COLORADO COURT OF APPEALS

DATE FILED: January 6, 2022
CASE NUMBER: 2020CA849

Court of Appeals No. 20CA0849
El Paso County District Court No. 95DR3983
Honorable G. David Miller, Judge

In re the Marriage of

Sigrid Geothoeffer Fisher,

Appellant,

and

Jonathan Fisher,

Appellee.

ORDER AFFIRMED

Division IV
Opinion by JUDGE BROWN
Navarro and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 6, 2022

Anne Whalen Gill, L.L.C., Anne Whalen Gill, Castle Rock, Colorado, for Appellant

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

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this post-dissolution of marriage proceeding between Sigrid Geothoeffer Fisher (wife) and Jonathan Fisher (husband), wife appeals the district court's order granting husband relief from a judgment for the arrearages owed for her share of his military retirement benefits. We affirm.

I. Background

¶ 2 The parties' marriage ended in 1996. As relevant here, wife received 37% of husband's military retirement benefits under the decree. The 1997 order distributing the benefits provided that wife would receive as a property interest 37% of husband's "disposable retired pay, to the maximum extent permitted by law." Also in 1997, however, husband began receiving Department of Veterans Affairs (VA) disability benefits, and a portion of his regular retirement pay was waived to account for those benefits.

¶ 3 In 2014, wife moved in relevant part to enforce the retirement benefits division from the decree, asserting that she had not been receiving her full share of husband's military retirement pay. The district court granted wife's motion based on husband's failure to respond. In 2017, wife moved for a judgment against husband for $62,533 in retirement benefit arrearages and the court granted the

motion. In 2018, wife moved to enforce the $62,533 judgment through an order that the military pay her 50% of husband's retirement pay until the judgment is satisfied. The court again granted wife's motion, noting husband's failure to respond.

¶ 4 Three months later, however, husband submitted a pro se letter to the court objecting to the judgment on the basis that it included his VA disability benefits. And in January 2020, after retaining counsel, husband moved for relief from the judgment under C.R.C.P. 60, asserting in relevant part that wife's arrearages calculation included his disability benefits, to which she was not entitled.

¶ 5 The district court granted husband relief from the judgment, finding that it had lacked subject matter jurisdiction to determine the arrearages by including his VA disability benefits. It ordered wife's attorney to prepare a new calculation showing the amount owed to wife without the disability benefits.

¶ 6 Wife appealed from this order. A division of this court ordered her to show cause why the appeal should not be dismissed for lack of a final, appealable order because the amount of arrearages was not yet determined. The show cause order was discharged,

however, and the appeal permitted to proceed after wife provided a copy of a later order granting the parties' stipulation establishing $17,885 as the amount owed to her.

II. Husband's Motion for Relief from the Judgment Was Timely

¶ 7 Wife first contends that husband's motion was untimely under C.R.C.P. 60(b), which requires that a motion for relief from a judgment be brought within a reasonable time. We disagree.

¶ 8 We review the district court's order granting husband relief from the judgment under Rule 60(b) for abuse of discretion but review de novo the legal standards the court applied, including its determination that the judgment was void for lack of subject matter jurisdiction. *See Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 314 (Colo. 2010); *see also In re Marriage of Anderson*, 252 P.3d 490, 493-96 (Colo. App. 2010) (reviewing de novo whether a decree provision dividing a spouse's social security benefits was void under the Supremacy Clause).

¶ 9 Under C.R.C.P. 60(b)(3), a court may relieve a party from a void final judgment. *Anderson*, 252 P.3d at 495. Although a motion under Rule 60(b) generally must be brought "within a reasonable time," a judgment that is void for lack of subject matter

jurisdiction may be challenged at any time. *Anderson*, 252 P.3d at 495 (quoting C.R.C.P. 60(b)); *see also Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 681 (Colo. 2007) (a challenge to the court's subject matter jurisdiction cannot be waived and may be raised at any stage of the proceedings).

¶ 10 The district court ruled that although husband had delayed in bringing his motion, the court "indeed lacked subject matter jurisdiction over the issue of determining arrearages based upon a calculation of military retirement division including [VA] disability benefits which should have been excluded from the calculation." Accordingly, the court granted husband's motion for relief from the judgment on this basis.

¶ 11 Wife argues that the judgment for her share of husband's retirement pay, including amounts waived for his disability pay, was not void for want of jurisdiction but rather merely erroneous, and therefore husband's motion was untimely. We are not persuaded.

¶ 12 Military retirement benefits are divisible as marital property in dissolution of marriage cases pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c)(1). *Howell v.*

Howell, 581 U.S. ___, ___, 137 S. Ct. 1400, 1402-04 (2017). Divisible benefits are limited, however, to "disposable retired pay," which excludes disability pay. *Id.* at ___, 137 S. Ct. at 1403 (quoting 10 U.S.C. § 1408(c)(1)); *see also In re Marriage of Tozer*, 2017 COA 151, ¶ 13. Divisible benefits also do not include retirement benefits the spouse waived in order to receive disability benefits. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1403; *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). Thus, *Howell* holds that state courts are "completely" preempted from dividing such waived retirement benefits and from ordering a spouse to reimburse or indemnify the other spouse for the waived benefits. 581 U.S. at ___, 137 S. Ct. at 1405-06; *see also Tozer*, ¶¶ 13, 19; *cf. Anderson*, 252 P.3d at 493 (explaining that the anti-assignment clause of the Social Security Act precludes a court both from dividing future Social Security benefits as marital property and from employing "an indirect offset" to account for the value of such benefits).

