pub. L. 101-189, § 1622(e)(6), substituted "The term 'final' for 'Final'".

Subsec. (a)(4). Pub. L. 101-189, § 1622(e)(6), substituted "The term 'disposable' for 'Disposable'" in introductory provisions.

Subsec. (a)(4)(D). Pub. L. 101-189, § 653(a)(5)(A), struck out "(26 U.S.C. 3402(i))" after "Code of 1986".

Subsec. (a)(5). Pub. L. 101-189, § 653(a)(5)(B), 1622(e)(6), substituted "The term 'member' for 'Member'" and inserted "entitled to retired pay under section 1331 of this title" after "a former member".

Subsec. (a)(6). Pub. L. 101-189, § 1622(e)(6), substituted "The term 'spouse' for 'Spouse'".

1987—Subsec. (a)(4). Pub. L. 100-26, § 3(3), made technical amendment to directory language of Pub. L. 99-661, § 644(a). See 1986 Amendment note below.

Subsec. (a)(4)(D). Pub. L. 100-26, § 7(h)(1), substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1986—Subsec. (a)(4). Pub. L. 99-661, § 644(a), as amended by Pub. L. 100-26, § 3(3), struck out "(other than the retired pay of a member retired for disability under chapter 61 of this title)" before "less amounts" in introductory text, added subpar. (E), and struck out former subpar. (E) which read as follows: "are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or".

1984—Subsec. (a)(2)(C). Pub. L. 98-525, § 643(a), inserted "in the case of a division of property,".

Subsec. (b)(1)(C). Pub. L. 98-525, § 643(b), inserted ", if possible,".

Subsec. (d)(1). Pub. L. 98-525, § 643(c)(1), substituted "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 or retainer 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 or retainer 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 or retainer pay specifically provided for in the court order" for "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 pay-

ments 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".

Subsec. (d)(5). Pub. L. 98-525, § 643(c)(2), substituted "child support or alimony or the payment of an amount of disposable retired or retainer 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 or retainer pay of the member to the spouse or former spouse of the member, any part" for "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".

Subsec. (e)(2). Pub. L. 98-525, § 643(d)(1), substituted "the disposable retired or retainer pay of the member" for "from the disposable retired or retainer pay of a member, such pay" before "shall be used to satisfy".

Subsec. (e)(3)(A). Pub. L. 98-525, § 643(d)(2)(A), struck out "from the disposable retired or retainer pay" before "of the same member".

Subsec. (e)(3)(A)(i). Pub. L. 98-525, § 643(d)(2)(B), substituted "from the member's disposable retired or retainer pay the least amount" for "the least amount of disposable retired or retainer pay" before "directed to be paid".

Subsec. (e)(2)(A)(ii)(I). Pub. L. 98-525, § 643(d)(2)(C), struck out "of retired or retainer pay" before "required by any conflicting".

Subsec. (e)(4)(A). Pub. L. 98-525, § 643(d)(3), struck out "the retired or retainer pay of" before "the same member" and substituted "satisfaction of such court orders and legal process from the retired or retainer pay of the members shall be" for "such court orders and legal process shall be satisfied".

Subsec. (e)(5). Pub. L. 98-525, § 643(d)(4), struck out "of disposable retired or retainer pay" after "payment of an amount" in two places and substituted "disposable retired or retainer pay" for "such pay" before "available for payment".

#### EFFECTIVE DATE OF 1993 AMENDMENT

Section 555(c) of Pub. L. 103-160 provided that: "The amendments made by this section [amending this section] shall take effect as of October 23, 1992, and shall apply as if the provisions of the paragraph (10) of section 1408(h) of title 10, United States Code, added by such subsection were included in the amendment made by section 653(a)(2) of Public Law 102-484 (106 Stat. 2426) [amending this section]."

#### EFFECTIVE DATE OF 1990 AMENDMENT

Section 555(e) of Pub. L. 101-510, as amended by Pub. L. 102-190, div. A, title X, § 1062(a)(1), Dec. 5, 1991, 105 Stat. 1475, provided that:

"(1) The amendment made by subsection (a) [amending this section] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act [Nov. 5, 1990]. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

"(2) The amendments made by subsections (b), (c), and (d) [amending this section] apply with only respect to divorces, dissolutions of marriage, annulments, and legal separations that become effective after the end of the 90-day period beginning on the date of the enactment of this Act."

#### EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by section 3(3) of Pub. L. 100-26 applicable as if included in Pub. L. 99-661 when enacted on Nov. 14, 1986, see section 12(a) of Pub. L. 100-26, set out as a note under section 776 of this title.

#### EFFECTIVE DATE OF 1986 AMENDMENT

Section 644(b) of Pub. L. 99-661 provided that: "The amendments made by subsection (a) [amending this section] shall apply with respect to court orders issued after the date of the enactment of this Act [Nov. 14, 1986]."

#### EFFECTIVE DATE OF 1984 AMENDMENT

Section 643(e) of Pub. L. 98-525 provided that: "The amendments made by this section [amending this section] shall apply with respect to court orders for which effective service (as described in section 1408(b)(1) of title 10, United States Code, as amended by subsection (b) of this section) is made on or after the date of the enactment of this Act [Oct. 19, 1984]."

#### EFFECTIVE DATE; TRANSITION PROVISIONS

Section 1006 of title X of Pub. L. 97-252, as amended by Pub. L. 98-94, title IX, § 941(c)(4), Sept. 24, 1983, 97 Stat. 654; Pub. L. 98-525, title VI, § 645(b), Oct. 19, 1984, 98 Stat. 2549, provided that:

"(a) The amendments made by this title [amending this section and sections 1072, 1076, 1086, 1447, 1448, and 1450 of this title and enacting provisions set out as notes under this section and section 1408 of this title] shall take effect on the first day of the first month [February 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, 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 [amending sections 1447, 1448, and 1450 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.

"(d) The amendments made by section 1004 of this title [amending sections 1072, 1076, and 1086 of this title] and the provisions of section 1005 of this title [set out as a note under this section] shall apply in the case of any former spouse of a member or former member of the uniformed services whether the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated before, on, or after February 1, 1983.

"(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 (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 (as added by section 1002 of this title); and

"(3) the term 'uniformed services' has the same meaning as provided in section 1072 of title 10, United States Code."

#### TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

#### ACCRUAL OF PAYMENTS; PROSPECTIVE APPLICABILITY

Section 653(c) of Pub. L. 102-484 provided that: "No payments under subsection (h) of section 1408 of title



10, United States Code (as added by subsection (a)), shall accrue for periods before the date of the enactment of this Act [Oct. 23, 1992]."

**STUDY CONCERNING BENEFITS FOR DEPENDENTS WHO ARE VICTIMS OF ABUSE**

Section 653(e) of Pub. L. 102-484 provided that:

"(1) The Secretary of Defense shall conduct a study in order to estimate—

"(A) the number of persons who will become eligible to receive payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)), during each of fiscal years 1993 through 2000; and

"(B) for each of fiscal years 1993 through 2000, the number of members of the Armed Forces who, after having completed at least one, and less than 20, years of service in that fiscal year, will be approved in that fiscal year for separation from the Armed Forces as a result of having abused a spouse or dependent child.

"(2) The study shall include a thorough analysis of—

"(A) the effects, if any, of appeals and requests for clemency in the case of court-martial convictions on the entitlement to payments in accordance with subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a));

"(B) the socio-economic effects on the dependents of members of the Armed Forces described in subsection (h)(2) of such section that result from terminations of the eligibility of such members to receive retired or retainer pay; and

"(C) the effects of separations of such members from the Armed Forces on the mission readiness of the units of assignment of such members when separated and on the Armed Forces in general.

"(3) Not later than one year after the date of the enactment of this Act [Oct. 23, 1992], the Secretary shall submit to Congress a report on the results of the study."

**COMMISSARY AND EXCHANGE PRIVILEGES**

Section 1005 of Pub. L. 97-252, which directed Secretary of Defense to prescribe regulations to provide that an unmarried former spouse described in 10 U.S.C. 1072(2)(F)(i) 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, was repealed and restated in section 1062 of this title by Pub. L. 100-370, § 1(c)(1), (5).

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 1059, 1078a, 1447, 1461, 1463 of this title.

**§ 1409. Retired pay multiplier**

(a) **RETIRED PAY MULTIPLIER FOR REGULAR-SERVICE NONDISABILITY RETIREMENT.**—In computing—

(1) the retired pay of a member of a uniformed service who is entitled to that pay under any provision of law other than—

(A) chapter 61 of this title (relating to retirement or separation for physical disability); or

(B) chapter 1223 of this title (relating to retirement for non-regular service); or

(2) the retainer pay of a member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under section 6330 of this title,

the retired pay multiplier (or retainer pay multiplier) is the percentage determined under subsection (b).

(b) **PERCENTAGE.**—

(1) **GENERAL RULE.**—Subject to paragraphs (2) and (3), the percentage to be used under subsection (a) is the product (stated as a percentage) of—

(A) 2½, and

(B) the member's years of creditable service (as defined in subsection (c)).

(2) **REDUCTION APPLICABLE TO NEW-RETIREMENT MEMBERS WITH LESS THAN 30 YEARS OF SERVICE.**—In the case of a member who first became a member of a uniformed service after July 31, 1986, has less than 30 years of creditable service, and is under the age of 62 at the time of retirement, the percentage determined under paragraph (1) shall be reduced by—

(A) 1 percentage point for each full year that the member's years of creditable service are less than 30; and

(B) ½ of 1 percentage point for each month by which the member's years of creditable service (after counting all full years of such service) are less than a full year.

(3) **75 PERCENT LIMIT.**—In the case of a member with more than 30 years of creditable service, the percentage to be used under subsection (a) is 75 percent.

(c) **YEARS OF CREDITABLE SERVICE DEFINED.**—In this section, the term "years of creditable service" means the number of years of service creditable to a member in computing the member's retired or retainer pay (including ½ of a year for each full month of service that is in addition to the number of full years of service of the member).

(Added Pub. L. 99-348, title I, § 101, July 1, 1986, 100 Stat. 683; amended Pub. L. 101-189, div. A, title VI, § 651(b)(3), Nov. 29, 1989, 103 Stat. 1460; Pub. L. 103-337, div. A, title XVI, § 1662(j)(6), Oct. 5, 1994, 108 Stat. 3005.)

**AMENDMENTS**

1994—Subsec. (a)(1)(B). Pub. L. 103-337 substituted "chapter 1223" for "chapter 67".

1989—Subsec. (a)(1). Pub. L. 101-189 substituted "who is entitled to that pay" for "who is retired" in introductory provisions.

**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, 1410, 1447, 1451, 1452, 3991, 3992, 6151, 6333, 6334, 8991, 8992 of this title; title 14 section 423; title 33 section 853o; title 42 sections 211, 212.

**§ 1410. Restoral of full retirement amount at age 62 for members entering on or after August 1, 1986**

In the case of a member or former member who first became a member of a uniformed service on or after August 1, 1986, and who becomes entitled to retired pay before the age of 62, the retired pay of such member or former

Tab B

# Exhibit B

great bodily injury), but remand the case for resentencing on count VI.<sup>23</sup>

PAULINE DAVIS HANSON, Acting P.J., and HAMLIN, J., concur.



176 Cal.App.3d 1152

**In re MARRIAGE of Patricia A. and Michael A. KUZMIAK.**

**U<sup>152</sup>Patricia A., KUZMIAK, Respondent and Appellant,**

**v.**

**Michael A. KUZMIAK, Petitioner and Respondent.**

**Civ. B003410.**

**Court of Appeal, Second District, Division 6.**

**Jan. 27, 1986.**

**Certified for Partial Publication \***

**Review Denied May 22, 1986.\*\***

Wife filed for divorce. The Superior Court, Santa Barbara County, Zel Canter, J., entered final judgment dissolving marriage and decided property division two and one-half years later. On appeal the Court of Appeal, Gilbert, J., held that: (1) separation pay as a severance benefit upon involuntary discharge from military is separate property of the service member, and (2) wife whose husband received separation pay upon involuntary discharge from military had present community property interest in husband's nonmatured longevity pension including the separation pay after husband reenlisted.

**Reversed and remanded.**

**23.** As to count VI, the court imposed a consecutive sentence of one-third of the middle term of three years, namely, one year. Count II was used as the base term.

# **1. Divorce ⇐252.3(4)**

Separation pay as a severance benefit upon involuntary discharge from military under 10 U.S.C.A. § 1174 is not disposable retired or retainer pay under Federal Uniformed Service Former Spouse's Protection Act, 10 U.S.C.A. § 1408(c)(1), permitting state court to treat disposable retired or retainer pay payable to member either as property solely of member or as property of member and his spouse and is separate property of the military service member, where unlike military benefits based upon longevity of service separation pay does not serve to compensate for past service but right to separation pay occurs only when there is involuntary discharge of service member.

# **2. Husband and Wife ⇐249(3)**

Wife whose husband received separation pay as a severance benefit upon involuntary discharge from military under 10 U.S.C.A. § 1174 had present community property interest in husband's nonmatured longevity pension including the separation pay after husband reenlisted, since 10 U.S.C.A. § 1174(h)(1) compels reimbursement of separation pay from the service member's retirement benefits and hence purposes of separation pay to ease service member's reentry into civilian life have not been fulfilled.

---

**U<sup>154</sup>Rodney S. Melville, Melville & Iwasako, Santa Maria, and Robert O. Angle, Santa Barbara, for respondent and appellant.**

**Charles G. Ward, Lompoc, for petitioner and respondent.**

**GILBERT, Associate Justice.**

Husband Michael A. Kuzmiak appeals the order of the trial court finding that the division of his Air Force separation pay is

\* Pursuant to Rule 976.1 of the California Rules of Court this opinion is certified for partial publication.

\*\* Reynoso, J., is of the opinion the petition should be granted.

community property. (10 U.S.C. § 1174.)<sup>1</sup> We reverse the order and hold that although the trial court had jurisdiction to divide the assets of the marriage, husband's military separation pay is his separate property unless he applies for military longevity retirement.

### FACTS

Husband enlisted in the United States Air Force in New Jersey on May 6, 1966. He married Patricia A. Kuzmiak four months later. The parties moved under military orders to Texas the day of their marriage. The Air Force later assigned husband to duty in New York, North Dakota and finally,<sup>1155</sup> California. The couple arrived in Lompoc, California in 1975 and lived together there for five years until wife filed for divorce on June 9, 1980. The trial court entered a final judgment dissolving the marriage on May 21, 1981, and decided property division two and one half years later.<sup>2</sup>

On February 28, 1983, between the time of the final judgment dissolving the marriage and the trial of the property issues, the Air Force released husband from his command under the military's "up or out"

policy. (§ 632.)<sup>3</sup> Husband was then entitled to "separation pay," calculated in part on the number of years he served and his annual salary. (§§ 642, 1174.) (The separation award formula is ten percent of twelve times the member's monthly basic pay times his years of active service, with a cap of \$30,000. (§ 1174, subd. (d)(1).)<sup>4</sup>) Husband, a captain with sixteen years of military service, received the maximum award of \$30,000. At the time of husband's release from duty, he was not entitled to longevity retirement benefits because he had not completed twenty years of service. (§ 3911.)

Three or four days after his release, husband reenlisted in the Air Force. He will become entitled to longevity retirement benefits once he achieves twenty years of military service. (§ 3911.) However, the government will deduct the \$30,000 separation pay from the retirement benefits husband will receive. (§ 1174, subd. (h)(1).)<sup>5</sup> As husband explained at trial, "[W]hen I got 1156 kicked out of the service, the option that they present to you, if you choose to stay in the service and you do get to retirement and you have collected this money, you must give it back.... I will start

1. All statutory references are to title 10 of the United States Code unless otherwise stated.

2. Trial on the property issues occurred after the United States Supreme Court decision in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2723, 69 L.Ed.2d 589 and after the enactment of the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA). (§ 1408, enacted September 8, 1982.)

3. Section 632 provides in part:

"(a) [E]ach officer ... who holds the regular grade of captain or major ... who has failed of selection for promotion to the next higher regular grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher regular grade shall (1) be discharged on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time; ...

(b) The retirement or discharge of an officer pursuant to this section shall be considered to

be an involuntary retirement or discharge for purposes of any other provision of law."

4. Subdivision (d) of section 1174 provides:

"The amount of separation pay which may be paid to a member under this section is—

(1) 10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty or \$30,000, whichever is less; ..."

5. Subdivision (h)(1) of section 1174 provides:

"A member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received separation pay under this section or separation pay, severance pay, or readjustment pay under any other provision of law until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay received."

collecting retirement when the \$30,000 is paid back."

The trial judge divided the \$30,000 as a community retirement benefit or payment in lieu of retirement.

On appeal husband contends that his military separation pay is his separate property under *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, and the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA) (§ 1408) and that by analogy, California courts have found layoff and termination benefits to be the separate property of the receiving spouse.

## DISCUSSION

### *Separation Pay*

For many years under California law, a spouse had a community property interest in retirement benefits earned by the other spouse from employment during the marriage. In 1981 *McCarty v. McCarty, supra*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, held that a state may not divide military longevity retired pay incident to a divorce absent a federal statute permitting such action. The United States Supreme Court examined the military retirement scheme and concluded that application of state community property laws conflicted with that scheme because Congress intended retired pay to be a personal entitlement of the service member. (*McCarty, supra*, at pp. 223, 232-236, 101 S.Ct. at pp. 2736, 2741-2743.) Thus, the court impliedly overruled California decisions as contrary to congressional intent.

In direct response to *McCarty*, Congress enacted the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA). (§ 1408; House Conference Report No. 97-749, 1982 U.S. Code Congressional & Admin. News, pp. 1555, 1570.) FUSFSPA, however, does not permit the states unlimited powers over military retirement benefits. For example, a nonmember spouse may not sell or assign his or her interest. (Subd. (c)(2).) The parties must have been 11<sub>157</sub> married 10 years (subd.

(d)(2)) and payments to the nonmember spouse may not exceed 50 percent of the member's disposable pay (subd. (e)(1)). (*In re Marriage of Costo* (1984) 156 Cal.App.3d 781, 786-787, 203 Cal.Rptr. 85.) Moreover, subdivision (c)(1) of FUSFSPA permits a state court to "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...." (Emphasis added.)

Although separation pay is calculated in a fashion similar to retired pay (§ 1401), we think it is not embraced within the meaning of "disposable retired or retainer pay" under FUSFSPA. Subdivision (a)(4) defines retired or retainer pay as a "monthly" payment; husband's separation pay here was a one-time payment. Moreover, section 1174 describes the severance benefit upon involuntary discharge as "separation pay." FUSFSPA does not mention separation pay in defining retired or retainer pay.

Furthermore, unlike military benefits based upon longevity of service, separation pay does not serve to compensate for past services. Although longevity of service determines the amount of this one-time payment, the right to separation pay occurs only when there is an involuntary discharge of the service member. The legislative history of section 1174, awarding separation pay upon involuntary discharge, states that the purpose of the payment is to financially assist the member during the transition period until he or she obtains private employment: "The separation pay is a contingency payment for an officer who is career committed but to whom a full military career may be denied. It is designed to encourage him to pursue his service ambition, knowing that if he is denied a full career under the competitive system, he can count on an adequate readjustment pay to ease his reentry into civilian life." (House Rep. No. 96-1462, reprinted in 1980 U.S. Code Cong. & Admin. News, pp. 6333, 6361.)

If a marriage subsists at the time the service member is involuntarily discharged,

the loss of employment becomes a community loss and separation pay serves to ameliorate this loss. If the service member is not married at the time of discharge, however, the adjustment to civilian life is his alone to make. Accordingly, the separation pay should be his separate property.

We have located but one reported decision analyzing the community or separate property characteristics of separation pay. In *Perez v. Perez* (Tex.1979) 587 S.W.2d 671, the military released the husband from duty under circumstances entitling him to separation pay. Despite their divorce seven years earlier, wife sued for a portion of the payment, contending it was a retirement benefit acquired during the marriage. The Texas Supreme Court<sup>1158</sup> concluded the purpose of the payment was to assist the service member in adjusting to civilian life, and the payment was not recompense for past services. (*Perez, supra*, at p. 673.) The court also held that application of community property principles to the payment would defeat federal objectives. (*Ibid.*) The court expressly declined to rule, however, whether wife was entitled to any retirement benefits if husband reenlisted and served until retirement. (*Ibid.*)

In similar cases, California courts have analyzed the purposes of "termination" or "layoff" benefits in determining their separate property or community character. In *re Marriage of Skaden* (1977) 19 Cal.3d 679, 139 Cal.Rptr. 615, 566 P.2d 249, concerned termination benefits consisting of a percentage of insurance premiums collected on insurance policies placed by a former insurance agent. Our Supreme Court concluded that the language of the employment contract indicated that the commissions were community property because they were deferred compensation for the agent's previous endeavors. (*Skaden, supra*, at pp. 687-688, 139 Cal.Rptr. 615, 566 P.2d 249.)

In *In re Marriage of Wright* (1983) 140 Cal.App.3d 342, 189 Cal.Rptr. 336, an assistant hospital administrator received termination pay when he resigned his position. Wright's employer testified that the pay-

ment was made in recognition that Wright would encounter difficulties in securing future employment as a hospital administrator. (*Id.*, p. 343, 189 Cal.Rptr. 336.) Since the payment was made after the parties separated, the court held the payment was separate property. (*Id.*, p. 345, 189 Cal.Rptr. 336.)

*In re Marriage of Flockhart* (1981) 119 Cal.App.3d 240, 173 Cal.Rptr. 818, concerned a "weekly layoff benefit" paid to displaced timber employees when the government expanded Redwood National Park. The court analogized the federal layoff benefit to disability benefits and recognized that both compensate the recipient for loss of future earnings occasioned by layoff or disability. (*Flockhart, supra*, at p. 243, 173 Cal.Rptr. 818.) The court then denied wife any community interest in the layoff benefits because they did not compensate husband for employment during marriage. (*Ibid.*)

[1] We are satisfied that Congress did not intend separation pay to be compensation for past services, and that under the reasoning of *Flockhart* and the California disability benefits decisions (*In re Marriage of Stenquist*, (1978) 21 Cal.3d 779, 787, 148 Cal.Rptr. 9, 582 P.2d 96), the payment is the separate property of the service member. Furthermore, FUSFSPA does not discuss court division of separation pay incident to divorce. This would end the matter if it were not for subdivision (h)(1) of section 1174 (fn. 5, *supra*), permitting the government to deduct separation pay from a service member's longevity retirement benefits as they are received.

