

Military Retirement Orders for Judges

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I. AUTHORITY TO DIVIDE RETIREMENT

- A. Federal.** Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 authorizes states to divide retirement
- B. Colorado.** Military retirement is divisible property interest. *IRM Gallo*, 752 P.2d 47 (Colo. 1988). *Gallo* not retroactive. *IRM Booker*, 833 P.2d 734 (Colo. 1992)
- C. Basis for Jurisdiction.** Personal jurisdiction over member insufficient to divide military retirement. 10 U.S.C. § 1408(c)(4) requires:
1. Residence not due to military orders,
 2. Domicile, or
 3. Consent
- D. USFSPA is Subject Matter.** USFSPA preempts state law, and CO lacks subject-matter jurisdiction to divide retirement absent domicile or affirmative conduct demonstrating express or implied consent. *IRM Booker*, 833 P.2d 734 (Colo. 1992), *IRM Akins*, 932 P.2d 863 (Colo.App. 1997)
- E. Retired Pay Subject to Division.** 10 U.S.C. § 1408(a)(4)(A) authorizes division of “disposable retired pay”, which is total retired pay minus amounts:
1. Owed to U.S. due to previous overpayments
 2. Deducted from retired pay as result of court-martial forfeiture
 3. Equivalent to the percentage of disability formula to a member eligible for a 61 disability retirement (see next section)
 4. Survivor Benefit Plan (SBP) premiums for benefit of former spouse
 5. *Waived to receive VA disability benefits. 38 U.S.C. §§ 5304 & 5305*

II. TYPES OF MILITARY RETIREMENT

A. Thrift Savings Plan (TSP)

1. Defined contribution plan
2. Same TSP as civilian federal employees
3. No special jurisdictional requirements beyond personal jurisdiction over member

B. “Legacy” High Three Retirement

1. Defined Benefit Plan, 1 yr of service worth 2.5% of average of highest 36 months of base pay. 10 U.S.C. § 1409(b)(1)
2. Vests at 20 yrs, limited early retirement (drawdown or medical)
3. Mandatory for service commencing before 1/1/2006, optional thereafter through 12/31/2017 (made election during 2018)

C. Blended “Modernized” Retirement (NEW in 2018). Combines defined benefit plan with enhanced TSP

1. TSP Member contribution, with up to 5% government match that vests at 2 yrs
2. **Defined benefit plan reduced**, receive multiplier of 2% x yrs service x High 3, instead of 2.5%. 10 U.S.C. § 1409(b)(4)
3. **Continuation Pay** at 12 yrs service, 2.5 - 13x monthly base pay (0.5-6.5x for reserves), depending upon duty position
4. **Lump Sum Election**. At retirement, can elect lump sum of 25% or 50% of present value of retirement at 20 yrs, in return for reduced monthly payments

D. “Chapter 61” Disability Retirement.

1. Involuntary retirement for disability under 10 U.S.C. § 1201(a) *et seq*
2. Member selects between formula for the longevity retirement (2 or 2.5% multiplier), or the percentage of disability x base pay, up to maximum of 75%. 10 U.S.C. § 1401(a)
3. Chapter 61 retirement not divisible. *IRM Tozer*, 2017 COA 151

4. Regardless of formula selected by member, the percentage of disability formula is deducted from gross retirement, and only remainder, if any, is divisible. 10 U.S.C. § 1408(d)(4)(A)(3).
5. No VA waiver if 20+ years of service, eligible for disability retirement plus full VA disability. 10 U.S.C. § 1414(b)(1).

III. MILITARY RETIREMENT CALCULATION

A. Dollar Amount vs Percentage. Court can award either specific dollar amount, or percentage of retired pay. 10 U.S.C. § 1408(a)(2)(C). Percentage award includes COLAs, but dollar amount does not. DOD FMR, Vol. 7B, section 290601(C)

B. Reserves/National Guard. Use points instead of years/months. DOD FMR sections 290205, 290211. Per *IRM Beckman*, 800 P.2d 1376 (Colo.App. 1990) unvested reserve points are divisible

C. Traditional Coverture Formula

1. *IRM Hunt*, 909 P.2d 525 (Colo. 1995). "Time Rule". Marital share:

$$\frac{\text{Months of marriage overlapping service}}{\text{Months of creditable service at retirement}}$$

2. Applicability:
 - a) Decree before 12/23/2016, OR
 - b) Already retired at time of decree (no post-divorce enhancements possible)

D. “Frozen Benefit Rule”

1. **2017 National Defense Authorization Act**, enacted on 12/23/2016, applies to *decree* issued after this date
2. **Freezes Former Spouse Share of Retirement at Decree.** Modifies definition of “disposable retired pay” in 10 U.S.C. §1408(a)(4) to add a new (a)(4)(B) which reads: “For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be— the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

