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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-213658

DATE: June 26, 1984

MATTER OF: Senior Chief Petty Officer Lawrence
Stallard, USN

DIGEST:

An agreement incorporated into a divorce decree provided that there would be joint custody of the children of the marriage but that the children would reside with the member's former wife and visit the member frequently and for long periods. The member asserts that the children actually resided with him before and after the divorce until he was ordered overseas and that they would have continued to reside together but for the military orders. Under these circumstances, the separation between the member and his children resulted from the provisions of the divorce settlement and not from his military assignment. Thus he is not entitled to family separation allowance, type I.

This action is in response to a request from a disbursing officer¹ for a decision on the question of whether Senior Chief Petty Officer Lawrence E. Stallard, USN, is entitled to family separation allowance, type I, subsequent to his divorce. On the basis of the evidence provided the allowance may not be paid since the agreement between the member and his former wife provided that the children were to reside with the wife and not the member.

Facts and Issue

A separation agreement between the parties was signed on February 21, 1983, and was incorporated into the divorce decree which was granted on April 13, 1983. That agreement

¹ The request, made by G. A. Sebastiani, Disbursing Officer at U.S. Navy Personnel Support Activity Detachment, U.S. European Command, and was transmitted by the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-N-1431.

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provided that Petty Officer Stallard and his wife would have joint custody of the children, subject to two conditions: (1) that the children reside with the wife, and (2) that the husband have extensive visitation rights. The agreement also provided that the children, who were ages 11 and 17, would be consulted and that they could visit with their father at his residence for as long a period as he and they desired. The agreement required liberal construction of these provisions to enhance the father-child relationship.

The disbursing officer in his submission says that when Petty Officer Stallard and his wife separated their two children, with his wife's approval, remained with him in the family home and continued to reside with him through the divorce on April 6, 1983, until May 15, 1983, when he was transferred to Stuttgart, Germany. His orders did not authorize dependents' travel, but it is stated that, had the orders authorized dependents to accompany the member, the children, with the ex-wife's approval, would have accompanied Petty Officer Stallard to his overseas post. Since the children could not accompany Petty Officer Stallard, his ex-wife returned to the family home after his transfer to care for the children.

The disbursing officer points out that the requirement to maintain two residences, the family home, and a residence in Germany, tends to support the validity of Petty Officer Stallard's claim. However, he says there is a question whether the provision that the children reside with their mother requires a conclusion that she had legal custody, and that the separation was for personal reasons rather than the result of military orders.

Discussion

The statutory authority for payment of family separation allowances is 37 U.S.C. § 427. Subsection (a) authorizes payment of FSA-I, the purpose of which is to compensate a member for the expense of procuring quarters for himself and his dependents during periods of enforced separation when government quarters are not available for assignment to him at his overseas station. Under paragraphs 30303d and 30311b of the Department of Defense Military Pay and Allowances Entitlements Manual, a separation is not enforced when a child is in the legal custody of another person. Whether a child is in the legal custody of another can be

resolved in some cases by the language of the divorce decree. However, in this case the member and his former wife retained joint custody of the children. In joint custody cases the provisions of the divorce settlement regarding the residence of the children and the facts involved must be the basis for resolving the question of whether the member is separated from his children because of the divorce or whether separation resulted from his assignment as a member of a military service.

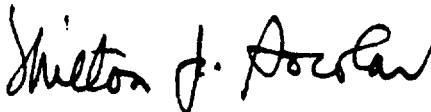
A decade ago we recognized that joint custody is entirely different from conventional divided custody in that the parents agree that each has an undivided equal right, which is the same as before the divorce. 52 Comp. Gen. 878 (1978). In one case where neither parent was awarded legal custody, we authorized payment of a family separation allowance since the provisions of the divorce and the facts involved showed an intent that one of the children would reside with the member. Chief Master Sergeant Burton R. Brennon, USAF, B-190008, November 30, 1977. In that case we noted that the member had broad visitation rights and the dependent actually resided with him after the divorce. Also, where the divorce settlement and the facts involved showed that the parties intended that the child would reside with the member under a joint custody divorce settlement family separation allowance was paid. Captain George S. Grove, USN, B-179976, November 7, 1974. However, in a case involving the award of joint custody, we held that a member was not entitled to family separation allowance where the decree awarded physical custody of the children to the member's wife. Sergeant Major Alexander Titoff, USA, B-211693, July 15, 1983. In that case the member was overseas serving a tour of duty on which he could not be accompanied by his dependents when the divorce decree was issued, and the dependents actually resided with the former wife in the family home.

In Petty Officer Stallard's case the provisions of the divorce settlement clearly provide that the children will reside with his former wife. The disbursing officer asserts that the provisions of that settlement were not consistent with the facts in that the children actually resided with the member and that they would have accompanied him overseas if he had been on an accompanied tour.

However, in February 1983 the parties agreed that the children would reside with Mrs. Stallard, and this agreement was recognized by the court as binding when the divorce was granted in April of that year. We are told that by May 15, 1983, the date of transfer, Petty Officer Stallard and his former wife had agreed to disregard that agreement so that the children could reside with Petty Officer Stallard.

We are asked to settle this case on the basis of the disbursing officer's statements as to the intent of Petty Officer Stallard and his former wife and disregard the binding provision of the separation agreement as incorporated in the divorce settlement. Although the intent of parties to a divorce may change with changes in circumstances, we cannot accept the disbursing officer's statements as evidence sufficient to overcome the provisions incorporated in the divorce decree. This is particularly clear because the agreement was entered into in February 1983, and affirmed at the time the divorce decree was granted in April when Petty Officer Stallard was aware that he would be transferred overseas in May.

Accordingly, Petty Officer Stallard is not entitled to family separation allowance subsequent to his transfer to Germany.


for Comptroller General
of the United States