¶ 13 Because an order dividing military disability benefits or requiring indemnification or reimbursement for waived retirement benefits is preempted by federal law, a state court lacks subject matter jurisdiction to enter or enforce such an order. *See*

Anderson, 252 P.3d at 493-94 (holding that because federal law preempts states from transferring social security benefits, state courts "lack subject matter jurisdiction to divide" such benefits and "are without power to enforce" agreements to do so); *Osband v. United Airlines, Inc.*, 981 P.2d 616, 619 (Colo. App. 1998) ("If federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim."); *see also Howell*, 581 U.S. at ___, 137 S. Ct. at 1405 (state courts "lack the authority" to give a spouse an interest in the other spouse's waivable military retirement benefits).

¶ 14 We are not persuaded otherwise by *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018), on which wife relies. There, the Alaska Supreme Court held that a spouse was not entitled to relief from a judgment enforcing a separation agreement provision dividing 50% of his military retirement pay, including his disability pay, because the enforcement order was not void but rather erroneous under federal law and thus not subject to collateral attack. *Id.* at 397-98. The court distinguished *Howell* because the case before it did not involve an order reimbursing the amount of retirement pay that a spouse waived post-decree for disability pay. *Id.* at 401.

¶ 15 The Alaska court did not address *Howell*'s holding that state courts are *preempted* from dividing military disability pay, however, or explain how its courts have the authority to enforce such divisions despite that finding. *See* 581 U.S. at ___, 137 S. Ct. at 1404-06. Accordingly, we decline to follow the Alaska decision in the face of *Howell* and Colorado authority to the contrary. *See id.*; *Tozer*, ¶¶ 19-21; *see also Anderson*, 252 P.3d at 494; *Osband*, 981 P.2d at 619. And for the same reason, we do not follow *Boutte v. Boutte*, 2019-734, p. 8-10 (La. App. 3 Cir. 7/8/20), 304 So. 3d 467, 472-73, on which wife also relies. There, the court applied a Louisiana freedom of contract statute to enforce a consent judgment dividing military disability benefits — likewise without addressing *Howell*'s statement of complete federal preemption over the issue.

¶ 16 Further, courts in other states have held, as we do here, that a dissolution court lacks "authority" or "subject matter jurisdiction" to enforce an order dividing military disability benefits. *See In re Marriage of Babin*, 437 P.3d 985, 991 (Kan. Ct. App. 2019); *Hurt v. Jones-Hurt*, 168 A.3d 992, 1002 (Md. Ct. Spec. App. 2017); *Mattson v. Mattson*, 903 N.W.2d 233, 241-42 (Minn. Ct. App. 2017); *Ryan v.*

Ryan, 600 N.W.2d 739, 745 (Neb. 1999) ("Based on the preemptive effect of the [Uniformed Services Former Spouses' Protection Act], we conclude that federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits.").

¶ 17 Last, wife's argument in the reply brief based on *In re Parental Responsibilities Concerning M.E.R-L.*, 2020 COA 173, is unpersuasive. Contrary to wife's argument, that case does not stand for the proposition that a "court retains subject matter jurisdiction over VA benefits." Rather, the division in that case addressed a different issue — whether a state may treat a parent's military disability benefits as income for calculating child support. *See id.* at ¶¶ 28-31. In holding that a court may do so, the division distinguished *Howell* based on the Supreme Court's statement that although a state court is preempted from dividing disability benefits as property, it could consider such benefits when calculating spousal support. *Id.* at ¶ 28. Thus, *M.E.R-L.* does not convince us to alter our disposition upholding the district court's ruling that *the property division judgment* including husband's disability benefits is void for lack of subject matter jurisdiction based on *Howell*.

¶ 18 In sum, the district court did not err by granting husband relief from the $62,533 arrearages judgment under Rule 60(b)(3).

III. *Howell* Applies Retroactively

¶ 19 Wife further argues that *Howell* changed Colorado law and therefore the district court erred by applying it retroactively to the present case. We disagree.

¶ 20 We note initially that, although it did not address retroactive application expressly, the division in *Tozer* applied *Howell* under similar circumstances as those involved here and held that *Howell* overruled *In re Marriage of Lodeski*, 107 P.3d 1097 (Colo. App. 2004), and *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. App. 2006), which wife cites. *See Tozer*, ¶¶ 16-21.

¶ 21 Even if *Howell* changed Colorado law, however, because it constitutes a controlling interpretation of *federal law*, it applies retroactively. *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also Russ*

v. Russ, 2021-NMSC-014, ¶ 14, 485 P.3d 223, 227 (applying *Howell* to similar facts and clarifying that "when a new federal rule of law is announced by the United States Supreme Court in a civil case it *always* applies retroactively"); *cf. LaFleur v. Pyfer*, 2021 CO 3, ¶¶ 42-45 (holding under *Harper* that because the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015), applied a rule of federal law to the litigants before it, the Court's holding that restrictions on same-sex marriages are unconstitutional must be given full retroactive effect, including to common law same-sex marriages in which the events establishing the marriage predated the decision).

¶ 22 Finally, we note that wife's reliance on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to support her argument against retroactive application is misplaced. The Court did not apply a federal rule of law in *Bouie*, as it did in *Howell*. Accordingly, its decision that the South Carolina court's interpretation of its own state's trespass statute may not be applied retroactively, *id.* at 362, is not relevant to the present case involving an issue preempted by federal law.

IV. Conclusion

¶ 23 The order is affirmed.

JUDGE NAVARRO and JUDGE VOGT concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

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: Gilbert M. Román
Chief Judge

DATED: January 6, 2022

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