COLORADO COURT OF APPEALS

DATE FILED: October 3, 2019
CASE NUMBER: 2018CA1177

Court of Appeals No. 18CA1177
El Paso County District Court No. 17DR31221
Honorable Timothy Schutz, Judge

In re the Marriage of

Tametra Copeland,

Appellant,

and

Kenneth Copeland,

Appellee.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE FREYRE
Taubman and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 3, 2019

Law Office of Greg Quimby, P.C., Greg Quimby, Erica Vasconcellos, Cody Christian, Colorado Springs, Colorado, for Appellant

Kent L. Freudenberg, Colorado Springs, Colorado, for Appellee

¶ 1 Tametra Copeland (wife) appeals the property division entered as part of the final order dissolving her marriage to Kenneth Copeland (husband). Specifically, she challenges the court's legal conclusion that military disability benefits may not be equitably considered in the court's property division. Because we discern no legal error, we affirm the judgment and remand for the district court to consider wife's appellate attorney fees request.

I. Relevant Facts

¶ 2 When the parties divorced, wife had worked thirteen years for the federal government and was eligible to receive a federal employee retirement system (FERS) pension in seven years. Husband was discharged from the military, and was receiving monthly disability benefits, but no retirement pay.

¶ 3 The parties agreed on how to divide most of their marital property, with wife netting $15,000 and husband $5000. Both parties waived maintenance. They disputed the division of wife's FERS pension and husband's military disability benefits.

¶ 4 Following briefing on these two issues, the court found, under *Howell v. Howell*, 581 U.S. ___, 137 S. Ct. 1400 (2017) and *Tozer v. Tozer*, 2017 COA 151, ¶ 21, that it could not consider husband's

military disability benefits in the marital property division, nor could it award wife all of her FERS pension as an offset to the disability pay. Instead, the court considered the stipulated property agreement and divided the FERS pension equitably between the parties. Further, recognizing that it could consider "all equitable circumstances," the court rejected the parties' maintenance waivers and instead, awarded wife $1 per month so that it could retain jurisdiction to reconsider maintenance once the parties began receiving their FERS payouts.

II. Military Disability Benefits

¶ 5 Wife concedes that the court correctly determined that it could not divide husband's military disability benefits as marital property. *See id.* at ___, 137 S. Ct. at 1402 (military disability benefits may not be divided as marital property); *see also In re Marriage of Tozer*, 2017 COA 151, ¶ 21 (same). Nevertheless, she argues that the court should have exercised its equitable power to consider husband's military disability benefits as an economic circumstance when dividing the marital estate. In essence, she argues that the court should have awarded her 100% of the FERS pension to compensate her for not receiving any share of husband's military

disability benefits. Because the same body of law that prohibits state courts from dividing military disability benefits in a property award also precludes them from equitably considering those disability benefits in dividing marital property, we disagree and affirm the court's judgment.

A. Standard of Review and Law

¶ 6 Although state law historically controls domestic relations, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2018), represents "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). The USFSPA permits state courts to equitably divide "disposable retired pay," 10 U.S.C. § 1408(c)(1), but it specifically excludes military retirement pay waived in order to receive veterans' disability payments.[1] § 1408(a)(4)(B).

[1] A veteran may choose to waive military retirement pay to receive comparable military disability benefits when the veteran qualifies to receive disability. This decision may reduce the amount a non-military spouse receives in the property division.

¶ 7 Seven years after Congress enacted the USFSPA, the United States Supreme Court interpreted it in a dissolution case where the decree effectively divided a veteran's disability benefits as part of the property settlement. *Mansell v. Mansell*, 490 U.S. 581 (1989). In *Mansell*, husband sought to modify the divorce decree, which ordered him to pay wife 50% of his total military retired pay, "including that portion of retirement pay waived so that [he] could receive disability benefits." 490 U.S. at 586. California courts had interpreted the USFSPA as allowing state courts to treat military disability benefits as community property and denied husband's request. *Id.* at 586-87. The United States Supreme Court reversed and held that the USFSPA preempted state court laws permitting the equitable distribution of military disability benefits. *Id.* at 594. Thus, in divorce cases where military retirement pay is waived to receive veterans' disability benefits, *Mansell* holds that the USFSPA does not grant state courts the power to treat military disability benefits as property subject to division on dissolution. *Id.* at 595.

