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A CHANGE IN MILITARY PENSION DIVISION: THE END OF COURT-ADJUDICATED INDEMNIFICATION—*HOWELL V. HOWELL*

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I. INTRODUCTION

Howell v. Howell[1] is a statutory interpretation case in which the United States Supreme Court held that the Uniformed Services Former Spouses' Protection Act (USFSPA)[2] preempts a state court from ordering a retired servicemember to indemnify[3] a former spouse for a reduction in their share of the retiree's military pension when the retiree elects to receive disability compensation from the Department of Veterans Affairs (VA), resulting in the waiver of an equal amount of military retired pay.[4] The veteran's reimbursement to the former spouse of monies waived for VA disability compensation is known as indemnification. By way of background, a retired servicemember may only receive VA disability compensation if he or she waives an equal amount of military retired pay.[5] This is referred to as a VA waiver. Military retired pay is taxable, whereas VA disability compensation is not.[6] The waived retired pay is restored (and thus, indemnification is not necessary) when the veteran has a VA disability rating of 50% or more and is receiving Concurrent

1. 137 S. Ct. 1400 (2017).

2. Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1982).

3. *See* BRETT R. TURNER, 2 EQUITABLE DISTRIBUTION OF PROPERTY § 6.10 (3d ed. 2017) [hereinafter EQUITABLE DISTRIBUTION] (defining "indemnity" as "a limited theory, applying only to one particular type of benefit outside the scope of the USFSPA: military retirement benefits waived to acquire military disability benefits, veteran's disability benefits, or civil service retirement benefits").

4. *See* Keith Berkshire, *Howell, How a Unanimous Supreme Court Overturned 27 States' Indemnification Laws for Military Disability*, AM. ACAD. MATRIM. LAWS., http://aaml.org/library/newsletter/howell-how-unanimous-supreme-court-overturned-27-states%E2%80%99-indemnification-laws-mil [https://perma.cc/M8P5/2KXF] (last visited June 20, 2018); Mark E. Sullivan, *The Death of Indemnification*, LEGAL ASSISTANCE FOR MIL. PERSONNEL, N.C. STATE BAR [hereinafter *The Death of Indemnification*], http://www.nclamp.gov/publications/silent-partners/the-death-of-indemnification/ [https://perma.cc/ME4B-A6VP] (last visited June 20, 2018).

5. 38 U.S.C. §§ 5304–05 (2012).

6. *Id.* § 5301(a)(1).

Retirement and Disability Pay (CRDP)[7]—unless the veteran also elects Combat-Related Special Compensation (CRSC),[8] as one cannot receive both.

Howell overruled the way many state courts have analyzed indemnification. This Note serves as an analytical and practical resource for family law practitioners nationwide, as the cost of military divorce and malpractice claims are both on the rise. This Note begins by exploring the history of the relevant Supreme Court precedent, explaining the statutory framework of the USFSPA, and examining the historic split among the states.[9] Following are the facts and procedural history of *Howell*.[10] Next, this Note examines post-*Howell* interpretation lenses—including how the Minnesota Court of Appeals has overstated the impact and application of the *Howell* decision[11]—and discusses potential remedies to address the impact of *Howell* going forward.[12] Finally, this Note concludes that *Howell* has an extremely narrow holding: federal law prevents a state court from adjudicating indemnification.[13] Although the *Howell* ruling precludes a state court from ordering a retired servicemember to indemnify a former spouse in certain situations,[14] the Supreme Court previously ruled that res judicata is a defense to federal preemption regarding the division of military service benefits.[15] The Court has yet to address whether an agreement that divides a preempted benefit (i.e., VA disability compensation) is enforceable.[16]

II. HISTORY

This section explains the history of a narrow area of family law: military pension division incident to divorce. To understand this area of law, this section begins by exploring the history of the relevant Supreme Court precedent and explains the statutory

7. 10 U.S.C. § 1414 (2012).
8. *Id.* § 1413a.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.C.5.
12. *See infra* Part IV.B.
13. *See infra* Part V.
14. Howell v. Howell, 137 S. Ct. 1400, 1405 (2017); *see* Berkshire, *supra* note 4; *The Death of Indemnification*, *supra* note 4.
15. *See* Mansell v. Mansell, 490 U.S. 581, 586 n.5 (1989).
16. *Id.* at 587 n.6.

framework of the USFSPA.[17] It also provides a broad overview of the historic split among the states regarding indemnification and specifically touches on the history of indemnification in Minnesota.

A. McCarty v. McCarty *and the Uniformed Services Former Spouses' Protection Act*

In *McCarty*, the issue presented to the Court was whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military retired pay pursuant to state community property (or equitable distribution) laws.[18] The Supreme Court held that the Supremacy Clause of the United States Constitution[19] prohibited state courts from doing so.[20] In so holding, the Court reasoned that the division of military retired pay had the potential to disturb the objectives Congress endorsed when it designed the military retirement system.[21] Those objectives were: (1) "to provide for the retired service member," and (2) "to meet the personnel management needs of the active military forces."[22]

In response to the *McCarty* decision, Congress enacted the USFSPA, which took effect on February 1, 1983.[23] The USFSPA authorizes state courts to treat "disposable retired pay" as marital (or community) property.[24] Disposable retired pay is defined as "the total monthly retired pay to which a member is entitled" less, among other things, any amount waived to receive tax-free VA disability compensation.[25] The USFSPA applies to disposable retired pay that

17. 10 U.S.C. § 1408 (2012).

18. McCarty v. McCarty, 453 U.S. 210, 211 (1981).

19. U.S. CONST. art. VI, § 2. The Supremacy Clause establishes that the Constitution and all federal laws enacted pursuant to the Constitution are the "supreme Law of the Land." *Id.*

20. *McCarty*, 453 U.S. at 220.

21. *Id.* at 233.

22. *Id.* at 232–33.

23. Act of Sept. 8, 1982, Pub. L. 97-252, Title X, § 1002(a), 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 (1984)).

24. 10 U.S.C. § 1408(c)(1) (2012).

25. *Id.* § 1408(a)(4)(A)(ii). Historically, a servicemember's disposable retired pay was generally gross pay less the VA waiver (if applicable), less any amount(s) owed to the United States government (if applicable), and less the cost of the Survivor Benefit Plan (SBP) premium (if applicable). *Id.* The SBP is governed by sections 1447–55. *Id.*

The statutory definition of disposable retired pay was redefined in December 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L.

is payable after June 25, 1981 (the day of the *McCarty* decision) and to court orders entered after that date.[26]

The USFSPA provides state courts with the power to divide military retired pay incident to divorce; the statute does not, however, *require* that military retired pay be divided.[27] The USFSPA also specifies that jurisdiction for military pension division is premised upon domicile, consent, or residence within the court's territorial jurisdiction, except due to military assignment.[28] The USFSPA provides that state courts can order the direct payment of pension division awards through the "designated agent"—currently the Defense Finance and Accounting Service or the Coast Guard Pay and Personnel Center—when there are at least ten years of marriage overlapping at least ten years of creditable military service.[29]

Although the USFSPA says a great deal about the payment of retired pay in compliance with court orders, it does not explain *how*

114-328, § 641, 130 Stat. 2000 (2016); 10 U.S.C. § 1408(a)(4)(B)(i) (defining "total monthly retired pay" (available for division) as "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").

This means that the disposable retired pay is a hypothetical amount frozen at the servicemembers' rank and years, or points, as of the date of divorce. *See* U.S. Dep't of Def., Reg. 7000.14-R, DOD Financial Management Regulation, vol. 7B, ch. 29, para. 2908 (June 2017), http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf [https://perma.cc/3NXQ-XVT5]**;** *see also* Mark E. Sullivan & Kaitlin S. Kober, *Military Pension Division: The Frozen Benefit Rule*, FAM. LAW. MAG. (Sept. 1, 2017), http://familylawyermagazine.com/articles/frozen-benefit-rule/_[https://perma.cc/BLF2-J3K9] ("On December 23, 2016 Congress passed The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) which dramatically altered how military pension division orders are written. Instead of allowing the states to decide how to divide military retired pay, Congress imposed a single uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the judgment of divorce is entered. This new rule up-ends the law regarding military pension division in almost every state.").

26. Mansell v. Mansell, 490 U.S. 581, 587 (1989).

27. 10 U.S.C. § 1408(c)(1) (stating that state courts can treat "disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court"). The USFSPA prohibits a state court from forcing a servicemember "to apply for retirement or retire at a particular time." *Id.* § 1408(c)(3).

28. *Id.* § 1408(c)(4).

29. *Id.* §1408(d)(2). Generally, direct payments may not exceed 50% of the servicemember's disposable retired pay. *Id.* § 1408(e)(1). Additionally, these direct payments cease upon the death of the servicemember or former spouse (whichever occurs first). *Id.* § 1408(d)(4).

to divide military retired pay or *how* to draft a Military Pension Division Order (MPDO).[30] There is no magic formula in the USFSPA that tells a family law practitioner what share of the servicemember's military retired pay, if any, the former spouse should receive because divorce and property division are state law issues.[31] More importantly, the USFSPA does not automatically entitle a former spouse to a share of the servicemember's retired pay.[32] It also does not prevent a court from awarding family support (e.g., child support, alimony or maintenance) from military retired pay.[33]

B. Mansell v. Mansell

Six years after the enactment of the USFSPA, the Supreme Court examined the definition of "disposable retired pay."[34] In *Mansell*, the parties signed a property settlement agreement that was later incorporated into a divorce decree.[35] The settlement divided a portion of the former servicemember's military retired pay that he waived to receive VA disability compensation.[36] Ultimately, the Supreme Court held that because the USFSPA expressly excluded VA disability compensation from the definition of disposable retired pay, military retired pay waived to receive VA disability benefits may not be treated as marital/community property.[37] Thus, VA disability compensation is separate (nonmarital) property.[38]

30. Since military retired pay is a federal entitlement under Title 10 of the United States Code rather than a retirement plan, a Qualified Domestic Relations Order (QDRO) is improper to effectuate the division. MARK E. SULLIVAN, MILITARY DIVORCE HANDBOOK 485 (ABA 2d ed. 2011) [hereinafter MILITARY DIVORCE HANDBOOK]. A properly worded Military Pension Division Order is the correct document to effectuate the division and direct payments from the retired pay center. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* Mansell v. Mansell, 490 U.S. 581 (1989).

35. *Id.* at 585.

36. *Id.* at 586.

37. *Id.* at 594–95.

38. *Id.* (holding "that the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits").

