

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

Family Law Note

Military Retirement Pay—Property or Income?

The Uniformed Services Former Spouses' Protection Act (USFSPA) allows state courts to treat military disposable retired pay as marital property.¹ It also allows state courts to award military disposable retired pay for family support purposes, specifically alimony or child support.² The purposes are not, however, mutually exclusive. Two recent state divorce cases illustrate that military pensions can be classified as both property and income.³

In both cases, the divorce courts awarded the former spouses percentages of the military retirement pay as marital property.⁴ In addition to the property settlement, the court entered child support orders using local child support guidelines. In assessing the child support awards, the courts considered as income the military retirement pay received by the retirees. The military retirees appealed, claiming that once the courts have classified the military pensions as marital property they could not also be treated as income for purposes of establishing child support.

Both appellate courts refused to accept this view of pension classification. Turning to their state support statutes, they found that the statutes broadly defined "income" to include money from *all* sources (except public assistance and child support) whether taxable or not.⁵ The Wisconsin court found that the property divisions address rights between the spouses whereas child support orders address the child's right to a fair share of support from the noncustodial parent's income.⁶ The Illinois court analogized retirement benefits to accounts receivable in business interests when couples divorce. The court found that, like accounts receivable, each spouse has an interest in the retirement pay as property of the marriage and then when the monthly amount is received it is income to the recipients for purposes of establishing their support obligation.⁷

Nothing in the USFSPA requires a state court to classify military retirement pay as either property or income. Indeed, the USFSPA merely allows the states to treat military retirement pay as they do civilian pension plans.⁸ Thus, military retirement pay is both marital property subject to division between the spouses in a property settlement *and* income to the noncustodial recipient for determining any support obligation. Major Fenton.

Consumer Law Note

What's in a Name?

The United States Court of Appeals for the Third Circuit (Third Circuit) recently used a case of confused names between a father and son to clarify the requirements for a prima facie case under accuracy provisions of the Fair Credit Reporting Act (FCRA).⁹ In *Philbin v. Trans Union Corp. and TRW Credentials*,¹⁰ the Third Circuit held, among other things, that the mere existence of inaccurate adverse information in a credit report was sufficient evidence for a reasonable jury to find that the

1. 10 U.S.C.A. § 1408 (West 1996).

2. *Id.*

3. See *In re Klomps*, No. 5-96-0351, 1997 WL 49650 (Ill. App. 5 Dist. Feb. 7, 1997); *Cook v. Cook*, No. 95-1963, 1997 WL 120088 (Wis. Sup. Ct. Mar. 19, 1997).

4. In *Klomps*, the court awarded Mrs. Klomps 35% of disposable retired pay after 18 years of marriage. In *Cook*, the court awarded Mrs. Cook 50% of disposable retired pay after 12 years of marriage.

5. *Klomps*, 1997 WL 49650, at *2; *Cook*, 1997 WL 120088, at *4.

6. *Cook*, 1997 WL 120088, at *5.

7. *Klomps*, 1997 WL 49650, at *4.

8. *Cook*, 1997 WL 120088, at *4.

9. 15 U.S.C.A. § 1681-1681t (West 1996).

adverse information caused the denial of credit, at least where other accurate credit reports issued by that credit reporting agency (CRA) and other agencies did not contain any other adverse information.¹¹

Some time prior to April 1990, TRW and Trans Union had both produced inaccurate credit reports regarding James R. Philbin, Jr. The reports listed a tax lien of approximately \$9500 on his account.¹² This information was inaccurate and apparently resulted from confusing Mr. Philbin with his father, James R. Philbin, Sr. In the spring of 1990, the junior Philbin notified both CRAs that the information was inaccurate and demanded that it be corrected.¹³

Between the summer of 1990 and the start of the suit in April 1993, Mr. Philbin was denied credit by eight different credit providers.¹⁴ Although the credit reports supplied by Trans Union and TRW listed the erroneous tax lien, the credit providers based their credit denial on a variety of reasons—none of which mentioned the tax lien.¹⁵ At trial, the district court granted summary judgment for the CRAs, at least in part, because Mr. Philbin stipulated that none of the denials of credit ever mentioned the tax lien.¹⁶ Consequently, the district court found that Mr. Philbin failed to meet his burden of going forward because he did not meet one of the elements of the prima facie case; he could not show that the denials of credit were based on the inaccurate tax lien information in his report.¹⁷

The FCRA provides that “whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”¹⁸ The FCRA allows for private causes of action for

willful or negligent noncompliance with the requirements of the Act. To sustain an action under the accuracy provision, a plaintiff must meet the following four elements: (1) inaccurate information was included in a consumer’s credit report; (2) the inaccuracy was due to the defendant’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered injury; and (4) the consumer’s injury was caused by the inclusion of the inaccurate entry.”¹⁹ *Philbin* focused on the last element, the issue of causation.

The Third Circuit agreed with the district court that the plaintiff had the burden of showing causation.²⁰ It disagreed, however, “that Philbin has failed to produce sufficient facts from which a reasonable jury could find that defendants’ alleged negligence caused his injuries.”²¹ The error that the district court made was in “assuming that Philbin could satisfy his burden only by introducing direct evidence that consideration of the inaccurate entry was crucial to the decision to deny credit.”²² While the Third Circuit agreed that this might improve the plaintiff’s case, all that is required is “that, as with most other tort actions, a FCRA plaintiff produce evidence from which a reasonable trier of fact could infer that the inaccurate entry was a ‘*substantial factor*’ that brought about the denial of credit.”²³ The Third Circuit found that, since Mr. Philbin had never been delinquent on any credit obligation and had not been denied credit prior to the credit providers receiving the inaccurate reports containing the tax lien information, a reasonable jury could infer that the denial of credit was based on the accurate tax lien entry.²⁴ The case is significant because it expressly rejects the notion that the plaintiff must prove the inaccurate information was the sole cause of the denial of credit.²⁵ It also demonstrates the fairly slight amount of evidence necessary to get the case to the jury.