3. **Formula.** Calculate of hypothetical share servicemember would be entitled to receive at time of decree given rank & time of service:

a) **Calculate hypothetical retirement at decree** (ignoring inability to retire with < 20 yrs service). Member with 12 yrs receives 24% (Blended 12 yrs x 2%) or 30% (Legacy 12 yrs x 2.5%) of high-three at the time of *decree*

b) **Modified Coverture Formula** to calculate spousal share applied against hypothetical retirement:

Months of marriage overlapping service

Months of creditable service at *decree*

4. **Spreadsheet to Calculate Frozen Benefit Share.** See sample at *EXH I*. Working Google Sheets copy (read only, will need to copy locally) at: <https://tinyurl.com/y7bohdsy>

5. **Effect.** Reduces spouse's share of retirement when member still in military at dissolution, increasing disparity the more time between decree & retirement

E. Methods of Division per *IRM Hunt*, 909 P.2d 525 (Colo. 1995)

1. **Deferred Distribution.** Calculate marital share, defer distribution until retirement. *Use when sufficient evidence to calculate marital share*

2. **Reserve Jurisdiction.** Wait until actual retirement. *Use when insufficient evidence to calculate marital share, or when complicated situation involving mixture of reserve/active time, breaks in service, etc*

3. **Net Present Value.** Authorized by *Hunt*. May use NPV even when retirement is unvested. *IRM Riley-Cunningham*, 7 P.3d 992 (Colo.App. 1999)

F. Cannot Require Member to Retire. 10 U.S.C. § 1408(c)(3). However, may be possible to order payments to start when member eligible to retire, even if member chooses to remain in military longer. Per *IRM Blake*, 807 P.2d 1211, 1213-14 (Colo.App. 1990). “[R]equiring husband to pay wife her share of the monthly pension before actual retirement does not force husband to retire; nor does it penalize him for his decision to continue working. Rather, husband remains able solely to decide when he wishes to retire.” Unclear if survives *Hunt* - potentially overruled by *Hunt* allowing spouse to share in post-divorce enhancements in return for member controlling when payments start by delaying retirement. However, frozen benefit rule undercuts *Hunt*'s rationale for waiting until retirement.

IV. DIRECT RETIREMENT PAYMENT FROM DFAS

A. **10/10 rule.** Requires at least 10 years of marriage overlapping military service (active or “good” reserve year). 10 U.S.C. § 1408(d)(2)

B. Order Needs All of the Following:

1. **SCRA.** Indication that rights under Servicemembers Civil Relief Act were respected or waived. DOD FMR, Vol. 7B, section 290602
2. **Jurisdiction.** Indication of basis of jurisdiction over servicemember (residence, domicile, or consent). DOD FMR, Vol. 7B, section 290604(A)
3. **Marriage date,** and indication that 10/10 rule met. DOD FMR, Vol. 7B, section 290604(B)
4. **Percentage, formula or dollar amount.** DOD FMR, Vol. 7B, section 290803(B). If formula, must include underlying data. DOD FMR, Vol. 7B, section 290615
5. **“Frozen Benefit” Data:** Current rank, years of service, and High-3 pay. DOD FMR, Vol. 7B, section 290803(B).

C. Sample Orders to Divide Military Retirement.

1. **Reserve Jurisdiction.** Recommended language containing jurisdictional findings, requiring member to provide information, and then reserving jurisdiction over the actual division. *EXH 2* (editable version at <https://tinyurl.com/yybwvoj3>)
2. **Deferred Distribution.** Recommended language with all findings and calculations necessary for DFAS to pay retirement directly to former spouse. *EXH 3* (editable version at <https://tinyurl.com/y45j8uda>)

D. No Deadline to Submit Order, but DFAS only pays prospectively after processing (takes about 90 days after receipt of application)

E. Maximum amount DFAS pays is 50% of disposable retired pay, or 65% if also paying support/maintenance. DOD FMR, Vol. 7B, section 291001(a)

V. SURVIVOR BENEFIT PLAN (SBP)

A. **“Insurance policy”** on retirement. Without SBP, retirement ends when retiree dies. However, if former spouse dies, share reverts to retiree. 10 U.S.C. § 1408(c)(2)

B. Premiums

1. 6.5% x “designated base amount”, which is itself 55% of retirement share. So effectively 11.8% per month. 10 U.S.C. § 1451(a),. DOD FMR Vol. 7B, section 420401
2. Court has discretion to allocate premium costs. *IRM Payne*, 897 P.2d 888 (Colo.App. 1995)
3. DFAS deducts premium pre-division, when SBP for benefit of former spouse, so effectively pay proportional to shares of retirement. DFAS will not honor different allocation, DOD FMR, Vol. 7B, section 290610, so deviation needs separate reimbursement mechanism.