Selitsch v. Selitsch,[39] a case decided by the Tennessee Court of Appeals, provides an excellent discussion of the full history of the *Mansell* decision:

> A careful review of *Mansell* reveals that the United States Supreme Court did not preclude spouses from contractually agreeing to divide non-disposable retired pay. In *Mansell*, the husband's original petition with the trial court asserted grounds for relief including: (1) that the USFSPA prevented state courts from treating his disability benefits as community property; and (2) federal law prevented courts from giving effect to parties' contractual assignment of military benefits. The wife responded that, even if the husband's contentions were true, res judicata prevented a collateral attack on the final divorce decree.
>
> The California courts denied the husband's petition for relief, holding that federal law permitted state courts to treat disability benefits as community property. As discussed above, the Supreme Court of the United States reversed, holding that the USFSPA prevents a court from considering non-disposable retired pay as community property during a divorce. Importantly, though, the Supreme Court did not consider the merits of the husband's contract argument or the wife's res judicata argument, and decided the case solely on USFSPA grounds. Thus, *Mansell* cannot be read to preclude enforcement of a parties' contractual agreement to divide military funds that fall outside of the USFSPA's definition of "disposable retired pay."[40]

There are two key footnotes in *Mansell*: footnote five, discussing res judicata,[41] and footnote six, discussing contractual indemnification.[42] Res judicata is an exception to the general rule of *Mansell*[43]—military retired pay that has been waived to receive VA

39. 492 S.W.3d 677 (Tenn. Ct. App. 2015) (holding that a former husband was not entitled to relief from a martial dissolution agreement based on a mutual mistake regarding military benefits).

40. *Id.* at 686–87 (emphasis added) (citations omitted).

41. Mansell v. Mansell, 490 U.S. 581, 586 n.5 (1989).

42. *Id.* at 587 n.6.

43. Brett R. Turner, *State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update*, 16 DIVORCE LITIG. 76, 80 (2004) [hereinafter *State Court Treatment*].

disability benefits may not be treated as marital/community property.[44] Footnote five in the *Mansell* opinion states:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.[45]

Ultimately, the Supreme Court approved the California state court's division of VA disability compensation under a theory of res judicata.[46] Res judicata is indisputably a matter of state law over which the Supreme Court has no jurisdiction.[47] Footnote five in the *Mansell* opinion "expressly permits division [of waived military retired pay] under the law of res judicata."[48] Brett R. Turner[49] explains that the post-remand denial of certiorari in *Mansell*[50] is an explicit refusal by the Supreme Court to reverse state court orders holding that division of preempted benefits are final and cannot be

44. *Mansell*, 490 U.S. at 594–95.

45. *Id.* at 586 n.5 (citations omitted).

46. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9 ("[T]he United States Supreme Court has twice expressly stated . . . that state courts can divide military benefits under a theory of res judicata."); *State Court Treatment*, *supra* note 43 ("[T]he benefits at issue were divided in a property settlement agreement, which was incorporated into the divorce decree. When an agreement is incorporated into the decree, it becomes for all purposes a term of the decree, just as if set forth therein.").

47. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9; *State Court Treatment*, *supra* note 43.

48. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9 ("A minority of state court decisions hold that division on the basis of res judicata is not permitted, generally on the basis that state courts lack subject matter jurisdiction to divide any military benefits outside the USFSPA on any theory at all."); *see, e.g.*, *State Court Treatment*, *supra* note 43.

49. Brett R. Turner "is the author of the leading national treatise on equitable distribution, *Equitable Distribution of Property* (3d ed. 2005), and is a nationally known expert in the law of equitable distribution." *Senior Research Attorney Brett R. Turner*, NAT'L LEGAL RESEARCH GRP., INC., http://www.nlrg.com/our-attorneys/brett-r-turner [https://perma.cc/E3YP-5LPA] (last visited June 20, 2018).

50. Mansell v. Mansell, 498 U.S. 806 (1990).

reopened, and therefore not void.[51] Turner further explains that in addition to *Mansell*:

> The Supreme Court held one other time that res judicata is a defense to federal preemption regarding the division of military service benefits. In a case decided shortly after McCarty, the courts of California expressly and directly held that McCarty did not prevent the division of military retirement benefits on a theory of res judicata. A petition for certiorari was filed, but the Supreme Court dismissed it for want of a substantial federal question. Dismissal for want of a substantial federal question is an adjudication on the merits. Like footnote 5 in Mansell, the dismissal of certiorari is precedential authority from the Supreme Court permitting division on a theory of res judicata.[52]

Thus, a "division [of preempted benefits] on the basis of res judicata is so strongly permitted that it lies outside federal appellate jurisdiction."[53]

Footnote six in the *Mansell* opinion reserved the question of whether an agreement that divides a preempted benefit (i.e., veteran's disability benefits) is enforceable.[54] Footnote six in the *Mansell* opinion states:

> Because we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, §3101(a), independently protects such pay.[55]

To date, this question has not been addressed by the United States Supreme Court.[56]

C. State Split

Prior to *Howell*, more than 60% of the states held that *Mansell* and the USFSPA did not apply to post-divorce VA waivers of military

51. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9.

52. *State Court Treatment*, *supra* note 43 (citations omitted).

53. *Id.* at 83.

54. *See id.*; *see also Mansell*, 490 U.S. at 587 n.6.

55. *Mansell*, 490 U.S. at 587 n.6.

56. *Id.*; EQUITABLE DISTRIBUTION, *supra* note 3, § 6.11 (citing Rose v. Rose, 481 U.S. 619 (1987) (stating the case that comes the closest to addressing this issue is *Rose v. Rose*, as it "suggests that the Supreme Court might well hold that a contractual assignment of military benefits to a family member of the veteran is not prohibited by the anti-assignment clause"); *see State Court Treatment*, *supra* note 43, at 80.

retired pay and that indemnification was permitted.[57] Although a few states had mixed authority on the subject, the conflicting case law could generally be distinguished by the underlying facts, such as whether the former spouse was awarded a share of the military pension by consent (e.g., separation agreement or consent order) or

57. Stone v. Stone, 26 So. 3d 1232 (Ala. Civ. App. 2009); Young v. Lowery, 221 P.3d 1006 (Alaska 2009); Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992); In re Marriage of Howell, 361 P.3d 936 (Ariz. 2015), *rev'd*, 137 S. Ct. 1400 (2017); In re Falkow, No. 2 CA-CV 2012-0096, 2013 WL 485678 (Ariz. Ct. App. Feb. 7, 2013); In re Marriage of Krempin, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); In re Marriage of Warkocz, 141 P.3d 926 (Colo. App. 2006); Getka v. Getka, No. KNOFA074107032S, 2010 WL 625791 (Conn. Super. Ct. Jan. 19, 2010); Blann v. Blann, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007); Jaylo v. Jaylo, 248 P.3d 1219 (Haw. Ct. App. 2011); Perez v. Perez, 110 P.3d 409 (Haw. Ct. App. 2005); Bienvenue v. Bienvenue, 72 P.3d 531 (Haw. Ct. App. 2003); McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993); In re Marriage of Neilsen & Magrini, 792 N.E.2d 844 (Ill. App. Ct. 2003); Bandini v. Bandini, 935 N.E.2d 253 (Ind. Ct. App. 2010); In re Marriage of Carlson, No. 13-1854, 2015 WL 576014 (Iowa Ct. App. Feb. 11, 2015); In re Marriage of Gahagen, 690 N.W.2d 695 (Iowa Ct. App. 2004); Black v. Black, 842 A.2d 1280 (Me. 2004); Pere v. Pere, No. 2279, 2016 WL 4415360 (Md. Ct. Spec. App. Aug. 19, 2016); Wilson v. Wilson, 117 A.3d 138 (Md. Ct. Spec. App. 2015); Dziamko v. Chuhaj, 996 A.2d 893 (Md. Ct. Spec. App. 2010); Allen v. Allen, 941 A.2d 510 (Md. Ct. Spec. App. 2008); Dexter v. Dexter, 661 A.2d 171 (Md. Ct. Spec. App. 1995); Krapf v. Krapf, 786 N.E.2d 318 (Mass. 2003); McGee v. Carmine, 802 N.W.2d 669 (Mich. Ct. App. 2010); Gatfield v. Gatfield, 682 N.W.2d 632 (Minn. Ct. App. 2004); Shelton v. Shelton, 78 P.3d 507 (Nev. 2003); Hodgins v. Hodgins, 497 A.2d 1187 (N.H. 1985); Whitfield v. Whitfield, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); Torwich v. Torwich, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995); Scheidel v. Scheidel, 4 P.3d 670 (N.M. Ct. App. 2000); Bagley v. Bagley, No. 2010-CA-17, 2011 WL 944190 (Ohio Ct. App. Mar. 18, 2011); Hodge v. Hodge, 197 P.3d 511 (Okla. Civ. App. 2008); Hayes v. Hayes, 164 P.3d 1128 (Okla. Civ. App. 2007); In re Marriage of Hayes, 208 P.3d 1046 (Ore. Ct. App. 2009); Morgante v. Morgante, 119 A.3d 382 (Pa. Super. Ct. 2015); Hayward v. Hayward, 868 A. 2d 554 (Pa. Super. Ct. 2005); Resare v. Resare, 908 A.2d 1006 (R.I. 2006); Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996); Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001); Selitsch v. Selitsch, 492 S.W.3d 677 (Tenn. Ct. App. 2015); Pederson v. Pederson, Nos. 1178-15-4, 2093-15-4, 2016 WL 4088875 (Va. Ct. App. Aug. 2, 2016); Jones v. Jones, No. 0062-15-2, 2016 WL 389492 (Va. Ct. App. Feb. 2, 2016); Poziombke v. Poziombke, No. 1150-05-1, 2006 WL 325296 (Va. Ct. App. Feb. 14, 2006); Hubble v. Hubble, No. 2015-01-4, 2002 WL 1809078 (Va. Ct. App. Aug. 6, 2002); Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992); In re Marriage of Ocasio-Santiago & Rockwood, 198 Wash. App. 1026 (Wash. Ct. App. 2017); *see* Ann K. Wooster, Annotation, *Construction and Application of Federal Uniformed Services Former Spouse Protection Act in State Court Divorce Proceedings*, 59 A.L.R.6th 433 (2015).

by adjudication.[58] Only a small minority of states did not permit indemnification.[59]

1. Minnesota

Historically, Minnesota has been a pro-indemnification state. In *Gatfield v. Gatfield*,[60] the parties included the following indemnification clause in their stipulated Virginia dissolution judgement:

58. *See* Copas v. Copas, 359 S.W.3d 471 (Ky. Ct. App. 2012) (holding a former husband's military disability benefits were not subject to division as marital property in post-dissolution proceeding, even though husband's election to receive the disability benefits reduced former wife's share of husband's "disposable military retired pay"); Morgan v. Morgan, 249 S.W.3d 226 (Mo. Ct. App. 2008); Tirado v. Tirado, 530 S.E.2d 128 (S.C. Ct. App. 2000); Wright v. Wright, 594 So. 2d 1139 (La. Ct. App. 1992).

