Fallout From *Yourko* and *Martin*: Military Retired Pay and Post-Divorce Disability Claims

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BIOGRAPHY

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Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and past President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other States, and in the drafting of various State and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

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FALLOUT FROM *YOURKO*, *MARTIN*, AND OTHER CASES

I. INTRODUCTION

Issues concerning disability benefits are often contentious. Retirement benefits are essentially a form of deferred reward for service, and so are generally divisible upon divorce, while disability benefits are conceptualized as compensation for future lost wages and opportunities because of disabilities suffered, and are thus typically ***not*** divisible or attachable. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized.[1]

The national law on the subject – which is followed in most states – establishes that payments labeled "disability benefits" are divisible property to the extent they include divisible retirement benefits.[2]

II. BACKGROUND

On June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v. McCarty*.[3] The Court determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce. The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired.[4]

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection

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[1] *See*, *e.g.*, *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999) (only disability award in excess of amount of retirement benefits otherwise payable are the separate property of the retiree); *In re Marriage of Higinbotham*, 203 Cal. App. 3d 322 (Ct. App. 1988), *citing In re Marrriage of Stenquist*, 21 Cal. 3d 779 (Cal. 1978) (same); *In re Marriage of Saslow*, 710 P.2d 346 (Cal. 1985) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kosko*, 611 P.2d 104 (Ariz. Ct. App. 1980) (disability benefits may be part retirement and part replacement of earnings).

[2] *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

[3] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[4] 453 U.S. at 235-36, 101 S.Ct. at 2743.

Act ("USFSPA") on September 8, 1982.[5] The declared goal of the USFSPA at the time of its passage was to "reverse *McCarty* by returning the retired pay issue to the states."[6]

But the USFSPA is written to permit state courts to only address "disposable retired pay," and disability benefits fall outside that term.

At any time, a military retiree can apply to the Veteran's Administration to be evaluated for a "service-connected disability."[7] If the evaluation shows such a disability, a rating is given between 10% and 100%, and "compensation" is paid monthly from the VA in accordance with a schedule giving a dollar sum corresponding to each 10% increase, plus certain additional awards for certain serious disabilities.[8] Still further waivers of retired pay for VA disability pay can be given if the retiree has dependents (a spouse or children, or even dependent parents).[9] It makes sense for a retiree to obtain a disability award, even with a dollar-for-dollar reduction in retired pay, because the disability awards are received tax-free.[10]

The USFSPA set up a federal mechanism for recognizing and enforcing State-court divisions of military retired pay, including definitions. One of these was of "disposable retired pay" (the sum that the military pay center could divide between spouses), which definition has

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[5] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. § 1408 (amended every year or two since 1983).

[6] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.News 1596, 1611. *See also Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

[7] 38 U.S.C. § 1101–1142.

[8] 38 U.S.C. §§ 1114, 1134, 1155.

[9] 38 U.S.C. §§ 1115, 1135.

[10] *See* 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. *See Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

changed over time.[11]

In *Mansell v. Mansell*,[12] the United States Supreme Court addressed disability pay for the first time. When the parties had divorced, the 1981 *McCarty* decision had not yet issued. The member had retired, and applied for and received disability benefits. The divorce decree included the stipulation that the parties would divide the ***gross*** sum of retirement benefits (including both retired pay and disability pay).

After Congress enacted the USFSPA, the member returned to court seeking to modify the judgment to exclude the disability portion of the retired pay from division with his ex-spouse.[13] The State court denied his request, holding the division of the disability portion of the military retired pay was proper. The member appealed.

The U.S. Supreme Court majority reversed, holding that the USFSPA did ***not*** constitute a total repudiation of the pre-emption it had declared in *McCarty*. Since the statute defined "disposable pay" as what was divisible, and excluded disability pay from that definition, the Court concluded that State courts could divide only ***non***-disability military retired pay.[14] The dissent echoed the conclusions reached earlier by the California Supreme Court in *Casas v. Thompson*[15] – that the gross sum of retirement benefits was available to the State divorce court for division.[16]

Ultimately, the matter was remanded to State court. Ironically, that court ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated.[17] In other words, the United States Supreme Court opinion had ***no effect*** on the order to divide the

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[11] The history of the definitions and terms are beyond the scope of these materials. For further details, see Marshal Willick, *Divorcing the Military: How to Attack, How to Defend*, posted at: https://www.willicklawgroup.com/military-retirement-benefits/.

[12] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[13] *Mansell*, 490 U.S. at 586.

[14] *Id*. at 594-95.

[15] *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), cert. denied, 479 U.S. 1012 (1987).

