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STATE OF WASHINGTON  
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DEPUTY

NO. 53366-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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HEIDI KAUFMAN,

Petitioner,

v.

GEOFFREY KAUFMAN,

Respondent.

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APPELLANTS' REPLY BRIEF

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Appeal from the Superior Court of Kitsap County,  
Cause No. 08-3-00305-7  
The Honorable John Hickman, Visiting Judge

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## INTRODUCTION

The United States Constitution, Article VI clause 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Under this “supremacy clause,” state law is preempted when it would hinder accomplishments of the full purposes and objectives of federal regulations.<sup>1</sup>

The Relevant Notes of Decisions following Article VI clause 2 include the following entry:

The Uniformed Services Former Spouses' Protection Act (USFSPA) preempted States from treating as divisible community property the military retirement pay that a veteran has waived in order to receive nontaxable service-related disability benefits, **and thus, States were prohibited from increasing, pro rata, the amount a divorced spouse received each month from the veteran's retirement pay in order to reimburse or indemnify the divorced spouse to restore that portion of retirement pay lost due to a postdivorce waiver;** abrogating *Glover v. Ranney*, 314 P.3d 535, *Krapf v. Krapf*, 439 Mass. 97, 786 N.E.2d 318, *Johnson v. Johnson*, 37 S.W.3d 892, *Abernethy v. Fishkin*, 699 So.2d 235. *Howell v. Howell*, U.S.Ariz.2017, 137 S.Ct. 1400, 197 L.Ed.2d 781. (Emphasis added.)

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<sup>1</sup> *Alverado v. Washington Public Power Supply System* (WPPSS), 111 Wn.2d 424, 431, 759 P.2d 427 (1988) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941)).

In this case, the trial court enforced a maintenance provision that does exactly what federal law prohibits. Ms. Kaufman nevertheless argues that the trial court's decision to enforce the Decree should be affirmed because: (1) "the Decree did not violate federal law, and certainly is not void"; (2) "even if the Decree had been entered in error, the Decree was not void, and is thus res judicata"; and (3) "even if the Decree were initially void for lack of subject matter jurisdiction, Mr. Kaufman is now precluded from challenging that jurisdiction under *Marriage of Brown*<sup>2</sup> and the Restatement (Second) of Judgments."<sup>3</sup> Mr. Kaufman submits this Reply for the Court's consideration.

#### REPLY

**A. The Decree violated federal law preempting state courts from dividing military disability pay, rendering the maintenance provision void ab initio.**

Contrary to Ms. Kaufman's assertion, the law governing the issue of division of Mr. Kaufman's military disability pay is **not** "complicated." As construed in *McCarty v. McCarty*,<sup>4</sup> earlier federal law had "completely pre-empted the application of state community property law to military retirement pay."<sup>5</sup> This was the result of the *McCarty* Court's conclusion that "division of military retirement pay by the States threatened to harm

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<sup>2</sup> 98 Wn.2d 46, 653 P.2d 602 (1982).

<sup>3</sup> Brief of Respondent Heidi Kaufman ("Response Brief"), page 9 (emphasis added).

<sup>4</sup> 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

<sup>5</sup> *Howell v. Howell*, 137 S.Ct.1400,137 S.Ct., 197 L.Ed.2d 781 (2017).

clear and substantial federal interests. Hence federal law preempted the state law.”<sup>6</sup>

Subsequently, Congress passed the Uniformed Services Former Spouses’ Protection Act,<sup>7</sup> “in which Congress wrote that a State may treat veterans’ ‘disposable retired pay’ as divisible property, i.e., community property divisible upon divorce.”<sup>8</sup> “But the new Act expressly excluded from its definition of ‘disposable retired pay’ amounts deducted from that pay ‘as a result of a waiver . . . required by law in order to receive disability benefits.’”<sup>9</sup>

In *Mansell v. Mansell*,<sup>10</sup> the Supreme Court interpreted the USFSPA, in which Justice Thurgood Marshall wrote that the Act provided

a “precise and limited” grant of the power to divide federal military retirement pay. [Citation omitted.] It did **not** “gran[t]” the States “the authority to treat **total** retired pay as community property.” [Citation omitted.] Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, **in respect to the waived portion of retirement pay, *McCarty*, with its rule of federal pre-emption, still applies.**<sup>11</sup>

Even before *Howell* was decided in 2018, the correct application of

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<sup>6</sup> *Howell*, 137 S.Ct. at 1403 (quoting *McCarty*, 453 U.S. at 235, 101 S.Ct. 2728.)