Compare Surratt v. Surratt, 148 S.W.3d 761, 768 (Ark. Ct. App. 2004) (holding that the veteran was obligated to pay the former spouse her full share of retired pay, regardless of whether the veteran continued to draw "disposable retired pay" as defined in the USFSPA), *with* Ashley v. Ashley, 990 S.W.2d 507, 509 (Ark. 1999) (holding that under the USFSPA, the former spouse was no longer entitled to the amount awarded in the divorce because the veteran's disposable retired pay was reduced due to a VA waiver).

Compare Hillard v. Hillard, 733 S.E.2d 176, 180–81 (N.C. Ct. App. 2012) (holding that a judge can require reimbursement if a VA waiver comes into play post-divorce), *with* Halstead v. Halstead, 596 S.E.2d 353, 358 (N.C. Ct. App. 2004) (holding that a judge cannot order indemnification at the outset), *and* White v. White, 568 S.E.2d 283, 286 (N.C. Ct. App. 2002) (holding that a judge can adjust former spouse's share of military pension if veteran elects disability). *But see* Parker v. Parker, No. 2012-CA-000079-MR, 2013 WL 2359661 (Ky. Ct. App. May 31, 2013); Wilson v. Wilson, Nos. 2004-CA-000276-MR & 2004-CA-001648-MR, 2005 WL 2398020 (Ky. Ct. App. Sept. 30, 2005); Carpenter v. Carpenter, No. 2004-CA-001270-MR, 2005 WL 1415554 (Ky. Ct. App. June 17, 2005) (holding that the trial court correctly ruled the wife was entitled to entitled to enforcement of the separation agreement but could not order division of husband's disability benefits); Ast v. Ast, 162 So. 3d 720 (La. Ct. App. 2005); Strassner v. Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995).

59. Geesaman v. Geesaman, CK92-3641, 92-7-30-DIV, 1993 WL 777094 (Del. Fam. Ct. 1993); In re Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999); Mallard v. Burkart, 95 So. 3d 1264 (Miss. 2012); Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997); Newman v. Newman, 248 A.D.2d 990 (N.Y. App. Div. 1998); Hagen v. Hagen, 282 S.W.3d 899 (Tex. 2009); Youngbluth v. Youngbluth, 6 A.3d 677 (Vt. 2010); Gillin v. Gillin, 307 S.W.3d 395 (Tex. Ct. App. 2009).

60. 682 N.W.2d 632 (Minn. Ct. App. 2004), *overruled by* Mattson v. Mattson, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017).

> Husband covenants, represents, warrants and agrees that he will not waive any portion of any longevity retired, retirement or retainer pay in order to elect disability or other pension or lump sum or severance pay or other compensation in lieu thereof and agrees to renounce the right to make such waiver and election and to elect an alternative form of retirement. In the event husband does in violation hereof, he shall upon receipt pay to wife fifty percent (50%) thereof.[61]

The husband later elected to receive disability benefits and "waived an equivalent portion of his military retirement pay."[62] The Minnesota Court of Appeals concluded that the USFSPA and *Mansell* did not prohibit a retired servicemember from voluntarily entering into a contract precluding the waiver of military retired pay in favor of disability benefits and requiring indemnification for the former spouse for any loss resulting from such a waiver.[63] The court further noted that "[i]t is well settled that in a stipulation, parties are free to bind themselves to obligations that a court could not impose."[64]

Just five months after the *Howell* decision, the Minnesota Court of Appeals, in *Mattson v. Mattson*, overruled *Gatfield* and held that federal law preempts state courts from dividing a veteran's VA disability compensation as marital property and rendered such property divisions unenforceable, even if they had been agreed upon.[65] The primary issue before the Minnesota Court of Appeals was whether federal law preempts enforcement of the portion of the parties' *stipulated* decree that divided the retired servicemember's VA disability compensation.[66] The court concluded that "[VA] disability compensation is not among the military benefits that may be divided as marital property, and states are preempted from enforcing such divisions."[67] This holding is further examined in Part IV of this Note.

61. *Gatfield*, 682 N.W.2d at 634–35.
62. *Id.* at 635.
63. *Id.* at 636.
64. *Id.* at 637.
65. Mattson v. Mattson, 903 N.W.2d 233, 235 (Minn. Ct. App. 2017), *petition for review denied*, (Minn. Dec. 27, 2017).
66. *Id.* at 263.
67. *Id.* at 241.

III. THE *HOWELL* DECISION

The *Howell* case is a landmark decision in family law. It sets a precedent that only a minority of states previously approved.[68] It is crucial to understand the underlying facts in *Howell* because they lay the foundation for its narrow holding. Without this clear understanding, one cannot properly apply *Howell* or distinguish it from seemingly comparable cases.

A. Facts and Procedural History

Mr. and Mrs. Howell divorced in Arizona in 1991.[69] The Decree of Dissolution awarded Mrs. Howell 50% of Mr. Howell's military pension.[70] There was no underlying separation agreement or consent between the parties containing an express indemnification clause. Mr. Howell retired from the Air Force in 1992 and began receiving military retried pay.[71] In 2005, he elected VA disability compensation resulting from a 20% VA disability rating.[72] The resulting VA waiver reduced his former wife's 50% share by about $125 per month.[73]

The former wife sought enforcement of the original decree in Arizona family court.[74] The decree did not contain an indemnification clause; it only awarded 50% of the military pension.[75] Thus, the former wife's enforcement action was not based on a prior agreement or a prior adjudication by the court (which would have amounted to res judicata) for the retiree to indemnify her. The trial court ordered Mr. Howell to indemnify his former wife and awarded arrears,[76] and Mr. Howell appealed.[77] The Arizona

68. *Supra* note 59 and accompanying text.

69. Howell v. Howell, 137 S. Ct. 1400, 1404 (2017).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* By way of illustration, the veteran "consequently had to waive about $250 per month of the roughly $1,500 of military retirement pay he shared with [his former spouse]. Doing so reduced the amount of retirement pay that he and [his former spouse] received by about $125 per month each." *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. In re Marriage of Howell, No. 2 CA-CV 2014-0112, 2014 WL 7236856 (Ariz. Ct. App. Dec. 18, 2014), *vacated*, In re Marriage of Howell, 361 P.3d 936 (Ariz. 2015).

Court of Appeals affirmed the trial court's ruling,[78] and Mr. Howell appealed once more.[79] The Arizona Supreme Court affirmed the trial court's judgment.[80] Mr. Howell petitioned for review by the United States Supreme Court.[81] Given that state courts had reached different conclusions on the matter, the Supreme Court granted the veteran's petition for certiorari,[82] and reversed and remanded.[83]

B. The Supreme Court's Decision

The issue presented in *Howell v. Howell* was whether a state court can increase a former spouse's pro rata share of military retired pay when a retiree waives military retired pay for nontaxable VA disability benefits post-divorce, thus causing a reduction in the former spouse's share.[84] Writing for the Court, Justice Stephen Breyer stated in the opinion that "[t]he question is complicated, but the answer is not."[85] The Court held that, "[a] state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits."[86]

The Court reasoned that its decision in *Mansell* that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property," determined the outcome of the case.[87] The Arizona Supreme Court attempted to distinguish Mr. Howell's case from *Mansell* by emphasizing that the VA waiver took place post-divorce, whereas in *Mansell* the VA waiver was already in place at the time of divorce.[88] However, the Court stated that this was not significant.[89] The Court opined that a state cannot "avoid *Mansell* by describing the family court order as an

78. Howell, 2014 WL 7236856, at *1. Interestingly, the former spouse did not even file a brief with the court of appeals. *Id.*

79. *See* In re Marriage of Howell, 361 P.3d 936 (Ariz. 2015), *rev'd*, 137 S. Ct. 1400 (2017).

80. *Id.* at 941.

81. *Howell*, 137 S. Ct. at 1401.

82. *Id.*

83. *Id.*

84. *Id.* at 1402.

85. *Id.*

86. *Id.* at 1401.

87. *Id.* at 1405.

88. *Id.*

89. *Id.*

order requiring [the veteran] to 'reimburse' or to 'indemnify' [the former spouse], rather than an order that divides property."[90] The Court further stated that:

> 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 preempted.[91]

This holding is extremely narrow. It was not based on contract law, as there was no express indemnification clause involved. The Court's examination of the USFSPA in *Howell* does not change the existing rules and precedents regarding express contract terms. Therefore, it cannot be said that federal law preempts a servicemember or veteran from knowingly and voluntarily negotiating and executing a contract that contains an express indemnification clause.[92] *Howell* makes it clear that prospective indemnification orders are preempted by federal law and that an award of indemnity is reversible error. But it does not address whether a prior un-appealed order awarding indemnity is void, or whether an agreement or consent order containing an express indemnification clause is enforceable.[93]

Howell is distinguishable from *Mansell* because it involved a timely appeal from an adjudication of indemnity, whereas *Mansell* involved a divorce decree that incorporated the parties' property settlement agreement that divided non-disposable retired pay.[94]

90. *Id.*

91. *Id.* at 1406.

92. *See, e.g.*, Shelton v. Shelton, 78 P.3d 507, 511 (Nev. 2003), *cert. denied*, 541 U.S. 960 (2004) (holding that state courts are not precluded from applying contract law when disability benefits are involved).

93. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.10 (discussing the significance of footnote six in *Mansell*).

94. Mansell v. Mansell, 490 U.S. 581, 585–86 (1989); *see* McCarty v. McCarty, 453 U.S. 210, 218 (1981); In re Marriage of Howell, 361 P.3d 936, 936 (Ariz. 2015). *McCarty*, like *Howell*, was also based on an adjudication, not an agreement. 453 U.S.

Howell did not consider the question left unanswered in *Mansell*—whether the parties can contract to waive a federal preemption objection.[95] A post-*Howell* state court has no authority to adjudicate an indemnification provision.[96] Accordingly, a servicemember is unlikely to agree to such a provision.

