

1989

Maxwell v. Maxwell : Brief of Respondent

Utah Court of Appeals

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Franklin L. Slaugh; attorney for appellant.

David A. McPhie; attorney for respondent.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

BETTY J. MAXWELL,)	
)	
Plaintiff and)	
Respondent,)	Case No. 890252-CA
)	
vs.)	
)	
OTIS C. MAXWELL,)	Argument Priority 14.b.
)	
Defendant and)	
Appellant.)	

RESPONDENT'S BRIEF

Appeal from an Order of the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable Kenneth Rigtrup

DAVID A. McPHIE #2216
Attorney for Plaintiff/Respondent
3450 Highland Drive, Suite 301
Salt Lake City, Utah 84106

Franklin L. Slaugh #2976
Attorney for Defendant/Appellant
9341 S. 1300 East
Sandy, Utah 84094

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Jurisdiction of Court of Appeals

Jurisdiction to hear this appeal is conferred by Utah Code § 78-2a-3(2)(h) (1988).

Nature of Proceedings

The proceeding in the trial court was on a petition by plaintiff for an Order to Show Cause why defendant should not be ordered to pay plaintiff one-half of his gross military retirement pay as ordered by the divorce decree pursuant to a stipulation between the parties. The Domestic Commissioner recommended that defendant pay one-half of his "disposable" retirement income as defined by federal statute. Upon plaintiff's objection, the matter was reviewed by the Honorable Kenneth Rigrup who ordered that defendant pay one-half of his gross retirement income as ordered in the original decree and that defendant pay \$1,419.00 representing the back amount due for the difference between the gross and "disposable" retirement income. Defendant has appealed this order.

Statement of Issues

There are two similar, but distinct issues presented on appeal. (1) Does the trial court have jurisdiction to award the plaintiff spouse more than one-half of the disposable retirement income of defendant or has the issue been totally pre-empted by federal statute? (2) Where the parties agreed by stipulation that plaintiff would be paid one-half of the gross retirement income, is the trial court precluded from enforcing the original decree entered on the basis of the stipulation?

Determinative Statutes

The statute, the interpretation of which is determinative of this matter, is 10 U.S.C. § 1408. This statute is reproduced in its entirety in the Addendum.

Statement of the Case

Plaintiff accepts appellant/defendant's statement of the case.

Summary of the Argument

The Uniformed Services Former Spouses Protection Act grants state courts the power to treat a retiree's disposable retirement pay as marital property to be dealt with according to the laws of the state having jurisdiction. According to the laws of the State of Utah, the trial court has broad discretion in distribution of marital property. While there is a limit to the amount of retirement income which the services will pay directly to the former spouse, there is no statutory or federal case law limitation on the amount of retirement income which the state court may, in exercise of its discretionary powers, award to the former spouse.

Defendant entered into a valid, enforceable stipulation which provided for payment of one-half of his gross retirement income to plaintiff. The original divorce decree was entered based upon this stipulation. Defendant cannot, without timely notice and evidence of good cause, avoid responsibility for this payment.

The trial court's actions in adjusting the property interests of the parties are entitled to a presumption of validity and, absent a showing of clear and prejudicial abuse of discretion, should not be overturned on appeal.

Argument

POINT I

DEFENDANT'S ENTIRE "DISPOSABLE" RETIREMENT INCOME IS SUBJECT TO THE JURISDICTION AND DISPOSITION OF THE TRIAL COURT ACCORDING TO THE LAWS OF THE STATE OF UTAH. THERE IS NO STATUTORY LIMITATION ON THE AMOUNT OF THE "DISPOSABLE" RETIREMENT INCOME WHICH THE TRIAL COURT CAN AWARD TO PLAINTIFF.

Section 1408 of Title 10, U.S.C. grants state courts authority to award a former spouse part of a former serviceman's retirement income. The legislation provides, in part:

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(1). Disposable retirement pay is defined at 10 U.S.C. § 1408(a)(4). Plaintiff concedes that a reasonable reading of the statute grants the trial court jurisdiction only over defendant's disposable retirement income as defined by the act.

Congress expressly granted state courts authority to treat all of the disposable retirement pay as marital property. The only restriction expressed in the act is the limitation of authority to disposable income. There is no express or implied condition imposing upon the trial court a limited authority over only 50% of the disposable income.

Section 1408(d) deals with direct payments by the government to the former spouse. The following subsection (e) states:

The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

10 U.S.C. § 1408(d)(1). These sections expressly limit the amount of direct payment by the government directly to the former spouse. They do not impose a limitation on the amount of marital property, i.e. "disposable retired or retainer pay", which the state court may award to the former spouse.

Defendant cites the recent case of Mansell v. Mansell, 490 US ____; 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989) for the proposition that the trial court may not award an amount based upon the retiree's gross retirement pay. In fact, the holding in Mansell is very narrow. The question addressed by the court is whether the court may exercise jurisdiction over retirement income which has been voluntarily waived by the retiree in order to accept disability payments. Noting that reductions for disability payments are included in the definition of "disposable retired or retainer pay" and that "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retire pay as community property", Mansell at 109 S.Ct. 2028, the Supreme Court held that the state court had no authority over the amounts voluntarily waived. The Mansell decision did not affect the clearly stated proposition that the state trial courts may treat the entire disposable amount as marital property "in accordance with the law of the jurisdiction of such court."

Defendant also relies upon Greene v. Greene, 751 P.2d 827 (Utah App

1988) for the proposition that plaintiff is prevented from receiving more than 50% of his disposable retirement income. In Greene, the modification ordered by the court was based upon an agreement between attorneys for the parties. Greene at 829. The Greene court merely approved the modification as "correction of a mistake" and did not hold that the attorneys' interpretation of federal law was, in fact, correct.