¶ 8 In the wake of *Mansell*, some state courts began ordering the military spouse to indemnify or reimburse the former spouse for a reduction in military retired pay received when the retiree elected to

receive disability compensation. *See* Brentley Tanner & Amelia Kays, *Winds of Change: New Rules For Dividing the Military Pension at Divorce*, 30 J. Am. Acad. Matrim. Law. 491, 499 n.22 (2018) (listing cases). "The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property." *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406.

¶ 9 In response, the Supreme Court granted certiorari in *Howell* to resolve the conflicting state court decisions. *Id.* at ___, 137 S. Ct. at 1404-05 (listing cases). In *Howell*, the parties' dissolution decree provided that the wife would receive 50% of husband's future military retirement benefits as her sole and separate property. *Id.* at ___, 137 S. Ct. at 1404. One year later, the husband retired, and the wife began receiving half of his military retirement pay. *Id.* Thirteen years later, the husband was found partially disabled, and he elected to waive part of his military retirement pay to receive disability benefits. *Id.* Because husband's waiver decision decreased wife's share of his retirement pay, the Arizona family court granted wife's request to enforce the full amount in the decree

and ordered husband to pay wife her full 50% share "without regard for the disability." *Id.* The Arizona Supreme Court agreed. *Id.*

¶ 10 In reversing, *Howell* reaffirmed the *Mansell* holding that federal law preempts the states from treating waived military retired pay as divisible community property. *Id.* at ____, 137 S. Ct. at 1405. The Court held that "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Id.* at ___, 137 S. Ct. at 1406. Thus, the Court held that orders for indemnification or reimbursement are likewise preempted. *Id.*

¶ 11 Following *Howell*, a division of this court considered the precise issues raised here — whether a court could employ equitable theories to consider husband's military disability benefits in dividing the marital property. *Tozer*, ¶ 15. Applying *Howell*, the division held that "[b]ecause federal law precludes state courts from dividing military disability benefits as marital property, the district court did not err in denying wife equitable relief." *Tozer*, ¶ 22. In doing so, it remarked, "The *Howell* takeaway is clear. Military retirement disability benefits may not be divided as marital

property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted." *Tozer*, ¶ 21.

B. Application

¶ 12 Applying *Howell* and *Tozer* here, we conclude that husband's military disability benefits are not subject to equitable division as part of the marital estate and that the district court properly determined that it was preempted from awarding wife 100% of her FERS pension as an offset to husband's disability payments.

¶ 13 We are not persuaded by wife's assertion that the USFSPA preempts only those orders giving a dollar for dollar offset against the disability benefits. While the specific indemnification in *Howell* "mirror[ed] the waived retirement pay, dollar for dollar," the Court concluded that *any* reimbursement or indemnification orders "[r]egardless of their form" are preempted. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406; *see also Tozer*, ¶ 21. Thus, courts may not shift marital property to avoid the requirements of the USFSPA or *Mansell's* holding, nor may they financially compensate a former spouse for not receiving a share of the military spouse's disability

pay. *See Howell*, 581 U.S. at ___, 137 S. Ct. at 1406; *Tozer*, ¶ 21; *see also Dunmore v. Dunmore*, 420 P.3d 1187, 1191 & n.2, 1193 (Alaska 2018) (where retirement assets are preempted from division under federal law, courts may not evade the federal prohibitions with a larger award of marital property to the other spouse).

¶ 14 We are also not persuaded by wife's temporal argument that *Howell* and *Tozer* do not control because they involved post-decree modifications to the property division rather than an initial property division. Wife cites no authority to support it, nor does she explain how this temporal difference affects a court's division of property. Moreover, *Howell* reaffirmed *Mansell*, which considered how to treat military retirement pay divisible as part of an initial property division. *See Howell*, 581 U.S. at ___, 137 S. Ct. at 1405-06. We infer from the Court's ratification that it intended *Howell* to apply equally to initial property distributions.

