

Reproduced with permission from The United States Law Week, 85 U.S.L.W. 1553, 5/18/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Family Law

Supreme Court Trims Checks For Veterans' Ex-Spouses

A divorced military wife isn't entitled to the 50 percent of her ex-husband's total retirement pay he agreed to in their divorce settlement, the U.S. Supreme Court ruled May 15 (*Howell v. Howell*, 2017 BL 161311, U.S., No. 15-1031, 5/15/17).

She isn't entitled to compensation for the portion of his retirement pay he waived unilaterally in order to receive disability benefits.

Federal law preempts state courts from treating the waived retirement pay as divisible community property, the court said in a unanimous opinion by Justice Stephen G. Breyer.

Quantifying Decision The opinion has been "30 years in the making," said Carson J. Tucker, Ann Arbor, Mich., who filed an amicus brief supporting the veteran husband on behalf of the Veterans of Foreign Wars and Operation Firing for Effect.

Its genesis is *McCarty v. McCarty*, which held that states can't consider a veteran's retirement pay to be divisible community property, he told Bloomberg BNA.

Disability payments aren't disposable because some veterans have horrific service-related injuries and can't work, Tucker said. The opinion is important because it reaffirms that federal law preempts all state court attempts to divest veterans of their interest in nondisposable disability benefits, he said.

But Arthur Ettinger, who practices family law with Greenspoon Marder, N.Y., told Bloomberg BNA this is a "problematic" decision. The court didn't explain how to "quantify" the discount, he said.

The opinion will create more litigation going forward, and it'll be interesting to see how actuaries apply the discount when trying to determine the value of a military pension, Ettinger said.

Ettinger said the opinion allows the federal government to trump the state's treatment of the settlement. The solution for military spouses may be to lobby Congress to change the law, he said.

Divisible Retirement Pay Military retirement pay can be divided between spouses under the federal Uniformed Services Former Spouses' Protection Act, which was adopted in answer to *McCarty*. Disability pay can't.

When a service member takes disability, retirement pay is reduced by the amount of the disability benefit. Even though monthly payments to the veteran are the

same, most service members choose disability because it isn't taxed.

John and Sandra Howell divorced in 1991 and agreed she would receive half of his military retirement. That arrangement worked until John waived 20 percent of his retirement pay to receive disability payments, which reduced Sandra's monthly benefit accordingly.

Arizona courts ordered John to pay Sandra half of his total retirement pay without factoring in the disability allocation.

But federal law preempted the state-court order, and he therefore couldn't be required to pay Sandra part of his disability benefit, he argued.

State courts had been divided over what to do with a divorce settlement when a veteran takes disability benefits in lieu of retirement benefits.

Precedent Controls The court's holding was controlled by *Mansell v. Mansell*, which said that federal law completely preempts states from treating military retirement pay as divisible community property.

It didn't make any difference whether the waiver of retirement pay came before or after the divorce settlement, the court said.

Calling Sandra's interest in John's retirement "vested" didn't help because, at most, it was "contingent, depending for its amount on a subsequent condition: John's possible waiver of that that pay," it said. And calling the state court order a reimbursement or indemnity was merely semantics "to restore that portion of retirement pay lost due to the postdivorce waiver."

The court recognized that preemption can cause a hardship for a divorced spouse. But family courts can take the possible waiver of benefits into account when they calculate the need for spousal support if military retirement benefits are involved, it said.

Justice Clarence Thomas wrote a concurrence saying he objected to the court's brief discussion of "purposes and objectives" preemption. That framework isn't necessary to support the court's judgment, he said.

Adam G. Unikowsky, Jenner & Block LLP, Washington, argued for John. Charles W. Wirken, Gust Rosenfeld PLC, Phoenix, argued for Sandra. Assistant to the Solicitor General Ilana H. Eisenstein argued for the United States as amicus curiae supporting Sandra.

Justice Neil M. Gorsuch took no part in the consideration of the case.

By BERNIE PAZANOWSKI

To contact the reporter on this story: Bernie Pazanowski in Washington at bpazanowski@bna.com

To contact the editor responsible for this story: Jessie Kokrda Kamens at jkamens@bna.com

Full text at <http://src.bna.com/oSd>.