STATE OF MICHIGAN

IN THE COURT OF APPEALS

DEBORAH LYNN FOSTER,

Plaintiff/Appellee,

v

COA Docket No. 324853
Circuit Court No. 07-15064-DM

RAY JAMES FOSTER

Defendant / Appellant.

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APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

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STATEMENT OF JURISDICTION

Appellant claims error in the proceedings in the above-captioned matter, which culminated in the trial court's November 6, 2014 order (**ATTACHMENT A**), from which Appellant filed a timely claim of appeal, acknowledged in this Court's March 4, 2015 order.

QUESTIONS PRESENTED ON APPEAL

Among the issues presented on appeal to this Court are the following:

I. Whether monies paid, and continuing to be paid monthly by Appellant Ray Foster (since 2008), and as reflected in calculations and amounts presented in the trial court's order of November 6, 2014, which are not spousal support or child support, but which are pure property settlement awards and which included and continue to include funds that are "benefits *due* or *to become due* under any law administered by the Secretary [of Veteran's Affairs]" are disposable, assignable, or otherwise available under any authorized law, and are exempt and not otherwise "liable to attachment, levy, or seizure by or under *any legal or equitable process whatever*, either before or after receipt by the beneficiary." See 38 U.S.C. § 5301 (emphasis added) and 10 USC § 1408(c)(1) (disability pay is not to be treated as disposable retired or retainer pay (except in instances of child support or spousal support, neither of which are at issue here).

Appellant Answers: Yes. The consent judgment of divorce ordered Appellant to pay over monies that are not calculable in an ordinary property distribution in a divorce.

II. Whether the 2008 consent judgment entered by the trial court in this matter unlawfully assigns non-disposable monies in contravention of 38 U.S.C. § 5301(a)(1) and (a)(3)(A), *inter alia*, and was a consent judgment procured by fraud, mistake and/or unconscionable advantage?

Appellant Answers: Yes. The consent judgment is an agreement whereby Appellant agreed to pay over to Appellee monies that are prohibited from being subject to legal and equitable distribution in contravention of 38 USC § 5301.

III. Whether the trial court's order was based on *the mistake of fact* that Appellant Ray Foster was not disabled, and had not become disabled, when in fact Appellant Ray Foster was totally disabled before the 2008 judgment was entered into, and the November 6, 2014 order therefore constitutes a violation of 38 U.S.C. § 5301(a)(1) and (a)(3)(A), *inter alia*.

Appellant Answers: Yes. Appellant was classified as disabled and entitled to receive Combat Related Special Compensation *prior to the December 2008* divorce decree. Therefore, all monies paid and ordered to be paid by Appellant in the ordinary property settlement award were monies that cannot be assignable or disposable under 38 USC § 5301 and 10 USC § 1408(c)(1) that disability pay is not to be treated as disposable retired or retainer pay (except in instances of child support or spousal support, neither of which are at issue here). Monetary payments being taken from Appellant Ray Foster on a monthly basis, and as reflected by imposition of the amounts

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calculated in the November 6, 2014 order, are based on the legally erroneous conclusion that Appellant Ray Foster is not disabled and never was disabled, even though he was deemed totally disabled *before* the 2008 consent judgment, and this fact was ignored or otherwise overlooked by the trial court, who when presented with this issue entered the November 6, 2014 order requiring exempt and otherwise non-assignable monies to be paid to appellee in violation of 38 U.S.C. § 5301(a)(1) and (a)(3)(A), *inter alia*.

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INTRODUCTION AND PROCEDURAL BACKGROUND

September 11, 2001 thrust our nation's finest into the teeth of combat actions facing an enemy with no concept of mercy. Since that day, thousands of soldiers have been killed, and many more have been maimed, wounded and scarred while engaged in combat actions authorized and executed by the United States of America ostensibly to protect and defend the constitutional freedoms so valiantly created by our founding fathers. Terrorism and the non-democratic and despotic rule of tyrants is what America has fought against since its declaration of independence from such oppression. Yet, on the eve of our 245th celebration of that declaration, permanently wounded and disabled veterans returning from war are being victimized by a system that has too often disregarded the law and failed to protect the only means of subsistence they have left – pure disability compensation that is supposed to be protected against assignment and garnishment under certain circumstances – circumstances absolutely present in the instant case.