¶ 15 However, our conclusion that *Howell* and *Tozer* precludes the court from considering or dividing husband's military disability benefits as part of the marital estate does not mean that the court lacked the authority to consider the equitable circumstances resulting from the military disability benefits in other contexts. To

be sure, *Howell* stressed that a district court may take account of military disability benefits when calculating or recalculating the need for spousal support. *See* 581 U.S. at ____, 137 S. Ct. at 1406. That is precisely what the district court did here.

¶ 16 The court refused to accept the parties' maintenance waivers, finding that it should consider husband's military disability benefits as an equitable circumstance. The court recognized the possible future inequity that could result from wife receiving only a share of her FERS pension and husband receiving both a share of wife's FERS pension and 100% of his monthly military disability benefits. Hence, the court determined that it should refuse the parties' maintenance waivers and reserve jurisdiction over maintenance to address whether an award would be necessary in the future when the parties begin receiving their FERS payouts. This was a proper exercise of discretion under *Howell*. 137 S. Ct. at 1406. Therefore, we reject wife's argument that the court simply "turned a blind eye" to the economic circumstances existing here.

¶ 17 In sum, we discern no error in the court's treatment of the military disability benefits or in its consideration of the benefits as an economic circumstance for maintenance purposes only.

III. Wife's FERS Pension

¶ 18 Wife next contends that the court erroneously divided her FERS pension. She concedes that "the court absolutely cannot divide Husband's military VA disability between the parties." However, she argues that the court "should have awarded Wife her entire FERS account as that was the equitable way to distribute the marital estate" by considering husband's military disability benefits. She claims that absent this equitable consideration, she will receive $1012.50 monthly while husband will receive $2262.98 monthly. In our view, this is simply another way of arguing that the court should have considered the military disability benefits in its marital property division — an argument we have already rejected.

¶ 19 The district court must enter a just and equitable division of marital property. *See* § 14-10-113(1), C.R.S. 2018. The equitable division of marital property is a matter within the district court's discretion. *In re Marriage of Cardona*, 2014 CO 3, ¶ 9. In reviewing a district court's property division, we recognize that the court has great latitude to effect an equitable distribution based upon the facts and circumstances of each case. *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001).

¶ 20 However, as explained above, state courts are preempted from dividing military disability benefits or including such benefits as part of the equitable distribution of marital property. Instead, they may retain jurisdiction by awarding spousal maintenance and adjusting the maintenance award based on the parties' circumstances.

¶ 21 Here, the court awarded wife $10,000 more in marital property than husband, and it awarded wife maintenance to retain jurisdiction over the parties. Accordingly, we discern no error in the court's property division. [2] Because the parties do not challenge the award of maintenance, we do not address it further.

IV. Wife's Attorney Fees Request

¶ 22 Wife seeks an award of her appellate attorney fees under section 14-10-119, C.R.S. 2019, arguing that husband has a higher monthly income. She asserts in her reply brief that husband's failure to object in his answer brief entitles her to this award. We

[2] We do not address the order's silence on the specific percentage of the marital portion of the pension to be allocated to each party, because it was not raised. For the same reason, we do not address the standard under which the parties' maintenance may be reviewed in the future.

reject this assertion, because whether wife is entitled to an award of appellate attorney fees under section 14-10-119 is a matter within our discretion. See C.A.R. 39.1.

¶ 23 Nevertheless, we exercise our discretion and remand the issue to the district court, which is better equipped to resolve the factual issues regarding the parties' current financial resources. In re Marriage of Kann, 2017 COA 94, ¶ 84.

V. Conclusion

¶ 24 The judgment is affirmed, and the case is remanded for the district court to determine wife's section 14-10-119 request for appellate attorney fees.

JUDGE TAUBMAN and JUDGE PAWAR concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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