C. Former Spouse Entitlement

1. Not remarried while under age of 55
2. At least one yr of marriage, or a child. 10 U.S.C. § 1447
3. Can only have one primary beneficiary, cannot allocate payments between multiple beneficiaries

D. No SBP Elected. If member retired at dissolution, and did not select SBP upon retiring (which would have required spousal waiver), cannot later add SBP, and will need life insurance instead

VI. VA DISABILITY. Member with service-connected disability entitled to receive disability payments after leaving service, including retirement

A. Disability Ratings

1. Rating 10-40%, waive military retirement dollar for dollar. 38 U.S.C. §§ 5304, 5305
2. Rating 50% or higher, no waiver, 10 U.S.C. § 1414, unless under 20 yrs of service, in which case VA waiver still in effect
3. VA payment based solely upon disability rating and dependents, not rank. Disabled sergeant receives same as 2-star general. Rate Tables at https://www.benefits.va.gov/COMPENSATION/resources_comp01.asp

B. Sample 2019 Monthly Amounts

1. 30%, no dependents = \$429 (waiver)
2. 40%, spouse & child = \$736 (waiver)
3. 80%, spouse & child = \$1868 (no waiver)
4. 100%, spouse & child = \$3352 (no waiver)

C. No Indemnity for VA Waiver. *Mansell v. Mansell*, 490 U.S. 581 (1989). CO previously applied this to pre-judgment waiver, *IRM Franz*, 831 P.2d 917

(Colo.App. 1992), but required indemnity for post-decree conversion of retirement to disability. *IRM Warkocz*, 141 P.3d 926 (Colo.App. 2006).

D. No Indemnity for Post-Judgment VA Waiver. *Howell v. Howell*, 137 S.Ct 1400 (2017). Court applied *Mansell* to all waivers, termed “semantic” distinction between pre-decree and post-decree waiver. Recognized potential for hardship: “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.”

E. *IRM Tozer*, 2017 COA 151

1. At dissolution, H on active duty, trial court ordered retirement divided, reserved jurisdiction over maintenance in case of VA waiver. H ultimately received chapter 61 disability retirement & VA disability
2. W argued H defeated her share by electing disability, first sought legal relief to enforce division by dividing disability - denied. W then sought equitable relief of indemnity - denied. W had remarried, so court denied req for maintenance in lieu of retirement
3. Holding: trial court properly denied relief, *Howell* overrules *Warkocz*. “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.” (¶ 21)

F. *IRM Longmire* (Unpublished). *EXH 4*

1. 21-yr marriage, separation agreement had provision requiring indemnity for VA waiver. H, with more than 20 yrs of service, received chapter 61 disability retirement plus VA disability in lieu of 20-yr retirement
2. Trial court ordered indemnity, finding separation agreement was contract, so *Howell* not apply, and H voluntarily cooperated with military medical process which resulted in disability retirement
3. Court of Appeals reversed: “Howell effectively overruled cases relying on the sanctity of contract to escape federal preemption.” ¶ 21, and *Howell* itself stated courts relying upon agreements to enforce indemnity were in error

G. Other States. Every cited case since *Howell* has held no indemnity, with or without separation agreement, except that one Texas case suggested in dicta that contractual agreement to divide military benefits is determined by state law, not

federal law. *Rudolph v. Jamieson*, 03-17-00693-CV (Tex. Ct. App., decided June 5, 2018).

H. Temporary Disability Retired List (TDRL). 10 U.S.C. § 1202 & § 1205

1. Servicemember with condition which may be temporary. At 3 yrs, member must be either (1) returned to duty, (2) PDRL if under 20 yrs, or (3) retired if eligible
2. As with Chapter 61 retirement, payment is greater of (1) 2.5% x base pay x years of service, or (2) base pay x disability %. 10 U.S.C. §1401
3. Under 20 yrs, not divisible, since would receive no payments but-for disability. *IRM Williamson*, 205 P.2d 538 (Colo.App. 2009)
4. Over 20 yrs, divisible to extent payment based on longevity and exceeds percentage of disability formula. *IRM Poland*, 264 P.3d 647 (Colo.App. 2011)

I. Permanent Disability Retired List (PDRL). 10 U.S.C, §§ 1201 & 1204

1. Member not returned to duty due to permanent medical condition, but no retirement as under 20 yrs service
2. Must waive disability dollar-for-dollar to receive VA disability, even for ratings of 50% or higher. 10 U.S.C. § 1414(b)(2)
3. As with Chapter 61 retirement, payment is greater of (1) 2.5% x base pay x years of service, or (2) base pay x disability %. 10 U.S.C. §1401
4. PDRL not divisible, since paid only when not qualify for longevity retirement.