The Court recognized the potential harm done by the *Howell* decision: a VA waiver could diminish or completely wipe out a former spouse's entire share of the military pension. Accordingly, Justice Breyer proposed two options that state courts can take to avoid that harm.[97] First, a state court can "take account of the contingency that some military retirement pay might be waived."[98] The Court did not, however, appear to consider the possibility that a future waiver of retired pay does not affect the present value.[99] Second, a state court can "take account of reductions in value when it calculated or recalculates the need for spousal support."[100] Yet, the Court did not appear to consider the possibility that support can be waived or not claimed, or that a party could be barred from claiming support by fault, by being a non-dependent spouse, by cohabitating, or by remarrying. Justice Breyer's proposed remedies are further discussed below.

IV. ANALYSIS

This section begins by discussing the potential remedies addressed in the *Howell* opinion and the potential problems with those remedies. It then discusses alternative remedies to address the impact of *Howell* going forward. Next, this section examines post-*Howell* interpretation lenses—the ways in which various state courts have interpreted and applied *Howell*—including how the Minnesota Court of Appeals has overstated the impact and application of the decision. Finally, it addresses the public policy implications of *Howell*.

at 217–18.

95. *See Mansell*, 490 U.S. at 587 n.6.
96. *Howell*, 137 S. Ct. at 1401.
97. *Id.* at 1406.
98. *Id.*
99. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9.
100. *Howell*, 137 S. Ct. at 1406.

A. Justice Breyer's Proposed Remedies

The Court proposed two steps a state court can take to avoid the potential harm *Howell* may cause when dividing property during a divorce case: (1) to "take account of the contingency that some military retirement pay might be waived," and (2) to "take account of reductions in value when it calculates or recalculates the need for spousal support."[101] Both of these proposed remedies pose potential problems.

1. Factor into Valuation/Distribution

First, the Court failed to address the possibility that a potential, future waiver of retired pay does not affect its present value.[102] By way of illustration, a house or 401(k) plan are worth a specific amount—a house can simply be appraised, and a 401(k) statement reflects its value. However, determining the value of a military pension is much more complex and requires the involvement of an expert, usually a Certified Public Accountant or actuary.[103] How could an expert determine the probability of a servicemember receiving a service-connected disability? What is the equation to compute this? How are factors such as the branch of service (e.g., Marine Corps, Coast Guard, Air Force, Army), active duty versus Guard/Reserve status, and general job nature (e.g., combat, legal, intelligence, communications, etc.) taken into account? It is just not possible. Maybe the Court meant that the state court can value the military pension and make a present-value award.

Initially, the Court seemingly confused the distinction between valuation and the actual division of property.[104] Considering a potential future election of VA disability compensation as a property division factor is like trying to provide a cash award to compensate in advance for the harm done to a vehicle in a car accident, knowing in advance that only some vehicles will be involved in a collision and the amount of damage is not predictable.[105] Considering a future election of VA disability compensation as a factor of division is not a reliable or adequate solution.

101. *Id.*

102. EQUITABLE DISTRIBUTION, *supra* note 3, § 6.10.

103. *See, e.g.*, OFFICE OF THE ACTUARY, U.S. DEP'T OF DEF., VALUATION OF THE MILITARY RETIREMENT SYSTEM (2008).

104. *See* EQUITABLE DISTRIBUTION, *supra* note 3, § 6.10.

105. *See id.* (offering an analogous scenario involving a tornado).

2. Spousal Support/Alimony

Second, the Court failed to consider many intertwined variables pertaining to spousal support. A state court cannot predict whether the harm (i.e., election of VA disability compensation) will occur and, if so, to what extent (i.e., if the former spouse's share is minimally reduced or completely diminished). Even so, on the surface level, this spousal support option seems slightly more viable than factoring a potential, future waiver of retired pay into valuation/distribution.[106] To illustrate, when a retired servicemember elects VA disability compensation and there is no agreement or final order, a state court cannot award indemnity.[107] It could, however, order the retired servicemember to pay additional spousal support.[108] While this solution seems reasonable, there are many questions that should be considered. For example, what if the VA waiver occurs at or before the setting of spousal support? What if the former spouse has remarried? What if the former spouse was barred by fault grounds from claiming spousal support? What if the former spouse was not a dependent spouse? What if state law includes rigid limitations on spousal support? What if the divorce occurred years ago and there was no claim for spousal support?

Since the Court has specifically listed spousal support as a remedy, it is imperative that the state court retain authority and reserve jurisdiction over spousal support after the divorce, as permissible by state law. Spousal support is governed by state law, so this remedy will vary substantially by state.[109] In many states, the issues of spousal support and property division are separate and distinct—there is no across-the-board solution.[110] In fact, at least one state has refused to allow an award of alimony as a remedy in a case regarding the election of VA disability compensation.[111]

106. *See id.*

107. Howell v. Howell, 137 S. Ct. 1400, 1401 (2017).

108. *See Family Law in the Fifty States 2015–2016: Charts*, 50 FAM. L. Q. 566, 566–69 (2017) (containing a chart showing the pertinent statutes and applicable factors in all fifty states).

109. Mansell v. Mansell, 490 U.S. 581, 586–87 (1989) ("*Casas* held that after the passage of the Former Spouses' Protection Act, federal law no longer pre-empted state community property law as it applies to military retirement pay.").

110. *See* In re Marriage of Cassinelli, 210 Cal. Rptr. 3d 311 (Cal. Ct. App. 2016).

111. *Id.* (holding that "the trial court erred by using spousal support as a remedy for the loss of a community property interest"), *vacated* and *remanded*, Cassinelli v. Cassinelli, 138 S. Ct. 69 (2017) (vacating and remanding the judgment for further

B. Potential Remedies

Military benefits, such as military retired pay, are governed by federal law. On the contrary, property division incident to divorce is a matter of state law, and the granting of military retired pay is implemented through a state court order.[112] However, the approval or denial regarding receipt of the benefit is determined by the federal government (i.e., the retired pay center determines military retired pay eligibility). Thus, "military benefits are creatures of federal law, and the treatment of military benefits in state divorce proceedings has been a source of federal and state tension for decades."[113] This illustrates that viable remedies will vary by state. There are five potential remedies that pertain to the issue of indemnification.

1. Alimony/Spousal Support

The first potential remedy, as proposed by Justice Breyer, is alimony/spousal support. Although VA disability benefits cannot be divided as marital/community property, they can be considered a source of income for purposes of alimony.[114] As observed in *Hurt v. Jones-Hurt*, "the impact of *Howell* may in a particular case constitute a change in circumstances entitling a court to revisit an alimony award . . . whether or not the parties or the court were aware *ex ante* that a spouse could elect to waive pension payments for disability benefits."[115] The problem lies with the timing of the alimony claim, whether alimony is waived, whether marital fault is relevant to alimony, and whether standard of living and reasonable needs are relevant to alimony. All of these factors may play a part and vary by state.[116]

consideration in light of *Howell*).

112. *Mansell*, 490 U.S. at 589.

113. Hurt v. Jones-Hurt, 168 A.3d 992, 997 (Md. Ct. Spec. App. 2017).

114. 42 U.S.C. § 659 (2012); *State Court Treatment*, *supra* note 43, at 82 ("Disability benefits which cannot be divided under *Mansell* clearly can be considered as a source for alimony."). "Where disability has not been elected at divorce, but an election is pending or otherwise seems likely, the court may make a nominal award or otherwise reserve jurisdiction to make an award of support after the election is final." *Id.* at 83. On the contrary, "[w]here disability is elected after the divorce, the election of disability is a sufficient change of circumstance to permit an increase in alimony." *Id.*

115. *Hurt*, 168 A.3d at 1003.

116. *See Family Law in the Fifty States*, *supra* note 108, at 566–69.

2. Res Judicata

The second potential remedy regarding indemnification and the division of waived military retired pay is the doctrine of res judicata. Res judicata is defined as, "a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again."[117] The Supreme Court has noted that "the res judicata consequences of a final, un-appealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."[118] Accordingly, if military and/or disability benefits are divided in violation of *Mansell* (and now *Howell*), but the servicemember fails to timely appeal, the decision is final. Thus, the benefits at issue are lawfully and validly divided.[119] Moreover, courts around the country have uniformly held that *McCarty* and *Mansell* are not retroactive.[120] Likewise, there is nothing in *Howell* that suggests that the Supreme Court intended to invalidate or otherwise render unenforceable prior valid judgments.

117. *Res judicata*, BLACK'S LAW DICTIONARY (2d ed. 1910).

118. Federated Dep't Stores Inc. v. Moitie, 452 U.S. 394, 398 (1981) (citing Angel v. Bullington, 330 U.S. 183, 187 (1947); Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Deen, 121 U.S. 525, 534 (1887)).

119. *See* Shelton v. Shelton, 78 P.3d 507 (Nev. 2003), *cert. denied*, 541 U.S. 960 (2004) (stating federally preempted benefits can be divided on a theory of res judicata; relying expressly on the post-remand decision in *Mansell*); In re Marriage of Curis, 9 Cal. Rptr. 2d 145 (Cal. Ct. App. 1992); Evans v. Evans, 541 A.2d 648 (Md. Ct. Spec. App. 1988); In re Zrubek, 149 B.R. 631 (Bankr. D. Mont. 1993); EQUITABLE DISTRIBUTION, *supra* note 3, § 6.9.

120. *See, e.g.*, In re Chandler, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983); Brown v. Robertson, 606 F. Supp. 494 (W.D. Tex. 1985); Ford v. Ford, 783 S.W.2d 879 (Ark. Ct. App. 1990); Allcock v. Allcock, 437 N.E.2d 392 (Ill. Ct. App. 1982); Toupal v. Toupal, 790 P.2d 1055 (N.M. Ct. App. 1990); Baxter v. Ruddle, 794 S.W.2d 761 (Tex. 1990); In re Marriage of Reinauer, 946 S.W.2d 853 (Tex. Ct. App. 1997), *on reh'g in part*, (May 22, 1997); Elliott v. Elliott, 797 S.W.2d 388 (Tex. Ct. App. 1990); Berry v. Berry, 870 S.W.2d 846 (Tex. Ct. App. 1989), *judgment rev'd*, 786 S.W.2d 672 (Tex. 1990), *writ granted*, (Mar. 28, 1990); Maxwell v. Maxwell, 796 P.2d 403 (Utah Ct. App. 1990); *see also* EQUITABLE DISTRIBUTION, *supra* note 3, § 6.11.