<sup>7</sup> 10 U.S.C. § 1408.

<sup>8</sup> *Howell*, 137 S.Ct. at 1403 (citing 10 U.S.C. 1408(c)(1)).

<sup>9</sup> *Id.* (quoting § 1408(a)(4)(B) (amended and now appearing at § 1408(a)(4)(A)(ii)).

<sup>10</sup> 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

<sup>11</sup> *Howell*, 137 S. Ct. at 1404 (emphasis added).

*Mansell* yielded the following results:

The effect of the USFSPA was addressed by the U.S. Supreme Court in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). In that case, the Court confronted the question whether disability benefits were among those that Congress had intended to make distributable under the USFSPA. *See id.*

The Court noted:

Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.

*Mansell v. Mansell*, 490 U.S. at 588, 109 S.Ct. 2023. The Court concluded that the USFSPA had a preemptive effect of its own and held that “the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits.” 490 U.S. at 594–95, 109 S.Ct. 2023.

**Based on the preemptive effect of the USFSPA, we conclude that federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits. Therefore, in the instant case, that portion of the decree purporting to divide Howard's VA disability income is void for want of jurisdiction.<sup>12</sup>**

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<sup>12</sup> *Ryan v. Ryan*, 257 Neb. 682, 690–91, 600 N.W.2d 739, 745 (1999) (emphasis added). See also *Matter of Marriage of Babin*, 56 Kan. App.3d 709, 713, 437 P.3d 985 (2019) (“The matter of division of military pay is an issue of federal preemption and jurisdiction . . . military disability compensation is not among the military benefits that maybe be divided as marital property, and the district court lacked jurisdiction to enforce such a

1. State courts have no authority to divide or distribute retirement pay through any type of order, whether characterized as “property” or “maintenance.”

The Kaufman settlement agreement treated Mr. Kaufman’s retirement payments as “property.” Disability payments are also “property.” After awarding Ms. Kaufman “one-half interest in [Mr. Kaufman’s] U.S. Navy retirement” under “Property Division,” the Agreement states under “Spousal Maintenance” that Mr. Kaufman “shall pay the wife spousal maintenance in a sum representing 50% of the husband’s US Navy VA waiver/disability,” and

[i]n the event the “waiver/disability portion increases (either as a result of COLAs or as a result of an increase in the VA waiver portion to the detriment of the retainer[sic] pay), the wife shall be entitled to her proportionate increase (50% of the adjusted VA waiver/disability) in spousal maintenance. . . .<sup>13</sup>

In other words, the effect of the Kaufman Settlement Agreement and Decree was to divide Mr. Kaufman’s “waiver/disability pay” in half and require Mr. Kaufman to pay 50% of his disability pay to Ms. Kaufman as “spousal maintenance.”

The *Howell* Court wrote that state courts cannot “avoid *Mansell* by

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division of property.”); *Mattson v. Mattson*, 903 N.W. 233, 241 review denied (2017) (“Because federal law precludes state courts from dividing military disability compensation as marital property, we conclude that the portion of the judgment dividing Mattson’s disability compensation is unenforceable.”).

<sup>13</sup> CP 319-320.

characterizing as an order requiring [the military spouse] to ‘reimburse’ or to ‘indemnify’ [the non-military spouse], rather than an order that divides property,” adding:

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.**<sup>14</sup>

Here, the parties’ Decree effectively provides for “reimbursement” or “indemnification” of Ms. Kaufman “to restore that portion of retirement pay lost due to the postdivorce waiver” and “the amount of indemnification mirrors the waived retirement pay.” This provision of the Decree does exactly “that which federal law pre-empts.”<sup>15</sup>

2. A division of disability pay cannot be “purified” by characterizing it as maintenance.

At page 13 of Ms. Kaufman’s Brief, she asserts that “the Decree at issue here properly followed both federal and state law,” because (1) neither the degree nor the settlement agreement “anywhere states that it is treating Mr. Kaufman’s disability payments as community property”; (2)

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<sup>14</sup> *Howell*, 137 S.Ct. at 1406.

<sup>15</sup> *Howell*, 137 S.Ct. at 1405.

the disability payments are “not mentioned at all in subsection ‘II. Division of Property’ of the Settlement Agreement,” but are “mentioned in the subsection of the Decree and the Settlement Agreement awarding Ms. Kaufman maintenance . . . only to indicate the measure of the proper maintenance.”

