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No. 39265-1-III

Case #: 1029357

SUPREME COURT  
OF THE STATE OF WASHINGTON

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JUSTIN TOWNLEY,

Appellant,

v.

KELLIE TOWNLEY,

Petitioner.

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**PETITION FOR REVIEW**

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### 1. IDENTITY OF PETITIONER

Kelly Townley, Respondent on Appeal, asks this Court to accept review of the Court of Appeals, Division III decision filed March 7, 2024.

### 2. COURT OF APPEALS DECISION

Kelly Townley requests review of the portion regarding division of Military Disability Retirement Pay. No motion for reconsideration was filed. For a copy of the decision, *see* App. 1 - 10.

### 3. ISSUES PRESENTED FOR REVIEW

Should Washington Courts employ a separate preemption analysis in ratifying separation agreements than original state court decisions regarding military disability retirement pay?

Does the fundamental right to contract preserve a veteran's ability to contract their disability retirement pay, so long as it reaches them first?

Did Division III misinterpret the law in concluding there was no distinction between individual parties contracting and court action dividing military disability retirement pay?

Do other Washington state laws apply and take priority when it comes to contracting retired disability pay, rather than universally applying federal preemption principles?

Do other state supreme courts hold that federal preemption is inapplicable to the division of military retirement disability benefits by contract?

Does the Washington Supreme Court have a duty to determine the public policy to protect separation contracts that would otherwise be compromised and reverse the appellate court nullifying the mutual mistake instruction?

#### 4. STATEMENT OF THE CASE:

Justin and Kellie Townley married in September 2003. Justin served in the Army and Washington National Guard throughout

their marriage until he became disabled. Justin eventually received medical disability retirement pay in 2018. App 1-2.

In March 2020, the parties entered a “financial agreement” which divided their income, assets, and debts. App 2. They agreed to divide the available cash flow equally. App 2, 25 and 34. The court found this constituted a separation agreement. App 2.

In August 2020, Justin petitioned for dissolution. At trial, Kellie asked that the financial agreement be enforced. Justin argued that federal law precluded the division of his disability pay and social security pay. App 2.

The Superior Court found the separation agreement to be fair at the time of adoption. App. 19, finding 13. After analysis of Division II cases, the court adopted the contract—dividing pay from the military disability funds, but not from the social security funds. App. 18-19. The separation contract contemplated disability pay as cash flow to both parties. App. 2, 25, 34. In the final documents, the court considered disability pay as spousal

support and Justin's personal entitlement, because it went undefined in the separation contract and by the parties. *E.g.* App. 10, 27, 29, & 31, 34.

Justin Appealed.

The Appellate Court reversed the Superior Court's decision on disability pay division, primarily relying on *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). To receive further relief, the wife was instructed to prove mutual mistake over the issue. App. 1-5.

Kelly Townley petitions for review.

## 5. ARGUMENT

The Supreme Court should review this decision for three reasons. One, the Court of Appeals lacks clarity and consistency in this area, leading to conflict. *See* RAP 13.4(b)(2). Two, a significant question of law exists under Washington law, Federal law, and the U.S. Constitution. *Id.* (3). And three, the public interest is jeopardized by this decision. *Id.* (4). We begin with the standard of review.



### **5.1) Standard of Review**

Questions on appeal involve the applicability of federal pre-emption to a contract and disability pay, which is de novo review. The burden of proof rests on “the party claiming preemption.” In re Tupper, 15 Wn. App. 1132, 796, 805, 478 P.3d 1132 (2020) (citing Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d 243, 265, 884 P.2d 592 (1994) and Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)). In family law cases there is a general presumption *against* preemption unless Congress has made known a clear and manifest purpose to preempt. *Tupper*, 15 Wn.App.2d at 805.

### **5.2) There is a conflict among Court of Appeals decisions needing clarification.**

Division II prioritizes non-community property laws over federal preemption within family law. The Court of Appeals Div. III treats preemption regarding judicial enforcement *the same* as

preemption over contracts in family law. The Supreme Court should clarify this conflation.

a) No Court of Appeals case addresses separation contracts specifically.

In its decision, the Appellate Court cited *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992) discussing the ramifications of *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). *Kraft*, now 42 years old, is the only prior WA Supreme Court case addressing state court limits in dividing disability pay as property, while honoring the court's duties under RCW 26.09.080 (making an equitable distribution given the parties' post-dissolution economic circumstances). See *In re Marriage of Kraft*, 119 Wn.2d 438.

But, here, the parties entered a separation agreement. Therefore, the trial court did not utilize RCW 26.09.080 and did not apply *Kraft*. Instead, the trial judge used RCW 26.09.070 (making an equitable distribution given the parties' post-dissolution economic circumstances) to consider the separation

contract. App. 18, Finding 2. *Kraft* does not address how a contract changes the equation.

The most recent appellate court case referenced by the trial judge, *In re Kaufman*, 17 Wn. App. 991, 497, 485 P.3d 991 (2021), was an action to enforce a prior decree stemming from a property settlement agreement dividing the husband's retirement pay, and ordering half his disability pay as permanent, non-modifiable spousal support. *Id.* at 502-03; App. 18, Finding 1. The trial court found the separation agreement to be a binding contract neither void nor voidable. *Id.* at 506. The Court of Appeals affirmed, referencing res judicata. *Id.* at 508.

The Division II case of *Weiser* brought principles highlighted in *Mansell II* to Washington. See *In re Weiser*, 14 Wn. App. 237, 884, 475 P.3d 237 (2020). The *Mansell II* case emphasized the U.S. Supreme Court's refusal to preempt all state laws and invalidate all orders that divide disability pay. In *Weiser*, the Supreme Court only pre-empted community property laws, not all state laws such as res judicata. 14 Wn.App.2d at 897-98.

Although the exception for contracts was squarely before the Division II court in *Weiser*, the appellate court chose to uphold the trial court's decision under res judicata and did not address the contract issue. *Weiser*, 14 Wn.App.2d at 911.

Another Division II case, *In re Marriage of Perkins*, 107 Wn. App. 313, 26 P.3d 989 (2001), held that trial courts cannot compensate one spouse with maintenance equal to funds lost to disability pay. Such a semantics shift by the court violated both *Howell v. Howell*, 581 U.S. 214, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017) and *Kraft*. See *In re Marriage of Perkins*, 107 Wn. App. at 324. However, *Perkins* is not a contract case.

None of the Washington cases squarely address separation agreements or other spousal contracts and disability pay. Appellate jurisprudence is thus inconclusive when applied to this issue. An opportunity exists to clarify the law in this area.

b) Other Supreme State courts have resolved this conflict.

In *Shelton*, the Nevada Supreme Court found that “states are not preempted from enforcing orders that are res judicata or from

enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved.” *Shelton v. Shelton*, 119 Nev. 492, 496, 78 P.3d 507 (2003).

Further, the Nev. Supreme Court, in *Martin v. Martin*, 520 P.3d 813 (Dec. 1, 2022) recently affirmed its decision in *Shelton*.

The *Martin* court observed that:

Neither *Howell* nor *Mansell* confronted the intersection of 10 U.S.C.S. § 1408 and such contractual issues, and beyond the federal preemption in this regard, as *Mansell* observed that whether res judicata applies to a divorce decree in circumstances such as these is a matter for a state court to determine and over which the United States Supreme Court lacks jurisdiction. See *Mansell*, 490 U.S. at 586 n.5.

Nev. Supreme Court, in *Martin*, 520 P.3d at 818.

Nevada notes the Supreme Court’s denial of certiorari for *Mansell II* per *Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227, 233-34 (1989), cert. denied, 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990). Nev. Supreme Court, in *Martin*, 520 P.3d at 819. Nevada further concludes that neither

express preemption nor field preemption apply, because 10 U.S.C.S. § 1408 contains no specific bar against state enforcement of divorce decrees and field pre-emption should not apply in state's family law matters. *Martin*, 520 P.3d at 818.

*Hoskins v. Skojec*, 265 A.D.2d 706, 696 N.Y.S.2d 303 (3d

Dep't 1999) held:

The Federal statute at issue does not restrict a recipient of disability benefits from entering into a contract with a spouse regarding the dispersion of benefits received. Therefore, the parties in this case who voluntarily agreed to an allocation of defendant's disability compensation shall be obligated to abide by its terms.

*Id.* at 707.

Virginia's ruling in *Yourko v. Yourko*, 884 S.E.2d 799 (2023) illustrates the difference a contract makes. The Supreme Court of Virginia found that neither *Mansell* nor *Howell* was implied or applied because neither case "can be read as addressing the enforceability of an indemnification provision in a contract."

*Id.* at 804. The *Yourko* court observed:

Neither Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed, it expressly permits such usage. See, e.g., 38 U.S.C. § 5301 (a)(3)(B) (permitting a veteran to use disability benefits to repay loans, provided the payments are ‘separately and voluntarily executed by the [veteran]).

*Yourko v. Yourko*, 884 S.E.2d 799, 804 (2023).

*Yourko* further found that *Howell* is only implicated when a court circumvents the USFSPA by *ordering* indemnification, but not when *enforcing* an indemnification provision the parties contractually agree to. *Id.* at 805. The *Yourko* court’s holding states:

We expressly adopt the holding of the Court of Appeals in *Owen* that, with regard to the division of military retirement benefits, ‘federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits.’ *Id.* at 805. And further, ‘federal

law does not bar courts from upholding such agreements or from enforcing indemnification provision that may be included to ensure that payments are maintained as intended by the parties.

*Yourko*, 884 S.E.2d at 805.

The Pentagon home-state agrees that contracts are not preempted by statute nor the Supreme Court's rulings.

The Alaska Supreme Court agrees, concluding that *Howell* stands for state enforcement of settlement agreements, and that such enforcement does not circumvent *Mansell*. See *Jones v. Jones*, 505 P.3d 224, 230 (2022). Both *Yourko* and *Jones* reference 2 MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES, 670 (3d ed. 2019). See App. 35-40.

