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NO. 52280-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHRISTOPHER RIGHTMYER,

Appellant,

vs.

REBECCA RIGHTMYER,

Respondent.

REPLY OF APPELLANT

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I. APPELLANT'S REPLY

The Brief submitted by the Respondent contains several concerning passages including what appears to be an attempt to raise issues without bringing them via a proper appeal. For instance, the Respondent introduces the issues of maintenance and compensatory maintenance even though the trial court denied Rebecca's Motion for additional maintenance and she has not challenged that decision.

The Brief of Respondent contains a number of legal misapplications that will be discussed as the Reply goes forth.

Finally, the Brief of Respondent ends with a suggestion that Chris' appeal is frivolous. Of course, it is not and why not will be explained near the end of this Reply.

A. VACATING THE AGREED PROPERTY DIVISION IS REVERSABLE ERROR.

- a. The USFSPA preempts state courts from dividing disability pay.

It appears as though the Respondent is conceding either that (1) that Chris did not waive disposable retired pay or (2) that the trial court erred in finding that Chris waived disposable retired pay. Brief of Respondent, p. 11 (*Whether Chris deliberately waived his military pension in lieu of (she probably meant "in favor of) VA disability, or whether it was initiated by the military is irrelevant ...*). Even if the Respondent is not conceding these points, how Chris ended up with 100% disability pension is not important to the outcome of this appeal.

I'm sure that this court is well versed in the applicable law, but for ease of reference, the USFSPA, 10 U.S.C. §1408 only allows “disposable retired pay” to be divided as property by the state courts. The applicable section reads,

(a) (4) (A) The term “disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which—

(i) n/a; (ii) are deducted from the retired pay of such member as a result of ... waiver of retired pay required by law in order to receive compensation under title 5 or title 38; (iii) n/a; or, (iv) n/a.

(b) n/a.

(c) Authority for To Treat as Property of the and Spouse.—

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The quintessential case that interpreted the USFSPA is the 1989 *Mansell* case. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023 (1989). The essence of *Mansell* was applied in the 2017 *Howell* case. *Howell v. Howell*, U.S., 137 S.Ct. 1400 (2017). Their application reads,

“In 1989 ... this Court reversed [California]. [This Court] held that federal law forbade California from treating the waived portion as community property divisible at divorce.” Id, at 1403.

The fact that Chris’ pay is 100% disability pay by virtue of his being retired based on 100% disability and that he never waived disposable retired pay in favor of disability is of no consequence. Either way, his pay is 100% exempt based on preemption.

- b. The trial court’s decision to vacate the property portion of the Decree is indemnification.

Rebecca’s only motivation for bringing the underlying Motion to Vacate is to get alternative compensation. By vacating the agreed property division, the court put Rebecca into a position to achieve her goal. Unless this court reverses the trial court decision, Rebecca is entitled to a trial that is specifically focused on a new property division order. There is no path that the trial court has set before Rebecca and Chris that doesn’t lead to an attempt to compensate Rebecca for the lost portion of Chris’ military pension. “Compensation for loss or harm” is exactly the definition of “indemnification.”

- c. Federal law preempts the state court from indemnifying Rebecca.

The Respondent points out, “The Decree of Dissolution here, unlike in Howell, contains an indemnification clause, requiring Chris to pay Rebecca the martial share of his military pension if DFAS did not pay

her directly. Brief of Respondent, p. 22. The section of the Decree that the Respondent is referring to says, "If DFAS cannot pay the wife directly, the husband shall pay this amount directly to the wife each month, ..." CP, p. 13. In spite of this clause, the clear application of the law is, "A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits." *Howell*, at 1401. A few pages later, the *Howell* court also reminds us that the Mansells had bargained for and included an indemnification clause in their Decree. The Mansell indemnification clause, which seems to have been more intentional than the one relied on in this case, was the law of their case for some time before Major Mansell brought a Motion to modify the decree and eliminate his obligation to comply with the bargained for indemnification clause. The passage reads,

Major Gerald E. Mansell and his wife had divorced in California. At the time of the divorce, they entered into a "property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." The divorce decree incorporated this settlement and permitted the division. Major Mansell later moved to modify the decree so that it would omit the portion of the

retirement pay that he had waived. The California courts refused to do so. But this Court reversed. It [this Court] held that federal law forbade California from treating the waived portion as community property divisible at divorce.”

