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The New Supreme Court Decision on Dividing Military Retired Pay in Divorce

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***Howell v. Howell,* 137 S. Ct. 1400 (2017).[3]**

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[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3]This is a very recent decision of the United States Supreme Court, released on May 15, 2017. The citation means that you can find this decision in Volume 137 of *Supreme Court,* starting on page 1400. Decisions of the United States Supreme Court are officially published by the United States Government in *United States Reports,* a series of sequential volumes that publish only decisions of the United States Supreme Court, but official publication lags several years behind the release of decisions. In the meantime, United States Supreme Court decisions can be found in several unofficial (commercially published) series of volumes, including *Supreme Court.* Justice Stephen Breyer wrote the decision of the Court and was joined by six of his colleagues. Justice Clarence Thomas concurred in the result and wrote a separate opinion. Justice Neil Gorsuch was nominated by President Donald Trump and confirmed by the Senate only recently. He did not participate in this decision because he was not a member of the Supreme Court when oral argument on this case was held months ago.

Background on the military retirement system and disability compensation.

There are three separate forms of military retirement, governed by three separate chapters of title 10 of the United States Code, which governs the armed forces generally. The traditional form of military retirement, based on 20 years or more of full-time military service, dates from the Civil War. The Reserve Component retirement system (in which a National Guard or Reserve service member receives a delayed military pension based on a combination of active duty and part-time Reserve Component service) dates from 1948. The third form of military retirement is disability retirement, for the service member who incurs a significant disability in the line of duty while serving and whose military career is cut short by that disability.

The United States Department of Veterans Affairs (VA) administers a separate system of compensation for persons who have suffered disabilities in military service. A person typically applies for VA compensation after leaving active duty, either for a career-long period of service of 20 years or more or a shorter period of service that ended short of retirement eligibility. A person who has qualified for military retirement based on 20 years or more of full-time service and who thereafter is awarded VA compensation for a service-connected disability is barred, by another provision, from concurrent receipt of both the military retirement and the VA disability compensation.[4]

The Reserve Officers Association (ROA) and other military associations have long argued that the bar on concurrent receipt is unfair and should be repealed. If Josephine Smith earned a military retirement based on 20 years or more of service, and if she also has been awarded VA disability compensation for an injury incurred in the line of duty and resulting disability, she should be able to receive both payments, and one should not be offset against the other. Our efforts to repeal the prohibition on concurrent receipt have been partially but not wholly successful.

Under legislation enacted in 2004, two changes were made. First, a military retiree who has a VA rating of 50% or more may receive full VA disability compensation as well as full retired pay. This is called Concurrent Retirement and Disability Pay (CRDP).

Second, a military retiree with a service-connected disability caused by wounds, hazardous service, instrumentalities of war, armed combat, or conditions simulating war may receive additional payments called Combat Related Special Compensation (CRSC). However, receipt of CRSC wipes out the restoration of full retired pay (CRDP), and so all VA disability compensation payments are subtracted from retired pay. This is the VA offset.

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[4]When a military retiree receives VA disability compensation and military retired pay, the retired pay is reduced dollar-for-dollar by the amount of VA disability compensation. Thus, the retiree receives no additional net money, because of this offset. Nonetheless, the retiree does receive a financial benefit from receiving VA disability compensation, because that compensation is not taxable, while military retired pay is taxed.

Division of military retired pay in divorce proceedings

Almost 36 years ago (on June 26, 1981), the Supreme Court released an important decision holding that federal law precluded the state courts from dividing military retired pay in divorce proceedings, because Congress had intended that the military retired pay should go only to the military retiree.[5] Some months later, Congress enacted and President Ronald Reagan signed into law the Uniformed Services Former Spouse Protection Act (USFSPA).[6]

When Congress enacts a new law or amends a law, the new law or amendment normally goes into effect on the date of enactment (the date the President signs the law or the date when Congress successfully overrides a veto or the date when the President allows a bill to become a law without his signature), but Congress can, if it chooses, select an earlier or later effective date. For the USFSPA, Congress chose an effective date of June 25, 1981, one day before the Supreme Court released the *McCarty* decision.

