Supreme Court No. 102935-7
Court of Appeals No. 39265-1-III

Supreme Court
of the State of Washington

In re the Marriage of:

Justin Townley,

Respondent,

and

Kellie Townley,

Petitioner.

Answer to Petition for Review

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1. Identity of Respondent

Justin Townley, Appellant at the Court of Appeals and Respondent herein, asks this Court to deny review.

2. Introduction

Before filing for divorce, Justin and Kellie Townley signed a written agreement to divide Justin's military disability pay. At the time, Justin did not know that division of his disability pay was pre-empted by federal law. Despite Justin's arguments, the trial court held the agreement valid and entered a decree that divided the disability pay, believing that the agreement could avoid pre-emption.

The Court of Appeals correctly held that the division of disability pay was pre-empted, despite the parties' agreement. Because Kellie fails to demonstrate any of the criteria for review by this Court under RAP 13.4(b), the Court should deny her petition for review.

3. Restatement of Issues Presented for Review

Kellie's petition states a number of issues, but they are all really sub-arguments under a single question of law, which the Court of Appeals correctly decided in Justin's favor. Justin stated the issue as follows in his opening brief: "Federal law pre-empts any state law that would allow division of military disability retirement pay in a divorce proceeding. By enforcing the financial agreement, the trial court impermissibly divided Justin's military disability retirement pay. **Did the trial court err in enforcing that portion of the financial agreement?**" Br. of App. 3 (emphasis in original).

Alternatively, the Court of Appeals stated the issue as follows: "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." Opinion at 1 (emphasis added). This is the question that Kellie would have this Court review. But because her petition fails to demonstrate any grounds for this Court's review, the Court should deny her petition.

4. Statement of the Case

The facts of the case are concisely and correctly stated in the Court of Appeals Opinion at 1-2. For further detail, see Justin's Br. of App. 5-10. The trial court proceedings are summarized at Br. of App. 10-15.

Kellie's Statement of the Case in her petition contains some misstatements, attempting to re-cast the property division as spousal support, as she did at the Court of Appeals. Justin demonstrated the falsity of

this revisionist history in Reply Br. of App. 1, 3-10 (citing, *e.g.,* RP 808-10, 819-20 (oral ruling dividing the disability pay as property); CP 139, 150-51 (written orders dividing the disability pay as property); *Perkins v. Perkins*, 107 Wn. App. 313, 317-18, 26 P.3d 989 (2001) (a servicemember's disability entitlement is treated as property but is not divisible due to federal pre-emption)). The trial court treated Justin's disability pay as property but erred when it divided the disability pay contrary to federal law.

5. Argument

A petition for review should be accepted only if the Court of Appeals decision conflicts with a published decision of the Supreme Court or the Court of Appeals; if the case involves a significant constitutional question; or if the case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). This case involves none of

those things. The Court of Appeals correctly reversed the property distribution as pre-empted by federal law. This Court should deny further review.

5.1 The Court of Appeals decision does not conflict with any published Washington precedent.

5.1.1 Kellie's admission that no Washington precedent squarely addresses the issue in this case should be enough for this Court to deny review.

Kellie's petition correctly admits that the Court of Appeals decision here does not conflict with any prior, published Washington precedent. Indeed, there is no Washington precedent directly addressing the question of whether divorcing parties can circumvent federal pre-emption by agreeing to divide military disability pay. And those decisions that come close to addressing it are in line with the Court of Appeals decision here.

Kellie calls this an "opportunity," but it is not the kind of opportunity that this Court is in the business of taking. Rather, this Court allows for "rigorous debate

at the intermediate appellate level" as subsequent panels of the Court of Appeals consider the same issues. *In re Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). If a consensus arises, there is no need for this Court to weigh in. Because of this possibility, judicial economy favors denying review at this early stage.

If subsequent panels eventually disagree, this Court will recognize the conflict and grant review. *Arnold*, 190 Wn.2d at 150. If this occurs, the "rigorous debate" at the Court of Appeals "improves the quality of appellate advocacy and the quality of judicial decision making" and "creates the best structure for the development of Washington common law." *Id.* at 152, 154. But where, as here, only one panel of the Court of Appeals has had the chance to ring in on this issue, this Court should allow the issue to simmer for a while, to see if any other panels will disagree.

5.1.2 Existing Washington precedent actually supports the Court of Appeals decision here.

So far, other panels that have addressed related issues appear to agree with the Court of Appeals decision in this case. Kellie's arguments to the contrary are incorrect. First, an analysis of the Court of Appeals decision and the underlying federal law would be helpful.