Howell, at p. 1403. The fact that there is any indemnification language in the parties’ Decree is unenforceable pursuant to *Mansell*. Such a clause cannot be used by the trial court to force Chris to pay Rebecca.

- d. The line of US Supreme Court Cases from *Mansell* to *Howell* help us to understand how improper it is for state courts to try and fashion work arounds to indemnify the non-member spouse who is precluded from partaking in the member’s disability pay.

Washington’s superior courts may anticipate potential retirement pay waiver in fashioning an original property (and debt) division. *In re the Marriage of Kraft*, 119 Wn.2d 438, 446, 832 P.2d 871 (1992) (The cited state court decisions interpreting *Mansell* establish the general proposition that when making property distributions or awarding alimony the trial court may consider military disability retirement pay as future income of the retiree spouse relevant to a determination of the parties’ ultimate economic circumstances.). All state courts are allowed to take disability pay and the possibility of future disability pay into consideration when fashioning fair and equitable economic results. 10 USC §1408; and, *Howell v. Howell*. In fact, the section of the *Howell* case that both sides included in their briefing materials says,

“We recognize, as we recognized in Mansell, the hardship that congressional preemption can sometimes work on divorcing spouses. See 490 U.S. at 594, 109 S.Ct. 2023, 104 L.Ed.2d 675. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support. See, Rose v. Rose, 481 U.S. 619, 630-634, and n. 6, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987); 10 U.S.C. § 1408(e)(6).” Howell, at 1401 [maybe 1402].

This reasoning may be interpreted to limit state courts to taking actual and potential disability pay (potentially waived disposable retired pay) into consideration at trial...the initial trial only.

Many of the cases cited by the Respondent support the idea that trial courts may consider disability pay when determining the initial property division but NONE OF THEM support considering disability in a property division modification action. The cases cited by the Respondent that I am referring to are: *Jones v. Jones*, 7 Haw.App. 496 (Neither Hawaii rule ... nor federal law precludes the family court, when dividing property and debts ... from considering ... a party's **time of divorce** right to receive veteran's and military disability pay); *Clausen v. Clausen*, 831

P.2d 1257 (federal law does not preclude our courts from considering, **when equitably allocating property upon divorce ...**); and, *Strong v. Strong*, 300 Mont. 331 (**A court “may” consider VA disability benefits in the same way it considers each party’s ability to earn income post-dissolution ...**). All three of these cases support the trial court considering VA disability pay in determining a fair and equitable property division at the same trial that ends the marriage. None of these cases support the idea of re-opening a case and reallocating property following a disability retirement or VA determination and waiver by the retiree.

- e. This court granting Chris’ appeal is the correct interpretation of the USFSPA, *Howell*, and *Mansell*.

The trial court’s vacation of the property section of Chris and Rebecca’s Decree is the same first step that happened in the *Howell* case. If this court allows this case to proceed to trial, this case will be similar to the *Howell* case in that respect as well. Before this court decides against the appeal and allows this case to proceed to the second stage, I would urge this court to consider the following section of the *Howell* case.

“We need not and do not decide these matters, for here the state courts made clear that the original divorce decree divided the whole of John's military retirement pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. Consequently, the determination of the Supreme Court of Arizona must be reversed. See Mansell, supra, at 594, 109 S.Ct. 2023, 104 L.Ed.2d 675.”