[16] Justice O'Connor, joined in a dissent by Justice Blackmun, argued that the term "disposable retired pay" only limited a State court's ability to garnish retired pay – not the court's authority to divide that pay. *Id*. at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause merely clarified that the federal direct payment mechanism does not replace State court authority to divide and garnish property through other mechanisms.

[17] *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case itself.

When Congress next amended the Act in 1990, it did nothing to address the *Mansell* holding. Thus, *Mansell* is often read to stand for the proposition that the subject matter jurisdiction of the State divorce courts is limited to division of "disposable retired pay." This may be less important than was thought at the time, however, since courts have widely expressed a willingness to consider the impact of disability or other benefits ***not*** included in the definition of "disposable retired pay" when dividing assets or making alimony orders between spouses.[18]

For many years, most courts throughout the U.S. did exactly what the California trial court did on remand in that case, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued ***prior*** to the *Mansell* decision,[19] or in which the disability was taken by the member after the divorce, thus retroactively dispossessing spouse.

From 1989 to 2017, with virtual uniformity, courts throughout the United States went to considerable lengths to protect former spouses from the effects of members' post-divorce waivers of retired pay for disability pay when such waivers partially or completely divested the spouses of sums that had already been awarded to them.

The theory often applied was phrased differently from one court to another, but was essentially that of ***resulting or constructive trust***.[20] Once a divorce was entered dividing the "gross" or "total" or "all" military retirement benefits, the money awarded to the former spouse was no longer considered the member's property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

The decision in the cases largely held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, the member would receive any sums

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[18] *See*, *e.g.*, *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999).

[19] *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990); *Lyons v. Lyons*, No. C034544 (Cal. Ct. App., Aug. 9, 2002, unpublished) (applying California law as of the time of the parties' 1979 marital settlement agreement in determining that as of the member's retirement 20 years later, the former spouse was entitled to a percentage of the gross retired pay before deduction for disability or SBP premiums for a later spouse).

[20] Alaska and California do not allow the use of a constructive trust in this context. *See Young v. Lowery*, 221 P. 3d 1006 (Alaska 2009) and *In re Marriage of Chapman*, 3 Cal. App. 5th 719 (Ct. App. 2016).

that had been awarded to the spouse as a ***resulting trustee*** of her funds, and must pay them over to her. The language quoted was the principle espoused earlier by the California Supreme Court in *Gillmore*[21] – that one party should not be allowed to defeat the other's interest in retirement benefits "by invoking a condition wholly within his or her control." Other courts have echoed the same thought, in similar language.[22]

III. *HOWELL v. HOWELL*

In 2017, however, the United States Supreme Court decided *Howell*[23] and in an instant swept away decades of that nearly universal consensus regarding indemnification of spousal interests when a member waives retired pay for disability pay.

The divorce decree of John and Sandra Howell awarded Sandra 50% of John's future Air Force retirement pay, which she began to receive when John retired the following year.[24]

About 13 years later, John applied for, and the Department of Veterans Affairs awarded, a "service-connected disability" award qualifying him for VA disability pay; the VA found John 20% disabled. To receive disability pay, John was required to give up an equivalent amount of retirement pay.[25]

By his election, John waived about $250 of his retirement pay, half of which was taken from Sandra's 50% share and paid to him instead. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the pre-waiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

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[21] *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981).

[22] *See*, *e.g.*, *Stone v. Stone*, ___ So. 3d ___ (WL 2070861, Ala. Ct. App., June 26, 2009), approvingly quoting from *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. Ct. App. 2006) ("one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse's share, if that factor or contingency is within the first party's complete control").

[23] *Howell v. Howell*, ___ U.S. ___, 2017 WL 2039158 (May 15, 2017).

[24] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017), makes all military disability non-divisible. The appropriate means of dealing with that possibility is an award, and reservation, of alimony, as cogently detailed in cases appearing in multiple States. *See Cassinelli v. Cassinelli*, 20 Cal. App. 5th 1267, 229 Cal. Rptr. 3d 801 (Cal. Ct. App., Mar. 2, 2018); *Hurt v. Jones-Hurt*, 168 A.3d 992 (Md. Ct. Spec. App. 2017).

[25] 38 U.S.C. § 5305.

The United States Supreme Court reversed, holding that a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.[26]

Resurrecting the *McCarty* holding from 1981 that federal law had "completely pre-empted" State community property law, and the *Mansell* holding from 1989 that the USFSPA only overcame that pre-emption to a "limited extent," a unanimous Court found that *Mansell* "determines the outcome here." The Court held that it makes no difference whether the disability occurs before or after a divorce; either way, the waived pay was beyond the power of a State court to address as a matter of federal pre-emption.