Decisions approving contracts that divide military disability pay are greater in number and longer in tradition than *McCarty* (contingent on the funds going to the veteran first). See *Selitsch v. Selitsch*, 492 S.W.3d 677, 687-88 (Tenn. Ct. App. 2015) (citing



cases from Louisiana; Massachusetts; Nevada; New York; North Carolina; South Carolina; Ohio; Utah; and Vermont). Cases from Oregon and Florida also approve contractual disability payments. *See Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997); *Hayes & Hayes*, 228 Or. App. 555, 565-66 (2009).

Touching briefly on the Louisiana case, the Court of Appeals dealt with an indemnification fact pattern similar to *Howell*, but like *Shelton* and *Martin*, found that Federal Law does not preempt state contract law, holding that “Nothing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another. We agree with the trial court that ‘the re-designation of pay cannot defeat the prior agreement of the parties. . ..’” *Poullard v. Poullard*, 780 So. 2d 498 (La. Ct. App. 2001)

The Supreme Court of WA should join these states in resolving the question: is enforcement of a separation contract dividing military retirement benefits preempted? To preserve the

fundamental right to contract and prevent public policy violations, the answer should be “no preemption.”

**5.3) The Division III decision involves significant questions of Federal law and Constitutional rights.**

The Supreme Court should undertake review because at stake is the fundamental right to contract and federal preemption analysis. The right of spouses to divide military retirement benefits by contract is endorsed by the Washington legislature, and not prohibited by Federal Law.

a) The right to contract is fundamental.

Parties possess a right to contract, protected by the Fourteenth Amendment. See *Lochner v. New York*, 198 U.S. 45, 53, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (“The general right to make a contract... is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”). However, the right to contract may be limited by the state in the name of public interest. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392, 57 S. Ct. 578, 81 L. Ed. 703

(1937). (Washington State limited the contracting rights of employers and employees by passing a minimum wage law to protect public health and safety). *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004) (courts are generally willing to enforce contracts that do not contravene public policy.)

Per 25 *Wash. Prac., Contract Law and Practice* section 9:22. “A Contract which is not prohibited by the state, condemned by judicial decision, or contrary to public morals contravenes no principle of public policy” (citing *LK Operating, L.L.C. v. Collection Grp., L.L.C.*, 181 Wn.2d 48, 331 P.3d 1147 (2014)).

Separation contracts serve public policy by allowing married parties to amicably settle disputes. RCW 26.09.070. The Washington legislature prefers these agreements, making them binding upon the courts (unless the court finds them unfair at the time of signing). See RCW 26.09.070(3); *Little v. Little*, 96 Wn.2d 183, 192, 634 P.2d 498 (1981); *Freedom Found. v.*

*Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 480 P.3d 1119 (2021).

Amicable agreements are so preferred that even those exceeding duties under the law are enforced. *See Untersteiner v. Untersteiner*, 32 Wn. App. 859, 864, 650 P.2d 256 (1982) (explaining “Nothing in law, public policy or reason prohibits a former spouse from voluntarily and formally obligating himself or herself to do more than the law requires in providing support for a former spouse.”).

As recognized by one treatise on the subject: “It’s one thing to argue about a judge’s power to require under principles of fairness and equity, a duty to indemnify; that approach has been eliminated by the *Howell* decision. It’s another matter entirely to require a litigant to perform what he has promised in a contract.”

2 MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES, 691 (3d ed. 2019). *See* App. 35-41.

The purpose of separation contracts is “to promote the amicable settlement of disputes.” RCW 26.09.070(1). RCW 26.09.070(3) mandates that the terms of a separation contract “shall be binding upon the court.” The only statutory exception is when the contract was unfair at the time of execution. RCW 26.09.070(3)

Therefore, not only is the right to contract fundamental, but it is specifically endorsed by the Washington legislature in this exact context: separation agreements. The Supreme Court should review to ensure constitutional rights are preserved, and the legislature’s intent followed.

b) No specific preemption exists.

Only under “compelling circumstances” can a superior court’s jurisdiction to divide property be narrowed, “such as when it is explicitly limited by the Legislature.” *Kaufman*, 17 Wn. App. 2d 497 at 511 (quoting *In re Marriage of Weiser*, 14 Wn. App. 2d 884 at 905).

Supreme Court precedent consistently holds that general legislation from Congress rarely intends to displace state authority within the family law arena. *Mansell*, 490 U.S. at 587. Hence, preemption does not occur unless “‘Positively required by direct enactment.’” *Id.* (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979); *Wetmore v. Markoe*, 196 U.S. 68, 25 S. Ct. 172, 49 L. Ed. 390 (1904)). See also *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)). Further, “[b]efore a state law governing domestic relations will be overridden, it “must do ‘major damage’ to ‘clear and substantial’ federal interests.” *Mansell*, 490 U.S. at 587 (citing *Hisquierdo* 439 U.S. 572 at 581 and *United States v. Yazell*, 382 U.S. 341, 352, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966)). “A mere conflict in words is not sufficient.” *Hisquierdo* 439 U.S. 572 at 581.

The Social Security Act is a clear example of preemption. 42 U.S.C.S. § 407 clearly prevents benefits from being transferred, assigned, executed, etc. Further, it specifically prevents

contracts from dividing Social Security benefits in divorce. *See Tupper*, 15 Wn. App. 2d 796.

Acts governing military disability benefits lack explicit prohibitions on division by agreement, when funds go to the veteran first without attachment. Title 10 has a similar provision as Title 42 and Title 38, but they are not as comprehensive nor explicit as the Social Security Act's prohibition on transfer. *Compare* 10 U.S.C.S. § 1408<sup>1</sup> *with* 42 U.S.C.S. § 407(a)<sup>2</sup> *and* 38 U.S.C.S. § 5301(a)(1).<sup>3</sup> Title 10

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<sup>1</sup> “Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.” 10 U.S.C.S. § 1408(c)(2).

<sup>2</sup> “The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” 42 U.S.C.S. § 407(a).

<sup>3</sup> “Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall

prohibits disposals “*by a spouse or former spouse,*”—it does not address agreements *between* spouses for disposal. Additionally, the legislature forbids attachments and levies on disability pay. The funds must reach the veteran and the veteran must be the payor of any debt or obligation.

However, attachments for spousal support and child support are explicitly allowed, as disability benefits are intended for the veteran and their families. *See Rose*, 481 U.S. at 634-35; *Rhone v. McDonough*, 53 F.4<sup>th</sup> 656, 661-62 (2022).

c) No Supreme Court decisions specifically examine private parties’ right to contractually divide pay.

The United States Supreme Court does not limit a veteran’s use of his personal entitlement once received. Federal law expressly permits usage as the veteran sees fit, so long as the pay is not attached. *See. e.g.*, 38 U.S.C.S. § 5301(a)(3)(B) (allowing

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not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” 38 U.S.C.S. § 5301(a)(1).



veterans to use disability benefits to repay loans provided the veteran pays direct, not as attachment).

The *McCarty* court barred the division of military retirement between divorcing spouses, while inviting Congress to act. *See McCarty*, 453 U.S. 210. Immediately responsive to *McCarty*, Congress changed military retirement division law to the same extent as addressed in *McCarty*, passing the Uniformed Services Former Spouses' Protection Act (USFSPA). *See* 10 U.S.C.S. § 1408. The USFSPA allows courts to divide military retirement pay in divorces but, exactly like *McCarty*, excludes disability pay. *Id.* § 1408(a)(4)(A). Congress defined disposable retired pay as the total monthly retired pay entitled to a military member, minus certain deductions. The deductions include all matters of disability payments. *Id.*

In 1989, the *Mansell* court decided how 10 U.S.C.S. § 1408 applied to disability pay, since it was directly excluded from the statute. *See Mansell*, 490 U.S. 581. The court questioned if exclusion was limited to the attachment section. *Id.* The original

property settlement agreement in *Mansell* gave the military spouse 50 percent of the major's total military retirement pay, including future waived disability pay. *Id.* The divorce decree incorporated the settlement agreement. *Id.*

The *Mansell* court 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." *Id.* at 594-95.

However, footnote 5 in *Mansell* recognized that state law governed the question of res judicata (which eventually barred the reopening of that pre-*McCarty* settlement), over which the Supreme Court stated that they had no jurisdiction. *Id.* The Supreme Court also did not address the contract aspect of the transaction, nor other state law issues keeping the original decision the same on remand. *Id.*

After *Mansell*, states were divided on whether they can make up the difference and fashion a remedy for a former spouse whose military partner waived divisible retirement pay for

indivisible disability pay. *Howell* denied state courts the ability to do so. *See Howell*, 581 U.S. 214. However, the *Howell* court did not address the difference of contractual indemnification.

No Supreme Court decision to date addresses the enforceability of a separation contract, even if a contract was within their facts. The same goes for federal statutes.

d) Federal statutes do not preempt the private right to contract.

Since the 1989 case of *Mansell*, statutes regarding disability pay have changed. This court has a duty to determine preemption per statute. USFSPA 10 U.S.C.S. § 1408(a)(2) does not address the court's ability to divide disability pay. Disability pay is governed by other Titles such as 38 U.S.C.S. Veteran's Benefits, or Title 42 Secretary of the VA's power to garnish a member's disability pay for alimony and child support. See, e.g., *Rhone*, 53 F.4th at 661-62 (discussing both retirement pay, and disability pay statutes allowing child support garnishments.).

One statute on topic is subsection 3 of the non-assignability and exempt status of veteran benefits, added in 2003. 38 U.S.C.S.