VII. RECEIPTS IN LIEU OF RETIREMENT

A. Career Status Bonus at 16 yrs service, convert to REDUX

B. Lump-Sum Payment at Retirement if elect in Blended Retirement System

C. VSI/SSB. Separation pay program from 1992-2001 is divisible asset. *IRM Heupel*, 936 P.2d 561 (Colo. 1997)

D. Administrative Separation. Full or partial separation pay may be available

VIII. MORE INFORMATION. DOD Financial Management Regulation, Vol. 7B, https://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf (Chapter 29 Military Retirement, and Chapter 45 SBP)

Active Duty Military Retirement

(Complete Shaded Boxes)

Spouse % Share (All Cases)

Date Entered Active Duty This Term	3/20/1993	
Days Total Service Before This Term	730	1/1/1991 through 12/31/1992
Days Marital Overlap Before This Term		<i>Dates, if applicable</i>
Date of Marriage	5/28/1994	
Days Break in Service During Marriage		<i>Dates, if applicable</i>
Date of Earlier of Decree/Retirement	11/21/2018	
Annual Credit (0.020 or 0.025)	0.025	0.02 Blended, or 0.025 Legacy Retirement
Total Service (Days)	10107	Marital Overlap (Days) 8943
Marital %	88.48%	Spouse % 44.24%

Currently Retired

(click + to left)

Disposable Retired Pay		
Marital Amount (Retirement x Marital %)		
Retiree Amount		Spouse Amount 0

Currently in Military

(Click + to left)

Curr Pay Grade Yrs	O6 over 26				
Last Promoted Date				<i>Dates to the left are informational only to ensure using correct data, and are not directly utilized in any formulas.</i>	
Last Longevity Date	O6 over 26	6/10/2018			
Prior Longevity Date	O6 over 24	6/10/2016			
Prior Longevity Date	O6 over 22	6/10/2014			
	Base Pay	# Months	Total	Dates	Pay Grade/Yrs
	11,372.40	5	56,862.00	Jul - Nov 2018	O6 over 26
	10,841.10	6	65,046.60	Jan - Jun 2018	O6 over 24
	10,587.00	12	127,044.00	Jan - Dec 2017	O6 over 24
	10,369.20	6	62,215.20	Jul - Dec 2016	O6 over 24
	10,106.70	6	60,640.20	Jan - Jun 2016	O6 over 22
	9,977.10	1	9,977.10	Dec 2015	O6 over 22
TOTAL		36	381,785.10	High 3:	\$10,605.14
Years of Service (days / 365)				27.69	
Retirement Multiplier (Years x Annual Credit)				69.23%	
Retirement at decree (Multiplier x High 3)				\$7,341.52	
Marital Amount (Retirement x Marital %)				\$6,496.01	
Spouse Amount, Plus COLAs				\$3,248.01	
SBP Base Amount Needed (Spouse \$ / 0.55)				\$5,905.47	
SBP Premium (Base Amount * 0.065)				\$383.86	
<i>Historic Pay Charts</i>	https://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html				

EXH 2: Sample Order for Reserve Jurisdiction

Petitioner has served in the U.S. armed forces, and may be entitled to receive a military retirement, which is subject to division per Colorado law and 10 U.S. Code § 1408(a). This Court has jurisdiction to divide the retirement because *Petitioner* consented to jurisdiction by (*indicate basis, e.g. filing the petition*), OR maintains Colorado as his/her state of legal domicile. At all times *Petitioner's* applicable rights under the Servicemembers Civil Relief Act have been respected.

Petitioner shall advise Respondent of a retirement or separation from the military or from active duty at least 90 days in advance, and promptly provide Respondent with a copy of all pertinent documents, including, but not limited to, retirement or separation orders, memorandum of release from active duty, DD214, Retiree Account Statement and, if in the reserves, the 20-year letter and a chronological statement of retirement points.

The parties shall then cooperate to calculate the marital share of *Petitioner's* retirement, and apply to the Court for whatever clarifying order may be necessary.

The Court retains jurisdiction to implement and enforce the allocation of military retirement, including entering appropriate orders should *Petitioner* receive financial benefits in lieu of some or all of the military retirement, merges the military retirement credit into another retirement such as FERS, participates in any program which either makes lump sum payments, or reduces the retirement available for division, such as receipt of the Career Status Bonus or Blended Retirement, or for any other reason where indemnity is not prohibited by law.

*****IF SBP ORDERED**

Prior to retirement, *Petitioner* shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating Respondent as the "former spouse beneficiary" for an annuity which pays an amount not less than Respondent's share of the retirement, and provide proof to Respondent upon completion. If in the reserves, *Petitioner* shall participate in the Reserve Component Survivor Benefit Plan, electing Option C (Immediate Annuity) within 90 days of receiving the "20-year" letter of entitlement to Reserve retirement pay.