Dismissing decades of holdings of the great majority of State courts[27] and the arguments of the Solicitor General (who filed an *amicus* brief in favor of the indemnified spouse), the Court sided with the minority of States that had found some preemption in similar circumstances[28] and held that:

> the temporal difference [between disability claims made before or after divorce] highlights only that John's military retirement pay at the time it came to Sandra was subject to later reduction (should John exercise a waiver to receive disability benefits to which he is entitled). The state court did not

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[26] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

[27] *See In re Marriage of Howell*, 361 P.3d 936 (Ariz. 2015); *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004); *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. App. 2006); *Blann v. Blann*, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007); *Perez v. Perez*, 110 P.3d 409 (Haw. Ct. App. 2005); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *In re Marriage of Neilsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003); *Bandini v. Bandini*, 935 N.E.2d 253 (Ind. Ct. App. 2010); *In re Marriage of Gahagen*, 690 N.W.2d 695 (Iowa Ct. App. 2004); *Black v. Black*, 842 A.2d 1280 (Me. 2004); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995); *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003); *McGee v. Carmine*, 802 N.W.2d 669 (Mich. Ct. App. 2010); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003); *Whitfield v. Whitfield*, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000); *Bagley v. Bagley*, 2011-Ohio-1272 (Ohio Ct. App. 2011); *Hodge v. Hodge*, 197 P.3d 511 (Okla. Civ. App. 2008); *In re Marriage of Hayes*, 208 P.3d 1046 (Ore. Ct. App. 2009); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006); *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996); *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

[28] *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999) (conflict with later case); *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999); *Copas v. Copas*, 359 S.W.3d 471 (Ky. Ct. App. 2012); *Wright v. Wright*, 594 So.2d 1139 (La. Ct. App. 1992); *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012); *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008); *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004); *Tirado v. Tirado*, 530 S.E.2d 128 (S.C. Ct. App. 2000); *Gillin v. Gillin*, 307 S.W.3d 395 (Tex. Ct. App. 2009); *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010).

> extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of Sandra's share of military retirement pay was possibly worth less—perhaps less than Sandra and others thought—at the time of the divorce.

The Court analogized military retired pay to a "defeasible property interest" subject to a condition subsequent.

Similarly, the Court dismissed any concern that the spouse's property share had vested upon divorce, holding that "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give."[29]

The Court found that ***any*** orders requiring the member to indemnify or reimburse the spouse dollar for dollar so as to restore the portion of the retired pay lost due the member's post-divorce waiver are pre-empted, "regardless of their form" because they would "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress."

The Court threw a bone to spouses by "recognizing":

> as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U.S., at 594. But we note that **a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.**

[Emphasis added.]

For that proposition, the Court cited its own holding allowing contempt sanctions to issue against a member for non-payment of child support even if his only income was disability pay,[30] and the "savings clause" of the USFSPA making state court judgments not payable under the USFSPA collectible by way of other State court proceedings[31] – which their own

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[29] *Citing* 38 U.S.C. § 5301(a)(1) for the principle that "disability benefits are generally nonassignable."

[30] *Rose v. Rose*, 481 U.S. 619, 630–634, and n. 6 (1987).

[31] 10 U.S.C. § 1408(e)(6). The provision provides that no part of the USFSPA "shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted" and that any benefits awarded but not payable by DFAS "may be enforced

holding in this case prohibited, as it reversed the Arizona order for indemnification.

IV. POST-*HOWELL* CASES

Cases began popping up all over the country of members who had elected disability after divorce trying to prevent their former spouses from collecting indemnification payments that they had promised to make in long-final divorce decrees.

The first four State Supreme Court cases to address the issue were in Alaska, Michigan, Nevada, and Virginia. A court of appeals decision in Washington state came out the same way.

In the Alaska case, *Jones*,[32] the parties had expressly agreed to an indemnification provision in the Property Settlement Agreement of their divorce decree. The Alaska Supreme Court distinguished *Howell* on that basis, explaining that "[a]lthough Howell makes clear that state courts cannot simply order a military spouse who elects disability pay to reimburse or indemnify the other on a dollar for dollar basis, Howell does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." The Alaska court embraced the observation by one expert commentator: "[i]t's one thing to argue about a judge's power to require ... a duty to indemnify, but another matter entirely to require a litigant to perform what he has promised in a contract."[33] The contractual indemnification provision was approved and enforced.

In the Michigan case, *Foster*,[34] the court found that the contractual indemnification *did* violate federal law, "impermissibly" dividing military disability pay in violation of federal law, but the court further found, as the California court had on remand in *Mansell* many years earlier, that "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle," and "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified." Again, the contractual indemnification provision was enforced.