§ 5301(3) clarifies that no one could establish direct payments of disability pay via contract, as any re-payment of loans must be authorized separately by the veteran. This section, however, does not preclude a veteran from contracting and paying for the obligations using disability pay, so long as the veteran is the payor. The Federal Government refuses to make payment or honor any attachment/levy against the disability pay *before* it reaches the veteran. Any direct payments out of disability benefits are void as against public policy. *Id.* § 5301(3)(C). However, payments *after* are another story altogether.

Nothing in 38 U.S.C.S. § 5301 prohibits a property settlement agreement using disability pay. If that was intended, it would have been added.

Nowhere within the VA benefits statutes is a direct reference precluding separation agreement or property settlement agreements and their satisfaction by the Veteran. When there is no unequivocal prohibition to [payments of family support] from

disability pay within legislation, there is no federal preemption. *Rose*, 481 U.S. at 636.

In sum, neither Supreme Court jurisprudence nor Congressional statute prohibits parties from contractually agreeing to share military disability benefit funds as financial support or income, when the veteran is the payor. Therefore, the Supreme Court should feel free to review this case in the interest of preserving the right to contract and correcting confusion about preemption application.

e) Division III missed *Mansell's* message.

Division III errors by assuming federal preemption of “state divorce laws” applies equally to parties and Superior Courts. They ignore the distinction between a veteran’s freedom to contract and a state court’s power to take and distribute a veteran’s personal entitlements pursuant to community property laws.

Division III concludes that since the *Mansell* case merely *involved* a property settlement agreement, preemption applies to

settlement agreements. That assumption ignores 1) the scope of the federal question to the Supreme Court; 2) the Supreme Court **did** not **address** the agreement; 3) the subsequent history of *Mansel*; and 4) that current statutes “positively require by **direct** enactment” preemption over family law contracts.

The *Mansell* Supreme Court refused to **address** state court matters. They **did** not **address** the property settlement agreement, nor the anti-attachment clause, and **remanded** on the issue of res judicata. *See Mansell*, 490 U.S. at 586 n.5 and n.6 (“The **doctrine** of res judicata is a matter of state law over which we have no **jurisdiction**.”). Review was limited to the federal question of USFSPA scope, holding “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.” *Id.* at 594. The *Mansell* court **acknowledged** the narrow scope of preemption, which is “positively **required** by **direct** enactment,” (*Id.* at 587)

and rarely intended to displace state authority within domestic relations. *Id.*

Upon *Mansell's* remand, the Superior Court of California was tasked with “further proceedings not inconsistent with this opinion,” *Mansell*, 490 U.S. at 595. The California court did not change its decision based on res judicata. *Weiser*, 14 Wn.App. 2d at 897-898 (citing *In re Marriage of Mansell*, 217 Cal.App.3d 219 (1989)). A second request for certiorari was denied. *Weiser*, 14 Wn.App. 2d at 898 (citing *Mansell*, 498 US 806).

California’s treatment of *Mansell* on remand illustrates that not all state law involving disability pay is preempted, and such contracts or orders are not automatically void.

In conclusion, Division III erred in applying *Mansell* to both state court authority in divorces and individual parties’ contractual agreements, all without analyzing preemption principles accordingly, without acknowledging that disability pay was categorized by the parties as shared income (not community property), and without realizing that contracting is

different from the state court's taking power, requiring a separate preemption analysis.

A separation agreement that evenly divides disability pay after receipt by the veteran has never been declared illegal by Congress, nor the U.S. Supreme Court. Therefore, such a contract should not be illegal or invalid, because it does not directly violate a legislative enactment nor public policy.

The Supreme Court should review this decision because it implicates significant questions of federal law and the U.S. Constitution, such as the fundamental right to contract and whether preemption applies to separation contracts dividing military disability retirement pay.

#### **5.4) This decision jeopardizes the public interest.**

Public interest is damaged by the Div. III decision. One, it defeats the Washington legislature's intent for amicable settling of domestic disputes. *See* RCW 26.09.070. Two, it frustrates the federal intent that military retirement and disability pay are for the veteran and their families.



As previously stated, separation agreements serve to settle disputes out of court. However, the Division III decision discourages military couples from contracting. It denies service members the freedom to contract with their spouse concerning military entitlements. It discourages future marriages to military personnel and interfering with all relevant current marital agreements without due process (pre-nuptials, post-nuptials, separation agreements, settlement agreements, etc.).

Such treatment also injures the federal program. A veteran's benefits are also for a veteran's dependents. *See Rose*, 481 U.S. at 634-35; *Rhone*, 53 F.4th at 661-62. Additionally, as previously stated, a veteran can use their benefits how they will. Limiting the ability to contract for these benefits infantilizes veterans and upends a federal system intended to provide support to families.

This Court should accept review to uphold Washington's public's interest in settlement agreements within military families, and to rightly determine that sharing of military entitlements between spouses, when done the proper way, is not


against any public policy and should not require such contracted spouses to undergo even more litigation.

## 6. CONCLUSION

No federal statute nor Supreme Court case directly precludes a contractual agreement to provide separating spouse half of military disability pay, monthly. This court should accept review to bring consistency to the Court of Appeals, preserve the fundamental right to contract, and protect the public's interest in not declaring such contracts to be against public policy and preempted.

I certify that this Petition for Review is 4784 words.

Submitted on this 5th day of April, 2024.



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**AMY RIMOV, WSBA No. 30613**  
**Attorney for Kelley Townley**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on the 5th day of April 2024, she served a copy of this Petition for Review via U.S. Mail and Email to the persons hereinafter named at the places of address stated below which are the last known addresses.

**Kevin Hochhalter:** Olympic Appeals PLLC  
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\_\_\_\_\_  
**Amy Rimov, WSBA No. 30613**  
**Attorney for Kelley Townley**

## Appendix

**FILED**  
**MARCH 7, 2024**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

In re the Marriage of:	)	No. 39265-1-III
	)	
JUSTIN DAVID TOWNLEY,	)	
	)	
Appellant,	)	OPINION PUBLISHED
	)	IN PART
and	)	
	)	
KELLIE LYNNE TOWNLEY,	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, J. — The Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408, prohibits courts in dissolution actions from awarding any portion of a military retiree’s disability pay to a former spouse. The question we decide today is whether this also precludes a court from incorporating into the decree an agreement made by the parties that provides for such an award. Bound by *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), we conclude it does.

FACTS

Justin and Kellie Townley married in September 2003. For years, Justin served in the United States Army and Washington National Guard. In June 2018, Justin was

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*Marr. of Townley*

permanently retired from service with a 70 percent disability rating due to posttraumatic stress disorder. His monthly gross military disability retirement (MDR) pay was \$4,951.00.

In March 2020, the parties agreed to separate. On March 25, they entered into a written agreement to divide their assets and liabilities. In the agreement, Justin committed to giving Kellie 50 percent of his MDR pay. The two signed the agreement and had it notarized.

In August 2020, Justin petitioned for dissolution. He argued federal law preempted the trial court from awarding Kellie any of his MDR pay. He testified he did not know when he signed the agreement that his disability pay could not be divided. Kellie conceded that a court could not divide Justin's MDR pay but argued that parties could agree to do so and a court could enforce the agreement. The trial court agreed with Kellie and awarded her 50 percent of Justin's MDR pay in accordance with the parties' written agreement. Justin appealed.

## ANALYSIS

### A. MILITARY DISABILITY RETIREMENT PAY

Justin contends the trial court erred when it enforced the written agreement by giving Kellie 50 percent of his MDR pay. We agree.

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*Standard of review*

We generally review a trial court's division of marital property for abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). However, federal preemption is a question of law that we review de novo. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008) (citing *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 722, 30 P.3d 1 (2001)).

*Federal preemption and military retirement pay*

In *McCarty v. McCarty*, 453 U.S. 210, 235, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the United States Supreme Court precluded state dissolution courts from dividing military retirement pay. There, military retirement *disability* pay was not at issue. *See id.* at 213. The Court reasoned that Congress intended military retirement pay to reach the veteran and no one else, and any treatment of military retirement pay as community property damages important military personnel objectives. *See In re Marriage of Kraft*, 119 Wn.2d 438, 443, 832 P.2d 871 (1992) (citing *McCarty*, 453 U.S. at 232-35).

In 1982, Congress responded to *McCarty* by enacting the USFSPA, which authorizes state courts to treat "disposable retired pay" as community property subject to

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division upon dissolution of a marriage. 10 U.S.C. § 1408(c)(1).<sup>1</sup> “Disposable retired pay” is defined in the USFSPA to *exclude*, as relevant here, retirement pay due to disability. 10 U.S.C. § 1408(a)(4)(A)(iii). Thus, although state courts were empowered to treat military retirement pay as community property, they could not treat certain other types of pay—such as retirement pay due to disability—as community property.

In *Mansell*, the United State Supreme Court framed the issue before it as: “[W]hether state courts, consistent with the [USFSPA], may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans’ disability benefits.” 490 U.S. at 583. There, Major Gerald Mansell had received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, disability benefits.<sup>2</sup> *Id.* at 585. The parties’ divorce decree included a property settlement agreement in which the Major had agreed to pay his former spouse 50 percent of his total military retirement, including his disability pay. *Id.* at 585-86. Four years later, the Major asked a trial court to modify the divorce decree by removing the provision that

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<sup>1</sup> 10 U.S.C § 1408(c)(1) provides in relevant part: “Subject to the limitations of this section, a court may treat disposable retired pay payable to a member . . . 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.”

<sup>2</sup> A portion of military retirement pay often is waived to receive nontaxable disability benefits. *Mansell*, 490 U.S. at 583-84. This form of disability pay also is excluded from “disposable retired pay.” 10 U.S.C. § 1408(a)(4)(A)(iii).



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required him to pay 50 percent of his total retirement pay to his former spouse. *Id.* at 586. The trial court declined his request. *Id.* Ultimately, the United States Supreme Court ruled in favor of Major Mansell. *Id.* at 594-95.