If the parties cannot agree on the SBP coverage necessary, *Petitioner* shall elect the higher of the parties' calculations unless this Court has entered an order to the contrary prior to retirement.

EXH 3: Sample Order for Deferred Distribution

Petitioner has served in the U.S. armed forces, and may be entitled to receive a military retirement, which is subject to division per Colorado law and 10 U.S. Code § 1408(a). This Court has jurisdiction to divide the retirement because Petitioner consented to jurisdiction by (*indicate basis, e.g. filing the petition*), OR maintains Colorado as his/her state of legal domicile. At all times Petitioner's applicable rights under the Servicemembers Civil Relief Act have been respected.

The marital share of the military retirement is ____%, calculated as follows:

*** *days/months/years/points* overlapping marriage & military service

*** *days/months/years/points* of military service through date of decree

Respondent is awarded one-half of the marital share, or ____%, plus COLAs. Respondent is entitled to a share of the actual disposable retired pay received, whether active duty or reserve. Days and reserve retirement points are interchangeable on a point-per-day basis, and to the extent points are referenced but Petitioner receives an active duty retirement, such points shall be treated as days, and to the extent days are referenced but Petitioner receives a reserve retirement, such days shall be treated as points.

***** IF NOT YET RETIRED**

On the date of the decree, Petitioner's high-3 pay was \$____ and he/she had the rank/pay grade of _____, with _____ years/months of creditable service. Respondent's share is the percentage defined above multiplied by the disposable retired pay Petitioner would be entitled to receive if Petitioner retired with this pay and creditable service, plus COLAs.

Petitioner shall advise Respondent of a retirement or separation from the military or from active duty at least 90 days in advance, and promptly provide Respondent with a copy of all pertinent documents, including, but not limited to, retirement or separation orders, memorandum of release from active duty, DD214, Retiree Account Statement and, if in the reserves, the 20-year letter and a chronological statement of retirement points.

***** IF ALREADY RETIRED**

Respondent's share of the military retirement is calculated by multiplying his/her percentage above by Petitioner's disposable retired pay, which is presently \$____/mo.

***** IF MORE THAN 10 YRS OVERLAP**

Because the parties were married on _____, they have more than 10 years of marriage overlapping the military service and Respondent is entitled to receive direct payment from DFAS, pursuant to 10 U.S.C. § 1408(d) and Respondent shall promptly apply to the Defense Finance and Accounting Service (DFAS) for his/her share of the military retirement. Timely payment remains Petitioner's obligation until such time that DFAS commences direct payments.

***** IF FEWER THAN 10 YRS OVERLAP**

Because the parties do not have more than 10 years of marriage overlapping military service, Petitioner shall pay Respondent's share of the retirement directly to him/her within 5 days of receipt of each payment.

***** ALL CASES**

Within 14 days of any change to the disposable retired pay, Petitioner shall provide Respondent with the Retiree Account Statement, VA documents, or any other documents relevant to the change. This does not apply to annual COLAs if DFAS is directly paying Respondent's share of the retirement.

Pursuant to 5 U.S.C. §552a(b)(11), this Order is a continuing court order directing DFAS to provide to Respondent upon request all information pertaining to Petitioner's retirement, including amounts, dates of service, and periodic Retiree Account Statements. Should DFAS or another agency require any further release for such information, Petitioner shall provide an executed release to Respondent within 14 days of Respondent providing such a release.

The Court retains jurisdiction to implement and enforce the allocation of military retirement, including entering appropriate orders should Petitioner receive financial benefits in lieu of some or all of the military retirement, merges the military retirement credit into another retirement such as FERS, participates in any program which either makes lump sum payments, or reduces the retirement available for division, such as receipt of the Career Status Bonus or Blended Retirement, or for any other reason where indemnity is not prohibited by law.

***** IF SBP ORDERED & ALREADY RETIRED**

Petitioner previously elected Survivor Benefit Plan or Reserve Component Survivor Benefit Plan (hereinafter "SBP") to protect Respondent's share of the retirement in the event of Petitioner's death. Within 60 days, Petitioner shall convert SBP to "former spouse beneficiary" coverage, and provide proof to Respondent upon completion.

*****IF SBP ORDERED & NOT YET RETIRED**

Prior to retirement, Petitioner shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating Respondent as the "former spouse beneficiary" for an annuity which pays an amount not less than Respondent's share of the retirement, and provide proof to Respondent upon completion. If in the reserves, Petitioner shall participate in the Reserve Component Survivor Benefit Plan, electing Option C (Immediate Annuity) within 90 days of receiving the "20-year" letter of entitlement to Reserve retirement pay.