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by any means available under law other than the means provided under this section."

[32] *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022).

[33] 2 Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 691 (3d ed. 2019) (explaining that the *Howell* decision "magnifies the importance of using an indemnification provision in the property settlement" for parties negotiating division of marital property).

[34] *Foster v. Foster*, No. 161892, 2022 WL 1020390 (Mich. Apr. 5, 2022). This case was also appealed to the United States Supreme Court, but cert was denied on October 2, 2023.

The Nevada case involved a couple, Erich and Raina, who married in 2002 while Erich was serving in the military. Erich filed a complaint for divorce, and the district court ordered mediation, resulting in a signed marital settlement agreement.

The decree allotted to Raina half of Erich's military retirement benefits and provided that Erich was to reimburse Raina for any reduction in that amount if he elected to receive disability pay instead of retirement pay. A year later, the court entered an OID dividing the military benefits, also including a provision under which Erich was to pay Raina directly to make up any deficit created if he applied for disability pay.[35]

Erich retired from the military in 2019, and Raina began receiving her agreed-upon share of Erich's retirement benefits from DFAS. In 2020, DFAS informed Raina that she would no longer be receiving benefit payments from DFAS because Erich opted for full disability pay, waiving all retirement pay.[36] Erich informed Raina that he would not pay her as agreed, claiming he was not required to do so under federal law.

In the subsequent motion for enforcement, the district court issued an order enforcing the divorce decree, finding that federal law did not "divest the parties of their right to contract" to the terms in the divorce decree requiring Erich to reimburse or indemnify Raina for any waiver of military retirement benefits resulting in a reduction of her payments. The district court also concluded that the decree was binding on the parties as *res judicata*, and ordered Erich to pay Raina as he promised.

Erich appealed. The Court of Appeals reversed the order enforcing the divorce decree, largely based on its decision the year before in *Byrd*.[37] The Nevada Supreme Court granted Raina's petition for review, and the American Academy of Matrimonial Lawyers (AAML) filed an amicus brief in support of Raina, in which the Family Law Section of the State Bar of Nevada joined.

The majority of the Nevada Supreme Court adopted the reasoning of both the Alaska court in *Jones*, *and* the *Michigan* court in *Foster*. It found that federal law did not bar the parties

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[35] The language used is part of the standard form used by QDRO Masters to divide military retirement benefits which I created in 1995 and has been in use throughout the country since that time. *See*, *e.g.*, *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002) (noting as "standard language" the form paragraphs created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity of the intent to contractually indemnify, first published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses" in 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30).

[36] Erich voluntarily elected to receive Combat Related Special Compensation (CRSC) instead of Concurrent Retired Disability Pay (CRDP). The difference is that under CRSC, there may not be any disposable retired pay to divide. Under CRDP, the disposable retired pay is restored to the full amount while the VA disability pay remains indivisible.

[37] *Byrd v. Byrd,* 137 Nev. ___, ___ P.3d ___ (COA Adv. Opn. No. 60, Sept. 30, 2021).

from contracting for any kind of payments, noting the mention in *Howell* that parties and courts were directed to "take into account" the contingency of possible waiver and do something about it if they wished, and that the provision was also enforceable as a matter of *res judicata*.

The Court found *Howell* and *Mansell* distinguishable, finding that neither case bars parties themselves from taking into account the possibility that one divorcing spouse may elect to receive disability compensation in the future and structuring the divorce decree accordingly.

The majority found no federal preemption to enforcement of such an agreement, since nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce, but only what divisions a state court may impose based on community property laws, noting the history recounted above of the *Mansell* case after remand.

The Court reaffirmed its prior enforcement of such agreements on the basis of *res judicata*,[38] noting that its prior holdings "aligns with the majority practice in state courts following *Mansell*," and that "divorce decrees that incorporate settlement agreements are interpreted under contract principles."

Two justices concurred, finding (as the Michigan court had) that the indemnification provision did run afoul of the prohibition of division of disability benefits, but since it was contained in a long-since-final, unappealed divorce decree, it could not be collaterally attacked as a matter of *res judicata* (claim preclusion).

Erich filed a motion for rehearing, which was denied after further briefing. He then filed a petition for certiorari in the United States Supreme Court, which as of this writing is still pending in *Martin*.

Since *Martin*, there has been one additional State Supreme Court decision in this subject area, in Virginia, in *Yourko*.[39] That decision, like that of the Alaska court, focused on the parties' ability to contract and found that it violated no federal law:

> For these reasons, we expressly adopt the holding of the Court of Appeals in *Owen* that, with regard to the division of military retirement benefits, "federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits." 14 Va. App. at 628. Along these same lines, federal law does not bar courts from upholding such agreements or from enforcing indemnification

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[38] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003).

