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In re Marriage of Cassinelli

Court of Appeal of California, Fourth Appellate District, Division Two

November 2, 2016, Opinion Filed

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Reporter

4 Cal. App. 5th 1285 *; 210 Cal. Rptr. 3d 311 **, 2016 Cal. App. LEXIS 940 ***

In re the Marriage of JANICE R. and ROBERT J. CASSINELLI. JANICE R. CASSINELLI, Respondent, v. ROBERT J. CASSINELLI, Appellant.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Subsequent History: Review denied by [Marriage of Cassinelli, 2017 Cal. LEXIS 83 \(Cal., Jan. 18, 2017\)](#)

Motion denied by *Cassinelli v. Cassinelli*, 137 S. Ct. 1836, 197 L. Ed. 2d 750, 2017 U.S. LEXIS 2787 (U.S., Apr. 24, 2017)

Vacated by, Remanded by, Motion granted by [Cassinelli v. Cassinelli, 2017 U.S. LEXIS 6006 \(U.S., Oct. 2, 2017\)](#)

Prior History: [***1] APPEAL from the Superior Court of Riverside County, No. D54420, Christopher B. Harmon, Judge.

Disposition: Reversed and remanded with directions.

Core Terms

retired pay, disability benefits, spouse, trial court, Marriage, military, civilian, waived, spousal support, military spouse, retired, parties, exempt, disability, veteran's, cases, election, retirement benefits, community property, retirement pay, state court, Citations, reimburse, benefits, factors, indemnity, pension, spousal support award, awarding, damages

Case Summary

Overview

* Pursuant to [California Rules of Court, rules 8.1105\(b\)](#) and [8.1110](#), this opinion is certified for publication with the exception of parts II and IX.

HOLDINGS: [1]-Regarding appellee wife's interest in appellant husband's military retired pay, the appellate court concluded that the trial court erred by using spousal support as a remedy for the loss of a community property interest; [2]-Because there was no evidence that the parties intended appellant to be able to defeat appellee's property right in his retired pay, the appellate court concluded that the parties did not intend this; [3]-However, the trial court properly ordered appellant to reimburse appellee for her lost community property interest; [4]-The appellate court could remedy the trial court's error by directing it to award the wife \$541 a month, not as spousal support, but as damages.

Outcome

Reversed and remanded with directions.

LexisNexis® Headnotes

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans Law > Servicemembers > Retirement

[HN1](#) **Compensation for Service Connected Death & Disability, Pensions**

A member of the armed services who retires based on length of service becomes entitled to retired pay. 10 U.S.C. §§ 1401 (Army), 6333 (Navy), 8991 (Air Force). Meanwhile, a veteran who becomes disabled as a result of an injury suffered or a disease contracted in the line of duty becomes entitled to disability benefits. [38 U.S.C. §§ 1110](#) (wartime disability), 1131 (peacetime disability). In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that the

military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits.” (*Id. at p. 595* (dis. opn. of O'Connor, J.); see also *id. at p. 601* (dis. opn. of O'Connor, J.) [same].)

B. *In re Marriage of Krempin*.

In the wake of *Mansell*, state courts have struggled with whether they have jurisdiction to grant a civilian spouse [***10] any remedy whatsoever for a military spouse's waiver of retired pay.

In California, the leading case is *In re Marriage of Krempin (1999) 70 Cal.App.4th 1008 [83 Cal. Rptr. 2d 134]*.³ There, [***318] the trial court entered a judgment, pursuant to a marital settlement agreement, awarding the wife 25 percent of the husband's military retired pay. (*In re Marriage of Krempin, supra, at pp. 1010–1011.*) After the husband retired, the wife began receiving \$327 a month as her share of his retired pay. Thereafter, the husband was determined to be disabled.

³Very recently, in *In re Marriage of Chapman (2016) 3 Cal.App.5th 719 [207 Cal.Rptr.3d 798]* also dealt with this issue. We choose not to rely on *Chapman*, because it is still subject to Supreme Court review. We note, however, that it came to the same conclusion as we do.

Janice also cites *In re Marriage of Smith (2007) 148 Cal.App.4th 1115 [56 Cal. Rptr. 3d 341]*. In fact, she has characterized the relief she is seeking as “Krempin/Smith relief.”