The parties shall divide the costs of the SBP in accordance with their respective shares of the retirement OR equally, with Respondent reimbursing Petitioner quarterly for any overpayment of the premium.

17CA1294 Marriage of Longmire 08-30-2018

COLORADO COURT OF APPEALS

DATE FILED: August 30, 2018
CASE NUMBER: 2017CA1294

Court of Appeals No. 17CA1294
El Paso County District Court No. 08DR4695
Honorable Jill M. Brady, Judge

In re the Marriage of

Suzanne Longmire, n/k/a Morrison,

Appellee,

and

Travis Longmire,

Appellant.

ORDER REVERSED

Division V
Opinion by JUDGE LICHTENSTEIN
Román and Furman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 30, 2018

Gill & Ledbetter, LLP, Anne Whalen Gill, Castle Rock, Colorado, for Appellee

Beltz & West, P.C., Daniel A. West, Colorado Springs, Colorado, for Appellant



¶ 1 In this post-dissolution of marriage case, Travis Longmire (husband) appeals the district court’s order requiring him, as part of a separation agreement, to pay Suzanne Longmire, now known as Suzanne Morrison (wife), her portion of his military disability retirement benefits. We reverse.

I. Pertinent Facts

¶ 2 At the time the district court dissolved the parties’ twenty-one-year marriage, husband was on active duty with the United States Air Force. The dissolution decree incorporated the parties’ separation agreement, which provided that they would divide husband’s “future disposable military retired pay” or “any related service related benefits” according to the “time rule” formula set forth in *In re Marriage of Hunt*, 909 P.2d 525, 531-32 (Colo. 1995). The separation agreement also included the following provisions:

Husband agrees not to merge or diminish his retired or retainer pay with any other pension and he agrees not to pursue any course of action that would defeat or diminish [w]ife’s rights to her portion of [h]usband’s retired or retainer pay. If [h]usband’s retired pay is diminished, wherein [w]ife’s interests are detrimentally affected, the [c]ourt shall reserve jurisdiction to compensate [w]ife for such diminution.

. . . .

[Husband] will be personally liable for any costs, including attorneys' fees that may be incurred by [wife] in enforcing her rights or collecting such benefits from [him].

[Husband] will not pursue any course of action that would defeat, reduce or limit [wife's] right to receive the share of his military retired pay awarded herein. [Husband] shall indemnify and hold harmless [wife] for any breach of this provision from funds of whatever source

¶ 3 Nearly seven years later, as a result of a physical disability incurred “in the line of duty as a direct result of armed conflict or caused by an instrumentality of war” and “during a period of war,” husband was separated from the Air Force under Chapter 61, 10 U.S.C. § 1201 (2012), with a physical disability rating of 100%. See 10 U.S.C. § 1201(a) (“Upon a determination . . . that a member . . . is unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay . . ., the Secretary may retire the member, with retired pay computed under [10 U.S.C. § 1401 (2012)]”); see also *In re Marriage of Tozer*, 2017 COA 151, ¶ 3 (“This form of military retirement — where the military itself retires a member who is ‘unfit to perform’ his duties due to a service-related physical disability —

is commonly referred to as ‘Chapter 61’ disability retirement.”)
(citation omitted). During a medical examination associated with
his separation, husband was diagnosed with Ankylosing
Spondylitis, an arthritic disease affecting his back and neck.

¶ 4 The Defense Department then provided husband the option to
receive either disability retirement benefits or regular military
retired pay. *See* 10 U.S.C. § 1401; *see also Tozer*, ¶ 3 (a veteran
retired under Chapter 61 may opt to receive monthly payments
based on his disability rating instead of military retirement pay).
Husband opted for disability retirement benefits.

¶ 5 In addition to his Chapter 61 disability retirement benefits,
husband also received disability benefits from the Veteran’s
Administration and Social Security. Thus, all of husband’s benefits
from the military were based on disability.

¶ 6 When wife became aware of the situation, she moved to
enforce the terms of the separation agreement and in the alternative
for equitable relief. She alleged that husband voluntarily elected to
receive only disability retirement benefits and that he defeated any
retirement benefits she would have been entitled to under the
agreement. She sought indemnification for her lost interest.

¶ 7 Following a hearing, the district court, based on contract theory, found that husband breached the separation agreement by “pursu[ing] a course of action” that defeated wife’s portion of his disposable military retired pay. Because the separation agreement also included the language “service related benefits,” the district court rejected husband’s argument that there “[was] no ‘disposable military retired pay’ here since Chapter 61 [disability] benefits are expressly excluded from the definition of ‘disposable retired pay’ under the Uniform Services Former Spouses’ Protection Act.”

