

DECISION

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

FILE: B-208598

DATE: April 15, 1983

MATTER OF: Senior Airman Donna L. McCoy, USAF, and
Staff Sergeant Marty L. Cooper, USAF

- DIGEST:**
1. A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters.
 2. A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody.

This action responds to questions submitted by Air Force accounting and finance officers concerning the claims of Senior Airman Donna L. McCoy, assigned to Keesler Air Force Base, Mississippi, and Staff Sergeant Marty L. Cooper, assigned to Ramstein Air Base, Germany, for increased basic allowance for quarters on account of their dependents. Since they involve similar questions, the two separate requests for advance decisions on these claims were approved and consolidated by the Department of Defense Military Pay and Allowance Committee and

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assigned control number DO-AF-1404. We conclude that both members are entitled to payment.

Facts - McCoy's Case

Donna McCoy is legally separated from her spouse, Johnny E. McCoy, who is also a military member. Two children were born of their marriage. By the terms of the separation agreement, Donna has care and custody of one of their children, and Johnny has care and custody of their other child. Their separation agreement further provides that no child support shall be paid by or to either parent until further order of the court. The agreement, which became effective and binding on June 3, 1982, provides that the terms and conditions thereof are intended to become a part of the final judgment of divorce terminating the McCoy's marriage.

On May 21, 1982, Donna McCoy terminated her residence with Johnny McCoy in Government family quarters. At that time she claimed basic allowance for quarters at the with-dependents rate, since she and the child in her custody then began residing in private quarters. Johnny McCoy and the child in his custody continued residence in Government family quarters.

The accounting and finance officer asks (1) whether under these circumstances Donna McCoy is entitled to an increased quarters allowance as claimed, and (2) whether basic allowance for quarters at the with-dependents rate will be payable to both members if Johnny McCoy should also move to private quarters with the child in his custody.

Facts - Cooper's Case

The same questions are raised concerning the claim of Sergeant Marty L. Cooper. Both Marty Cooper and his wife, Evelyn Cooper, are military members stationed in Germany. On May 27, 1982, they executed a notarized separation agreement, which gave Marty custody of one of their three children. Evelyn received custody of their other two children. Marty terminated his residence with Evelyn in Government quarters and returned the child in his custody to the continental United States. Evelyn and the children in her custody continued their residence in Government quarters.

Marty Cooper claims basic allowance for quarters at the with-dependents rate on account of the child in his custody, who resides in private quarters. In connection with claims for basic allowance for quarters under such circumstances, the submission indicates some uncertainty as to the legal sufficiency of a separation agreement that has not been issued or sanctioned by an appropriate court. We are also asked whether the answers to the questions presented would be the same if the separation agreement is subsequently incorporated into the court order and final decree of divorce.

Discussion

A member of a uniformed service who is entitled to basic pay is also entitled to an increased basic allowance for quarters on account of his dependents if adequate Government quarters are not provided for them. 37 U.S.C. § 403 (1976). The purpose of the increased allowance is to reimburse the member for a part of the expense of providing private quarters for his or her dependents. 60 Comp. Gen. 399 (1981).

We have held that when two members are married to each other and have one or more children of their marriage, only one member is entitled to an increased basic allowance for quarters on account of their common dependent(s), even though one of the members may already receive an increased allowance on behalf of dependents acquired prior to the present marriage. 54 Comp. Gen. 665 (1975); and Matter of Cruise, B-180328, October 21, 1974.

If two members who are married to each other have dependents of their marriage and subsequently separate or divorce, generally only one of the members may receive an increased basic allowance for quarters for their common dependents. For example, if the non-custodial member is supporting the common dependents in an amount required by the regulations (Department of Defense Military Pay and Allowances Entitlements Manual, paragraphs 30236a(1), c and d), pursuant to a legal obligation created by an agreement or court order, that member is entitled to the increased allowance. Matter of Doerfer, B-189973, February 8, 1979. However, if the member who is legally required to provide child support is entitled to an increased allowance on account of other dependents (i.e., dependents not common to the

relevant marriage to another member), then the custodial member is entitled to an increased allowance on behalf of their common dependent(s), if the custodial parent provides the substantial portion of the dependent's support. Pay and Allowances Manual, paragraph 30236a(3); 60 Comp. Gen. 399 (1981); 52 Comp. Gen. 602 (1973); Matter of Doerfer, cited above.