3. Express Contractual Indemnification

Although res judicata provides a "defense to federal preemption regarding the division of military service benefits,"[121] the question is whether federal law preempts agreements between parties. A common understanding of executed settlement agreements would suggest that "if an agreement dividing military or veteran's disability benefits is incorporated into a decree, the agreement and the decree should be fully enforceable under state law principles of res judicata."[122] However, the status of an agreement that is not incorporated into a decree has not yet been resolved at the Supreme Court level.[123] A state court does not need to treat a benefit as marital/community property in order to enforce a contract dividing it, as contracts dividing separate (nonmarital) property are universally enforceable under state law.[124]

4. Extraordinary Remedy

Generally, property division incident to divorce is fixed and final, and cannot be reopened. However, exceptional circumstances may justify the reopening of a previously settled or adjudicated division of marital/community property. In many states, this remedy is governed by the statute governing relief from judgment or order.

Alaska paved the way in *Guerrero v. Guerrero*, a case that held that the lower court abused its discretion by refusing to reopen the parties' property settlement agreement and conduct a full equitable division analysis when the veteran's disposable retired pay ended up being zero dollars.[125] Although *Guerrero* was decided prior to *Howell*, its principal conclusion remains relevant: when a division of marital/community property is based on a fundamental assumption that the veteran's military retired pay is divisible (and it is the parties' primary asset), it is erroneous to deny relief when the former spouse's share is completely offset due to the veteran's receipt of disability benefits.[126] Thus, although property division is generally

121. *State Court Treatment, supra* note 43, at 80.

122. *Id.*

123. *Id.*

124. *Id.* (citations omitted). Additionally, "[a] former spouse's right to enforce a contract with the service member also has a degree of constitutional protection." EQUITABLE DISTRIBUTION, *supra* note 3, § 6.11; *see* U.S. CONST. art. I, § 10.

125. Guerrero v. Guerrero, 362 P.3d 432, 445 (Alaska 2015).

126. *Id.* at 444. *Guerrero* involved Military Disability Retired Pay (MDRP), which

fixed and final, a court may have discretion to reopen a division of marital/community property when extraordinary circumstances arise.

5. Present Value Offset

The fifth potential remedy is to offset the present value of the military pension with an alternative asset, such as the marital residence. Generally, to divide marital/community property incident to divorce, it must be valued. Often, a military pension is not valued unless the case goes to trial because determining the value of a military pension is a complex task and requires the skills of an expert, which can be expensive. In cases where the servicemember is not yet retired, a present value offset award may be the answer for the soon-to-be-former spouse.[127]

For example, an expert values the military pension, and its value at the date of classification is $800,000. Assume that 70% of the pension is marital. Accordingly, the former spouse's one-half share is 35%, or approximately $280,000. The servicemember could keep the pension, and the former spouse could be compensated in the property distribution with an asset or assets of similar or equivalent value.

The problem with this approach will be that the parties may not have an asset large enough to offset the former spouse's share of the pension. Alternatively, using the example above, the state court could award spousal support in the amount of $2,000/month for 140 months until the $280,000 is paid up. Determining the present value of the former spouse's share, then awarding spousal support (non-modifiable due to cohabitation or remarriage)[128] for a set period

is governed by 10 U.S.C. §§ 1201–1222 (2012). MDRP, like VA disability compensation, is non-divisible retired pay. *See Military Pension Division Order: "REJECTED,"* SILENT PARTNER, ABA SECT. FAM. L., https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/rejected.authcheckdam.pdf [https://perma.cc/2ZZ9-75MR] (last visited June 20, 2018).

127. *See, e.g.*, Cunningham v. Cunningham, 615 S.E.2d 675 (N.C. Ct. App. 2005). However, valuing a military pension when the servicemember has less than twenty years of service comes with added complications. For example, the expert must account for and apply additional discount rates pertaining to the probability of reaching twenty years of service. *Id.* at 681.

128. Most states will not allow this method of calculating spousal support—except by consent—as it is contrary to state statutes. *See, e.g.,* MINN. STAT. § 518.552(6) (2017).

until the total payout is equivalent to the present value share may be a more viable solution.[129]

*C. Post-*Howell *State Interpretation Lenses*

A handful of states have interpreted and applied the *Howell* decision at the state appellate level.

1. Winters v. Winters

Winters v. Winters,[130] an Illinois Court of Appeals case, was decided shortly after the *Howell* decision. Although *Winters* does not refer to *Howell*, it correctly applied the principles that *Howell* examined. *Winters* is distinguishable from *Howell* because it involved a consent order with an indemnification provision.[131]

When the parties divorced in 2014 (pre-*Howell*), the husband, a retired servicemember, was receiving military retired pay and VA disability compensation.[132] The court entered a judgment for dissolution of marriage that awarded the wife one-half of the retiree's gross military retired pay and included an indemnification provision.[133] The husband filed a timely motion for relief and argued that part of his military pension consisted of VA disability compensation that was not subject to division under the USFSPA.[134] Subsequently, the parties reached an agreement.[135] The parties agreed that the 2014 judgment would remain in effect with the exception of the husband's child support obligation, which was modified.[136] The court entered an order incorporating this agreement in January 2015, which was not appealed.[137] Soon after, in April 2015, the wife filed a petition for rule to show cause asserting

129. Email from Marshal S. Willick, Principal Attorney, Willick Law Grp., to Mark E. Sullivan, Principal Attorney, Sullivan & Tanner, P.A., *et al.* (Sept. 26, 2017, 17:39 EST) (on file with author).

130. No. 5-16-0217, 2017 WL 3276408 (Ill. App. Ct. July 31, 2017).

131. *Id.* at *1.

132. *Id.*

133. *Id.* The indemnification provision required the husband "to pay Wife the difference between any money she would lose were Husband to opt for VA benefits, or anything else he might do to reduce Wife's share of Husband's pension." *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

that the husband was not making proper payments to her.[138] In July 2015, the parties entered into a consent order, which reduced the wife's share of the military pension to $1,609.84 per month.[139] The husband did not appeal.[140]

In November 2015, the wife filed a motion to enforce, again asserting that the husband was not making proper payments to her.[141] The husband again argued that part of the $1,609.84 he was required to pay was VA disability compensation.[142] The court enforced the July 2015 consent order, and ordered him to pay the full amount.[143] An appeal followed.[144]

On appeal, the husband concurred that $2,210.47 of his military retired pay was attributable to VA disability compensation, which is excluded from disposable retired pay.[145] He argued that his former spouse was only entitled to 50% of his disposable retired pay under the USFSPA.[146] Although VA disability compensation is excluded from disposable retired pay, the husband ignored two other factors that applied in his case.[147] First, the husband never appealed the original judgment awarding his former spouse one-half of gross military retired pay, nor did he appeal any subsequent order on the basis that a large portion of his military pension was attributable to VA disability compensation.[148] Therefore, the doctrine of res judicata applies.

Second, the husband *agreed* to pay his former spouse a certain amount.[149] Although he could not be forced, he could still

138. *Id.*

139. *Id.*

140. *Id.* Additionally, the husband did not file a motion for reconsideration. *Id.*

141. *Id.* at *2.

142. *Id.* According to the husband, one-half of his military retired pay was approximately $500 per month (since a VA wavier was in place), thus he was not required to pay in excess of that. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* Furthermore, "Husband was the one who supplied the court with his retirement pay figures. Husband is the one who withdrew his motions to change the amount of support and/or chose not to pursue his arguments that a large portion of his retirement benefits could not be used in calculating the amount of support Wife could receive." *Id.*

149. *Id.*

voluntarily choose to do so.[150] He agreed to pay an amount in excess of what was permitted under the USFSPA.[151] Thus, the argument the husband made on appeal is an argument which he waived in prior court proceedings and by the entry of consent orders that were not appealed.[152] In summary, the retired servicemember's post-retirement *agreement* to pay his former spouse a share of his military pension, together with the doctrine of res judicata, barred his later claim that he did not have to indemnify his former spouse for amounts waived for VA disability compensation. The Illinois Court of Appeals correctly affirmed.

2. Bloom v. Bloom

Bloom v. Bloom,[153] a Pennsylvania Superior Court case, was also decided shortly after the *Howell* decision. Like *Winters*, the *Bloom* opinion does not specifically refer to *Howell*, but it correctly applies the principles examined in *Howell*. *Bloom* is distinguishable from *Howell* because it involves an agreement incorporated in a judgment with language regarding "retirement pay from the U.S. Army" rather than disposable retired pay.[154]

The parties divorced in 1992 (pre-*Howell*) and their settlement agreement was incorporated in a divorce decree.[155] It provided the former wife with 50% of the retired former husband's "retirement pay from the U.S. Army for as long as she lives."[156] About twenty years later, the former husband was declared completely disabled.[157] He qualified for tax-free CRSC,[158] thus waiving the entirety of his disposable retired pay.[159] Accordingly, the former wife's payments ceased.[160]

150. *Id.*
151. *Id.* ("A party can agree to pay more than is allowable under any statute. He cannot be forced to do so, but he can voluntarily choose to do so.").
152. *Id.*
153. No. 1443 WDA 2016, 2017 WL 3225862 (Pa. Super. Ct. July 31, 2017).
154. *Id.* at *6.
155. *Id.* at *1.
156. *Id.* at *4.
157. *Id.* at *1. He had to resign from his high school teaching position. *Id.*
158. 10 U.S.C. § 1413a (2012).
159. *Bloom*, 2017 WL 3225862, at *1.
160. *Id.*

The former wife filed a petition for enforcement, alleging that the cessation of payments violated their settlement agreement.[161] After a hearing on the matter, the court ordered the former husband to reinstitute payments to the former wife, as required by their divorce settlement agreement.[162] The court reasoned that the election of CRSC in lieu of military retired pay amounted to "a 'unilateral and extrajudicial modification of the decree,' depriving [wife] of the bargained-for benefits included in the divorce decree."[163] It further reasoned that "so long as the court's order avoids specifying an 'improper source of funds' for payments to be made in conformity with the decree, there will be no violation of [*Mansell*]."[164]

On the husband's appeal, the court affirmed the trial court's decision to provide the wife with an equitable remedy.[165] The court stated that the settlement agreement was intended to ensure the wife "receiv[ed] a share of [h]usband's 'retirement pay from the U.S. Army'" as opposed to disposable retirement pay.[166] The court further reasoned that *Mansell* "does not stand for the proposition that the trial court must determine that a party can satisfy his contractual obligations, but only that such satisfaction cannot be attached directly to the party's military disability pay."[167]

In summary, the retiree's post-retirement *agreement* to pay his former wife a share of his military pension, together with the doctrine of res judicata, barred his later claim that he did not have to indemnify his former wife for amounts waived for CRSC. The Superior Court of Pennsylvania correctly affirmed.