This argument is meritless: disability pay is “property,” and regardless of which particular “section” of the Settlement Agreement divided Mr. Kaufman’s disability payments, the Settlement Agreement treated them as if they were community property, dividing them in half between the parties. The *Perkins* court wrote:

the key question here is whether the trial court divided Jeffrey's veteran's disability pension and distributed part of it to Deanna; or, alternatively, whether the trial court merely considered the undivided disability pension as one factor tending to show Jeffrey's postdissolution ability to pay maintenance. . . .

Deanna argues that the trial court purified this otherwise improper division and distribution by calling it “maintenance.” ***Mansell* flatly prohibits a state dissolution court from dividing, and then distributing any part of, a veteran's disability pension. It makes no difference whether the division and distribution are implemented by awarding part of the future income stream that is the pension itself; by finding present value and making an offsetting award of other assets; or by awarding “maintenance.”** We hold that *Mansell* cannot be circumvented simply by chanting “maintenance.”<sup>16</sup>

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<sup>16</sup> *Perkins v. Perkins*, 107 Wn. App. 313, at 323-324, 26 P.3d 989 (2001) (emphasis added).

A trial court is authorized, “when it **first** determines the value of a family’s assets . . . to **take account of the contingency that some military retirement pay might be waived**, or . . . **take account of reductions in value** when it calculates or recalculates the need for spousal support.”<sup>17</sup>

In this case, however, the dissolution court made no calculation of Ms. Kaufman’s “need for spousal support” or of Mr. Kaufman’s ability to pay spousal support, but merely stated in its Findings of Fact/Conclusions of Law that “[m]aintenance should [be] paid by the husband to the wife representing one-half of the husband’s current and continuing, as adjusted, United States VA waiver benefit.”<sup>18</sup> The “maintenance” provision of the Agreement is set out in the Decree.<sup>19</sup> Ms. Kaufman subsequently testified by Declaration it was her “understanding that I would receive the sum of 50% of the disability as spousal support for the rest of my life.”<sup>20</sup>

Contrary to Ms. Kaufman’s argument, the parties’ Settlement Agreement and the Decree do far more than merely “indicate the measure of the proper maintenance amount,”<sup>21</sup> for the dissolution court never made that calculation. The Kaufman Decree divides the military disability

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<sup>17</sup> *Howell*, 137 S. Ct. at 1406.

<sup>18</sup> CP 3.

<sup>19</sup> *Cf.* CP 319-320 with CP 7-8.

<sup>20</sup> CP 88.

<sup>21</sup> Response Brief, pages 13-14.

compensation.

The trial court's findings on Ms. Kaufman's Motion to Enforce Property Settlement Agreement & Decree of Dissolution (entered by the Court on October 25, 2019, two months after Mr. Kaufman filed his Opening Brief), include this sentence:

The wife was not awarded an interest in the VA Waiver/Disability by way of any court or military qualified domestic relations order, **nor was the husband required to pay the spousal maintenance from the VA Waiver/Disability assignment.**<sup>22</sup>

A qualified domestic relations order to divide military disability pay would not be accepted or honored by the military, since such an order would be in violation of federal law. The finding that the husband was not required to "pay the spousal maintenance from the VA Waiver/Disability assignment" or characterizing the distribution to Ms. Kaufman as "maintenance" do not "purify" the maintenance provision in the Settlement Agreement and Decree, as *Perkins* makes clear.

Regardless of how it was characterized, the effect of the "maintenance" provision of the Decree was to divide and distribute Mr. Kaufman's disability payments, which did, in fact, violate federal law and, as discussed below, was void ab initio.

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<sup>22</sup> CP 372.

**B. Based on federal preemption, the trial court lacked subject matter jurisdiction to divide Mr. Kaufman's disability payments in the Decree, and the maintenance provision of the Decree was void ab initio.**

1. Under *Mansell*, the trial court lacked subject matter jurisdiction to divide Mr. Kaufman's disability pay.

“Preemption is an issue concerning the subject matter jurisdiction of the state court that may be considered for the first time on appeal.”<sup>23</sup>

As *Mansell* and *Howell* make clear, Federal law “completely preempts” states from dividing military disability pay.<sup>24</sup> The USFSPA

provides an exception to federal preemption of rights to federal military retirement pay only for “disposable retired pay” **which is defined to exclude . . . any amount received on account of disability.** And see *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed. 2d 589 (1981) (federal law preempts the application of state community property law to military retirement pay).<sup>25</sup>

Because of federal preemption, the trial court lacked subject matter jurisdiction to divide Mr. Kaufman's disability payments,<sup>26</sup> even if characterized as “maintenance.”

