

# Military Family Law Issues

## MVA & FLS CLE

April 21, 2023

Sabra Janko (Moderator)

Cory Tuck

Carl O. Graham

Ezra Hurwitz

### I. JURISDICTION (Cory)

#### A. Subject Matter Jurisdiction to Grant Dissolution

1. C.R.S. 14-10-106(1)(a)(I) requires one party be resident 91 days prior to filing
2. Being stationed in CO pursuant to military orders, without more, insufficient for jurisdiction. *Viernes v. District Court*, 509 P.2d 306 (Colo. 1973)
3. “State Taxes” section of Leave & Earnings Statement (LES) shows state of residence as reported to military & IRS

5168.76		4132.00				
st	Lv Paid	Use/Lose	FED	Wage Period	Wage YTE	
.0	.0	18.0	TAXES	26.19	113114.28	
Wage YTD	Med Tax YTD	STATE	St	Wage Period	\	
114256.80	1656.2	TAXES	WA		.00	
Share	Stat	JFTR	Depns	20	JFTR	BA
1	R					
Pay Rate	Spec Pay Current	Inc Pay Rate	Inc Pay Currei			

4. Civilian spouse living in CO usually means residence unless no “footprint.” Per Military Spouses Residency Relief Act, for purposes of *taxes* (10 U.S.C. § 4001(a)(2)) and *voting* (10 U.S.C. § 4025(b)), if spouse and member have same state of residence, spouse residence does not change by virtue of accompanying the member for military duties

#### B. Personal Jurisdiction Over Member. Same as civilian, except for retirement

#### C. Jurisdiction to Divide Military Retirement

1. **Federal.** Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(c)(4), enacted in 1982, authorizes, but does not require, states to divide *disposable retired pay*
2. **Disposable Retired Pay** 10 U.S.C. § 1408(a)(4)(A) defines as gross retired pay minus the following:
  - a) Owed to U.S. due to previous overpayments (*Rare*)
  - b) Deducted from retired pay as result of court-martial forfeiture (*Rare*) or VA Waiver (*Common*)
  - c) Equivalent to the percentage of disability formula to a member eligible for a Chapter 61 disability retirement
  - d) Survivor Benefit Plan (SBP) premiums for benefit of former spouse

PAY ITEM DESCRIPTION		
ITEM	OLD	NEW
GROSS PAY	.00	11,527.00
SBP COSTS	.00	455.00
TAXABLE INCOME	.00	11,072.00

  

PAYMENT ADDRESS	YEAR TO I
DIRECT DEPOSIT	TAXABLE IN FEDERAL IN STATE TAX V

3. **Colorado.** *IRM Gallo*, 752 P.2d 47 (Colo. 1988). Military retirement is divisible property interest. *Gallo* is not retroactive, and only applies to post-*Gallo* decrees. *IRM Booker*, 833 P.2d 734 (Colo. 1992)
4. **Personal Jurisdiction Insufficient.** USFSPA requires
  - a) Residence not due to military orders
  - b) Domicile, or
  - c) Consent
5. **USFSPA is Subject Matter &** preempts state law. *IRM Booker*, 833 P.2d 734 (Colo. 1992), *IRM Akins*, 932 P.2d 863 (Colo.App. 1997)
6. **What is Consent?**
  - a) “the statutory language requires some form of affirmative conduct demonstrating express or implied consent to general in-personam jurisdiction... However, husband continually objected to the court's jurisdiction over his pension and asserted that he was a resident and domiciliary of North Carolina. Thus, husband did not

consent to the exercise of jurisdiction under the USFSPA.” *IRM Akins*, 932 P.2d 863 (Colo.App. 1997).

- b) Filing motion to modify child support is consent to jurisdiction. *IRM Booker*, 833 P.2d 734 (Colo. 1992)
- c) Between *Howell* decision on VA waiver and Frozen Benefit rule, division of military retirement is effectively “federalized”, so probably little reason to withhold consent

**D. UCCJEA Jurisdiction over Military Child.** UCCJEA jurisdiction required before any parenting proceeding, including dissolution, legal separation, grandparent visitation, guardianship, dependency & neglect, paternity, etc. C.R.S. 14-13-102(4)

1. Home state of child (182 days residence) at commencement, or within 182 days of commencement if one parent remains in CO. C.R.S. 14-13-201(1)(a)

2. *IRM Brandt*, 2012 CO 3

- a) 2006 MD divorce, H & W lived in MD with child until H moved to CO in 2008. W commissioned in Army 2009, stationed in TX with child. W deployed 2010, parties agreed child spend 2010-11 school year in CO, then return to W. H registered action in CO
- b) In 2011, CO court assumed jurisdiction after finding no parent/child currently resided in MD. H got writ to pick up child from W’s parents in another state, brought back to CO. Both CO and MD asserted UCCJEA jurisdiction, scheduled hearings, etc
- c) Supreme Ct - Being absent from state in itself not deprive state of UCCJEA jurisdiction. “Presently reside” \= “currently reside” or “physical presence”, but “necessitates an inquiry broader than ‘technical domicile’ into the totality of the circumstances that make up domicile.” ¶ 16
- d) Factors include: parent’s permanent home where intends to return, length & reasons for absence, intent in departing state and returning to it, military assignments, where maintain home, car driver’s license, voter registration, pay state taxes, etc

## II. SERVICE OF PROCESS ON MILITARY PERSONNEL (*Cory*)

A. **Servicemembers Civil Relief Act** - no special requirements to serve process on military members. Issue is logistics, not legal

- B. Absent Respondent.** <https://www.usa.gov/military-personnel-and-installations> has information on locating military
- C. Service on Military Installation.** Contact Provost Marshal (Fort Carson) or Security Forces (Air Force Academy/Peterson/Schriever)
- D. Service Abroad (Korea/Germany, etc).** Major ordeal, as must comply with *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Military will assist only to see if member willing to accept service
- E. Service While Deployed.** Absent waiver of service, no practical way to serve, and even if service effected, Servicemembers Civil Relief Act protections would stay proceeding

### III. SERVICEMEMBERS CIVIL RELIEF ACT (Cory)

#### A. Stay of Proceedings When Notice. 50 U.S.C. § 3932

1. Applies to Petitioner or Respondent
2. Court **may**, on own motion, and **shall**, upon application by a member which meets these criteria, stay the proceedings for at least 90 days:
  - a) Applicant in military service, or within 90 days after service ends,
  - b) Applicant has actual notice of the proceeding,
  - c) Application is written, and includes facts stating (i) how service materially affects ability to appear, and (ii) date when member may appear, and
  - d) Application includes communication from commander that military duty prevents appearance, and military leave not authorized
3. Initial 90-day stay is mandatory. Thereafter, member may apply for additional stay, using same criteria. Court must grant application unless appoints attorney to represent servicemember
4. Simply being stationed overseas, thereby making it harder to appear, does not materially affect ability to appear. Telephonic testimony, 30 days annual leave, cooperative military
5. DOD Instruction 1327.06, *Leave and Liberty Policy and Procedures*, para. (1)(j)(11): “Court Determination and/or Child Support Leave. When a Service member requests leave on the basis of need to attend hearings to determine paternity or to determine an obligation to provide child support, ordinary leave shall be granted unless: (a) The member is serving in or

with a unit deployed in a contingency operation; or (b) Exigencies of military service require a denial of such request.”

6. If request for stay denied, member cannot then seek to set aside default judgment
7. “Shield” vs “sword” - will stay of proceedings prevent member’s own attorney from serving discovery or filing motions?

**B. Protection Against Default Judgment. 50 U.S.C. § 3931**

1. Applies only to Respondent military member
2. Provides Respondent member in civil action with relief against default judgment *if member has never appeared*. In theory, that means post-decree default against deployed member who never received motion is okay!
3. Petitioner seeking default judgment must first submit affidavit stating whether Respondent is military, or whether Petitioner does not know.
4. If cannot determine status of military service from affidavit, Court may require bond to indemnify Respondent against any loss
5. If Respondent in military, Court may appoint attorney
6. Court shall reopen default judgment and allow servicemember to defend when:
  - a) Judgment entered during military service or within 60 days
  - b) Member's ability to defend materially affected by service
  - c) Member has meritorious or legal defense, and
  - d) Application to reopen is made during the military service, or within 90 days after it ended. Technically, this means total military service, not just the specific contingency which prevented servicemember from appearing

**C. 4th Judicial District** has forms & process to implement the SCRA protections for military members, including appointment of attorney to determine military status, and requiring affidavit before default judgment

**IV. TYPES OF MILITARY RETIREMENT (Carl)**

**A. Thrift Savings Plan (TSP)**

1. Defined contribution plan

2. Same TSP as civilian federal employees
3. No special jurisdictional requirements beyond personal jurisdiction over member
4. Government match if under “Blended” plan

**B. “Legacy” High Three Retirement**

1. Defined Benefit Plan, 1 yr of service worth 2.5% of average of highest 36 months of base pay. 10 U.S.C. § 1409(b)(1)
2. Vests at 20 yrs, limited early retirement (drawdown or medical)
3. Applies to members who first entered military before 1/1/2018, and did not elect Blended retirement during 2018

-CR FWR					.00
=EOM PAY					1593.80
DIEMS		RET PLAN			
3305.00	010810	HIGH 3			
Wage YTD	M/S	Ex	Add'l Tax	Tax YTD	
47545.72	S	01	.00	5542.09	
Period	Wage YTD	M/S	Ex	Tax YTD	

=EOM PAY					9524.07
DIEMS		RET PLAN			
4132.00	950625	CHOICE			
Wage YTD	M/S	Ex	Add'l Tax	Tax YTD	
113114.28	S	00	.00	20409.96	
Period	Wage YTD	M/S	Ex	Tax YTD	

**C. Blended “Modernized” Retirement.** Reduced defined benefit plan with enhanced TSP

1. **Applicability.** Joined 1/1/2018 or later, or prior to that date and elected Blended during 2018
2. **TSP Member contribution,** with 1% - 5% match that vests at 2 yrs
3. **Defined benefit plan reduced,** receive multiplier of 2% x yrs service x High 3, instead of 2.5%. 10 U.S.C. § 1409(b)(4)
4. **Annual COLA,** based upon CPI
5. **Continuation Pay** at 12 yrs service, 2.5 - 13x monthly base pay (0.5-6.5x for reserves), depending upon duty position
6. **Lump Sum Election.** At retirement, can elect 25% or 50% of present value of retirement at 20 yrs, in return for reduced monthly payments. Probably divisible. *IRM Heupel*, 936 P.2d 561 (Colo. 1997)
7. See “Ret Plan” box on LES

		-CR FWR		.00	
		=EOM PAY		169.39	
30.00		DIEMS		RET PLAN	
		120515		BLENDE	
Wage YTD	M/S	Ex	Ad'l Tax	Tax YTD	
20890.29	S	00	.00	2157.36	
Period	Wage YTD	M/S	Ex	Tax YTD	

#### D. "Chapter 61" Disability Retirement.

1. 10 U.S.C. §§ 1201-1205. AKA Temporary Disability Retired List (TDRL), Permanent Disability Retired List (PDRL).
2. **Temporary** (up to 3 yrs), or **permanent** (30% disability or 20+ yrs service)
3. **Payment Amount.** Per 10 U.S.C. § 1401, retiree receives greater of
  - a) 2.5% x base pay x years of service, or
  - b) Base pay x disability %, up to a maximum of 75%
4. **VA Waiver.**
  - a) Member will receive both VA Disability & Disability Retirement.
  - b) < 20 yrs service, must waive retirement dollar-for-dollar to receive VA disability, even for ratings of 50% or higher. 10 U.S.C. § 1414(b)(2)
  - c) > 20 yrs service, must waive retirement to extent percentage of disability formula exceeds longevity. 10 U.S.C. § 1414(b)(1).
5. **Divisibility.**
  - a) < 20 yrs service, not divisible, since would receive no payments *but-for* disability. *IRM Williamson*, 205 P.2d 538 (Colo.App. 2009)
  - b) > 20 yrs service, divisible to extent payment based on longevity and exceeds % of disability method. 10 U.S.C. § 1408(a)(4)(A)(iii), *IRM Poland*, 264 P.3d 647 (Colo.App. 2011), *IRM Tozer*, 2017 COA 151
  - c) Only once seen Chapter 61 retirement divided, as disability rating method invariably higher than longevity (20-year) retirement.