The Court of Appeals correctly summarized the controlling case law on federal pre-emption and military retirement pay. Opinion at 3-5. In ***McCarty v. McCarty***, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the United States Supreme Court held that federal pre-emption precluded state courts from dividing *any* military retirement pay in a divorce. Congress immediately responded by enacting the USFSPA, which provided a "precise and limited" grant of authority back to state courts to divide "disposable retired pay," a statutorily defined term that excludes

disability pay. **10 U.S.C. 1408**; ***Mansell v. Mansell***, 490 U.S. 581, 588-89, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). Thus, the pre-emption found in *McCarty* still precluded state courts from dividing disability pay. ***Howell v. Howell***, 581 U.S. 214, 218, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017); ***Mansell***, 490 U.S. at 594-95.

The Court of Appeals astutely recognized that *Mansell* determines the outcome in this case. Opinion at 1, 6. In *Mansell*, at the time of the divorce, the servicemember was already retired and receiving both "disposable retired pay" and disability pay. ***Mansell***, 490 U.S. at 585. The parties "entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." ***Id.*** at 585-86. Some years after the decree had become final, Major Mansell sought to reopen and modify the decree to eliminate the sharing

of his disability pay, arguing it was pre-empted by federal law. ***Id.*** at 586. The U.S. Supreme Court agreed with Major Mansell that division of his disability pay was pre-empted. ***Id.*** at 594-95.[1]

Like *Mansell*, Justin was, at the time of the agreement and the decree, already receiving military disability pay. Under the U.S. Supreme Court's decision in *Mansell*, division of Justin's disability pay was pre-empted, and the trial court was precluded from adopting the parties' agreement to divide it. The Court of Appeals correctly reversed.

Washington courts have strictly followed the U.S. Supreme Court's lead on the pre-emption of dividing

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[1] On remand, the California Court of Appeals held that, despite the high Court's clarification of the pre-emption, the final decree was nevertheless res judicata and there were no grounds for reopening the decree. ***In re Marriage of Mansell***, 217 Cal.App.3d 219, 234-35, 265 Cal. Rptr. 227 (Cal. Ct. App. 1989). But because Justin has appealed directly from entry of the decree, no res judicata concerns are present in this case. Thus, if pre-emption applies, the decree must be reversed.

disability pay. In ***In re Marriage of Kraft***, 119 Wn.2d 438, 451, 832 P.2d 871 (1992), this Court held, "The trial court may not … divide and distribute the disability pay or value it and offset other property against that value." In ***Perkins v. Perkins***, 107 Wn. App. 313, 318, 26 P.3d 989 (2001), the Court of Appeals clarified, "Federal law prohibits a state dissolution court from dividing such a pension [military disability retirement pay], and from distributing *by any means* any part of such pension" (emphasis in original). The Court of Appeals decision here is consistent with these prior precedents in applying federal pre-emption to the trial court's decree.

While *Kraft* and *Perkins* did not involve agreements of the parties, agreements *were* involved in the Division II cases of ***In re Marriage of Weiser***, 14 Wn. App. 2d 884, 475 P.3d 237 (2020), and ***In re Marriage of Kaufman***, 17 Wn. App. 2d 497, 485 P.3d

991 (2021). Both of these cases are consistent with the Court of Appeals decision here.

In *Weiser*, the court held that an error in applying federal law did not render the original decree void or otherwise subject to collateral attack. ***Weiser***, 14 Wn. App. 2d at 906-07. The doctrine of res judicata required the trial court to enforce the original decree, even if it was in error. ***Id.*** at 911. *Kaufman* followed the *Weiser* analysis, explaining, "res judicata protected the finality of the unappealed prior order even where the trial court's enforcement of that order resulted in a property division that contradicted federal and state law because errors of law do not 'automatically open [the trial court's] judgments to collateral attack.' " ***Kaufman***, 17 Wn. App. 2d at 511.

The underlying rationale of both cases was that the prior unappealed orders were incorrect at the time they were made because they violated federal pre-emption. ***Kaufman***, 17 Wn. App. 2d at 512. The orders

were only upheld because of res judicata, a concern that is not present in this direct appeal. The decision of the Court of Appeals here is consistent with the reasoning of these prior precedents.

Because there is no conflict between the Court of Appeals decision and prior published precedents, this Court should decline further review under RAP 13.4(b).

5.1.3 Decisions of other state courts are irrelevant to this Court's decision of whether to accept review.

Kellie presents some decisions of other state courts, arguing that this Court should follow those decisions. But the decisions of other state courts are irrelevant to the question of whether to accept review of this case. A conflict with decisions of other state courts is not one of the criteria for accepting review under RAP 13.4(b).

Nevertheless, Justin will address some of Kellie's arguments. The cases Kellie relies on are factually

distinguishable. None involves a direct appeal from a divorce decree based on an agreement that divided disability pay at the time of the decree. Justin has only located two such cases, and both were resolved in his favor.