Appellant, SFC Ray James Foster (retired), like so many others, sacrificed the best years of his life and youth to support these values by joining the Army and honorably serving this country for more than 20 years. He deployed to Iraq on two separate occasions (from November 2003 through April 2004 and from November 2005 through November 2006), where he served as a platoon leader in a combat infantry unit. During deployment, his unit was attacked on multiple occasions and his Humvee was struck by an improvised explosive device. SFC Foster received the Bronze Star for his courage and honor in leading his troops through this nightmare.

However, the scars and remnants of his experiences left him a broken man. He suffered a traumatic brain injury when an improvised explosive device struck his convoy and he has post-traumatic stress disorder. SFC Foster separated from the Army in 2007. In 2009, the Veterans Administration (VA) classified SFC Foster as 100 percent disabled and 100 percent unemployable.

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SFC Foster's classifications were retroactively awarded. He also received a subsequent determination of a retroactive entitlement to Combat Related Special Compensation, which took effect on November 1, 2007 (before the December 2008 judgment of divorce). See **ATTACHMENT F**.

He lives in a small apartment in Colorado and his life is centered around scheduling VA medical appointments and getting by on his meager benefit payments so he can try and spend time with his children in Colorado and Michigan, and his mother, who also lives in Michigan. To say that SFC Foster sacrificed his very existence as a human being to support this country he so deeply believes in is an understatement.

SFC Foster was married to Plaintiff / Appellee in 1988. The couple had a daughter in 1990. An inevitable result of the stress of his multiple deployments, SFC Foster went through family turmoil culminating in divorce from his wife in 2008 after over 20 years of marriage.

A consent judgment of divorce was entered on December 3, 2008. (**ATTACHMENT B**) The judgment did not award spousal support to either party.[1] Under Section VI, entitled "Property

[1] This is an extremely important fact. The divorce judgment did not award child support and did not award spousal support or alimony. The monetary award at the heart of this dispute was the ostensible division of Appellant's military benefits (including disability benefits) in the divorce judgment. See **ATTACHMENT B**, pp. 4-5. Despite Appellant's raising of this argument, see **ATTACHMENT C**, Appellant's April 9, 2008 Brief, the trial court never properly understood that the monies awarded to Appellant's former spouse were purely from funds received by Appellant from his VA disability benefits. (**ATTACHMENT D**, April 24, 2008 Finding of Fact, Opinion and Order, pp. 5-6 (characterizing the pending award after briefing by the parties as "spousal support", which is incorrect – spousal support is entirely different from what was ultimately agreed to by way of a "property settlement"). See also **ATTACHMENT E** – January 5, 2011 Order Denying Defendant's Motion for Reconsideration (stating "it is the opinion of the Court that the language indicating 'if Defendant should ever become disabled' did not require a finding of disability which occurred only after December 3, 2008. It included any disability which altered the nature of the disposable military retirement pay on or after December 3, 2008"). The problem with this statement is twofold. First, the trial court did not understand Appellant ***was already disabled and entitled to disability benefits prior to the December 3, 2008 judgment*** – see **ATTACHMENT F**. Second, the trial court erroneously classified the trial court continuously

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Settlement" there is a section regarding "Pension and Retirement Benefits". That section provided, in pertinent part, as follows:

> Each party by virtue of employment held during the marriage has participated in a pension or retirement plan sponsored by their employer.
>
> [Appellee] is awarded one hundred percent (100%) of any interest she has acquired in any retirement and pension benefits as a result of any employment she has held during her marriage to the [Appellant].
>
> [Appellee] is awarded fifty percent (50%) of any military retirement benefits the parties have acquired as a result of military employment with the armed forces of the United States during the parties marriage to each other.
>
> The [Appellee] is awarded a percentage of the [Appellant's] ***disposable*** military retired pay, to be computed by multiplying fifty percent (50%) times a fraction, the numerator of which is two hundred twenty-five (225) months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service. Appellee shall receive ***this portion*** of the Appellant's ***military entitlement***, together with Cost of Living increases.
>
> Beginning ***December 1, 2008*** until the [Appellee] begins to directly receive the portion of the retirement benefits she is eligible to receive under this Judgment the [Appellant] shall pay [Appellee] the amount of the retirement benefits she is entitled to within ten (10) days from the date he receives his retirement benefit check.
>
> ***If [Appellant] should ever become disabled, either partially or in whole, then [Appellee's] share of [Appellant's] entitlement shall be calculated as if [Appellant] had not become disabled. [Appellant] shall be responsible to pay, directly to [Appellee], the sum to which she would be entitled if [Appellant] had not become disabled. [Appellant] shall pay this sum to [Appellee] out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refused to pay those sums directly to [Appellee]. If***

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referred to the award as either spousal support or alimony – not the distribution of "property" from the pension benefits of Appellant. It was in fact the latter. Such monies are considered non-disposable income and cannot be the subject of distributions to former spouses under federal law; even by way of a consent judgment. Moreover, the disability determinations made by the VA in this case were awarded retroactively, and therefore ***before*** the consent judgment was entered into. The fundamental error of fact, and the resulting erroneous legal rulings of the trial court were based on the assumption that when the judgment was entered into Appellant was not then disabled. In fact, he was disabled and entitled to these non-disposable, non-distributable payments *before* the judgment was entered. An even more tragic result is since Appellant is 100 percent disabled and 100 percent unemployable, the only monies he receives are the VA benefits.

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> ***the military merely reduces, but does not entirely stop, direct payment to [Appellee], [Appellant] shall be responsible to pay directly to [Appellee] any decrease in pay that [appellee] should have been awarded had [Appellant] not become disabled, together with any Cost of Living increases that [Appellee] would have received had [Appellant] not become disabled. Failure of [Appellant] to pay these amounts is punishable through all contempt powers of the Court….***
>
> [(**ATTACHMENT B**, pp. 4-5 (emphasis added).

The November 6, 2014 order was a culmination of prior orders holding Appellant in contempt for a failure to pay the difference between what his spouse had been receiving under this agreement, and the amount she started to receive after Appellant's retirement pay was reduced. Appellant appeals the continuing orders requiring the monies paid and continuing to be paid.

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ARGUMENTS AND ANALYSIS

I. MONIES PAID, AND CONTINUING TO BE PAID MONTHLY BY APPELLANT RAY FOSTER (SINCE 2008), AND AS REFLECTED IN CALCULATIONS AND AMOUNTS PRESENTED IN THE TRIAL COURT'S ORDER OF NOVEMBER 6, 2014, ARE NOT SPOUSAL SUPPORT OR CHILD SUPPORT, BUT ARE PURE PROPERTY SETTLEMENT AWARDS AND ERRANTLY INCLUDED AND CONTINUE TO INCLUDE FUNDS THAT ARE "BENEFITS *DUE* OR *TO BECOME DUE* UNDER ANY LAW ADMINISTERED BY THE SECRETARY [OF VETERAN'S AFFAIRS]" ARE DISPOSABLE, ASSIGNABLE, OR OTHERWISE AVAILABLE UNDER ANY AUTHORIZED LAW, AND ARE EXEMPT AND NOT OTHERWISE "LIABLE TO ATTACHMENT, LEVY, OR SEIZURE BY OR UNDER *ANY LEGAL OR EQUITABLE PROCESS WHATEVER*, EITHER BEFORE OR AFTER RECEIPT BY THE BENEFICIARY." SEE 38 U.S.C. § 5301 (EMPHASIS ADDED) AND 10 USC § 1408(C)(1).

