

The U.S. Supreme Court Rules on Divorce and Military Disability Benefits



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The May 15, 2017, U.S. Supreme Court ruling in *Howell v. Howell* is a unanimous victory for disabled U.S. veterans. The U.S. Supreme Court decision upholds federal law and prior rulings that military disability compensation is not divisible in divorce proceedings.

Case Background

Air Force veteran John Howell and Sandra Howell divorced in 1991 in the community property state of Arizona. The divorce decree awarded Sandra one-half (1/2) of John’s military retirement compensation. In 2005, the Department of Veterans Affairs found John to be partially disabled due to a service-related injury and awarded him disability compensation. In order to receive the disability compensation, non-taxable income, under Federal law 38 U. S. C. § 5305, John was required to waive an equivalent

portion of his military retirement compensation, which is taxable income. The election resulted in a \$250 per month reduction in John’s military retirement compensation which equated to a \$125 per month reduction in the amount Sandra would receive.

Sandra then petitioned the Arizona Family Court to enforce the original divorce decree and restore the \$125 per month amount she was no longer receiving. The Family Court concurred with Sandra and “held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John’s retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver.”

The Arizona Supreme Court affirmed the ruling and held that “federal law did not pre-empt the family court’s order.” The Arizona Supreme Court distinguished the *Mansell* ruling with the *Howell* case based on the fact that the veteran’s waiver in *Mansell* took place before the divorce proceeding while the waiver *Howell* took place after the divorce.

History of the Law

In *McCarty v. McCarty*,¹ the U.S. Supreme

Court addressed whether a state “could consider any of a veteran’s retirement pay to be a form of community property, divisible at divorce.” The Court concluded that states could not, as it threatened to harm clear and substantial federal interests. As a result, in 1982 Congress passed the Uniformed Services Former Spouses’ Protection Act (“USFSPA”). The USFSPA authorizes states to treat a veteran’s “disposable retired pay” as community property divisible upon divorce.² However, it excludes from the definition of “disposable retired pay” any amounts deducted from that pay “as a result of a waiver ...required by law in order to receive” disability benefits.³

The first big test of the USFSPA was the case of *Mansell v. Mansell*.⁴ *Mansell* involved a California divorce and “property settlement which required Mansell to pay his spouse fifty (50%) percent of his total military retirement compensation, including that portion of his retirement compensation waived so that he could receive disability benefits. Mansell later moved to modify the divorce decree and remove the disability compensation portion of the payment. When the California courts refused to modify the divorce decree, the U.S. Supreme Court did and held that “federal law forbade California from treating the waived portion as community property divisible at divorce.” Justice Thurgood Marshall, in writing the opinion for the Court, eloquently noted that federal law “completely pre-empted the application of state community property law to military retirement pay” and the USFSPA provided a “precise and limited grant of the power to divide federal military retirement pay.”

U.S. Supreme Court

As a result of different state court holdings on this issue, the U.S. Supreme Court accepted the case. In accepting the case, the Court addressed whether the Arizona state court could resort to semantics, by describing its order as an order requiring John to “reimburse” or to “indemnify” Sandra, to avoid the ruling in *Mansell*. Similarly, the Court reaffirmed that while a divorce decree might be said to “vest”

a divorced spouse with an immediate right to a portion of their former spouse's military retirement compensation, that interest is contingent and subject to being waived by the former military spouse. The Court concluded that a state court should not be permitted to "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver." The Court also reaffirmed the 1989 U.S. Supreme Court's ruling in *Mansell* that "the act does not permit state courts to treat retirement pay that has been waived to receive veterans' disability benefits as something that can be divided."

In a decision written by Justice Stephen Breyer, the justices concluded that under federal law, state courts lack the authority to divide up disability benefits, and a state is not permitted to circumvent the restrictions imposed by federal law by ordering one former spouse to reimburse the other for the retirement compensation they no longer receive. As a result, a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. The decision further suggested that "state courts can try to account for the possibility that a veteran could later waive some part of retirement pay in favor of disability benefits, or they can recalculate spousal support based on later changes in circumstances." See *Abernethy v. Fishkin*,⁵ in which the Florida Supreme Court permitted indemnification to accomplish the parties' "intent to maintain level monthly payments pursuant to their property settlement agreement." As a result, the judgment of the Supreme Court of Arizona is reversed, and the case was remanded for further proceedings not inconsistent with the opinion.

ENDNOTES

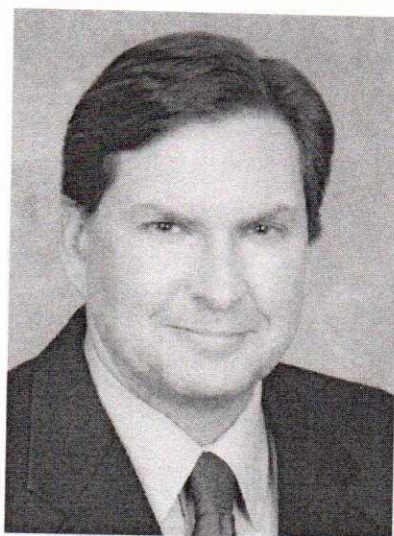
¹ 453 U. S. 210 (1981).

² 10 U. S. C. § 1408.

³ § 1408(a)(4)(B)

⁴ 490 U. S. 581.

⁵ 699 So. 2d 235 (Fla. 1997). ❖



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