6. **Identifying a Disability Retirement.** If married at retirement, spouse will likely know if member went through process. If already retired, Retiree Account Statement is same for Chapter 61 and normal 20-year retirement, so must review DD 214, Block 28 (Narrative Reason for Separation).

*Sample Longevity Retirement*

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)		
23. TYPE OF SEPARATION RETIREMENT	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AFI 36-3203	26. SEPARATION CODE RBD	27. REENTRY CODE N/A
28. NARRATIVE REASON FOR SEPARATION VOL. RETIREMENT; SUFFICIENT SERVICE FOR RETIREMENT		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE		30. MEMBER REQUESTS COPY 4 (Initials) N/A
DD FORM 214, AUG 2009		MEMBER-4

*Sample Disability Retirement*

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)		
23. TYPE OF SEPARATION RETIREMENT	24. CHARACTER OF SERVICE (Include upgrades) HONORABLE	
25. SEPARATION AUTHORITY AFI 36-3212	26. SEPARATION CODE SEJ	27. REENTRY CODE N/A
28. NARRATIVE REASON FOR SEPARATION DISABILITY, PERMANENT (ENHANCED)		
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) NONE		30. MEMBER REQUESTS COPY 4 (Initials) N/A
DD FORM 214, AUG 2009		MEMBER-4

**V. MILITARY RETIREMENT CALCULATION (Carl)**

**A. Dollar Amount vs Percentage.** Court can award either specific dollar amount, or percentage of retired pay. 10 U.S.C. § 1408(a)(2)(C). Percentage award includes COLAs, but dollar amount does not. DOD FMR, Vol. 7B, section 290601(C). Use dollar amount to protect against VA waiver?

**B. Traditional Coverture Formula**

1. *IRM Hunt*, 909 P.2d 525 (Colo. 1995). "Time Rule". Marital share:

$$\frac{\text{Months of marriage overlapping service}}{\text{Months of creditable service at retirement}}$$

2. Applicability:

- a) Decree before 12/23/2016
- b) Already retired at time of decree (as no post-divorce enhancements possible), or
- c) Civilian defined benefit plans



**C. “Frozen Benefit Rule”**

1. **2017 National Defense Authorization Act**, enacted on 12/23/2016, applied to *decree* issued after this date when member still in military
2. **Freezes Former Spouse Share of Retirement at Decree.** Act modifies & restructures definition of “disposable retired pay” in 10 U.S.C. §1408(a)(4) to add a new (a)(4)(B) which reads: “For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be— the *amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order*, as increased by each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.” (Emphasis added)
3. **New Formula.** Calculate hypothetical share member would receive at time of dissolution given rank & time of service
  - a) **Calculate hypothetical retirement at decree**, ignoring inability to retire with < 20 years. Service. Member with 12 years receives 24% or 30% of the high-three of his base pay at the time of dissolution. 12 years x 2% (*Blended*) or 2.5% (*Legacy*)
  - b) **Modified Coverture Formula** to calculate spousal share based upon service through *decree* (i.e. not through retirement as traditional coverture). Marital share, to be applied against the hypothetical retirement is therefore:  
$$\frac{\text{Time in marriage overlapping service}}{\text{Time in service at date of } \textit{decree}}$$
4. **Effect.** Reduces spouse’s share of retirement when servicemember in military at dissolution, increasing disparity the longer the time between decree & retirement. See examples below to show disparity

**D. Net Present Value.** Authorized by *Hunt*. Court may use NPV even when pension is not yet in pay status. *IRM Riley-Cunningham*, 7 P.3d 992 (Colo.App. 1999)

**E. Deferred Distribution.** Calculate marital share, defer distribution until retirement

**F. Reserve Jurisdiction.** Wait until actual retirement

**G. Reserves/National Guard.** Similar formula - substitute reserve points for months/years. DOD FMR sections 290205, 290211. *IRM Beckman*, 800 P.2d 1376 (Colo.App. 1990)

**H. Cannot Require Member to Retire.** 10 U.S.C. § 1408(c)(3). However, may be possible to order payments to start when member eligible to retire, even if member chooses to remain in military longer. Per *IRM Blake*, 807 P.2d 1211, 1213-14 (Colo.App. 1990). “[R]equiring husband to pay wife her share of the monthly pension before actual retirement does not force husband to retire; nor does it penalize him for his decision to continue working. Rather, husband remains able solely to decide when he wishes to retire.” Potentially overruled by *Hunt* allowing spouse to share in post-divorce enhancements in return for member controlling when payments start by delaying retirement, but then *Hunt* rationale undercut by frozen benefit rule

**I. Sample Order at EXH I**

**VI. DIRECT RETIREMENT PAYMENT FROM DFAS (Carl)**

**A. 10/10 rule.** Requires at least 10 years of marriage overlapping military service (active or “good” reserve year). 10 U.S.C. § 1408(d)(2)

**B. Order Needs All of the Following:**

1. **SCRA.** Indication that rights under Servicemembers Civil Relief Act were respected or waived. DOD FMR, Vol. 7B, section 290602
2. **Jurisdiction.** Indication of basis of jurisdiction over member (residence, domicile, or consent). DOD FMR, Vol. 7B, section 290604(A)
3. **Marriage date** and indication that 10/10 rule met. DOD FMR, Vol. 7B, section 290604(B)
4. **Either (a) percentage, (b) formula, or (c) dollar amount.** DOD FMR, Vol. 7B, section 290803(B). If formula, must include underlying data, such as numerator, and define denominator. DOD FMR, Vol. 7B, section 290615
5. **“Frozen Benefit” Data:** Current rank, years of service, and High-3 pay. DOD FMR, Vol. 7B, section 290803(B)
6. **Send to DFAS** with DD Form 2293 & certified copies of decree & order dividing retirement

**C. No Deadline,** but DFAS only pays prospectively after processed (takes about 90 days after application), so need mechanism for payment in interim

**D. Maximum amount** DFAS pays is 50% of disposable retired pay, or 65% if also paying support/maintenance. DOD FMR, Vol. 7B, section 291001(a)

**VII. SURVIVOR BENEFIT PLAN (SBP) (Carl)**

**A. “Insurance policy”** on retirement. Without SBP, retirement ends when retiree dies. However, if former spouse dies, share reverts to retiree. 10 U.S.C. § 1408(c)(2)

**B. Premiums**

1. 6.5% x “designated base amount”. Pays 55% of base amount, so effectively 11.8% per month. 10 U.S.C. § 1451(a),. DOD FMR Vol. 7B, section 420401
2. Court has discretion to order SBP or allocate premium. *IRM Payne*, 897 P.2d 888 (Colo.App. 1995)
3. DFAS only deducts premium pre-division, when SBP for benefit of former spouse, so effectively pay proportional to shares of retirement. DFAS will not honor different allocation, DOD FMR, Vol. 7B, section 290610, so deviation needs separate reimbursement mechanism
4. Commonly, costs shared between parties, with reimbursement if retirement shares not close to 50/50
5. Premiums stop once retiree is 70 and has paid 360 mos of premiums. 10 U.S.C. § 1452(j)

**C. Former Spouse Entitlement**

1. Not remarried while under age of 55, and
2. At least one year of marriage, or a child. 10 U.S.C. § 1447.
3. Can only have one primary beneficiary, cannot allocate payments between multiple beneficiaries

**D. Spouse vs Former Spouse coverage.** Beneficiary is “office” of spouse, not the person, so if not change coverage from spouse to former spouse, and retiree remarries, new spouse becomes beneficiary

**E. No SBP Elected.** If member retired before dissolution without electing SBP (would require spousal waiver), cannot later add SBP. Need life insurance. ***NOTE - for 2023 only, there is an open season.*** Allows retiree to cancel or initiate SBP, but not change amount of coverage. Details:  
<https://www.graham.law/blog/military-sbp-open-season-enrollment/>

**F. Deemed Election.** Rather than relying upon member to opt for SBP coverage, or to convert spouse to former spouse coverage, former spouse can request election directly from DFAS. Use DD Form 2656-10. *Must use to protect former spouse*

**G. Deadline.** *Deemed election request, or conversion from spouse to former spouse coverage, must be within 12 mos of order requiring SBP!*

**VIII. VA DISABILITY (Carl)**

**A. Applicability.** Member with service-connected disability entitled to receive disability payments after leaving service. Applies to all veterans, not just retirees

**B. No Direct Relationship to Ability to Work.** VA disability primarily compensates for condition, not lost wages, except if 100% disability with Total Disability finding

**C. Disability Ratings**

1. Rating 10-40%, waive military retirement dollar for dollar. 38 U.S.C. §§ 5304, 5305
2. Rating 50% or higher, no waiver, 10 U.S.C. § 1414, unless under 20 years of service, in which case VA waiver still in effect
3. VA payment based solely upon disability rating and dependents, not rank. Disabled sergeant receives same as 2-star general. Rate Tables at [https://www.benefits.va.gov/COMPENSATION/resources\\_comp01.asp](https://www.benefits.va.gov/COMPENSATION/resources_comp01.asp)

**D. Sample 2023 Monthly Payments**

1. 10% = \$166 (waiver)
2. 30% no dependents = \$508 (waiver)
3. 40% spouse & child = \$876 (waiver)
4. 80% spouse & child = \$2215 (no waiver)
5. 100% spouse & child = \$3972 (no waiver)

**E. No Indemnity for Disability Waiver/Retirement**

1. **Prejudgment vs. Postjudgment VA Waiver.** Many states, including CO, previously ordered indemnity for post-judgment conversion of retirement to disability. E.g. *IRM Warkocz*, 141 P.3d 926 (Colo.App. 2006).
2. *Howell v. Howell*, 137 S.Ct 1400 (2017). Court termed “semantic” distinction between pre-decree and post-decree waiver. Recognized potential for hardship: “a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.”
3. *IRM Tozer*, 2017 COA 151. *Howell* overrules *Warkocz*. “The *Howell* takeaway is clear. Military retirement disability benefits may not be

divided as marital property, and orders crafted under a state court’s equitable authority to account for the portion of retirement pay lost due to a veteran’s post-decree election of disability benefits are preempted. (¶ 21)

4. **IRM Longmire** (Colo.App. 2018) (Unpublished, at **EXH 2**). Pre-*Howell* separation agreement provided for indemnity. Trial judge ordered indemnity on contract theory. Court of Appeals reversed: “*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption.” ¶ 21.
5. **IRM Copeland** (Colo.App. 2019) (Unpublished, at **EXH 3**). “Courts may not shift marital property to avoid the requirements of the USFSPA or *Mansell’s* holding, nor may they financially compensate a former spouse for not receiving a share of the military spouse’s disability pay.” ¶ 13
6. **IRM Fisher** (Colo.App. 2022) (Unpublished, at **EXH 4**). Since *Howell* is binding interpretation of federal law, it is retroactive, and pre-*Howell* order for indemnity is void, so no deadline to file motion per C.R.C.P. 60(b)(3). Retroactive relief for payments already made??

