

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

DR 1991-092542

03/07/2018

HONORABLE KRISTIN CULBERTSON

CLERK OF THE COURT

V. Felix/L. Barrett

Deputy

IN RE THE MATTER OF  
DIANE MERRILL

JAMES S OSBORN POPP

AND

ROBERT KENNETH MERRILL

KEITH A BERKSHIRE

**UNDER ADVISEMENT RULING**

The parties married in 1963. Husband was a member of the military, and retired from the military in 1983. The Court entered the Decree of Dissolution on August 12, 1993. At that time, Husband's disability rating was 18.62% per the Veterans Administration. The Decree of Dissolution acknowledged Husband's ongoing receipt of monthly military disability payments but did not treat those payments as community property subject to division. It did, however, equally divide Husband's military retirement pay by providing a QDRO awarding Wife 50% of Husband's military retirement pay, effective January 31, 1993.

In 2004, the Veterans Administration approved Husband's application for 100% disability, and found him eligible to receive Combat-Related Special Compensation benefits ("CRSC"). 10 U.S.C. § 1413a. This allowed Husband, as a veteran injured in combat, to choose tax-free benefits in exchange for a dollar-for-dollar reduction in his retirement pay. Husband elected this option, and Wife's share of his retirement pay was drastically reduced.

On February 1, 2010, Wife filed a "Petition for Post-Decree Relief; For Order to Appear; Request for Arrearage Judgment and Modified Retirement Award." Wife sought redress for her financial loss as a result of Husband's election of CRSC benefits instead of military retirement pay. An Evidentiary Hearing took place on October 1, 2010. The evidence presented

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demonstrated Husband was eligible to receive \$3,262.00 per month in retirement pay, and he waived all but approximately \$400.00 of that in favor of tax-free CRSC benefits of \$2,823.00. As a result of this waiver, Wife's share of Husband's monthly retirement was reduced from \$1,116.00 to \$133.00 in 2010.

The Court denied Wife's petition on December 7, 2010. The Court noted the Decree did not contain any language requiring Husband to indemnify or otherwise compensate Wife for any decrease in military retirement pay stemming from his election of disability. The Court then agreed with Husband that A.R.S. § 25-318.01 prohibited the Court from ordering Husband to indemnify Wife for the reduction in pay. At that time, A.R.S. § 25-318.01 stated,

In making a disposition of property pursuant to section 25-318 or 25-327, a court shall not do any of the following:

- (1) Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 38 United State Code chapter 11.
- (2) Indemnify the veteran's spouse or former spouse for any prejudgment or post-judgment waiver or reduction in military retirement or retainer pay related to receipt of disability benefits.
- (3) Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or post-judgment waiver or reduction in military retirement or retainer pay related to the receipt of the disability benefits.

A.R.S. § 25-318.01.

Wife filed her Notice of Appeal on January 5, 2011. The Arizona Court of Appeals issued its decision on August 9, 2012. *Merrill v. Merrill*, 230 Ariz. 369 (Ariz. App. 2012) (hereinafter "*Merrill I*"). The Court of Appeals reversed and remanded. The Court of Appeals concluded as follows:

- (1) Husband could not unilaterally opt for disability benefits in lieu of the military retirement benefits to which Wife was entitled to under the Decree of Dissolution;
- (2) The statute (A.R.S. § 25-318.01) precluding the division of disability benefits did not apply to the CRSC benefit elected by Husband, as A.R.S. § 25-318.01 only applied to disability benefits under Title 38 chapter 11 at that time; and

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- (3) Remand was necessary to determine whether and how Husband could satisfy the financial loss sustained by Wife.

On August 9, 2013, the Court conducted an Evidentiary Hearing to address the issues remanded. The Court ruled as follows:

- (1) Entered judgment in favor of Wife and against Husband for her portion of the military retirement pay through July 2013, with Husband paying the judgment from any and all non-exempt income and assets;
- (2) Required Husband to pay Wife her interest in the military retirement, \$1,486.30, on a monthly basis and 100% of his non-exempt income beginning August 2013;
- (3) Interest on the above unpaid sums at 4.25% from each date the payment becomes due; and;
- (4) Entered judgment for Wife and against Husband for attorney's fees, \$10,000.00 and costs, \$1,098.85, at an interest rate of 4.25%.

Husband filed a Notice of Appeal on September 10, 2013. Husband argued the Court did not follow the *Merrill I* mandate because it failed to determine, as a threshold matter, whether Husband could satisfy the indemnification obligation to Wife. While the second appeal was pending, the Arizona Legislature amended A.R.S. § 25-318.01 (2014) to include benefits awarded pursuant to 10 U.S.C. § 1431a, *i.e.* the CRSC benefits Husband elected, and made the amendment retroactive to July 28, 2010.

Based on the amendment of A.R.S. § 25-318.01, Husband moved to dismiss the action, vacate the August 9, 2013, judgment, and asked the Court of Appeals to overrule *Merrill I* (or remand to the trial court to dismiss the matter and vacate the judgment).