<sup>1159</sup>If a member reenlists after involuntary discharge and subsequently receives a longevity pension after serving 20 years, the purposes of the separation pay have not been fulfilled. Subdivision (h)(1) of section 1174 recognizes this by compelling reimbursement of separation pay from the member's retirement payments. There is no reason for finding separation pay to be the member's separate property once the member reenlists and earns a longevity pension.

Therefore we conclude, wife presently has an interest in husband's nonmatured longevity pension. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 842, 126 Cal. Rptr. 633, 544 P.2d 561.) Husband's application for a longevity retirement pension and the government's withholding of \$30,000 from this retirement pay deprives wife of her community property interest in these funds. Our Supreme Court has held, that when a husband who is a service member elects to take a disability pension over a longevity pension, he cannot defeat the community property interests of his wife by unilaterally transmuting community property into separate property. (*In re Marriage of Stenquist, supra*, 21 Cal.3d 779, 782, 148 Cal.Rptr. 9, 582 P.2d 96. Such an election is inconsistent with "the protective philosophy of the community property law." (*Ibid.*) We think this reasoning pertains here.

Although *McCarty v. McCarty, supra*, appears inconsistent with *In re Marriage of Stenquist, supra*, the reasoning of *Stenquist* is still vital. Our Supreme Court recently affirmed and applied the *Stenquist* reasoning to private disability insurance proceeds purchased with community funds in *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 221 Cal.Rptr. 546, 710 P.2d 346. The court declared that "... disability benefits have been denominated community property to the extent that they equal the benefits foregone under a retirement pension. (*Ibid.*)

We also note that *McCarty* technically did not discuss an election of one form of benefit over another. (*In re Marriage of Mastropaolo* (1985) 166 Cal.App.3d 953, 959, 213 Cal.Rptr. 26.) Moreover, within months of *McCarty*, Congress enacted FUSFSPA with the manifest purpose of nullifying *McCarty*. (*Id.*, at p. 960, 213 Cal.Rptr. 26.)

[2] For these reasons, we conclude that wife has a community property interest in husband's longevity pension, including the \$30,000 separation pay the government will withhold from his retirement benefits. This holding recognizes the separate prop-

erty characteristic of the separation pay (until husband's actions in reenlisting and earning a longevity pension) and also protects wife's rights to a community property asset. Moreover, our holding does not frustrate congressional intent that separation pay ease the service member's reentry into civilian life.

11160The proper division of husband's longevity retirement benefits remains within the trial court's discretion. The parties may reach a reasonable agreement concerning division of the benefits. (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 428, 174 Cal.Rptr. 493, 629 P.2d 1.) If not, the trial judge may divide the benefits according to any of the methods described by our Supreme Court in *Gillmore*, pp. 428-429, 174 Cal.Rptr. 493, 629 P.2d 1, or *Ska-den, supra*, 19 Cal.3d 679, 688-689, 139 Cal.Rptr. 615, 566 P.2d 249.

Accordingly, the order is reversed and the case remanded for a new hearing. Each party to bear own costs on appeal.

STONE, P.J., and ABBE, J., concur.



176 Cal.App.3d 1161

11161**In re Christopher FALCO on Habeas Corpus.**

**In re Roy E. SMITH on Habeas Corpus.**

**In re Michael PUNZAL on Habeas Corpus.**

**In re Andrea BOWEN on Habeas Corpus.**

**AO 32559, AO 32627, AO 32684 and AO 32751.**

Court of Appeal, First District,  
Division 1.

Jan. 28, 1986.

Petitioners, after criminal convictions, filed petition for writs of habeas corpus,



Tab C

# Exhibit C

PERKINS, SCHWOBE & McLACHLAN  
Mark C. McLachlan (#2207)  
Attorney for Plaintiff  
343 South 400 East  
Salt Lake City, Utah 84111  
Telephone (801) 521-0177

AUG 16 1989  
*Calvin*

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \* \* \*

MARION MARSH,

Plaintiff,

vs.

SCOTT ALLAN MARSH,

Defendant.

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:  
:  
:  
:  
:

215100  
8-17-89-8:12am.  
DECREE OF DIVORCE

Civil No. 894901070DA  
Judge Raymond S. Uno

\* \* \* \* \*

This matter came on for Hearing on August 16, 1989 before the Honorable Raymond S. Uno, one of the Judges of the above-entitled Court. Plaintiff was present and represented by her attorney, Mark C. McLachlan, and Defendant was not present or represented by counsel; and the parties having entered into a Stipulation and Property Settlement Agreement; and the Court having approved the Stipulation as reasonable; that the Defendant having consented, among other things, that his Answer be stricken and that his default be entered; and pursuant to the terms and conditions of the Stipulation of the parties, the default of the Defendant was duly entered, and the Plaintiff having been sworn and testified in her own behalf, and the Court having

reviewed the files herein and the pleadings contained therein; and based upon the Motion of Plaintiff's counsel, and more than ninety (90) days having elapsed since the filing of the Complaint in this action; the Court, being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is hereby granted a Decree of Divorce, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the Clerk in the Register of Actions.

2. That Plaintiff and Defendant are hereby awarded the joint legal custody and control of the minor children of the parties, to wit: Bryana Marsh, age 5; Ana Maia Marsh, age 10; Christopher Marsh, age 12; and Stephen Marsh, age 14; subject to the terms and conditions hereinafter set forth:

(a) The primary physical residence of the children shall be the residence of Marion Marsh.

(b) The primary care taker of the children and the primary legal residence of the children shall be with Marion Marsh.

(c) Plaintiff and Defendant are hereby ordered to exchange information concerning the health, education, and

welfare of the children and, where possible, confer before making decisions concerning any of these areas.

(d) It is ordered that the rights and duties of each parent regarding the children's present and future physical care, religious training, support, and education shall be made jointly by the parties except as specifically provided for herein; however, if the parties are unable to agree on an issue, after conferring with a mutually-agreeable third party, the decision of Marion Marsh shall be controlling.

(e) It is ordered that at all times during the school year, the children shall reside with Marion Marsh, except as the parties may mutually otherwise agree in writing.

(f) The Defendant is hereby ordered to pay the full cost of lodging, meals and transportation for transporting the children between Plaintiff's and Defendant's residences.

(g) Each party is hereby ordered to encourage the children to reside with Scott Marsh for substantial periods of time while not attending school; however, if a child expresses his or her desire not to reside with Scott Marsh while not attending school, the parties will make reasonable efforts to encourage the child to reside with Scott Marsh, but shall not use undue pressure on the children or force the children against the child's will to reside with Scott Marsh.

3. That Defendant is ordered to pay to Plaintiff the sum of Three Hundred Dollars (\$300.00) per month, per child, for the support and maintenance of said minor children, commencing on August 1, 1989. It is further ordered that said child support payments shall continue until said children shall attain the age of eighteen (18) years or graduate from high school in the normal course of his or her high school education, whichever last occurs. Further, if the Defendant falls thirty (30) days or more in arrears in his child support obligation, the Plaintiff should be entitled to mandatory income withholding relief, pursuant to Utah Code Annotated (78-45(d)-1 et. seq.) (1984 as amended). Further, it is ordered that the Plaintiff is entitled to claim the two youngest minor children as exemptions for purposes of Federal and State Income Taxes and that Defendant is entitled to claim the two oldest children for such exemptions and the Plaintiff and the Defendant are ordered to execute Form 8332, waiving their claim to the exemptions not awarded to them for the purposes of Federal and State Income Tax. In addition to the child support obligations provided for herein, Defendant is ordered to pay the monthly obligation presently being incurred at the Utah Boys Ranch, for Stephen Marsh, until such time as Stephen Marsh is released. Said obligation being approximately Four Hundred Dollars (\$400.00) per month. Further, although the parties hereto have agreed to joint legal custody of the minor

children, as hereinbefore defined and modified, Defendant is hereby ordered, at all times until said minor children reach the age of majority, to pay child support to Plaintiff for each child as provided for herein, even if said child resides with Defendant, unless said child resides with Defendant pursuant to a written agreement wherein Plaintiff waives her claim to child support for said child or an Order is entered by this Court relieving the Defendant from the obligation of paying child support for said child.

4. Defendant is hereby ordered to pay to Plaintiff the sum of Four Hundred Sixty-eight Dollars (\$468.00) per month as alimony, commencing August 1, 1989, and payable on the 1st day of each month thereafter. Said alimony payment to decrease to Three Hundred (\$300.00) per month after Plaintiff completes paying for Plaintiff's Honda automobile under the current terms of the loan agreement, but in no event later than July 1, 1992. Said alimony payments shall continue until Plaintiff remarries; provided, however, should Plaintiff remarry prior to the time the automobile is paid in full, Defendant shall continue to pay Plaintiff the sum of Two Hundred Sixty-eight Dollars (\$268.00) per month until the automobile loan is paid in full.

5. Plaintiff is hereby awarded all right, title and interest in and to the home and real property located at 8966 South 3860 West, West Jordan, Utah, and more particularly described as:

Lot 28, Valley West No. 1, according to the official plat thereof recorded in Book 79-12 of Plats at Page 352, records of Salt Lake County, Utah,

the 1988 Honda Civic automobile, and, except as specifically hereinafter awarded to Defendant, all furniture, appliances and household goods located in the home at 8966 South 3860 West, West Jordan, Utah, Plaintiff's clothing and personal effects and all balances on deposit in Plaintiff's checking and savings accounts.

6. Defendant is hereby awarded the 1988 Ford Ranger pickup truck, all sums on deposit in his checking and savings accounts, together with all personal property and personal effects presently in the possession of Defendant. Further, Defendant is hereby awarded the bedroom dresser, mirror and two (2) nightstands, and one-half (1/2) of all video tapes, all of which items except the video tapes are presently in the possession of the Plaintiff and should be made available to the Defendant upon reasonable notice.

7. Plaintiff is hereby awarded 11/40ths of all pension and retirement benefits that the Defendant may receive upon his retirement from military service with the United States Government and Defendant is hereby awarded 29/40ths of such pension and retirement benefits.

8. Plaintiff is hereby ordered to assume, pay, and hold the Defendant harmless on the obligation with Fleet Mortgage



Company in the amount of approximately Seventy-five Thousand Dollars (\$75,000.00), which obligation is secured with the home and real property located at 8966 South 3860 West, West Jordan, Utah, together with the balances presently owed upon the credit cards, against which Plaintiff has made purchases.

9. Defendant is hereby ordered to assume, pay, and hold the Plaintiff harmless on the obligation with Naval Federal Credit Union, which is secured with, among other things, the Honda Civic XL 1988 automobile herein awarded to Plaintiff. This obligation assumed by Defendant shall not be construed as being in addition to the total alimony payment of Four Hundred Sixty-eight Dollars (\$468.00) per month, unless Defendant dies before the obligation is paid.

10. Defendant is hereby required to assume, pay, and hold Plaintiff harmless on all other debts and obligations incurred during the marriage not herein specifically ordered to be assumed by Plaintiff.

11. Defendant is hereby ordered to maintain health, dental and accident insurance for the benefit of the minor children and each party is hereby ordered to pay one-half (1/2) of any medical or non-elective dental bills not covered by insurance.

12. Defendant is hereby ordered to keep in effect his life insurance policy through the United States Government in the amount of Fifty Thousand Dollars (\$50,000.00), naming the minor

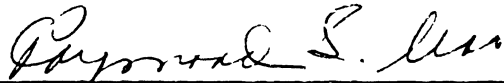
children of the parties as beneficiaries until such minor children shall reach the age of majority.

13. Defendant is hereby ordered to pay Five Hundred Dollars (\$500.00) towards Plaintiff's attorney's fees and costs incurred in this action.

14. Each party is hereby ordered to cooperate with each other to effectuate changes and titles to properties agreed to be divided hereunder, to change the names and responsibility for payment under the charge accounts and other debts divided herein, and to cooperate as may be necessary or proper to insure that the terms of this Decree of Divorce are carried out in detail.

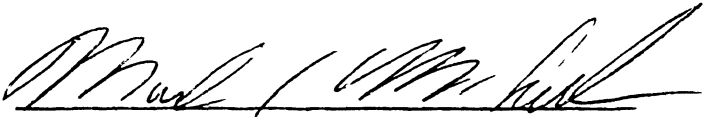
DATED this 16<sup>th</sup> day of August, 1989.

BY THE COURT

  
RAYMOND S. UNO  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing DECREE OF DIVORCE was mailed, postage prepaid, to Scott A. Marsh, 6500 Hampton Boulevard, Norfolk, VA 23508, this 16<sup>th</sup> day of August, 1989.

  
Mark C. McLachlan

Tab D

# Exhibit D

FILED DISTRICT COURT  
Third Judicial District

JUN 9 1997

KELLIE F. WILLIAMS #3493  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: 801-328-1162

By E. MATHIAS  
SALT LAKE COUNTY  
Deputy Clerk

---

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

MARION MARSH,

Plaintiff,

vs.

SCOTT ALLAN MARSH,

Defendant.

ORDER AND ORDER OF MODIFICATION

215100

Civil No. 894901070 DA  
Judge Leslie A. Lewis  
Comm. Michael S. Evans

---

THE ABOVE-CAPTIONED MATTER having come on regularly for trial before the above-entitled court on April 17, 1997, at the hour of 9:30 a.m., the Honorable Leslie A. Lewis, Third District Court Judge, presiding, on Plaintiff's motions and petitions, and Plaintiff being present in person and being represented by counsel, Kellie F. Williams, and Defendant being present in person and being represented by counsel, Richard Bigelow, and the parties having testified and having presented exhibits to the court and Plaintiff having called Neil B. Crist as an expert witness, and the court

Marsh v. Marsh  
Order of Modification  
June 3, 1997

having reviewed the file, the case law, and having considered the exhibits and testimony, and the court having also considered Defendant's Objection to Commissioner's Recommendation, and the court having previously entered its Findings of Fact and Conclusions of Law, based thereon, and for good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The \$30,000.00 disbursement Defendant received on January 31, 1991 was either a marital asset or in anticipation of retirement and, therefore, an advance on retirement. Plaintiff is awarded 11/40ths of the disbursement.

2. Defendant is ordered to provide Plaintiff with his 1991 tax return immediately. Plaintiff's 11/40ths shall be calculated by assessing the actual tax rate and tax paid by Defendant on the \$30,000.00. Plaintiff is hereby awarded judgment against Defendant in the sum of 11/40ths of that net sum, together with interest at the rate of 7.64% from February 1, 1991 to the present. If Defendant fails to provide his 1991 tax return to Plaintiff immediately, then judgment shall enter in the sum of \$8,250.00, together with interest at 7.64% on that sum since February 1, 1991.

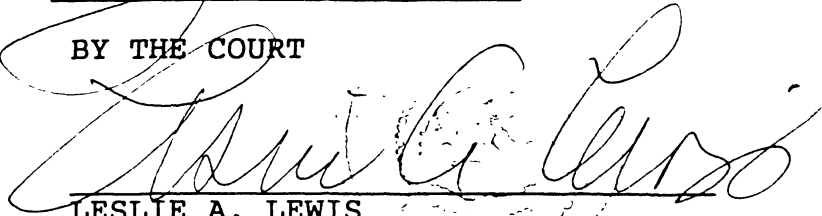
IN THE event of the retirement of Defendant and when paid, the payments are diminished by prior payments or advances received, then the parties are to share the diminishment in the appropriate ratio. (P@11/40ths). RNB

Marsh v. Marsh  
Order of Modification  
June 3, 1997  
Page 2

3. Each party shall pay their own attorneys fees and court costs.

DATED THIS 9<sup>th</sup> day of June, 1997.

BY THE COURT

  
LESLIE A. LEWIS  
Third District Court Judge

APPROVED:

\_\_\_\_\_  
RICHARD BIGELOW  
Attorney for Defendant  
DATED: \_\_\_\_\_

Tab E



# Exhibit E

D 89 1070

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \* \* \*

MARION MARSH, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SCOTT ALLAN MARSH, )  
 )  
Defendant. )

CASE NO. 894901070

\* \* \* \* \*

BEFORE THE HONORABLE LESLIE A. LEWIS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SALT LAKE CITY, UTAH

APRIL 17, 1997

NON-JURY TRIAL

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A P P E A R A N C E S

FOR THE PLAINTIFF: MS. KELLIE F. WILLIAMS, ESQ.  
Corporon & Williams  
Attorneys at Law  
808 East South Temple  
Salt Lake City, Utah 84102

FOR THE DEFENDANT: MR. RICHARD N. BIGELOW, ESQ.  
Attorney at Law  
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## I N D E X

## WITNESS

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## EXHIBITS

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1 1991 W-2

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2 Gross Calculations

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3 Net Calculations, with Interest

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13 Separation Pay

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1 SALT LAKE CITY, UTAH; APRIL 17, 1997; A.M. SESSION

2 THE COURT: Counsel and the parties, welcome.

3 Let me indicate that I have now had an opportunity in  
4 Marsh V. Marsh to look at the objection to  
5 commissioner's recommendation. And first, I want to  
6 apologize, a 4-501 was filed on that a long time ago,  
7 although it doesn't look like it was filed, at least the  
8 one I spotted, near the time that the recommendation, or  
9 the objection was filed. But clearly November 4 of '96  
10 there was a notice to submit for decision filed, and it  
11 never came to my attention. For that I apologize.

12 I've now had an opportunity to review the  
13 objection to the commissioner's recommendation. The  
14 recommendation itself- - And the response to the  
15 objection, and the objection is denied. It appears that  
16 the recommendation was appropriate at the time,  
17 well-reasoned, and the same reasoning was articulated.

18 Specifically that the reason the plaintiff  
19 became delinquent in the mortgage payments was as a  
20 direct result of not having been paid child support and  
21 alimony as ordered, therefore the commissioner  
22 determined it appropriate to handle it in the manner he  
23 did, and this court supports that.

24 We are here today in Marsh V. Marsh,  
25 894901070, to deal with two issues that remain from the

1 trial that was conducted on November 7th of '96 on the  
2 petition to modify. The remaining issues are the  
3 retirement pay and separation pay of the defendant, and  
4 how that ought to be treated.

5 I will indicate that I've read all of the  
6 pleadings on file from beginning to end, I believe I'm  
7 generally conversant with the facts of the case and this  
8 particular issue. I understand there will be some  
9 testimony adduced, and perhaps some proffers and  
10 argument, and that this is primarily a legal issue, and  
11 there's very little question as to the facts. And I'm  
12 happy to hear from counsel.

13 Ms. Williams, would you like to lead off?

14 MS. WILLIAMS: Yes, Your Honor, I'd like a  
15 brief opening statement, just to explain to the court,  
16 indeed, in our opinion there is one issue, not two  
17 issues, because the retirement/severance issue that the  
18 court, or separation pay issue that the court has  
19 alluded to is the same issue.

20 THE COURT: It's a single issue?

21 MS. WILLIAMS: It is a single issue. One of  
22 the questions, initial questions before the court is a  
23 clarification, or definition of what Mr. Marsh received,  
24 and the next question for the court is whether it is a  
25 marital asset. We strongly believe, and believe the

1 court should find that it is a marital asset, accrued  
2 during the marriage, that should be divided.

3 We believe that the testimony will show that  
4 it is appropriately divided, and that, frankly, if it  
5 isn't divided by this court, there is little likelihood  
6 that Ms. Marsh would receive the retirement that she was  
7 awarded in paragraph 7 of the decree of divorce.

8 When the parties divorced in 1989, the now  
9 Ms. Garner was awarded eleven-fortieths of the military  
10 pension of Mr. Marsh. I was not representing Ms. Garner  
11 at that time, and though they had been married for  
12 fourteen years--they'd been married longer than fourteen  
13 years, but they'd been married during fourteen years of  
14 his service--for whatever reason she was only awarded  
15 eleven fortieths. But we're working with that  
16 provision.

17 In 1991, subsequent to the parties' divorce,  
18 Mr. Marsh did receive a \$30,000 distribution, which, on  
19 the W-2, was indicated as pension plan. Different  
20 evidence that the court will hear will call it variable,  
21 different things, different names. But ultimately, we  
22 believe that, whether it be called separation pay or  
23 pension, that she is entitled to her eleven fortieths of  
24 that distribution, and that, again, if the court does  
25 not award it, that she will be foreclosed from getting

1 her portion.

2 There is just no other way to make certain  
3 that this asset, this marital asset is divided without  
4 her receiving the portion that we're requesting.

5 And there is a case that will be referred to  
6 by counsel that I will argue in closing, if the court  
7 gives us that opportunity, that is a California case,  
8 and I don't believe it's applicable, nor is it binding  
9 on this court.

10 THE COURT: And you will certainly both have  
11 an opportunity for closings.

12 Mr. Bigelow?

13 MR. BIGELOW: Thank you, Your Honor. Just  
14 very briefly, I would indicate to the court that I  
15 believe that the statutes that we will argue are quite  
16 clear on the nature of the payment that was received by  
17 Mr. Marsh, and clear on the distribution and resolution  
18 of the issue. And that, coupled with the case law that  
19 I will cite the court to and provide for the court,  
20 would indicate that the retirement pay issue addressed  
21 in the decree of divorce has not yet arisen.

22 The risks inherent in receiving that  
23 retirement pay are the same risks inherent in any award  
24 of retirement benefits that will not be available until  
25 some future date, and would indicate to the court that



1 Mr. Marsh's proffer of testimony, along with the  
2 statutes we would submit, I think will clearly show the  
3 court at least how the congress intended that these two  
4 issues, or the issue of severance pay versus retirement  
5 pay, are to be treated. And that in this case it should  
6 be held as a severance pay, to be treated as set forth  
7 in those statutes and cases. Thank you.

8 THE COURT: All right, and you may proceed.

9 MS. WILLIAMS: Your Honor, would you like the  
10 proffer of- - We have stipulated that we can proffer  
11 clients' testimony. It would appear that it would  
12 probably be a little clearer to the court if we  
13 proffered our clients' testimony before Mr. Crist  
14 testifies.

15 THE COURT: I think that's appropriate.

16 MR. BIGELOW: We have agreed to that.

17 THE COURT: You have or have not, counsel?

18 MR. BIGELOW: We have.

19 THE COURT: All right, thank you.

20 MS. WILLIAMS: Your Honor, if my client were  
21 called to testify, she would testify that the parties  
22 were married in 1974 and divorced by this court in  
23 August of 1989, at that time having had four children at  
24 the time of the divorce. They were ages five through  
25 fourteen.