The Minnesota Court of Appeals has examined this question in a case with facts essentially the same as the ones before this court. In Deliduka v. Deliduka, 347 N.W.2d 52 (Minn App 1984) the appellant challenged the award of 50% of his gross retirement income to his former wife. In Deliduka, the trial court attempted to order direct government payments of one half of the gross retirement income. The appellate court concluded:

A fair reading shows that the act grants the authority to treat all disposable retired pay as marital property, but limits direct government payments to former spouses to 50 percent of disposable retired pay (65 percent for multiple court orders). This means that a state court wishing to award a former spouse more than 50 percent of disposable retired pay must order direct government payments and payments by the member of the military to his spouse.

Deliduka at 55, emphasis in original. The Minnesota court held in favor of the spouse and observed, "The trial court erred only in its method of disbursing pension payments to the wife." Id. at 56.

In Utah, when dealing with military retirement pay, an equal split of the distributable portion between the spouses is not mandatory. For example, if the

retired spouse "has retained an inequitable share of the marital assets, the court may divide the retirement as it sees fit." Maxwell v. Maxwell, 754 P.2d 84, 86 (Utah App 1988) citing Woodward v. Woodward, 656 P.2d 431 (Utah 1982), emphasis added.

In the present case, as in Deliduka, it was the intent of the court to award plaintiff one-half of the gross retirement income. The trial court properly has jurisdiction over the disposable amount and, to the extent the entire disposable amount will support the award of one-half of the gross benefits, the court acted correctly within its discretion. Defendant has not appropriately challenged the discretion of the court in making the award.

POINT II

DEFENDANT ENTERED INTO A VALID, ENFORCE-
ABLE STIPULATION UPON WHICH THE DIVORCE
DECREE WAS ENTERED. DEFENDANT, HAVING
FAILED TO PROPERLY APPLY TO THE COURT FOR
MODIFICATION OF THE DECREE AND PROVIDE
EVIDENCE OF GOOD CAUSE MUST BE BOUND BY
THE STIPULATED DECREE.

The original decree in this matter was ordered based upon a stipulation of the parties. Defendant knew what he was agreeing to, entered into a valid stipulation, and cannot now escape his responsibilities based upon a tenuous technicality.

A valid and binding stipulation exists where (1) the parties have completed their negotiations, (2) the agreement is reduced to writing, and (3) the agreement is signed and filed with the clerk or read into the record before the court. Brown v. Brown, 744 P.2d 333, 335 (Utah App 1987). A valid stipulation is conclusive and binding "unless, upon timely notice and for good cause shown, relief is

granted therefrom." Higley v. McDonald, 685 P.2d 496, 499 (Utah 1984). Such stipulations are also binding in divorce proceedings. Sorensen v. Sorensen, 769 P.2d 820, 832-33 (Utah App. 1989).

Where the stipulation of the parties gives rise to a division of property which is equitable, the court "cannot presume that had the [trial] court made the division, it would have fallen into error." Mortensen v. Mortensen, 760 P.2d 304, 309 (Utah 1988). Though the stipulation of the parties is not necessarily binding upon the court, it is usually followed unless the court finds it to be unfair or unreasonable. Colman v. Colman, 743 P.2d 782, 789 (Utah App 1987). The trial court "may refuse to enforce an agreement upon a specific finding as to why the agreement should not be followed. . . In its findings, the trial court must therefore clearly articulate these reasons for disregarding the stipulation." Colman at 789, emphasis added.

Defendant entered into a valid and binding stipulation. He has made no effort to procedurally obtain modification of the stipulation based decree by proper notice and showing of good cause. Defendant clearly stipulated and intended that his former wife receive one-half of his gross military retirement benefits. Absent a showing of good cause, defendant should continue to be bound by his stipulation. The trial court, therefore, acted properly in holding defendant responsible for that amount.

POINT III

UNDER UTAH LAW, THE TRIAL COURT HAS CONSIDERABLE DISCRETION IN AWARDING PROPERTY INTERESTS AND IS ENTITLED TO A PRESUMPTION OF VALIDITY. DEFENDANT HAS FAILED TO SHOW

**CLEAR AND PREJUDICIAL ABUSE OF DISCRETION.
THEREFORE THE TRIAL COURT'S DETERMINATION
SHOULD STAND.**

"It is well established that in divorces the trial courts are given considerable discretion in adjusting the parties' financial and property interests, and their actions are entitled to a presumption of validity." Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah App 1987). See also Throckmorton v. Throckmorton, 767 P.2d 121, 122 (Utah App 1988). The Utah Supreme Court has taken a similar position:

In dividing the marital estate, the trial court can enter such orders concerning property and alimony as are equitable. Utah Code Ann. § 30-3-5 (1987). In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this Court. [citations omitted] It is therefore incumbent on the appealing party to prove that the trial court's division violates these standards. . ."

Newmeyer v. Newmeyer, 748 P.2d 1276, 1277 (Utah 1987). The trial court's actions are granted a presumption of validity and, "Absent a showing of a clear and prejudicial abuse of discretion, we will not interfere with an alimony or property award." Throckmorton at 122.

Defendant has failed to show clear and prejudicial abuse of the trial court's discretion. The order of the trial court should, therefore, be affirmed.

Conclusion

The trial court is clearly granted authority to treat the entire disposable retirement income of defendant as marital property according to the laws of the State

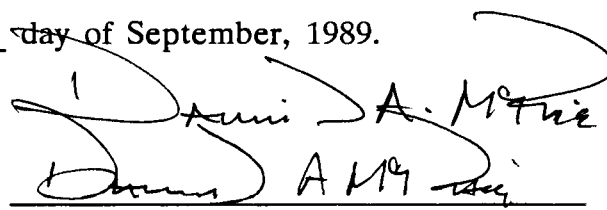
of Utah. There is no limitation, up to the maximum disposable amount, which the court may distribute equitably between the parties. The trial court may, in reasonable exercise of its discretion, award plaintiff a larger share of the retirement income than defendant.