A. Standard of Review

The disposition of this issue depends on interpretation of statutes, which is subject to *de novo* review by this Court. See *Corwin v. Daimler Chrysler*, 296 Mich. App. 242; 819 N.W.2d 68 (2012).

B. Analysis

Prior to the judgment (although retroactively awarded), Appellant received a classification allowing him to receive Combat Related Special Compensation pay (CRSC). **ATTACHMENT F**. Thus, even though the effects of that award were to reduce the benefits being received by Appellee after the judgment, Appellant's entitlement and his election were all pre-judgment. In other words, Appellant did not make a unilateral, post-judgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. *Cf. Megee v. Megee*, 290 Mich. App. 551; 802 N.W.2d 669 (2010).

The Uniformed Former Spouses' Protection Act (USFSPA) authorizes state courts to treat "disposable retired pay" as marital property subject to equitable division. Section 1408(c)(1), Title 10, U.S.Code. The statutory definition of "disposable retired pay" is "total monthly retired pay to which a member is entitled" minus certain deductions. Section 1408(a)(4), Title 10, U.S.Code.

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Among the deductions are any amounts waived in order to receive veterans' disability benefits. Section 1408(c)(1)(B), Title 10, U.S.Code. Interpreting this section, the United States Supreme Court in *Mansell v. Mansell*, 490 U.S. 581, 594–595, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), held that state courts may not "treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."

The United States Supreme Court has held that while states have authority under federal law to divide disposable retired or retainer pay, they do not have the power to treat as divisible property military retirement pay which has been waived to receive veterans' disability benefits. *Mansell v. Mansell*, 490 U.S. 581, 589, 595, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). Even if the parties enter into a settlement agreement to divide veterans' disability benefits, such an agreement is unenforceable because it is preempted by federal law. *Abernethy v. Fishkin*, 699 So.2d 235, 239 (Fla.1997). See also 38 USC § 5301(a)(1) (disability pay not assignable or subject to levy, garnishment or any legal or equitable process) and (3)(A) (no agreements or consent judgments can require military disability beneficiary to pay over such monies to former spouse).

Taking this further, this Court in *King v. King*, 149 Mich. App. 495, 499-500; 386 N.W.2d 562 (1986) held under the USFSPA a party's military disability pension ***may not be considered "directly or indirectly" as a marital asset for purposes of property division.*** As further explained by this Court in King, supra at 497-498, the substantive question in these cases is whether the USFSPA and the supremacy clause of the federal constitution, U.S. Const., art. VI, prevents a state court from treating a military disability pension as a distributable marital asset.

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 law precludes a state court from dividing military nondisability retirement pay pursuant to state community property law. In *Grotelueschen v.*

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Grotelueschen, 113 Mich.App. 395, 318 N.W.2d 227 (1982), *lv. den.* 417 Mich. 940 (1983), this Court held that *McCarty*, which involved a community property state, applied equally in Michigan. *King v. King*, 149 Mich. App. 495, 497-98 (1986).

The divorce judgment did not award child support and did not award spousal support or alimony. The monetary award at the heart of this dispute was the ostensible division of Appellant's pre-judgment, pre-divorce military disability benefits in the divorce judgment. See **ATTACHMENT B**, pp. 3, 4-5 "VI. PROPERTY SETTLEMENT" and "Pension and Retirement Benefits".

Despite Appellant's raising of this argument, see **ATTACHMENT C**, Appellant's April 9, 2008 Brief, the trial court never properly understood that the monies awarded to Appellant's former spouse were purely from funds received by Appellant from his VA disability benefits. (**ATTACHMENT D**, April 24, 2008 Finding of Fact, Opinion and Order, pp. 5-6 (characterizing the pending award after briefing by the parties as "spousal support", which is incorrect – spousal support is entirely different from what was ultimately agreed to by way of a "property settlement"). See also **ATTACHMENT E** – January 5, 2011 Order Denying Defendant's Motion for Reconsideration (stating "it is the opinion of the Court that the language indicating 'if Defendant should ever become disabled' did not require a finding of disability which occurred only after December 3, 2008. It included any disability which altered the nature of the disposable military retirement pay on or after December 3, 2008"). The problem with this statement is twofold. First, the trial court did not understand Appellant ***was already disabled and entitled to disability benefits prior to the December 3, 2008 judgment*** – see **ATTACHMENT F**. Second, the trial court erroneously classified the trial court continuously referred to the award as either spousal support or alimony – not the distribution of "property" from the pension benefits of Appellant. It was in