10. 101 F.3d 957 (3d Cir. 1996).

11. *Id.* at 968-69.

12. *Id.* at 960.

13. *Id.* at 960-61.

14. *Id.* at 960-62.

15. *Id.* at 960-61.

16. *Id.* at 962.

17. *Id.*

18. 15 U.S.C.A. § 1681e(b) (West 1996). The Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) has modified portions of the FCRA; however, section 1681e(b) is unaffected by these changes.

19. *Philbin*, 101 F.3d at 963.

20. *Id.* at 966.

21. *Id.* at 966-67.

22. *Id.* at 968.

23. *Id.*

For legal assistance practitioners, *Philbin* provides additional leverage when trying to make credit reporting agencies more responsive in correcting inaccuracies. This case makes it easier for consumers to use the potential “hammer” of the FCRA, the civil suit. Legal assistance practitioners should consider *Philbin* in determining whether to advise the client to seek outside counsel for a suit based on inaccurate credit report information. Ensuring the accuracy of a credit report can be an exasperating experience. Proper use by legal assistance attorneys of consumer-friendly cases like *Philbin*, along with legislative changes to the FCRA that will take effect in September of this year,²⁶ should help to alleviate some of this frustration for legal assistance clients. Major Lescault.

Tax Law Notes

Approved Private Deliverers

Passed in 1996, the Taxpayer Bill of Rights 2²⁷ permits taxpayers to use private delivery services to send returns and other information to the IRS and qualify for the timely-mailed-is-timely-filed rule.²⁸ This legislation required the Internal Revenue Service (IRS) to designate which private delivery services taxpayers could use.²⁹ Effective 11 April 1997, the IRS designated the following private delivery services and the following specific types of delivery services:

1. Airborne Express (Airborne): Overnight Air Express Service, Next Afternoon Service, and Second Day Service.
2. DHL Worldwide Express (DHL): DHL “Same Day” Service and DHL USA Overnight;
3. Federal Express (FedEx): FedEx Priority Overnight, FedEx Standard Overnight, and FedEx 2Day; and

4. United Parcel Service (UPS): UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, and UPS 2nd Day Air A.M.³⁰

As a result, taxpayers may use these private delivery services and qualify for the timely-mailed-is-timely-filed rule. The timely-mailed-is-timely-filed rule states that if an item is mailed prior to its due date it will be treated as if the IRS received it on the due date, even though the IRS does not actually receive the item until after the due date.³¹ For example, a taxpayer who mails his tax return on 15 April will be treated as having timely filed that return on 15 April even though the IRS does not receive that return until 18 April. Prior to the Taxpayer Bill of Rights 2, a taxpayer could only receive this treatment if he sent the item through the United States Postal Service.³² The Taxpayer Bill of Rights 2 changed this and allows private delivery services to qualify, so long as the private delivery services are designated by the IRS. Although the IRS did not designate the private delivery services until 11 April, taxpayers who have later due dates because they are overseas or have an approved extension will be able to use these services should they so desire. Major Henderson.

Docket Entry is a Court Decree

The Tax Court has ruled that a docket entry was a court decree for purposes of determining whether certain payments qualified as alimony.³³ In *Landreth v. Commissioner*,³⁴ Mrs. Landreth did not include \$21,600 in payments that she received from her estranged husband. Mr. Landreth made these payments pursuant to Mrs. Landreth’s motion for temporary maintenance. At the hearing on Mrs. Landreth’s motion, the presiding judge made an entry on the docket sheet indicating that Mrs. Landreth’s motion was “sustained.” At issue in the case was whether or not the entry on the docket sheet was sufficient to constitute a decree. For a payment from one spouse to another spouse to qualify as alimony, it must be made pursu-

24. *Id.*

25. *Id.* at 969.

26. These changes will be detailed in an *Army Lawyer* note this summer.

27. Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.).

28. *Id.* § 1210.

29. *Id.*

30. IRS Notice 97-26, 1997-17 I.R.B. 6.

31. I.R.C. § 7502 (RIA 1996).

32. *Id.* § 7502(b).

33. *Landreth v. Commissioner*, 73 T.C.M. (CCH) 2536 (1997).

34. *Id.*

ant to a divorce or separation instrument.³⁵ A divorce or separation instrument includes “a decree of divorce or separate maintenance or a written instrument incident to such a decree.”³⁶ Mrs. Landreth unsuccessfully argued that the docket entry was not a decree. The Tax Court disagreed and held that under Missouri law the docket entry was a court decree.

This case illustrates once again that payments from one spouse to another will only be treated as alimony if all the statutory requirements are met. The payments must be made pursuant to a divorce or separation instrument.³⁷ Divorce or separation instruments include decrees of divorce (or separate

maintenance) and written separation agreements. The payments must also end at the death of the payee spouse.³⁸ In addition, if the parties are separated but not divorced, the payments cannot be made to a member of the same household.³⁹ Legal assistance attorneys should keep these requirements in mind when drafting separation agreements and when advising clients on how to treat these types of payments on their tax returns. Major Henderson.

35. I.R.C. § 71(b)(1)(A) (RIA 1996).

36. *Id.* § 71(b)(2)(A).

37. *Id.* § 71(b)(1)(A).

38. *Id.* § 71(b)(1)(D).

39. *Id.* § 71(b)(1)(C).