**IX. OTHER RECEIPTS IN LIEU OF RETIREMENT (Carl)**

- A. **VSI/SSB**. Divisible asset. *IRM Heupel*, 936 P.2d 561 (Colo. 1997). Must repay if reenter military & ultimately retire
- B. **Disability Severance Pay**. Years of active service (max 12) x 2 x highest base pay. Available if not returned to service after TDRL, and disability rating 30% or lower. 10 U.S.C. § 1212
- C. **Administrative Separation**. Full or partial separation pay may be available

**X. MILITARY INCOME & CRCP 16.2 DISCLOSURES(Ezra)**

ENTITLEMENTS		DEDUCTIONS	
Type	Amount	Type	Amount
BASE PAY	9521.40	FEDERAL TAXES	1700.83
BAS	254.39	FICA-SOC SECURITY	590.33
BAH	2049.00	FICA-MEDICARE	138.06
REF SOC SECURITY	.04	SGLI	25.00
		TRADITIONAL TSP	95.21
		ROTH TSP	95.21
		MID-MONTH-PAY	2524.12
<b>TOTAL</b>	<b>11824.83</b>		<b>5168.76</b>

**A. Leave & Earnings Statement.** All military have at least:

**1. Base Pay**

- a) Based upon rank & years of service
- b) Military ranks in “Grade” box - enlisted are E1-E9, Officers are O1-O10, Warrant officers are WO1-WO5.
- c) Annual cost of living adjustment (COLA) in January, longevity increases every two years from Pay Date - *so a service member may receive two pay raises per year.*

**2. Basic Allowance for Housing (BAH)**

- a) Based upon rank, zip code, and whether has dependents (BAH-With) or no dependents (BAH-Without)
- b) Calculator  
<https://www.travel.dod.mil/Allowances/Basic-Allowance-for-Housing/BAH-Rate-Lookup/>, or search “BAH Calculator”
- c) Not taxable
- d) Though rare with privatized housing, in-kind housing in lieu of BAH is income. *IRM Long*, 921 P.2d 67 (Colo.App. 1996). ISSUE - should barracks room count?

**3. Basic Allowance for Subsistence (BAS).** Officers \$311.68/mo, Enlisted \$452.56. [www.dfas.mil/militarymembers/payentitlements/Pay-Tables/bas/](http://www.dfas.mil/militarymembers/payentitlements/Pay-Tables/bas/). Not taxable

**B. Additional Pay & Allowances.** Some members may have other pay, based upon job location or career field. May be long-term or temporary, and include:

- 1. **Professional Pay** - for medical professionals (not lawyers), includes additional monthly and annual pay;
- 2. **Misc Pay** - jump pay, flight pay, foreign language proficiency pay, reenlistment bonuses, etc. Most will appear on LES
- 3. **Overseas COLAs** count as income. *IRM Stress*, 939 P.2d 500 (Colo.App. 1997)
- 4. **Deployed Pay** - \$225 Hostile Fire Pay, \$250 Family Separation Allowance, \$100 HDP, Per diem. Short term only
- 5. **GI Bill BAH Monthly Stipend Only Counts as Income.**

- a) Stipend is at the E-5 BAH-With, per 38 U.S.C. § 3313(c)(1)(B)(i). BAH based upon zip code where the college is located
- b) *IRM Tooker*, 2019 COA 83. Monthly BAH stipend is income for purposes of child support/maintenance, but not tuition reimbursement or book/supply stipend.
- c) “Because the tuition assistance benefit was not available to Mark for general living expenses and would in no discernable way assist him in paying maintenance or child support, we conclude that the district court properly excluded the tuition assistance benefit as gross income for purposes of calculating maintenance and child support.” ¶ 20.

**C. W2 Not Reflect Gross Income.** BAH & BAS are not taxable, and while deployed, all pay is tax-free

**D. Retiree Account Statement** if already retired. Need to declare defined benefit plan as asset on SFS.

PAY ITEM DESCRIPTION			
ITEM	OLD	NEW	ITEM
GROSS PAY	.00	11,527.00	FITW
SBP COSTS	.00	155.00	SITW
TAXABLE INCOME	.00	11,072.00	NET
PAYMENT ADDRESS		YEAR TO DATE S	
DIRECT DEPOSIT		TAXABLE INCOME: FEDERAL INCOME TA STATE TAX WITHHEL	

**E. Reserves/Guard.** Unless intertwined with primary employment (which it often is for National Guard Techs), should not count as income for formula purposes. *IRM Salby*, 126 P.3d 291 (Colo.App. 2005). However, 2nd job is financial resource to determine maintenance. *IRM Nelson*, 2012 COA 205

**F. VA Disability.** Do not receive monthly pay stub, but veteran can get benefits letter, or review bank statement (since not taxable, gross should be same as net). Counts as income. *In re: M.E.R-L and D.L.R-L*, 2020 COA 173, *Rose v. Rose*, 481 U.S. 619 (1987)

**G. Military Assets**

- 1. **Military Retirement.** Members often omit military retirement from LES, particularly if under 20 yrs service. Unvested retirement is divisible. *IRM Beckman*, 800 P.2d 1376 (Colo.App. 1990)

## 2. Accumulated Leave

- a) Accumulate 2.5 days/mo. 10 U.S.C. § 701(a)
- b) Lose excess over 60 days each Sep 30. 10 U.S.C. § 701(b)
- c) Can sell up to 60 days lifetime limit at discharge. Each day worth 1/30 monthly basic pay. 10 U.S. C. § 501
- d) For enlisted, discharge includes reenlistment. 10 U.S.C. § 501(f)
- e) Asset per *IRM Cardona & Castro*, 2014 CO 3

N O					
	TOTAL			11824.83	
<b>LEAVE</b>	BF Bal	Ernd	Used	Cr Bal	ET
	48.0	7.5	0	55.5	
<b>FICA TAXES</b>	Wage Period	Soc Wage YTD		Soc	
	9521.40	114256.80			

## 3. Thrift Savings Plan (TSP). YTD contributions near bottom of LES

DATA	W/DEP	CHILD	32542	.00	1	R	0
TRADITIONAL PLAN (TSP)	Base Pay Rate	Base Pay Current	Spec Pay Rate	Spec Pay Current	Inc Pay Rate	Ir	
	1	.00	0	.00	0		
ROTH PLAN	Base Pay Rate	Base Pay Current	Spec Pay Rate	Spec Pay Current	Inc Pay Rate	Ir	
	1	.00	0	.00	0		
CM AGCY CONTR	AGCY-AUTO	AGC-MATCH					
	.00	.00					
<b>CONTRIBUTIONS TOTALS</b>	YTD Deductions	YTD TSP Deferred	YTD TSP Exempt	YTD ROTH	Y		
	1713.78	1142.52	.00	571.26			
REMARKS:	YTD ENTITLE 136276.39		YTD DEDUCT 31188.42				
	IF TSP ELECTION AMT EXCEEDS NET AMT DUE, TSP WILL NOT BE DEDUCTED.			EQUIFAX/TRANSUNION/EX SIGNUP, CREATE ACCOUNT ACTIVE-DUTY STATUS.			
	-GET READY FOR TAX SEASON NOW. GET YOUR 1095						

## H. Checklist of Disclosures for Military Cases

1. LES, RAS, Retirement Orders, Points Statement, VA Determination letter, DD214, etc.

## XI. FAMILY SUPPORT (*Ezra*)

### A. Temporary Family Support

1. **Applicability.** Physical separation, including deployment, in absence of court order or agreement. Important if member deploys before hearing
2. **Army**



- a) Army Regulation 608-99  
[https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/r608\\_99.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r608_99.pdf)
- b) Amounts (para. 2-6)
  - **Spouse/children in military housing:** None
  - **Civilian spouse/children:** BAH-With
  - **Civilian spouse/children living separately:** Pro rata share of BAH-With
  - **Military spouse, no children:** None
  - **Military spouse, split custody of children:** None
  - **Military spouse with children:** BAH-Diff
- c) No in-kind payments, with limited exceptions (e.g. rent/mortgage or essential utilities). Para. 2-9.
- d) Relief. Battalion/Squadron commander may relieve soldier of spousal obligation (not children) if civilian spouse has higher income, is in jail, has committed physical abuse against soldier, or soldier has already paid support per regulation for 18 months. Para. 2-14.
- e) Examples:
  - E-5 (Sergeant): \$972
  - O-3 (Captain): \$1330.20
  - O-6 (Colonel): \$1892.10

### 3. Air Force

- a) Air Force Instruction 36-2906, Chapter 4  
[https://static.e-publishing.af.mil/production/1/af\\_a1/publication/afi36-2906/afi36-2906.pdf](https://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2906/afi36-2906.pdf)
- b) Pay spouse pro rata share of BAH-With without locality adjustment
- c) Squadron commander can relieve obligation to provide spouse only if: Spouse income exceeds member, spouse committed DV against member, spouse in jail, paid 18 mos already

### 4. Navy

- a) MILPERSMAN 1754-030, Chapter 15, Support of Family Members

<https://www.public.navy.mil/bupers-npc/reference/milpersman/100/0/1700Morale/Documents/1754-030.pdf>

- b) Amounts. Support is fraction of sailor's "gross pay" (defined as base pay + BAH, if entitled, but excludes all other allowances, such as BAS, hostile fire pay, etc)
- **Spouse only:** 1/3
  - **Spouse & 1 minor child:** 1/2
  - **Spouse & 2 or more children:** 3/5
  - **1 minor child:** 1/6
  - **2 minor children:** 1/4
  - **3 minor children:** 1/3
- c) Relief. Member may request waiver of spousal portion only (not children) on grounds of desertion without cause, physical abuse or adultery.