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fact the latter. Such monies are considered non-disposable income and cannot be the subject of distributions to former spouses under federal law; even by way of a consent judgment. Moreover, the disability determinations made by the VA in this case were awarded retroactively, and therefore ***before*** the consent judgment was entered into. The fundamental error of fact, and the resulting erroneous legal rulings of the trial court were based on the assumption that when the judgment was entered into Appellant was not then disabled. In fact, he was disabled and entitled to these non-disposable, non-distributable payments *before* the judgment was entered. An even more tragic result is since Appellant is 100 percent disabled and 100 percent unemployable, the only monies he receives are the VA benefits.

Second, the trial court legally erred in concluding these monies could be included in a "property settlement" award between spouses because such an award is not one that is included in the exceptions under 38 USC § 5301. See also **ATTACHMENT G**, January 8, 2010 Letter from Secretary of Veterans Affairs to Congressman. This letter clearly explains what courts apparently misconstrue time and time again when considering what assets *are* and *are not* disposable income in divorce settlements involving military members. The letter explains:

> The Department of Veterans Affairs (VA) administers Veterans' benefits in accordance with the provisions of title 38, United States Code (U.S.C.). Section 5301(a)(1) states that:
>
> > "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 not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever."
>
> Consequently, courts or other legal entities are prohibited from attaching, diverting, or garnishing a Veteran's service-connected disability compensation payments. An exception to 38 USC § 5301(a)(1) occurs when a servicemenber waive military retired pay in order to receive VA

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> compensation. In these cases, VA compensation may be attached up to the amount of military retired pay waived, ***but only for purposes of alimony or child support*** pursuant to a court order. Absent these circumstances, section 5301(a)(1) prohibits VA from complying with a state court garnishment order.
>
> [*Id*. (emphasis added).]

The award in the instant case was not alimony or child support. It was the distribution of pre-judgment "property" from the disability benefits of Appellant. See **ATTACHMENT B**, pp. 3, 4-5. Such monies are considered non-disposable income and cannot be the subject of distributions to former spouses under federal law; even by way of a consent judgment. See *King v. King*, 149 Mich. App. 495, 499-500; 386 N.W.2d 562 (1986) held under the USFSPA a party's military disability pension ***may not be considered "directly or indirectly" as a marital asset for purposes of property division.***

Moreover, the disability determinations made by the VA in this case were awarded retroactively, and therefore ***before*** the consent judgment was entered into. The fundamental error of fact, and the resulting erroneous legal rulings of the trial court were based on the assumption that when the judgment was entered into Appellant was not then disabled. In fact, he was disabled and entitled to these non-disposable, non-distributable payments *before* the judgment was entered. An even more tragic result is since Appellant is 100 percent disabled and 100 percent unemployable, the only monies he receives are these VA benefits. And yet, by virtue of this ongoing order, Appellant is being required to pay these benefits monthly to his former spouse.

Therefore, as a result of the fact Appellant was declared disabled and entitled to disability benefits *prior to* the December 3, 2008 judgment, *any distribution* of benefits ordered to be made by Appellant in a property distribution arrangement was a prohibited distribution because it had the effect of forcing Appellant to pay such benefits to Appellee. This was the case even though

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the reality is Appellant did not start receiving the disability benefits until after the divorce judgment. This is what caused confusion when Appellee's payments were reduced by the VA. Appellee then looked to Appellant to make up the difference as was ostensibly contemplated in the December 3, 2008 judgment at pp. 4-5.