In its ruling, the Court reasoned, “[U]nder the [USFSPA’s] plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property.” *Id.* at 589. The Court held, “the [USFSPA] 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.” *Id.* at 594-95. The Supreme Court provided no direction to the lower court on remand. *See id.* at 595.

As noted in the *Mansell* Court’s statement of the issue, it treated the Major’s agreement to share his disability benefits with his former spouse as a “waiver,” even though there was no evidence the Major knew that dissolution courts could not apportion any of his disability benefits to his former spouse. As explained below, the *Mansell* Court’s application of waiver is how Washington courts apply the waiver doctrine.

Waiver requires an intentional relinquishment of a known right, either express or implied. *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 711, 24 P.3d 390 (2001). Knowledge of the right can be actual or constructive. *See Yakima County (W. Valley) Fire Prot. Dist.*

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*No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). All parties are charged with constructive knowledge of the law. *Id.*

Here, Justin's lack of knowledge that dissolution courts could not apportion his disability benefits to Kellie is immaterial. He had constructive knowledge of the law and thus waived his right to those benefits. Even so, *Mansell* instructs us that dissolution courts may not divide waived military disability retirement pay.

But unlike *Mansell*, we deem it prudent to give the lower court remand instructions. Kellie might have a remedy. When signing their agreement, both Justin and Kellie undoubtedly believed that Justin would pay, and Kellie would receive, 50 percent of Justin's MDR pay. If Kellie proves by clear, cogent, and convincing evidence that this mutual mistake was material and was a basic assumption on which the agreement was formed, she is entitled to rescind the agreement. *See Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 50, 185 P.3d 640 (2008). In that event, the trial court must enter its own property award in accordance with RCW 26.09.080 and perhaps its own maintenance award in accordance with RCW 26.09.090.<sup>3</sup> We reverse and remand for proceedings consistent with this opinion.

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<sup>3</sup> The property and maintenance awards must also be consistent with *Kraft*: [W]hen making property distributions or awarding spousal support in a dissolution proceeding, the court may regard military disability retirement pay as future income to the retiree spouse and, so regarded,

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A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

B. THE SURVIVOR BENEFIT PLAN

The trial court additionally awarded Kellie the Survivor Benefit Plan (SBP), conditioned on Kellie paying the monthly premium. With one exception not applicable here,<sup>4</sup> a veteran's former spouse is eligible for continuing coverage under the SBP, either voluntarily, by agreement, or by court order. *See* 10 U.S.C. § 1448(b)(3).

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consider it as an economic circumstance of the parties. In particular, the court may consider the pay as a basis for awarding the nonretiree spouse a proportionately larger share of the community property [or spousal support] where equity so requires. 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.

119 Wn.2d at 447-48.

<sup>4</sup> The one exception is that a veteran may not make an election to provide SBP coverage to a former spouse whom the veteran married after being eligible for retired pay, unless the veteran and former spouse were married for at least one year or have a child together. 10 U.S.C. § 1448(b)(3)(B)(i), (ii). This limitation does not apply here because Justin was eligible for the SBP during his marriage to Kellie and had elected to cover Kellie and their children during the marriage.

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Justin does not dispute that the SBP is an asset that the trial court was permitted to divide. Rather, he argues the trial court abused its discretion when awarding the asset to Kellie because the trial court's reason for awarding the asset was erroneous. Specifically, the trial court awarded the asset to Kellie so she could receive the benefit of the property agreement, which reflected an agreement by Justin to pay Kellie 50 percent of his MDR pay for her life. We disagree with Justin's argument.

In the event the trial court determines that Kellie may *not* rescind the written agreement (notwithstanding her inability to receive 50 percent of Justin's MDR pay), the reasoning the court gave for awarding the SBP to Kellie still remains—the parties intended for Kellie to receive 50 percent of Justin's MDR for life.

But in the event the trial court determines that Kellie may rescind the written agreement, the SBP still is a marital asset that the trial court must divide. In that event, the trial court must determine whether, and on what terms, allocation of the asset to Kellie is consistent with RCW 26.09.080.

#### C. SPOUSAL MAINTENANCE

The trial court ordered Justin to pay Kellie 10 years of diminishing maintenance *even if* she remarries. The diminishing maintenance applies only to income earned, not to Justin's Social Security or MDR payments. The trial court's order was based on its construction of the following language in the parties' written agreement:

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	Kellie Income	Duration
Retirement	50%	For Life
Justin's Income	50%	Year 1 or remarriage
Justin's Income	45%	Year 2 or remarriage
Justin's Income	40%	Year 3 or remarriage
Justin's Income	35%	Year 4 or remarriage
Justin's Income	30%	Year 5 or remarriage
Justin's Income	25%	Year 6 or remarriage
Justin's Income	20%	Year 7 or remarriage
Justin's Income	15%	Year 8 or remarriage
Justin's Income	10%	Year 9 or remarriage
Justin's Income	5%	Year 10 or remarriage

See Clerk's Papers at 148.

Justin contends the trial court abused its discretion because its construction of the written agreement was erroneous. Kellie did not respond to this argument. Even had she responded, we would agree with Justin.

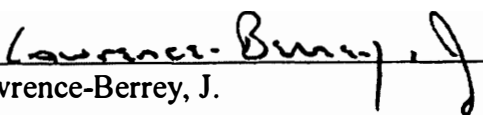
Preliminarily, we have reviewed the record and are of the opinion that neither side presented any evidence of what their intent was with respect to this particular issue. The sole evidence is the written agreement itself.

We recognize the common practice of courts and settling parties to terminate maintenance when the party receiving maintenance remarries. Here, the parties crafting the written agreement are not lawyers. The mere fact that the written agreement can be construed one way as easily as the other is an insufficient reason, in our view, to construe it in a manner that would defeat the common practice and reasonable expectations of

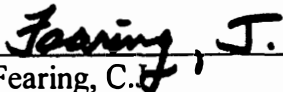
No. 39265-1-III  
*Marr. of Townley*

divorcing parties. In the event the trial court determines that Kellie may *not* rescind the written agreement, we direct it to order Justin’s limited maintenance obligation to end upon Kellie’s remarriage.

But in the event the trial court determines that Kellie may rescind the written agreement, we remind the trial court it must award maintenance, if any, in accordance with RCW 26.09.090 and *Kraft*, 119 Wn.2d at 447-48.

  
Lawrence-Berrey, J.

WE CONCUR:

  
Fearing, C.

  
Staab, J.

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**10/21/2022 12:18 PM**

<b>SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY</b>
--

In re the marriage of:

Petitioner:

**Justin Townley,**

And Respondent:

**Kellie Townley**

No. 20-3-01706-32

NOTICE OF APPEAL TO COURT OF  
APPEALS, DIVISION III

Justin Townley, Petitioner, seeks review by the Court of Appeals, Division III, of the Findings and Conclusions about a Marriage, Final Divorce Decree, Parenting Plan and Child Support Order – Final, entered on or about September 23, 2022; together with any other orders subject to review under the Rules of Appellate Procedure. Copies of the identified pleadings are attached hereto.

DATED this 21<sup>st</sup> day of October, 2022.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Appellate Attorney for Petitioner Justin Townley  
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Attorney for Respondent Kellie Townley:

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused this Notice of Appeal to be efiled with the Spokane County Superior Court Clerk's Office, a courtesy copy was also efiled with the Court of Appeals, and a true copy was sent to the following counsel of record through the Appellate Court's Portal:

Amy Rimov, J.D., P.S.  
1312 N Monroe Street  
Suite 116  
Spokane, WA 99201  
amy@rimovlaw.com

Signed in Lacey, Washington this 21<sup>st</sup> day of October, 2022.

/s/ Rhonda Davidson  
Rhonda Davidson, Paralegal  
Olympic Appeals PLLC  
4570 Avery Lane SE, #C-217  
Lacey, WA 98503  
360-763-8008  
rhonda@olympicappeals.com



The court **has** jurisdiction over the Respondent.

**4. Information about the marriage**

The spouses were married on: September 20, 2003 at: Spokane, WA.

**5. Separation Date**

The marital community ended on: August 26, 2020. The parties stopped acquiring community property and incurring community debt on this date.

**6. Status of the marriage**

**Divorce** – This marriage is irretrievably broken, and it has been 90 days or longer since the *Petition* was filed and the *Summons* was served or the Respondent joined the *Petition*.

**7. Separation Contract**

**Note** – A separation contract is a written agreement between the spouses that covers some or all of the issues that must be decided in this divorce. Prenuptial or community property agreements are **not** separation contracts but may be the basis for a separation contract or final orders.

The spouses signed a separation contract on: March 25, 2020.

**Conclusion:** The parties should be ordered to comply with the terms of the contract.

**8. Real Property (land or home)**

The spouses' real property is listed below:

Real Property Address	Tax Parcel Number	Community or Separate Property
7221 N FORKER RD, SPOKANE, WA	46262.9117	community property

**Conclusion:** The division of real property described in the final order is fair (just and equitable).

**9. Community Personal Property (possessions, assets, or business interests of any kind)**

The community personal property has already been divided fairly between the spouses. Each spouse should keep any community personal property that spouse now has or controls.

The spouses' community personal property is listed below. *(Include vehicles, pensions/retirement, insurance, bank accounts, furniture, businesses, etc. Do not list more than the last 4 digits of any account number. For vehicles, list year, make, model, and VIN or license plate number.)*

1. Household goods	2. leather and beads
3. 2002 VW Jetta	4. Camping gear
5. 2000 VW Cabrio	6. 1977 Chevy K30 Truck
7. Piano	8. Guns
9. Schwab IRA account	10. military uniforms
11. USAA 395	12. 1996 Toyota 4Runner

13. Survivor Benefit Plan	14. USAA 4941
15. Schwab account	16.

**Conclusion:** The division of community personal property described in the final order is fair (just and equitable).

**10. Separate Personal Property** (*possessions, assets, or business interests of any kind*)

[ X ] The **Petitioner's** separate personal property is listed below. (*Include vehicles, pensions/retirement, insurance, bank accounts, furniture, businesses, etc. Do not list more than the last 4 digits of any account number. For vehicles, list year, make, model, and VIN or license plate number.*)

1. Military Disability Payment entitlement	2. Social Security Disability Payment entitlement
3. USAA Checking #4394	4. USAA checking #5179
5. Property accumulated post separation	6.