In ***McMahan v. McMahan***, 567 So. 2d 976 (Fla. App. 1990), the servicemember appealed from entry of a decree based on the agreement of the parties to divide disability pay. ***Id.*** at 977. The Florida appellate court reversed the decree, holding, shortly after *Mansell*, "case law has now convincingly established that no portion of a military pension which is attributable to disability is subject to distribution for the benefit of the other spouse." ***Id.*** at 978. The court rejected the wife's contract-based arguments:

> Finally, appellee's argument that this case is distinguishable from federal and state precedent reaching a contrary result, because it involves a contract between parties, is without merit. *Mansell* also involved a property settlement agreement

> which required Mr. Mansell to pay his wife 50 percent of his total retirement pay, which necessarily included a portion of disability benefits. Despite the existence of this contract, the United States Supreme Court determined that federal law controlled, and that the wife was not entitled to any portion of the military retirement pay that constituted disability.

Id. at 979.

Similarly, in *In re Marriage of Babin*, 437 P.3d 985 (Kan. Ct. App. 2019), the trial court believed that pre-emption could be avoided because the parties agreed to divide disability pay. *Id.* at 987. The servicemember timely appealed the decree. *Id.* at 988. The wife relied on contractual arguments, asserting the agreed division was "no more objectionable than it would be if he decided to use that disability payment to buy groceries and gas at the local convenience store." *Id.* at 991. The Kansas appellate court disagreed: "Although creative, we believe this argument does not follow the intent of Congress, which is to ensure that

the disability benefit goes to the support of the veteran, not to the support of others." ***Id.*** The court noted that the U.S. Supreme Court in *Howell* had "overruled cases relying on the sanctity of contract." ***Id.*** (citing ***Howell***, 137 S.Ct. at 1404-05).

Other state courts are thus in agreement with the Court of Appeals decision here in cases based on similar facts. The cases highlighted by Kellie, in contrast, are factually distinguishable. Many of her cases are *Weiser*-type cases rejecting collateral attacks on final judgments. *See* ***Shelton v Shelton***, 78 P.3d 507 (Nev. 2003); ***Martin v Martin***, 520 P.3d 813, 820 (Nev. 2022); ***Hayes v Hayes***, 228 Or. App. 555, 208 P.3d 1046 (2009). These cases are unhelpful because they rely on the finality of the original decree, a fact that is simply not present in this direct appeal.

Those cases that Kellie cites as allowing parties to contract around federal pre-emption all miss important points that have been recognized by other

state courts. For example, some of Kellie's cases claim that the federal statutes do not bar a servicemember from using their disability pay in any way they see fit. But this is not true. As noted by the Michigan supreme court in ***Foster v. Foster***, 949 N.W.2d 102, 112-13 (Mich. 2020), **38 U.S.C. 5301** prohibits servicemembers from assigning disability pay to another person. Under that statute, any agreement that gives another person the right to receive a portion of the disability pay "shall be deemed to be an assignment and is prohibited." **38 U.S.C. 5301(a)(3)(A)**; *see* Reply Br. of App. 15-17. Thus, the statutes specifically limit a servicemember's freedom to contract away their disability benefits, in keeping with the Congressional intent that supports pre-emption.

The Minnesota Court of Appeals refused to enforce a parties' agreement to indemnify a spouse for the conversion of disposable retired pay to disability pay, recognizing that *Howell* had overruled cases that

relied on such contractual arguments. ***In re Marriage of Mattson***, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017). In response to an argument that the servicemember could do whatever he wanted with the disability payments once they were in his pocket, the court held, "Again, as recognized in *Howell*, state courts may not simply circumvent federal preemption by relying on arguments rooted in semantics. To recognize the legitimacy of such an argument would eviscerate federal preemption." ***Id.***

The Maryland appellate court recognized that, after *Howell*, it had become clear that

> the veteran's ability under federal law to waive retirement pay for disability benefits, at whatever time his disability status might change, overrides (preempts!) any state law agreement he might have made, or state court judgment to which he was a party, relating to his military retirement benefits.

Hurt v. Jones-Hurt, 223 Md. App. 610, 626, 168 A.3d 992 (2017).

Kellie's argument that *Mansell* does not bar state courts from adopting an agreement of the parties to divide disability pay is not well taken. *Mansell* involved a property settlement agreement that divided disability pay. Despite the agreement, the U.S. Supreme Court held that such division was pre-empted. If the Court had believed that an agreement of the parties was safe from pre-emption, it would have held the parties to their contract. *See* ***Abernathy v Fishkin***, 699 So.2d 235, 239 (Fla. 1997). Instead, the U.S. Supreme Court held that the decree based on the parties' agreement was pre-empted. The Court of Appeals in this case correctly concluded that it was bound by *Mansell*. The trial court's decree dividing disability pay was pre-empted, despite the agreement of the parties.