It makes no difference whether the division and distribution are implemented by awarding part of the future income stream that is the pension itself; by finding present value and making an offsetting award of other assets; **or by**

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<sup>23</sup> *Fowlkes v. International Bhd. of Elec. Workers Local No. 76*, 58 Wash.App. 759, 764, 795 P.2d 137, 808 P.2d 1166 (1990), review denied, 117 Wash.2d 1019 (1991). See also *McRay v. Marriott Hotel Services, Inc.*, 902 F.3d 1005, 1009 (2018) (“Preemption is a matter of subject matter jurisdiction[.]”).

<sup>24</sup> *Howell*, 137 S. Ct. at 1404 (emphasis added).

<sup>25</sup> *Matter of Marriage of Gravelle*, 194 Wn. App. 1051 (2016) at \*3. This unpublished case may be cited and considered by the Court pursuant to GR 14.1.

<sup>26</sup> *Ryan*, 257 Neb. at 690–91, 600 N.W.2d at 745.

**awarding “maintenance.”** We hold that *Mansell* cannot be circumvented simply by chanting “maintenance.”<sup>27</sup>

At the time the parties executed their Settlement Agreement and at the time the Decree was entered, division of Mr. Kaufman’s disability pay was prohibited by federal law, which “completely preempted” state courts from doing so. “Where a court lacks subject matter jurisdiction to issue an order, **the order is void.**”<sup>28</sup> “[O]ne portion of an order or judgment can be considered void, if a court acted without jurisdiction as to a portion of that order or judgment.”<sup>29</sup>

The provision of the Decree that purported to divide Mr. Kaufman’s disability pay as “maintenance” was void ab initio because, under federal law, the court below had no subject matter jurisdiction to enter an order dividing Mr. Kaufman’s disability pay for **any** reason.

2. The *Mansell II* case is distinguishable.

At pages 31-35 of her Response Brief, Ms. Kaufman presents an argument based on footnote 5 of *Mansell* that the “subsequent history” of *Mansell* “indicate[s] that the USFSPA was not intended to strip state courts of jurisdiction.” But *Mansell* did **not** “strip state courts of jurisdiction” to divide military **disability** compensation because state

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<sup>27</sup> *Perkins v. Perkins*, 107 Wn. App. 313, 318, 26 P.3d 989 (2001) (emphasis added).

<sup>28</sup> *Buecking v. Buecking*, 179 Wn.2d 438, 446, 316 P.3d 999, 1003 (2013).

<sup>29</sup> *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 451, 874 P.2d 182, 186 (1994) (citing *In re Marriage of Leslie*, 112 Wash.2d 612, 618–21, 772 P.2d 1013 (1989)).

courts **never had such jurisdiction.**<sup>30</sup>

In *Mansell*, the parties had signed a property settlement agreement and entered a final decree in 1979 that divided Mr. Mansell's "gross" military retirement pay (both retirement and disability pay) in half, including any future increase in the gross military pay allotment.

In 1981, *McCarty* was handed down.

In 1983, Mr. Mansell filed a motion to modify the decree based on *McCarty* and the USFSPA, which was denied by a California superior court, then affirmed by a California Court of Appeals, and then denied review by the California Supreme Court.

Mr. Mansell then sought review by the United States Supreme Court, and in 1989, *Mansell I* was handed down, in which the California court was reversed. The U.S. Supreme Court remanded the *Mansell* case "for further proceedings not inconsistent with" its *Mansell* decision.

Footnote 5 of *Mansell I* states:

In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented **this pre-McCarty** property settlement from being reopened. . . .The California Court of Appeal, **however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question...** Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a

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<sup>30</sup> See *McCarty*, 453 U.S. at 224, 228, 232; *Mansell*, 490 U.S. at 583-595, 109 S.Ct. at 2028-2032; and *Howell*, 137 S.Ct. at 1403-1404.

matter of state law over which we have no jurisdiction.<sup>31</sup>

At page 32 of Ms. Kaufman's Response Brief, she writes that the California court affirmed the original trial court decision "on the grounds that the initial decree was res judicata." This is a misstatement of the grounds for the *Mansell II* decision:

Although the *Mansell I* opinion did not employ the term "res judicata," the question before this court at the time, and the question before it now, **was whether the superior court had erred in denying Husband's motion for modification of a final judgment.** It was **that question** which we answered in the negative, relying on *Casas v. Thompson* to find **that regardless of when the judgment was entered, the court had the power and jurisdiction to divide the community property. The essence of our holding in *Mansell I* was that there was an insufficient showing to disturb a final judgment.**<sup>32</sup>

In *Mansell II*, the California Court of Appeals concluded "that subject matter jurisdiction was vested in the superior court **when the final decree was entered,**"<sup>33</sup> which was in **1979**, pre-*McCarty* and pre-*Mansell*. "In 1979, at the time the parties stipulated to a division of Husband's retirement and disability benefits, the law in California clearly held such payments to be divisible community property."<sup>34</sup> "California courts have

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<sup>31</sup> *Mansell*, 109 S.Ct. at p. 2027, fn. 5.