[ X ] The **Respondent's** separate personal property is listed below. (*Include vehicles, pensions/retirement, insurance, bank accounts, furniture, businesses, etc. Do not list more than the last 4 digits of any account number. For vehicles, list year, make, model, and VIN or license plate number.*)

1. BECU Checking #5993	2. Property accumulated post separation
------------------------	---

**Conclusion:** The division of separate personal property described in the final order is fair (just and equitable).

**11. Community Debt**

The spouses' community debt is listed below:

Debt Amount	Creditor (person or company owed this debt)	Account Number (last 4 digits only)
\$2,148	VA Overpayment Debt	
\$15,087	USAA Signature CC	
\$8,425	USAA Platinum Visa CC	
\$6,670	USAA Personal loan 1148	
\$2,200	Lowes Store Card – Synchrony Bank	
\$159,591.89	Mortgage on Home	

**Conclusion:** The division of community debt described in the final order is fair (just and equitable).

**12. Separate Debt**

The **Petitioner's** separate debt is listed below:

Debt Amount	Creditor (person or company owed this debt)	Account Number (last 4 digits only)
\$	USAA CC 6651 SP Debt of J	

\$		
----	--	--

The Respondent's separate debt is listed below:

Debt Amount	Creditor (person or company owed this debt)	Account Number (last 4 digits only)
\$8,125	Mortgage Forbearance Debt	
\$8,886.96	GreenSky Furnace	
\$3,626.25	Best Buy CC	
\$6,371.53	BECU	
\$212.49	Care Credit	
\$305.82	Furniture Row	

**Conclusion:** The division of separate debt described in the final order is fair (just and equitable).

**13. Spousal Support** (maintenance/alimony)

Spousal support should be based on the separation contract listed in 7.

**Conclusion:** Spousal support should:

be ordered because: It was agreed to in the separation contract and the separation contract has been found to be valid.

**14. Fees and Costs**

Each party should pay their own fees or costs.

**15. Protection Order**

No one requested an *Order for Protection* in this case.

**16. Restraining Order**

No one requested a *Restraining Order* in this case.

**17. Pregnancy**

Neither spouse is pregnant

**18. Children of the marriage**

The spouses have the following children together who are still dependent:

Child's name	Age	Child's name	Age
1. Karis	15	2. David	11

**19. Jurisdiction over the children** (RCW 26.27.201 – .221, .231, .261, .271)

The court can approve a *Parenting Plan* for the children the spouses have together because:

**Exclusive, continuing jurisdiction** – A Washington court has already made a custody order or parenting plan for the children, and the court still has authority to make other orders for: Karis and David.

**20. Parenting Plan**

The court signed the final *Parenting Plan* filed separately today.

**21. Child Support**

The dependent children should be supported according to state law.

The court signed the final *Child Support Order* and *Worksheets* filed separately today.

**22. Other findings or conclusions (if any)**

- 1) The cases of *In re Marriage of Weiser*, 14 Wn.App. 2d, 884 (Div 2, 2020); *In re Marriage of Kaufman*, 17 Wn.App. 2d 497, (2021) are instructive regarding allowing federal disability retirement to be divided by agreement, while Social Security disability payments are not per *Tupper v. Tupper*, 478 P.3d 1132 (Div. 2, 2020). Other legal authorities supplied by Ms. Townley also supports the legal position that military disability retirement pay may be divided by agreement.
- 2) The court considered if the March 25, 2020, financial agreement constituted a separation agreement under RCW 26.09.070 and if it is valid. This statute indicates that it is binding upon the Court if a party petitions the Court for dissolution at the time the contract is executed or at a subsequent time.
- 3) The March 25, 2020 financial agreement was signed and notarized by both parties.
- 4) The parties intended to separate at that time. Mr. Townley began to live in a separate part of the house and a separate bedroom after the March 25, 2020 agreement. The parties kept track of separate bills and traded off who was doing various household things and childcare. Ms. Townley began taking responsibility for maintaining the home with repairs. Ms. Townley began to date other people.
- 5) The parties did make attempts at reconciliation on and off until about August 2020, as is common in these situations. But their attempts at reconciliation do not nullify or defeat the separation contract.
- 6) Neither party complained that they did not have an opportunity to talk to an attorney. Neither party talked to an attorney, but there's not evidence they didn't have that opportunity.
- 7) Mr. Townley does not claim that he did not have knowledge about the property involved or that he did not enter into the agreement voluntarily. Mr. Townley had sufficient knowledge, as contemplated by the fact that he considered the separation and divorce for months prior to telling Ms. Townley that he wanted a divorce and prior to drafting the financial agreement with Ms. Townley.

- 8) Mr. Townley controlled the income. He had the income, and gave some to Ms. Townley, dependent on the expenses she would be responsible for paying.
- 9) Another reason for the agreement was to assist Ms. Townley with getting comfortable with the family finances, as before, Mr. Townley had more of the control of the finances, prior to the entry of the financial agreement.
- 10) There's no evidence that <sup>Mr. Townley</sup> ~~he~~, the party that <sup>CMB</sup> does not want this agreement to be enforced, did not have knowledge of the property, the debt, or his own income which was the income for the parties.
- 11) The only aspect that was not known by the parties when they entered the agreement was that the Court could not independently order distribution of Mr. Townley's disability pay. But this information is irrelevant to the parties' agreement because there was no found connection between having that information and why that information would have prevented the agreement. The Court can't independently order the distribution of the disability, but the parties can contract to do so and did indeed do just that.
- 12) Mr. Townley did not present any evidence to the court that he was under any duress or undue influence at the time of the agreement. Mr. Townley had testified that his mental health had improved by 2020. Only that once he learned that the court could not independently order a division of disability pay, then he no longer wished that he had executed the agreement; later he wished to back out.
- 13) At the time of execution, the agreement was fair and valid agreement at the time that it was entered. At the time of execution, Ms. Townley was concerned about her health and lack of work experience. Mr. Townley acknowledged that Ms. Townley had kept him alive, caring for him after the Oso incident.
- 14) The *Tupper* case forbids the Social Security amount of \$1,282 from being divided, within the agreement. However, SSDI can be distributed for child support obligations. A child support calculation must be done, and the separation agreement can not ~~for~~ control child support.
- 15) The validity of the Financial Agreement was not addressed at the temporary orders stage, the ~~the~~ court declined to analyze and apply the financial agreement then. It was not fully litigated at the temporary orders stage. Further, RCW 26.09.060 requires that temporary orders not prejudice the rights of the party at any subsequent hearing, including trial.
- 16) For all these above reasons, the financial agreement is a valid separation contract.

- 17) The 7221 North Forker Rd property is addressed by the financial agreement. The parties agreed total value of \$370,00, that it is community property and that it is to be awarded to Ms. Townley. \$370,00 is supported by P-42. Ms. Townley will also be responsible for the mortgage. She must refinance within six months so that Mr. Townley can choose to buy a home if he wants and not continue to be tethered to that mortgage after six months. Ms. Townley will also be responsible for the \$8,125 separate mortgage debt incurred after separation.
- 18) All of the equity within the 7221 North Forker Rd is to be awarded to Ms. Townley per the March 25, 2020 separation agreement, as binding on the court.
- 19) The Schwab IRA is addressed in the Financial Agreement and awarded to Mr. Townley.
- 20) The financial agreement requires Ms. Townley to have 50% of Mr. Townley's retirement pay (disability pay) for her life, which will require continuing the military survivor benefit to her. Ms. Townley will be responsible for any costs in maintaining the survivor benefit to her.
- 21) The financial agreement has Mr. Townley taking responsibility for the personal loan that was last known to be \$6,670.
- 22) The financial agreement has Mr. Townley taking responsibility for the Platinum Visa at \$8,425 at time of trial; and the Signature Credit Card at \$15,086 at time of trial.
- 23) Mr. Townley's separate debt includes a credit card ending in 6651.
- 24) The post separation or post financial agreement debts assigned to Ms. Townley include the GreenSky furnace debt at \$8,886.96; Best Buy at \$3525.25; BECU Credit card at \$6,371.53; the CareCredit at \$212.49 and Furniture Row Card at \$305.82.
- 25) The VA debt for the overpayment from active duty is a community debt, and it should be equally distributed at \$1,074 to each party. (Ms. Townley would be responsible for paying Mr. Townley that amount.
- 26) The court must determine if there are any .191 restrictions. Mr. Townley does have a long-term emotional or physical impairment that affects his parenting per his history of PTSD that may harm the children's best interests.
- 27) Mr. Townley expressed having a poor memory at times, so the Court did give Ms. Townley's testimony more credibility in those areas where Mr. Townley's memory may have been affected.



