

Note from the Field

Modification of Military Retired Pay as Spousal Support in Indiana

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The Indiana Court of Appeals recently clarified when an award of military retired pay under the Uniformed Services Former Spouse's Protection Act (USFSPA)¹ is subject to later modification based upon changes in the circumstances of the divorced parties. While Indiana courts cannot modify an award of military retired pay that is characterized as a *division of marital property*,² an award that is characterized as *spousal maintenance* may be modified.³ In *Thomas v. Abel*,⁴ the Indiana Court of Appeals clarified when modifications may be made due to changes in circumstances. The court concluded that if a settlement agreement awards military retired pay as spousal maintenance, the trial court may not subsequently modify the maintenance agreement upon the petition of one party and over the opposition of the other.⁵

The USFSPA permits state divorce courts to divide military retired pay within a divorce decree provision for child support, the division of marital property, or the payment of alimony.⁶ The Social Security Act defines "alimony" as the "legal obligation of an individual to provide support and maintenance of the spouse (or former spouse) of the individual."⁷

In *Thomas*, the Court of Appeals of Indiana considered whether and when a divorce decree that divided the military retired pay of a National Guard officer could be modified due to a change in circumstances. The decree in *Thomas* awarded the officer's spouse one-third of his retired pay as spousal maintenance.⁸

The parties were married in 1957 and divorced in 1981. At the time of the divorce, the husband was vested with the right to receive retired pay for non-regular service in the armed forces.⁹ Therefore, he would not receive monthly-retired pay until he reached age sixty. The decree incorporated a separation agreement with separate articles that addressed property disposition, child support, and spousal maintenance.

Under the spousal maintenance article, the husband agreed to pay one-third of his monthly military retired pay as spousal support after he reached age sixty. He also agreed to execute any documents that were necessary to authorize the Army to pay this amount directly to his former spouse.¹⁰ In addition, the agreement stated: "This Agreement shall be irrevocably binding on both parties"¹¹

The husband turned sixty in December 1993. In January 1994, he began receiving retired military pay monthly. Contrary to his agreement, he neither paid the spousal support nor filed the necessary assignment with the Defense Finance and Accounting Service (DFAS) for direct payment to his former wife. Failing to obtain his cooperation, his former wife applied to the DFAS for payment. The DFAS rewarded her persistence in August 1994 when she began receiving checks, although they were less than the amount provided for in the divorce decree. She filed a contempt citation against her former husband for his failure to abide by the divorce decree. He responded by filing a petition to terminate or to modify the agreement based upon "a change of circumstances so substan-

1. 10 U.S.C.A. § 1408 (West 1998).

2. *Myers v. Myers*, 560 N.E.2d 39, 44 (Ind. Ct. App. 1990).

3. *Id.* at 42.

4. 688 N.E.2d 197 (Ind. Ct. App. 1997).

5. *Id.* at 201 (citing *Voigt v. Voigt*, 670 N.E.2d 1271 (Ind. Ct. App. 1996)).

6. See 42 U.S.C.A. § 659(i)(3) (West 1998) (defining alimony).

7. *Id.*

8. *Thomas*, 688 N.E.2d at 199.

9. "Retired pay for non-regular service" is the present retirement program for members of the reserve components. See 10 U.S.C.A. § 12731 (West 1998).

10. *Thomas*, 688 N.E.2d at 199.

11. *Id.*

tial and continuing as to render the payment of one-third of his retirement pension to be unreasonable.”¹² A master commissioner held hearings on the matter. The trial court later approved the master commissioner’s recommendation and terminated the maintenance order.¹³

The Indiana Court of Appeals reversed the trial court’s order terminating spousal maintenance. The court reasoned that the spousal maintenance order was not based upon a finding of the spouse’s incapacity, but was rather the product of an agreement of the parties. The court stated that parties to a divorce may enter into “*such settlement agreements as in a spirit of amicability and conciliation they wish.*”¹⁴

Indiana law provides that divorce decree provisions for spousal maintenance that are ordered due to a spouse’s physical or mental incapacity may be modified or revoked upon a showing of “changed circumstances so substantial and continuing as to make its terms unreasonable.”¹⁵ In *Thomas*, the respondent attempted to bring the terms of his settlement agreement for spousal maintenance within the statute that permits subsequent modifications. In his decree, however, the spousal maintenance provision was not a court-imposed order based upon a finding of spousal incapacity. The Indiana Court of Appeals rejected

his attempt and held that while a trial court may award post-divorce spousal maintenance only under the narrow circumstances outlined in the dissolution statute, the parties are not so limited in drafting settlement agreements.¹⁶ The court reasoned that the husband and wife freely and voluntarily entered into the settlement agreement that included the maintenance provision.¹⁷ Accordingly, the trial court lacked the authority to modify the settlement agreement and terminate the husband’s maintenance obligation.¹⁸

Thomas provides a valuable guide to counsel who are drafting or reviewing a proposed settlement agreement that will be merged into an Indiana divorce decree. The first decision is whether to characterize the division of a military pension as a division of marital property or as spousal maintenance. If it is characterized as spousal maintenance, the provision should be clearly identified as either court-imposed due to spousal incapacity or a negotiated settlement agreement of the parties. The agreement should state whether and under what circumstances the provision is subject to future modifications or a termination of the maintenance obligation.

12. *Id.* *Thomas v. Abel* does not specify what factors the husband alleged as constituting a substantial change in circumstances.

13. *Id.*

14. *Id.* at 201 (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1277 (Ind. Ct. App. 1996)).

15. IND. CODE ANN. § 31-15-7-3 (West 1998). An order of spousal maintenance found in an Indiana dissolution decree may be modified or revoked. Modifications of spousal support may be made only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. *Id.*

16. *Thomas*, 688 N.E.2d at 201 (citing *Voigt*, 670 N.E.2d at 1277).

17. *Id.*

18. *Id.*