If the trial court erred, it was in the insignificant area of ordering that plaintiff be paid 50% of the gross retirement benefits directly by the government. It properly should have ordered the direct payment of 50% of the disposable amount and payment by defendant of the difference between that amount and 50% of the gross amount.

Defendant has failed either to show grounds why he should not be bound by his stipulation or that the trial court clearly abused its discretion in making the property award.

The order of the trial court should, therefore, be affirmed to the extent that it awards plaintiff one-half of the gross amount of defendant's retirement income. The trial court should be instructed to amend its order to provide that defendant pay plaintiff the difference between half of the disposable amount and half of the gross amount.

Respectfully submitted this 7 day of September, 1989.

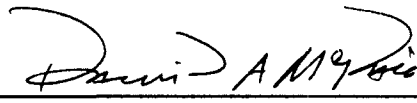


David A. McPhie
Attorney for Plaintiff/Respondent

Certificate of Service

I hereby certify that, on the 8 day of September, 1989, I caused to be mailed four (4) copies of Respondent's Brief, postage prepaid, to:

Franklin L. Slauch
Attorney for Defendant/Appellant
9341 S. 1300 East
Sandy, Utah 84094



David A. McPhie

Addendum

1. 10 U.S.C. § 1408 - Payment of retired or retainer pay in compliance with court orders.
2. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn App 1984).

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

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

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

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

Historical Note

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

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

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

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

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

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

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

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

Cross References

Computation of retired pay of personnel of—

Air Force, see section 8991 of this title.

Army, see section 3991 of this title.

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

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

Computation of retired pay of personnel of Public Health Service—

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

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

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

Recomputation of retired pay to reflect advancement on retired list—

Air Force, see section 8992 of this title.

Army, see section 3992 of this title.

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

Retired grade and pay of—

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

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

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

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

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

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

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

Library References

Armed Services —23.4.

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

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

(a) In this section:

(1) "Court" means—

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

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

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

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

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

(B) provides for—

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

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

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

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

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

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

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

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

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

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

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

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

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

(b) For the purposes of this section—

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

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated,

the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

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

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

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

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

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

(B) is legal in form; and

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

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

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

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

(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member, to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

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

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

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

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

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

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

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

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

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

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

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

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

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

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

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

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served

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

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

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

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

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

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

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730.)

Historical Note

References in Text. Section 462 of the Social Security Act, referred to in subsec. (a)(2) (B)(i), (ii), and section 459 of that Act, referred to in subsec. (c)(3)(A)(iii), (4)(A), (D), (5) and (6), are sections 462 of Act Aug. 14, 1935, c. 331, Title IV, as added May 23, 1977, Pub.L. 95-30, Title V, § 501(d), 91 Stat. 159, and 459 of Act Aug. 14, 1935, c.

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

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

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

The Soldiers' and Sailors' Civil Relief Act of 1940, referred to in subsec. (b)(1)(D), is Act Oct. 17, 1940, c. 888, 54 Stat. 1178, which is classified generally to section 501 et seq. of the Appendix to Title 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 volume.

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

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

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

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

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

"(e) For the purposes of this section—

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

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

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

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

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

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

Notes of Decisions

Offsets against retired pay 2

Retroactive effect of court decisions 1

1. Retroactive effect of court decisions

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

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

(B) The term "senior enlisted member" means any of the following:

- (i) Sergeant Major of the Army.
- (ii) Master Chief Petty Officer of the Navy.
- (iii) Chief Master Sergeant of the Air Force.
- (iv) Sergeant Major of the Marine Corps.
- (v) Master Chief Petty Officer of the Coast Guard.

(Added Pub.L. 99-348, Title I, § 104(b), July 1, 1986, 100 Stat. 686, and amended Pub.L. 100-180, Div. A, Title V, § 512(d)(2), Title XIII, § 1314(b)(6), Dec. 4, 1987, 101 Stat. 1090, 1175; Pub.L. 100-456, Div. A, Title XII, § 1233(c), Sept. 29, 1988, 102 Stat. 2057.)

References in Text. Section 16 of the Coast and Geodetic Survey Commissioned Officers' Act of 1948, referred to in subsec. (g), is classified to section 8530 of Title 33, Navigation and Navigable Waters.

Section 210(g) of the Public Health Service Act, referred to in subsec. (h), is classified to section 211(g) of Title 42, The Public Health and Welfare.

Section 211(a) of the Public Health Service Act, referred to in subsec. (h), is classified to section 212(a) of Title 42.

1987 Amendment. Subsec. (d). Pub.L. 100-180, § 512(d)(2)(A), substituted "section 6151 or 6334 of this title" for "section 6151 of this title".

Pub.L. 100-180, § 512(d)(2)(B), added item in table relating to section 6334.

Subsec. (i). Pub.L. 100-180, § 1314(b)(6)(A), inserted "and Vice Chairmen" following "for former Chairmen" in subsection catchline.

Subsec. (j)(1). Pub.L. 100-180, § 1314(b)(6)(B), inserted "or Vice Chairman" following "served as Chairman".

Prior Provisions. A prior section 1406, Added Pub.L. 89-652, § 2(1), Oct. 14, 1966, 80 Stat. 902, relating to limitations on revocation of retired pay, was redesignated as section 1338 of this title.

Legislative History. For legislative history and purpose of Pub.L. 100-180, see 1987 U.S. Code Cong. and Adm. News, p. 1018. See, also, Pub.L. 100-456, 1988 U.S. Code Cong. and Adm. News, p. 2503.