1           At the time of the decree of divorce, in  
2 paragraph 7 of that decree, she was awarded eleven  
3 fortieths of the pension and retirement benefits of  
4 Mr. Marsh. That at the time of the decree that she had  
5 been married to him for a period of fourteen years,  
6 during which he was in the military, and so that she was  
7 a military wife for that fourteen years.

8           She would testify, Your Honor, that she was a  
9 homemaker during the marriage, that she accrued no  
10 retirement benefits of her own during the marriage, that  
11 she, in fact, only worked minimally for, I believe,  
12 approximately six months during the entire time of the  
13 marriage on a part-time basis only, and that the parties  
14 relied upon Mr. Marsh and his future, and military  
15 service for their future and for their retirement.

16           Ms. Marsh would testify that she was informed  
17 that Mr. Marsh, on February 22nd, 1991, received a  
18 \$30,000 disbursement from the Navy Finance Center, that  
19 the disbursement was indicated on the 1991 W-2 that he  
20 received, marked on the W-2 as a pension--and I have  
21 Plaintiff's Exhibit 1- - And I would ask to admit  
22 Plaintiff's Exhibit 1.

23           THE COURT: Any objection?

24           MR. BIGELOW: No objection, Your Honor.

25           THE COURT: All right, thank you, it's

1 received.

2 (WHEREUPON Exhibit Number 1 was received into  
3 evidence.)

4 MS. WILLIAMS: That Ms. Garner, now Garner,  
5 has calculated her eleven fortieths of the distribution  
6 that was made, and that we have calculated both the  
7 gross and the net calculations, and also included in  
8 those calculations the interest that was, that  
9 Ms. Garner would request from the date that it was  
10 received until today's date at 10 percent interest. And  
11 if I can approach the court- -

12 THE COURT: You may.

13 MS. WILLIAMS: The Plaintiff's Exhibits 2 and  
14 3 are the gross and net computations.

15 THE COURT: Any objection to those?

16 MR. BIGELOW: I have not seen those yet, Your  
17 Honor.

18 MS. WILLIAMS: I'm sorry, these are the same  
19 that you had prior.

20 MR. BIGELOW: Actually, my objection to the  
21 one--I don't have the numbers on them, Your Honor--the  
22 one I think is the gross- -

23 THE COURT: Wait a minute, have they been  
24 marked?

25 MR. BIGELOW: I'm not sure what they are.

1 MS. WILLIAMS: I gave you the wrong ones,  
2 excuse me.

3 THE COURT: What is your objection?

4 MR. BIGELOW: I believe the proffer was that  
5 Mr. Marsh received a \$30,000 distribution, and I believe  
6 this is showing a \$33,000.

7 THE COURT: Well, with that exception, do you  
8 have any objection?

9 MR. BIGELOW: Not as to P-2, Your Honor.  
10 Just that the calculations need to be adjusted.

11 THE COURT: P-2 is received with that  
12 understanding.

13 (WHEREUPON Exhibit Number 2 was received into  
14 evidence.)

15 MR. BIGELOW: And P-3, I have no objection to  
16 P-3, except that I have not- - Obviously we don't agree  
17 to the 10 percent interest. We don't stipulate to the  
18 numbers.

19 THE COURT: Do you stipulate that it may be  
20 received as illustrative of the plaintiff's testimony,  
21 were she to testify?

22 MR. BIGELOW: That's correct, Your Honor, I  
23 do.

24 THE COURT: All right, it's received on that  
25 basis.

1                   (WHEREUPON Exhibit Number 3 was received into  
2 evidence.)

3                   MS. WILLIAMS: Also Ms. Garner would testify  
4 that she has been addressing this issue, now, for a  
5 period of approximately five years.

6                   Initially, back in 1992, there was an order  
7 that the defendant, Mr. Marsh, provide Ms. Garner with  
8 severance information, and that she be provided  
9 information in order to assess whether the payment made  
10 in '91 was separation pay, and somehow excluded, or was  
11 retirement, or in the nature of retirement, and  
12 specifically that at that time she was awarded the right  
13 to assert an interest in that asset.

14                   That since that time that this matter has  
15 been pending she has made vigorous efforts to resolve  
16 the issue, it has resulted in a trial before Your Honor.  
17 She would testify that at the time of a pretrial where  
18 she was present with counsel, that counsel for Mr. Marsh  
19 indicated at the pretrial that he, indeed, agreed that  
20 it was a pension disbursement.

21                   There was a retraction of that at a later  
22 pretrial, and that, based upon those sequence, or that  
23 sequence of events, that she believes it is appropriate  
24 that she be awarded her attorneys fees.

25                   She has no savings or source of moneys other

1       than from Mr. Marsh's income to pay those attorneys  
2       fees. Indeed, this matter did proceed to trial before  
3       Your Honor earlier on the issue, or various other  
4       issues. There was attorneys fees awarded at that time  
5       of some substance. Even though we've attempted, there  
6       has been no payment of those fees.

7               And again, Ms. Garner is in a position that  
8       she is in need, and unable to bear the expense of the  
9       attorneys fees. And I have prepared our affidavit of  
10      attorneys fees related to this issue only, and  
11      subsequent to finalization of the earlier issues and  
12      documents related to the first trial in this matter.  
13      And that those sums are due and owing and have not been  
14      paid by Ms. Garner.

15             I would then call myself to testify, if  
16      Mr. Bigelow believes that's necessary, or I would ask to  
17      submit the affidavit.

18             MR. BIGELOW: Your Honor, I have no objection  
19      to Ms. Williams' affidavit as illustrative of what her  
20      testimony would be.

21             THE COURT: All right. And it's received  
22      with that understanding.

23             MS. WILLIAMS: And that's Plaintiff's Exhibit  
24      5, Your Honor.

25             THE COURT: All right, 5's received.

1 (WHEREUPON Exhibit Number 5 was received into  
2 evidence.)

3 THE COURT: Ms. Williams, let me just ask  
4 you--and certainly I'll want to hear from Mr. Bigelow on  
5 this question, as well--is the defendant current at the  
6 moment on child support and alimony?

7 MS. WILLIAMS: Your Honor, since the last- -  
8 Don't you hate it when people don't say yes or no?

9 THE COURT: Take whatever time you need.

10 MS. WILLIAMS: Since the last trial, when one  
11 of the children ended up in the custody of Mr. Marsh,  
12 that child has now moved over into the custody of  
13 Mrs. Marsh. And so I believe that, under the current  
14 court orders, technically he is current.

15 But because the child has moved over, and  
16 because that's an issue, so that she's back in her  
17 custody, that's an issue that really wasn't before the  
18 court, we haven't been able to address that.

19 There are certainly support issues, because  
20 she's not getting adequate support at this time. But  
21 technically he is currently current in support.

22 THE COURT: But two of the children are with  
23 Mrs. Marsh?

24 MS. WILLIAMS: That's correct.

25 THE COURT: All right, that gives me a better

1 feel for it. And Mr. Bigelow? Would you like to make a  
2 commensurate proffer?

3 MR. BIGELOW: Yes, Your Honor, I would.

4 THE COURT: You may proceed, counsel.

5 MR. BIGELOW: Thank you, Your Honor. First I  
6 would like to indicate that we do have a disagreement  
7 over whether the one child that was just referred to as  
8 being returned to the custody of Ms. Garner, if that  
9 really is the case. It's my understanding that that  
10 child is in the custody of juvenile court presently.

11 THE COURT: Well, and counsel, I appreciate  
12 hearing from you, because I heard from Ms. Williams  
13 briefly on it, but I'm not actually sure that's before  
14 me today. Unless both parties want me to look at this  
15 issue, I'm going to leave it up to counsel to resolve  
16 this.

17 MR. BIGELOW: I believe that will be  
18 resolved. Mr. Marsh indicated he has already agreed to,  
19 with Recovery Services, I believe, to pay additional  
20 support based upon this child being in with juvenile  
21 court.

22 I would like to indicate to the court that  
23 Mr. Marsh would proffer, or I would proffer as  
24 Mr. Marsh's testimony, first of all, that the issue of  
25 the calculation to arrive at eleven fortieths of the



1 separation pay, or excuse me, the eleven fortieths  
2 calculation that's reflected in paragraph 7 of the  
3 decree of divorce was arrived at by way of a stipulated  
4 agreement at the time of the prior divorce.

5 THE COURT: And that is really not before me,  
6 either. That's what it is. So do you dispute the  
7 figure?

8 MR. BIGELOW: No, we do not dispute the  
9 figure. I thought counsel was going to make an argument  
10 to dispute the figures, for some reason.

11 THE COURT: I didn't understand that to be  
12 the case.

13 MR. BIGELOW: Okay. I would indicate to the  
14 court that Mr. Marsh was, his proffer would be that he  
15 was involuntarily separated from the Navy on November  
16 11th, 1991, due to not being selected for higher tenure.  
17 There is a letter we would submit, Exhibit 14,  
18 Defendant's Exhibit 14, to substantiate that.

19 THE COURT: Ms. Williams, do you have any  
20 problem with that as being received?

21 MS. WILLIAMS: Your Honor, I do have an  
22 objection, because the individual is not here to  
23 examine.

24 THE COURT: All right. You can, if you wish  
25 to, proffer what the defendant would say, just as he

1 might speak to this issue were he called. But I think  
2 Ms. Williams' point, with reference to my receiving an  
3 exhibit without foundation, is well taken.

4 MR. BIGELOW: Your Honor, Mr. Marsh- - I  
5 understand that. Mr. Marsh would testify that that was  
6 the basis on which he was separated from the Navy, that  
7 it was involuntary, and it was done as a result of his  
8 being passed over for promotion.

9 He would proffer that he was, at the time he  
10 was separated, a lieutenant in the Navy, grade O-3, and  
11 he'd been passed over for promotion to the rank of  
12 lieutenant commander, O-4. And that as a result of that  
13 separation, that Mr. Marsh was then- -

14 THE COURT: Let me get a little clarification  
15 on this. Are you saying that in the Navy if you're  
16 eligible, along with other individuals, for a promotion,  
17 and you don't get promotion, that they also terminate  
18 you?

19 MR. BIGELOW: Yes, that's correct, Your  
20 Honor.

21 THE COURT: Why is that?

22 MR. BIGELOW: There are- - I'm not certain  
23 all the reasons, but the ones I'm aware of, Your Honor,  
24 are that they have a process whereby they- - That's  
25 their way of, in essence, determining if someone is, in

1     their view, fit for continuing in a full-time career,  
2     the review for promotion looks at that. And so they've  
3     instituted a rule, as I understand it, that says if you  
4     are passed over for promotion, I think, especially as an  
5     officer--I don't know if the same applies to enlisted  
6     men--but if you're passed over for promotion a certain  
7     number of times, you then are, they do involuntarily  
8     separate you. I have a couple of statutes.

9             THE COURT: I'm not disputing. I'm just  
10     curious. It seems a little- - It's a different way of  
11     looking at it.

12            MR. BIGELOW: Additionally, Mr. Marsh would  
13     testify that it was his understanding that when this  
14     happened in '91, there was a lot of national pressure to  
15     reduce the size of the military, and this became a  
16     sensible way for the armed forces, as well, to reduce  
17     the number of personnel in the armed forces.

18            So there may have been some other thinking  
19     there that we're not aware of. But at any rate, I am  
20     confident, Your Honor, that it does happen, that they do  
21     involuntarily separate individuals if they're passed  
22     over a sufficient number of times for promotion.

23            I would indicate to the court that, based  
24     upon this separation, there was a separation pay made to  
25     Mr. Marsh on or about the date proffered by Ms. Marsh,

1 or by Ms. Garner, of \$30,000. And that \$30,000 amount  
2 was, in fact, a separation, or severance pay, and not a  
3 retirement payment. And I would submit Defendant's  
4 Exhibit 13 in support of that, Your Honor.

5 THE COURT: On Exhibit 13, is this the one  
6 previously discussed to which you have an objection,  
7 Ms. Williams?

8 MR. BIGELOW: No.

9 MS. WILLIAMS: I don't have any objection,  
10 Your Honor.

11 THE COURT: All right, 13 is received.

12 (WHEREUPON Exhibit Number 13 was received  
13 into evidence.)

14 MR. BIGELOW: Your Honor, I would indicate  
15 that additionally the defendant, or excuse me, Mr. Marsh  
16 would testify that the total gross amount of the  
17 severance pay paid to him is reflected on the worksheet  
18 that we would submit as Defendant's Exhibit Number 10.

19 THE COURT: Any objection to the receipt of  
20 10?

21 MS. WILLIAMS: No, Your Honor.

22 THE COURT: All right, 10 is received.

23 (WHEREUPON Exhibit Number 10 was received  
24 into evidence.)

25 MR. BIGELOW: If I might, Your Honor, I'd

1 give them to the court.

2 And I would indicate, Your Honor, that  
3 reviewing those two exhibits, Mr. Marsh would testify  
4 that, as I said, the gross was thirty, that the- - That  
5 he actually, or there was an amount of \$6,000 withheld  
6 that's reflected on Exhibit 13 for federal income tax  
7 withholding when this lump sum was paid to Mr. Marsh.  
8 So in reality, he only received \$24,000, and the taxes  
9 on that distribution were paid at that time.

10 So that in the event the court concludes that  
11 it is going to award an amount to Ms. Marsh pursuant to  
12 her petition, that the court would please take note of  
13 the fact that the gross amount was thirty, but the net  
14 was twenty-four, and the taxes have been paid, and  
15 therefore it would be Mr. Marsh's position that only the  
16 net amount would be the appropriate amount to consider  
17 if the court were going to consider that.

18 Mr. Marsh would also, we also proffer his  
19 testimony that at the time he was separated from the  
20 Navy, he was not entitled to retirement benefits, that  
21 those would not be available to him until he was the  
22 statutory age, which he understood to be sixty years of  
23 age. He was only thirty-nine when he was separated from  
24 the Navy, and therefore had no claim on any retirement  
25 benefits.

1                   THE COURT: What is the severance pay, what  
2 he alludes to as the severance pay, predicated upon?  
3 How do they calculate the amount?

4                   MR. BIGELOW: It is based upon a years of  
5 service calculation, as I understand it, Your Honor. It  
6 is, based upon years of service, and whatever his pay  
7 rate had been as of the time of the severance or  
8 separation. And that formula is laid out by statute. I  
9 don't believe I have that exact statute with me.

10                  THE COURT: So it's not for six months or  
11 something, equivalent to what one was earning per month  
12 for a period of six months to allow one to sort of  
13 regroup. It's based upon years of service, then?

14                  MR. BIGELOW: It is- - Well, my  
15 understanding of it is that, Your Honor. I'll see if I  
16 can find the statute, while we're sitting here, that  
17 specifically lays out the formula for that.

18                  THE COURT: And we have an expert today, as  
19 well, right?

20                  MR. BIGELOW: If I can come- - The other  
21 side has an expert.

22                  THE COURT: Well, I assume he's not an expert  
23 for a side. I assume he may have been called by one  
24 side, but my understanding is he's an independent  
25 expert. But we'll see, I suppose.

1           MR. BIGELOW: At any rate, Your Honor, that  
2 would be Mr. Marsh's proffer, except, to the extent that  
3 he would indicate that he, too, has incurred costs and  
4 legal fees in this matter regarding the separation,  
5 severance pay versus retirement pay issue.

6           And while the divorce decree is clearly  
7 speaks to retirement pay and retirement benefits, it  
8 does not speak to separation or severance pay. And that  
9 on that basis we'd, one, deny any liability for legal  
10 fees, and two, indicate to the court that he has had to  
11 incur legal fees, as well, to contest this matter. And  
12 Your Honor, that would be under Mr. Marsh's proffer.

13           The only other evidence we would have would  
14 be, I intended to simply testify as to the amount of  
15 time and legal fees incurred by me in preparation for  
16 this matter. I did not prepare- -

17           THE COURT: All right, this is in lieu of an  
18 affidavit?

19           MR. BIGELOW: Yes.

20           THE COURT: Before I hear from you, can I get  
21 you to raise your right hand and we'll just swear you  
22 in?

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RICHARD N. BIGELOW

called as a witness by and on behalf of the Defendant,  
having been first duly sworn, was examined and testified  
as follows:

DIRECT TESTIMONY

BY MR. BIGELOW:

Thank you. My name is Richard N. Bigelow,  
I'm an attorney for the defendant in this matter. I've  
been licensed to practice law in the state of Idaho  
since 1978, and the state of Utah since 1983. I've  
practiced law continuously in Salt Lake City since 1983.

My, a substantial portion of my time as a  
legal practitioner has been devoted to domestic cases  
such as this one. My current customary billing rate is  
\$150 an hour. I believe, for someone of my time as an  
attorney, and experience, that that is a reasonable  
rate.

I would proffer to the court that my time in  
doing legal research to prepare for this hearing today  
was two hours, that my preparation in preparing for this  
trial today was two hours, and that I obviously am in  
court now, and am billing my client for the time to be  
here. And would ask that the court, in the event it  
finds that an award of attorneys fees in this issue is  
appropriate, would award the four hours prior to coming



1 here today, and the time for being in court, and  
2 finalizing the documentation that's required in this  
3 matter, at the rate of my normal billing rate of \$150 an  
4 hour. That would be my testimony.

5 THE COURT: What part of Idaho, counsel?

6 MR. BIGELOW: I grew up in Idaho Falls, I  
7 lived there for about four years while I was practicing  
8 law.

9 THE COURT: Thank you. And Ms. Williams, do  
10 you wish the opportunity to cross examine Mr. Bigelow?  
11 He's not- - He's chosen to testify, which is most  
12 appropriate, on this point, rather than submitting an  
13 affidavit. But I think, given that, you're entitled to  
14 cross.

15 MS. WILLIAMS: I have no cross examination.

16 THE COURT: All right, fine, and I accept the  
17 representation of counsel. You may be seated.

18 THE COURT: And I guess what remains is to  
19 adduce the remaining testimony, Ms. Williams.

20 MS. WILLIAMS: I'd like to call Mr. Neil  
21 Crist.

22 THE COURT: Mr. Crist, if you'd come forward  
23 to be sworn.

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NEIL B. CRIST

called as a witness by and on behalf of the Plaintiff,  
having been first duly sworn, was examined and testified  
as follows:

DIRECT EXAMINATION

BY MS. WILLIAMS:

Q Would you state your name and your business  
address, please.

A My name is Neil Berry Crist, my law practice  
is 380 North 200 West, Suite 260, Bountiful, Utah.

Q Can you describe for the court your expertise  
in relation to military retirement and separation pay?

A I can. I'm not sure how far the court would  
like me to go back, but I've been on active duty and  
reserve for almost thirty-five years.

Q With what?

A With the United States Air Force. I recently  
retired as a colonel, O-6. For the past ten years I  
have managed three separate substantial manpower  
programs for the Air Force Reserve, in which I have  
dealt with the severance and separation issue on  
numerous occasions.

I believe the court is aware that I am an  
attorney, and I've practiced law since April of 1978 in  
the state of Utah, with a very heavy concentration in

1 domestic. And I've taught many seminars for both the  
2 Air Force and for the Utah State Bar in relation to the  
3 retirement type issues. I've taught at the Air Force  
4 Institute of Technology and for the Air University and  
5 for the JAG Course, Judge Advocate General-type people,  
6 on the same type things.

7 Q And that's with regarding military  
8 retirement?

9 A That's with the Air Force on those issues,  
10 that's correct.

11 Q Does the Air Force military retirement differ  
12 from the Naval retirement?

13 A No, it's all dealt with under the same,  
14 10 USC 11-74 is the United States code section that  
15 deals with that.

16 Q So the armed forces are one group, when it  
17 comes to issues relating to severance pay or retired  
18 pay?

19 A It's all handled as Department of Defense,  
20 yes.

21 Q Okay. In your education background, your  
22 teaching background, can you tell me when you last spoke  
23 on the issue? Or taught on the issue?

24 A The last time I taught a seminar was about  
25 three weeks ago for the Utah State Bar.

1                   THE COURT: Ms. Williams, can I ask for  
2 clarification on one point? This may show my ignorance.  
3 But I'm not clear on what Mr. Crist meant when he said  
4 for ten years he's managed substantial manpower  
5 programs. Could we clarify that at some point, as well?

6                   MS. WILLIAMS: Yes.

7                   THE WITNESS: I'll answer that directly, if  
8 that's okay.

9                   MS. WILLIAMS: Okay.

10                  THE WITNESS: I have a hard time being a  
11 witness instead of the attorney. I have been, for the  
12 last ten years, in a portion of the Air Force Reserve  
13 where I would work about ninety days a year, eighty or  
14 ninety days a year, as the senior mobilization augmentee  
15 for either Air Force Materiel Command or Air Combat  
16 Command, managing reserve programs.

17                  It's sort of an unusual type hybrid  
18 situation, where you have an active duty counterpart,  
19 but the management of the entire reserve side of the  
20 house is delegated to the reserve mobilization  
21 augmentee. And that's what I have done. I've been  
22 responsible for hiring all the reserve people, many of  
23 which are these people that have separated under the  
24 VSI-type programs.

25                  THE COURT: All right, I understand. Thank

1       you.

2               Q       (BY MS. WILLIAMS)   And through that  
3       employment, have you developed an expertise, or a skill  
4       related to military retirements, military separation  
5       pay?

6               A       Yes, I've dealt with it many times on an  
7       actual case-by-case basis with people that we've  
8       employed.

9               Q       And as an attorney, have you represented Air  
10      Force persons out of Hill Air Force Base?

11              A       I've represented both sides.   The wives of  
12      the Air Force people, and the members themselves.

13              Q       And prepared military allocation orders, or  
14      divisions of retirement assets, military retirements?

15              A       That's correct.

16              Q       And how many do you think you've prepared?

17              A       A lot.   More than 100.   Two hundred, 300,  
18      it's been quite a few.

19              Q       Okay.   In addition to your teaching in a  
20      seminar setting, have you testified as an expert before  
21      in Utah?

22              A       Yes, in Judge Medley's court.

23              Q       And when was that?

24              A       It's been about six months ago.

25              Q       Okay.   And you were designated as an expert

1 at that time?

2 A Nobody challenged it.

3 THE COURT: I think, then, it would be fair  
4 to say you were so qualified.

5 Q (BY MS. WILLIAMS) Are you, or can you tell  
6 the court what documents you have reviewed in relation  
7 to this case, Marsh versus Marsh?