Yet, by virtue of the timing, i.e., the retroactive (post-judgment) award of disability benefits, which actually took effect *pre*-judgment, all of the payments received were of the award of disability benefits to this "difference" was non-disposable income that was incorrectly ordered to be paid by Appellant to Appellee. Thus, Megee is distinguishable in that it dealt with a post-judgment award of CRSC.

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II. THE 2008 CONSENT JUDGMENT ENTERED BY THE TRIAL COURT IN THIS MATTER UNLAWFULLY ASSIGNS NON-DISPOSABLE MONIES IN CONTRAVENTION OF 38 U.S.C. § 5301(A)(1) AND (A)(3)(A), *INTER ALIA*, AND WAS A CONSENT JUDGMENT PROCURED BY FRAUD, MISTAKE AND/OR UNCONSCIONABLE ADVANTAGE

A. Standard of Review

The disposition of this issue depends on interpretation of statutes, which is subject to *de novo* review by this Court. See *Corwin v. Daimler Chrysler*, 296 Mich. App. 242; 819 N.W.2d 68 (2012).

B. Analysis

Appellant would be remiss if he did not challenge the apparent hypocrisy in allowing indemnification awards to circumvent the clear intent of 10 USC § 1408(c)(1) that disability pay is not to be treated as disposable retired or retainer pay (except in instances of child support or spousal support, neither of which are at issue here). See **ATTACHMENT G**. This Court was correct in *King v. King*, *supra*, in ruling 10 USC § 1408(a)(4) "excludes disability pay from the definition of 'disposable retired or retainer pay.'" Disability pay is "excluded from division by the state courts under 10 USC § 1408." *Id*. at 499. In *King*, supra, this Court also noted that the United States Supreme Court in *McCarty v. McCarty*, 453 U.S. 210 (1981) ruled that the prohibition that disability benefits could not be the subject of distribution in a marital assets disposition "could not be circumvented by an 'off-setting award'". *King*, *supra* at 500, citing *McCarty*, 453 U.S. 228-229 and n. 22.

In Michigan, the goal in distributing assets in a divorce proceeding is to reach a fair and equitable distribution of property depending on the needs and resources of each party. *Darwish v. Darwish*, 100 Mich.App. 758, 770, 300 N.W.2d 399 (1980). Other considerations are the length of the marriage, the age of the parties and their health, their station in life, earning ability, and

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other necessities and circumstances. *Charlton v. Charlton,* 397 Mich. 84, 95 fn. 5, 243 N.W.2d 261 (1976). In making an equitable distribution of property, a court may take into account both a discrepancy in the parties' assets and one party's income-producing assets. *Bywater v. Bywater,* 128 Mich.App. 396, 400-401, 340 N.W.2d 102 (1983). *King v. King*, 149 Mich. App. 495, 500 (1986).

The trial court in the instant case *never* appreciated the disparity of the parties. Some of this had to do with the fact Appellant was not represented at all times and tried, in his own way, to demonstrate the unjustness of being required to pay his former spouse a majority (almost 100% of his own income) when she has a regular income, and when he is 100% disabled and 100% unemployable.

Appellant was entitled to disability pay based on being classified as such prior to the 2008 judgment. Thus, any subsequent distribution by order or otherwise of monies (directly or indirectly) that come from this source are prohibited by federal law. *King, supra*. This Court has never overruled or otherwise changed the basic ruling in *King* and that ruling applies to the facts of this case.

This case in unlike *Megee* because there the question was whether a post-judgment election and classification of disability could be offset. Again, while Appellant does not concede the point, and thinks, in fact, *Megee* was wrongly decided, it is distinguishable from the instant case and therefore it does not serve as judicial precedent.

Notwithstanding the aforementioned, another argument is applicable in the alternative, but it is no less persuasive. Because the source Appellant's ostensible obligation arises from an agreement to distribute non-disposable disability pay to Appellee, it is in direct violation of 38 USC § 5301. This argument was also missed, and inadequately addressed by the trial court on

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both occasions. As reflected in the order appealed, the distribution of monies comes from disability pay to which Plaintiff was entitled *prior to the divorce*. See **ATTACHMENT A**, November 6, 2014 Order.