<sup>32</sup> *Mansell II*, 265 Cal. Rptr. at 236. This citation is to the unpublished portion of *Mansell II*. It is not cited here as precedent or persuasive authority, but for the sole purpose of demonstrating Ms. Kaufman's misstatement of fact regarding the *Mansell II* decision.

<sup>33</sup> *Mansell II*, 265 Cal. Rptr 227, 229 (1990).

<sup>34</sup> *Id.* at 232.

consistently refused to apply *McCarty* retroactively,<sup>35</sup> and “have overwhelmingly found *McCarty* to have no effect on judgments final prior to its 1981 filing date.”<sup>36</sup>

The California Court of Appeals also wrote that the parties’ belief at the time the decree was entered “was that military disability pay was divisible community property. The belief was, at that time, correct.”<sup>37</sup> Addressing Mr. Mansell’s argument that the parties had made a mutual mistake of law when they stipulated to dividing the “gross” military pay, the *Mansell II* court wrote:

The mere fact that in 1982 or today a court might be required to reach a different result due to intervening interpretations of the law does not mean that, in 1979, Husband and Wife were operating under a mistaken impression of the law as it was applied at that time.<sup>38</sup>

In *Mansell II*, the California Court of Appeals once again affirmed the trial court’s denial of Mr. Mansell’s motion to vacate and modify the decree. Contrary

In contrast to *Mansell*, at the time the Kaufman Property Settlement Agreement and Decree were entered, both federal and state law precluded the Washington state court from dividing Mr. Kaufman’s disability pay. *Mansell II* is irrelevant here.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 234 (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

**C. The maintenance provision in the Decree is void because the Superior Court lacked inherent power to make or enter that order.**

“Where a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order, its judgment is void.”<sup>39</sup> The U.S. Supreme Court, the Washington Court of Appeals, and the Washington Supreme Court have all ruled that federal law preempts a state court from dividing military disability pay in a divorce case. State courts thus have no “inherent power” to do so. The provision of the Decree that purported to divide Mr. Kaufman’s disability pay as “maintenance” is void, both because the trial court had no subject matter jurisdiction to enter such an order and because the trial court lacked the “inherent power” to enter an order dividing Mr. Kaufman’s disability pay for any reason.

At page 23 of Ms. Kaufman’s Response Brief, she argues that the definition of a void judgment as set out in *State ex rel. Turner v. Briggs*,<sup>40</sup> which quoted *Dike v. Dike*,<sup>41</sup> “has been expressly rejected by this state’s Supreme Court in *Marley v. Dept. of Labor & Indus. of State*[.]” Ms.

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<sup>39</sup> *Chai v. Kong*, 122 Wn. App. 247, 254, 93 P.3d 936, 939 (2004) (emphasis added). See also *State v. Coe*, 101 Wn.2d 364, 370, 679 P.2d 353, 357 (1984); *Matter of Dependency of S.E.R.*, 2019 WL 4619889 at \*2 (quoting *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) (“A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved.”))

<sup>40</sup> 94 Wn. App. 299, 971 P.2d 581 (1999).

<sup>41</sup> 75 Wn.2d 1, 448 P.2d 490 (1968).

Kaufman is wrong. *Turner v. Briggs* has **no** negative history, and *Dike v. Dike* was cited by the Supreme Court for the same definition of a void judgment seven years later in *Bresolin v. Morris*<sup>42</sup> and again in *State v. Coe*,<sup>43</sup> seven years after that. *Turner v. Briggs* was most recently cited for the same definition of void judgment in *Lyth v. Hatch*, a 2019 Court of Appeals case.<sup>44</sup>

The *Marley* court itself wrote:

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.<sup>45</sup>

Federal and Washington state courts established before the Kaufman Decree was entered that state courts do not have authority to divide military disability pay, even in the guise of “maintenance.”

**D. Res judicata does not apply to a void order.**

“A threshold requirement of res judicata is a valid judgment. If the judgment is void . . . , res judicata does not apply.”<sup>46</sup> “There are in general three jurisdictional elements in every valid judgment, namely jurisdiction

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<sup>42</sup> 86 Wn.2d 241, 245, 543 P.2d 325, 328 (1975), supplemented, 88 Wn.2d 167, 558 P.2d 1350 (1977).

