



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lieutenant Colonel Warren L. Early, USAF
(Retired) - Survivor Benefit Plan - Former Spouse
Coverage

File: B-226563

Date: March 2, 1990

DIGEST

Where retired Air Force officer's court-ordered election to provide his former spouse with annuity coverage under the Survivor Benefit Plan (SBP) was invalid under then-current SBP law, Air Force should not have begun deducting premiums from his pension. Accumulated amount should not be refunded to the officer, however, since the court clearly intended the premium amount to benefit the former spouse. Instead, the Air Force should retain the money pending further court action.

DECISION

The Department of the Air Force requests an advance decision on refunding to retired Lieutenant Colonel Warren L. Early Survivor Benefit Plan (SBP) costs that had been deducted from his retired pay for an annuity for his former spouse. The issue involves whether Colonel Early's election to provide the annuity coverage was valid.^{1/}

We find that Colonel Early's election was invalid. For the reasons stated below, the Air Force should retain the accumulated premium amount pending direction from the divorce court, which had mandated the election in connection with ordering alimony payments by Colonel Early, as to the proper distribution.

BACKGROUND

Colonel Early retired from the Air Force on April 1, 1973, at which time he elected to participate in the SBP program with spouse coverage. He thus chose to receive retired pay

^{1/} The request was approved and assigned submission number DO-AF-1472 by the Department of Defense Military Pay and Allowance Committee.

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at a reduced rate in order to provide an annuity for his wife, Dolores E. Early, if she survived him.

On April 7, 1983, a Maryland state court issued a decree of divorce terminating the Earlys' marriage. The court directed that Colonel Early pay Mrs. Early \$2,000 per month in alimony, less \$200 that he was to pay for her continued SBP coverage.

Because Colonel Early did not pursue an election to provide former spouse SBP coverage for Mrs. Early during the following year, Mrs. Early initiated further proceedings in the divorce court in an effort to compel him to do so. The court issued an order on April 5, 1984, directing Colonel Early to make the election. This order was countersigned by Colonel Early's attorney as well as by Mrs. Early's attorney.

The following day, Mrs. Early signed a Department of Defense form styled an SBP "Election Statement for Former Spouse Coverage," and she attached an affidavit stating that "on April 7, 1983, my then husband, Warren L. Early, promised, and he and I agreed that he would maintain me on his Survivor's Benefits."

On the same day Mrs. Early signed the SBP form, Colonel Early wrote "Please See Attached" in the block provided for his signature on the form. In an attached, signed, document he said, "I, Warren L. Early, hereby sign this Consent, pursuant to the Court Order issued on April 5, 1984, which has specifically directed me, under threat of contempt and jail sentence, to sign this election. . . ." Colonel Early went on to say that he did not want his ex-wife to receive the annuity, and that the election was not voluntary. He suggested that the court's order had therefore contravened his rights under the laws governing the SBP program, and he specifically cited subsection 1450(f)(3) of title 10, United States Code. That law provided:

"(3) Nothing in this chapter authorizes any court to order any person to elect . . . to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such election."

Colonel Early also expressed the belief that he had not been given adequate notice of the court proceedings, and that he had not been given an adequate opportunity to be heard in those proceedings.

On the basis of this "election" made by Colonel Early, the Air Force established SBP former spouse annuity coverage for Mrs. Early effective October 1, 1984, and began deducting SBP costs of approximately \$200 per month from Colonel Early's military retired pay.

In a December 4, 1984 letter to the Air Force, Colonel Early demanded that the deductions stop, and indicated that he had appealed the court order. The Air Force advises that it never was told of the resolution of the appeal, if in fact taken. Air Force officials, who have continued the deductions since 1984, request our decision on whether Colonel Early should be reimbursed for the deductions in view of the comments he included in the election documents.