## 5. Marine Corps.

- a) MCO P5800.16A, Marine Corps Manual for Legal Administration, Chapter 15  
<https://www.marines.mil/Portals/59/MCO%20P5800.16A%20W%20CH%201-7.pdf>
- b) Amount. Greater of specific dollar amount or a pro rata share of BAH/OHA, up to maximum of 1/3 full gross pay:
- **1 family member:** 1/2 BAH/OHA, minimum \$350 each
  - **2 family members:** 1/3 BAH/OHA, minimum \$286 each
  - **3 family members:** 1/4 BAH/OHA, minimum \$233 each
  - **4 family members:** 1/5 BAH/OHA, minimum \$200 each
  - **5 family members:** 1/6 BAH/OHA, minimum \$174 each
  - **6 or more family members:** 1/7 BAH/OHA, minimum \$152 each
- c) Relief: Commanding officer may relieve member of obligation where marine cannot determine "whereabouts and welfare of the child concerned", civilian spouse committed documented physical abuse against marine, or is in jail

## 6. Coast Guard

- a) COMDINST M1000.2, Chapter 2E  
[https://media.defense.gov/2018/Oct/31/2002057802/-1/-1/0/CIM\\_1600\\_2.PDF](https://media.defense.gov/2018/Oct/31/2002057802/-1/-1/0/CIM_1600_2.PDF)
- b) Amounts (para 2.E.3.c.)
- **Spouse only:** BAH-Diff, plus 20% of base pay

- **Spouse & 1 child:** BAH-Diff, plus 25% of base pay
- **Spouse & 2 or more children:** BAH-Diff, plus 30% of base pay
- **1 child:** 1/6 of base pay
- **2 children:** 1/4 of base pay
- **3 or more children:** 1/3 of base pay

## 7. Enforcement

- a) Violation of Lawful General Regulation is UCMJ Article 92 offense
- b) No ability to divert money, just disgorge it
- c) Enforcement of civilian orders. E.g. AR 608-99 – must comply with support (para. 2-4a) & custody orders (para. 2-10b)
- d) Contact installation Inspector General or Legal Assistance Office

## B. Garnishment of Military Pay

### 1. Active Duty. Send Notice to Withhold Income via certified mail to:

DFAS-GAG/CL  
 PO Box 998002  
 Cleveland, Ohio 44199-8002  
 Fax: (216) 522-6960

### 2. Retiree. Utilize DD Form 2293 & certified copy of support order

- a) **Income Subject to Garnishment.** 5 CFR § 581.105. Subtract debt to U.S., taxes, life & health insurance premiums, normal retirement contributions
- b) **Maximum Garnishment Percentages.** 5 CFR § 581.402
  - 50% if providing support to dependents not covered by order
  - 55% if providing support to other dependents, but has arrearage
  - 60% if not providing support to other dependents
  - 65% if no support to other dependents, and has arrearage

### 3. Garnishing VA Disability

- a) Subject to garnishment for support/maintenance, *to extent of VA waiver*. 42 U.S.C. § 659(h)(1)(A)(v), *Rose v. Rose*, 481 U.S. 619 (1987)
- b) Not simple process – contact VA Regional Office for apportionment application, then send VA Form 21-4138, Statement

in Support of Claim, with copy of the current support order and any other pertinent documents

(1) Call (800) 527-1000 to determine appropriate regional office

(2) In Colorado, contact:

VA Regional Office  
155 Van Gordon St.  
Lakewood CO 80228  
Tel. (800) 827-1000  
Fax (303) 914-5879

(Mailing Address)

VA Regional Office  
Box 25126  
Denver CO 80225

4. **Re-Garnish Former Spouse Payments?** No. So if retirement recipient has support arrears, must ask court to modify amount of retirement to build in the offset

## **XII. FORMER SPOUSE BENEFITS AFTER DECREE (*Ezra*)**

- A. Legal Separation.** Treated as married for purposes of ID card, so retain full benefits as if married. See para. 3.2, and table 8.3 of joint regulation, *Identification Cards For Members Of The Uniformed Services, Their Eligible Family Members, And Other Eligible Personnel*, published under Air Force Instruction 36-3036.
- B. Full 20/20/20 Benefits.** Per 10 U.S.C. § 1072(2)(F), former spouse is entitled to all military benefits & installation privileges, including medical, commissary, military exchanges (PX/BX), etc. Criteria:
1. Married at least 20 years,
  2. Member had at least 20 years of creditable service, and
  3. At least 20 years overlap between marriage and military service
- C. Transitional 20/20/15 Benefits.** Per 10 U.S.C. § 1072(2)(G) & (H), former spouse is entitled to military medical care only for 1 year. Criteria:
1. Married at least 20 years,
  2. Member had at least 20 years of creditable service, and

3. At least 15 years overlap between marriage and military service

**D. Remarriage terminates health**, and suspends all other 20/20/20 benefits

**E. Continued Health Care Benefit Program (CHCBP)**

1. Similar to COBRA for private health insurance programs, Tricare will provide CHCBP to unremarried former spouses
2. CHCBP not cheap - as of 1/2022, premium cost per quarter is \$1654 (individual) or \$4079 (family)
3. Must elect CHCBP within 60 days of losing Tricare, using DD Form 2837. 10 U.S.C. § 1078a(d)
4. Per 10 U.S.C. § 1078a(g)(4), coverage available for 36 mos, except indefinite for former spouse who meets this criteria:
  - a) Did not remarry under the age of 55,
  - b) Was enrolled as a family member in an approved health care benefits program (i.e. Tricare/DEERS) at any time in the 18 months before dissolution or annulment, and
  - c) Is receiving a share of the member's military retirement OR has a court order or written agreement for a share of the retirement or for SBP coverage.

### **XIII. PARENTING (*Ezra*)**

- A. Paternity.** Court order required for temporary family support. 32 C.F.R. § 81.3. However, voluntary acknowledgment of paternity sufficient for child to receive ID card & benefits. JOINT Air Force Instruction 36–3026, para. 4-9
- B. *IRM DePalma*, 176 P.3d 829 (Colo.App. 2007).** Reservist father deployed, sought to delegate his equal parenting time to stepmother despite first right of refusal provision
  1. Parent has presumptive right to control children's upbringing, including making decisions on who cares for children during parenting time
  2. Court determines best interests if dispute, but fit parent presumed to act in best interests of children
  3. Stepmother had no independent right to children. However, analogize to other third parties providing care to children, such as teachers, day care
  4. Stepmother has no right to make decisions, so mother makes day-to-day decisions while father gone

5. First right of refusal essentially set aside in that case

### C. Uniform Deployed Parents Custody & Visitation Act

1. Approved July 2012 by National Conference of Commissioners on Uniform State Laws

2. Codified in Colorado at C.R.S. 14-13.7-101, *et seq*

#### 3. Definitions

- a) **Deployment.** Movement/mobilization for 90 days – 18 months where family members not authorized. §102(8). *Not limited to hostile fire zone, so technically includes Korea, TDY, etc*
- b) **“Caretaking authority** means the right to live with and care for a child on a day-to-day basis. The term includes physical custody, parenting time, right to access, and visitation.” §102(2)
- c) **“Custodial Responsibility** includes all powers and duties relating to caretaking authority and decision-making authority for the child. The term includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child.” §102(5)
- d) **“Decision-Making Authority** means the power to make major decisions regarding a child, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel. The term does not include the power to make decisions that necessarily accompany a grant of caretaking authority.” §102(6)
- e) **“Limited Contact** means the authority of a nonparent to visit a child for a limited time. The term includes the authority to take the child to a place other than the residence of the child.” §102(10)

#### 4. Procedure

- a) **Deploying Parent Provide Notice** within 12 days of orders unless circumstances prohibit, else as soon as possible. §105(1)
- b) **Parents Exchange Parenting Proposals** “as soon as reasonably possible after notification of deployment.” §105(2)
- c) **Relevance of Deployments for Parenting Orders.** “In a proceeding for custodial responsibility of a child of a service member, a parent’s past deployment or possible future deployment in itself may not serve as the *sole basis* in determining the best

interest of the child. Nothing in this section shall be construed as prohibiting the court from applying section 14-10-124 in determining the best interest of the child.” §107

## 5. Agreement During Deployment

- a) Parents may enter interim agreement during deployment. §201(1)
- b) Must be in writing & signed. §201(2)
- c) Must specify §201(3) (but omission not invalidate agreement):
  - (1) Facts surrounding deployment
  - (2) Caretaking authority between parents, and if applicable, nonparent
  - (3) Decision-making which may accompany caretaking
  - (4) Any limited contact granted to nonparent
  - (5) Dispute resolution process if nonparents involved
  - (6) Deployed parent’s contact with child during deployment
  - (7) Deployed parent’s contact with child while on leave or available
  - (8) Acknowledgment that support change requires court order
  - (9) Termination after deployment

## 6. Interim Court Order

- a) **Interim Order.** After notice, either parent may file a motion, and court may issue an interim custodial responsibility order during deployment, unless prohibited by Servicemembers Civil Relief Act. §302.
- b) **Expedited hearing.** §303
- c) **Prior order/agreement** designating custodial responsibility in case of deployment is **binding** unless standard for modification is met. §305(1)
- d) **Caretaking Authority.** “A court may grant caretaking authority to nonparent who is an adult family member of the child or an adult with whom the child has a *close and substantial relationship.*” §306(1) (Emphasis added)

- e) **Close and substantial relationship** means physical care for more than 182 days. §301
- f) **Nonparent Schedule.** Absent agreement, time granted to nonparent is limited to time deploying parent has, including unusual travel time. §306(2)
- g) **Decision-Making Authority.** Court may grant nonparent specific part of deploying parent’s decision-making powers. §306(3)
- h) **Limited Contact.** “Unless the court finds that the contact would not be in the best interests of the child, **a court shall grant limited contact** to a nonparent who is a family member of the child or an individual with whom the child has a close and substantial relationship.” §307
- i) **Child Support.** Court may enter interim support order if UIFSA jurisdiction. §310
- j) **Terminates Upon Redeployment.** §311

## 7. Return from Deployment

- a) **Termination of Interim Agreement.** Agreement terminates upon date specified, or 35 days after notice that has returned from deployment. §401
- b) **Termination of Interim Order.** 35 days after notice that returned from deployment. §404
- c) **Interim Contact.** Absent agreement, between return from deployment and termination of interim court order, court shall immediately issue an interim order granting deploying parent reasonable contact unless not in best interests of child. §403

## 8. UCCJEA Jurisdiction

- a) **Court Must Have UCCJEA Jurisdiction** to issue interim order. §104(1), absent emergency jurisdiction
- b) **Parent Residence** not changed by virtue of deployment. §104
- c) **Child Home State** not changed by interim parenting schedule. C.R.S. 14-13-102(7)(b). Potentially avoids *IRM Brandt* situations?