8 A Yes. I reviewed- - I went back and checked  
9 the statutory foundation, which is 10 USC 11-74.

10 THE COURT: One more time. Ten- -

11 THE WITNESS: USC 11-74, and the relevant  
12 section of that statute, if the court wants a complete  
13 reference, is section small "H," paren 1, that I believe  
14 is the one that the court's going to be most interested  
15 in.

16 And I also checked the Department of Defense,  
17 they changed the whole regulation system, here, about  
18 two years ago, and I think they're called DOD-FMR's,  
19 which is the Department of Defense Financial Management  
20 Regulation, which also deals with this sort of the  
21 implementing regulation, sort of like the IRS regs  
22 implement the IRS code.

23 And I also looked at some documents that you  
24 provided me, one of which was, I think, Defendant's  
25 Exhibit 10, which was the worksheet on the allocation of

1 the severance pay, or how they calculated it. And I saw  
2 a letter that I guess you objected to, from DFAS  
3 Cleveland, that's Defense Finance Accounting Service,  
4 and the abbreviation is DFAS. Cleveland, which is the  
5 central Department of Defense management point for all  
6 these kind of things, now.

7 Q (BY MS. WILLIAMS) And did you review the  
8 decree of divorce?

9 A Oh, yes, I did review the decree of divorce,  
10 too.

11 Q And did you review the W-2 that was referred  
12 to as Plaintiff's Exhibit 1?

13 A I don't remember if I saw the W-2.

14 THE COURT: Here is the original, counsel.

15 Q (BY MS. WILLIAMS) Did you have an  
16 opportunity to review Plaintiff's Exhibit 1?

17 A Oh, I think I did see this, yes. This  
18 document, I would note, predates the current  
19 organizational structure, where everything is combined  
20 under the Department of Defense now. In actuality, what  
21 they show here is the Navy finance center is now the  
22 entire financial management center for the entire  
23 Department of Defense for these type of issues.

24 Q Okay.

25 A So yes, I have seen that, and I do note that

1       it's checked as pension funds.

2               Q       Let me show you what I've had marked as  
3       Plaintiff's Exhibit 15. Is that the statute for the  
4       U.S. code provision that you were referencing?

5               A       Yes, it starts down at the bottom of the  
6       page, dealing with separation pay upon involuntary  
7       discharge or release from active duty.

8               Q       Okay. After reviewing the documents that  
9       we've referred to in the code provisions, have you come  
10      to a conclusion or formed an opinion regarding whether  
11      the moneys received by Mr. Marsh are retired pay,  
12      retirement, or connected to the retirement?

13              A       The short- -

14                      MR. BIGELOW: Your Honor, could I make an  
15      objection, here? I think we'll solve it, but I don't  
16      believe you've got, moved to have Mr. Crist admitted as  
17      an expert.

18                      THE COURT: That's true.

19                      MS. WILLIAMS: I apologize. I jumped. I  
20      would ask the court to find that Mr. Crist is an expert,  
21      and qualified to testify regarding his opinion in this  
22      case.

23                      MR. BIGELOW: And I have no objection.

24                      THE COURT: All right, and the court so  
25      finds. The court finds that Mr. Crist is an expert in



1 matters pertaining to legal interpretation of retirement  
2 benefits for the Department of Defense.

3 MR. BIGELOW: The next issue I have was that  
4 I think you referred to an Exhibit 16 just now?

5 THE COURT: I don't know that we've had a 16,  
6 have we?

7 MS. WILLIAMS: It was 15? Okay. I'm sorry,  
8 it was 15.

9 MR. BIGELOW: Thank you, I've now seen 15.

10 THE COURT: Just one moment. Let's see, 10  
11 was received, as was 13, and 15 we had not made a  
12 request for yet.

13 MS. WILLIAMS: No.

14 THE COURT: All right. Then you may proceed.

15 Q (BY MS. WILLIAMS) Let me back up just a bit  
16 before I get back into the opinion. Can you tell me how  
17 separation pay is calculated?

18 A Yes. I noticed that the judge had that  
19 question earlier, I made a note of it. Basically it's a  
20 years of service type formula. It is specifically not  
21 six months of pay or something like that, like the court  
22 asked.

23 In this particular case, if I can speak to  
24 that exhibit you objected to from the Navy finance  
25 center, they refer in there that this was based upon

1     fifteen years' service. The \$30,000 was calculated  
2     based upon fifteen years of service. So it is.

3             And there's a threshold that you have to be  
4     beyond--and I'm not sure how far the court wants to get  
5     into this--but depending on the career field and the  
6     personnel management policies that they're trying to  
7     implement- -

8             And Mr. Bigelow mentioned that in 1991,  
9     that's correct, I was, I worked for the assistant  
10    secretary of the Air Force for acquisition at that time,  
11    and I was involved fairly heavily in the policy matters  
12    that went into this. And depending on the career field  
13    for the Department of Defense, generally it was you had  
14    to have at least six years.

15            There are different, pilots are treated  
16    somewhat differently, doctors are treated somewhat  
17    differently, but generally the policy, underlying policy  
18    consideration was that people who were within their  
19    mandatory service requirement for courses that they'd  
20    taken or schooling that they'd received or whatever, did  
21    not qualify for this.

22            Q       So you needed a certain number of years of  
23    service before you could be considered for separation  
24    pay?

25            A       Right, before you could even get it at all.

1           Q       Okay. And what is the relationship- -  
2       Strike that. How is retired pay calculated?

3           A       Retirement pay, depending on whether you're  
4       active or reserve, is calculated based upon a years of  
5       service formula. Basically it's two and a half percent  
6       of your base pay for each year of active duty service.  
7       Now, as a reservist, it's calculated on a different  
8       basis. It's a point system.

9           Q       But the formula for calculating separation  
10      pay and retired pay, am I correct that it's basically  
11      the same? Or similar?

12          A       It's very similar, yes. And in terms of the  
13      time element. The formulas are not the same, obviously.  
14      And that's why I asked specifically earlier exactly  
15      which program he received the payment under, because the  
16      actual policies are pretty much the same. It's  
17      basically about \$2,000 a year.

18          Q       On separation pay?

19          A       On the separation pay, yes.

20          Q       Based on past service.

21          A       Prior- - Service at the time of separation.

22          Q       And so future service doesn't have any  
23      bearing on it.

24          A       No. No, future service does have a bearing,  
25      and that's why I think section 11-74-H is so critical to

1 this, because there is a provision where a person who is  
2 involuntary separated for being passed over, like  
3 apparently Mr. Marsh was- - And that is a DOD-wide  
4 policy for up and out, Your Honor. It's strictly a  
5 management, flow of the promotion-type management tool.

6 Q You're referring to Plaintiff's Exhibit 15?

7 A Fifteen, yes.

8 Q Okay. Can you tell me what connection the  
9 separation pay has with the pension and retirement  
10 benefits?

11 A Yes. The relevant portion of this is  
12 subsection 1, "A member who has received separation pay  
13 under this section or separation pay, severance pay, or  
14 readjustment pay under any other provision of law based  
15 on service in the armed forces, and who later qualifies  
16 for retired or retainer pay under this title or Title  
17 14, shall have deducted from each payment of such  
18 retired or retainer pay as is based on the service for  
19 which he received separation pay under this section,  
20 until the total amount deducted is equal to the total  
21 amount of the separation pay received."

22 Q Can you tell us, in laymen terms, what that  
23 means?

24 A Well, just to make sure that I understood it  
25 correctly, since I was going to have to testify about

1       it, I called the Air Force Reserve expert in Denver and  
2       went through it with them. And it's probably a good  
3       thing I did, because my understanding was that it had to  
4       be repaid. But the mechanics of how it was repaid are a  
5       little bit different than I expected.

6               Basically what they will do is they will take  
7       the number of months- -

8               MR. BIGELOW: I'm going to object to this as  
9       hearsay on Mr. Crist's part. He's testifying about what  
10      somebody's told him.

11              THE COURT: Will you lay some additional  
12      foundation, Ms. Williams as to whether the witness has  
13      an independent working knowledge of this?

14              MS. WILLIAMS: Your Honor, I would submit to  
15      the court that, as an expert witness, he has the  
16      ability--and as an exception to the hearsay rule--the  
17      ability to gather information, and through the gathering  
18      of information as an expert, in needing to gather that  
19      information for a particular case, he can rely on  
20      what- -

21              THE COURT: All right, and that requires  
22      foundation, too. So you may wish to ask that question  
23      instead.

24              MS. WILLIAMS: Okay.

25              Q       (BY MS. WILLIAMS) In the preparation for

1       this case, in order to more fully understand the US code  
2       provision, did you do further research or inquiry?

3           A       Yes, I did.

4           Q       And what was the- - What did you do in that  
5       research or inquiry?

6           A       Well, based on my prior experience with my  
7       military duties, I knew that the office that had the,  
8       all the expertise for the Air Force on the actual  
9       implementation of this provision was located at the Air  
10      Force person, Air Force Reserve Personnel Center in  
11      Denver. And I called and spoke to that individual.

12          Q       When you have questions relating to finance  
13      issues, is that where you call?

14          A       That's correct.

15          Q       And you- -

16          A       And I also spoke with the people at Defense  
17      Finance and Accounting Service in Cleveland, which is  
18      the people that actually implement this for the  
19      Department of Defense, to make sure that I was on the  
20      right track.

21          Q       And do you use that service in your, acting  
22      in your reserve status as employed by the military?

23          A       Yes.

24          Q       And do you regularly contact them, as well,  
25      on other financial issues related to the military?

1           A       Yes.

2           MR. BIGELOW: Your Honor, if I might object  
3 and voir dire simply on the issue of who the individual  
4 was that he spoke to.

5           THE COURT: Well, you're welcome to voir dire  
6 if you'd like to. Would you like to ask that?

7           MR. BIGELOW: Yes, Your Honor.

8           THE COURT: And sir, if you remember the  
9 inquiry, you can answer that.

10          THE WITNESS: Yes. The individual's name is  
11 Jim, I'm not positive of his last name, it's like  
12 Hebertsen, it starts with "H." And if you call the  
13 personnel center, his extension is 246. I didn't bring  
14 that piece of paper with me.

15          THE COURT: That's all right. Anything  
16 further by way of voir dire?

17          MR. BIGELOW: No, thank you.

18          THE COURT: You may proceed.

19          Q       (BY MS. WILLIAMS) And in your services in  
20 the reserve, and as an attorney preparing military  
21 allocations orders, do you regularly contact these  
22 entities, and rely on the information you receive?

23          A       I do. They are the people that actually  
24 carry it out.

25          Q       And after the contact, were you able to gain

1 more understanding of how the code provision, sub H, is  
2 implemented?

3 A Yes. And the other thing I would point out  
4 is that I did review the Department of Defense financial  
5 management regulation, which is the regulatory guidance  
6 for implementing that, also.

7 Q And do you recall the cite on that  
8 regulation?

9 A Yes, it's DOD-FMR, as in Frank, Mike, Romeo,  
10 Volume 7, part B, paragraph 60308, and it's that whole  
11 section. Paren C is the one that's really the most  
12 important, I think.

13 Q And after doing that investigation, again,  
14 what, how is the pay back of the separation pay  
15 implemented in relation to the retirement?

16 A It's based on a pro rata distribution of the  
17 disposable retirement pay. And disposable retirement  
18 pay is an important concept that we'll probably have to  
19 define, here.

20 Q Okay, why don't you do that now?

21 A Because it's really important in these  
22 retirement allocations. And that definition changed as  
23 of February, 1991, and for purposes of this case, a lot  
24 of the things that they talk about are not applicable.

25 But the one thing that is really relevant to



1       this case is the federal and state taxes. Because after  
2       February of 1991, federal and state taxes are not  
3       considered part of the net disposable retainer pay, as  
4       they were prior to 1991.

5           Q       What impact does that have on this case?

6           A       The impact it has on this case is whether or  
7       not the plaintiff should receive eleven fortieths of the  
8       gross amount and she pay taxes on what she receives, at  
9       what I understand to be a lower rate than Mr. Marsh's  
10      rate, or whether Uncle Sam gets 20 percent off the top  
11      because of his tax rate, and then she just gets her  
12      eleven fortieths of the after tax.

13          Q       Okay. And so the implement that the military  
14      uses now is that they do not make it a percentage of the  
15      net, they make it a percentage of the gross now.

16          A       They actually allocate- - The way it's done  
17      now is they will allocate the, what they define as the  
18      net disposable retirement pay, which does not include  
19      taxes.

20          Q       Okay.

21          A       And then they actually give to the alternate  
22      payee a form 1099-R, which shows that they received that  
23      during the year.

24          Q       Okay.

25          A       And that's to avoid- - Because there was all

1 kinds of complications with trying to do it the other  
2 way.

3 Q Okay, so that impacts the issue of whether  
4 it's gross or net.

5 A Correct.

6 Q But as to the pro rata distribution that  
7 you're describing, can you explain how that would affect  
8 Mr. Marsh, if he's got \$30,000 gross pay that's being  
9 pro rata divided between the retirement pay.

10 A The thing that I got clarification from these  
11 people on, that bothered me, is because of the  
12 difference between the active duty side of the  
13 retirement, and the reserve side.

14 Now, once he's gone into the reserve side of  
15 the house, he has to be paid under the Reserve  
16 Retirement Entitlement Act. Okay, which means, as  
17 Mr. Bigelow said, he doesn't start to get paid until age  
18 sixty. And it's based upon his total points at the time  
19 of retirement.

20 Now, where you have a problem is where you  
21 have the interface, where he had fifteen years of active  
22 duty service. What they do is they'll convert that to  
23 360 points per year. And now, for his reserve duty, he  
24 receives one point for each period of inactive duty, and  
25 one point for each day of active duty. And that's why I

1       said, in my experience in the last ten years, I've been  
2       receiving anywhere around ninety to 120 days of worth of  
3       points during the year.

4                Okay. So the thing that's going to really  
5       make this lopsided on the payback is, they are going to  
6       withhold, assuming that he retires at fifteen years--or  
7       twenty years of service, I'm sorry--which is the  
8       minimum, when he gets to be age sixty, he will have an  
9       entitlement for whatever grade he is at the time. And I  
10      don't know if he's been promoted or not, but it's  
11      whatever the rank is at the time that he gets his  
12      retirement.

13               They will then withhold fifteen twentieths of  
14      any payment he would otherwise be entitled to. So  
15      they're going to hold 75 percent of every payment until  
16      this \$30,000 is paid back. Did I say that clearly?

17           Q       Uh-huh.

18           A       Okay. So the net effect of this is going to  
19      be, if he has fifteen years of active duty, that would  
20      work out to- - What's 15 times 2 and a half percent?  
21      That's going to be thirty, almost 40 percent of the base  
22      pay that was accrued during his active duty time.

23               Now, for his remaining five years, assuming  
24      he takes a 20-year retirement, and he could go to thirty  
25      years, and if he gets to be a general he could go to

1 thirty-five years or something like that. Most of us  
2 don't make the general cut. But so what he's going to  
3 have is, he's going to have- - Something like 90  
4 percent of his total accrued payable points actually  
5 took place during the fifteen years that he was on  
6 active duty. So he's not going to have near as many  
7 points for that last part.

8 The bottom line of that is going to be, most  
9 of what he's going to get is going to go towards  
10 repaying this \$30,000 until it's paid off. So that the  
11 equity problem that you run into is, and the way the  
12 defense finance and accounting service will actually  
13 implement this, is after they take the 75 percent, which  
14 is considered an obligation owed to the federal  
15 government, which is deducted from the pay before it  
16 becomes net disposable, so that's going to come out  
17 every month. So what Mrs. Garner is going to get is  
18 going to be eleven fortieths of- -

19 Q 25 percent?

20 A The peanuts that are left. It's not really  
21 even going to be 25 percent. Because of the difference  
22 between active duty years and reserve years. So she  
23 would get eleven fortieths of almost nothing until that  
24 \$30,000 is repaid.

25 After the \$30,000 is repaid, then she would

1 get eleven fortieths of whatever the retirement pay is,  
2 which, assuming he retires as a lieutenant commander, it  
3 would probably be \$1,800 a month. I would have to- -  
4 It's going to depend on his rank and how many years he  
5 has at the time that he retires.

6 Q Okay, so under the decree of divorce she's  
7 entitled to eleven fortieths, which is a little more  
8 than 25 percent of his gross retired pay.

9 A That's correct.

10 Q But because of the fact that the severance  
11 pay has to be paid back, she cannot receive that from  
12 the military.

13 A If she doesn't get it out of the severance  
14 pay, she won't ever get her share of it. Her share of  
15 the retirement will be reduced by what her share of that  
16 \$30,000 would have been.

17 Q Is that the interplay between the pension and  
18 retirement and the separation that we were talking  
19 about, or is there any other interplay that we should  
20 know about?

21 A No, that's primarily what it is. I can tell  
22 you the policy considerations that went into it in 1991,  
23 because that's what we did at the air staff, and it was  
24 to make a lump sum retirement- -

25 The problem that the Air Force and the Navy

1 have is, they needed to get their force size down. They  
2 didn't want to involuntarily terminate any more people  
3 than they had to. So there's two primary ways they do  
4 it. One is the way of calling out officers that  
5 Mr. Bigelow referred to, which is the up-or-out program,  
6 or if you're passed over twice you're on the street.  
7 But then they give you the severance pay to go with  
8 that.

9 The other thing, that got more publicity, is  
10 the voluntary separation, where someone who has ten  
11 years can come in, and they'll give him \$20,000--and  
12 it's different if you're a pilot and some other  
13 things--but basically give you \$20,000 and you're on  
14 your way.

15 Now, a lot of these people, especially  
16 somebody in the situation that he's in, where they have  
17 fifteen years, want to get into the retirement, or the  
18 reserve program, because of the fact all they have to do  
19 is serve five more years and they qualify for a pretty  
20 good retirement.

21 So we have, we used to have a lot of those  
22 people getting, trying to get into our programs. And  
23 initially, when they first came out, we couldn't even  
24 take them. So this was a change where they made it to  
25 where we could actually take them and they would pay

1 back the retirement.

2 Q Okay. As a military officer in the field of  
3 expertise that you have, do you consider this separation  
4 pay under Utah law a marital asset?

5 A Since Woodward, I believe it is. I think  
6 Woodward settled the issues of what's speculative on the  
7 receipt of the retirement pay and so on and so forth.  
8 In fact, this portion is, there's no speculation  
9 involved in this part. He's already got it.

10 Q By the speculation, you're talking about  
11 Woodward's reference to vested versus unvested?

12 A And whether you'll stay long enough to  
13 actually get it and so on and so forth, yes.

14 MS. WILLIAMS: I have no further questions.

15 THE COURT: Cross?

16 MR. BIGELOW: Yes, Your Honor, thank you.

17 MS. WILLIAMS: Your Honor, would it be  
18 possible to take just a two-minute break?

19 THE COURT: Yes. Is that acceptable to you,  
20 counsel?

21 MR. BIGELOW: Yes.

22 THE COURT: We'll make it actually a  
23 10-minute break. We'll take a 10-minute break and pick  
24 up where we left off. Thank you.

25 (Brief recess.)

1 THE COURT: Let's proceed with cross.

2 MS. WILLIAMS: Your Honor, I don't believe I  
3 asked to admit Plaintiff's Exhibit 15, although I don't,  
4 since it is a U.S. Code cite, I don't need it to be used  
5 as an exhibit.

6 THE COURT: Any objection to the receipt of  
7 15?

8 MR. BIGELOW: No, Your Honor.

9 THE COURT: All right, 15 is received.

10 (WHEREUPON Exhibit Number 15 was received  
11 into evidence.)

12 CROSS EXAMINATION

13 BY MR. BIGELOW:

14 Q Mr. Crist, just for clarification sake, for  
15 the court, you're here at the request of the plaintiff  
16 and her attorney, correct?

17 A Yes.

18 Q You and I have not previously met to discuss  
19 this matter, have we?

20 A No.

21 Q To your knowledge, was I aware of you being  
22 called as an expert before today?

23 A I don't know. I haven't talked to you. On  
24 this matter.

25 Q You are being paid by the plaintiff in this



1 matter as an expert?

2 A That's correct.

3 Q Thank you. Mr. Crist, you stated, I believe,  
4 that you did review the decree of divorce regarding the  
5 award to the plaintiff of certain pension retirement  
6 benefits; is that correct?

7 A Yes.

8 Q And from your review of that decree of  
9 divorce, is there any reference made to severance or  
10 separation benefits?

11 A I don't- - Not that I recall, but I'll check  
12 just to make sure.

13 Q Paragraph 7 is, I believe, the applicable  
14 paragraph?

15 A It says "eleven fortieths of all pension and  
16 retirement benefits that the defendant may receive upon  
17 his retirement from military service from the United  
18 States government."

19 Q In the military, regarding the issues of  
20 severance or separation pay on the one hand, and  
21 retirement or pension pay on the other hand, is there a  
22 distinction between those two areas?

23 A You mean are they handled separately, I  
24 guess? Yeah, there is a distinction between them.

25 Q Is there- - When the military refers to

1 pension and retirement benefits, is it also referring to  
2 severance or separation pay?

3 A It depends- - I'm not sure if I can answer  
4 this right. It depends on which side you're looking at  
5 it from. If you're looking at it from the retirement  
6 side, then it clearly fits in, because it's calculated  
7 in.

8 If you're looking at it strictly from the  
9 severance pay side, then you can get severance pay and  
10 never be entitled to retirement if you don't complete- -  
11 It's kind of like you were talking about, the  
12 speculative nature of the retirement thing.

13 Q Is there any question in your mind in this  
14 instance as to whether Mr. Marsh, when he received the  
15 \$30,000 distribution, whether that was a severance or  
16 separation pay, rather than a retirement or pension  
17 payment?

18 A In his mind?

19 Q In your mind. Is there any question- -

20 A In my mind. In my mind, it's clearly an  
21 advance on a retirement pay.

22 Q Okay. Can you tell me, in the applicable  
23 code section, where it says that it is an advance on  
24 retirement?

25 A I don't think it says- - I don't know of any

1 place where it actually says that. If you look at it  
2 as- -

3 Q So the term "advance on retirement," then, is  
4 your term, correct?

5 A Well, it's calculated on the basis of number  
6 of years of service, that's correct. And that's my  
7 term, I guess.

8 Q And again, let me go back, just to make  
9 certain I understand. In this particular case, do you  
10 believe that Mr. Marsh was paid severance or separation  
11 pay?