The plain language of 38 USC § 5301(a)(1) and (3)(A) applies. Subsection (a)(1) clearly states that "payments of benefits *due* or *to become due*…shall not be assignable except to the extent specifically authorized by law…and shall 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…. Thus, in the instant case, as applied, the benefits to which Appellant was already entitled, and which were received by him (in other words, not diverted or attempted to be diverted from the Secretary of Veterans Affairs directly to Appellee) are not assignable and cannot be the subject to any legal or equitable process whatever.

Now, for those who continue to argue that "authorized by law" refers to the state court's authority to distribute such assets, that *limited* exception, see 42 USC § 659, only applies to child support and alimony awards made by state courts, not property distribution awards.

Moreover, this argument that the "authorized by law provision" applies unequivocally to state courts' unbridled authority regarding disposition of marital assets in divorce proceedings falls flat when one considers the plain and unambiguous language of subsection (a)(3)(A), which *directly* and *unequivocally* applies to the 2008 consent judgment in this case.

Subsection (a)(3)(A) states unmistakably that subsection (a)(1) is "intended to clarify that, in any case where a beneficiary entitled to compensation…enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit ***by payment*** of such compensation, pension, or dependency and indemnity compensation, as the case may be…such agreement ***shall be deemed to be an assignment and is***

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prohibited." (emphasis added). This is Congress' way of saying what this Court reiterated in *King v. King*, *supra* at 499-500 that nondisposable disability compensation may not be directly or indirectly required to be paid by the former military member to the former spouse. Put more succinctly, subsection (a)(3)(A) provides that a consent agreement cannot have the indirect effect of requiring the former servicemember to pay over to the former spouse by agreement that which could not be assigned, subject to attachment, levy or any legal or equitable procedure under subsection (a)(1). The agreement in the instant case does precisely that and is in violation, and continues to be in violation of federal law.

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CONCLUSION

The November 6, 2014 order continues to this day to require Appellant to pay over monies to which Appellee is not entitled and which Appellant cannot be forced to pay either by law or by consent. These are not child support or alimony payments, but rather pure disability compensation benefits to which Appellant is entitled, and which are non-assignable, and otherwise non-disposable for purposes of a distribution of property under federal law. See *King*, *supra*; 10 USC § and 38 USC § 5301.

For more than a century Michigan has recognized the common-law rule of equity that a judgment ordering payment of benefits based on incorrect or otherwise erroneous factual information ("mistake of fact") may be set aside as between the payor (here Appellant Ray Foster) and the payee (here Appellee Deborah Lynn Foster), and that the payee is required to pay restitution. Here, the clear and unequivocal mistake of fact made by the trial court is that Appellant Ray Foster was not disabled when he had already been declared disabled by the Veterans Administration *before* the 2008 consent judgment, which ordered payment by Appellant Ray Foster of monies to appellee that were not legally assignable and were otherwise exempt from liability "to attachment, levy, or seizure by or under *any legal or equitable process whatever*, either before or after receipt by the beneficiary" under state and federal law, including, *inter alia*, 38 U.S.C. § 5301(a)(1) and (a)(3)(A). The trial court was presented with the evidence demonstrating the mistake of fact and issued the November 6, 2014 order, ignoring or otherwise overlooking the clear mistake of fact and the illegality, non-assignability and/or exempt status of the benefits that Appellant Ray Foster has paid and continues to be required to pay.

Nor has the maxim that equity will not grant relief from a mistake of law been applied vigorously in this jurisdiction. In *Renard v. Clink*, 91 Mich. 1, 51 N.W. 692, 693, 30 Am.St.Rep.

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458 (1892), the court said: 'While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. *Martin v. Hamlin*, 18 Mich. 354 [100 Am.Dec. 181] (1869); and *Lapp v. Lapp*, 43 Mich. 287, 5 N.W. 317 (1880). But even where a person is ignorant or mistaken with respect of his own antecedent and existing private legal rights, interest, or estate, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." See also *Barr v. Payne*, 298 Mich. 85, 89-90 (1941).