1. **Husband/Wife** (hereinafter “member” for the purposes of this section) has served in the U.S. armed forces, and may be entitled to receive a military retirement, which is subject to division per Colorado law and 10 U.S. Code §1408(a). This Court has jurisdiction to divide the retirement because member consented to jurisdiction **\*\*OR** resides in and maintains Colorado as **\*\*\*his/her** legal domicile. At all times member’s applicable rights under the Servicemembers Civil Relief Act have been respected.
2. The marital share of the military retirement is \_\_\_\_\_%, calculated as follows:  
$$\frac{\text{*** days/months/points overlapping marriage \& military service}}{\text{*** days/months/points of service through date of decree/retirement}}$$
3. **Husband/Wife** (hereinafter “former spouse” for purposes of this section) is awarded one-half of the marital share, or \_\_\_\_\_%, plus the Cost of Living Adjustments (COLAs) granted to retirees after the date of the decree. Former spouse is awarded a *percentage share* of the retirement, and any references herein to specific dollar amount are solely estimates for planning purposes, and shall *not* be construed as an award of a fixed dollar amount.
4. Former spouse is entitled to a share of the actual disposable retired pay received, whether active duty or reserve, and is not entitled to retirement if none is received. Days and reserve retirement points are interchangeable on a point-per-day basis, and to the extent points are referenced but member receives an active duty retirement, such points shall be treated as days, and to the extent days are referenced but member receives a reserve retirement, such days shall be treated as points.
5. On the date of the decree, member’s high-3 pay was \$\_\_\_\_\_ and member had the rank/pay grade of \_\_\_\_\_, with \_\_\_\_\_ years/months of creditable service. Former spouse’s share is the percentage defined above multiplied by the disposable retired pay member would be entitled to receive if member retired with this pay and creditable service, plus COLAs. **NOTE - STRICTLY SPEAKING, SHOULD NOT BE NECESSARY, AND IF MEMBER WAS LONG RETIRED, IT’S HARD TO CALCULATE. BUT I’VE HEARD OF DFAS REJECTING ORDERS WHICH DON’T INCLUDE THIS, EVEN FOR RETIREES.**
6. **NOT YET RETIRED.** Member shall advise former spouse of a retirement or separation from the military or from active duty at least 90 days in advance. Within 14 days of receipt, member shall provide former spouse with a copy of all pertinent documents, including 20-year letter, retirement/separation orders, memorandum of release from active duty, DD214, Retiree Account Statement, Statement of Service, chronological statement of retirement points, VA disability determinations, retirement estimates, documents reflecting separation or other pay received in lieu of retirement, etc.
7. **ALREADY RETIRED:** Former spouse’s share of the military retirement is calculated by multiplying former spouse’s percentage defined above by member’s disposable retired pay, which is presently \$\_\_\_\_\_/mo. Former spouse’s share is about \$\_\_\_\_\_/mo.

8. Former spouse's share of the military retirement is reportable as income to former spouse, and deductible from member's income for tax purposes. Any retirement payments which member makes directly to the former spouse shall be based upon the pre-tax disposable retired pay.
9. **MORE THAN 10 YRS OVERLAP.** Because the parties were married on \_\_\_\_\_, they have more than 10 years of marriage overlapping the military service and former spouse shall receive direct payment from DFAS, pursuant to 10 U.S.C. § 1408(d). Former spouse shall promptly apply to the Defense Finance and Accounting Service (DFAS) for **\*\*\*his/her** share of the military retirement, utilizing DD Form 2293, or any other necessary form. Payment of the retirement remains member's obligation, and member shall pay former spouse's share of the disposable retired pay to former spouse within 5 days of member receipt of a payment which includes the share that was owing to former spouse.
10. **FEWER THAN 10 YRS OVERLAP.** Because the parties do not have more than 10 years of marriage overlapping member's military service, member shall pay former spouse's share directly to former spouse within 5 days of receipt of each payment.
11. Within 14 days of any change to the disposable retired pay, member shall provide former spouse with the Retiree Account Statement, VA documents, or any other documents relevant to the change. This does not apply to annual COLAs if DFAS is directly paying former spouse's share of the retirement.
12. Pursuant to 5 U.S.C. §552a(b)(11), this Order is a continuing court order directing DFAS to provide to former spouse upon request all information pertaining to member's retirement, including amounts, dates of service, and periodic Retiree Account Statements. Should DFAS or another agency require any further release for such information, member shall provide an executed release to former spouse within 14 days of former spouse sending such release to member.
13. The Court retains jurisdiction to implement and enforce the division of retirement as set forth herein, including entering appropriate orders should member receive financial benefits in lieu of some or all of the military retirement, merges the military retirement credit into another retirement such as FERS, participates in any program which either makes lump sum payments, or reduces the retirement available for division, or for any other reason where indemnity is not prohibited by law.
14. **ALREADY RETIRED & SELECTED "SPOUSE" SBP COVERAGE.** Member previously elected Survivor Benefit Plan or Reserve Component Survivor Benefit Plan (hereinafter "SBP") to protect former spouse's share of the retirement in the event of member's death. Within 60 days, member shall convert such coverage by designating former spouse as "former spouse beneficiary", and provide to former spouse proof of enrollment, and any other forms pertaining to SBP within 30 days of receipt or execution.  
**NOTE - DEADLINE TO CONVERT SPOUSE TO FORMER SPOUSE COVERAGE IS 1 YEAR AFTER ORDER.**

15. **NOT YET RETIRED.** Prior to retirement, member shall make an irrevocable election to participate in the Survivor Benefit Plan (SBP), designating former spouse as the “former spouse beneficiary” for an annuity which pays an amount not less than former spouse’s share of the retirement. If in the reserves, member shall participate in the Reserve Component Survivor Benefit Plan, electing Option C (Immediate Annuity) within 90 days of receiving the “20-year” letter of entitlement to Reserve retirement pay. Member shall provide former spouse proof of enrollment, and any other forms pertaining to SBP within 30 days of receipt or execution.
16. The parties shall divide equally the costs of the SBP, and to the extent member is assessed any greater portion by DFAS, former spouse shall compensate member for the difference every six months.

17CA1294 Marriage of Longmire 08-30-2018

COLORADO COURT OF APPEALS

DATE FILED: August 30, 2018  
CASE NUMBER: 2017CA1294

---

Court of Appeals No. 17CA1294  
El Paso County District Court No. 08DR4695  
Honorable Jill M. Brady, Judge

---

In re the Marriage of

Suzanne Longmire, n/k/a Morrison,

Appellee,

and

Travis Longmire,

Appellant.

---

ORDER REVERSED

Division V  
Opinion by JUDGE LICHTENSTEIN  
Román and Furman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced August 30, 2018

---

Gill & Ledbetter, LLP, Anne Whalen Gill, Castle Rock, Colorado, for Appellee

Beltz & West, P.C., Daniel A. West, Colorado Springs, Colorado, for Appellant



¶ 1 In this post-dissolution of marriage case, Travis Longmire (husband) appeals the district court's order requiring him, as part of a separation agreement, to pay Suzanne Longmire, now known as Suzanne Morrison (wife), her portion of his military disability retirement benefits. We reverse.

### I. Pertinent Facts

¶ 2 At the time the district court dissolved the parties' twenty-one-year marriage, husband was on active duty with the United States Air Force. The dissolution decree incorporated the parties' separation agreement, which provided that they would divide husband's "future disposable military retired pay" or "any related service related benefits" according to the "time rule" formula set forth in *In re Marriage of Hunt*, 909 P.2d 525, 531-32 (Colo. 1995). The separation agreement also included the following provisions:

Husband agrees not to merge or diminish his retired or retainer pay with any other pension and he agrees not to pursue any course of action that would defeat or diminish [w]ife's rights to her portion of [h]usband's retired or retainer pay. If [h]usband's retired pay is diminished, wherein [w]ife's interests are detrimentally affected, the [c]ourt shall reserve jurisdiction to compensate [w]ife for such diminution.

. . . .

[Husband] will be personally liable for any costs, including attorneys' fees that may be incurred by [wife] in enforcing her rights or collecting such benefits from [him].

[Husband] will not pursue any course of action that would defeat, reduce or limit [wife's] right to receive the share of his military retired pay awarded herein. [Husband] shall indemnify and hold harmless [wife] for any breach of this provision from funds of whatever source

¶ 3 Nearly seven years later, as a result of a physical disability incurred “in the line of duty as a direct result of armed conflict or caused by an instrumentality of war” and “during a period of war,” husband was separated from the Air Force under Chapter 61, 10 U.S.C. § 1201 (2012), with a physical disability rating of 100%. See 10 U.S.C. § 1201(a) (“Upon a determination . . . that a member . . . is unfit to perform the duties of the member’s office, grade, rank, or rating because of physical disability incurred while entitled to basic pay . . ., the Secretary may retire the member, with retired pay computed under [10 U.S.C. § 1401 (2012)] . . . .”); see also *In re Marriage of Tozer*, 2017 COA 151, ¶ 3 (“This form of military retirement — where the military itself retires a member who is ‘unfit to perform’ his duties due to a service-related physical disability —

is commonly referred to as ‘Chapter 61’ disability retirement.”)  
(citation omitted). During a medical examination associated with  
his separation, husband was diagnosed with Ankylosing  
Spondylitis, an arthritic disease affecting his back and neck.

¶ 4 The Defense Department then provided husband the option to  
receive either disability retirement benefits or regular military  
retired pay. *See* 10 U.S.C. § 1401; *see also* *Tozer*, ¶ 3 (a veteran  
retired under Chapter 61 may opt to receive monthly payments  
based on his disability rating instead of military retirement pay).  
Husband opted for disability retirement benefits.

¶ 5 In addition to his Chapter 61 disability retirement benefits,  
husband also received disability benefits from the Veteran’s  
Administration and Social Security. Thus, all of husband’s benefits  
from the military were based on disability.

¶ 6 When wife became aware of the situation, she moved to  
enforce the terms of the separation agreement and in the alternative  
for equitable relief. She alleged that husband voluntarily elected to  
receive only disability retirement benefits and that he defeated any  
retirement benefits she would have been entitled to under the  
agreement. She sought indemnification for her lost interest.

¶ 7 Following a hearing, the district court, based on contract theory, found that husband breached the separation agreement by “pursu[ing] a course of action” that defeated wife’s portion of his disposable military retired pay. Because the separation agreement also included the language “service related benefits,” the district court rejected husband’s argument that there “[was] no ‘disposable military retired pay’ here since Chapter 61 [disability] benefits are expressly excluded from the definition of ‘disposable retired pay’ under the Uniform Services Former Spouses’ Protection Act.”

Additionally, the district court distinguished a recent United States Supreme Court decision, *Howell v. Howell*, 581 U.S. \_\_\_, 137 S. Ct. 1400 (2017), stating that the case “did not involve a Separation Agreement where the parties’ specifically contracted for the non-military spouse to receive her share of military retirement or any service related benefits.” In the end, the court ordered husband to indemnify wife by paying her approximately 40% of his monthly disability benefits. It also ordered him to pay her attorney fees incurred in connection with his breach of the separation agreement.



## II. Husband's Military Disability Retirement Benefits Cannot Be Divided Under Federal Law

¶ 8 Husband contends that the district court was preempted from ordering him to indemnify wife for the amount of military retirement pay that she would have received under the separation agreement.

We agree.

¶ 9 Although state law historically controls domestic relations, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), the Uniformed Services Former Spouses' Protection Act (USFSPA) represents "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). Thus, the USFSPA raises the question of preemption.