It was not unprecedented or in any way improper for Congress to overrule a Supreme Court decision by enacting a statute. When the Supreme Court or a lower court construes the meaning of a statute, it must do so by determining the intent of Congress *when it enacted the statute.*[7] A court determines the meaning of a statute by looking at the meaning of the words that Congress enacted, often by consulting with dictionaries that were published in the same era that the statute was enacted, because the meaning of words can change over a period of decades. If the enacted words are unclear, or if the specific issue is not addressed in the text of the statute, a court can look to legislative history.[8]

In *McCarty,* the Supreme Court did *not* hold that it was unconstitutional for state courts to divide military retired pay. The Court held that such military pension division was inconsistent with the intent of Congress when it enacted the military retired pay statute more than a century before the 1981 Supreme Court decision. Congress' intent on this question had changed, and it was entirely appropriate for Congress to enact a new statute reflecting its new

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[5] *McCarty v. McCarty,* 453 U.S. 210 (1981). The citation means that this Supreme Court decision is officially published in Volume 453 of *United States Reports,* starting on page 210.

[6] Public Law 97-252, 96 Stat. 730. The citation means that the USFSPA was the 252nd new Public Law enacted during the 97th Congress (1981-82). You can find this Public Law, in the form that it was originally enacted, in Volume 96 of *Statutes at Large,* starting on page 730. The USFSPA is codified in a single section of title 10, section 1408, or 10 U.S.C. 1408. This section has been amended several times since its 1982 enactment. The most recent amendment was signed into law by President Barack Obama on December 23, 2016. The effect of that amendment is discussed in detail in Law Review 17006 (February 2017). That article is by Mark E. Sullivan, Esq., a retired Army Reserve Colonel and life member of ROA, and the lawyer who is the nation's foremost expert on military family law, including the division of military retired pay in divorce proceedings.

[7] In the *McCarty* case, the Supreme Court was determining the meaning of a statute enacted by Congress more than a century before the 1981 Supreme Court decision.

[8] Legislative history includes committee reports of the Senate and House of Representatives and floor debates, which are transcribed and reported in the *Congressional Record.*

intent. The 1982 enactment of the USFSPA does not mean that the 1981 *McCarty* decision was wrongly decided, only that Congress' intent on the issue changed.

The enactment of the USFSPA permits (with certain limitations included in the text of the statute) but does not require the states to provide for the division of military retired pay in divorce proceedings. All 50 states, the District of Columbia, the United States Virgin Islands, and Guam provide for the division of military retired pay in divorce. Among United States jurisdictions, only the Commonwealth of Puerto Rico does not provide for such division.[9]

Although all United States jurisdictions except Puerto Rico provide for the division of military retired pay in divorce proceedings, the details of how such retired pay is divided are a matter of state law and vary considerably from state to state. The rules in a specific state are made by the state legislature, by enacting state statutes, and by the state supreme courts and lower state courts, through case law development. A state can choose its own doctrines and formulas for division of military retired pay, so long as the state does not run afoul of the specific provisions of the USFSPA.

The *Howell* Case

John Howell and Sandra Howell were married for many years, and their marriage apparently overlapped almost all of John's Air Force career. They were divorced in 1991, and the Arizona state court awarded Sandra 50% of John's military retired pay, when received.[10] In 1992, John retired and started drawing his retired pay, and the Defense Finance and Accounting Service (DFAS) withheld 50% of each monthly retirement check from John and paid it to Sandra, in accordance with the Arizona divorce decree and the USFSPA.

About 13 years later, the VA determined that John was partially disabled due to a service-connected disability resulting from an injury he had received years earlier, when he was still on active duty. Accordingly, John's military retired pay was reduced dollar-for-dollar by the amount of his monthly VA disability compensation, as discussed above. This required waiver of a part of John's military retired pay inevitably resulted in a reduction of the monthly direct deposit that Sandra received from DFAS.

The USFSPA provides for the division of "disposable retired pay" received by the retired service member. Money received by the retiree from the VA, for a service-connected disability, is not subject to division under the USFSPA. Moreover, if the retiree is required to waive a portion of

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[9]Puerto Rico was a colony of Spain until the end of the 19th Century, when it became part of the United States through the Spanish-American War. Because Puerto Rico joined our country more recently than most states, it has a legal system that differs in important respects from the typical state legal system.

