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DFAS-CL/HGE

April 15, 2009

Richard L. Crane, Esq.  
Willick Law Group  
3591 East Bonanza Road – Suite 200  
Las Vegas, NV 89110-2101

Re: Mason v. Cuisenaire,  
Former Spouse SBP Annuity Claim

Dear Mr. Crane:

This letter is intended to provide the legal opinion of the Office of General Counsel regarding your February 2007 deemed election of former spouse SBP coverage on behalf of Ms. Martine Cuisenaire under the provisions of 10 U.S.C. §§ 1448(d)(3) and 1450(f)(3), based upon the February 2, 2007 Order of the District Court, Family Division, of Clark County, Nevada. As more fully explained below, we have concluded that the February 2, 2007 Order is a valid and enforceable order and that DFAS should honor the deemed election in favor of Martine Cuisenaire effective March 1, 2007.

The following analysis is relevant to our conclusion. In 2001, Martine Cuisenaire filed an action in the State of Nevada, where the member was then residing, to resolve issues of child support, alimony, and obtain a division of omitted assets never adjudicated in North Carolina. On September 11, 2002, the District Court, Family Division, of Clark County, Nevada issued an order addressing matters of child support and alimony, but reserved for a subsequent evidentiary hearing the issues regarding omitted assets, debts, and the SBP. Although we do not have a complete procedural history, Rod Mason contested Ms. Cuisenaire's request to be awarded the SBP, and eventually appealed the District Court's order requiring the evidentiary hearing regarding the omitted assets, debts, and SBP all the way to the Nevada Supreme Court. Rod E. Mason died in an active duty status on August 13, 2005, while his appeal was pending in the Nevada Supreme Court.

On February 9, 2006, the Nevada Supreme Court affirmed in part and reversed in part and remanded the case to the District Court for further proceedings. Mason v. Cuisenaire, 128 P.3d 446 (2006). The primary focus of the Supreme Court decision was to affirm the validity of the 1999 North Carolina Divorce Judgment and to reverse certain aspects of a retroactive award of child support. Since the parties had also appealed issues related to a division of Rod Mason's military retirement benefits and the SBP, in its findings the Nevada Supreme Court briefly addressed both issues. The Court declared that the retirement benefits issue was moot in light of the member's death and found that since the district court made no determination of the survivor

benefits issue, having reserved the matter for consideration during the evidentiary hearing, the district court should conduct an evidentiary hearing and determine the survivor benefits.

On February 2, 2007, the District Court issued its final Order, which directed that Martine be “deemed the “Mandatory Former Spouse” for Survivor’s Benefit Plan (SBP) annuity payments.” By a letter dated February 7, 2007, Mr. Willick submitted a deemed election for former spouse SBP coverage on behalf of Martine. DFAS denied the deemed election request on August 28, 2007, on grounds that the February 2, 2007 Order was issued after the member’s death and therefore, could not be honored under the SBP law, 10 U.S.C. § 1448(d)(3).

After further legal review, it is our opinion that, under the circumstances of the present case, it is appropriate to recognize the February 2, 2007 Order of the District Court of Clark County, Nevada as a valid and enforceable order for purposes of requiring former spouse SBP and that Martine Cuisenaire submitted a timely deemed election on or about February 7, 2007.

In reaching this conclusion, it is significant to note that in 2001 Ms. Cuisenaire took appropriate legal action to address the omissions of the North Carolina divorce judgment regarding marital property and the SBP, by filing a petition in Nevada, where the member resided, requesting resolution of child support and marital property claims. Despite the district court having set an evidentiary hearing in September 2002 to address issues including the SBP, the member’s appeal of the September 2002 Order was still pending almost 3 years later when the member died in August 2005. Accordingly, the former spouse properly sought to secure her SBP claim before the member became eligible to participate in the SBP. Moreover, the Court specifically found that the member’s actions throughout this litigation were unreasonable and an abuse of the judicial process unnecessarily delaying the final outcome.

Therefore, in light of the particular circumstances of the domestic relations proceedings between Rod E. Mason and Martine Cuisenaire in Nevada and the explicit findings of the District Court of Clark County, Nevada contained in the final Order of February 2, 2007, DFAS should honor the deemed election request for former spouse SBP coverage submitted on behalf of Ms. Cuisenaire, on or about February 7, 2007.

Before we can fully implement this opinion, we must obtain several items. First, in light of the July 31, 2008 District Court order requiring the member’s surviving spouse, Jennifer, to repay the annuity previously received, plus interest, for a total of \$36,228.37, and to pay all future SBP payments received by Jennifer or her children to Martine Cuisenaire through your office, we require a formal statement acknowledged by Jennifer Mason of all amounts paid to Ms Cuisenaire or your office in compliance with the Court’s July 31<sup>st</sup> Order. Secondly, we must receive a new DD Form 2656-7, Verification for Survivor Annuity, signed by Ms. Cuisenaire and, if at all possible, authorization for direct deposit of the monthly annuity payments. To simplify transmission of this form to Ms. Cuisenaire, it is available electronically at the following link: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-7.pdf>. Finally, because Ms. Cuisenaire is a Belgian citizen, we must receive an IRS Form W-8BEN signed by Martine to avoid assessing a 30% federal income tax withholding rate on the annuity payments.

Since DFAS has already paid Martine Cuisenaire the one-third child annuity interest of her daughter Audrey, the retroactive annuity payment to Martine Cuisenaire must take into account the payments Martine has received on behalf of her daughter for the period March 1, 2007 and after, because there is no authority for duplicate annuity payments for the same period of time. The portion of the child annuity payments that represent Audrey's share through February 28, 2007 are proper, since under the provisions of 10 U.S.C. § 1450(f)(3)(D), the former spouse deemed election would become effective March 1, 2007.

Finally, by virtue of authorizing Martine to receive former spouse annuity payments accruing after March 1, 2007, the child annuity payments made to Jennifer Mason after that date, on behalf of her children, Marion G. and Eric H. Mason, will become erroneous, subject to a possible request for waiver of the indebtedness. DFAS will separately notify Jennifer Mason regarding the impact of our final decision to honor your client's deemed election for former spouse SBP coverage and any claim for erroneous annuity payments on behalf of her children.

Please contact the undersigned if you have any further questions regarding this matter, at (216) 204-7432.

Sincerely,



Scott Lafferty  
Assistant Counsel  
Military and Civilian Pay Law