<sup>43</sup> 101 Wn.2d 364, 370, 679 P.2d 353, 357 (1984)

<sup>44</sup> 2019 WL 181903 at \*4. This unpublished case is citeable and may be considered by this Court as persuasive authority.

<sup>45</sup> *Marley*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).

<sup>46</sup> *Franulovich v. Spahi*, 77697-5-1, 2019 WL 1245658, at \*5 (citing *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009)). This unpublished case is citeable and may be considered by the court under GR 14.1.

of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.”<sup>47</sup> “[A] judgment is not res judicata where the court rendering it acted beyond its authority or without jurisdiction . . . of the subject matter.”<sup>48</sup> In this case, the trial court had no subject matter jurisdiction and no inherent authority to divide Mr. Kaufman’s military disability pay.

The doctrine of res judicata is predicated upon a valid judgment. A judgment which is null and void may not be used as a basis for the application of the doctrine of res judicata. Thus, a judgment rendered by a court lacking jurisdiction cannot be a basis for the application of the doctrine of res judicata.<sup>49</sup>

In this case, the maintenance provision in the Decree was void ab initio based on federal preemption and the resulting lack of subject matter jurisdiction or inherent authority in the Kitsap County Superior Court to divide Mr. Kaufman’s military disability.

**E. *In Matter of Marriage of Brown*<sup>50</sup> does not apply in this case.**

At page 27 of Ms. Kaufman’s Brief, she asserts that the *Brown* case is the “most relevant” of Washington authorities that support the conclusion that the trial court here had subject matter jurisdiction to issue

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<sup>47</sup> *Little v. Little*, 96 Wn.2d 183, 197, 634 P.2d 498, 506 (1981).

<sup>48</sup> 50 C.J.S. Judgments § 950, “Void Judgments.”

<sup>49</sup> 46 Am. Jur. 2d Judgments § 487 “Effect of validity of judgment on res judicata” (footnotes citing cases omitted).

<sup>50</sup> 98 Wn.2d 46, 563 P.2d 602 (1982).

the maintenance provision in the Decree.” To the contrary, *Brown* is not relevant at all.

In *Brown* (a consolidated case), the parties’ decrees were entered **before** *McCarty* was handed down, in which the U.S. Supreme Court “held federal law preempted and thus state courts were precluded from dividing military retired pay in property settlements under their own community property laws.”<sup>51</sup> The parties in both cases had property settlement agreements that “included a division of military retired pay” and were unappealed.<sup>52</sup> **After** *McCarty* was published, both husbands sought modification of their property settlement agreement, and in both instances, the trial court denied modification.<sup>53</sup> The Supreme Court affirmed.<sup>54</sup>

The bases for the *Brown* decision were (1) there was “nothing in *McCarty* to suggest **pre-McCarty** courts had been divested of jurisdiction over military retired pay,” and (2) “while a state court is preempted from dividing military retired pay, there is nothing in *McCarty* which prevent state courts from considering it as a factor within the totality of circumstances surrounding dissolution.”<sup>55</sup>

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<sup>51</sup> *Brown*, 98 Wn.2d at 48, 563 P.32d 602.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 49 (emphasis added).

First, unlike the decrees in *Brown*, the Kaufman decree was entered **after** *Mansell*,<sup>56</sup> *Kraft*,<sup>57</sup> and *Perkins*<sup>58</sup> cases had long established that federal law preempted state courts from dividing military disability payments.

Second, in this case, the trial court went far beyond merely considering Mr. Kaufman's disability pay as a "factor within the totality of circumstances surrounding dissolution," which is still permitted under *Howell* "when [a trial court] **first** determines the value of a family's assets" or when a trial court "**recalculates the need** for spousal support."<sup>59</sup> In fact, the Kaufman Decree, required division, dollar per dollar, of Mr. Kaufman's disability pay, which is exactly what federal law prohibits.

Third, Ms. Kaufman quotes language from *Brown* that the pre-*McCarty* division of military retirement pay "should be regarded as an error of law rather than a lack of subject matter jurisdiction."<sup>60</sup> As stated, the decrees in *Brown* were entered **before** the *McCarty* Court held that

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<sup>56</sup> *Mansell*, 109 S.Ct. at 2032 ("For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits.").