§ 1407. Retired pay base for members who first became members after September 7, 1980: high-36 month average

(a) Use of retired pay base in computing retired pay.—The retired pay or retainer pay of any person entitled to that pay who first became a member of a uniformed service after September 7, 1980, is computed using the retired pay base or retainer pay base determined under this section.

(b) High-three average.—The retired pay base or retainer pay base of a member under this section is the member's high-three average determined under subsection (c).

(c) Computation of high-three average.—

(1) Formula.—For the purposes of this section, a member's high-three average is the amount equal to—

(A) the total amount of monthly basic pay to which the member was entitled for the member's high-36 months, divided by

(B) 36.

(2) High-36 months defined.—

(A) General rule.—A member's high-36 months are the 36 months out of all the months of active duty served by the member as a member of a uniformed service for which the monthly basic pay to which the member was entitled was the highest.

(B) Rule for non-regular service retirees.—In the case of a member who is entitled to retired pay under section 1204 or 1205 of this title or under chapter 67 of this title, a member's high-36 months are the 36 months out of all the months the member was a member of a uniformed service before becoming entitled to retired pay for which the monthly basic pay to which the member would have been entitled had he served on active duty during those months was the highest.

(d) Limitation for enlisted members retiring with less than 30 years' service.—In the case of a member who is retired under section 8914 or 8914 of this title or who is transferred to the Fleet Reserve or Fleet Marine Corps Reserve under section 6330 of this title, the member's high-36 average shall be computed using only rates of basic pay applicable to months of active duty of the member as an enlisted member.

(e) Special rules for short-term disability retirees.—

(1) Members entitled to retired pay under section 1201 or 1202.—In the case of a member who—

(A) is entitled to retired pay under section 1201 or 1202 of this title; and

(B) served on active duty for less than 36 months,

the months (including any fraction thereof) that the member served on active duty shall be deemed to be the member's high-36 months.

(2) Members entitled to retired pay under section 1204 or 1205.—In the case of a member who—

(A) is entitled to retired pay under section 1204 or 1205 of this title; and

(B) was a member of a uniformed service for less than 36 months, the months (including any fraction thereof) that the member was such a member shall be deemed to be the member's high-36 months.

(f) Special rule for members retiring with non-regular service.—

(1) Disability retirement.—In the case of a member of a uniformed service who is entitled to retired pay under section 1204 or 1205 of this title (relating to members on active duty for 30 days or less), the high-36 average is determined as if the member served on active duty and was entitled to basic pay for the member's high-36 months.

(2) Chapter 67 retirement.—In the case of a person who is entitled to retired pay under section 1331 of this title (relating to retired pay for non-regular service), the person's high-36 average is determined as if the person served on active duty and was entitled to basic pay for the person's high-36 months.

(g) Definition.—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 $\frac{1}{12}$ 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, § 104(b), July 1, 1986, 100 Stat. 689.)

Prior Provisions. A prior section 1407, Added Pub.L. 96-342, Title VIII, § 813(a)(1), Sept. 8, 1980, 94 Stat. 1100, and amended Pub.L. 96-513, Title I, § 113(c), Title V, §§ 501(21), 511(33), Dec. 12, 1980, 94 Stat. 2877, 2908, 2925, which related to determination of retired pay base, was repealed by Pub.L. 99-348, Title I, § 104(b), July 1, 1986, 100 Stat. 686.

Notes of Decisions

1. Computation

Erroneous payments should not be included in computation of a service member's retired pay base, for purposes of computing his entitlement, under this section. 1983, 62 Comp.Gen. 157.

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

(a) In this section:

[See main volume for text of (1)]

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

[See main volume for text of (A) and (B)]

(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 or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

[See main volume for text of (3)]

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which—

[See main volume for text of (A) to (C)]

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1986 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) 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

[See main volume for text of (F), (5) and (6)]

(b) For the purposes of this section—

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

[See main volume for text of (A) and (B)]

(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

[See main volume for text of (D), (2), (c)]

(d)(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 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. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay

[See main volume for text of (2) to (4)]

(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 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 of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer 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 or retainer pay which remains after the satisfaction of all court orders which have been previously served.

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

(i) pay to that spouse from the member's disposable retired or retainer 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, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

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

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

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

[See main volume for text of (iii) and (B)]

(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 or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

[See main volume for text of (B)]

(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 or retainer 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 or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

[See main volume for text of (6); (f) to (h)]

(As amended Pub.L. 98-525, Title VI, § 643(a)-(d), Oct. 19, 1984, 98 Stat. 2547, 2548; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887, as amended Pub.L. 100-26, § 3(3), Apr. 21, 1987, 101 Stat. 273; Pub.L. 100-26, § 7(h)(1), Apr. 21, 1987, 101 Stat. 282.)

References in Text. Section 3402(i) of the Internal Revenue Code of 1986, referred to in subsec. (a)(4)(D), is classified to section 3402(i) of Title 26, Internal Revenue Code.

Codification. Section 3(3) of Pub.L. 100-26 made a technical amendment to the directory language of section 644(a) of Pub.L. 99-661 by substituting "Title 10, United States Code," for "such title," which amendment required no change in text. Such amendment by section 3 of Pub.L. 100-26 effective 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 774 of this title.

1987 Amendment. Subsec. (a)(4)(D), Pub.L. 100-26, § 7(h)(1), substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1986 Amendment. Subsec. (a)(4), Pub.L. 99-661, § 644(a)(1), struck out "other than the retired pay of a member retired for disability

under chapter 61 of this title)" preceding "less amounts".

Subsec. (a)(4)(E). Pub.L. 99-661, § 644(a)(2), added subpar. (E). Former subpar. (E), which read "are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or" was struck out.