Smith held that, when entering a divorce judgment, the trial court could order that, if, in the future, the military spouse waived retired pay in order to receive disability benefits, the military spouse would have to reimburse the civilian spouse for the latter's share of the [***11] waived retired pay. The court reasoned that “*Mansell* held merely that the federal law does not grant state courts the power to divide ‘military retirement pay that *has been* waived to receive veterans’ disability benefits.’ [Citation.] In this case, so far as we can tell from the record, [the military spouse] was not receiving any disability payments when judgment was entered so the court did not divide retirement pay that ‘has been waived.’” (*In re Marriage of Smith, supra, 148 Cal.App.4th at pp. 1123–1124.*)

The judgment here contains no similar express indemnity provision. Moreover, Robert waived retired pay in or around 2013; in 2015, *after* his retired pay “ha[d] been waived,” the trial court ordered him to compensate Janice for her lost share of the retired pay. Thus, *Smith* does not support Janice's claim that she was entitled to a remedy in this scenario. Indeed, if anything, it implies that *Mansell* would prohibit such an order.

He waived retired pay and began receiving disability payments of \$2,051 a month, which meant that his retired pay went to zero. The trial court denied the wife's motion to reinstate the payments to her. (*Id. at p. 1011.*)

The appellate court began by surveying out-of-state cases. It found that: “Courts in other states have protected the nonmilitary spouse's interest through various means.” [***1296]

“Some courts have found that the waiver of retirement pay and resulting reduction in the pension payment to the nonmilitary spouse were changed circumstances [***12] which permitted reassessment of support payments or redistribution of marital property. [Citations.]

“In some cases the courts have enforced judgments which provided that the military spouse would take no action to diminish his or her retirement pay, and would indemnify the nonmilitary spouse for any such diminution. [Citations.] ... Because the military spouse is free to satisfy the indemnity obligation with assets other than the disability benefits, there is no division of those benefits in contravention of *Mansell*. [Citations.] [¶] *This same result has been reached even where there was no express indemnity agreement.*” (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1013*, italics added.)

In sum, then, “[a] majority of state courts, on one theory or another, ‘take equitable action to compensate the former spouse’ when that spouse's share of retirement pay is reduced by the other's postjudgment waiver. [Citation.] A review of the out-of-state precedents confirms that this result is nearly universal.” (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1015.*)

The court then stated: “If the trial court were to conclude that the parties intended for [the wife] to continue to receive her original share of [the husband]'s retirement pay even if he waived all or a portion of that pay to obtain [***13] disability benefits, the *Mansell* case would not prevent the court from giving appellant the benefit of her bargain on [a] resulting trust theory [Citation.]” (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1021*, fn. omitted.) Thus, it remanded to the trial court for further proceedings. (*Id. at p. 1022.*)

C. *Out-of-state Cases*.

As *Krempin* mentioned, there are a number of relevant out-of-state cases. Indeed, we have an advantage over

the *Krempin* court, because additional out-of-state cases have been decided since *Krempin*, **[**319]** affording us almost an embarrassment of riches.

CA(6) **[↑]** **(6)** It is the clear majority rule that **HNS** **[↑]** *Mansell* does not prevent a state court from ordering a military spouse to reimburse a civilian spouse for retired pay that the military spouse has waived in order to receive disability benefits. We count 21 states as so holding: *In re Marriage of Howell* (2015) 238 Ariz. 407, 410–411 [361 P.3d 936, 939–940],⁴ petition for certiorari filed February 16, **[*1297]** 2016; *In re Marriage of Lodeski* (Colo.App. 2004) 107 P.3d 1097, 1101; *Blann v. Blann* (Fla.Dist.Ct.App. 2007) 971 So.2d 135, 137; *Perez v. Perez* (2005) 107 Hawaii 85, 90–91 [110 P.3d 409, 414–415]; *McHugh v. McHugh* (1993) 124 Idaho 543, 545 [861 P.2d 113, 115]; *In re Marriage of Neilsen* (2003) 341 Ill.App.3d 863, 869 [792 N.E.2d 844, 849]; *Bandini v. Bandini* (Ind.Ct.App. 2010) 935 N.E.2d 253, 264; *Black v. Black* (2004) 2004 ME 21 [842 A.2d 1280, 1285]; *Dexter v. Dexter* (1995) 105 Md.App. 678, 686 [661 A.2d 171, 174]; *Krapf v. Krapf* (2003) 439 Mass. 97, 108 [786 N.E.2d 318, 326]; *Megee v. Carmine* (2010) 290 Mich.App. 551, 574 [802 N.W.2d 669, 682]; *Shelton v. Shelton* (2003) 119 Nev. 492, 496 [78 P.3d 507, 509], certiorari denied (2004) 541 U.S. 960; *Whitfield v. Whitfield* (2004) 373 N.J.Super. 573, 582–583 [862 A.2d 1187, 1192]; *Hadrych v. Hadrych* (2006) 140 N.M. 829, 832 [149 P.3d 593, 596]; *Hillard v. Hillard* (2012) 223 N.C.App. 20, 24–25 [733 S.E.2d 176, 180–181]; *Hayes v. Hayes* (2007) 2007 OK CIV APP 58 [164 P.3d 1128, 1130–1132]; *Hayward v. Hayward* (2005) 2005 PA Super 44 [868 A.2d 554, 559–560]; *Resare v. Resare* (R.I. 2006) 908 A.2d 1006, 1009–1010; *Hisgen v. Hisgen* (1996) 1996 SD 122 [554 N.W.2d 494, 498]; *Johnson v. Johnson* (Tenn. 2001) 37 S.W.3d 892, 897–898.⁵