¶ 10 Under the Supremacy Clause, article VI, clause 2 of the United States Constitution, state law must yield to federal law when application of the two conflict. *Wos v. E.M.A.*, 568 U.S. 627, 636 (2013); see *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (Federal law preempts state jurisdiction where Congress so provides "by an explicit statutory directive, by unmistakable

implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”).

¶ 11 Federal preemption is a question of law that we review de novo. *Timm v. Prudential Ins. Co. of Am.*, 259 P.3d 521, 525 (Colo. App. 2011); *see also In re Marriage of Anderson*, 252 P.3d 490, 493 (Colo. App. 2010) (“We review de novo . . . whether the decree provision requiring husband to pay part of his future Social Security benefits to wife conflicts with the Social Security Act and thereby violates the Supremacy Clause of the United States Constitution.”).

¶ 12 State courts are limited in how they may divide military benefits in dissolution cases. In *Mansell*, a husband and wife entered into a property settlement agreement in which the husband agreed to pay the wife 50% of his total military retired pay, “including that portion of retirement pay waived so that [he] could receive disability benefits.” 490 U.S. at 586. Four years later, the husband moved to modify the divorce decree, arguing that the waived retirement benefits could not be divided under the USFSPA. California, determining that the USFSPA allowed state courts to treat disability benefits as community property, denied husband

relief. *Id.* at 586-87. The United States Supreme Court reversed. The Court recognized the hardship that congressional preemption can sometimes work on divorcing spouses. *Id.* at 594. Yet, it held that the USFSPA, 10 U.S.C. § 1408 (2012), explicitly excludes military disability benefits from the definition of disposable retired pay. Thus, in divorce cases where military retirement pay has been waived to receive veterans' disability benefits, the USFSPA does not grant state courts the power to treat these disability benefits as property divisible on dissolution. *Mansell*, 490 U.S. at 595.

¶ 13 In *Howell*, the United States Supreme Court again recognized the USFSPA's preemptive effect on divorcing spouses. Nonetheless, the Court reaffirmed and clarified the holding in *Mansell*. *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1405-06.

¶ 14 In *Howell*, the dissolution decree provided that the wife would receive 50% of the husband's future military retirement benefits as her sole and separate property along with spousal maintenance. 581 U.S. at \_\_\_, 137 S. Ct. at 1404. One year later, the husband retired from the Air Force. *Id.* The wife then began receiving half of his military retirement pay, which she continued to receive for the next thirteen years until he was found to be partially disabled. *Id.*

In order to receive disability benefits, the husband elected to waive part of his retirement pay, which, in turn, decreased the wife's share of his retirement pay. *Id.* As a result, the wife moved to enforce the divorce decree so that she would again receive her original share. *Id.* The Arizona family court concluded that the divorce decree had given the wife a "vested" interest in the prewaiver amount of the husband's military retirement pay and ordered him to ensure that she receive her full 50% share "without regard for the disability." *Id.*

¶ 15 The Arizona Supreme Court agreed. *Id.* It concluded that *Mansell* did not control because, unlike the veteran there, the husband made his waiver after, rather than before, the court divided his military retirement pay. *Id.* And thus federal law did not preempt the reimbursement order. *Id.*

¶ 16 In reversing, the United States Supreme Court held that even though the military spouse unilaterally waived a portion of his retirement pay for disability benefits, federal law preempts state courts from ordering the military spouse to indemnify their former spouse for the loss of that spouse's portion of retirement pay. *See id.* at 1406. The Court explained:

Neither can the State avoid *Mansell* by describing the family court order as an order requiring [the husband] to “reimburse” or to “indemnify” [the wife], rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.

*Id.*

¶ 17 In the wake of *Howell* and during the pendency of this appeal, a division of this court in *Tozer* held that if a veteran’s retired pay consists of Chapter 61 disability retirement benefits, it is not disposable retired pay under the USFSPA. *See Tozer*, ¶ 13; *see also* 10 U.S.C. § 1408(a)(4)(A)(iii); *Guerrero v. Guerrero*, 362 P.3d 432, 442 (Alaska 2015) (A military “member does not unilaterally choose to become Chapter 61 retired.”). The division also concluded that “orders crafted under a state court’s equitable authority to account

for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted." *Tozer*, ¶ 21.

¶ 18 In light of these cases, we conclude that wife is not entitled to any portion of husband's military disability benefits, and, therefore, the district court was precluded under the USFSPA from directing him to pay her nearly 40% of such benefits per month. *See Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1406; *see also Tozer*, ¶ 21.

¶ 19 Wife nonetheless asserts the present case is distinguishable because the parties specifically contemplated that husband's disposable military retired pay may cease to exist and included indemnity language in their separation agreement reflecting the parties' intent that wife would still receive her share of his retirement pay. We are not persuaded.

¶ 20 First, as discussed above, state courts are preempted from ordering military veterans receiving Chapter 61 disability benefits to indemnify their former spouses. *See Tozer*, ¶ 13. Here, the record reflects that husband was separated from the Air Force with a physical disability rating of 100% and his "disposable military retired pay" consisted entirely of disability retirement benefits. Thus, the district court was preempted from dividing such benefits

under the USFSPA and ordering husband to indemnify wife for her lost portion. See 10 U.S.C. § 1408(a)(4)(A)(ii), (iii); see also *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1406; *Tozer*, ¶¶ 13, 21.

¶ 21 Second, state courts may not rely on contract theory to avoid federal preemption. True, in *Howell* the parties did not specifically contract for indemnification to ensure that the nonmilitary spouse would receive his or her share of retirement pay. But, as recognized in *Mattson v. Mattson*, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017), “*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption.” *Id.*

¶ 22 Indeed, in *Howell*, the United States Supreme Court recognized that some state courts were enforcing separation agreements that treated military retirement pay as divisible community property. But it determined that those state courts were acting in error. For example, it cited *Krapf v. Krapf*, 786 N.E.2d 318, 324 (Mass. 2003) (army veteran breached separation agreement when parties expected and intended that his wife would receive one-half of his full military retirement benefits and he unilaterally executed a waiver reducing his military retirement benefits for disability payments), as a state court decision that

failed to properly interpret *Mansell*. See *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1404-05; see also *Roberts v. Roberts*, No. M2017-00479-COA-R3-CV, 2018 WL 1792017, at \*7 (Tenn. Ct. App. Apr. 16, 2018) (unpublished opinion) (“[T]he holding in *Howell* casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefit other than disposable retired pay.”).

¶ 23 Recently, the Alabama Court of Appeals stated that, based on *Howell*, it was compelled to determine that despite an express indemnity provision in the parties’ settlement agreement, husband’s temporary disability retired list pay was not disposable retired pay under the USFSPA and cannot be treated as marital property subject to division. *Brown v. Brown*, \_\_\_ So. 3d \_\_\_, 2018 WL 1559790, at \*4-6 (Ala. Civ. App. March 30, 2018).

¶ 24 We likewise are compelled to conclude, based on *Howell*, that the court here was preempted from ordering husband to indemnify



wife for the amount of military retired pay that she would have received under the separation agreement.<sup>1</sup>

¶ 25 In her answer brief, wife argues that to reverse the district court's order would constitute the taking of a property interest in violation of the United States Constitution. However, we decline to address this issue because it was raised for the first time on appeal. *See In re Marriage of Ensminger*, 209 P.3d 1163, 1167 (Colo. App. 2008) (arguments not raised to the district court will not be addressed for the first time on appeal).

### III. Because Husband Did Not Breach the Separation Agreement Wife Is Not Entitled to District Court Attorney Fees or Appellate Attorney Fees

¶ 26 Husband contends that the district court erred in awarding wife her attorney fees under the separation agreement. Again, we agree.

¶ 27 Because the district court was preempted from enforcing the separation agreement's provision that would divide husband's disability benefits, husband did not breach the separation agreement and therefore is not liable for wife's attorney fees.

---

<sup>1</sup> Given our disposition, we need not address husband's alternative arguments.

Accordingly, we reverse this portion of the order as well. *See In re Marriage of Williams*, 2017 COA 120M, ¶ 25 (reversing attorney fee award under the prevailing party provisions of the parties' agreements when the district court erroneously decided that the agreements required the former husband's estate to continue paying maintenance to the wife).

¶ 28 Likewise, we deny wife's request for appellate attorney fees. *See id.* at ¶ 27.

#### IV. Conclusion

¶ 29 The order is reversed.

JUDGE ROMÁN and JUDGE FURMAN concur.

# Court of Appeals

STATE OF COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, CO 80203  
(720) 625-5150

PAULINE BROCK  
CLERK OF THE COURT

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb  
Chief Judge

DATED: October 19, 2017

*Notice to self-represented parties: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at [http://www.cba.cobar.org/repository/Access%20to%20Justice/AppellateProBono/CBAAppProBonoProg\\_PublicInfoApp.pdf](http://www.cba.cobar.org/repository/Access%20to%20Justice/AppellateProBono/CBAAppProBonoProg_PublicInfoApp.pdf)*

18CA1177 Marriage of Copeland 10-03-2019

COLORADO COURT OF APPEALS

DATE FILED: October 3, 2019  
CASE NUMBER: 2018CA1177

---

Court of Appeals No. 18CA1177  
El Paso County District Court No. 17DR31221  
Honorable Timothy Schutz, Judge

---

In re the Marriage of

Tametra Copeland,

Appellant,

and

Kenneth Copeland,

Appellee.

---

JUDGMENT AFFIRMED AND CASE  
REMANDED WITH DIRECTIONS

Division I  
Opinion by JUDGE FREYRE  
Taubman and Pawar, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced October 3, 2019

---

Law Office of Greg Quimby, P.C., Greg Quimby, Erica Vasconcellos, Cody  
Christian, Colorado Springs, Colorado, for Appellant

Kent L. Freudenberg, Colorado Springs, Colorado, for Appellee

¶ 1 Tametra Copeland (wife) appeals the property division entered as part of the final order dissolving her marriage to Kenneth Copeland (husband). Specifically, she challenges the court’s legal conclusion that military disability benefits may not be equitably considered in the court’s property division. Because we discern no legal error, we affirm the judgment and remand for the district court to consider wife’s appellate attorney fees request.

### I. Relevant Facts

¶ 2 When the parties divorced, wife had worked thirteen years for the federal government and was eligible to receive a federal employee retirement system (FERS) pension in seven years. Husband was discharged from the military, and was receiving monthly disability benefits, but no retirement pay.

¶ 3 The parties agreed on how to divide most of their marital property, with wife netting \$15,000 and husband \$5000. Both parties waived maintenance. They disputed the division of wife’s FERS pension and husband’s military disability benefits.

¶ 4 Following briefing on these two issues, the court found, under *Howell v. Howell*, 581 U.S. \_\_\_, 137 S. Ct. 1400 (2017) and *Tozer v. Tozer*, 2017 COA 151, ¶ 21, that it could not consider husband’s

military disability benefits in the marital property division, nor could it award wife all of her FERS pension as an offset to the disability pay. Instead, the court considered the stipulated property agreement and divided the FERS pension equitably between the parties. Further, recognizing that it could consider “all equitable circumstances,” the court rejected the parties’ maintenance waivers and instead, awarded wife \$1 per month so that it could retain jurisdiction to reconsider maintenance once the parties began receiving their FERS payouts.