1984 Amendment. Subsec. (a)(2)(C). Pub.L. 98-525, § 643(a), added "in the case of a division of property," before "specifically provides for".

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

Subsec. (d)(1). Pub.L. 98-525, § 643(c)(1), substituted "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" for "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" and substituted "in an amount suffi-

cient 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 retiree pay specifically provided for in the court order" for "specifically provided for in the court order." in the first sentence

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 retiree 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 retiree pay of the member to the spouse or former spouse of the member, any part" for "disposable retired or retiree 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 retiree pay of the member, any part"

Subsec. (e)(2) Pub L. 98-525, § 643(d)(1), substituted "the disposable retired or retiree pay of the member" for "from the disposable retired or retiree 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 retiree 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 retiree pay the least amount" for "the least amount of disposable retired or retiree pay" before "directed to be paid"

Subsec. (e)(3)(A)(ii) Pub L. 98-525, § 643(d)(2)(C), struck out "of retired or retiree pay" before "required by any conflicting"

Subsec. (e)(4)(A) Pub L. 98-525, § 643(d)(3)(A), struck out "the retired or retiree pay of" before "the same member"

Pub L. 98-525, § 643(d), substituted "satisfaction of such court orders and legal process from the retired or retiree pay of the members shall be" for "such court orders and legal process shall be satisfied" before "on a first-come"

Subsec. (e)(5) Pub L. 98-525, § 643(d)(4)(A), struck out "of disposable retired or retiree pay" in two places in the first sentence

Pub L. 98-525, § 643(d)(4)(B), substituted "disposable retired or retiree pay" for "such pay" before "available for payment" in the first sentence

Effective Date of 1986 Amendment. Section 644(b) of Pub L. 99-661 provided that "The amendments made by subsection (a) [amending subsec. (a)(4), prec. subpar (A) and (a)(4)(E) of 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 subsecs. (a), (b), (d) and (e) of 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 [subsec. (b)(1) of this

section]) is made on or after the date of enactment of this Act [Oct 19, 1984]"

Effective Date: Transition Provisions. Section 1006 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

[See main volume for text of (a) to (c)]

"(d) The amendments made by section 1004 of this title [enacting sections 1072(2)(F) and 1086(c)(3) and amending section 1076(b) of this title] and the provisions of section 1005 of this title [set out as a note under section 1408 of this title] shall apply in the case of any former spouse of a member or former member of the uniformed services 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—

[See main volume for text of (1) and (2)]

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

Savings Provisions. Reference to law replaced by Pub L. 100-370 to refer to corresponding provision enacted by such public law, regulation, rule, or order in effect under law so replaced to continue in effect under provision enacted until repealed, amended or superseded, and action taken or offense committed under law replaced treated as taken or committed under provision enacted, see section 4 of Pub L. 100-370, set out as a note under section 101 of this title

Commissary and Exchange Privileges. Section 1005 of Pub L. 97-252 which provided that Secretary of Defense prescribe regulations to provide unremarried former spouse commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of retired member of the uniformed services, was repealed by Pub L. 100-370, § 1(c)(5), July 19, 1988 102 Stat. 841

Legislative History. For legislative history and purpose of Pub L. 98-525, see 1984 U.S. Code Cong. and Adm. News, p. 4174. See, also Pub L. 99-661, 1986 U.S. Code Cong. and Adm. News, p. 6413

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1/4 Retroactive effect of section

Former wife was entitled to relief from divorce judgment which did not address equitable distribution of former husband's military pension, where judgment was entered subsequent to United States Supreme Court ruling that such pensions were not includable in marital estate for purposes of equitable distribution and prior to legislative enactment of this section which, by its terms, was retroactive to date of the Supreme Court decision and provided for inclusion of military pensions in marital estates. Castiglioni v. Castiglioni, 1984, 471 A.2d 809, 192 N.J. Super 594

In enacting this section Congress intended to obliterate the adverse effect of McCarty upon a divorced spouse of military personnel by making it retroactive to the date of that decision. Smith v. Smith, Del. Fam. Ct. 1983, 458 A.2d 711

Federal Uniformed Services Former Spouses' Protection Act, which permits application of state divorce laws to military retired pay, did not prohibit dissolution court's division of disability retired pay and, in any event, even if it did the Act could not be applied retroactively to an almost ten-year old dissolution decree, which awarded wife one-half of husband's military retirement

benefits, so as to preclude wife from recovering one-half of husband's military disability retirement benefits, final dissolution judgment vesting wife's community property interest in husband's military retired pay was a property interest that could not be denied without due process, disagreeing with *In re Marriage of Costo*, 156 Cal. App. 3d 781, 203 Cal. Rptr. 85. *In re Marriage of Stier*, 1986, 223 Cal. Rptr. 399, 178 C.A.3d Supp. 1205C, 178 C.A.3d 42, review denied

For purpose of West's Ann. Cal. Civ. Code § 5124, governing modification of community property settlements to include division of military retirement benefits, term "final" as applied to judgments or decrees means final in sense of being free from further direct attack, regardless of any reservation of jurisdiction on pension issue, and, thus, statute permits modification of judgments and decrees where parties could not have sought retroactive application of curative provisions of Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. §§ 1408, 1408(c)(1), because federal legislation was not operative before time for direct attack had elapsed. *In re Marriage of Van Dyke*, 1985, 218 Cal. Rptr. 11, 172 C.A.3d 145

This section which allows state courts to treat disposable retired or retiree pay of retired member as community property was retroactive to date of United States Supreme Court decision in *McCarty*, June 26, 1981, and was applicable to case not final on effective date of this section, Feb. 1, 1983, prior California decisions relative to treatment of military pensions as community property were controlling on all cases not yet final, whether they were filed before, on, or after June 26, 1981. *In re Marriage of Hopkins*, 1983, 191 Cal. Rptr. 70, 142 C.A.3d 350

