**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

| | | |
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| 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

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.

*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

division upon dissolution of a marriage. 10 U.S.C. § 1408(c)(1).[1] "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.[2] *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

[1] 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."

[2] 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).

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.*

*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.[3] We reverse and remand for proceedings consistent with this opinion.

[3] 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,

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,[4] 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.

[4] 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.

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:

| | 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

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.J.

Staab, J.