Additionally, the district court distinguished a recent United States Supreme Court decision, *Howell v. Howell*, 581 U.S. ___, 137 S. Ct. 1400 (2017), stating that the case “did not involve a Separation Agreement where the parties’ specifically contracted for the non-military spouse to receive her share of military retirement or any service related benefits.” In the end, the court ordered husband to indemnify wife by paying her approximately 40% of his monthly disability benefits. It also ordered him to pay her attorney fees incurred in connection with his breach of the separation agreement.

II. Husband's Military Disability Retirement Benefits Cannot Be Divided Under Federal Law

¶ 8 Husband contends that the district court was preempted from ordering him to indemnify wife for the amount of military retirement pay that she would have received under the separation agreement.

We agree.

¶ 9 Although state law historically controls domestic relations, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), the Uniformed Services Former Spouses' Protection Act (USFSPA) 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). Thus, the USFSPA raises the question of preemption.

¶ 10 Under the Supremacy Clause, article VI, clause 2 of the United States Constitution, state law must yield to federal law when application of the two conflict. *Wos v. E.M.A.*, 568 U.S. 627, 636 (2013); see *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (Federal law preempts state jurisdiction where Congress so provides "by an explicit statutory directive, by unmistakable

implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”).

¶ 11 Federal preemption is a question of law that we review de novo. *Timm v. Prudential Ins. Co. of Am.*, 259 P.3d 521, 525 (Colo. App. 2011); see also *In re Marriage of Anderson*, 252 P.3d 490, 493 (Colo. App. 2010) (“We review de novo . . . whether the decree provision requiring husband to pay part of his future Social Security benefits to wife conflicts with the Social Security Act and thereby violates the Supremacy Clause of the United States Constitution.”).

¶ 12 State courts are limited in how they may divide military benefits in dissolution cases. In *Mansell*, a husband and wife entered into a property settlement agreement in which the husband agreed to pay the 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. Four years later, the husband moved to modify the divorce decree, arguing that the waived retirement benefits could not be divided under the USFSPA. California, determining that the USFSPA allowed state courts to treat disability benefits as community property, denied husband

relief. *Id.* at 586-87. The United States Supreme Court reversed. The Court recognized the hardship that congressional preemption can sometimes work on divorcing spouses. *Id.* at 594. Yet, it held that the USFSPA, 10 U.S.C. § 1408 (2012), explicitly excludes military disability benefits from the definition of disposable retired pay. Thus, in divorce cases where military retirement pay has been waived to receive veterans' disability benefits, the USFSPA does not grant state courts the power to treat these disability benefits as property divisible on dissolution. *Mansell*, 490 U.S. at 595.

¶ 13 In *Howell*, the United States Supreme Court again recognized the USFSPA's preemptive effect on divorcing spouses. Nonetheless, the Court reaffirmed and clarified the holding in *Mansell*. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1405-06.

¶ 14 In *Howell*, the dissolution decree provided that the wife would receive 50% of the husband's future military retirement benefits as her sole and separate property along with spousal maintenance. 581 U.S. at ___, 137 S. Ct. at 1404. One year later, the husband retired from the Air Force. *Id.* The wife then began receiving half of his military retirement pay, which she continued to receive for the next thirteen years until he was found to be partially disabled. *Id.*

In order to receive disability benefits, the husband elected to waive part of his retirement pay, which, in turn, decreased the wife's share of his retirement pay. *Id.* As a result, the wife moved to enforce the divorce decree so that she would again receive her original share. *Id.* The Arizona family court concluded that the divorce decree had given the wife a "vested" interest in the prewaiver amount of the husband's military retirement pay and ordered him to ensure that she receive her full 50% share "without regard for the disability." *Id.*

¶ 15 The Arizona Supreme Court agreed. *Id.* It concluded that *Mansell* did not control because, unlike the veteran there, the husband made his waiver after, rather than before, the court divided his military retirement pay. *Id.* And thus federal law did not preempt the reimbursement order. *Id.*

¶ 16 In reversing, the United States Supreme Court held that even though the military spouse unilaterally waived a portion of his retirement pay for disability benefits, federal law preempts state courts from ordering the military spouse to indemnify their former spouse for the loss of that spouse's portion of retirement pay. *See id.* at 1406. The Court explained:

Neither can the State avoid *Mansell* by describing the family court order as an order requiring [the husband] to “reimburse” or to “indemnify” [the wife], rather than an order that divides property. The difference is semantic and nothing more. 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, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless 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. All such orders are thus pre-empted.

Id.