Uniformed Services Former Spouses' Protection Act provision allowing retirement pay of service personnel to be treated as a marital asset [10 U.S.C.A. § 1408(c)(1)] is retroactive to June 26, 1981, the date of the United States Supreme Court's *McCarty* decision precluding state courts from awarding nonmilitary spouses a portion of military spouse's government pension. *Keen v. Keen*, 1985, 378 N.W.2d 612, 145 Mich. App. 824

Uniform Services Former Spouses Protection Act, could be retroactively applied, so as to require husband to pay military pension proceeds to wife retroactively to date of Supreme Court decision that Act reversed rather than date on which award was reinstated. *Thorpe v. Thorpe*, 1985, 367 N.W.2d 233, 123 Wis.2d 424

Retroactive application of Uniform Services Former Spouses Protection Act [10 U.S.C.A. § 1408], permitting division of military retirement payments in final dissolution decrees, to dissolution decrees that were final and not appealed during 20-month interim period between judicial decision prohibiting distribution of military retirement payments as part of community property and passage of Act, did not divest husbands of any vested rights, particularly where husbands had been married throughout period prior to rendering of judicial decision when payments were considered community property. *Flanagan v. Flanagan*, 1985, 709 P.2d 1247, 42 Wash. App. 214

Application of statute [10 U.S.C.A. § 1408] allowing division of military retired pay upon

In the Matter of the Application for the Discipline of Harold D. KIMMEL, Jr., an Attorney at Law of the State of Minnesota.

No. C1-81-955.

Supreme Court of Minnesota.

April 18, 1984.

Review Denied July 26, 1984.

ORDER

WHEREAS, by decision of this court filed July 23, 1982, *In re Kimmel*, 322 N.W.2d 224 (Minn.1982), respondent's practice has been restricted to examiner of titles throughout the remainder of his probation in connection with *State of Minnesota v. Harold Dean Kimmel*, Washington County, # 4479, Pine County # 64-25B; and

WHEREAS, by order of the Washington County District Court dated April 2, 1984, respondent was discharged from probation; and

WHEREAS, respondent has satisfied all current Continuing Legal Education requirements and has paid all past and current attorney registration fees;

IT IS HEREBY ORDERED that, consistent with the original opinion of this court and upon the respondent's demonstrated satisfactory completion of the terms of the suspension from practice, respondent is reinstated to practice law. Minn.R.Law.Prof. Resp. 18 is deemed inapplicable to these proceedings.



Mary E. DELIDUKA, Respondent,

v.

George E. DELIDUKA, Appellant.

No. CO-83-1261.

Court of Appeals of Minnesota.

April 4, 1984.

~~The District Court, Wright County,~~ Harold Dahl, J., dissolved marriage and made property division and support awards, and spouse appealed. The Court of Appeals, Sedgwick, J., held that: (1) military retirement benefits are marital property; (2) award to wife of 50 percent of husband's military retirement benefits did not violate Uniform Services Former Spouses' Protection Act; (3) failure to award permanent maintenance was not abuse of discretion; and (4) it was not abuse of discretion to order parties to pay their respective attorney fees.

Affirmed and remanded.

1. Divorce \S 252.3(4)

Military pension benefits are "marital property" subject to the division on dissolution of marriage. M.S.A. \S 518.54, subd. 5.

See publication Words and Phrases for other judicial constructions and definitions.

2. Divorce \S 252.3(4)

Uniform Services Former Spouses' Protection Act grants states the authority to treat all disposable retired pay as marital property but limits direct government payments to former spouses to 50 percent of disposable retired pay and, hence, where a nonservice spouse is awarded one-half of the gross pension, the service spouse is to pay the excess over the 50 percent of disposable pension payable directly by the federal government to the other spouse. 10 U.S.C.A. \S 1408(a)(4), (c), (e), (e)(1), (e)(4)(B), (e)(6).

3. Divorce \S 252.3(4)

By labeling its disposition of husband's military pension benefits as a division of marital property, but structuring installment payments to former wife over more than ten years, the dissolution court anticipated Internal Revenue Services treatment as periodic payments taxable to wife and deductible by husband, notwithstanding that tax regulations technically required husband to pay withholding on entire amount and prohibited withholding from direct pension payments to the wife. 26 U.S.C.A. §§ 71, 215.

4. Divorce \S 253(2), 307

It could not be said that dissolution court miscalculated former husband's income tax rate where other than pay statements reflecting withholding the husband made no effort to prove facts concerning his income tax liabilities and although he alleged that withholding amounts on pay stubs did not accurately reflect tax liabilities the substitute figures he offered were totally unsupported.

5. Divorce \S 286(6), 312.6(8)

Reviewing court will not disturb dissolution court's maintenance or child support awards on basis of unsubstantiated claims and self-serving figures as to a party's income tax liabilities.

6. Divorce \S 237

Factors relevant to award of permanent maintenance are length of marriage, spouse's age, family responsibilities, lack of job skills and lack of resources to obtain further training or education.

7. Divorce \S 286(3)

Question on appeal is not whether permanent maintenance is appropriate but whether trial court abused its discretion by not awarding it.

8. Divorce \S 247, 308

Although wife's age, i.e., 48, family responsibility in caring for four minor children and lack of job skills supported her plea for permanent maintenance, it was not abuse of discretion to award spousal maintenance of \$100 for three years, and child

support of \$900 per month considering wife's present net income of \$714 per month as newspaper carrier and security afforded by long-term pay out of retired husband's military pension.

9. Divorce \S 223

It was not abuse of discretion to order each spouse to pay his/her own attorney fees.