<sup>57</sup> *Kraft*, 119 Wn.2d at 448, 832 P.2d 871 ("The court may not, however, divide or distribute the military disability retirement pay as an asset. It is improper under *Mansell* for the trial court to reduce military disability pay to present value where the purpose of ascertaining present value is to serve as a basis to award the nonretiree spouse a proportionately greater share of the community property as a direct offset of assets.").

<sup>58</sup> *Perkins*, 107 Wn. App. at 317-318 ("Federal law preempts" state courts from distributing disability payments to the extent they are replacing retirement benefits).

<sup>59</sup> *Howell*, 137 S.Ct. at 1406.

<sup>60</sup> Appellant's Brief, page 35.

federal law preempted state courts from dividing military retirement pay under their state community property laws. Here, both federal and state law handed down prior to entry of the Kaufman decree clearly indicated that state courts had been divested of jurisdiction over military disability pay.

The *Brown* court applied Restatement (Second) of Judgments § 12 (1982) to support its conclusion that the parties were “precluded from contesting the subject matter jurisdiction before the court” because modern development of the law “has been to favor finality rather than validity.”<sup>61</sup> Section 12 states, in pertinent part:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation **except if:**

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government[.]<sup>62</sup>

Neither of these exceptions applied to the facts in *Brown*.

However, contrary to Ms. Kaufman's assertion at page 37 of her brief that “none of the exceptions to preclusion apply” in this case, **both** of these

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<sup>61</sup> *Brown*, 98 Wn.2d at 49-50, 563 P.32d 602.

<sup>62</sup> *Brown*, 98 Wn.2d at 50, quoting Restatement (Second) of Judgments § 12 (1982) (emphasis added).

subsections apply. Federal law preempts state courts from dividing military disability pay, leaving state courts without subject matter jurisdiction or inherent authority to do so. Allowing the trial court's decision to enforce the Kaufman decree to stand would "substantially infringe" the authority of the United States Supreme Court and the Congress of the United States.

While Ms. Kaufman is correct that Washington Constitution article IV, § 6 "specifically confers on the superior courts of this state jurisdiction over "all matters . . . of divorce,"<sup>63</sup> United States Constitution Article VI, clause 2 states that "the Laws of the United States . . . shall be the supreme Law of the Land; and **the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**" (Emphasis added).

Under the supremacy clause of the United States Constitution, in spite of Washington Constitution article IV § 6, state courts are preempted from increasing, pro rata, the amount a divorced spouse received each month from the veteran's retirement pay in order to reimburse or indemnify the divorced spouse to restore that portion of retirement pay lost due to a postdivorce waiver.<sup>64</sup> The trial court did exactly that in the Kaufman decree. The "maintenance" provision of the decree was void ab

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<sup>63</sup> Response Brief, page 26.

<sup>64</sup> *Howell*, 137 S.Ct. at 1405-1406.

initio.

**F. The validity of the Settlement Agreement provision to divide Mr. Kaufman's disability pay is relevant in this appeal.**

It is odd that Ms. Kaufman argues at page 43 of her Response Brief that "Mr. Kaufman's contract arguments are irrelevant to the proper disposition of this case on appeal," where at pages 17-18 of the Brief she discusses the parties' Settlement Agreement in an effort to distinguish this case from *Perkins*, which followed *Mansell*.

At pages 17-18 of her Response Brief, Ms. Kaufman quotes *Little v. Little*<sup>65</sup> to set out the general rules that agreements are preferred over litigation to resolve property and maintenance questions, and that a separation contract is binding on the court unless it was unfair at the time of its execution. However, there was no issue of federal preemption in *Little*. Ms. Kaufman also quotes *In re Marriage of Huelscher*<sup>66</sup> for the general rule that "[a]ny later challenge to its fairness at execution is time-barred."<sup>67</sup> Again, there was no issue of federal preemption of a maintenance provision in *Huelscher*.

Although separation contracts that include no provision dividing military disability payments may be binding on Washington courts, a

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<sup>65</sup> 96 Wn.2d 183, 634 P.2d 498 (1981).

<sup>66</sup> 143 Wn. App. 708, 180 P.3d 199 (2008).

<sup>67</sup> Response Brief at page 18 (citing *Hulscher*, 142 Wn. App. at 717, 180 P.3d 199.)

Washington court has no subject matter jurisdiction or inherent authority to “incorporate” a maintenance provision dividing military disability payments into a decree. Neither does a state court have subject matter jurisdiction or inherent authority to enforce such a provision previously “incorporated” into a decree. In this case, Judge Hickman entered an order enforcing a nullity.