Howell, at 1406. Clearly, 100% of Chris' military pension was divided in the Decree. Clearly, 100% of the pension Chris receives is non-divisible, disability pay. And, the only reason the trial court vacated the property division in the *Howell* case and the only reason that the trial court granted Rebecca's Motion to Vacate in this case is the same. The Respondent's attempt to argue that the trial court vacated the property section of the Decree for any reason other than disallowed indemnification is incorrect.

B. OTHER.

- a. The inclusion of any form of spousal support in the Brief of Respondent is inappropriate.

The issue of spousal support is not properly before this court.

Rebecca brought a Motion to have her spousal support changed and that Motion was denied by Commissioner Thomas and no Motion to Revise or Appeal was sought by Rebecca. However, the Brief of Respondent contains, references to "compensatory spousal maintenance" (Brief of Respondent, p. 16) and "maintenance" (Brief of Respondent, p. 17).

- b. Attorney's fees should not be awarded to the Respondent.

The Respondent's request for attorney's fees based on need and ability to pay should be denied. The record lacks the information required by RCW 26.09.140 and RAP 18.1.

As for the argument that this court should consider requiring Chris to pay some of Rebecca's fees because Chris' appeal is frivolous, it seems to me that the only argument that is frivolous is that Chris' appeal is frivolous. This case and how it is progressing through our court system is

the exact opposite of frivolous. The trial court had no experience in applying CR 60(b)(6) to a case with the unique facts that make up Chris and Rebecca's case. The trial court had no experience in applying the *Howell* case to such facts either. I'm pretty sure that had the trial court denied Rebecca's Motion to Vacate and she appealed that decision that this court would not consider her appeal frivolous.

II. CONCLUSION

With all due respect to my esteemed colleague, the arguments raised in the Response Brief must fail and the appeal should be granted. The vacation of the property portion of the parties' overall settlement is the first step toward nothing other than an attempt to indemnify Rebecca for the income lost by the fact that there is no disposable retired pay to divide. The USFSPA and ALL of the applicable cases dating back to *Mansell* have determined that it is inappropriate for the state courts to attempt such indemnification.

The *Howell* case is not "new law," but it is helpful to have it as a reference now and in the future. The *Howell* case supports this appeal in two important ways: (a) it reinforces the state court's authority to take disability pay and potential disability pay into consideration when addressing RCW 26.09.080 at the original trial and (b) it reinforces the state court's authority to take disability pay into consideration when addressing support issues during the original trial or at a subsequent modification action. Neither of these applications apply to this case

because this is an attempt at modifying a final property settlement to indemnify Rebecca.

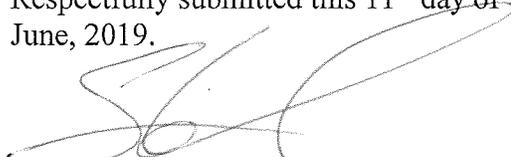
CR 60(b)(6) cannot and should not be used to reform the parties' property division.

Spousal support is not an issue before this court.

Finally, there is no basis for this court to award attorney's fees to either party.

Therefore, Chris respectfully requests that the Order to Vacate be reversed and the parties' 2016 agreement reinstated.

Respectfully submitted this 11th day of
June, 2019.



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Declaration of Transmittal

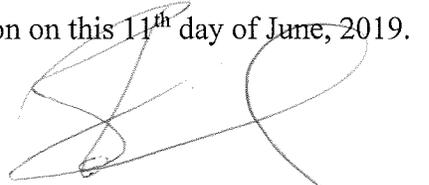
Under penalty of perjury under the laws of the State of Washington, I affirm the following to be true:

I transmitted Appellant's Opening Brief by electronic filing to:

Washington State Court of Appeals
Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

on January 8, 2019, and by either hand delivery to or electronic service (pre-arranged and agreed to Respondent's attorney of record, Sophia Palmer, WSB #37799).

Signed at Tumwater, Washington on this 11th day of June, 2019.



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