¶ 17 In the wake of *Howell* and during the pendency of this appeal, a division of this court in *Tozer* held that if a veteran’s retired pay consists of Chapter 61 disability retirement benefits, it is not disposable retired pay under the USFSPA. *See Tozer*, ¶ 13; *see also* 10 U.S.C. § 1408(a)(4)(A)(iii); *Guerrero v. Guerrero*, 362 P.3d 432, 442 (Alaska 2015) (A military “member does not unilaterally choose to become Chapter 61 retired.”). The division also concluded that “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.

¶ 18 In light of these cases, we conclude that wife is not entitled to any portion of husband's military disability benefits, and, therefore, the district court was precluded under the USFSPA from directing him to pay her nearly 40% of such benefits per month. *See Howell*, 581 U.S. at ___, 137 S. Ct. at 1406; *see also Tozer*, ¶ 21.

¶ 19 Wife nonetheless asserts the present case is distinguishable because the parties specifically contemplated that husband's disposable military retired pay may cease to exist and included indemnity language in their separation agreement reflecting the parties' intent that wife would still receive her share of his retirement pay. We are not persuaded.

¶ 20 First, as discussed above, state courts are preempted from ordering military veterans receiving Chapter 61 disability benefits to indemnify their former spouses. *See Tozer*, ¶ 13. Here, the record reflects that husband was separated from the Air Force with a physical disability rating of 100% and his "disposable military retired pay" consisted entirely of disability retirement benefits. Thus, the district court was preempted from dividing such benefits

under the USFSPA and ordering husband to indemnify wife for her lost portion. See 10 U.S.C. § 1408(a)(4)(A)(ii), (iii); see also *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406; *Tozer*, ¶¶ 13, 21.

¶ 21 Second, state courts may not rely on contract theory to avoid federal preemption. True, in *Howell* the parties did not specifically contract for indemnification to ensure that the nonmilitary spouse would receive his or her share of retirement pay. But, as recognized in *Mattson v. Mattson*, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017), “*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption.” *Id.*

¶ 22 Indeed, in *Howell*, the United States Supreme Court recognized that some state courts were enforcing separation agreements that treated military retirement pay as divisible community property. But it determined that those state courts were acting in error. For example, it cited *Krapf v. Krapf*, 786 N.E.2d 318, 324 (Mass. 2003) (army veteran breached separation agreement when parties expected and intended that his wife would receive one-half of his full military retirement benefits and he unilaterally executed a waiver reducing his military retirement benefits for disability payments), as a state court decision that

failed to properly interpret *Mansell*. See *Howell*, 581 U.S. at ___, 137 S. Ct. at 1404-05; see also *Roberts v. Roberts*, No. M2017-00479-COA-R3-CV, 2018 WL 1792017, at *7 (Tenn. Ct. App. Apr. 16, 2018) (unpublished opinion) (“[T]he holding in *Howell* casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefit other than disposable retired pay.”).

¶ 23 Recently, the Alabama Court of Appeals stated that, based on *Howell*, it was compelled to determine that despite an express indemnity provision in the parties’ settlement agreement, husband’s temporary disability retired list pay was not disposable retired pay under the USFSPA and cannot be treated as marital property subject to division. *Brown v. Brown*, ___ So. 3d ___, 2018 WL 1559790, at *4-6 (Ala. Civ. App. March 30, 2018).

¶ 24 We likewise are compelled to conclude, based on *Howell*, that the court here was preempted from ordering husband to indemnify

wife for the amount of military retired pay that she would have received under the separation agreement.¹

¶ 25 In her answer brief, wife argues that to reverse the district court's order would constitute the taking of a property interest in violation of the United States Constitution. However, we decline to address this issue because it was raised for the first time on appeal. *See In re Marriage of Ensminger*, 209 P.3d 1163, 1167 (Colo. App. 2008) (arguments not raised to the district court will not be addressed for the first time on appeal).

III. Because Husband Did Not Breach the Separation Agreement Wife Is Not Entitled to District Court Attorney Fees or Appellate Attorney Fees

¶ 26 Husband contends that the district court erred in awarding wife her attorney fees under the separation agreement. Again, we agree.

¶ 27 Because the district court was preempted from enforcing the separation agreement's provision that would divide husband's disability benefits, husband did not breach the separation agreement and therefore is not liable for wife's attorney fees.

¹ Given our disposition, we need not address husband's alternative arguments.

Accordingly, we reverse this portion of the order as well. *See In re Marriage of Williams*, 2017 COA 120M, ¶ 25 (reversing attorney fee award under the prevailing party provisions of the parties' agreements when the district court erroneously decided that the agreements required the former husband's estate to continue paying maintenance to the wife).

¶ 28 Likewise, we deny wife's request for appellate attorney fees. *See id.* at ¶ 27.

IV. Conclusion

¶ 29 The order is reversed.

JUDGE ROMÁN and JUDGE FURMAN concur.

Court of Appeals

STATE OF COLORADO
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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: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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