- 28) Mr. Townley did not provide sufficient evidence to support his testimony after 2018 regarding his mental and physical health. The medical records provided are from prior to 2018, when we are currently in 2022.
- 29) Mr. Townley chose not to provide medical records after 2018 to the present day. The letters he submitted were not especially helpful, as the witnesses were not subject to cross-examination, and the information was limited to what Mr. Townley wanted the Court to know. And even if the witnesses had testified, they would not have provided information regarding Mr. Townley's treatment.
- 30) Mr. Townley did not want current mental health record information to be known to anyone in the courtroom.
- 31) The court would not have been able to make a decision based on only in-camera evidence, as he had offered, regarding Mr. Townley's medical treatment within the last six months, as she would not be at liberty to use the information in a finding.
- 32) The evidence included that Mr. Townley suffered severe PTSD as the result of his military service, which included a deployment to Iraq and in the National Guard during the Oso mudslide.
- 33) The evidence included that the PTSD affected every aspect of his life, including his parenting and marriage. He attempted multiple therapies. He eventually stabilized and was determined to be permanently disabled with an unlikelihood of improving as of June 2018.
- 34) Although Mr. Townley claims to have improved, the extent of his improvement is unknown to the court or to Ms. Townley, when providing little to no evidence to support his current medical condition. He claimed to have not had a full evaluation by a doctor since 2018.
- 35) Mr. Townley admittedly experienced homicidal and suicidal ideation in August 2020 and has not followed through on recommendations to stay on his medications. The court does not know if Mr. Townley has had any of these issues arise since 2020 nor of the likelihood of it happening again without having the medical documentation. But the permanent disability means that he has a finding that he's not likely to improve.
- 36) Ms. Townley observed the children to experience symptoms after a long visit of 5 days with Mr. Townley such as Karis (aka "their) having trouble breathing and can't stop shaking their hands. David is clingy and cries easily when he returns. It takes both children time to recover after a 5-day stretch. Karis' schoolwork is not completed after 5 day stretches with

her father. And pressure on the children and Ms. Townley to complete a lot of homework for the next day after returning at 7:00 p.m. puts a lot of stress, anxiety, and pressure on the children. This affected Karis with dropping grades.

- 37) Before the parties separated Ms. Townley was able to monitor many of the interactions between Mr. Townley and the children. She was able to intervene, when necessary, before things escalated. Now the parties live apart. Mr. Townley does not have the support of a partner or co-parent residing with him to help him with caring for the children.
- 38) Mr. Townley has difficulty with changes and kid schedules are always changing.
- 39) Mr. Townley admitted that breaks in parenting are critical to him as he focuses on his mental health.
- 40) Mr. Townley's emotional impairment interferes with his parenting performance.
- 41) Both parents have a good relationship with their children and were involved with their children. There is a strong relationship between the children and their Dad.
- 42) There was a period of time when Mr. Townley was suffering more as a result of his PTSD, and Ms. Townley had to really step in and care for Mr. Townley and also care for the children. So naturally, there would be more of a stable relationship between Ms. Townley and the children.
- 43) There is no agreement between the parties as to a parenting plan.
- 44) Both parents have exercised parenting functions. The mother was more detailed with regard to parenting functions. There was a period of time where Ms. Townley was caring for both Mr. Townley and the children. But as of the date of trial, he is able to perform parenting functions.
- 45) Both children suffer from anxiety, and both go to a therapist.
- 46) The children are involved with their school and significant activities. David is involved with cross country, wrestling, and loves video games. Karis is more artistic.
- 47) There is no evidence of the wishes of the children. The parent's wishes are reflected in their proposed parenting plans.
- 48) RE employment schedules: Mr. Townley is not working because he has not been released to do so by the VA. The court has concerns on how Mr. Townley's need, to step away from parenting and care for his mental health, will affect the children.



# Exhibit A

Financial Agreement between Justin David Townley and Kellie Lynne Townley effective 202004Q1 for Year 1 of Separation

Kellie (Former)		Justin		Income Stream	
Income		Income		Retirement	4185.16
Retirement	2092.58	Retirement	2082.58	SSDI	1282
SSDI	641	SSDI	641	SSDI Kids	712
SSDI Kids	712	SSDI Kids	0	Voc Rehab	1011.12
Voc Rehab	505.56	Voc Rehab	505.56	Child Support	107
Child Support	107	Child Support	0	Work Justin	0
Work Justin	50%	Work Justin	50%	Work Kellie	0
Work Kellie	100%	Work Kellie	0%		
Total Income	4058.14	Total Income	3239.14		
DIV Assets		DIV Assets		Retirement	50% For Life
Emergency	1000	Emergency	1000	Justin's Income	50% Year 1 or remarriage
House Fund	1500	Meth Retire	4428.77	Justin's Income	45% Year 2 or remarriage
Equity	68000	Total Assets	5428.77	Justin's Income	40% Year 3 or remarriage
Total Assets	70500			Justin's Income	35% Year 4 or remarriage
				Justin's Income	30% Year 5 or remarriage
				Justin's Income	25% Year 6 or remarriage
DIV Liabilities		DIV Liabilities		Justin's Income	20% Year 7 or remarriage
		Sig	17000	Justin's Income	15% Year 8 or remarriage
		Kel Rate	10000	Justin's Income	10% Year 9 or remarriage
		Lowes	2200	Justin's Income	5% Year 10 or remarriage
		Personal Loan	10100		
		MH Debt	3300		
Total Liabilities	0	Total Liabilities	42600		

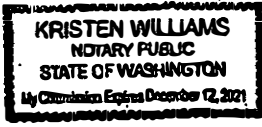
State of Washington Kellie Lynne Townley  
 County of Spokane

*Kellie Lynne Townley*

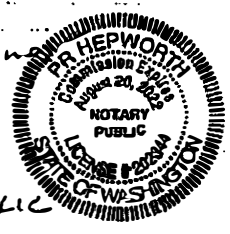
Justin David Townley

Signed and sworn to (or affirmed) before me on  
March 2, 2020  
Kellie Lynne Townley

Signature Kristen Williams  
 (Printed name) Kristen Williams  
 Title Notary Public  
 My appointment expires 12/12/2021



Signed before me  
 3/25/20  
*Pratt*  
 PR HEPWORTH  
 NOTARY PUBLIC



**Superior Court of Washington, County of Spokane**

In re the marriage of:

Petitioner:

JUSTIN TOWNLEY

And Respondent:

KELLIE TOWNLEY

No. 20-3-01706-32

Final Divorce Order (Dissolution Decree) (DCD)

Clerk's action required: 1, 2, 6, 13, 14, 15, 16, 18

**Final Divorce Order**

**1. Money Judgment Summary**

No money judgment is ordered.

**2. Summary of Real Property Judgment (land or home)**

*Summarize any real property judgment from section 7 in the table below.*

Grantor's name	Grantee's name	Real Property (fill in at least one)	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Justin Townley	Kellie Townley	46262.9117	26-26-44: PTN OF S850FT OF SW1/4 OF NW1/4 DAF: THE N425FT OF THE E375FT AND THE S249.60FT OF THE N674.60FT OF THE E315FT; TOG W/ THE S850FT OF THE SE1/4 OF THE NW1/4 LYG WLY OF FORKER RD; PARCEL'A' OF CE-85-13 (A&B)
Lawyer: Amy Rimov		represents: Kellie Townley	
Lawyer: Christine Gallagher		represents: Justin Townley	

➤ **The court has made Findings and Conclusions in this case and now Orders:**

**3. Marriage**

This marriage and any domestic partnerships or civil unions are dissolved. The Petitioner and Respondent are divorced.



Other: \*The guns may be sold by Ms. Townley, and the proceeds shall go to Mr. Townley.

**9. Respondent’s Personal Property** (possessions, assets, or business interests of any kind)

The personal property listed below is given to Respondent as their separate property. *(Include vehicles, pensions/retirement, insurance, bank accounts, furniture, businesses, etc. Do not list more than the last 4 digits of any account number. For vehicles, list year, make, model, and VIN or license plate number.)*

1. leather and beads	2. Household goods in her possession not otherwise ordered to the other
3. 2000 VW Cabrio	4. 50% of Camping gear
5. 2002 VW Jetta	6. personal effects
7. Survivor Benefit Plan	8. Separate bank account
9. BECU 5993 Checking account	10. 50% Military Retirement/Disability Pay

Other: Mr. Townley is to maintain the survival benefit plan for Ms. Townley and file the necessary forms to do so, and Ms. Townley will be responsible for any costs in maintaining the survivor benefit plan.

**10. Petitioner’s Debt**

The Petitioner must pay all debts the Petitioner incurred (took on) since the date of separation, unless the court makes a different order about a specific debt below.

The Petitioner must pay debts as required by the separation contract described in 5 above.

The Petitioner must pay all debts listed below:

Debt Amount	Creditor (person or company owed this debt)	Account Number (last 4 digits only)
\$1,074	VA overpayment Debt	
\$15,087	USAA Signature CC previously worth \$17k	
\$ ?	USAA CC 6651 SP Debt of Justin	
\$8,425	USAA Platinum Visa to Justin	
\$6,670	USAA Personal loan 1148	
\$2,200	Lowe's store card – Synchrony Bank	

Other: The parties shall work together to transfer accounts and/or debts to their respective names within 30 days of this order. The parties shall work together to remove the other party as an authorized user within 30 days of this order.

**11. Respondent’s Debt**

The Respondent must pay all debts the Respondent incurred (took on) since the date of separation, unless the court makes a different order about a specific debt below.

The Respondent must pay the debts that are now in the Respondent's name.



The Respondent must pay all debts listed below:

Debt Amount	Creditor (person or company owed this debt)	Account Number (last 4 digits only)
\$8,125	Mortgage Company Forbearance debt	
\$	Mortgage on Home	
\$8,886.96	GreenSky Furnace	
\$3,626.25	Best Buy CC	
\$6,371.53	BECU CC	
\$212.49	Care Credit	
\$305.82	Furniture Row	
\$1,074	VA overpayment Debt	

Other: Ms. Townley is responsible for paying Mr. Townley her portion of the VA debt. The parties shall work together to transfer accounts and/or debts to their respective names within 30 days of this order. The parties shall work together to remove the other party as an authorized user within 30 days of this order.