10. Divorce \S 223

Allowance of attorney fees in dissolution cases rests almost entirely in the discretion of the trial court.

11. Divorce \S 286(4)

Award of attorney fees in dissolution case should not be disturbed absent clear abuse of discretion.

12. Divorce \S 227(1)

Although there was no abuse of discretion in requiring each spouse to pay their respective attorney fees in dissolution proceeding, husband was ordered to pay wife \$400 for attorney fees on appeal.

Syllabus by the Court

1. Military pensions are marital property as defined by Minn.Stat. § 518.54.

2. The Uniformed Services Former Spouses' Protection Act grants states authority to treat all disposable retired pay as marital property, but limits direct government payments to former spouses to 50 percent of disposable retired pay.

3. The trial court properly refused to consider tax considerations not raised at trial in calculating the husband's net income available for maintenance and child support.

4. The trial court's award of minimal temporary maintenance was not an abuse of discretion considering the wife's earning potential and her share of the marital property.

5. The trial court's assignment of attorney fees was not an abuse of discretion.

Medard B. Kaisershot, Crystal, for appellant.

Marilyn J. Michales, Minneapolis, for respondent.

Heard, considered and decided by FOLEY, P.J., and WOZNIAK and SEDGWICK, JJ.

OPINION

SEDGWICK, Judge.

This is an appeal from a dissolution judgment and from an order denying a new trial. The husband contends that the trial court erred by awarding his wife 50 percent of his gross military retirement benefits and by failing to make certain tax calculations in determining income available for child support and maintenance.

The wife contends that the court abused its discretion by granting her temporary rather than permanent maintenance and by not requiring her husband to pay her attorney fees.

Affirmed as modified.

FACTS

Mary and George Deliduka were divorced in June-1983 after 23 years of marriage. The Delidukas, ages 48 and 45 respectively, had seven children. The children, ages 21, 20, 18, 17, 15, 13, and 9, all live with Mrs. Deliduka. The court granted Mrs. Deliduka custody of all four minor children.

Mr. Deliduka was an officer in the U.S. Air Force during the Delidukas' marriage. He retired in 1980 after 20 years of service. He has a vested interest in a military retirement pension plan. According to a retirement pay statement submitted at trial, he receives \$1566.46 gross/\$1380.04 net per month from the pension.

Mr. Deliduka now works as a training coordinator for Trane Sentinel, Inc. Pay stubs submitted at trial show that he receives \$957.85 gross/\$731.73 net bi-weekly from Trane.

Mrs. Deliduka was a full time homemaker from 1960 until 1981. In 1981 to help

the family meet expenses she took a job as an adult newspaper carrier. Her net salary from the route is approximately \$714 per month.

The Delidukas' debts at the dissolution totalled \$16,701.66. Their only significant assets were their home and Mr. Deliduka's military pension.

The parties dispute the trial court's treatment of military retirement benefits as a marital asset, its award of spousal maintenance of \$100 per month for three years, and child support of \$900 per month for the four minor children, with reductions as each child reaches majority, and attorneys fees.

ISSUES

1. Are military retirement benefits marital property subject to division between spouses in a dissolution proceeding in Minnesota?
2. Does the trial court's award to the wife of 50 percent of her husband's military retirement benefits violate the Uniformed Services Former Spouses' Protection Act?
3. Did the trial court abuse its discretion by:
 - a. failing to take into account tax considerations not raised at trial in calculating Mr. Deliduka's income?
 - b. failing to award permanent maintenance to a long term homemaker with four minor children?
 - c. ordering the parties to pay their respective attorney fees?

ANALYSIS

[1] 1. Mr. Deliduka contends that the trial court erred in treating his military pension benefits as marital property. Minn.Stat. § 518.54, subd. 5, defines marital property as:

property, real or personal, *including vested pension benefits or rights*, acquired by the parties, or either of them, to a dissolution * * * at any time during

the existence of the marriage relation between them. (emphasis added)

Therefore, Mr. Deliduka's military pension qualifies as marital property.

[2] 2. Appellant also challenges the award of 50 percent of his gross military pension benefits to his wife as a violation of 10 U.S.C. § 1408, the Uniformed Services Former Spouses' Protection Act. He argues that the Act limits the maximum portion of military pension benefits a court may award to a former spouse to 50 percent of "disposable retired pay." Disposable retired pay is gross retired pay less deductions authorized by 10 U.S.C. § 1408(a)(4).¹

1. 10 U.S.C. § 1408(a)(4) defines disposable retired or retainer pay as:

(T)he total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which * * *

(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;

2. 10 U.S.C. § 1408(c) grants state courts authority to treat military pensions as military property. It provides:

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

3. 10 U.S.C. § 1408(d) permits direct government payments to former spouses, subject to certain limitations. It provides:

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

(d)(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall,

The act is new and the United States Supreme Court has not definitively interpreted its provisions. A fair reading shows that the act grants states the authority to treat all disposable retired pay as marital property,² but limits direct government payments to former spouses to 50 percent of disposable retired pay (65 percent for multiple court orders).³ That means that a state court wishing to award a former spouse more than 50 percent of disposable retired pay must order direct government payments and payments by the member of the military to the spouse.⁴

In this case the trial court intended to award Mrs. Deliduka one half of her hus-

subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

10 U.S.C. § 1408(e) specifies the percentage limitations. § 1408(e)(1) provides:

The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

And § 1408(e)(4)(B) provides:

Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

4. § 1408(e)(6) provides:

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

band's gross military pension as a division of marital property. Since the parties had inadequate resources to permit a lump sum settlement, the court provided for installment payments to Mrs. Deliduka.

