PLM-II

**DECISION**

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

[Entitlement To Reimbursement for Erroneous Allotment Payments] 10,839 10,844

FILE: B-194692 DATE: July 24, 1979

MATTER OF: Sergeant Richard C. Rushing, USA A6C00020

DIGEST: (1) Allotment payments from an Army member's pay made to his spouse in a community property State are considered to be assets of the community in which the member has an interest. Since the member has a direct interest in the payments he is not entitled to be reimbursed for the money erroneously deducted from his pay and paid to his wife in order to pay a voluntary support allotment although the member took the necessary steps to discontinue the allotment.

(2) Allotment payments from an Army member's pay made to his former spouse in a community property State after the spouse and the member are divorced inure to the benefit of the spouse's separate estate. It can no longer be said that the member has an interest in the payments. Since the member was not at fault for the continuance of the allotment payments and took all the necessary steps to discontinue the allotment, the member is not liable for the payments made after the divorce and is entitled to be reimbursed for them. The former spouse is liable for them and they should be collected from her.

The issue in this case is whether Sergeant Richard C. Rushing, USA, is entitled to reimbursement of $3,000 deducted from his military pay account in order to pay a voluntary allotment for the support of his wife after he had requested that the allotment be stopped. We conclude that Sergeant Rushing is entitled to reimbursement only for the allotment payments made after the date of his divorce, and only to the extent that he was not reimbursed by his wife.

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The question arises as a result of Sergeant Rushing's letter of March 30, 1979, appealing a settlement issued by our Claims Division on September 28, 1978, denying his claim for reimbursement.

On August 29, 1977, Sergeant Rushing executed two separate DA Forms 1341, to discontinue allotments in the amount of $25 and $500, effective September 1, 1977. The allotments were payable to his then wife, Tina A. Rushing (now Tina A. Ross), for her support. Sergeant Rushing's end-of-month pay voucher for September 1977, reflected the $25 allotment as being stopped. The $500 allotment, however, continued to be paid for the next six months with the appropriate deductions made from Sergeant Rushing's pay. During these six months, Sergeant Rushing submitted 3 additional requests to stop the allotment. Due to oversights by the clerks who post the records none of the stop allotment authorizations became effective. The final payment was made for the period ending February 28, 1978, only after the Army was informed that Sergeant Rushing and his wife were divorced on January 16, 1978. Sergeant Rushing was subsequently reimbursed by his ex-wife for the $500 she received on March 1, 1978.

The general rule in situations such as this is that where an allotment or family allowance has been erroneously paid and the service member was not at fault, the payee or recipient, not the service member, is legally liable to refund the payment. 33 Comp. Gen. 309, 313-314 (1954). Thus, it would follow that in addition to not being liable the service member would be entitled to a refund of the money deduction from his pay. The member, however, would not be entitled to a refund if he had an interest in, or the proceeds from the allotment inured to his benefit. See Matter of Ollie N. Marshall, B-193400, January 31, 1979; Matter of Neal B. Batts, Jr., B-185820, February 11, 1977; 37 Comp. Gen. 218 (1957). Compare 49 Comp. Gen. 361 (1969).

The record indicates that Sergeant Rushing and his spouse were residents of the State of Texas and that they remained husband and wife without any formal or legal separation until January 16, 1978. As legal residents of Texas, the member and his spouse were subject to the laws

of that State as they related to their property rights. See: Matter of Neal B. Batts, Jr., supra and authorities cited therein. The State of Texas is a community property State.

According to the laws of Texas, community property consists of the property other than separate property acquired by either spouse during marriage. See: Tex. Fam. Code Ann. §5.01(b) (Vernon). In the case of Sterrett v. Sterrett, 228 S.W. 2d 341 (Ct. App., Tex. 1950), the Texas Court of Appeals stated that an allotment paid by the United States Government to a serviceman's wife was part of the serviceman's compensation for services rendered and was therefore property of the community. It follows that the money erroneously paid to Sergeant Rushing's wife was part of his compensation for services rendered to the Army and was, under Texas law, a part of the community estate. See: Matter of Neal B. Batts, Jr., supra.

Therefore, even though payment of the money in question to the wife was not authorized by Sergeant Rushing, under the law of Texas such payments were in the nature of community property assets in which he had a direct interest. Cf. Sterrett v. Sterrett, supra. Since Sergeant Rushing had an interest in the payments he is not entitled to be reimbursed the money deducted from his pay and erroneously paid to his wife prior to their divorce.

As was stated above, Sergeant Rushing and Tina Rushing were divorced on January 16, 1978. At this time, the District Court of Dallas County, Texas, 254th Judicial District divided the community property. Thus, anything earned or acquired by Sergeant Rushing or his ex-wife after the date of the divorce became their separate property.

The record indicates that Tina Rushing received allotment payments for the months of January and February 1978 after the date of the divorce. During this time all allotment payments received by Tina Rushing inured to the benefit of her separate estate and Sergeant Rushing had no interest in these payments. Since there is every indication that Sergeant Rushing was not at fault for the continuance of the allotment payments and he had taken all the steps necessary to discontinue the allotment, he is not to be considered liable for the last two allotment payments.

Sergeant Rushing has been reimbursed by Tina Rushing for the allotment check she received covering the month of February 1978. Therefore, he is only entitled to be reimbursed for the allotment payment for the month of January 1978. However, in January 1978, Sergeant Rushing was in receipt of basic allowance for quarters (BAQ) at the with dependent rate. Since after January 16, 1978, he did not have a dependent, he was not entitled to BAQ at the with dependent rate after that date. Therefore, Sergeant Rushing is entitled to be reimbursed the amount of the allotment paid to Tina Rushing for the month of January 1978, less the excess BAQ he received for January 17-31, 1978. He will receive a settlement for that amount in due course.

Tina Rushing is liable for the erroneous January allotment payment she received and appropriate collection action should be taken to recover that amount.

The Claims Division settlement is modified in accordance with the above.

R.F.Keller

Deputy Comptroller General
of the United States