⁴One of the few out-of-state cases that the parties cite is *Merrill v. Merrill* (2012) 230 Ariz. 369 [284 P.3d 880], which followed the majority rule. Robert claims that *Merrill* is unpublished, which is incorrect. Robert also claims that *Merrill* was overruled, which is inaccurate. Actually, it was partially superseded by state statutes. (*Ariz. Rev. Stat. §§ 25-318.01, 25.530.*) However, the Arizona Supreme Court has held that **[***14]** these statutes apply only when the original divorce judgment dividing the retired pay was entered after the statutes' effective date. (*In re Marriage of Howell, supra, 361 P.3d at pp. 940–941.*) With respect to divorce judgments entered before the statutes' effective date, the Arizona Supreme Court adopted the majority rule. (*Id. at pp. 938–939.*)

⁵In determining whether a state follows the majority or minority

In general, the reasoning in such cases has two simple premises. First, “the non-military spouse has a vested interest in his or her portion of [the retired pay] as of the date of the court's decree and ... the vested interest cannot thereafter be unilaterally diminished by an act of the military spouse.” (*Provencio v. Leding* (2011) 2011 Ark.App. 53, *3 [381 S.W.3d 82, 84]; but see *Ashley v. Ashley* (1999) 337 Ark. 362 [990 S.W.2d 507].) Second, “because the military spouse is free to satisfy the indemnity obligation with assets **[***15]** other than the disability benefits, there is no division of disability benefits in contravention of *Mansell*. [Citations.]” (*Perez v. Perez, supra, 110 P.3d at p. 414.*)

A minority of states hold that *Mansell* absolutely prohibits a state court from **[**320]** awarding the civilian spouse any remedy whatsoever for the loss of the **[*1298]** retired pay. We count five: *Ex parte Billeck* (Ala. 2000) 777 So.2d 105, 108–109; *In re Marriage of Pierce* (1999) 26 Kan.App.2d 236, 240 [982 P.2d 995, 998]; *Mallard v. Burkart* (Miss. 2012) 95 So.3d 1264, 1272; *Ex parte Burson* (Tex. 1981) 615 S.W.2d 192, 196; *Youngbluth v. Youngbluth* (2010) 188 Vt. 53, 65 [6 A.3d 677, 685]. These courts reason that it is a sort of legal fiction—an end run around *Mansell*—to say that the military spouse could make payments out of other assets. “*Mansell* must be followed, even when it leads to seemingly unfair results. [Citation.]” (*Youngbluth v. Youngbluth, supra, 6 A.3d at p. 685.*)

D. Application to This Case.

CA(7) **[↑]** **(7)** The fact that a majority of other states follow the same rule persuades us to adhere to that rule. Moreover, we agree with the reasoning of the majority: The military spouse has unilaterally deprived the civilian spouse of a property interest in the retired pay and can be required to reimburse the civilian spouse, albeit not directly out of disability benefits. **HNS** **[↑]** “[B]asic state policy prevent[s] a marital partner from depriving the other spouse of a vested community property right by a unilateral decision” (*In re Marriage of Mastropaolo* (1985) 166 Cal.App.3d 953, 961–962 [213 Cal. Rptr.

rule, there is some room for the exercise of judgment; reasonable minds may differ. We have tried to take a strict view and to count a state as adhering to one rule or the other only if it appears that it would apply that rule in a non-fact-specific manner. For example, we have omitted states in which the result would turn on whether parties have a marital settlement agreement that includes an express indemnity provision. (Compare *Strassner v. Strassner* (Mo.Ct.App. 1995) 895 S.W.2d 614, 617–618 with *Morgan v. Morgan* (Mo.Ct.App. 2008) 249 S.W.3d 226, 233.)