The trial court tried to give Mrs. Deliduka her half of the gross pension by ordering direct government payments to her under 10 U.S.C. § 1408. But, since § 1408 limits direct payments to former spouses to 50 percent of *disposable* retired pay, direct payments alone would not result in Mrs. Deliduka receiving 50 percent of the *gross* pension.

The trial court erred only in its method of disbursing pension payments to the wife. To guarantee its intended division of marital property, the court, in addition to ordering direct government payments, should have ordered Mr. Deliduka to make monthly supplemental payments. Mrs. Deliduka would then receive her full one-half of the gross pension—50 percent of the disposable pension would be paid by the federal government, and the difference between 50 percent of gross pension and 50 percent of disposable pension would be made by payments from Mr. Deliduka.

[3] 3. Mr. Deliduka contends that his income available for maintenance and child support was overestimated because the court presumed that the parties would each pay income tax on their respective halves of the pension. He correctly notes that the trial court's income calculations were expressly premised upon the Deliduka's each paying income taxes on their respective halves of the military pension. But his argument that he must pay income tax on the entire pension, while his wife escapes all tax liability, is without merit.

Tax regulations technically require him to pay withholding on the entire amount and prohibit withholding from direct pension payments to his wife. However, he will ultimately be liable for income tax only on his half of the pension. The trial court properly recognized the nature of the pension asset, i.e., that it was marital property, but structured its payout as periodic payments for tax purposes. By labeling its

disposition of the pension benefits a division of marital property, but structuring installment payments over more than 10 years, the trial court anticipated IRS treatment as periodic payments taxable to Mrs. Deliduka under 26 U.S.C. § 71 and deductible by Mr. Deliduka under 26 U.S.C. § 215.

Mr. Deliduka has confused tax withholding with ultimate tax liability and ignores the fact that withholding may be adjusted. A taxpayer has both the ability and the right, under the withholding tax regulations, to increase his maximum allowable exemptions to reflect his actual tax obligation. Mr. Deliduka cites no authority for his argument that he is only entitled to claim himself and the four minor children as exemptions.

The trial judge recognized that uncertainties about the application of federal tax laws and the Uniform Services Former Spouses' Protection Act could upset his calculations. So his decree specifically invites Mr. Deliduka to come back to court for adjustments of support and maintenance should he have to pay income tax on more than his one-half share of the pension. If, after consulting a tax attorney or accountant, the planned division of tax liabilities proves impossible, Mr. Deliduka can return the matter to the trial court for modification of maintenance and child support. If he does, it will be his obligation to prove that the tax treatment carefully considered by the trial court to give this family the maximum monetary benefit from the pension division will not work.

[4] 3a. Mr. Deliduka's claim that the trial court miscalculated his income tax rate is also unsubstantiated. Other than pay statements reflecting withholding for taxes, he made no effort to provide facts to the trial court concerning his income tax liabilities. In a motion for amended findings he alleged that the withholding amounts on the pay stubs did not accurately reflect his tax liabilities and offered new figures totally unsupported by the trial record. On appeal he made spurious arguments on the effect of the tax regulations.

[5] We will not disturb the trial court's maintenance or child support awards on the basis of unsubstantiated claims and self-serving figures as to a party's income tax liabilities. The trial court's net income computations are supported by the evidence presented at trial and are not clearly erroneous. Therefore, they must stand.

3b. Mrs. Deliduka argues that the court's award of only \$100 per month temporary maintenance for three years, and its failure to grant permanent maintenance constitutes abuse of discretion under Minn. Stat. § 518.552.

[6] The length of the marriage, Mrs. Deliduka's age, her family responsibilities, her lack of job skills, and her lack of resources to obtain further training or education all support her plea for permanent maintenance.

[7, 8] But the question upon appeal is not whether permanent maintenance would be appropriate, but whether the trial court abused its discretion by not awarding it. The court's minimal maintenance award for a limited period was not an abuse of discretion considering Mrs. Deliduka's present earnings and the security she is afforded by the long-term payout of the pension asset.

[9-11] 3c. Mrs. Deliduka also contends that the trial court abused its discretion by not requiring her husband to pay her attorney fees. The court's order that the parties pay their own attorney fees was within its discretionary power. Allowance of attorney fees in dissolution cases rests almost entirely in the discretion of the trial court. *Solon v. Solon*, 255 N.W.2d 395 (Minn.1977). An award should not be disturbed absent clear abuse of discretion. *Davis v. Davis*, 306 Minn. 536, 235 N.W.2d 836 (1975).

DECISION

The decision of the trial court is affirmed and remanded to the trial court with instructions to make the following modifications:

Mr. Deliduka is hereby ordered to:

1. serve notice on the appropriate government agency consistent with the Uniformed Services Former Spouses Protection Act 10 U.S.C. § 1408 (1982) to provide for direct monthly payments to Mrs. Deliduka of 50 percent of his disposable retired pay.

2. adjust income tax withholding on the military pension by taking the maximum allowable exemptions resulting in withholding reflecting his tax obligation on 50 percent of the gross pension.

3. make monthly payments to Mrs. Deliduka of a sum totaling 50 percent of his gross military retirement pay less 50 percent of disposable retired pay.

[12] In addition, Mr. Deliduka is hereby ordered to pay Mrs. Deliduka \$400 for attorney fees on appeal.



Derald C. NELSON and Carol L. Nelson, Appellants,

v.

Curtis R. ENGEN, Defendant,

National Family Insurance Co., Respondent.

No. CO-83-1440.

Court of Appeals of Minnesota.

April 10, 1984.

Following declaratory judgment determining that insurer did not provide coverage for certain automobile owned by judgment debtor, which automobile was being driven by debtor at time of accident from which judgment arose, judgment creditors served a garnishment summons upon the insurer and moved for leave to file a supplemental complaint making the insurer a