161. *Id.*

162. *Id.*

163. *Id.* at *4 (citations omitted).

164. *Id.* (citations omitted). "Hence, it concluded that Husband breached a valid contract when he unilaterally changed the source of his monthly benefits so that Wife no longer received her share of his retirement funds. The court determined that Wife was entitled to receive the benefit of the bargain, but refrained from attaching Wife's payments to Husband's CRSC benefits. Instead it ordered Husband to pay Wife the damages flowing from his breach of contract." *Id.*

165. *Id.* at *6.

166. *Id.*

167. *Id.* ("Although some courts have utilized alternative sources of income in rendering an equitable judgment, we find no language in *Mansell* which mandates such a finding.").

3. Hurt v. Jones-Hurt *and* Stojka v. Stojka

Hurt v. Jones-Hurt,[168] a Maryland Court of Special Appeals case, is the first case to recognize and interpret *Howell*. When the parties divorced in 2004, the trial court awarded the wife of a military retiree one-third of the marital share of the husband's military pension.[169] The court was unaware that the husband had a 10% VA disability rating and was receiving VA disability compensation at the time of the divorce.[170]

Some years later, the husband began drawing retired pay, and his VA disability rating had increased to 30%.[171] Over the course of three different orders, the court ruled that the former wife was entitled to the same overall dollar amount for the retired servicemember's military retired pay, notwithstanding the reduction for the VA waiver.[172] Essentially, the court ordered that the husband "shall pay to [wife] the differential between the amount [wife] receives directly from the government . . . and the full amount of the pension she is entitled to receive pursuant to the divorce judgment."[173] Thus, absent a prior agreement or consent order, the court ordered the retired servicemember to indemnify his former wife for a reduction in her retired pay share due to a VA waiver—a prime example of adjudicated indemnification. The husband timely appealed.[174]

The *Howell* decision was issued after oral arguments had been made in *Hurt*.[175] The Court of Special Appeals of Maryland incorrectly and unnecessarily asserted that *Howell* overruled the Maryland state precedent in support of indemnification.[176] It should have found that *Howell* did not overrule prior Maryland

168. 168 A.3d 992 (Md. Ct. Spec. App. 2017).

169. *Id.* at 994. Although he was already retired from the Army National Guard, he would not begin to draw retired pay until the age of sixty. 10 U.S.C. § 12731(f)(1) (2012).

170. *Hurt*, 168 A.3d at 994.

171. *Id.* at 995.

172. *Id.* at 994.

173. *Id.* at 996.

174. *Id.* at 997.

175. *Id.* at 1001.

176. *Id.* at 1002.

precedent—*Allen,*[177] *Dexter*,[178] and *Wilson*[179]—as the underlying facts were distinguishable in those cases.

The court reasoned that the veteran's choice to elect VA disability benefits overrode the court's ability to amend the marital property award to reflect post-judgment changes in circumstances.[180] The court noted that "[a]lthough the circuit court could not have known this at the time, we now know that military retirement benefits are always contingent, whether or not the veteran has a disability rating at the time of divorce."[181] The court further noted that "[t]he possibility of a new disability rating is always out there, and parties and courts must account for (and attempt to predict the likelihood of) these contingencies when valuing military retirement pay."[182]

In summary, the Maryland Court of Special Appeals reversed the judgment of the circuit court and held that a judge could not order reimbursement/indemnification for a former spouse when the veteran's VA disability rating (increased from 10% to 30%) diminished the former spouse's share of military retired pay.[183] However, it is important to note that *Hurt,* like *Howell*, is not a contract case, as there was no agreement between the parties and no consent order. Additionally, there was at least one prior un-appealed order.

Stojka v. Stojka,[184] another Maryland Court of Special Appeals case, further interprets *Howell* and *Hurt*. The issue presented in *Stojka* was whether the trial court erred by including language in the parties' divorce judgment that indefinitely reserved jurisdiction over

177. Allen v. Allen, 941 A.2d 510, 516 (Md. Ct. Spec. App. 2008) (stating that the term "pension/retirement plans" included "all retirement benefits accrued as a result of appellant's military service").

178. Dexter v. Dexter, 661 A.2d 171, 174–75 (Md. Ct. Spec. App. 1995) (finding that the parties reached an agreement regarding the division of one spouse's military pension, and that agreement was read into the record and incorporated into their divorce judgment).

179. Wilson v. Wilson, 117 A.3d 138, 140 (Md. Ct. Spec. App. 2015) (affirming a district court's holding that a disabled military retiree breached the property settlement with his former wife when he did not increase her payment after his increased disability earnings).

180. *Hurt*, 168 A.3d at 1002.

181. *Id.*

182. *Id.*

183. *Id.*

184. No. 1496, 2017 WL 5036322 (Md. Ct. Spec. App. Nov. 2, 2017).

the parties and their personal property if the former spouse's share of the veteran's military retired pay was reduced.[185] Essentially, the trial court retained jurisdiction to modify the pension division payments in the event the former spouse's share of the servicemember's military retired pay was later reduced due to a VA waiver or for any other reason.[186] Upon the servicemember's timely appeal, the Maryland Court of Special Appeals properly held that the portion of the judgment pertaining to indemnification for a VA waiver violated the USFSPA because the servicemember did not consent to it.[187] Accordingly, the trial court was directed to strike the portion of the judgment "retaining jurisdiction to modify the pension division payments should [the servicemember] waive gross military retire[d] pay for VA disability compensation."[188]

The Maryland Court of Special Appeals holding is consistent with *Howell*.[189] However, the court properly distinguished *Stojka* from *Howell* and *Hurt* by noting that "the court contemplated the ability to maintain continuing jurisdiction to revisit the division of pension payments not only in the case of potential disability, but also if [the servicemember] saw a reduction in force or was not selected for promotion."[190] Thus, the appellate court did not declare that the trial court may not retain *any* jurisdiction over its judgment regarding the military pension; the court only restricted the retention of jurisdiction regarding indemnification.[191]

4. Vlach v. Vlach

Vlach v. Vlach[192] is a Tennessee Court of Appeals case that involved a 2002 (pre-*Howell*) final decree of divorce, which incorporated the parties' marital dissolution agreement.[193] The agreement included a provision dividing the servicemember's

185. *Id.* at *1.
186. *Id.* at *4.
187. *Id.* at *8.
188. *Id.*
189. *Id.*
190. *Id.* The servicemember testified during trial that although he has over seventeen years of active duty military service, he may not attain the twenty years necessary to receive military retired pay. *Id.* at *2.
191. *Id.* at *9.
192. No. M2015-01569-COA-R3-CV, 2017 WL 4864991 (Tenn. Ct. App. Oct. 27, 2017).
193. *Id.* at *1.

military retired pay and considered that the servicemember's receipt of disability benefits may affect his retired pay.[194] The agreement specifically stated that it was the court's "intention that if the [former spouse] receives a deduction from [the servicemember's] military retirement pension, such as for an election of VA disability, then the percentage of the military retirement pension will be adjusted to equal the same dollar sum as if no disability or similar deduction was made."[195] Thus, it contained an indemnification clause. It was not appealed.

The final decree of divorce was not sufficient to effectuate direct payments from the retired pay center, so the servicemember's former wife sought a clarifying order.[196] A clarifying order was granted, which awarded the former wife 26% of the veteran's "total military retired pay."[197] The clarifying order further stated that, "[i]f [the retiree] becomes classified as 74% or more disabled, he may petition th[e] court for appropriate relief."[198] Shortly thereafter, the retiree received a VA disability rating of 100%.[199] He petitioned the court for relief, but the court determined that he was not relieved of his obligation to pay his former wife 26% of his military retired pay.[200] The retiree timely appealed.[201]

On appeal, the Tennessee Court of Appeals acknowledged that the marital dissolution agreement included an indemnification provision.[202] Indemnification was not applicable to this case, however, because the retiree's 100% VA disability rating did not cause a reduction in his military retired pay because he was eligible for receipt of CRDP.[203] However, the court incorrectly held that "the provision runs afoul of [*Howell*] and is unenforceable."[204] This is incorrect because the parties' marital dissolution agreement was a contract that was entered into knowingly and voluntarily, and it was

194. *Id.* The marital dissolution agreement included a definition of "disposable retirement pension" that was contrary to the statutory definition. *See id.* at *6; *see also* 10 U.S.C. § 1408(a)(4)(A) (2012).

195. *Vlach*, 2017 WL 4864991, at *1.

196. *Id.*

197. *Id.* at *2.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *4.

203. *See* 10 U.S.C. § 1414 (2008).

204. *Vlach,* 2017 WL 4864991, at *5.

incorporated into the parties' final decree of divorce, which was not appealed.[205] Had indemnification been at issue in this case, contract law and res judicata would apply.[206] Furthermore, there is nothing in *Howell* that suggests that the Supreme Court intended to invalidate, or otherwise render unenforceable, prior valid judgments.[207]

In summary, the Tennessee Court of Appeals properly affirmed the judgement of the trial court, as modified to reflect that the former spouse's share is a percentage of disposable retired pay rather than total retired pay.[208] Nevertheless, the court incorrectly concluded that (pre-*Howell*) indemnification clauses are unenforceable.[209]

5. Mattson v. Mattson

Minnesota was one of the first states to examine and apply the *Howell* decision. *Mattson v. Mattson*[210] involved a stipulated divorce decree. The former spouse was to receive 40% of the veteran's "gross monthly military retirement pay" and 40% of "the gross amount of [the veteran's] military disability compensation" that he received from the VA.[211] The decree was not appealed,[212] which distinguishes this case from *Howell*. However, as in *Howell*, there was no underlying agreement or contract between the parties containing an express indemnification clause.[213]

The veteran "made only sporadic payments on his obligations under the decree, resulting in substantial arrearages."[214] The former spouse sought enforcement, and the district court granted

205. *See id.* at *1.

206. The court acknowledged that "[i]n order to understand the language used in the [marital dissolution agreement], one must understand federal law governing military retirement pay at the time the [marital dissolution agreement] was drafted." *Id.* at *2. However, the court seemed to disregard this in their analysis.

207. With great uniformity, case law around the country has held that *McCarty* and *Mansell* are not retroactive. *See supra* note 120 and accompanying text. Applying *Howell* retroactively would create serious public policy implications.