## II. Military Disability Benefits

¶ 5 Wife concedes that the court correctly determined that it could not divide husband’s military disability benefits as marital property. *See id.* at \_\_\_, 137 S. Ct. at 1402 (military disability benefits may not be divided as marital property); *see also In re Marriage of Tozer*, 2017 COA 151, ¶ 21 (same). Nevertheless, she argues that the court should have exercised its equitable power to consider husband’s military disability benefits as an economic circumstance when dividing the marital estate. In essence, she argues that the court should have awarded her 100% of the FERS pension to compensate her for not receiving any share of husband’s military

disability benefits. Because the same body of law that prohibits state courts from dividing military disability benefits in a property award also precludes them from equitably considering those disability benefits in dividing marital property, we disagree and affirm the court’s judgment.

A. Standard of Review and Law

¶ 6 Although state law historically controls domestic relations, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408 (2018), represents “one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.” *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). The USFSPA permits state courts to equitably divide “disposable retired pay,” 10 U.S.C. § 1408(c)(1), but it specifically excludes military retirement pay waived in order to receive veterans’ disability payments.<sup>1</sup> § 1408(a)(4)(B).

---

<sup>1</sup> A veteran may choose to waive military retirement pay to receive comparable military disability benefits when the veteran qualifies to receive disability. This decision may reduce the amount a non-military spouse receives in the property division.

¶ 7 Seven years after Congress enacted the USFSPA, the United States Supreme Court interpreted it in a dissolution case where the decree effectively divided a veteran's disability benefits as part of the property settlement. *Mansell v. Mansell*, 490 U.S. 581 (1989). In *Mansell*, husband sought to modify the divorce decree, which ordered him to pay wife 50% of his total military retired pay, "including that portion of retirement pay waived so that [he] could receive disability benefits." 490 U.S. at 586. California courts had interpreted the USFSPA as allowing state courts to treat military disability benefits as community property and denied husband's request. *Id.* at 586-87. The United States Supreme Court reversed and held that the USFSPA preempted state court laws permitting the equitable distribution of military disability benefits. *Id.* at 594. Thus, in divorce cases where military retirement pay is waived to receive veterans' disability benefits, *Mansell* holds that the USFSPA does not grant state courts the power to treat military disability benefits as property subject to division on dissolution. *Id.* at 595.

¶ 8 In the wake of *Mansell*, some state courts began ordering the military spouse to indemnify or reimburse the former spouse for a reduction in military retired pay received when the retiree elected to



receive disability compensation. See Brentley Tanner & Amelia Kays, *Winds of Change: New Rules For Dividing the Military Pension at Divorce*, 30 J. Am. Acad. Matrim. Law. 491, 499 n.22 (2018) (listing cases). “The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property.” *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1406.

¶ 9 In response, the Supreme Court granted certiorari in *Howell* to resolve the conflicting state court decisions. *Id.* at \_\_\_, 137 S. Ct. at 1404-05 (listing cases). In *Howell*, the parties’ dissolution decree provided that the wife would receive 50% of husband’s future military retirement benefits as her sole and separate property. *Id.* at \_\_\_, 137 S. Ct. at 1404. One year later, the husband retired, and the wife began receiving half of his military retirement pay. *Id.* Thirteen years later, the husband was found partially disabled, and he elected to waive part of his military retirement pay to receive disability benefits. *Id.* Because husband’s waiver decision decreased wife’s share of his retirement pay, the Arizona family court granted wife’s request to enforce the full amount in the decree

and ordered husband to pay wife her full 50% share “without regard for the disability.” *Id.* The Arizona Supreme Court agreed. *Id.*

¶ 10 In reversing, *Howell* reaffirmed the *Mansell* holding that federal law preempts the states from treating waived military retired pay as divisible community property. *Id.* at \_\_\_\_, 137 S. Ct. at 1405. The Court held that “[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.” *Id.* at \_\_\_\_, 137 S. Ct. at 1406. Thus, the Court held that orders for indemnification or reimbursement are likewise preempted. *Id.*

¶ 11 Following *Howell*, a division of this court considered the precise issues raised here — whether a court could employ equitable theories to consider husband’s military disability benefits in dividing the marital property. *Tozer*, ¶ 15. Applying *Howell*, the division held that “[b]ecause federal law precludes state courts from dividing military disability benefits as marital property, the district court did not err in denying wife equitable relief.” *Tozer*, ¶ 22. In doing so, it remarked, “The *Howell* takeaway is clear. Military retirement disability benefits may not be divided as marital

property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted." *Tozer*, ¶ 21.

## B. Application

¶ 12 Applying *Howell* and *Tozer* here, we conclude that husband's military disability benefits are not subject to equitable division as part of the marital estate and that the district court properly determined that it was preempted from awarding wife 100% of her FERS pension as an offset to husband's disability payments.

¶ 13 We are not persuaded by wife's assertion that the USFSPA preempts only those orders giving a dollar for dollar offset against the disability benefits. While the specific indemnification in *Howell* "mirror[ed] the waived retirement pay, dollar for dollar," the Court concluded that *any* reimbursement or indemnification orders "[r]egardless of their form" are preempted. *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1406; *see also Tozer*, ¶ 21. Thus, courts may not shift marital property to avoid the requirements of the USFSPA or *Mansell's* holding, nor may they financially compensate a former spouse for not receiving a share of the military spouse's disability

pay. *See Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1406; *Tozer*, ¶ 21; *see also Dunmore v. Dunmore*, 420 P.3d 1187, 1191 & n.2, 1193 (Alaska 2018) (where retirement assets are preempted from division under federal law, courts may not evade the federal prohibitions with a larger award of marital property to the other spouse).

¶ 14 We are also not persuaded by wife’s temporal argument that *Howell* and *Tozer* do not control because they involved post-decree modifications to the property division rather than an initial property division. Wife cites no authority to support it, nor does she explain how this temporal difference affects a court’s division of property. Moreover, *Howell* reaffirmed *Mansell*, which considered how to treat military retirement pay divisible as part of an initial property division. *See Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1405-06. We infer from the Court’s ratification that it intended *Howell* to apply equally to initial property distributions.

¶ 15 However, our conclusion that *Howell* and *Tozer* precludes the court from considering or dividing husband’s military disability benefits as part of the marital estate does not mean that the court lacked the authority to consider the equitable circumstances resulting from the military disability benefits in other contexts. To

be sure, *Howell* stressed that a district court may take account of military disability benefits when calculating or recalculating the need for spousal support. See 581 U.S. at \_\_\_\_, 137 S. Ct. at 1406. That is precisely what the district court did here.

¶ 16 The court refused to accept the parties' maintenance waivers, finding that it should consider husband's military disability benefits as an equitable circumstance. The court recognized the possible future inequity that could result from wife receiving only a share of her FERS pension and husband receiving both a share of wife's FERS pension and 100% of his monthly military disability benefits. Hence, the court determined that it should refuse the parties' maintenance waivers and reserve jurisdiction over maintenance to address whether an award would be necessary in the future when the parties begin receiving their FERS payouts. This was a proper exercise of discretion under *Howell*. 137 S. Ct. at 1406. Therefore, we reject wife's argument that the court simply "turned a blind eye" to the economic circumstances existing here.

¶ 17 In sum, we discern no error in the court's treatment of the military disability benefits or in its consideration of the benefits as an economic circumstance for maintenance purposes only.

### III. Wife's FERS Pension

¶ 18 Wife next contends that the court erroneously divided her FERS pension. She concedes that “the court absolutely cannot divide Husband’s military VA disability between the parties.” However, she argues that the court “should have awarded Wife her entire FERS account as that was the equitable way to distribute the marital estate” by considering husband’s military disability benefits. She claims that absent this equitable consideration, she will receive \$1012.50 monthly while husband will receive \$2262.98 monthly. In our view, this is simply another way of arguing that the court should have considered the military disability benefits in its marital property division — an argument we have already rejected.

¶ 19 The district court must enter a just and equitable division of marital property. *See* § 14-10-113(1), C.R.S. 2018. The equitable division of marital property is a matter within the district court’s discretion. *In re Marriage of Cardona*, 2014 CO 3, ¶ 9. In reviewing a district court’s property division, we recognize that the court has great latitude to effect an equitable distribution based upon the facts and circumstances of each case. *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001).

¶ 20 However, as explained above, state courts are preempted from dividing military disability benefits or including such benefits as part of the equitable distribution of marital property. Instead, they may retain jurisdiction by awarding spousal maintenance and adjusting the maintenance award based on the parties' circumstances.

¶ 21 Here, the court awarded wife \$10,000 more in marital property than husband, and it awarded wife maintenance to retain jurisdiction over the parties. Accordingly, we discern no error in the court's property division.<sup>2</sup> Because the parties do not challenge the award of maintenance, we do not address it further.

#### IV. Wife's Attorney Fees Request

¶ 22 Wife seeks an award of her appellate attorney fees under section 14-10-119, C.R.S. 2019, arguing that husband has a higher monthly income. She asserts in her reply brief that husband's failure to object in his answer brief entitles her to this award. We

---

<sup>2</sup> We do not address the order's silence on the specific percentage of the marital portion of the pension to be allocated to each party, because it was not raised. For the same reason, we do not address the standard under which the parties' maintenance may be reviewed in the future.

reject this assertion, because whether wife is entitled to an award of appellate attorney fees under section 14-10-119 is a matter within our discretion. See C.A.R. 39.1.

¶ 23 Nevertheless, we exercise our discretion and remand the issue to the district court, which is better equipped to resolve the factual issues regarding the parties' current financial resources. In re Marriage of Kann, 2017 COA 94, ¶ 84.

#### V. Conclusion

¶ 24 The judgment is affirmed, and the case is remanded for the district court to determine wife's section 14-10-119 request for appellate attorney fees.

JUDGE TAUBMAN and JUDGE PAWAR concur.



# Court of Appeals

STATE OF COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, CO 80203  
(720) 625-5150

PAULINE BROCK  
CLERK OF THE COURT

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard  
Chief Judge

DATED: December 27, 2018

*Notice to self-represented parties: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at [http://www.cobar.org/Portals/COBAR/repository/probono/CBAAppProBonoProg\\_PublicInfoApp.pdf](http://www.cobar.org/Portals/COBAR/repository/probono/CBAAppProBonoProg_PublicInfoApp.pdf)*

20CA0849 Marriage of Fisher 01-06-2022

COLORADO COURT OF APPEALS

DATE FILED: January 6, 2022  
CASE NUMBER: 2020CA849

---

Court of Appeals No. 20CA0849  
El Paso County District Court No. 95DR3983  
Honorable G. David Miller, Judge

---

In re the Marriage of

Sigrid Geothoeffer Fisher,

Appellant,

and

Jonathan Fisher,

Appellee.