12 A Yes.

13 Q And when he received that distribution in  
14 1991, that was paid, intended to be paid to him by the  
15 military as a severance or separation pay, correct?

16 A Yes.

17 Q And the chapter of the Armed Forces Act that  
18 deals with severance or separation pay is which chapter,  
19 if you know?

20 A It's the Title 10, 1174, section 1174. I'm  
21 not sure what the chapter is on that.

22 Q Is it Chapter 36? Does that ring a bell to  
23 you?

24 A I could probably- -

25 Q I'll withdraw that question, Your Honor.

1 1174 that you have referred to, Mr. Crist, specifically  
2 deals with the issue of how to handle severance or  
3 separation pay, does it not?

4 A The section that I referred to- - You mean  
5 1174-H, that I referred to and read from?

6 Q No, I'm talking about the entire section,  
7 1174. That's dealing with separation and severance pay,  
8 correct?

9 A Upon involuntary discharge or release from  
10 active duty, right.

11 Q Correct. It is not dealing with pension or  
12 retirement pay, correct? Except as stated within the  
13 body of that section.

14 A Well, it does deal with retirement pay.  
15 That's what that section, or the section H deals with.

16 Q That's right. Section H does address the  
17 issue of retirement pay, and it specifies, does it not,  
18 that at the time that a person who has received  
19 separation or severance pay who later qualifies for  
20 retirement pay, that then there is an adjustment to be  
21 made, correct?

22 A Yes. That's what it says.

23 Q When Mr. Marsh was separated from the Navy in  
24 November of 1990, was he entitled to any kind of  
25 retirement or pension benefits at that time?

1           A       I think it was November of 1991, if I'm  
2 not- -

3           THE COURT: That was the testimony.

4           THE WITNESS: But at that time he had fifteen  
5 years accrual towards what's a between-year minimum  
6 that's required for retirement. But he could not  
7 receive a retirement based on fifteen years. Well, he  
8 could if he took a medical, but that's totally  
9 different.

10          Q       (BY MR. BIGELOW) Point of clarification, and  
11 I misspoke the date. The date when he was involuntary  
12 separated was November of 1991.

13          A       Right.

14          Q       The day he received the disbursement was  
15 February of 1992. Simply to clarify that point.

16                 So back to my question, then, and I think you  
17 answered it, let me just make sure. Was he entitled to  
18 any disbursement of retirement or pension funds when he  
19 was involuntarily separated from the Navy in November of  
20 1991?

21          A       He could not receive any in November of 1991.

22          Q       When would have been the earliest time at  
23 which he could receive retirement or pension benefits,  
24 if he was age thirty-nine in November of 1991, with the  
25 years of service he had at that time?

1           A       It would be five more years. So he would  
2 have been forty-four.

3           Q       Would he have to had remained on active duty  
4 to receive that pension at age forty-four?

5           A       He would have had to receive active duty  
6 retirement credit, and generally that has to be on  
7 extended active duty.

8           Q       And to your knowledge, did Mr. Marsh  
9 participate in that kind of active duty?

10          A       I don't know anything about that.

11          Q       But that's the only way he could have  
12 received it by age forty-four; is that correct?

13          A       That's correct, once he transfer- - That's  
14 what I said. Once he transfers to a reserve component,  
15 he has to take his retirement through the reserve  
16 component retirement plan, which is the age sixty thing.

17          Q       Assuming Mr. Marsh did not engage in any kind  
18 of extended active duty, as you testified, but, instead,  
19 went into the reserve component, then it would be your  
20 testimony that he could not then qualify for any kind of  
21 retirement or pension benefits until he was age sixty;  
22 is that correct?

23          A       Unless he qualified for a disability of some  
24 type. But standard, plain-old retirement, requires age  
25 sixty. You can get a disability component earlier than

1       that.

2               Q       Thank you.  There is an entire separate  
3 chapter in the Armed Forces Act, Section 10 USCA,  
4 regarding retirement payments, isn't there?

5               A       Are you talking about Title 10?

6               Q       Title 10, excuse me.  Yes.

7               A       Yeah, there is a whole section that the  
8 Uniform Services Former Spouse's Protection Act is  
9 appended to, if that's what you mean.

10              Q       In fact, there's a separate fund set up from  
11 which the government pays retirement benefits under the  
12 Armed Forces Retirement Act, is there not?

13              A       No, there's not- - It is paid out of current  
14 personnel appropriations.  It is not a fund, like you  
15 would have an IRA fund, that makes those payments.  It's  
16 a line-item appropriation for the defense personnel  
17 budget.

18              Q       Are you familiar with Title 10, section 1408,  
19 that--subsection H-8--that references that, "Retirement  
20 payments in accordance with this section shall be made  
21 out of funds in the Department of Defense Military  
22 Retirement Fund established by Section 1461 of this  
23 title"?

24              A       Section 1408, I think- - Isn't that the  
25 Uniform Services Former Spouse's Protection Act section?

1           Q       That does deal with that.

2           A       Right. Well, I guess it depends on how  
3       you're using the term "fund." It is paid from funds  
4       that are appropriated against the line item for  
5       personnel, retirement personnel payments.

6           Q       Are those funds the same funds from which  
7       separation or severance benefits are paid?

8           A       I remember during the time that we were  
9       working on that at the air staff, there was some  
10      discussion of that.

11                   To be honest with you, I don't remember where  
12      it came down, if it came out of that same line item  
13      entry, or if it came out of a separate appropriation. I  
14      would say it probably did come out of those funds,  
15      because I don't know of a separate appropriation that  
16      was made for separation payments. So it's got to come  
17      out of- -

18                   In order for the government to spend it, it's  
19      got to come out of some appropriation. And that's the  
20      most likely one for it to come out of.

21           Q       But you're just speculating on that, aren't  
22      you?

23           A       I don't know of any other one that it could  
24      possibly come out of.

25           Q       Okay. I'd like to go to the example that



1       you've stated in your testimony about, you believed a  
2       lieutenant commander, presently, if he were to retire,  
3       would receive in the neighborhood of \$1,800 a month.  
4       Wasn't that your testimony?

5               A       Based on the number of points that I would  
6       project for him. That's really a rough projection.

7               Q       And I'm not going to hold you to an exact  
8       projection. I simply want to use it for purposes of  
9       working through an example. Mrs. Garner is entitled to  
10      eleven fortieths of any retirement pay Mr. Marsh is to  
11      receive, correct?

12              A       Of the net disposable retirement pay, yes.

13              Q       Correct. And that eleven fortieths is, it's  
14      not exactly, but roughly 25 percent of the, what would  
15      be the disposable pay, correct?

16              A       Just a little bit more than 25 percent, yes.

17              Q       Right. And can we say that of \$1,800 a  
18      month, 25 percent of that would be approximately \$450 a  
19      month?

20              A       Yes.

21              Q       And as I understand your testimony, you  
22      stated that, given the fact that Mr. Marsh will have to  
23      repay the \$30,000 by having that deducted out of net  
24      disposable retired pay at the time he does retire, that  
25      roughly 75 percent of that total amount would be

1 withheld by the Navy, and roughly 25 percent would be  
2 paid out; is that correct?

3 A It won't be withheld by the Navy, it'll be  
4 withheld by the Defense Accounting and Finance Service  
5 in Cleveland.

6 Q Okay. But other than that clarification, is  
7 what I stated generally correct?

8 A Until the \$30,000 is repaid, that's correct.

9 Q Okay. And then it was your testimony, as I  
10 understand it, that the military would then divide that  
11 remaining four, approximately \$450 a month into a parcel  
12 that is twenty-nine fortieths to go to Mr. Marsh and  
13 eleven fortieths to go to Ms. Garner.

14 A That's correct.

15 Q Until the \$30,000 has been repaid?

16 A That's correct.

17 Q And based upon that, you testified that you  
18 didn't believe that she would be able to receive her  
19 eleven fortieths of what she'd be entitled to, correct?

20 A That's correct.

21 Q I need to ask you a few other questions. If  
22 Scott Marsh had come to the end of a term of service of  
23 enlistment in the armed forces, excuse me, in the Navy,  
24 in November of 1991, and had not been involuntarily  
25 separated, but simply his time was up and he chose not

1 to re-enlist, would he have been entitled to any kind of  
2 severance or separation benefit at that time?

3 A Well, it was my understanding he was an  
4 officer.

5 Q He was.

6 A Officers don't have terms of enlistment.  
7 They're appointed for an indefinite term. So- - I  
8 don't think the question makes sense.

9 Q My example does not work for an officer,  
10 then?

11 A No, it wouldn't work for an officer.

12 Q If he simply chose to submit his resignation,  
13 rather than be involuntary separated, involuntarily  
14 separated, would he have been entitled to any sort of  
15 disbursement at that time?

16 A In November of 1991, he probably would have.

17 MS. WILLIAMS: Your Honor, I'd object based  
18 on relevancy and- -

19 THE COURT: How is this relevant, counsel?

20 MR. BIGELOW: I think we need to establish  
21 what Mr. Marsh was and would have been entitled to at  
22 the time of the separation, trying to distinguish the  
23 issue of whether it's retirement and pension benefits--

24 THE COURT: At the time of what separation?  
25 Separation from the military?

1 MR. BIGELOW: From the military, correct.

2 THE COURT: And your last question was- -  
3 Well, ask your next question, let's see where we are.

4 Q (BY MR. BIGELOW) I just want to know, if  
5 Mr. Marsh would have voluntarily resigned from the  
6 military at that time, versus having been involuntarily  
7 separated, would he have been entitled to any kind of  
8 retirement or pension benefits at that time?

9 A Without knowing the specific plans that were  
10 available at the time, without looking at those plans, I  
11 can't tell you that. I know that there were VSI-type  
12 programs at the time for voluntary separation that did  
13 provide the same type payment. But whether he qualified  
14 under the terms of those plans, without knowing more  
15 specifics, I can't answer it in a general- -

16 Q If Mr. Marsh dies before he turns age sixty,  
17 would there be any of this retirement pay available to  
18 Mrs. Garner?

19 A It depends. I'm not sure you want to get  
20 into this can of worms, but it depends on whether or not  
21 there has been an election under the Survivor's Benefit  
22 Program. If there's been an election under the  
23 Survivor's Benefit Program, then she would have a  
24 payment, whether or not he gets it.

25 That has been changed recently in the last

1 two years as to how that's done. In the past, if the  
2 court ordered that to be done, then he would be ordered  
3 to elect that, or, if he had previously elected that  
4 option prior to the divorce, then it would continue in  
5 effect.

6 Now, there's a way that she can apply, even  
7 if it hasn't been awarded by the court, she can apply to  
8 the Defense Finance and Accounting Service in Cleveland  
9 and obtain what's called SVP, survivor benefit  
10 protection on her portion of the retirement.

11 What they do then is, the actuary will take  
12 the present value of what her share would be, and then  
13 they stretch it out for the amount of payments for her  
14 lifetime. So it actually reduces the amount- -

15 So if she was going to get, under your  
16 example, \$450 a month, then with her difference in life  
17 expectancy, I would say it would reduce it to \$375 a  
18 month. But that would then continue for her lifetime.

19 Q Okay. In the event that Mr. Marsh lived to  
20 age sixty, took his retirement that would be available  
21 to him, but died prior to the \$30,000 being recouped by  
22 the military, would basically the same result occur as  
23 what you've just described?

24 A Well, under that scenario it would be  
25 different, because she would receive eleven fortieths of

1 the \$450 until he died, and then from that time forward  
2 she would receive her portion under the SVP, if that's  
3 what you're asking.

4 Q Okay, I understand that. So I think, to make  
5 sure we've had a meeting of the minds, here, is that she  
6 would- - If this election were made about this  
7 surviving- -

8 A SVP?

9 Q - -SVP. That if that was made, in essence  
10 Mrs. Marsh would receive the eleven fortieths payment of  
11 whatever it should have been, or was to be, if Mr. Marsh  
12 died, whether he died before age sixty or after age  
13 sixty. Is that correct?

14 A Clearly if he gets to age sixty and he goes  
15 into pay status, there's no question she gets it that  
16 way. And to be honest with you, with this new election  
17 where she can apply for it herself, I don't know- -

18 That deals with what we refer to as the gray  
19 area. And that's what I'm in now. Where you've retired  
20 from active reserve service, but you haven't qualified  
21 for the age sixty payment plan yet. And I honestly  
22 would have to go back and research that to make sure I  
23 was absolutely positive.

24 But I think, as long as she's elected the  
25 survivor benefit, and he's actually got his twenty years

1 of creditable service, then whether or not he gets to  
2 age sixty to get his, she can still get hers under the  
3 SVP allocation. When he would otherwise be age sixty.

4 Q If Mr. Marsh never reached the twenty years  
5 of service, would Mrs. Garner ever be entitled to  
6 receive eleven fortieths of any type of pension or  
7 retirement benefits from Mr. Marsh?

8 A Not under that program, no.

9 Q Or from the government?

10 A No.

11 Q I believe in your testimony you made the  
12 statement that if she doesn't get her eleven fortieths  
13 out of the retirement--I think you're referring to the  
14 full retirement benefit in my example, which would have  
15 been the \$1,800 a month--you made the statement she will  
16 never get it. I just want to ask you about that  
17 statement.

18 I think what you were stating is that--and  
19 you tell me if I'm wrong--is that the amount, eleven  
20 fortieths of the \$450 a month she would be getting if  
21 the recoupment was going on, is a small enough amount  
22 that you were suggesting that it may take a long time,  
23 or forever, to recoup that amount. And there's no  
24 guarantee based upon whether she lives, or longevity, or  
25 whatever.

1           A       No. No, the point was that there's going to  
2       be 75 percent of that retirement pay that's going to go  
3       back to the government. So she's never going to get  
4       eleven fortieths of that, what is it, \$1,350 a month  
5       that's going back to the government. She would only get  
6       her eleven fortieths of the \$450 that's left. But he's  
7       already got the \$30,000 that the \$1,350 a month is  
8       paying back.

9           Q       Okay. Now, using that as a base, if- - That  
10      could be simply remedied, couldn't it, by Mr. Marsh  
11      simply permitting Ms. Garner to receive the full \$450 a  
12      month, which would be roughly equivalent to what she was  
13      going to receive under the eleven fortieths of \$1,800 a  
14      month.

15           A       No, he couldn't.

16           Q       He couldn't do that?

17           A       No, because under the Uniform Services Former  
18      Spouses Protection Act, there are limits on what can be  
19      paid, and for retirement benefits it's a maximum of 50  
20      percent unless there's an arrearage or some other  
21      things. It can go up to 65 percent if there's an  
22      arrearage on alimony or child support at the time, but  
23      the basic limitation under FSPA is 50 percent.

24           Q       You're saying that's the most that could be  
25      garnished from Mr. Marsh, is this 50 percent or 60



1 percent?

2 A That's the only amount that the Defense  
3 Finance Accounting Service will send her, period.

4 Q I understand that. But Mr. Marsh, certainly  
5 there are ways that Mr. Marsh could, for example,  
6 receive a check and pay out of his own pocket the sum to  
7 Mrs. Marsh, correct?

8 A Well, I guess, yes.

9 Q There's no law preventing him from doing  
10 that, is there?

11 A There's no law that prevents it, but it kind  
12 of undermines the whole purpose of the Former Spouses  
13 Protection Act.

14 Q Well, I'll move on to another area. When the  
15 military makes a payment of moneys to Mr. Marsh, as it  
16 did in February of 1992, is it your opinion that the  
17 military knows what it's doing when it terms it as  
18 severance pay or separation pay, rather than retirement  
19 pay?

20 A Well, the problem I have with that is the W-2  
21 that they provided showed it as retirement pay.

22 Q Okay, on that W-2, if it was severance or  
23 separation pay rather than retirement, what- - Where  
24 should it have been marked on that particular W-2?

25 A On this particular one, they don't have a

1 block for VSI that I can tell. The print is so small  
2 that I can't- -

3 THE COURT: Let me interrupt. Counsel, how  
4 much more do you have with this witness?

5 MR. BIGELOW: Just a couple of minutes, Your  
6 Honor.

7 THE COURT: Okay.

8 Q (BY MR. BIGELOW) To your knowledge- -  
9 Strike that. Do you recall looking at W-2 forms  
10 provided for the military during the time frame of this  
11 W-2, for the year 1991, previously?

12 A Most of what I've had to do with this is  
13 people coming into the program that were wanting to make  
14 sure they could get their money, or they could get their  
15 retirement after they came in.

16 Q So you don't recall whether there's an, on  
17 W-2s generated by the military at this time, whether  
18 there was a box for severance pay, versus simply marking  
19 it as retirement or pension pay, do you?

20 A I honestly don't, no.

21 Q To your knowledge, was it a course of dealing  
22 of the military to include a reference to severance or  
23 separation pay on a W-2 form in the same box as pension  
24 or retirement pay?

25 A All I can go by is the one that's sitting in

1 front of me, and I would say I guess the answer would be  
2 yes.

3 Q That they do do that?

4 A Yes.

5 Q Because it's clear in your mind that what  
6 Mr. Marsh got was a severance or separation pay,  
7 correct?

8 A That's what they called it.

9 Q One last thing. You stated that in your  
10 opinion, under Utah law, that this severance or  
11 separation pay Mr. Marsh received became a retirement  
12 benefit?

13 A It was a retirement benefit at the time it  
14 was paid.

15 Q And what's your basis for saying that?

16 A Well, if you used the analysis that the court  
17 made in the Woodward formula, this is a deferred  
18 compensation that was accrued during the period of time  
19 that the parties were married that is received by one  
20 party rather than the parties jointly.

21 I think it fits into those criteria about as  
22 squarely as it can fit. I think the only difference is  
23 that it has a name of severance pay that denotes that it  
24 is an advance payment that avoids that speculative  
25 problem that you're talking about, that you mentioned in

1 your opening statement.

2 Q If Mr. Marsh died before he's sixty, would  
3 his estate be required to pay the \$30,000?

4 A No. That's only repaid out of retirement  
5 payments.

6 Q And his retirement payments are not vested  
7 until he has completed his twenty years and turned age  
8 sixty, correct?

9 A No, they're vested as you go along. The  
10 military is a defined benefit plan, an unfunded defined  
11 benefit plan. And he's totally vested in it. Whether  
12 he reaches the payment age is another question.

13 Q If he doesn't reach the payment age, though,  
14 he would never, he or his estate would never be entitled  
15 to any retirement benefits.

16 A His estate will never be entitled to any  
17 retirement benefit, whether he gets to age sixty or not.

18 Q So if he doesn't get to it, he won't get it  
19 either?

20 A If he doesn't get there he won't get it, but  
21 there is a separate provision to take care of her.

22 MR. BIGELOW: That's correct. Thank you.

23 THE COURT: Anything by way of redirect?

24 MS. WILLIAMS: No, Your Honor.

25 THE COURT: Sir, you may stand down. Thank

1       you for your assistance. Any reason why Mr. Crist can't  
2       be excused at this time?

3               MS. WILLIAMS: No, Your Honor.

4               MR. BIGELOW: No, Your Honor.

5               THE COURT: Mr. Crist, now you can tell  
6       witnesses you know what it feels like to be in the hot  
7       seat. Thank you again for your help.

8               THE COURT: Counsel, I'm assuming that you're  
9       going to want to make some brief argument. It's now a  
10      quarter to 12:00. Why don't we have our lunch break, I  
11      haven't given my court reporter or anyone else much of a  
12      break this morning, and then come back and pick up at  
13      about 1:15, 1:30, and take what time you need. Any  
14      problem with that?

15              MS. WILLIAMS: It's the court's choice. I  
16      don't know how much time counsel has, but we probably  
17      would need about a half hour, I would guess.

18              THE COURT: That's what I would figure.

19              MR. BIGELOW: I suspect that, as well, and it  
20      would be my preference to do it at 1:30.

21              THE COURT: Let's do it at 1:30. We'll see  
22      you then, and if you wish to leave anything in the  
23      courtroom in the meantime, you can. I'll set aside  
24      thirty minutes at that juncture. Thank you counsel.

25                       (Noon recess.)

1                   THE COURT: Let's proceed, counsel, when  
2                   you're ready.

3                   MS. WILLIAMS: Your Honor, I would call  
4                   Mr. Marsh.

5                   THE COURT: Mr. Marsh, if you'd come forward,  
6                   please.

7  
8                   SCOTT A. MARSH  
9                   called as a witness by and on behalf of the Plaintiff,  
10                  having been duly sworn, was examined and testified as  
11                  follows:

12                  DIRECT EXAMINATION

13                  BY MS. WILLIAMS:

14                  Q        Would you state your name, please.

15                  A        Scott Allan Marsh.

16                  Q        And your address?

17                  A        10034 Jordan Crest Circle, South Jordan,  
18                  Utah, 84095.

19                  Q        How old are you?

20                  A        Forty-five.

21                  Q        Are you in the reserve?

22                  A        Yes, I am.

23                  Q        And is that the Naval Reserve?

24                  A        That's correct.

25                  Q        And how long have you been in the Naval

1 Reserve?

2 A Six years.

3 Q Since 1991?

4 A That's correct.

5 Q So you have twenty years of military service  
6 at this juncture?

7 A Yes.

8 MS. WILLIAMS: No further questions.

9 THE COURT: Anything further?

10 MR. BIGELOW: No, Your Honor.

11 THE COURT: You may stand down. Thank you  
12 for your assistance. Any other witnesses?

13 MS. WILLIAMS: No, Your Honor, we would rest.

14 THE COURT: All right. And you've rested?

15 MR. BIGELOW: That's correct, Your Honor.

16 THE COURT: All right. And both sides have  
17 rested, both sides are entitled to make closings.

18 Let me indicate my understanding of the  
19 status of the exhibits. One, 2, 3 and 5 are in. Is 4  
20 in?

21 MS. WILLIAMS: No, I didn't- -

22 THE COURT: Ten, 13 and 15 are in.

23 MS. WILLIAMS: Thank you, Your Honor.

24 Again, just some of the background, Your  
25 Honor, because I think it is important, because of the

1 court's equitable nature, that this is a 15-year  
2 marriage where four children were born as issue. That  
3 during the marriage Mr. Marsh was the wage earner,  
4 Ms. Marsh, now Garner, was the homemaker, and she  
5 accrued no retirement benefit throughout the course of  
6 the 15-year marriage.