208. *Vlach*, 2017 WL 4864991, at *6.

209. *See id.* at *4.

210. 903 N.W.2d 233 (Minn. Ct. App. 2017).

211. *Id.* at 236.

212. *Id.* (stipulating that the issues on appeal are limited to the states authority to enforce division of military benefits and the awarding of attorney fees).

213. *Id.* at 243 (explaining that the court relied on Minnesota Statute section 518.14, subdivision 1 as the basis for awarding the wife attorney fees and costs).

214. *Id.* at 236.

relief—ordering the veteran to pay the military retired pay and disability compensation due pursuant to the stipulated divorce decree.[215] The veteran subsequently appealed.[216] The issue before the Minnesota Court of Appeals was whether federal law preempts enforcement of the parties' stipulated decree dividing the veteran's disability compensation.[217]

When the court examined *Gatfield* and applied *Howell,* it failed to distinguish a key fact. *Gatfield* involved an express contractual indemnification clause, whereas *Howell* did not;[218] the *Howell* case involved court adjudicated indemnification.[219] Thus the court's reasoning in *Mattson*, stated below, is flawed:

> In light of *Howell*, we conclude that our holding in *Gatfield* has been functionally overruled. In *Gatfield*, we held that principles of contract and res judicata could render a stipulated decree indemnifying an ex-spouse enforceable, even if it ran afoul of *Mansell*, because "parties are free to bind themselves to obligations that a court could not impose." But, as clarified in *Howell*, such equitable compensation degrees do not escape federal preemption and are simply unenforceable.[220]

The court failed to recognize that the decision in *Howell* is extremely narrow. The issue in *Howell* was the court's post-divorce adjudication of indemnification when there was no underlying agreement or stipulation containing an express indemnification clause.[221] Thus, *Howell* does not change the existing laws and precedent regarding express contract terms that are entered into voluntarily. Furthermore, the court should have applied the doctrine of res judicata, as the initial stipulated divorce decree was not appealed.

The Minnesota Court of Appeals ultimately determined that "[f]ederal law preempts state courts from dividing a veteran's military disability compensation as marital property and renders such property

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Howell v. Howell, 137 S. Ct. 1400, 1404 (2017); *see also* Gatfield v. Gatfield, 682 N.W.2d 632, 634–35 (Minn. Ct. App. 2004). Likewise, there is no express contractual indemnification clause in *Mattson.*

219. *Howell*, 137 S. Ct. at 1404.

220. *Mattson*, 903 N.W.2d at 241 (citations omitted).

221. *Howell*, 137 S. Ct. at 1402.

divisions unenforceable, even if agreed upon."[222] But the public policy implications for such a determination are unclear, as "[i]t is difficult to see how federal interests are harmed to a greater degree when the owning spouse voluntarily consents to a contract dividing the benefits."[223] It is a common misconception that a veteran's disability benefits are untouchable. In *Rose v. Rose*, the Supreme Court held that the federal preemption doctrine did not prohibit the state of Tennessee from holding a military veteran in contempt for nonpayment of child support.[224] In that case, VA disability compensation was the veteran's only means for satisfying his support obligation, notwithstanding the provision of federal law that VA benefits are not subject to attachment, levy, or seizure under Title 38, U.S. Code, Section 5301(a)(1).[225]

The issue regarding division of VA disability compensation was already decided in 1981 in *Mansell*.[226] *Mansell* does *not* hold that parties are proscribed from contractually agreeing to divide military benefits that lay outside the USFSPA's definition of disposable retired pay.[227] And neither does *Mansell* hold that res judicata should be ignored.[228] In fact, it holds the exact opposite.[229]

The issues in *Gatfield* and *Howell* are completely different from the issue presented in *Mattson*. The chart below illustrates a summary of the underlying facts, issue(s), and holding in *Gatfield*, *Howell*, and *Mattson*.

222. *Mattson*, 903 N.W.2d at 235.

223. *State Court Treatment*, *supra* note 43, at 81.

224. 481 U.S. 619, 636 (1987)

225. *Id.* at 626–28.

226. Mansell v. Mansell, 490 U.S. 581, 604 (1989).

227. *Id.* at 583 (holding only that under the USFPA state courts may not treat "military retirement payment waived by the retiree in order to receive veterans' disability benefits" as divisible property upon divorce).

228. *See supra* Part II.C.1.

229. *See Mansell*, 490 U.S. at 586 n.5.

	Facts	**Issue**	**Holding**
Gatfield	**Stipulated** (Virginia) Dissolution Judgment with an indemnification provision	Can a state court enforce a stipulated provision of a dissolution judgment—in which the veteran agreed *not* to waive military retired pay in favor of VA disability pay and to pay 50% of the gross military retired pay—if he waived military retired pay for nontaxable VA disability benefits, thus causing a reduction in the former spouse's share?	Yes. Parties are free to bind themselves to obligations that a court could not impose.
Howell	**Adjudicated** Decree of Dissolution awarded 50% of military pension (*without an indemnification provision*). No underlying separation agreement or contract between parties containing an express indemnification clause	Can a state court increase a former spouse's pro rata share of military retired pay when a retiree waives military retired pay for nontaxable VA disability benefits post-divorce, thus causing a reduction in the former spouse's share?	No. Subsequent (post-*Howell*) *adjudicated* indemnification orders are preempted by federal law and an *adjudicated* award of indemnity is reversible error.

Mattson	**Stipulated** Divorce Decree—40% of gross retired pay and 40% of gross military disability payments	Does federal law preempt enforcement of the parties' agreed-upon decree dividing the veteran's disability compensation?	Yes. Federal law preempts a state court from dividing a veteran's VA disability compensation as martial property, and such property divisions are unenforceable even if they were agreed upon.

Parties should still be "free to bind themselves to obligations that a court could not impose."[230] Although *Howell* prevents a state court from adjudicating indemnification, *Mattson* is distinguishable, given that *Howell* did not involve a stipulation to divide disability compensation. Furthermore, *Howell* did not involve an express contractual indemnification clause, as was the case in *Gatfield*. In *Mattson*, the Minnesota Court of Appeals overreached in its analysis of *Howell*.

D. Public Policy

Since the Supreme Court has ruled on the issue of court-adjudicated indemnification, the only course of remedial action is through a legislative fix by Congress. Only an amendment to the USFSPA can change the *Howell* precedent.[231] A large part of the battle with former-spouse military divorce issues is that Congress generally supports protections for military retirees, veterans, and servicemembers, whereas state law is typically what provides protections for former spouses.[232] Congress does not enact family law

230. Gatfield v. Gatfield, 682 N.W.2d 632, 637 (Minn. Ct. App. 2004).

231. *See The Death of Indemnification*, *supra* note 4.

232. Email from Brett R. Turner, Senior Research Attorney, Nat'l Legal Research Grp., Inc. to Mark E. Sullivan, Principal Attorney, Sullivan & Tanner, P.A. (May 15, 2017, 12:54 EST) (on file with author).

legislation, it likely does not understand the intricacies of family law, and it "persistently undervalues family law policies, except when there is an occasional political uproar"—for example, the *McCarty* decision.[233] *McCarty* caused a political uproar, which is why Congress enacted the USFSPA shortly thereafter. Since federal law trumps state law, Congress's lack of familiarity with family law—specifically, the complex intricacies of military divorce—is a large and growing problem.[234] The recent policy implications affect current and retired servicemembers, their former spouses, and attorneys.

Plainly stated, "[t]he decision in the *Howell* case means that retirees may elect VA disability compensation 'without a price tag,' that is, without fear that a judge may later order a pay-back of moneys lost by the [retirees] former spouse because of a VA waiver."[235] It fully supports the servicemember's side in military divorce cases, and provides nothing but positive policy implications for servicemembers.

There are three recent policy changes that affect military divorce and negatively impact the former spouse. First, there is nothing in the *Howell* decision that benefits former spouses of military members. Previously, "an indemnification clause [was] the best preventive medicine to use in these cases."[236] Now, it is not likely that a servicemember or veteran will ever agree to one.[237] Even without an indemnification clause, the majority of states had laws or precedent allowing a remedy.[238] *Howell* essentially takes away this precedential protection. The precise remedies that may be available to a former spouse who ends up with a reduced share of military

233. *Id.*

234. *See id.*

235. *The Death of Indemnification*, *supra* note 4.

236. MILITARY DIVORCE HANDBOOK, *supra* note 30, at 531.

237. Knowing that *Howell* prevents a state court from adjudicating indemnification, the servicemember has little incentive to agree to indemnify their former spouse in the event of a VA waiver. *See* Allison A. Polchek, *Recent Property Settlement Issues for Legal Assistance Attorneys*, THE ARMY LAW., 4, 7 (1992) ("Although *Mansell* apparently would not prevent a service member and his or her spouse from agreeing to divide the service member's gross retired pay, the decision leaves the service member with little incentive to do so. Knowing that *Mansell* will prevent a divorce court from dividing his or her gross retired pay, a service member probably will refuse to settle in hopes of protecting any assets the court cannot reach.")

238. *See* MILITARY DIVORCE HANDBOOK, *supra* note 30, at 531–32.

retired pay due to a VA waiver are currently unknown,[239] and the remedies that do arise will likely vary by state.[240]

Second, section 641 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017) [241] revised the USFSPA by changing the way MPDOs must be written and by redefining "disposable retired pay."[242] This new definition changed the amount of military retired pay that the government may pay directly to a former spouse.[243] Essentially, going forward, the "disposable retired pay" is "the hypothetical retired pay attributable to the rank and years [or points] of service of the military member at the time of the divorce"—this is called the "Frozen Benefit Rule."[244] Under NDAA 2017, in addition to the flat dollar, percentage, formula, or hypothetical award to the former spouse, the MPDO must contain the following data points: (1) the date of divorce;[245] (2) the servicemember's retired pay base as of the date of divorce;[246] and (3) the servicemember's creditable years of service (if active duty) or the servicemember's creditable retirement points (if National Guard or Reserves) as of the date of divorce.[247] This "Frozen Benefit Rule" only

239. *See The Death of Indemnification*, *supra* note 4.

240. *Id.*

241. National Defense Authorization Act of 2017, Pub. L. No. 114-328, § 641, 130 Stat. 2000 (2016). The NDAA is a federal law that is passed consecutively every year since 1963. It specifies annual budget and expenditures and addresses the operations and business for the Department of Defense.