---

ORDER AFFIRMED

Division IV  
Opinion by JUDGE BROWN  
Navarro and Vogt\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced January 6, 2022

---

Anne Whalen Gill, L.L.C., Anne Whalen Gill, Castle Rock, Colorado, for  
Appellant

Beltz & West, P.C., Daniel A. West, Colorado Springs, Colorado, for Appellee

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this post-dissolution of marriage proceeding between Sigrid Geothoeffer Fisher (wife) and Jonathan Fisher (husband), wife appeals the district court’s order granting husband relief from a judgment for the arrearages owed for her share of his military retirement benefits. We affirm.

### I. Background

¶ 2 The parties’ marriage ended in 1996. As relevant here, wife received 37% of husband’s military retirement benefits under the decree. The 1997 order distributing the benefits provided that wife would receive as a property interest 37% of husband’s “disposable retired pay, to the maximum extent permitted by law.” Also in 1997, however, husband began receiving Department of Veterans Affairs (VA) disability benefits, and a portion of his regular retirement pay was waived to account for those benefits.

¶ 3 In 2014, wife moved in relevant part to enforce the retirement benefits division from the decree, asserting that she had not been receiving her full share of husband’s military retirement pay. The district court granted wife’s motion based on husband’s failure to respond. In 2017, wife moved for a judgment against husband for \$62,533 in retirement benefit arrearages and the court granted the

motion. In 2018, wife moved to enforce the \$62,533 judgment through an order that the military pay her 50% of husband's retirement pay until the judgment is satisfied. The court again granted wife's motion, noting husband's failure to respond.

¶ 4 Three months later, however, husband submitted a pro se letter to the court objecting to the judgment on the basis that it included his VA disability benefits. And in January 2020, after retaining counsel, husband moved for relief from the judgment under C.R.C.P. 60, asserting in relevant part that wife's arrearages calculation included his disability benefits, to which she was not entitled.

¶ 5 The district court granted husband relief from the judgment, finding that it had lacked subject matter jurisdiction to determine the arrearages by including his VA disability benefits. It ordered wife's attorney to prepare a new calculation showing the amount owed to wife without the disability benefits.

¶ 6 Wife appealed from this order. A division of this court ordered her to show cause why the appeal should not be dismissed for lack of a final, appealable order because the amount of arrearages was not yet determined. The show cause order was discharged,

however, and the appeal permitted to proceed after wife provided a copy of a later order granting the parties' stipulation establishing \$17,885 as the amount owed to her.

## II. Husband's Motion for Relief from the Judgment Was Timely

¶ 7 Wife first contends that husband's motion was untimely under C.R.C.P. 60(b), which requires that a motion for relief from a judgment be brought within a reasonable time. We disagree.

¶ 8 We review the district court's order granting husband relief from the judgment under Rule 60(b) for abuse of discretion but review de novo the legal standards the court applied, including its determination that the judgment was void for lack of subject matter jurisdiction. *See Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 314 (Colo. 2010); *see also In re Marriage of Anderson*, 252 P.3d 490, 493-96 (Colo. App. 2010) (reviewing de novo whether a decree provision dividing a spouse's social security benefits was void under the Supremacy Clause).

¶ 9 Under C.R.C.P. 60(b)(3), a court may relieve a party from a void final judgment. *Anderson*, 252 P.3d at 495. Although a motion under Rule 60(b) generally must be brought "within a reasonable time," a judgment that is void for lack of subject matter

jurisdiction may be challenged at any time. *Anderson*, 252 P.3d at 495 (quoting C.R.C.P. 60(b)); *see also Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 681 (Colo. 2007) (a challenge to the court's subject matter jurisdiction cannot be waived and may be raised at any stage of the proceedings).

¶ 10 The district court ruled that although husband had delayed in bringing his motion, the court “indeed lacked subject matter jurisdiction over the issue of determining arrearages based upon a calculation of military retirement division including [VA] disability benefits which should have been excluded from the calculation.” Accordingly, the court granted husband's motion for relief from the judgment on this basis.

¶ 11 Wife argues that the judgment for her share of husband's retirement pay, including amounts waived for his disability pay, was not void for want of jurisdiction but rather merely erroneous, and therefore husband's motion was untimely. We are not persuaded.

¶ 12 Military retirement benefits are divisible as marital property in dissolution of marriage cases pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(c)(1). *Howell v.*

*Howell*, 581 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1400, 1402-04 (2017).

Divisible benefits are limited, however, to “disposable retired pay,” which excludes disability pay. *Id.* at \_\_\_, 137 S. Ct. at 1403 (quoting 10 U.S.C. § 1408(c)(1)); see also *In re Marriage of Tozer*, 2017 COA 151, ¶ 13. Divisible benefits also do not include retirement benefits the spouse waived in order to receive disability benefits. *Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1403; *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). Thus, *Howell* holds that state courts are “completely” preempted from dividing such waived retirement benefits and from ordering a spouse to reimburse or indemnify the other spouse for the waived benefits. 581 U.S. at \_\_\_, 137 S. Ct. at 1405-06; see also *Tozer*, ¶¶ 13, 19; cf. *Anderson*, 252 P.3d at 493 (explaining that the anti-assignment clause of the Social Security Act precludes a court both from dividing future Social Security benefits as marital property and from employing “an indirect offset” to account for the value of such benefits).

¶ 13 Because an order dividing military disability benefits or requiring indemnification or reimbursement for waived retirement benefits is preempted by federal law, a state court lacks subject matter jurisdiction to enter or enforce such an order. See

*Anderson*, 252 P.3d at 493-94 (holding that because federal law preempts states from transferring social security benefits, state courts “lack subject matter jurisdiction to divide” such benefits and “are without power to enforce” agreements to do so); *Osband v. United Airlines, Inc.*, 981 P.2d 616, 619 (Colo. App. 1998) (“If federal law preempts state law, the state trial court lacks subject matter jurisdiction to hear a claim.”); *see also Howell*, 581 U.S. at \_\_\_, 137 S. Ct. at 1405 (state courts “lack the authority” to give a spouse an interest in the other spouse’s waivable military retirement benefits).

¶ 14 We are not persuaded otherwise by *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018), on which wife relies. There, the Alaska Supreme Court held that a spouse was not entitled to relief from a judgment enforcing a separation agreement provision dividing 50% of his military retirement pay, including his disability pay, because the enforcement order was not void but rather erroneous under federal law and thus not subject to collateral attack. *Id.* at 397-98. The court distinguished *Howell* because the case before it did not involve an order reimbursing the amount of retirement pay that a spouse waived post-decree for disability pay. *Id.* at 401.



¶ 15 The Alaska court did not address *Howell's* holding that state courts are *preempted* from dividing military disability pay, however, or explain how its courts have the authority to enforce such divisions despite that finding. See 581 U.S. at \_\_\_, 137 S. Ct. at 1404-06. Accordingly, we decline to follow the Alaska decision in the face of *Howell* and Colorado authority to the contrary. See *id.*; *Tozer*, ¶¶ 19-21; see also *Anderson*, 252 P.3d at 494; *Osband*, 981 P.2d at 619. And for the same reason, we do not follow *Boutte v. Boutte*, 2019-734, p. 8-10 (La. App. 3 Cir. 7/8/20), 304 So. 3d 467, 472-73, on which wife also relies. There, the court applied a Louisiana freedom of contract statute to enforce a consent judgment dividing military disability benefits — likewise without addressing *Howell's* statement of complete federal preemption over the issue.

¶ 16 Further, courts in other states have held, as we do here, that a dissolution court lacks “authority” or “subject matter jurisdiction” to enforce an order dividing military disability benefits. See *In re Marriage of Babin*, 437 P.3d 985, 991 (Kan. Ct. App. 2019); *Hurt v. Jones-Hurt*, 168 A.3d 992, 1002 (Md. Ct. Spec. App. 2017); *Mattson v. Mattson*, 903 N.W.2d 233, 241-42 (Minn. Ct. App. 2017); *Ryan v.*

*Ryan*, 600 N.W.2d 739, 745 (Neb. 1999) (“Based on the preemptive effect of the [Uniformed Services Former Spouses’ Protection Act], we conclude that federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits.”).

¶ 17 Last, wife’s argument in the reply brief based on *In re Parental Responsibilities Concerning M.E.R-L.*, 2020 COA 173, is unpersuasive. Contrary to wife’s argument, that case does not stand for the proposition that a “court retains subject matter jurisdiction over VA benefits.” Rather, the division in that case addressed a different issue — whether a state may treat a parent’s military disability benefits as income for calculating child support. *See id.* at ¶¶ 28-31. In holding that a court may do so, the division distinguished *Howell* based on the Supreme Court’s statement that although a state court is preempted from dividing disability benefits as property, it could consider such benefits when calculating spousal support. *Id.* at ¶ 28. Thus, *M.E.R-L.* does not convince us to alter our disposition upholding the district court’s ruling that *the property division judgment* including husband’s disability benefits is void for lack of subject matter jurisdiction based on *Howell*.

¶ 18 In sum, the district court did not err by granting husband relief from the \$62,533 arrearages judgment under Rule 60(b)(3).

### III. *Howell* Applies Retroactively

¶ 19 Wife further argues that *Howell* changed Colorado law and therefore the district court erred by applying it retroactively to the present case. We disagree.

¶ 20 We note initially that, although it did not address retroactive application expressly, the division in *Tozer* applied *Howell* under similar circumstances as those involved here and held that *Howell* overruled *In re Marriage of Lodeski*, 107 P.3d 1097 (Colo. App. 2004), and *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. App. 2006), which wife cites. See *Tozer*, ¶¶ 16-21.

¶ 21 Even if *Howell* changed Colorado law, however, because it constitutes a controlling interpretation of *federal law*, it applies retroactively. See *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”); see also *Russ*

*v. Russ*, 2021-NMSC-014, ¶ 14, 485 P.3d 223, 227 (applying *Howell* to similar facts and clarifying that “when a new federal rule of law is announced by the United States Supreme Court in a civil case it *always* applies retroactively”); *cf. LaFleur v. Pyfer*, 2021 CO 3, ¶¶ 42-45 (holding under *Harper* that because the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644 (2015), applied a rule of federal law to the litigants before it, the Court’s holding that restrictions on same-sex marriages are unconstitutional must be given full retroactive effect, including to common law same-sex marriages in which the events establishing the marriage predated the decision).

¶ 22 Finally, we note that wife’s reliance on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), to support her argument against retroactive application is misplaced. The Court did not apply a federal rule of law in *Bouie*, as it did in *Howell*. Accordingly, its decision that the South Carolina court’s interpretation of its own state’s trespass statute may not be applied retroactively, *id.* at 362, is not relevant to the present case involving an issue preempted by federal law.

#### IV. Conclusion

¶ 23 The order is affirmed.

JUDGE NAVARRO and JUDGE VOGT concur.

# Court of Appeals

STATE OF COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, CO 80203  
(720) 625-5150

PAULINE BROCK  
CLERK OF THE COURT

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román  
Chief Judge

DATED: January 6, 2022

*Notice to self-represented parties: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at <https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono>*