**12. Debt Collection (hold harmless)**

If one spouse fails to pay a debt as ordered above and the creditor tries to collect the debt from the other spouse, the spouse who was ordered to pay the debt must hold the other spouse harmless from any collection action about the debt. This includes reimbursing the other spouse for any of the debt that spouse paid and for attorney fees or costs related to defending against the collection action.

**13. Spousal Support (maintenance/alimony)**

Spousal support must be paid as required by the separation contract described in 5 above. Spousal support will end when Ms. Townley dies and if Mr. Townley dies it will be converted to the Survivor Benefit Funds.

The Petitioner is to pay Respondent spousal support as follows: If Mr. Townley earns income beyond his Social Security and Disability pay, he shall pay Ms. Townley a percentage of his income over the course of 10 years, beginning from March 25, 2020 until March 25, 2030.

Year 1 he pays 50%; Year 2 he pays 45%; Year 3 he pays 40%; Year 4 he pays 35%; Year 5 he pays 30%; Year 6 he pays 25%; Year 7 he pays 20%; Year 8 he pays 15%; Year 9 he pays 10%, and Year 10 year pays 5%.

The payment of this percentage of income as spousal support is not dependent upon whether Ms. Townley or Mr. Townley remarry.

The amounts due are owed to be transferred to Kelly Townley within 3 days of receipt of the funds by Justin Townley.

Amount:	Start date:	End date :	Payment schedule:
<u>\$ See para above</u> each month	<u>See para above</u>	<u>See para above</u> (If any)	<u>See para above.</u>

	Date 1 <sup>st</sup> payment is due	Day(s) of the month each payment is due (for example, "the 5 <sup>th</sup> ," "weekly," or "half on the 1 <sup>st</sup> and half on the 15 <sup>th</sup> ")				
<p>Whether or not there is an end date; as a matter of law, spousal support will end when either spouse dies, or the spouse receiving support gets married or registers a new domestic partnership, unless expressly stated below. (RCW 26.09.170(2).)</p> <p>Other: <u>See Financial Agreement attached as <b>Exhibit A</b>.</u></p>						
<p><b>Make all payments to:</b></p> <p><input checked="" type="checkbox"/> the other spouse directly by (check one):</p> <p style="margin-left: 40px;"><input type="checkbox"/> mail to: _____</p> <table style="margin-left: 80px; width: 80%; border-collapse: collapse;"> <tr> <td style="width: 50%; text-align: center; border-bottom: 1px solid black;">Street Address or PO box</td> <td style="width: 15%; text-align: center; border-bottom: 1px solid black;">City</td> <td style="width: 15%; text-align: center; border-bottom: 1px solid black;">State</td> <td style="width: 10%; text-align: center; border-bottom: 1px solid black;">Zip</td> </tr> </table> <p style="margin-left: 40px;"><input checked="" type="checkbox"/> direct deposit/transfer to a bank account identified by the receiving party. The receiving party must notify the paying party of any address or account change.</p> <p><input type="checkbox"/> the Washington State Support Registry (WSSR). The Registry will forward the support to the other spouse (only if child support is also ordered). (If you check this box, also check the "Clerk's action required" box in the caption on page 1.) DSHS Division of Child Support (DCS) can collect the support owed from the wages, earnings, assets, or benefits of the parent who owes support, and can enforce liens against real or personal property as allowed by any state's child support laws without notice to the parent who owes the support.</p> <p style="margin-left: 40px;"><b>To the Clerk:</b> forward a copy of this order to WSSR.</p> <p><input type="checkbox"/> the court clerk, who will forward the support to the other spouse (only if there is <b>no</b> child support order). (If you check this box, also check the "Clerk's action required" box in the caption on page 1.)</p> <p><input type="checkbox"/> Other (specify): _____</p>			Street Address or PO box	City	State	Zip
Street Address or PO box	City	State	Zip			

- The spouse paying support has public (state) retirement benefits. (RCW 26.09.138)
- The spouse owed support may ask, without giving notice, for the other spouse's retirement benefits to be assigned to him/her if:
  - \$100 or more in spousal support is more than 15 days late, or
  - The other spouse asks to take money out of their public retirement account. (RCW 41.50)
- The Department of Retirement Systems may pay all or part of a withdrawal from a retirement account directly to the spouse owed support. (RCW 41.50.550(3))
- Other (specify): \_\_\_\_\_

**14. Fees and Costs** (Summarize any money judgment in section 1 above.)

Each spouse will pay their own fees and costs.

**15. Protection Order**

No one requested an *Order for Protection*.

**16. Restraining Order**

No one requested a *Restraining Order*.

**17. Children of the marriage**

This court has jurisdiction over the children the spouses have together as explained in the *Findings and Conclusions* for this case.

If there are children of both spouses listed in the *Findings and Conclusions* who do not have both spouses listed on their birth certificates, the State Registrar of Vital Statistics is ordered to amend the children's birth certificates to list both spouses as parents upon receipt of a certified copy of this order and the *Findings and Conclusions*.

**Important!** The court does not forward this *Order* to the State Registrar. To amend the birth certificate, a party must provide a certified copy of this *Order* and the *Findings and Conclusions* to the State Registrar of Vital Statistics. Other information may be required by the State Registrar of Vital Statistics. If the child was **not** born in Washington, contact the appropriate agency in the state where the child was born.

**18. Parenting Plan**

The court signed the final *Parenting Plan* filed separately today.

**19. Child Support**

**Court Order** – The court signed the final *Child Support Order* and *Worksheets* filed separately today.

*Tax issues and post-secondary (college or vocational school) support are covered in the Child Support Order.*


**20. Other Orders (if any):**

Per the parties' separation agreement, attached as **Exhibit A**, which consists of paying 50% of the husband's military retirement pay/ military disability pay for Justin's life, minus the amount paid by Ms. Townley for paying the continuing cost for the survivor's benefits, this portion of spousal support is owed beginning June 2022. Mr. Townley will provide Ms. Townley proof of this disability entitlement yearly each time the amount of disability or survivor benefit cost changes occur.

Mr. Townley will make the 1/2 disability payment transfer electronically (minus the survivor's benefit cost) to Ms. Townley immediately after receiving the funds.

Mr. Townley will seek and effect all necessary paperwork to ensure the survivor's benefit of the disability pay is permanently assigned to Kellie.

Ordered. 9-23-2022  
Date

  
Judge Bjelkengren

**Petitioner and Respondent or their lawyers fill out below.**


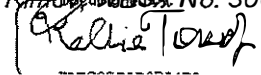
This document:

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me

This document:

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me

Christine Gallagher, WSBA No. 28364

  
Amy Rimov, WSBA No. 30613  


8/5/2022

Justin Townley, Petitioner

Date

Kellie Townley, Respondent

Date

# Exhibit A

Financial Agreement between Justin David Townley and Kellie Lynne Townley effective 20200401 for Year 1 of Separation

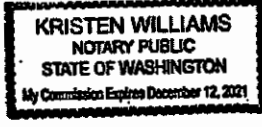
Kellie (Forker)		Justin		Income Stream	
Income		Income		Retirement	4185.16
Retirement	2092.58	Retirement	2092.58	SSDI	1282
SSDI	641	SSDI	641	SSDI Kids	712
SSDI Kids	712	SSDI Kids	0	Voc Rehab	1011.12
Voc Rehab	505.56	Voc Rehab	505.56	Child Support	107
Child Support	107	Child Support	0	Work Justin	0
Work Justin	50%	Work Justin	50%	Work Kellie	0
Work Kellie	100%	Work Kellie	0%		
<b>Total Income</b>	<b>4058.14</b>	<b>Total Income</b>	<b>3238.14</b>		
				<b>Kellie Income</b>	<b>Duration</b>
DIV Assets		DIV Assets		Retirement	50% For Life
Emergency	1000	Emergency	1000	Justin's Income	50% Year 1 or remarriage
House Fund	1500	Meth Retire	4428.77	Justin's Income	45% Year 2 or remarriage
Equity	68000	<b>Total Assets</b>	<b>5428.77</b>	Justin's Income	40% Year 3 or remarriage
<b>Total Assets</b>	<b>70500</b>			Justin's Income	35% Year 4 or remarriage
				Justin's Income	30% Year 5 or remarriage
				Justin's Income	25% Year 6 or remarriage
DIV Liabilities		DIV Liabilities		Justin's Income	20% Year 7 or remarriage
		Sig	17000	Justin's Income	15% Year 8 or remarriage
		Kel Rate	10000	Justin's Income	10% Year 9 or remarriage
		Lowe's	2200	Justin's Income	5% Year 10 or remarriage
		Personal Loan	10100		
		Mortgage Debt	3300		
<b>Total Liabilities</b>	<b>0</b>	<b>Total Liabilities</b>	<b>42600</b>		

State of Washington Kellie Lynne Townley *Kellie Lynne Townley* Justin David Townley

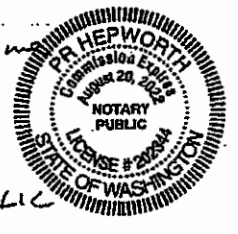
County of Spokane

Signed and sworn to (or affirmed) before me on March 25, 2020 by Kellie Lynne Townley

Signature *Kristen Williams*  
 (Printed name) Kristen Williams  
 Title Notary Public  
 My appointment expires 12/12/2021



*Signed before me  
 3/25/20  
 Kristen Williams  
 Notary Public*



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### Possible Remedies for the Former Spouse

Zealous advocacy and professional competence demand that remedies and protection for the former spouse be addressed initially at the stage of drafting the settlement document. The issues at stake are finances, fairness, and foreseeability. The FS might rely on the steady, stable receipt of pension payments to pay the mortgage, the utilities, or the grocery bill each month. The FS will undoubtedly consider the agreement or decree to be fixed and final. It could be devastating for her to receive a drastically reduced payment without court approval or appeal.