26].)

At the same time, we disagree with the reasoning of the minority, which was that an order for reimbursement [***16] is an end run around *Mansell*. *Mansell* relied narrowly on a literal reading of the statutory language. (*Mansell v. Mansell, supra, 490 U.S. at pp. 589, 594.*) It declined to consider the broader purposes behind FUSFSPA, in part because Congress had “mixed purposes”: “[T]he legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees.” (*Mansell, at p. 594.*) Requiring the military spouse to reimburse the civilian spouse for the latter’s share of the lost retired pay—provided the military spouse is not required to make the payments out of disability benefits—does not violate the language of FUSFSPA and thus does not violate *Mansell*.

Also, under *Krempin*, the majority rule is already the law of California. Robert claims that *Krempin* is distinguishable because it involved “active duty military personnel.” Admittedly, the husband was still on active duty when the judgment was entered. (*In re Marriage of Krempin, supra, 70 Cal.App.4th at pp. 1010–1011.*) Nevertheless, the trial court awarded the wife a share of his future retired pay. (*Ibid.*) After that, the husband retired, and after *that*, he waived retired pay so he could receive disability benefits. (*Id. at [*1299] p. 1011.*) Thus, *Krempin* is on point. We fail to see [***17] why the husband’s active duty status when the judgment was entered is relevant.⁶

We do not necessarily agree with *Krempin* in every respect. In part IV, *post*, we will disagree somewhat with its conclusions regarding the intent of the parties. And in part V, *post*, we will disagree somewhat with its choice of remedy.

[**321] CA(8) (8) For now, however, we do agree that HN7 a state court can order a military spouse who has waived retired pay to reimburse a civilian

⁶ Robert also argues that *Krempin* is distinguishable because there (1) the parties had an express indemnity agreement, and (2) the divorce judgment included a reservation of jurisdiction. These arguments do not impugn *Krempin*’s central holding that a state court can grant a remedy to the civilian spouse without violating *Mansell*. Rather, they go to issues of the intent of the parties, which we will deal with in part IV, *post*, and finality of judgments, which we will deal with in part VI, *post*.

spouse for the latter’s loss of a community property interest in the retired pay without violating *Mansell*.

IV

THE INTENT OF THE PARTIES

Robert contends that there was insufficient evidence that the parties intended to protect Janice against the consequences of a waiver [***18] of Robert’s retired pay.

Krempin indicated that whether the civilian spouse is entitled to a remedy for the military spouse’s waiver of retired pay depends on the terms of the judgment and may require the interpretation of those terms. (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1018.*) It noted five aspects of the judgment before it that had some bearing on this question.

First, the judgment did not include an express indemnity provision. “However, while [the wife]’s claim would be stronger if the judgment or stipulation included an indemnity provision, the absence of an indemnity agreement is not necessarily fatal to her position.” (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1019.*)

Second, the judgment referred to retirement benefits paid by the Defense Accounting and Finance Center; thus, it implicitly excluded disability benefits paid by the VA. (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1019.*)

[*1300]

Third, the judgment identified a specific amount (\$327) that was to be paid to the wife monthly, and it required the husband to make these payments until the Defense Accounting and Finance Center took over. (*In re Marriage of Krempin, supra, 70 Cal.App.4th at pp. 1019–1020.*) “This suggests an understanding that [the husband] was ultimately responsible for insuring specific monthly payments.” (*Id. at p. 1020.*)

Fourth, the judgment included a reservation of jurisdiction “to make such orders relating to [the husband’s] [***19] retirement benefits as are necessary to carry out this agreement.” (*In re Marriage of Krempin, supra, 70 Cal.App.4th at p. 1020.*) “[T]he very fact that the parties’ agreement includes a reservation of jurisdiction on this subject suggests that they may have anticipated future contingencies such as waivers of retirement pay which might call for new arrangements to preserve the original bargain.” (*Ibid.*)

Fifth, the marital settlement agreement provided that it