7           They were married in 1974, divorced in August  
8 of 1989. That at the time of the divorce, Mr., or  
9 during the marriage and at the time of the divorce,  
10 Mr. Marsh had fourteen years of service in the military,  
11 and under the Uniform Spouse Protection Act, Uniform  
12 Services Former Spouses Protection Act, Public Law  
13 97-257, Ms. Garner is entitled to, we don't call it a  
14 QDRO, they will let you call it anything else, but she  
15 is allowed to an order that will be directed to the  
16 military that will tell the military that because she  
17 has ten years of marriage during which the member had  
18 ten years of service, that the military, then, under  
19 that act, will send that retirement portion directly to  
20 her.

21           As the court's aware, under Woodward and  
22 numerous other cases, it was determined that, unlike the  
23 old law, that spouses were left out in the cold, it was  
24 determined that retirements were marital assets. It  
25 took the military a while to catch up. They've caught



1 up to the extent of the ten-year period. If it's under  
2 ten years then you're left to your own devices.

3 Ms. Garner is awarded eleven fortieths of his  
4 retirement, and it's clear that in February of '91 he  
5 received a disbursement of \$30,000 gross, \$24,000 net.

6 The reason that we've done both exhibits is  
7 because, whether you take the gross or the taxed amount,  
8 is a 20 percent tax bracket. Certainly there's been no  
9 evidence produced by Mr. Marsh that he actually ended up  
10 paying that full amount after his, by the time he filed  
11 his taxes. Who knows what the actual taxed amount was?

12 And I believe that that's one of the reasons  
13 that Mr. Crist testified that there had been a recent  
14 change, so that the military doesn't divide up the net  
15 any more, they divide up the gross amount, so that the  
16 individuals pay taxes at whatever level they are in,  
17 whatever their tax bracket is.

18 Exhibit 15, which is titled 10 USC 1174- -

19 THE COURT: So you're suggesting that  
20 Mrs. Marsh is entitled to eleven fortieths of the  
21 \$30,000 gross.

22 MS. WILLIAMS: Yes, Your Honor.

23 THE COURT: All right, go ahead.

24 MS. WILLIAMS: We are also requesting a  
25 reasonable interest, and I used 10 percent because for

1 years the courts have used 10 percent as a prejudgment  
2 interest, maybe just out of simplicity, because I've  
3 never found it anywhere. But Mr. Marsh has had the use  
4 and benefit of those funds since he received them in  
5 February of 1991. And, indeed, since 1992, Ms. Garner  
6 has been trying to get her portion, her share.

7 The first order from December of 1992, after  
8 a hearing, ordered Mr. Marsh to provide more  
9 verification and information regarding that  
10 disbursement. It also specifically stated that  
11 Ms. Garner had a right to assert her interest in that.  
12 Even though that order was outstanding, we still added  
13 into our petition of April '96 in paragraph 5 that the  
14 court needed to either consider it a pension plan for  
15 division, or that the court should consider it as a  
16 marital asset for purposes of division.

17 Clearly his receipt of those funds is a  
18 substantial and material change of circumstances, since  
19 the entry of the decree.

20 The applicable code that really ties it to  
21 the retirement, Your Honor, is title 10 USC 1174 sub H,  
22 which very clearly says that the member has to pay the  
23 \$30,000--in this case \$30,000--back upon retirement.  
24 And I don't think there's any dispute that it says that  
25 you do that.

1           Mr. Crist, fortunately, was able to explain  
2   to us in more detail what that meant, and how it's  
3   actually paid out. The net effect is that, since it's  
4   paid out at the rate of 75 percent of each month's  
5   disposable pay, that he would then get 25 percent of  
6   what he would normally get.

7           What Mr. Crist also testified to, however, is  
8   that because he gets more points because he's retiring  
9   as a reservist, since he gets more points for those  
10   fifteen years of service, that the actual end result, if  
11   merely an allocation order, what would be a QDRO, is  
12   granted to her for eleven fortieths, she doesn't even  
13   get eleven fortieths of the 25 percent, because that's  
14   not the way it's calculated by the military in terms of  
15   reserves and active duty.

16           It's unquestioned from the testimony that he  
17   has his twenty years in, that unless he dies, that at  
18   age sixty he is going to receive this, his pension.

19           The testimony from Mr. Crist also was that,  
20   because of the need to protect spouses, that there is a  
21   new law that allows, under the current law, what is  
22   called, he called the SBP election, a Survivor's Benefit  
23   Program, that would allow Ms. Garner to apply now to the  
24   Defense Finance and Accounting in Cleveland for some  
25   rights to the retirement, even if he dies prior to

1     attaining the age of sixty years.

2             The testimony from Mr. Crist is that the  
3     same, to his knowledge, that the same fund of money that  
4     pays out the severance from the military department is  
5     the same fund that pays out the retirement. He wasn't  
6     absolutely sure, but he did say he couldn't think of any  
7     other place where the moneys have been earmarked for  
8     that purpose.

9             It was clear also from Mr. Crist's testimony  
10    that if the court does nothing, and if Mr. Marsh is  
11    permitted to retain the moneys he's received, then it  
12    completely eviscerates her retirement. It does not  
13    allow her to be made whole. There is absolutely no way  
14    that she can get the portion she was awarded in the  
15    decree of divorce.

16            Now, apparently counsel's indicating, and  
17    questioned Mr. Crist, "Well, he can just pay it to her  
18    himself."

19            And what Mr. Crist said is, "Well, yeah, but  
20    that completely destroys the purpose of the Uniform  
21    Services, Former Spouses Protection Act." Because the  
22    court is very much accustomed to people coming into  
23    court chasing after people who aren't paying their  
24    required bills and the requirements under the decree.  
25    And again, that's what he's asking, apparently, that she

1 do.

2 He's, in a sense he would end up with a great  
3 deal. He's got a loan against his retirement, she has  
4 to pay it back, and he isn't in any way required, except  
5 for maybe at the age of sixty, if we can find him, he's  
6 not required to pay it back to her.

7 He's got the current use and benefit. It was  
8 an asset that accrued over the course of the marriage,  
9 and it is important that it be divided.

10 Counsel will provide, or has provided the  
11 court with a California case, which is In Re: Marriage  
12 of Kuzmiak, and it's a 1986 case out of California that,  
13 as I read it--and I'd like to discuss it now, because  
14 he's going to bring it up. As I read it, if you read it  
15 quickly, you don't really get what it's saying, I don't  
16 think. I think you have to read it two or three times.  
17 At least I was, maybe I'm slow.

18 But the court, in its analysis, determines,  
19 and did determine, that the separation pay under  
20 California law was separate property, and not marital  
21 property.

22 I am going to disagree with their reasoning.  
23 I think it was clear from Mr. Crist's testimony it's  
24 based on prior years of service, that it's not like a  
25 severance package, where you're paying for the next six

1 months. But even if you agree to some degree with, or  
2 if you agree with their characterization of it, once  
3 Mr. Marsh has taken that, and once he's earned his right  
4 to retirement, then it's a different thing altogether.

5 Because in this case, what the court said is  
6 that the government's withholding of the \$30,000 from  
7 his retirement pay deprives wife of her community  
8 property interest in these funds. The \$30,000 that  
9 should have been in the retirement.

10 The election that he took, in the case of  
11 Kuzmiak, is inconsistent with the protective philosophy  
12 of the community property law.

13 Now, I understand California's community  
14 property law, and Utah is a hybrid of equitable  
15 distribution. But I think that California has some of  
16 the same concepts, which is if you've earned it during  
17 the marriage, it's a marital asset.

18 The court, on page 648, said that if they  
19 simply gave that \$30,000 to him, it would deprive the  
20 wife of her interest in the funds. And the court said,  
21 "For these reasons we conclude the wife has a community  
22 property interest in husband's longevity pension,  
23 including the \$30,000 separation pay the government will  
24 withhold from his retirement benefits."

25 This holding recognizes the separate property

1 characteristic of the separation pay, in quotes, "Until  
2 husband's actions in reenlisting and earning a longevity  
3 pension." And it goes on to say, same sentence, "And  
4 also protects wife's rights to a community property  
5 asset."

6 The court said afterwards that, "The proper  
7 division of husband's longevity retirement benefits  
8 remains within the trial court's discretion; the parties  
9 may reach a reasonable agreement concerning the division  
10 of the benefits."

11 So what the court was saying in this case,  
12 Your Honor, is that if you don't include that \$30,000,  
13 even if you call it a separate asset, that you're going  
14 to be damaging, or injuring her rights to that asset.

15 What perhaps the lower court and the  
16 appellate court didn't have in the record on this case  
17 was the kind of testimony that the court's had from  
18 Mr. Crist today, which is that if this court doesn't  
19 divide up this asset now, that it creates a myriad of  
20 problems in the future.

21 There is no way, given the scenario the court  
22 has before it, that the court can compensate Ms. Garner  
23 with what minimal moneys will be available when  
24 Mr. Marsh retires. There is no way to divide it up.  
25 The only way to pay her her interest is to pay her the

1       portion of the \$30,000 that has already been received.

2               I think that the distinguishing feature of  
3       this case from our case is likely that--and we don't  
4       have that before us--but likely that the lower court  
5       didn't have all the information, the appellate court  
6       didn't have the record before it, indicating that if you  
7       don't give it to her now, she's cut out when he retires.

8               THE COURT: Let me turn to another question.  
9       This interest concept. Why is the 10 percent interest  
10      figure appropriate if I determine that interest is  
11      warranted?

12              MS. WILLIAMS: Your Honor, we have asked for  
13      prejudgment interest, and prejudgment interest  
14      historically, in my practice, has been assessed at 10  
15      percent. Again, I really have never fully understood  
16      that. In fact, I've called, I've researched it, I've  
17      called the clerk's office, and it's just one of those  
18      magic numbers that's unexplainable.

19              I have not gone back to try to figure out  
20      what judgment interest was from 1991 to the present.  
21      Certainly if the court believes judgment interest is  
22      appropriate, we would ask the court for judgment  
23      interest, which I think is 7.64 percent at this point.

24              THE COURT: All right.

25              MS. WILLIAMS: And lastly, Your Honor, as to



1 the issue of attorneys fees, again, Ms. Marsh, or  
2 Garner, has been chasing this issue for five years, now.  
3 It's been an ongoing issue. As was testified through  
4 proffer, at one point in the pretrial there was an  
5 admission by counsel that it was a pension. Certainly,  
6 based upon those kinds of representations, there is no  
7 reason that plaintiff would not continue pursuing it.

8 Besides the fact that the W-2 seems to be  
9 clear, besides the fact that, given the testimony that  
10 we have, and all of the evidence, that it is an asset, a  
11 marital asset that should be divided.

12 We have requested attorneys fees and costs  
13 relating to the expert. Our attorneys fees are \$1,125,  
14 that's probably an understatement because there should  
15 be another hour of attorneys time added to that, for  
16 another \$150, because of the longer trial than I  
17 anticipated. That would be \$1,275. Also that it was  
18 anticipated that the fees related to Mr. Crist would be  
19 five to \$800. We have not gotten a final bill from him,  
20 he has been paid \$400 thus far.

21 We would anticipate, given the length of the  
22 trial, again, that it would run the \$800 figure. We can  
23 certainly get a statement from him to confirm that.

24 Ms. Marsh testified through proffer, she has  
25 no moneys with which to pay this. He, on the other

1 hand, has had the fund of money ever since '91. She  
2 testified also that Mr. Marsh was ordered in the last  
3 court order to pay her attorneys fees, and he has taken  
4 no action to do so, even though attempts have been made  
5 for collection, and they have come to no avail at this  
6 point. Thank you.

7 THE COURT: Thank you, Ms. Williams.  
8 Counsel?

9 MR. BIGELOW: Your Honor, I have previously  
10 provided to opposing counsel a, just some materials  
11 stapled together of certain statutes that I'd like to  
12 present to the court.

13 THE COURT: Yes, I'd be happy to consider  
14 those, counsel.

15 MR. BIGELOW: I'd like to submit that to you,  
16 then.

17 THE COURT: Thank you.

18 MR. BIGELOW: Your Honor, I think if we start  
19 with a clear reading of the decree of divorce in this  
20 case, which, as I understand it, was a stipulated  
21 agreement, and was not one that was submitted to the  
22 court for its decision, paragraph 7 is very clear. And  
23 that's the one we're talking about.

24 Paragraph 7 refers to all pension and  
25 retirement benefits that the defendant may receive upon

1 his retirement from military service. And I think,  
2 under every look at the testimony that's been presented  
3 today, including Mr. Crist's, there's absolutely no  
4 question that what we are talking about that Mr. Marsh  
5 received was not retirement or pension, but was  
6 separation, or severance pay.

7 Now, if I might, Your Honor, the first page  
8 of the materials I provided to you refers to Title 10,  
9 section 627, indicating what Mr. Marsh had testified  
10 about regarding the effect of failure of selection for  
11 promotion, that when someone is not advanced, and as  
12 Mr. Marsh testified about happened to him, that's what  
13 resulted in his involuntary separation.

14 I will indicate to the court that I had not  
15 pulled--and I just noticed it now--from this packet of  
16 information a letter that I had sought to admit as  
17 evidence, and the court sustained an objection to that,  
18 so I think it would be appropriate, the second page, to  
19 go ahead and delete from the court's packet of  
20 materials, and I apologize for not going through and  
21 pulling that out.

22 THE COURT: That's all right.

23 MR. BIGELOW: But at any rate, it's clear  
24 we're talking about a separation. The reason we get to  
25 section 1174, that is the one that was relied upon by

1 Mr. Crist and by counsel for Ms., by counsel, to argue  
2 this entire issue is referenced in the next section,  
3 section 642, indicating that an officer who's discharged  
4 under this chapter is entitled, if eligible therefor, to  
5 separation pay under section 1174 of this title.

6 Now, there has been no evidence or argument  
7 to the contrary today but that Mr. Marsh was paid  
8 pursuant to this chapter of the, of Title 10, which  
9 refers to separation pay. Section 1174, which is the  
10 next, if you get to the next page, is specifically the  
11 section that deals with involuntary discharge, or  
12 release from active duty, and why that results in a  
13 separation or severance pay.

14 Section 1174 subsection A indicates the  
15 entitlement that Mr. Marsh had to this severance pay, or  
16 excuse me, separation pay, that was provided by the Navy  
17 to him, the \$30,000 sum. Again, this is specifically  
18 identified as separation pay. It is not retirement, or  
19 pension pay.

20 I would indicate to the court on the next  
21 page, which is numbered page 46 at the bottom, I hadn't  
22 highlighted, but the court had asked the question  
23 earlier, "How is the amount of separation pay  
24 calculated?" Well, there is a specific calculation  
25 criteria set forth in this section, subsection D.

1           It states amount of separation pay, the  
2           amount of separation pay which must be paid to a member  
3           under this section is, there's a calculation, 10 percent  
4           of the product of his years of active service and twelve  
5           times the monthly basic pay which he's entitled to at  
6           the time of his discharge, or, one half of the amount  
7           imputed under clause 1.

8           I will confess, I don't know quite how the  
9           military comes down to a final number from that formula,  
10          but clearly there is a calculation based upon his last  
11          twelve months' pay, in part, which would go towards the  
12          issue, which is the stated, I think, congressional  
13          intent regarding this section, and that is to assist  
14          someone who has been involuntarily separated from the  
15          armed services to have the opportunity, by virtue of  
16          this separation pay, to work their way back into  
17          civilian life.

18          And it is that very concept that I believe is  
19          the reason that the court in the Kuzmiak case that I  
20          have attached here next, it's the very reason that court  
21          came to the conclusion that this was a separation,  
22          severance pay, that was a separate asset and not a  
23          community asset, because of the nature of the intent to  
24          assist an involuntarily separated military member to get  
25          back into society.

1           I would indicate to the court that subsection  
2 H at the bottom of this page, page 46, is the subsection  
3 that we specifically dealt with, and it is absolutely  
4 clear, Your Honor, that separation pay and pension and  
5 retirement pay are different things under this act. And  
6 that the money that was paid to Mr. Marsh is separation  
7 pay.

8           The only question about whether or not it's  
9 separation pay comes from the exhibit, I believe it is  
10 1, that is the W-2 form where the "pension" box is  
11 marked, and I believe--I'm not quite sure what the  
12 testimony of Mr. Crist was--he had never seen a W-2 form  
13 with a different place to mark for separation pay than  
14 in the pension box, and that he was not aware of it  
15 being marked any place else on a W-2, and to the best of  
16 his knowledge, the retirement and separation benefits  
17 were reflected in the same box on the W-2 form.

18           What is clear in the Exhibits 10 and 13  
19 submitted by plaintiff, is that there is a specific  
20 calculation or reflection of the \$30,000 sum as  
21 separation pay. There is a specific notation indicating  
22 that \$6,000 was withheld in terms of federal income tax,  
23 and that the net that came to Mr. Marsh as a result of  
24 that was \$24,000.

25           At any rate, going on, regarding subsection H

1 of section 1174, again, it's clear that separation pay  
2 is treated different than retirement pay. And I  
3 recognize that the problem in this particular situation  
4 is that, in the event Mr. Marsh lives to be age sixty,  
5 there will be required to be a repayment of the \$30,000  
6 that he got.

7           There are a whole bunch of sides to that  
8 particular issue. One of the sides is, first of all, he  
9 has to live to age sixty. Secondly, or- - Or that  
10 \$30,000 repayment will never happen. And according to  
11 Mr. Crist's testimony, assuming this appropriate  
12 designation is put in place of this Surviving Benefits  
13 Protection, she would receive the same thing she would  
14 be entitled to if the \$30,000 had not been paid to  
15 Mr. Marsh, minus whatever- - Well, there's going to be  
16 an adjustment, because it's a surviving spouse's benefit  
17 package that is adjusted somehow, not as a result of the  
18 \$30,000, but as a result of Mr. Marsh dying before age  
19 sixty.

20           But there are other, I mean there are  
21 other- - Counsel wants to talk about the uncertainties  
22 of Ms. Marsh ever collecting this money. Your Honor,  
23 that's inherent in every award where there is an  
24 expectation that that award will not be paid until into  
25 the future, depending on whether--especially a lengthy

1 period of time in the future--depending on whether each  
2 side survives to that point in time.

3 If, for example, if Mrs. Marsh, or Ms. Garner  
4 passed away before Mr. Marsh turned sixty, but this  
5 court had required Mr. Marsh to pay that money back, or  
6 pay that money to Ms. Marsh, conceivably she never would  
7 have received any of that money. And the factors that  
8 are thrown into this kind of pension retirement factor  
9 always create uncertainty about what's going to happen  
10 fifteen years into the future. Mr. Marsh is forty-five,  
11 we're looking at fifteen years into the future.

12 If I might, Your Honor, go on. The Kuzmiak  
13 case, I know the court probably hasn't had, in fact I'm  
14 sure you haven't had a chance to read it in detail. I  
15 would indicate to the court that it is clear from that  
16 case, from this--and it is a California decision, and I  
17 will tell the court it's the only one I could find  
18 anywhere on the subject--but in this decision the court  
19 clearly found that this separation pay was different  
20 from retirement pay, and that it was a separate asset,  
21 and not to be counted as part of the community assets.

22 The court then did go back and indicate that,  
23 at the time of the making of the decision about how to  
24 divide the assets, the court did say in the Kuzmiak  
25 case, that the wife presently had an interest in the



1 husband's non-mature longevity pension. That's on page  
2 648.

3 And based upon that, the court took, stated  
4 with its two holdings that, one, the property was  
5 separate, but two, the wife had an interest in the  
6 husband's non-matured longevity pension. It sent the  
7 matter back to the lower court to be decided. We don't  
8 have a report of a resolution from this particular case,  
9 and so I can't report to you how the lower court dealt  
10 with that.

11 I would indicate, though, that the appellate  
12 court in California, it looks like the Second District  
13 Appellate Court in California that decided this  
14 particular case, referenced the parties back to another  
15 California case called In Re: Matter of Gilmore. And  
16 unfortunately I just had time to grab one copy of that  
17 this morning, I've got a copy of it here, and I haven't  
18 given one to counsel yet. Because I just got the one  
19 copy made, I'd be happy to make some more copies and  
20 distribute it, or- -

21 THE COURT: What does it say?

22 MR. BIGELOW: - -or make it available to  
23 whoever. But Your Honor, basically what it says is that  
24 the lower court should divide the property in such a way  
25 that at the time that the pension benefits are

1 payable--but it was referring to pension benefits--that  
2 at that point in time the divorced spouse who was  
3 receiving a percentage, or pro rata portion, would be  
4 entitled at that time to receive their pension, and that  
5 the party who was actually receiving the retirement, had  
6 worked for the company that was going to be paying for  
7 the retirement, could not make decisions to delay  
8 receipt of that pension money by virtue of, instead of  
9 retiring at age sixty-two, the first time they could  
10 retire, choosing to wait until age seventy and then  
11 retiring, and for the interim eight-year period then the  
12 spouse would not receive any benefits.

13 The California court said no, the spouse that  
14 could have received benefits at age sixty-two can't go  
15 put off, and you have to make those available to that  
16 spouse at age sixty-two, or as soon as it was available.  
17 Dealing only with retirement benefits.

18 And so that's as much direction as those  
19 courts came up with in terms of providing direction for  
20 us here. But I would indicate that I don't think that  
21 law is any different than where we stand in terms of the  
22 current understanding, here, of retirement plans, that  
23 they are customarily to be paid out at the time that the  
24 pension or retirement fund is available to be paid.

25 I would indicate to the court, if you go on

1 in the packet of materials I've provided, that--and this  
2 is, gets into an area that Mr. Crist was not conversant  
3 with, apparently--section 1408, it's chapter 74 of Title  
4 10, and it gets into the issue of retirement pay. It's  
5 a totally different chapter than the earlier chapter we  
6 were dealing with on severance or separation pay.

7 And in this particular chapter, in section  
8 1408, it gets to a definition of this term, "disposable  
9 retired pay." On page, what is page 105, it talks about  
10 "disposable retirement pay, meaning the total monthly  
11 retired pay to which a member is entitled, less amounts  
12 which one are owed to the U.S. for previous overpayments  
13 or for recoupments." So that's where the law comes in  
14 that permits the, in essence, coupled with the prior  
15 section, 1174-H, that permits the recoupment.

16 But going on in this section, and it is  
17 section 1408 subparagraph H-8, it's reflected on page  
18 109, it indicates that, "Payments in accordance with  
19 this subsection shall be made out of funds in the  
20 Department of Defense Military Retirement Fund  
21 established by section 1461 of this title."