The *Howell* decision magnifies the importance of using an indemnification provision in the property settlement. About 95 percent of cases involving the division of marital or community property are settled. The *Howell* case involved an order by the trial court in the absence of a contractual reimbursement clause. It's one thing to argue about a judge's power to require, under principles of fairness and equity, a duty to indemnify; that approach has been eliminated by the *Howell* decision. It's another matter entirely to require a litigant to perform what he has promised in a contract.<sup>175</sup> Unless and until the Supreme Court makes a different ruling, the indemnification clause in a settlement or a separation agreement ought to provide some protection for the FS. It is always a good practice for the former spouse's attorney to include language for an indemnification clause in the settlement, language that requires the retiree to pay back or reimburse the former spouse for any reduction in the share or amount of retired pay that is divided.

### Drafting the Contractual Indemnification Clause

With this in mind, Mrs. Roberts's attorney first must focus on prevention by prudent drafting if he or she is handling the case at the time of preparation of the settlement agreement or court order. The document should include a provision that states that the former spouse's share of military retired pay is based on *no VA waivers* or, if there is already a VA waiver at the time of the pension division, only on the waiver currently in place. This clause has the effect of specifying the intent of the court and the underlying facts in existence at the time of the order or agreement. Such a clause might read:

<sup>175</sup> The *Mansell* decision specifically noted that the decision was not based on the issue of whether a SM or retiree could agree to an assignment of VA benefits (i.e., division of VA disability compensation). *Mansell v. Mansell*, 490 U.S. at 587, n.6.

At the time of this hearing, the Husband is receiving [*here state amount of pay, active duty or retired, plus any deductions*]. The Husband has not elected any VA disability pay in lieu of retired pay [*or state the amount or percentage of retired pay presently waived if that is the case*]. The anticipated pension payment to the Wife is approximately \$\_\_\_\_ per month [*—OR—The court does not anticipate any further reduction in the share of Wife*]. The award herein is based on these facts.

In addition, the order or agreement should state that the court retains continuing jurisdiction over the issue of property division (in the event that the SM still elects to apply for a waiver). Such a clause would allow the judge to review the case in the future and adjust the retired pay amounts or percentages, or perhaps modify the division of other marital property, should the SM take actions that result in a reduced share for the ex-spouse.

This could be combined with a “savings clause” that specifically states that there shall be an adjustment of the former spouse’s share to pre-waiver levels by increasing his or her share of retired pay or requiring payments from other sources. Such a clause would benefit Mrs. Roberts by clearly setting out the intent of the court if a review hearing is held, and this could be helpful if the judge assigned to the case is not the one who originally heard the pension division matter or signed the consent order. Such a clause might state:

The parties consent to the court’s retaining continuing jurisdiction to modify the pension division payments or the property division specified herein if Husband should waive military retired pay for an equivalent amount of VA disability compensation and this action reduces Wife’s share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the Wife’s share or amount to the pre-waiver level or to require payments or property transfers from Husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court in this order.

The indemnification clause needs to be clear and unequivocal as to the promise, agreement, and duty to reimburse. Leave nothing to chance, and do not draft in a way that requires assumptions or inferences. Express contractual indemnification means that the obligation to pay back lost money from the spouse’s pension-share amount is expressly set out in the settlement or order.

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The importance of upholding express contractual terms that provide for indemnification, with an explanation that *Mansell v. Mansell* did not rule on the issue, is found in the decision *Selitsch v. Selitsch*, a 2015 Tennessee case which stated:

A careful review of *Mansell* reveals that the United States Supreme Court did not preclude spouses from contractually agreeing to divide non-disposable retired pay. In *Mansell*, the husband's original petition with the trial court asserted grounds for relief including: (1) that the USFSPA prevented state courts from treating his disability benefits as community property; and (2) federal law prevented courts from giving effect to parties' contractual assignment of military benefits. See *Mansell [v. Mansell]*, 490 U.S. at 586; see also [Brett R. Turner] 2 Equit. Distrib. of Property, 3d § 6:6. The wife responded that, even if the husband's contentions were true, res judicata prevented a collateral attack on the final divorce decree. *Mansell*, 490 U.S. at 586 n. 5.

The California courts denied the husband's petition for relief, holding that federal law permitted state courts to treat disability benefits as community property. *Mansell*, 490 U.S. at 586. As discussed above, the Supreme Court of the United States reversed, holding that the USFSPA prevents a court from considering non-disposable retired pay as community property during a divorce. . . . Importantly, though, the Supreme Court did not consider the merits of the husband's contract argument or the wife's res judicata argument, and decided the case solely on USFSPA grounds. See *id.* at 586-87 nn. 5-6; 2 Equit. Distrib. of Property, 3d § 6:6. Thus, *Mansell* cannot be read to preclude enforcement of a parties' contractual agreement to divide military funds that fall outside of the USFSPA's definition of "disposable retired pay."

This conclusion has been recognized by other state courts as well. See *Poullard v. Poullard*, 780 So. 2d 498, 500 (La. Ct. App. 2001) ("[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another"); *Krapf v. Krapf*, 439 Mass. 97, 786 N.E.2d 318, 326 (Mass. 2003) ("Nothing in 10 U.S.C. § 1408 or in the *Mansell* case precludes a veteran from voluntarily entering into a contract whereby he agrees to pay a former spouse a sum of money that may come from the VA disability benefits he receives."); *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 510-11 (Nev. 2003) (holding that federal law does not

prevent a husband from using his disability payments to satisfy a contractual obligation to his wife); *Hoskins v. Skojec*, 265 A.D.2d 706, 707, 696 N.Y.S.2d 303 (N.Y. App. Div. 1999) (“[P]arties are free to contractually determine the division of [military disability] benefits and a court may order a party to pay such moneys to give effect to such an agreement.”); *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283, 285 n.1 (N.C. Ct. App. 2002) (noting that *Mansell* does not prohibit military spouses from contracting away their disability benefits), *aff’d*, 357 N.C. 153, 579 S.E.2d 248 (N.C. 2003); *Evans v. Evans*, No. 02CA2869, 2003-Ohio-4674, 2003 WL 22053929, at \*3 (Ohio Ct. App. Aug. 22, 2003) (recognizing that Ohio courts permit parties to a divorce to agree to divide military disability pensions); *Price v. Price*, 325 S.C. 379, 480 S.E.2d 92, 94 (S.C. Ct. App. 1996) (“While we recognized that *Mansell* does not permit a state court to treat military disability benefits as property subject to equitable distribution, we do not believe the decision can be used by Husband to undermine the Agreement approved by the court.”); *Maxwell v. Maxwell*, 796 P.2d 403, 406–07 (Utah Ct. App. 1990) (concluding that a stipulation dividing husband’s gross retirement pay, without making the various deductions required by the USFSPA, could be enforced without violating *Mansell*); *Callahan v. Callahan*, 184 Vt. 602, 958 A.2d 673, 677 (Vt. 2008) (holding that, although the USFSPA limits an ex-spouse’s interest in military retirement pay to “disposable retired pay,” parties may contract otherwise and are not “required to use the precise, federally defined term of art . . . to effectuate a legally binding agreement[.]”); *McLellan v. McLellan*, 33 Va. App. 376, 533 S.E.2d 635, 638 (Va. Ct. App. 2000) (“[F]ederal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits.”).

Therefore, we conclude that the agreement of the spouses to share Husband’s retirement benefit does not violate federal law. Moreover, the fact the agreement is set forth in a court order does not violate federal law. Accordingly, Husband’s argument that the property settlement as set forth in the final decree violates federal law is unpersuasive.<sup>176</sup>

<sup>176</sup> *Selitsch v. Selitsch*, 492 S.W.3d 677, 686–88 (Tenn. Ct. App. 2015).

A memorandum on the validity of express contractual indemnification, prepared by Laura W. Morgan of Family Law Consulting, is at Appendix 8-BB. It analyzes the issue in the context of Missouri law and a retiree who was separated with a military disability retirement, but the arguments apply with equal validity to the situation of a VA waiver.

Careful drafting of a marital settlement agreement or court order is the key to indemnifying the nonmilitary spouse when this type of retirement might occur in the future. A good example of this is found in *Owen v. Owen*, a Virginia Court of Appeals case.<sup>177</sup> In that case, the property settlement agreement (PSA) contained an indemnification clause. The clause specified the level of payments that the ex-wife would receive, "one-half of the husband's gross military retirement pay based on 25 years of service, including cost-of-living increases."<sup>178</sup> The PSA clause also stated that the husband would take no action to reduce this monthly payment and that he guaranteed this and agreed to indemnify the former wife against any breach by him and to hold her harmless therefrom. This language did not specify the source of the indemnification payments and was held not to violate the *Mansell* mandate.

The Virginia Court of Appeals mentioned in passing the alternative remedy of providing replacement spousal support in *Owen v. Owen*:

The guarantee/indemnification clause of the PSA constitutes consideration for the wife's agreement to waive spousal support. If this clause were found to be invalid, the consideration would fail, and we would be obliged to remand this cause for further proceedings to determine spousal support.<sup>179</sup>

How does one draft a provision to protect the nonmilitary spouse? There are several basic building blocks for a clause that protect the nonmilitary spouse from the erosion of his or her expected pension division payments through the election of VA disability compensation and the concurrent waiver of retired pay.

First, such a clause should include a straightforward statement of the facts and intentions of the parties as to what monetary amount the nonmilitary

<sup>177</sup> *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (1992). Other cases upholding the indemnification approach (either by agreement or imposed in the terms of the original court order) include *Scheidel v. Scheidel*, 129 N.M. 223, 4 P.3d 670 (2000), *Abernathy v. Fishkin*, 670 So. 2d 1027 (Fla. Dist. Ct. App. 1996), *Strassner v. Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995), and *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (Idaho Ct. App. 1993).

<sup>178</sup> *Owen*, 14 Va. App. at 627.

<sup>179</sup> *Id.*

**RIMOV LAW**

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