These rules are based on the assumption that the non-custodial member is providing support pursuant to a legal obligation to one or more of the common dependents not residing in his household. However, in a situation where a custodial member has established a separate household and the other member is not paying that parent for any of the common dependents in his or her care at the minimum amount required by the Pay and Allowances Manual, then that custodial member is entitled to an increased basic allowance for quarters on account of the dependents in his or her care. This is so because a divided custody and support arrangement separates the two members' dependents so that they are members of two different households and are no longer the "common dependents" of the two members.

In the present cases, one member has legal custody of one or more dependent and the other member has legal custody of the other dependent or dependents, neither member is legally obligated to support the dependent or dependents in the custody of the other, and the dependents of one member do not reside in the same household with the dependents of the other. Thus, the two members no longer have "common dependents" for purposes of entitlement to increased basic allowance for quarters. Therefore, under the provisions of 37 U.S.C. § 403, either or both of the members may be paid the increased allowance, each in his or her own individual right, provided that the dependent on account of whom the increased allowance is paid resides in private, non-Government quarters. See 58 Comp. Gen. 100 (1978) and Matter of Ranazzi, B-195383, November 6, 1979. Entitlement to the increased allowance commences on the date the member and the child in his or her custody establish a residence in non-Government quarters or the effective date of the separation agreement, whichever is later.

Concerning the legal sufficiency of the separation agreement in the Coopers' case, for the purpose of determining a member's eligibility for increased basic

allowance for quarters, if under the law of the controlling jurisdiction, a husband and wife are authorized to enter an agreement that contemplates an existing or immediate marital separation, which does in fact occur, such agreement is generally recognized by the courts. Hill v. Hill, 142 P.2d 417 (Cal. Sup. Ct. 1943). This is so even though the agreement may not have been submitted to the court for approval. Singer v. Singer, S.W.2d 605 Mo. Ct. App. (1965).

In concert with these general principles, we have recognized a written, properly executed separation agreement as a legitimate statement of the parties' marital separation and legal obligations pertaining to their marriage, for the purpose of determining a member's entitlement to certain allowances. See 58 Comp. Gen. 100, 103 (1978), and Matter of Doerfer, cited above; see also Pay and Allowances Manual, paragraphs 30236d and e.

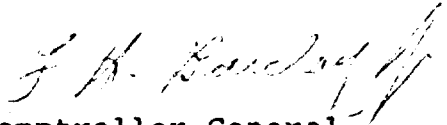
It should be noted, however, that although the separation agreement may include provisions for custody and maintenance of the couple's children, such agreement is not binding upon the court in awarding custody. Hudson v. Hudson, 257 S.E.2d 448 (N.C. Ct. App. 1979). Thus, while the legal support obligations the two members assumed under the separation agreement may be recognized for entitlement to increased basic allowance for quarters, both members' entitlement should be reassessed following actions by the court regarding custody and support. If the members' custody and support obligations remain unchanged, so also do their entitlements. If these arrangements are modified by the order of the court, changes in the members' allowance may be required.

Conclusion

Accordingly, payment of the increased allowance is authorized for Airman Donna McCoy, beginning on June 3, 1982, and for Sergeant Marty Cooper, beginning on the date he and the child in his custody assumed residence in non-Government quarters, if that date is subsequent to the effective date of his separation agreement. If either of their spouses moves from Government quarters to private quarters, Airman McCoy's or Sergeant Cooper's entitlement to the increased allowance will not be affected. But, presumably, the other spouse then also

B-208598

will become entitled to the quarters allowance at the with-dependents rate, unless the present custody and support arrangements are modified. Incorporation of support agreements into the orders of the court and final decrees will not affect these holdings.

For 
Comptroller General
of the United States