Ms. Kaufman notes that Mr. Kaufman did not seek vacation of the decree under CR 60(b)(5) for lack of subject matter jurisdiction and did not appeal the decree within 30 days of its entry. However,

[A] party may challenge a court's subject matter jurisdiction at any time, including for the first time on appeal. RAP 2.5(a)(1); *Matheson v. City of Hoquiam*, 170 Wn. App. 811, 819, 287 P.3d 619 (2012); *Wesley v. Schneckloth*, 55 Wn.2d 90, 94, 346 P.2d 658 (1959). Our Supreme Court explained over fifty years ago that, if a court lacks jurisdiction, **any judgment entered is void ab initio and, in legal effect, no judgment at all.** *Wesley v. Schneckloth*, 55 Wn.2d at 93–94, 346 P.2d 658.<sup>68</sup>

A void order, judgment or decree “is a nullity, . . . and may be attacked collaterally at any time and in any proceeding by the one adversely affected.”<sup>69</sup>

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<sup>68</sup> *State v. Priest*, 200 Wn. App. 1012 (2017) at \*9 (emphasis added).. This unpublished case may be cited and considered by this Court pursuant to GR 14.1.

<sup>69</sup> *State v. McFarland*, 84 Wn.2d 391, 406–07, 526 P.2d 361, 369 (1974).

## CONCLUSION

The “purported syllogism” set out by Ms. Kaufman at pages 20-21 of her Response Brief to summarize Mr. Kaufman’s arguments in this appeal is correct, and is supported by both federal and state law.

First, the Kaufman Decree divides Mr. Kaufman’s military disability compensation, which is “property,” characterizing Ms. Kaufman’s 1/2 of the disability as “maintenance.”

Second, under Washington state law, a decision entered without subject matter jurisdiction or without the inherent power to enter the particular order is void.

Third, under *Mansell* and *Howell*, state courts have neither subject matter jurisdiction nor inherent power to divide military disability payments.

Fourth, the provision in the Kaufman Decree for “maintenance” in the amount of 50% of Mr. Kaufman’s disability compensation was void ab initio, and the Decision enforcing that provision is reversible error.

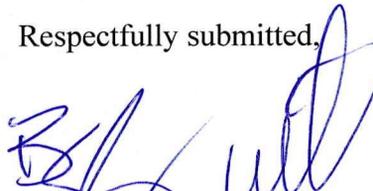
This Court should reverse the Order on Enforcement of Property Settlement Agreement & Decree of Dissolution, including the Money Judgment included therein for “past due spousal support from January

2017 to June 2019” and “lawyer fees and costs.”<sup>70</sup> The Order states that “the Court will award attorney’s fees to the Repondent, **per the terms of the settlement agreement.**”<sup>71</sup> The Settlement Agreement states, “Each party shall **pay their own costs and attorney’s fees.**”<sup>72</sup> Contrary to the language of the Settlement Agreement, the Court Ordered Mr. Kaufman to pay \$10,000 to Ms. Kaufman for costs and fees.

The Court should remand this case for further proceedings to determine whether Ms. Kaufman should receive maintenance and, if so, the amount to be paid based on all relevant factors and entry of proper findings of fact under RCW 26.09.090.

DATED this 27<sup>th</sup> day of November, 2019.

Respectfully submitted,



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C. Bayly Miller, WSBA No. 22281  
Attorney for Appellant

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<sup>70</sup> CP 372

<sup>71</sup> Sealed Financial Source Document, Index #50, CP 320

<sup>72</sup> CP 374.

**CERTIFICATE OF SERVICE**

FILED  
COURT OF APPEALS  
DIVISION II  
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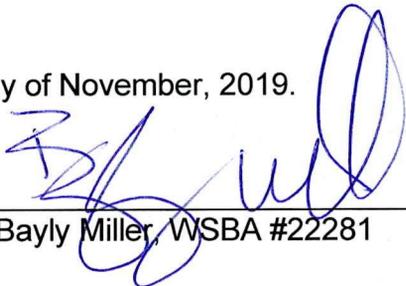
The undersigned declares as follows:

1. I am over the age of 21 and not a party to this action.
2. I am the attorney for the Appellant/Respondent, Geoffrey Kaufman
3. On this day, I certify that I forwarded a true and correct copy of this document to the counsel of record for Petitioner, Heidi Kaufman, in the following manner:

David Corbett Attorney at Law 2106 N Steele Street Tacoma, WA 98406 E-mail: david@davidcorbettlaw.com	X	Via electronic mail
	X	

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington this 27<sup>th</sup> day of November, 2019.




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