The Court of Appeals decision in this case was correct. It does not conflict with any prior published Washington precedent. Conflict among the decisions of

other state courts is not a reason for this Court to accept review. The Court should deny Kellie's petition.

5.2 There is no constitutional question.

This case does not involve a significant constitutional question. The only constitutional question Kellie raises is the "fundamental right to contract." Petition at 14. But this is the first time she raises any sort of constitutional argument against federal pre-emption. She does not attempt to demonstrate that the Court of Appeals made a manifest error affecting her constitutional rights. *See* RAP 2.5(a).

In any event, as Kellie acknowledges, the right to contract may be limited by Congress so long as there is a rational basis for doing so. *E.g.,* ***West Coast Hotel Co. v. Parrish***, 300 U.S. 379, 398, 57 S. Ct. 578, 81 L. Ed. 703 (1937) ("we again declared that if such laws have a reasonable relation to a proper legislative purpose, and

are neither arbitrary nor discriminatory, the requirements of due process are satisfied; … and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."). The federal statutes at issue here cleared that low bar when the Court expressed in *Mansell*, "Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice." ***Mansell***, 490 U.S. at 594. Congress was free to choose to restrict servicemembers' rights to contract away their disability benefits while leaving them free to divide only their "disposable retired pay." *See* ***Id.*** Kellie fails to demonstrate any significant constitutional question for this Court's review.

The remainder of this section of her petition, from pages 14-28, relate to state and federal statutes, not to any constitutional questions. Her arguments on these pages do not demonstrate any grounds for this Court to

accept review under **RAP 13.4(b)**. Throughout these pages, Kellie continues to misinterpret the federal statutes and the U.S. Supreme Court decision in *Mansell*. She asks this Court to re-do the pre-emption analysis already completed by the U.S. Supreme Court in *McCarty*, *Mansell*, and *Howell*. Those cases and their pre-emption analysis are binding on this Court. *See* ***Howell***, 581 U.S. at 222 (the reasons stated for pre-emption in *McCarty* "apply a fortiori to disability pay."). This Court can safely disregard all of the arguments on pages 14-28 of the petition.

Because Kellie fails to demonstrate any significant constitutional question, this Court should deny her petition.

5.3 There is no issue of public interest.

Kellie also fails to identify any issue of substantial public interest. She argues that the Court of Appeals decision defeats the Washington

legislature's intent for amicable settling of domestic disputes and that it frustrates the federal intent that disability pay is to benefit the veteran and their family. Both arguments are incorrect.

The Court of Appeals decision, and the federal pre-emption that it upholds, do not discourage parties from settling their divorce disputes. Pre-emption of division of disability pay simply changes the possible terms of settlement. Disability pay is off-limits. Settlements will have to be on other terms. Settlements are always made within the confines of a larger legal framework. Pre-emption is simply part of that framework. Parties and their counsel will adjust and will continue to find ways to settle their disputes.

The Court of Appeals decision supports, rather than injures, the "federal program." The federal program is set forth in the USFSPA, in which Congress "balanced the military objective of maintaining a national defense with the goal of fairly compensating

military spouses in divorce." ***Mattson***, 903 N.W.2d at 237-38 (citing ***Mansell***, 490 U.S. at 594 (noting congressional intent to both "create new benefits for former spouses and to place limits on state courts designed to protect military retirees")). To achieve this balance, Congress carved out "disposable retired pay" as an asset divisible between spouses in a dissolution (compensating military spouses), but specifically reserved disability pay as the exclusive property of the servicemember (protecting military retirees and national defense goals). ***Id.*** at 238.

It is not for Kellie or this Court to argue with the policy choice made by Congress. ***Mansell***, 490 U.S. at 594. Congress chose to reserve disability pay as the exclusive property of the servicemember in a divorce. *See* ***Id.***; ***Howell***, 581 U.S. at 218. The Court of Appeals decision here supports this federal policy choice. It is this Court's duty to uphold that policy, not to question its wisdom.

Because Kellie fails to demonstrate any issue of substantial public interest that this Court can decide, the Court should deny her petition for review.

6. Conclusion

The Court of Appeals correctly reversed the division of Justin's disability pay as pre-empted by federal law. The Court of Appeals decision does not conflict with any published Washington precedent, does not involve any constitutional questions, and does not raise any issue of substantial public interest that could warrant this Court's attention. The Court should deny Kellie's petition for review.

I certify that this document contains 3,615 words.

Submitted this 20th day of May, 2024.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on May 20, 2024, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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