The 2008 consent judgment constituted an illegal agreement to assign non-assignable disability pay in contravention of state and federal law, and the trial court entered the judgment on the mistaken belief (the mistake of fact) that Appellant Ray Foster was not disabled and that such monies were assignable, where in fact, Appellant Ray Foster had already been declared disabled. Every subsequent order of the trial court, including the November 6, 2014 order identifying payments to be made by Appellant Ray Foster constitutes an ongoing and continuing violation of the applicable state and federal laws prohibiting assignments of such benefits. Subsequent orders of the trial court, including the November 6, 2014 order, required, and continue to require Appellant Ray Foster to pay monies to appellee that are non-assignable, non-liable, and/or otherwise exempt from any legal process whatsoever under state and/or federal law.

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When finally presented with the "mistake of fact" upon which the 2008 consent judgment was entered, that mistake being that the trial court assumed and continued to assume that Appellant Ray Foster was not then disabled, when in fact he was totally disabled, and that all disability compensation retroactively awarded to him prior to the 2008 consent judgment was exempt, non-assignable and otherwise non-liable to any legal process whatsoever under state and/or federal law, and was being unlawfully ordered to be paid to appellee, the trial court nonetheless entered the November 6, 2014 order from which this appeal was taken, which order constitutes an affirmative ruling by the trial court on this issue, which ruling results in an order and a continuing order to Appellant Ray Foster to continue to pay these monies in contravention of state and/or federal law.

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RELIEF REQUESTED

Appellant respectfully requests this Court to nullify that part of the consent judgment of divorce in 2008 that is in direct violation of federal law, and expressly hold that such violation continues and is continuing as long as Appellant is being required to pay the monies both previously paid and in arrears that are prohibited by federal law from being distributed in a property distribution agreement to his former spouse, Appellee.

As a consequence of the preceding paragraph, Appellant further respectfully submits he is entitled to recoupment and/or reimbursement of the monies wrongfully paid over to Appellee, and those monies representing same which are alleged to be in arrears. This Court should hold same and remand the matter to the trial court only for the express and limited purpose of an accounting and determination of the amounts that have been overpaid.

As Appellant is now and has been previously held in "contempt" of court, and has suffered the burdens of imposition of this unlawful process, Appellant respectfully requests this Court hold that any process, bond, contempt order, and the like that is burdening him and his family be annulled and lifted by direct order of this Court. A "bond" currently exists to ensure payment by Appellant of the ostensible arrears and the security for that "bond" is the home of Appellant's ailing mother. Appellant respectfully requests this Court to specifically and explicitly lift said bond so that the order can be clearly understood and applied without ambiguity by the lower court, which, in addition to the aforementioned accounting, should be the only thing that the lower court should ever do with respect to this case.

Undersigned counsel served in the United States Navy as an enlisted service member and then in the United States Army as a Major in the Judge Advocates General (JAG) Corps for a combined 26 years. I can say after meeting this Appellant, SFC Ray J. Foster (ret.), U.S. Army,

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is a courageous and fearless platoon leader. Leaders act with moral clarity and conviction even amidst the uncertainty of the circumstances surrounding them in moments of war and combat. I can say that in my time as both an enlisted member of the United States armed services, and then as an officer in the very Army in which SFC Foster served with valor, that he is a true leader – the type that will walk into fire to save a fellow soldier. His cause in this case is not just his cause, but that of all soldiers who have been jailed, rendered homeless, and persecuted because of a profound misunderstanding and misapplication of the federal laws governing disposition after divorce of veterans' disability pay and compensation. Appellant cannot do justice to the perseverance and tenacity with which Appellant, SFC Foster has pursued the issue in this case. Suffice it to say it would be an honor and a privilege if I were allowed to stand alongside this soldier in combat.

Respectfully submitted by:

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Dated: July 1, 2015

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