

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

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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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