22 And so there is, in fact, contrary to  
23 Mr. Crist's recollection, a specific fund that's set up  
24 by the government for the purpose of paying out  
25 retirement benefits.

1           And then the last page I have attached, the  
2   last two pages I've attached references, number one,  
3   what the, in section 1462, what the assets of the fund  
4   are, and section 1463, who receives payments from the  
5   fund. And the first subsection is A-1, "retired pay  
6   payable to members on the retired lists of the Army,  
7   Navy, Air Force and Marine Corps." And I point that out  
8   to Your Honor to indicate that, not only are these types  
9   of pay, separation and pension, different in talk,  
10   they're different in funding, they're different by  
11   statute.

12           The controlling document, the decree of  
13   divorce in this case, only references pension and  
14   retirement benefits. It was a document that was  
15   negotiated between the parties, who had counsel, back in  
16   1989. And presumably the issue of severance, or  
17   separation pay could have been dealt with at that time,  
18   it was not.

19           But under any circumstance--at least it was  
20   not from a plain reading of the decree of divorce--but  
21   that asset, that the asset that Ms. Garner is claiming  
22   Mr. Marsh's time in the military, that was in existence  
23   in 1989 at the time of the decree of divorce, and from a  
24   reading of all of these, the decree, the statutes, the  
25   cases, the case that I've supplied to the court, there's

1 no question, severance pay is a separate issue, and it  
2 was not brought up in the decree.

3 To somehow, at this point, go back in time  
4 and open up the decree and permit an opening up of the  
5 decree to change paragraph 7 to include separation or  
6 severance pay, to me seems to be permitting a revision  
7 or review of that property distribution many, many  
8 years--way past any length--after the fact, and could  
9 not be permissible under our laws regarding going back  
10 and reviewing judgments.

11 At any rate, Your Honor, the issues to me  
12 seem absolutely crystal clear in terms of the difference  
13 between the types of payments. Mr. Crist and  
14 Ms. Williams both have argued, or stated somehow, that  
15 Ms. Garner will never get her money if she doesn't get a  
16 judgment against Mr. Marsh for the eleven fortieths of  
17 the money that was, that came to him by separation pay.

18 The other side of that coin is, Your Honor,  
19 in the event that Mr. Marsh lives to age sixty and  
20 starts to collect his retirement pay but Mrs. Garner  
21 does not live that long, or is nowhere to be found, she  
22 would have received a distribution of money, based upon  
23 what she's asking for right now, that legally she ought  
24 to be entitled to repay to the military.

25 Because if he's going to have to repay the

1     portion of the \$30,000 that he got, and then she gets  
2     some of it, then she's going to have to repay that  
3     portion, as well. It would not be fair to require him  
4     to repay the entire amount- -

5             THE COURT: My understanding is it comes out  
6     of each of their shares.

7             MR. BIGELOW: At the time- - If they're both  
8     alive, and Mr. Marsh is starting to see retirement, yes,  
9     it would come out of their both of their shares.

10            THE COURT: And Mr. Marsh is what?

11            MR. BIGELOW: Forty-five. Excuse me.  
12     Mr. Marsh retired and started to receive the retirement,  
13     then it would come out of both of their shares.

14            THE COURT: Then they're both repaying. But  
15     if she receives nothing now, she's repaying something  
16     she never received. And that seems to, it seems to me,  
17     is key to this whole analysis.

18            MR. BIGELOW: Well, she may never be entitled  
19     to any of that money, either. If she does the surviving  
20     spouse benefit option that has been addressed by  
21     Mr. Crist, then she would receive whatever the eleven  
22     fortieths of the total, not just eleven fortieths of the  
23     smaller amount. If Mr. Marsh did not live until he was  
24     sixty.

25            If Mr. Marsh lives to sixty, and she does

1     also, well, she lives until then also, and he's  
2     collecting retirement, then it's true she, in essence,  
3     would, be only getting eleven fortieths of the  
4     disposable amount. If the court will remember my  
5     example of Mr. Crist, on an \$1,800 a month payment,  
6     there would be \$450 that, roughly, that would be paid  
7     out. And under the repayment process, only Mrs. Garner  
8     will only receive eleven fortieths of that \$450, and  
9     Mr. Marsh the remaining portion. I think, frankly, I  
10    think that can be easily dealt with. But that's what  
11    would happen, based upon Mrs. Garner not getting any  
12    money right now.

13                 However, if she got money right now, and she  
14    was not available to repay her portion, then Mr. Marsh  
15    would be required to pay back all of the money. So in  
16    essence he's paying twice. He's paying, if he were  
17    required to pay some now, and then he lived to age sixty  
18    and she was not available, he would still have to repay  
19    the full amount, and then he would be paying it a second  
20    time to the military. The first time to her and the  
21    second time to the military, and that's not fair or  
22    equitable, either.

23                 At any rate, Your Honor, it seems to me that  
24    the way to deal with this matter is to let things be  
25    what they are stated, which is in the decree of divorce,

1 pension and retirement benefits when Mr. Marsh gets  
2 them. She gets her eleven fortieths, and Mr. Marsh  
3 would stipulate that until the \$30,000 sum was paid  
4 back, this court could order that Mrs. Marsh be entitled  
5 to receive his full amount, as well as her full amount  
6 from the \$450 in the example I used.

7 And if the court were to do that, what that  
8 would do is, until the \$30,000 was repaid out of the  
9 portion that would come from the military to these two  
10 people, Mrs. Marsh, or Ms. Garner would receive within a  
11 few dollars everything she would have received if she  
12 received eleven fortieths of the full \$1,800 a month.  
13 And that's a way to ensure that she gets paid.

14 The plaintiff seems to make a big deal out of  
15 the fact that there's a question about whether Mr. Marsh  
16 will pay. You know, Mr. Marsh deserves credibility in  
17 this case, Your Honor. He has been in here, and he has  
18 paid a substantial sum of child support and alimony for  
19 a lot of years, now, and he was current, in terms of his  
20 mind, with Recovery Services up until the time of the  
21 last hearing. And then, since then, based upon the  
22 orders of this court, he's had to go back and is working  
23 out the payment of different amounts, but he's still  
24 making those payments.

25 And Mr. Marsh does not deserve, in my view,



1 Your Honor, to be treated as though he is a credit risk  
2 in this particular case, based upon his track record.  
3 And, in fact, it doesn't really matter that much,  
4 because there is going to be money coming from the  
5 military as long as Ms. Garner's alive.

6 So under any circumstance, Your Honor, I  
7 believe that we have to treat these things as they are.  
8 It's separate property, separate pay, it's separation  
9 pay. It's not pension, it's not retirement. The  
10 statutes clearly hold that. The only case that we can  
11 find holds that, that it is a sole and separate asset.  
12 And the very moneys that the plaintiff is asking for are  
13 paid from an account that is not a retirement or pension  
14 account with the U.S. Government. It's from a different  
15 account, not the retirement and pension account.

16 Based upon that, Your Honor, I believe that  
17 Mr. Marsh's position that he did not have an obligation  
18 to pay eleven fortieths to the plaintiff was a  
19 well-founded, correct legal and factual position, that  
20 he has therefore not damaged Ms. Garner in any fashion  
21 by not paying that money to her.

22 That for those reasons, not only should there  
23 be no judgment against him for monies, but there should  
24 certainly be no interest of any kind on any judgment,  
25 nor should there be any attorneys fees. And based upon

1 the status of the facts and nature of this payment, that  
2 is it's undisputed, it's separation pay, and not  
3 retirement pay, that Mr. Marsh ought to be entitled to  
4 his legal fees to which I've testified in reimbursing  
5 him.

6 THE COURT: The court finds that the  
7 disbursement of \$30,000 received by the defendant when  
8 he was involuntarily separated from the Navy as a result  
9 of being passed over for separation pay is either a  
10 marital asset, as a matter of equity is going to be  
11 divided equitably, or it is anticipatory retirement  
12 allocation. I think the expert witness referred to it  
13 as an advance on retirement pay.

14 It seems to me that the expert in this case  
15 was an extremely credible expert, there were no  
16 objections to his qualifications or to the court finding  
17 him to be an expert, and therefore his testimony is  
18 given a lot of weight by this court as a person who has  
19 expertise in this area. His testimony is clear as a  
20 bell. Those, I believe, are his exact words.

21 He said it's clearly an advance on retirement  
22 pay. He also said it was a retirement benefit accrued  
23 during marriage, and it fits squarely under Woodward V.  
24 Woodward in that connection, and this court so finds.

25 This court finds that the W-2 form is

1 consistent with that, showing it as retirement pay.  
2 Therefore that money is to be split in the manner agreed  
3 to by the parties at the time of the decree, and that is  
4 the eleven fortieths allocation.

5 This court is concerned about whether to  
6 allocate eleven fortieths of \$30,000, or eleven  
7 fortieths of some other sum. I am not persuaded that  
8 anyone has established that the defendant actually  
9 received \$24,000. But what appears to me is that he did  
10 receive less than \$30,000 after taxes were taken out.

11 To require that he then gives the plaintiff  
12 her full share of \$30,000, when, in fact, he did not  
13 receive \$30,000, seems inequitable. So what I'm going  
14 to do is suggest that she's entitled to the  
15 proportionate share that the parties agreed on of what  
16 he actually received, and I am finding that it is no  
17 less than \$24,000, and no greater than \$30,000, but in  
18 all likelihood, somewhere in between, depending on what  
19 his tax rate was at the time.

20 If counsel cannot agree on that, proof needs  
21 to be furnished and an allocation made by Ms. Williams  
22 based upon that information. If information is not  
23 provided by the defendant to allow that figure to be  
24 determined, then it'll be based upon the \$30,000.

25 This court finds that, based upon the

1 credible testimony, this is a retirement-type benefit,  
2 but as a matter of equity, it is also appropriate for it  
3 to be awarded in the manner indicated. And for those  
4 reasons the court has so indicated.

5 As to the issue of interest, this court finds  
6 that since the defendant has had the full benefit of  
7 this money since receiving the same, and has made no  
8 offers to plaintiff to let her share in any portion of  
9 this, or even to set aside a portion of it in some kind  
10 of escrow account that can be earning money, that he is  
11 responsible for paying some interest on this. I'm  
12 inclined, instead of making it a 10 percent prejudgment  
13 interest rate sought by the plaintiff, to make it the  
14 lesser amount consistent with judgment interest of 7.64  
15 percent. Although it was not reduced to a judgment, it  
16 seems more appropriate to me to set it at the lower  
17 amount.

18 It is also clear to this court that the  
19 plaintiff is eligible for what has been termed the SVP  
20 election, entitled to an order directed to the military  
21 to send her her proportionate share of the retirement  
22 income that comes due in the future consistent with the  
23 decree and with equity.

24 It is clear to this court, in looking at this  
25 disbursement of \$30,000, that in calculating it based

1 upon the years of service, specifically fifteen years of  
2 service, and the fact that the defendant is fully  
3 vested, has his twenty years in at this juncture, that  
4 it would be inequitable and wrong not to give her her  
5 proportionate share of that sum.

6 As to the attorneys fees, that is a tougher  
7 question, because I believe that the defendant, in  
8 coming to court on this matter, had a good faith belief  
9 that this was not a settled area. I do not believe, as  
10 often happens, that he came to court taking a shot at  
11 prevailing, believing that in all likelihood he would  
12 lose.

13 On the contrary, I think this is a legal  
14 issue that was a bit of a conundrum, if you will, for  
15 both sides, and not one that is as well settled as some,  
16 and consequently I'm disinclined to award attorneys  
17 fees. Both sides are to pay their own.

18 But I will say this. There is no reason,  
19 Mr. Marsh, why you have not paid the pre-existing  
20 attorneys fees that you were ordered to pay. There's no  
21 viable reason, and those need to be paid immediately.  
22 There's no reason for those not to be paid.

23 Is there anything further at this point in  
24 time that I have failed to address that we need to deal  
25 with?

1 MS. WILLIAMS: No, Your Honor.

2 THE COURT: I'm going to ask, Ms. Williams,  
3 that you prepare findings consistent with my ruling, but  
4 not limit it to the same, consistent with the expert  
5 witness' testimony.

6 I do find him to be a person with expertise  
7 in this area, and a person who is credible as a witness.  
8 And in spite of the fact that he was brought in by the  
9 plaintiff, he appeared to me to be a person who  
10 approached this as a disinterested individual with  
11 expertise in military retirement benefits who had no  
12 reason to testify for or against either party. And  
13 consequently I did give his testimony a great deal of  
14 weight. Is there anything further?

15 MS. WILLIAMS: No, Your Honor.

16 MR. BIGELOW: No, Your Honor.

17 THE COURT: I appreciate the high quality of  
18 the argument today, and the research that went into it.  
19 It's always a pleasure to have both counsel in court.  
20 Best luck to the parties. We're in recess.

21

22

23

24

25

REPORTER'S CERTIFICATE

STATE OF UTAH           )  
                                   SS.       )  
 SALT LAKE COUNTY       )

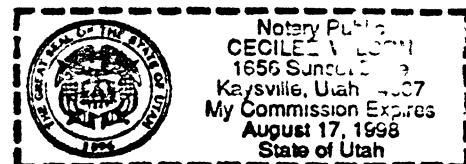
I, CECILEE WILSON, an official court reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported stenographically the proceedings in the matter of MARION MARSH VS. SCOTT ALLAN MARSH, Case No. 894901070, and that the above and foregoing is a true and correct transcript of said proceedings.

Dated this 11th day of August, 1997.

*Cecilee Wilson*

Cecilee Wilson  
 Utah License No. 105247

\* \* \*



Tab F



# Exhibit F

4500201628  
30-  
KELLIE F. WILLIAMS #3493  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
310 South Main Street, Suite 1400  
Salt Lake City, Utah 84101  
Telephone: 801-328-1162

FILED  
JUL 14 1990  
CLERK OF DISTRICT COURT  
SALT LAKE COUNTY, UTAH

*My Ball.*

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IN THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

MARION MARSH,  
Plaintiff,  
vs.

**VERIFIED PETITION FOR MODIFICATION  
OF DECREE OF DIVORCE AND MOTION FOR  
RELIEF**

SCOTT ALLAN MARSH,  
Defendant.

Civil No. 894901070 DA  
Judge Leslie A. Lewis  
Comm. Michael S. Evans

---

COMES NOW the Plaintiff, by and through counsel, Kellie F. Williams, and moves and petitions the above-entitled court to modify the parties' Decree of Divorce, and grant Plaintiff the relief requested and, in support of said petition and motion, states and alleges as follows:

1. That a Decree of Divorce was entered in the above captioned matter on August 16, 1989. Within said Decree, Plaintiff was awarded the primary physical care, custody and control of the parties' four minor children. Defendant was ordered to pay child support to Plaintiff the sum of \$300.00 per month, per child. That order of support was subsequently modified by an order dated

November 25, 1992, which ordered the Defendant to pay child support at the rate of \$680.00 per month for the four children.

2. Since the entry of the Decree of Divorce, the circumstances and situation of the parties has changed substantially and materially and as follows:

a. Two of the children have become emancipated and there remains two minor children who are in need of support. Defendant is currently paying child support to Plaintiff at the rate of \$170.00 per child.

b. Defendant's employment has changed and, to the knowledge and information of Plaintiff, Defendant is earning substantially greater income than at the time of the entry of the Decree.

c. Plaintiff is informed and believes that the support that would be paid under the current Utah Uniform Child Support Guidelines would be 25% more than the Defendant is currently obligated to pay under the existing order.

3. It is reasonable, necessary and proper that this court enter an order modifying the order of child support, so that the support is consistent with the Utah Uniform Child Support Guidelines, given the current incomes of the parties. Said support increase should be retroactive to the date of Plaintiff's filing of this Petition for Modification. Further, said support should be

payable on or before the 1st day of each month in which the support is due, and payable until each child attains the age of 18 years or graduates from high school in due course, with their class, whichever last occurs.

4. That within the Decree of Divorce, Plaintiff was awarded 11/40 of all pension and retirement benefits that Defendant would receive upon his retirement from military service with the United States Government (See, paragraph 7, Decree of Divorce). Subsequent to the entry of the Decree, the Defendant received a lump sum payment from the United States Navy, of \$33,149.40, which payment was referred to, on Defendant's W-2, as "pension plan", a copy of which check is attached hereto, designated as Exhibit "A" and incorporated herein by reference. After subsequent hearing, and by an order dated November 25, 1992, Defendant was to provide Plaintiff with the IRS publication relating to the Navy "severance payment". Plaintiff was given the right to assert issues related to the Navy's severance payment at a later date. The only verification that Plaintiff has received is a letter dated September 4, 1992, which letter was considered incomplete by the court, and a copy of which letter is attached hereto, designated as Exhibit "B" and incorporated herein by reference.

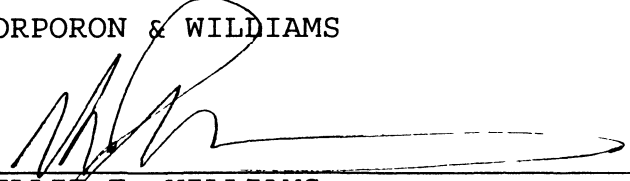
5. Plaintiff is entitled to further verification from Defendant as to the nature of this payment and as to whether that

pay, which has been called "severance pay or involuntary separate pay" should be considered as "pension plan" for purposes of division between the parties.

6. The Plaintiff is in need of attorney's fees and costs in bringing this matter before the court, it is reasonable, necessary and proper that the Defendant be ordered to pay to Plaintiff her reasonable attorney's fees and costs incurred.

DATED this 23<sup>rd</sup> day of December, 1994.

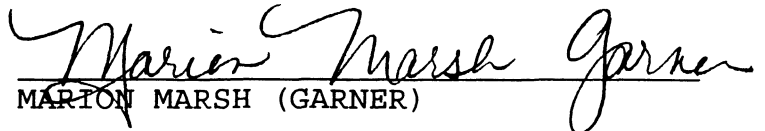
CORPORON & WILLIAMS



KELLIE F. WILLIAMS  
Attorney for Plaintiff

STATE OF UTAH                                 )  
                                                      :SS.  
COUNTY OF SALT LAKE                     )

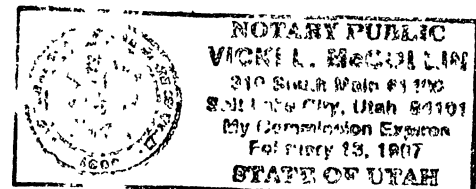
MARION MARSH (GARNER), being first duly sworn upon oath, deposes and states as follows: That she is the Plaintiff in the above-captioned matter; that she has read the foregoing PETITION FOR MODIFICATION OF DECREE OF DIVORCE AND MOTION FOR RELIEF, including attachments, and that she understands the contents thereof, and that the same is true of her own personal knowledge, except as to those matters stated upon information and belief, and as to those matters, she believes the same to be true.

  
MARION MARSH (GARNER)

ON THE 30 day of December, 1994, personally appeared before me, the undersigned notary, MARION MARSH (GARNER), the signer of the foregoing VERIFIED PETITION FOR MODIFICATION OF DECREE OF DIVORCE AND MOTION FOR RELIEF, who duly acknowledged to me that she signed the same voluntarily and for its stated purpose.

  
Notary Public  
Residing in Salt Lake County

My Commission Expires: 2/13/97



Tab G

# Exhibit G



FILED DISTRICT COURT  
Third Judicial District

KELLIE F. WILLIAMS #3493  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: 801-328-1162

JUN 9 1997

By E. Matheson SALT LAKE COUNTY  
Deputy Clerk

---

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

MARION MARSH,  
  
Plaintiff,  
vs.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

SCOTT ALLAN MARSH,  
  
Defendant.

Civil No. 894901070 DA  
Judge Leslie A. Lewis  
Comm. Michael S. Evans

---

THE ABOVE-CAPTIONED MATTER having come on regularly for trial before the above-entitled court on April 17, 1997, at the hour of 9:30 a.m., the Honorable Leslie A. Lewis, Third District Court Judge, presiding, on Plaintiff's motions and petitions, and Plaintiff being present in person and being represented by counsel, Kellie F. Williams, and Defendant being present in person and being represented by counsel, Richard Bigelow, and the parties having testified and having presented exhibits to the court and Plaintiff having called Neil B. Crist as an expert witness, and the court having reviewed the file, the case law, and having considered the exhibits and testimony, and the court having also considered

Defendant's Objection to Commissioner's Recommendation, and based thereon, the court now makes and enters the following:

FINDINGS OF FACT

1. The parties were divorced by this court on August 16, 1989, having been married for approximately 15 years.

2. At the time of the divorce, there were four minor children. Plaintiff had been a homemaker, primarily, and Defendant had been the primary wage earner, having been engaged in the military for a period of 14 years of the marriage.

3. Within the parties' Decree of Divorce, Plaintiff was awarded 11/40ths of all pension and retirement benefits which Plaintiff accrued through his service with the United States Navy.

4. Subsequent to the parties' divorce, Defendant fell in arrears in child support and, pursuant to a court order dated November 25, 1992, Defendant was then in arrears in support of the sum of \$7,637.00 through November 1992.

5. During the period that Defendant was in arrears in his child support obligation, Plaintiff fell in arrears in the payment of the mortgage owed on the former marital residence, as a result of which the home was foreclosed. The deficiency owed due to the foreclosure, however, was waived and so Defendant has paid no monies out of pocket due to the foreclosure. Based upon the foregoing and the commissioner's previous findings, it is

reasonable that Defendant's objection to the commissioner's ruling on November 7, 1994 should be denied and overruled.

6. Subsequent to the Decree of Divorce, Defendant separated from the military. The separation was involuntary and based upon the Defendant being passed over for promotion on two occasions.

7. Defendant was paid the sum of \$30,000.00, gross, on January 31, 1991, as a result of his separation from the U.S. Navy. Taxes of \$6,000.00 were withheld so that the net actually then received by Defendant was \$24,000.00 on January 31, 1991.

8. Defendant received a 1991 W-2 Wage and Tax Statement from the Navy Finance Center which designated the disbursement "pension plan."

9. Upon learning of the disbursement, Plaintiff made a claim by motion and petition and asked the court for her 11/40ths of the payment, based upon the fact that the disbursement was either part of Defendant's pension plan or should be considered a marital asset for purposes of division between the parties.

10. Subsequent to his involuntary discharge, Defendant continued in the Naval Reserve and, at the time of trial in this matter, had over 20 years of service for purposes of a reserve retirement.