242. *Id.*

243. National Defense Authorization Act of 2018, Pub. L. No. 115-91, § 624, 131 Stat. 1283 (2017) (further clarifying 10 U.S.C. § 1408); Mark E. Sullivan, *Military Pension Division: The Frozen Benefit Rule*, FED. BAR ASS'N VETERANS AND MIL. L. SEC. 3 (2017), http://www.fedbar.org/Image-Library/Sections-and-Divisions/Veterans/Tommy-Winter-2017.aspx [https://perma.cc/4BAU-P4G8].

244. *Id.* The implementing regulations are found in the Department of Defense Financial Management Regulation (DODFMR). U.S. DEP'T OF DEF., *supra* note 25, at ch. 29.

245. This is problematic because some states do not permit or are strongly opposed to bifurcation of the divorce and the property division. *See* EQUITABLE DISTRIBUTION, *supra* note 3, § 3.2 (providing a summary of arguments against bifurcation of the divorce and the property division with case citations for state appellate decisions).

246. For servicemembers entering military service after September 7, 1980, the retired pay base is the "high-36"—the average of the highest 36-months of basic pay. 10 U.S.C. § 1407 (2012). For servicemember's entering military service before September 8, 1980, the retired pay base is the final basic pay. *Id.* § 1406.

247. U.S. DEP'T OF DEF., *supra* note 25 at ch. 29, para. 290802; *see also* Mark E. Sullivan, *Military Pension Division: The Frozen Benefit Rule, Part 2*, FED. BAR ASS'N

applies to the division of military retired pay of servicemembers who are not yet receiving retired pay (i.e., active-duty, National Guard, Reserves, gray area retirees).[248] Regardless of the state's date of classification,[249] the "Frozen Benefit Rule" essentially freezes the former spouse's share of military retired pay at the date of divorce.

Third, Congress passed the National Defense Authorization Act for Fiscal Year 2016 (NDAA 2016)[250] to modernize the retirement systems for the uniformed services.[251] The NDAA 2016 created the Blended Retirement System, which went into effect on January 1, 2018.[252] Under this new retirement system, many retired pay decisions are unilaterally up to the servicemember, which could detrimentally impact the former spouse's share of military retired pay.[253]

E. Effect on Attorneys

Military divorce is a complex and confusing area in family law, and thus a lawyer could easily make a serious error that could turn into a malpractice claim.[254] Military divorce law represents a

VETERANS AND MIL. L. SEC. 4 (2017), http://www.fedbar.org/Image-Library/Sections-and-Divisions/Veterans/Tommy-Spring-2017.aspx [https://perma.cc/QHA6-DFW2].

248. *See id.*

249. The classification date is the marital cut-off date, which is the date the marriage terminated for marital/community property division purposes pursuant to state law.

250. National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (2015).

251. "Uniformed services" are the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service. 10 U.S.C. § 101(a)(5).

252. *See* Karen Jowers, *Your Retirement: The Big Choice Nears*, ARMY TIMES, Sept. 4–11, 2017, at 22; Brentley Tanner, *To Have and to Hold: Retirement Considerations in Military Divorce*, ROLL CALL, (Military Law Comm., ABA Family Law Section, Chicago, Ill.), Spring 2016, at 11, https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/rc_spring2016.authcheckdam.pdf [https://perma.cc/7Y44-XQWY]; *The Blended Retirement System Explained*, MILITARY.COM, https://www.military.com/benefits/military-pay/blended-retirement-system.html [http://perma.cc/NE7P-P2VK] (last visited June 20, 2018).

253. *See* Tanner, *supra* note 252, at 11, 14.

254. *See* Mark E. Sullivan, *Fact or "Whacked"? Myths and Mistakes in Military Divorces,* LEGAL EAGLE (Jan. 24, 2008), [hereinafter *Myths and Mistakes*] http://www.nclamp.gov/publications/the-legal-eagle/fact-or-whacked-myths-and-mistakes-in-military-divorces/ [https://perma.cc/FFB5-RFBU].

complicated fusion of state family law and several federal statues applicable only to military servicemembers.[255] Some of the most common malpractice matters in family law are the improper drafting of pension division orders,[256] omission of survivor annuities,[257] and inadequate knowledge of a specific nature of the law.[258] Put simply, "[t]he problem is that [attorneys] don't know what they don't know. And the law is ever-changing."[259] For example, attorneys are often unaware of the federal statutory requirements and deadlines pertaining to military retired pay, the SBP (the survivor annuity associated with military retired pay), and health care benefits and options.[260] While it is an added upfront expense for either the attorney or the client, it is always a good idea to consult with an expert in the field, as it is easier and less costly to do things thoroughly and correctly the first time rather than having to correct an error later on.[261] The expert does not have to be the attorney of record; he or she can simply associate as a consultant to assist solely with the military aspects of the divorce case.[262] Sometimes, a Judge Advocate General (JAG) officer, a Guard or Reserve lawyer, or a

255. *See* Steven P. Shewmaker & Alexa N. Lewis, *About Face—Congress Alters the Age Old Military Retirement System*, ROLL CALL (Military Law Comm., A.B.A. Family Law Section, Chicago, Ill.), Spring 2016, at 7, https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/rc_spring2016.authcheckdam.pdf [https://perma.cc/7Y44-XQWY]; *see, e.g.*, 10 U.S.C. § 1408.

256. Mark E. Sullivan & Kaitlin S. Kober, *Malpractice and Military Divorce*, 40 FAM. ADVOC. 38, 40 (2017).

257. GREGG M. HERMAN, ONE HUNDRED ONE PLUS PRACTICAL SOLUTIONS FOR THE FAMILY LAWYER 365 (2003).

258. Thomas J. Watson, *Beware the Danger Signs: The Top Ten Family Law Malpractice Issues*, 40 FAM. ADVOC. 6, 8, 11 (2017) (quoting Brian Anderson, Senior Claims Attorney at Wisconsin Lawyers Mutual Insurance Company). Mr. Watson recommends that practitioners hire an expert to draft a proper order for division of complex retirement plans and benefits. *Id.* at 3. Although a military pension is not a retirement plan, but rather a federal entitlement under Chapter 71 in Title 10 of the United State Code, Mr. Watson's recommendation is still applicable.

259. *Id.* at 11 (noting that it is "critical that lawyers stay on top of changes in the law").

260. *See Myths and Mistakes, supra* note 254.

261. *See id.*; Emily W. McBurney, *Avoiding Legal Malpractice: Retirement Benefits and Qualified Domestic Relations Orders*, 40 FAM. ADVOC. 22, 22 (2017) (addressing common mistakes that can lead to malpractice claims and stating that "[p]reparation on the front end can save you and your client a lot of time and money at the end of the case and keep you safe from claims of inadequate legal representation").

262. *See Myths and Mistakes, supra* note 254.

retired JAG officer can provide limited legal assistance. However, because JAG officers often do not "have the in-depth knowledge necessary for a serious case, they cannot go into court, and they usually have short-term assignments in legal assistance."[263] Attorneys should be aware that JAG officers often lack the exposure and expertise in the constantly changing realm of family law and military divorce.[264]

V. CONCLUSION

Under federal law, the divisible portion of military retired pay is limited to "disposable retired pay."[265] Essentially, this means that if a veteran receives VA disability compensation under Title 38 or Military Disability Retired Pay (MDRP) or CRSC under Chapter 61 and Section 1413a of Title 10 respectively, a former spouse's "share" of military retired pay could be substantially reduced or completely diminished. Until *Howell*, most states remedied this situation by applying the concept of indemnification.[266] However, state courts are no longer allowed to adjudicate indemnification.[267] *Howell*'s holding is narrow—federal law prevents a state court from adjudicating indemnification.[268] There are two potential solutions to this problem.

First, a solution may be to amend the USFSPA.[269] In essence, the term "disposable retired pay" could be redefined to mean "military retired pay that the servicemember would be entitled to based only on the length of the servicemember's creditable service" and eliminate the reduction for a VA waiver (i.e., eliminate 10 U.S.C. § 1408(a)(4)(A)(ii)). For the sake of simplicity, this Note does not address the implications of the SBP[270] premium, nor does it go into

263. *Id.*

264. *See id.*

265. 10 U.S.C. § 1408(a)(4)(A) (2012).

266. *State Court Treatment*, *supra* note 43.

267. *See* Howell v. Howell, 137 S. Ct. 1400, 1401 (2017).

268. *Id.* at 1406 ("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.").

269. 10 U.S.C. § 1408.

270. The SBP is the survivor annuity associated with military retired pay; it is governed by 10 U.S.C. §§ 1447–55. The SBP premium is deducted from gross retired pay when computing disposable retied pay under 10 U.S.C. § 1408(a)(4)(A)(iv). *See generally* Ashley L. Oldham & Phillip J. Tucker, *The Armed Forces Survivor Benefit Plan:*

depth regarding the Frozen Benefit Rule,[271] MDRP,[272] and CRSC.[273] Redefining disposable retired pay poses significant public policy problems, as nobody wants to be seen as taking benefits away from veterans.

Second, a potentially more favorable solution is to allow for concurrent receipt of military retired pay and VA disability compensation for all retirees, regardless of their VA disability rating. Currently, CRDP is only for retirees who have a VA disability rating of 50% or greater.[274] Allowing CRDP for all retirees would eliminate the VA waivers. In other words, it would eliminate offsets to military retired pay when receipt of VA disability compensation is elected, and the retiree would receive his or her full military retired pay and full VA disability compensation. However, this resolution would not provide any relief to a former-spouse in situations in which a retiree is receiving MDRP[275] or CRSC.[276]

The Supreme Court has previously stated that res judicata is a defense to federal preemption regarding the division of military service benefits,[277] and the Court has yet to address whether an agreement that divides a preempted benefit, such as a veteran's disability benefits, is enforceable. Nevertheless, the United States Supreme Court decided in *Howell* that federal law prevents a state court from adjudicating indemnification. More specifically, *Howell* preempts state courts from ordering a retired servicemember to indemnify a former spouse for a reduction in the former spouse's share of the retiree's military retired pay when the retiree elects to receive VA disability compensation and an equal amount of military retired pay is waived. Instead, many state courts have misinterpreted *Howell* to be broader than it actually is.

Can I Be a Beneficiary and Why Do I Care?, 29 J. AM. ACAD. MATRIM. LAW. 149 (2016) (providing a "practical guide" to the SBP).

271. *Supra* Part IV.D.
272. 10 U.S.C. §§ 1201–22.
273. *Id.* § 1413a.
274. *Id.* § 1414.
275. *Id.* §§ 1201–22.
276. *Id.* § 1413a.
277. *Supra* Part II.B.

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