[39] Va Case No. No. 220039.

> provisions that may be included to ensure that payments are maintained as intended by the parties.

The above paragraph included a footnote directly citing the other decisions discussed above and a Washington state court:

> In reaching this conclusion, we join a growing number of states holding that "*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022). *See also Martin v. Martin*, 520 P.3d 813, 819 (Nev. 2022); *In re Marriage of Weiser*, 475 P.3d 237, 249 (Wash. Ct. App. 2020).

The member's petition for rehearing was denied. As of this writing, the member has filed a petition for certiorari in the United States Supreme Court which is pending.

Until and unless the United States Supreme Court holds otherwise, however, the Virginia courts will apparently recognize and enforce contractual indemnification agreements in divorce cases.[40]

V. OTHER CASES AND OTHER RESULTS

A. Contract Theory

Not all states have held that contract theory protects the interests of the former spouse. Some states have read *Howell* generally as a total preemption and that no state law can interfere in the payment of benefits that are waived as a result of disability.

Alabama – post-*Howell* – decided two cases in this area. The first was *Brown*.[41] In this case, the Alabama Court of Civil Appeals found that *Howell* placed the issue "outside of the purview of a state." The court also found that "[w]e can draw no meaningful distinction between the circumstances in *Howell*, in which the military member waived retirement benefits to receive disability benefits from the VA, and the circumstances in this case." Of course there was no discussion of the fact that the *Howell* case did not involve a contract provision between the parties and involved only a prohibition of court-ordered indemnification.

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[40] *See Lott v. Lott*, No. 1322-22-1 Va. Ct. App Unpublished Memorandum Opinion, Dec. 12, 2023.

[41] *Brown v. Brown*, 260 So. 3d 851 (Ala. Civ. App. 2018).

The second case, *Williams*,[42] was a straight indemnification situation, so the Alabama Court correctly found that *Howell* controlled and that payment was not to be made.

On October 2, 2017, the Minnesota Court of Appeals decided *Berberich*.[43] Here the parties entered into a stipulated property settlement agreement. The court found that federal law preempts state law, noting that "*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption." But again, that court did not perceive as important that *Howell* did not deal with a contracted payment scheme and should not have been applied to the facts of that case.

In Kansas, the *Babin* case similarly confused the issue. Again the parties had contracted through a property settlement agreement to pay the wife even if some or all of the benefits were waived for disability. The Kansas Court of Appeals held, "the trial court lacked jurisdiction to enforce the agreement because federal law does not include disability pay within the definition of disposable retired pay, and *Howell* holds that the state court cannot vest that which it lacks authority to give."[44]

Likewise in Tennessee in the *Vlach*[45] case, the Court of Appeals held that *Howell* overrides contract law. *Howell* does not address contract theory at all. *Vlach* was a poorly reasoned case.

It is unclear if any of those states will reconsider those decisions in light of the reasoning of the holdings in *Jones*, *Foster*, *Martin*, and *Yourko*.

B. *Res Judicata*

The doctrine of res judicata bars re-litigation of the same issue, and may encompass the principles of issue preclusion and claim preclusion. Elements of res judicata include a final judgment on the merits and the same or similar claim between identical parties.

As discussed above, res judicata was found to be a valid defense to a claim that the military member should not have to pay amounts to his former spouse that were included in a long ago unappealed order. However, some states have found this to be not the case.

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[42] *Williams v. Burks*, No. 2200169, 2021 Ala. Civ. App. LEXIS 118, at *1 (Ala. Civ. App. Nov. 5, 2021).

[43] *Berberich v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017).

[44] *In re Babin*, 437 P.3d 985 (Kan. Ct. App. 2019).

[45] *Vlach*, 556 S.W.3d at 225.

Iowa ruled upon a post-*Howell* case in 2022. In *Erlandson*,[46] the Iowa Court of Appeals ruled that state law did not allow for modification of a property division. Further, it found that Mrs. Erlandson could not demonstrate the necessary components for a modification of spousal support under Iowa law. The trial court's order was affirmed by the Court of Appeals finding that res judicata did not apply.

VI. CONCLUSION

The bottom line—for now—is that a final, unappealed divorce decree containing a provision for contractual indemnification as set out in our "standard form" will be enforced in multiple states. As with several issues, further United States Supreme Court cases could alter the reality of what can be done to actually enforce equal division of community and marital property and hold people to the agreements that they make.

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[46] *In re Marriage of Erlandson*, 973 N.W.2d 601, 603 (Iowa Ct. App. 2022).