On December 18, 2014, the Court of Appeals issued a memorandum decision. *Merrill v. Merrill*, 1 CA-CV 13-0649, 2014 WL 7237678 (Ariz. App. Dec. 18, 2014, revised Jan. 7, 2015)(mem. decision) ("*Merrill II*"). In *Merrill II*, the Court of Appeals vacated the 2013 judgment and denied Wife's February 1, 2010 petition. *Id.* at ¶ 17 & ¶19. In doing so, the Court of Appeals noted its decision was not based on a misapplication of the *Merrill I* mandate but rather the 2014 statutory amendment of A.R.S. § 25-318.01. *Id.*

Wife then sought, and was granted, review by the Arizona Supreme Court. 238 Ariz. 467 (2015). **The Arizona Supreme Court reversed reasoning Wife had a vested interest in Husband's military retirement pay** before the effective date (July 28, 2010) of the A.R.S. § 25-318.01

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amendment, and the trial court was not precluded from ordering Husband to indemnify Wife for the reduction in her portion of the benefit. *Id.* at 470.

Husband appealed *Merrill II* to the United States Supreme Court. The United States Supreme Court remanded to the Arizona Supreme Court for further consideration in light of its decision rendered in *Howell v. Howell*. 137 S.Ct. 1400 (2017). The Arizona Supreme Court then remanded to this Court reversing the August 9, 2013, judgment, asked this Court to consider Husband's request that Wife reimburse him for any monies paid pursuant to the August 9, 2013 judgment, and remanded for further proceedings consistent with *Howell*.<sup>1</sup>

This Court conducted a Status Conference on October 24, 2017. The parties agreed to proceed by summary judgment.

Wife filed her Motion for Summary Judgment on December 1, 2017. Wife claims *Howell* does not resolve the issues before this Court. More specifically, Wife argues the reduction in pay in *Howell* was "required by law" in order for the retiree to collect Title 38 disability benefits. Here, however, Wife contends Husband can elect disability (CRSC) but is not required to do so.

[Husband] is invoking a condition wholly within his control – the election of CRSC over retired pay – to defeat the property interest of [Wife]. While [Husband] may prefer to elect the non-taxable CRSC in place of the taxable and divisible retired pay, a preference is not the same as the legally-required deduction in *Howell*. Because [Husband] is entitled to military retirement pay and voluntarily chooses not to receive it, it remains obligated to compensate [Wife] for the reduction to military retired pay that he has caused. . .

(Wife's December 1, 2017, Motion for Summary Judgment at p. 5.)

Wife also contends A.R.S. § 25-318.01 may not be applied retroactively to impair vested rights, and relies on the Arizona Supreme Court holding in *Merrill II* to support her position.

Husband also filed his Motion for Summary Judgment on December 1, 2017. Husband maintains the *Howell* decision is dispositive of this matter because this Court does not have jurisdiction to do what Wife requests.

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<sup>1</sup> Husband waived any right to reimbursement at the Status Conference on October 24, 2017 and again on February 28, 2018.

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The federal statute, 10 U.S.C. § 1408(C)(1), permits a court to treat “disposable retired pay” as either sole property or community property in accordance with state law. After the enactment of 10 U.S.C. § 1408(C)(1) the United States Supreme Court held, unlike military retired pay under 10 U.S.C. § 1408, disability pay was not divisible by any state court. *Mansell v. Mansell*, 490 U.S. 51, 583 (1989).

In this appeal, we decide whether state courts, consistent with the federal Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408 (1981 ed. and Supp. V). . . may treat property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans’ disability benefits. We hold they may not.

*Id.*

In 2002, Congress enacted CSRC. 10 U.S.C. §1413a. In doing so, Congress specifically precluded CRSC from the definition of military retired pay. 10 U.S.C. § 1413a(g). “Status of payments – payments under this section are not retired pay.” 10 U.S.C. § 1413a(g).

Most recently, in *Howell*, the United States Supreme Court held a state court cannot require indemnification for any financial loss resulting from one spouse’s waiver of retired pay in favor of disability pay. *Howell*, 137 S.Ct. at 1402.

In this case a State treated as community property and awarded to a veteran’s spouse upon divorce a portion of the veteran’s total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive nontaxable disability benefits from the Federal Government instead. Can the State 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 question is complicated, but the answer is not. Our cases and the statutes make clear that the answer to the indemnification question is ‘no.’

*Id.*

*Howell* does not appear to make any distinction regarding waivers **required** by law as opposed to **elected** by the veteran spouse, as Wife asks this Court to do. This Court is not inclined to make such a distinction either.

In addition, the Court is not persuaded by Wife’s argument that *Merrill II* precludes this Court from applying A.R.S. § 25-318.01 retroactively. *Howell* addressed this issue stating,

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“[t]he Arizona courts referred to [Wife’s] interest in the waivable portion as having ‘vested’ does not help. State courts cannot vest that which (under governing federal law) they lack the authority to do.” *Id.* at 1405.

**IT IS ORDERED** Husband’s Motion for Summary Judgment, filed on December 1, 2017, is GRANTED.

**IT IS FURTHER ORDERED** Wife’s Motion for Summary Judgment, filed on December 1, 2017, is DENIED.

Having considered the parties’ requests for fees and costs, and the appropriate statutory authority,

**IT IS FURTHER ORDERED** denying the requests for fees and costs.

Having granted Husband’s Motion for Summary Judgment,

**IT IS FURTHER ORDERED** Wife’s “Petition for Post-Decree Relief; For Order to Appear: Request for Arrearage Judgment and Modified Retirement Award,” filed on February 1, 2010 is DISMISSED.

**IT IS FURTHER ORDERED** signing this minute entry as a formal order of this Court pursuant to Rule 81, *Arizona Rules of Family Law Procedure*.

DATED the 12<sup>th</sup> day of March, 2018

/s/ HONORABLE KRISTIN CULBERTSON

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HONORABLE KRISTIN CULBERTSON  
JUDICIAL OFFICER OF THE SUPERIOR COURT

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