11. The separation pay received by Defendant was computed based upon Defendant's years of active service, including the years

of service during the marriage of Plaintiff and Defendant. Defendant has qualified for a reserve retirement and upon Defendant's retirement, if he survives, Defendant will have deducted from each payment of his retirement pay 75% of the monthly benefit until the entire \$30,000.00 disbursement was paid in full. (10 U.S.C. §1174(h).) Neil B. Crist was called as an expert witness and, given no objection by Defendant's counsel, was qualified by this court as an expert witness relating to separation and retirement pay for members of the Armed Forces. It was his testimony that the disbursement was in the nature of an advance on Defendant's retirement. Further, Mr. Crist testified that Defendant's military retirement would be calculated by adding points earned in both years of active military service and years of service in the reserve. Defendant would receive substantially greater points for the years of active service versus his years as a member of the Naval Reserve. Therefore, upon receipt of his reserve retirement, the majority of the monthly retirement or, approximately, 90%, which was Mr. Crist's best guess, would be attributable to the years of active service versus the reserve service years. Therefore, when the monthly retirement payments are reduced by 75%, and there is 25% remaining, Plaintiff would only be entitled to a portion of 11/40ths of that 25% payment. Upon Defendant's retirement, it would be impossible for Plaintiff to be

made whole and receive her 11/40ths of Defendant's retirement as awarded to her at the time of the Decree. Only after payment in full, by offset, of the entire \$30,000.00, would Plaintiff then be able to receive her 11/40ths of the retired pay.

12. The court finds that the \$30,000.00 disbursement made to Plaintiff when he separated from the Navy is either a marital asset or in anticipation of retirement and therefore "advance on retirement." The court finds the expert witness, Mr. Crist to be extremely credible and his testimony should be given a great deal of weight. Mr. Crist testified that the monies received were clearly an advance on Defendant's retirement benefits that had accrued and that the monies fit squarely under the holding of Woodward v. Woodward, 656 P.2d 431 (Utah 1982).

13. Plaintiff should be entitled to 11/40ths of the amount actually received by Defendant, which sum shall be no less than the \$24,000.00 net paid to him on January 31, 1991. Defendant shall provide Plaintiff, immediately, with his 1991 tax return so that Plaintiff can calculate Defendant's actual tax consequences of the \$30,000.00 gross disbursement. Plaintiff shall then receive 11/40ths of that actual sum. However, if Defendant does not immediately provide that tax return to Plaintiff, then Plaintiff will be awarded 11/40ths of the full gross sum of \$30,000.00.

14. Defendant has had the full benefit of the money since February 1991. It is reasonable, necessary and proper that Defendant be ordered to pay interest to Plaintiff at judgment interest rate of 7.64% on the amount that should have been paid to Defendant, commencing February 1, 1991 and until paid in full.

15. The court finds that Plaintiff is eligible for an SVP election and is entitled to any necessary order to permit her make that SVP election with the military.

16. The court finds that Defendant had a good faith belief that he was entitled to the funds that he had received. The disbursement received was one received in an area that is not settled. It is reasonable that each party bear their own attorney's fees and court costs incurred in bringing this matter before the court.

BASED UPON the foregoing Findings of Fact, the court now makes and enters the following:

#### CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties to this action and over the subject matter of this action.

2. The Defendant's Objection to Commissioner's Recommendation, dated November 7, 1994, should be denied and overruled.

3. Plaintiff should be entitled to an award of 11/40ths of the disbursement received by Defendant in 1991, together with interest thereon at 7.64%, from January 1, 1991 and pursuant to the foregoing Findings of Fact.

4. Each party should pay their own attorney's fees and court costs incurred in this matter.

DATED THIS 9th day of June, 1997.

BY THE COURT

Leslie A. Lewis  
LESLIE A. LEWIS

Third District Court Judge

APPROVED:

RICHARD BIGELOW  
Attorney for Defendant  
DATED: \_\_\_\_\_

Tab H



# Exhibit H

**Bruce H. Shapiro (Bar No. 4761)**  
**BRUCE H. SHAPIRO, P.C.**  
**Attorneys for Defendant**  
**3760 S. Highland Drive, Suite 200**  
**Salt Lake City, Utah 84106**  
**Telephone: 273-3314**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARION MARSH,

Plaintiff,

**VS.**

SCOTT ALLAN MARSH,

Defendant.

AFFIDAVIT OF DEFENDANT IN  
SUPPORT OF DEFENDANT'S  
MOTION FOR ORDER TO  
SHOW CAUSE

Civil No. 894901070DA

Judge Leslie Lewis

STATE OF UTAH )  
 : ss  
County of Salt Lake )

The undersigned, Scott Allan Marsh, being duly sworn under oath, states and represents to the court as follows:

1. I am the Defendant in the above-entitled action.

2. Pursuant to the Divorce Decree entered on August 16, 1989, Plaintiff

was ordered to assume, pay, and hold me harmless on the mortgage obligation secured by real property located at 8966 South 3860 West, West Jordan, Utah.

3. On or about November 1, 1991, I received information from the Veterans Administration that the mortgage was in arrears and that foreclosure proceedings had been instituted.

4. Subsequent to November, 1991, I received information that the property had been foreclosed and that there was an arrearage amount due and owing of \$13,028.11. Exhibit "A", CSC Credit Services, Inc., deposition of Marion Marsh, p. 49:13-15.

5. I have since made demand upon the Plaintiff to pay off the arrearage amount, but to date she refuses to make arrangements for payment thereon. Deposition of Marion Marsh, p. 50:2-17.

6. Because I was contractually obligated for the mortgage and the Plaintiff did not assume, pay, or hold me harmless on the mortgage obligation, I have been unable to obtain a loan through the Veterans Administration.

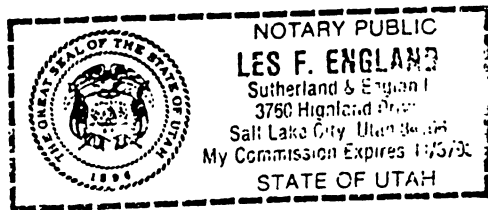
7. I have been informed by the Veterans Administration that if I do not pay off the arrearage amount, I will not be able to ever qualify for a Veterans Administration loan and other GI benefits.

8. The loan default has caused a cloud on my credit reporting.

DATED this 21 day of September, 1994.

  
SCOTT ALLAN MARSH

Subscribed and sworn to before me this 21 day of September, 1994.



  
NOTARY PUBLIC

Residing in \_\_\_\_\_

Commission expires \_\_\_\_\_

FORWARDING AND ADDRESS  
CORRECTION REQUESTED

CSC Credit Services Inc.  
Collection Services Division

GOVERNMENT SERVICES DIVISION

7909 Parkwood Circle  
Suite 250  
Houston, Texas 77036  
713/995-3630  
800/444-4965

360-399264  
SCOTT A MARSH  
1805 MILLBROOK RD  
SALT LAKE CITY UT 84106

Re: DEPARTMENT OF VETERANS AFFAIRS  
Name: SCOTT A MARSH  
Loan No: 54688591500SAMARSH21  
Principal Amount: 12469.58  
Interest Referred: 401.38  
Interest Accrued: 157.15  
Total Due: 13028.11

AUG 25 1993

Dear SCOTT A MARSH,

Your delinquent loan balance owed to the DEPARTMENT OF VETERANS AFFAIRS has been placed with our office for immediate collection.

The serious delinquency of this loan necessitates that the total amount due be sent immediately. Failure to respond will leave us no alternative but to use all appropriate remedies we deem necessary to ensure collection of this loan.

All funds should be made payable to the DEPARTMENT OF VETERANS AFFAIRS and mailed in the enclosed envelope. Do not make your check payable to our organization; do not send cash or postage stamps as payment.

All inquiries concerning your loan should be made directly to our office at the address and telephone number above.

Sincerely,

REBECCA JOHNSON  
Office Manager

cc: file

PLEASE SEE REVERSE SIDE FOR IMPORTANT INFORMATION

*EXHIBIT "A"*

THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

UNLESS YOU NOTIFY THIS OFFICE WITHIN THIRTY (30) DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THE DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THIS DEBT IS VALID. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN THIRTY DAYS FROM RECEIVING THIS NOTICE, THIS OFFICE WILL OBTAIN VERIFICATION OF THE DEBT OR OBTAIN A COPY OF A JUDGEMENT AND MAIL YOU A COPY OF SUCH JUDGEMENT OR VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN THIRTY DAYS AFTER RECEIVING THIS NOTICE, THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.

***EXHIBIT "B"***

1 Most of the times that he's slept there, we have been  
 2 watching T V or talking and just fallen asleep. as most  
 3 couples do  
 4 Q How about when he sleeps in your bedroom?  
 5 A What do you mean?  
 6 Q You testified earlier that he has slept in your  
 7 bedroom before  
 8 A Yes  
 9 Q In the last six months?  
 10 A Yes  
 11 Q Were you sleeping in the bedroom, also?  
 12 A Yes. I have fallen asleep in the bedroom, too.  
 13 Q Okay. But you can't recall how many times  
 14 that's occurred?  
 15 A No. It's not been -- it's been very few times.  
 16 but it does happen on occasion when I know he's too  
 17 tired to drive. I fall asleep; he's fallen asleep.  
 18 Sometimes I fall asleep talking to him, and he ends up  
 19 falling asleep, too. Sometimes he gets up and leaves.  
 20 Q Where is your T.V. located?  
 21 A In my bedroom.  
 22 Q Okay. Have you ever slept in his bedroom in the  
 23 last six months in his home?  
 24 A Uh-huh.  
 25 Q Has he been in the bedroom?

INTERMOUNTAIN COURT REPORTERS 263-1396

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1 and I'll be back in a minute  
 2 (Whereupon a discussion was held off the record )  
 3 MR SHAPIRO Let's go back on the record I'll find  
 4 the rest of my notes We're almost done  
 5 Q When did you begin discussing marriage plans  
 6 with Mr. Garner?  
 7 A In March of '91  
 8 Q March of '91?  
 9 A Uh-huh.  
 10 Q Have the kids ever spent any summers at Mr.  
 11 Garner's home?  
 12 A Christopher.  
 13 Q Christopher has? What summers?  
 14 A Summer of '93  
 15 Q Have the kids ever spent Christmas over at Mr.  
 16 Garner's home?  
 17 A No.  
 18 Q Thanksgivings?  
 19 A Yes.  
 20 Q Which Thanksgiving?  
 21 A '92.  
 22 Q Has Ana ever spent any time at Mr. Garner's  
 23 relatives?  
 24 A Yes.  
 25 Q When?

INTERMOUNTAIN COURT REPORTERS 263-1396

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1 A. Huh-uh.  
 2 Q. Okay. Have you ever traveled to Washington D.C.  
 3 with Mr. Garner, or to the State of Washington?  
 4 A. Huh-uh.  
 5 Q. Have you ever told any of your children not to  
 6 tell Mr. Marsh that you're engaged because he will get  
 7 mad?  
 8 A. Yes, I told my daughter that.  
 9 Q. When did you tell her that?  
 10 A. When I told her that we were getting married,  
 11 about two weeks or a month ago No, it hasn't been a  
 12 month It's only been a few weeks.  
 13 Q With the exception of Bryana, are any of the  
 14 other children in counseling?  
 15 A Yes  
 16 Q Who?  
 17 A. Ana  
 18 Q What's she in counseling for?  
 19 A Sexual problems that she had when she was at  
 20 Scott's house  
 21 Q Are you currently in counseling?  
 22 A I see the counselor too. yes  
 23 Q Is Mr. Garner currently in counseling?  
 24 A He started going with us yes  
 25 MR SHAPIRO Okay I'm going to take a short break.

INTERMOUNTAIN COURT REPORTERS 263-1396

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1 A. Summer of '93.  
 2 Q. How long; full summer?  
 3 A. No, it was about two months.  
 4 Q. Two months?  
 5 A. Uh-huh.  
 6 Q. Why?  
 7 A. Because she wanted to go down and stay with  
 8 them. She had made real good friends with his  
 9 sister-in-law and wanted to go stay with her because  
 10 they told her she could work down there  
 11 Q So she stayed with the sister-in-law?  
 12 A Uh-huh  
 13 Q Tell me about the home you lived in at 8966  
 14 South 3860 West. Did it go into foreclosure?  
 15 A Yes.  
 16 Q Whose name was on the promissory note?  
 17 A Scott's and mine  
 18 Q Okay Were you ordered to assume, pay, and hold  
 19 Scott harmless on the mortgage?  
 20 A I was ordered to pay the mortgage, yes  
 21 Q Okay Are you aware of a deficiency?  
 22 A No  
 23 Q Okay I'm going to hand you what's been marked  
 24 as Exhibit No 3  
 25 Have you ever received any notices like this?

INTERMOUNTAIN COURT REPORTERS 263-1396

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DEPARTMENT OF VETERANS AFFAIRS  
Regional Office  
125 South State Street  
PO Box 11500  
Salt Lake City UT 84147

November 4, 1994

Marion Marsh Garner

In Reply, Refer To:  
341/26  
41-41-2-0137885  
8966 S 3860 W  
West Jordan, UT

Dear Ms. Garner:

Per our telephone conversation yesterday, the records on the above subject loan, which you were a co-obligor, indicate the foreclosure sale was held on March 10, 1992. There was a debt of \$12,469.58 established against the veteran.

Scott Marsh requested a waiver of this debt and it was granted on December 13, 1993. He does not have to pay this debt unless he wants his VA entitlement restored for future use.

If you have any further questions please contact me at 801-524-3411 ext. 2617.

Sincerely yours,

  
JANALEE GREEN  
Loan Service Representative

360-399264  
SCOTT A MARSH  
1805 MILLBROOK RD  
SALT LAKE CITY UT 84106

~~7000 Parkwood Drive~~  
Suite 250  
Houston, Texas 77036  
713/995-3630  
800/444-4965

Re: DEPARTMENT OF VETERANS AFFAIRS  
Name: SCOTT A MARSH  
Loan No: 54688591500SAMARSH21  
Principal Amount: 12469.58  
Interest Referred: 401.38  
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Total Due: 13028.11

AUG 25 1993

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The serious delinquency of this loan necessitates that the total amount due be sent immediately. Failure to respond will leave us no alternative but to use all appropriate remedies we deem necessary to ensure collection of this loan.

All funds should be made payable to the DEPARTMENT OF VETERANS AFFAIRS and mailed in the enclosed envelope. Do not make your check payable to our organization; do not send cash or postage stamps as payment.

All inquiries concerning your loan should be made directly to our office at the address and telephone number above.

Sincerely,

REBECCA JOHNSON  
Office Manager

cc: file

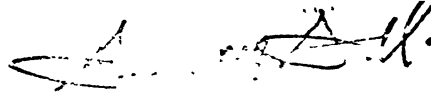
PLEASE SEE REVERSE SIDE FOR IMPORTANT INFORMATION

**EXHIBIT "**

Tab I

# Exhibit I

TERRY R. SPENCER, Ph.D. #6635  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
310 South Main Street  
Suite 1400  
Salt Lake City, Utah 84101  
Telephone: 801-328-1162



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IN THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

MARION MARSH,  
Plaintiff,  
vs.

SCOTT ALLAN MARSH,  
Defendant.

**PLAINTIFF'S RESPONSE TO  
DEFENDANT'S ORDER TO  
SHOW CAUSE**

Civil No. 894901070 DA

Judge: Leslie Lewis  
Comm.: Michael S. Evans

---

PLAINTIFF, by and through counsel, Terry R. Spencer, hereby responds to Defendant's Order to Show Cause as follows, based on the affidavit of Plaintiff filed herewith:

1. The parties are formerly husband and wife and were divorced pursuant to a Decree of Divorce entered on or about August 16, 1989, by Judge Raymond S. Uno of the above-entitled court.

2. That the parties are the parents of four children, two of which are still minors.

3. Pursuant to the Decree of Divorce, Plaintiff was awarded the physical custody of the parties' minor children, and Defendant

was ordered to pay \$300.00 per month per child for child support for a total of \$1,200.00 per month, plus \$468.00 per month in alimony. Plaintiff was also awarded the marital home located at 8966 South 3860 West, West Jordan, Utah, subject to paying and holding Defendant harmless on the mortgage thereon. A copy of the Decree of Divorce is attached to Plaintiff's Affidavit as Exhibit "A".

4. Defendant failed and refused to pay the ordered child support and alimony ordered by the court in the Decree of Divorce, and by November 1992, the date the Decree of Divorce was last modified, Defendant was in arrears for family support in the amount of \$7,637.00. A copy of the Order modifying the Decree of Divorce, which identifies Defendant's arrearage amount, is attached to Plaintiff's Affidavit as Exhibit "B".

5. Because of Defendant's willful failure to pay the child support and alimony ordered by this court, Plaintiff was unable to maintain the mortgage on the real property located at 8966 South 3860 West, West Jordan, Utah.

6. The subject real property was foreclosed on March 10, 1992, with an outstanding debt of \$12,469.58 after the sale of the house to cover loan arrearages, sale costs and attorney's fees.


See the Letter from the Veterans Administration, dated November 4, 1994, and attached to Plaintiff's Affidavit as Exhibit "C".

7. As a result of a request by Defendant, the outstanding debt on this property was waived by the Veterans Administration as of December 13, 1993, and there is nothing now due and owing to the Veterans Administration. See the Letter from the Veterans Administration, dated November 4, 1994, and attached to Plaintiff's Affidavit as Exhibit "C".

8. Because: (1) there is now no debt due and owing to the Veterans Administration, (2) if any amount had been due and owing, that amount would have been a direct result of Defendant's failure to pay family support as required by the Decree of Divorce, and (3) Defendant knew, at the time this Order to Show cause was filed, that no money was due and owing to the Veterans Administration; Defendant has brought this matter before the court with unclean hands and in bad faith, and therefore, Defendant should be required to pay Plaintiff's attorney's fees pursuant to Utah Code Ann. Section 78-27-56 and/or Rule 11 of the Utah Rules of Civil Procedure.

DATED this 4th day of November, 1994.

CORPORON & WILLIAMS



---

TERRY R. SPENCER, Ph.D.  
Attorney for Plaintiff



Tab J

# Exhibit J

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

|                    |   |                                 |
|--------------------|---|---------------------------------|
| MARSH, MARION      | : | MINUTE ENTRY                    |
|                    | : |                                 |
| PLAINTIFF          | : | CASE NUMBER 894901070 DA        |
|                    | : | DATE 11/07/94                   |
| VS                 | : | HONORABLE MICHAEL S. EVANS      |
|                    | : | COURT REPORTER TAPE-1-1500-1883 |
| MARSH, SCOTT ALLAN | : | COURT CLERK CPW                 |
| DEFENDANT          | : |                                 |

---

TYPE OF HEARING: MOTION HEARING  
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. SPENCER, TERRY  
D. ATTY. SHAPIRO, BRUCE H

---

COMM. RECOMMENDS:

1. DEFT'S MOTION FOR JUDGMENT FOR DEFICIENCY AMOUNT REGARDING THE HOME IS DENIED FOR REASONS NOTED ON THE RECORD.
  2. FOR REASONS NOTED ON THE RECORD, COMMISSIONER WILL NOT RECOMMEND ISSUE OF PLTF'S CONTEMPT BE CERTIFIED FOR FURTHER HEARING.
  3. EACH PARTY BEAR THEIR OWN FEES AND COSTS FOR TODAY'S HEARING.
- MR. SHAPIRO PREPARE ORDER

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Tab K

# Exhibit K

Richard N. Bigelow (Bar No. 3991)  
Attorney for Defendant  
700 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 364-6450

FILED  
DISTRICT COURT

97 OCT 17 AM 8:55

FILED IN DISTRICT  
COURT SALT LAKE COUNTY  
BY W. L. CHRISTENSEN  
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARION MARSH,  
Plaintiff,

vs.

SCOTT ALLAN MARSH,  
Defendant.

**AFFIDAVIT OF SCOTT A. MARSH**

**Civil No. 894901070 DA**

**Judge Leslie A. Lewis**

STATE OF UTAH )  
 ) :ss  
COUNTY OF SALT LAKE )

COMES NOW Defendant Scott Allan Marsh and hereby affirms as follows:

1. I have personal knowledge of the facts contained herein.
2. I am the defendant in the above entitled matter.
3. I live in and am jointly purchasing a home in Salt Lake County with my wife, Leslie Marsh, located at 10034 S. Jordan Crest Circle, South Jordan, Utah 84065.
4. My wife, three of her five children from a previous marriage, her mother and I all reside in that home.
5. My wife did not receive support from her previous husband for several years (although earlier this year she began to receive support from him) and so each month I

was required to spend monies from my paycheck to assist in providing support to the children who reside with me.

6. My wife and I have each been employed in Salt Lake County for more than the last five years, her children go to school in Salt Lake County. My minor daughter does live and attend school in Weber County.

7. I have been current in the payment of my support obligations to Plaintiff since 1992 except when the Court has made a decision to order retroactive support, and then I have quickly paid off any arrearages the Court determined were owed.

8. My employment is stable.

9. I do not have the lump sum amount owed Plaintiff from the most recent Court Order.

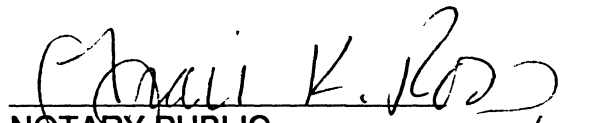
10. I have filed a Declaration of Homestead regarding my property pursuant to Utah Code Annotate Section 78-23-3 et. seq.

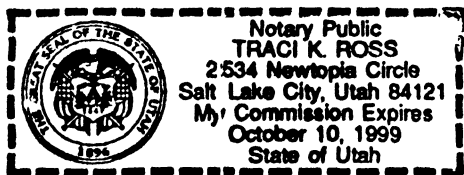
DATED this HA day of OCTOBER, 1997.

Respectfully submitted,

  
Scott Allan Marsh

SUBSCRIBED AND SWORN to before me this 7 day of October, 1997.

  
NOTARY PUBLIC  
My Commission expires: 10/10/99



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing AFFIDAVIT OF SCOTT A. MARSH was mailed, postage prepaid, on this 15<sup>th</sup> day of Oct, 1997 to:

Kellie F. Williams  
CORPORON & WILLIAMS  
808 East South Temple  
Salt Lake City, Utah 84102

Field W. Biggs

MARSH.AFF