ANALYSIS AND CONCLUSION

The SBP program, 10 U.S.C. §§ 1447-1455, was established by Congress in 1972 as an income maintenance plan for the dependents of deceased members of the uniformed services. Under the original legislation, there was no authority for coverage of a former spouse, and upon divorce a retiree's former spouse generally lost coverage.^{2/}

Ten years later, in September 1982, the Uniformed Services Former Spouses' Protection Act^{3/} amended the SBP program to allow a service member to make an election to provide an annuity for a former spouse. The amendment, however, applied only to a service member who had a former spouse at the time he became eligible for the SBP program, and did not authorize a service member in Colonel Early's situation, who was married and had elected SBP spouse coverage at the time of his retirement (in 1973), to designate that former spouse upon a subsequent divorce. Consequently, there was no SBP statutory authority for Colonel Early to elect former spouse coverage as mandated by the divorce court in April 1983.

The law was changed in September 1983 through further amendments to the SBP program that authorized a retiree to elect former spouse coverage within 1 year following

^{2/} Pub. L. No. 92-425, Sept. 21, 1972, 86 Stat. 706. See 66 Comp. Gen. 687, 689 (1987).

^{3/} Pub. L. No. 97-252, title X, Sept. 8, 1982, 96 Stat. 718, 730, 735.

divorce.^{4/} Retirees in Colonel Early's situation who were already divorced were given a 1-year period in which they could elect former spouse annuity coverage after the date of the enactment of the amendment. Accordingly, there was SBP statutory authority in April 1984 for Colonel Early to effect an election as directed by the court at that time.

The 1982 amendment also added 10 U.S.C. § 1450(f)(3), to which Colonel Early referred, and which is set out above. That provision remained in effect until October 1984.

We agree with Colonel Early that his April 1984 election should not have been given effect. There simply was no provision in the law as of April 1983 for a former spouse designation, and although there was such authority beginning in September 1983, 10 U.S.C. § 1450(f)(3) was clear that implementation of a court order had to be founded on a voluntary writing by the member. Colonel Early's remarks appended to the election document indicate that his written election was not voluntary except to the extent that it would keep him from being cited for contempt.

In fact, in 1984 the Congress recognized that under then-current law a member could agree to designate a former spouse, permit a court to incorporate or ratify the agreement in a court order, and then subvert the law's intent by refusing to sign the actual election document. See S. Rep. No. 500, 98th Cong., 2d Sess. 222 (1984). The Congress consequently enacted Pub. L. No. 98-525, § 644, Oct. 19, 1984, 98 Stat. 2492, 2548, to provide in that situation that the former spouse could make an appropriate request of the Secretary concerned within 1 year of the act's passage or the date of the court order, whichever was later, and the service would "deem" an election to have been made by the member. This amendment, was codified at 10 U.S.C. § 1450(f)(3), and the provision then at that subsection was moved to subsection (f)(4).

Accordingly, the Air Force should not have processed the SBP election form filed in April 1984.

This does not mean, however, that we think the Air Force should refund the money it has collected to Colonel Early. The court in both 1983 and 1984 earmarked a total of \$2,000 per month of his pension for Mrs. Early's benefit, including the \$200 in issue in the form of an annuity premium. To ignore that designation to let Colonel Early keep \$200 of

^{4/} Pub. L. No. 98-94, § 941, Sept. 24, 1983, 97 Stat. 614, 652.

the total monthly payment would be patently unfair, since the court presumably would have designated that amount as a direct payment to Ms. Early had it not designated it indirectly through an SBP premium. (It is not apparent from the record why the court thought Colonel Early could elect former spouse coverage in April 1983.)

In these circumstances, we think the appropriate distribution of the money should be decided in court through a review of the parties' court-ordered support arrangement and its implementation. We note in this respect that in November 1986 Congress revised 10 U.S.C. § 1450(f)(4) (the old subsection (f)(3)) to give state courts in divorce proceedings the authority to require a person to elect SBP former spouse annuity coverage regardless of whether the person otherwise agrees to do so.^{5/}

The Air Force should retain the funds in issue until advised by the parties of the court's distribution decision.

for 
Comptroller General
of the United States

^{5/} Pub. L. No. 99-661, § 641, Nov. 14, 1986, 100 Stat. 3816, 3885.