[10]John was still on active duty when the divorce was finalized. The USFSPA permits a state court to award the spouse up to 50% of the service member's retired pay, but not more than 50%.

his or her retired pay to receive VA disability compensation, the waived portion of retired pay cannot be treated as community property and divided in the state court divorce proceeding.[11]

In 1989, the Supreme Court held that section 1408(a)(4)(B) means what it says and that when a retired service member is required to waive a portion of his or her retired pay to receive VA disability compensation the waived portion of retired pay must not be divided by the state court in the divorce proceeding.[12] In this *Mansell* case, the VA determination of Mansell's service-connected disability and the resulting reduction of Mansell's military retired pay occurred prior to the divorce. In the *Howell* case, the VA determination and the reduction of John Howell's retired pay occurred many years after the divorce.

Sandra sought to reopen the Arizona divorce case after the waiver of part of John's retired pay resulted in a reduction of Sandra's monthly direct deposit from DFAS. Sandra sought a state court order requiring John to make her whole for the reduction in Sandra's monthly income due to the required waiver of part of his military retired pay. John, through his attorney, strenuously argued that such a "make whole" order would be inconsistent with the USFSPA, as construed by the Supreme Court in *Mansell.*

The Arizona trial judge agreed with Sandra's lawyer and disagreed with John's lawyer. The trial judge distinguished *Mansell* because in that case the VA determination and the resulting waiver of part of the retired service member's retired pay had already occurred before the divorce, while in *Howell* the VA determination and resulting reduction of retired pay occurred many years after the divorce. John appealed to the Arizona Supreme Court, which agreed with the trial court and affirmed the make whole order, holding that it was not inconsistent with federal law (the USFSPA).[13] John then applied to the United States Supreme Court for a writ of certiorari.

When a state supreme court decides an issue of state law, the decision of the state supreme court is final and not reviewable by the United States Supreme Court. When a state supreme court decides a question of federal law, as in the *Howell* case, the United States Supreme Court has jurisdiction to review the state supreme court decision with respect to the federal law issue, in much the same way that the Supreme Court reviews decisions of the 13 federal appellate courts (circuit courts).

A party who has lost at the state supreme court or federal circuit court level on a question of federal law can apply to the United States Supreme Court for certiorari (discretionary review). Certiorari is granted only if four or more of the nine Supreme Court justices vote to grant certiorari, during a Supreme Court conference to consider matters of this nature. Certiorari is granted in only about 1% of the cases where it is sought.

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[11] 10 U.S.C. § 1408(a)(4)(B).
[12] *Mansell v. Mansell*, 490 U.S. 581 (1989).
[13] *In re Marriage of Howell*, 238 Ariz. 407, 361 P.3d 936 (Dec. 2, 2015).

Certiorari is most often granted when there is a conflict among the state supreme courts or the federal circuit courts on a question of federal law. Such a conflict exists when some state supreme courts or federal circuit courts have decided the question in one way and other state supreme courts or federal circuit courts have decided the same federal question in an inconsistent way, in similar but separate cases. The Supreme Court granted certiorari in *Howell* because there were several state supreme court decisions that distinguished *Mansell* on the basis that the VA determination and resulting waiver of a part of the military retired pay occurred after the state court divorce proceeding, as the Arizona Supreme Court decided, and there were other state supreme court decisions holding that *Mansell* applied even when the VA determination and waiver of retired pay occurred after the divorce.

After granting certiorari, the Supreme Court received briefs from the parties and invited amicus curiae (friend of the court) briefs from other interested persons. The United States, through the Solicitor General, filed an amicus brief urging the Court to affirm the decision of the Arizona Supreme Court, and an attorney on the Solicitor General's staff also participated in the Supreme Court oral argument and urged the Court to affirm the decision of the Arizona Supreme Court.

On May 15, 2017, the Supreme Court unanimously held that the *Mansell* precedent applies to cases like *Howell* where the VA determination occurred years after the divorce. The Supreme Court remanded the case to the Arizona Supreme Court and directed that court to decide the case in a way that is consistent with this new Supreme Court precedent.

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This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[14] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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[14]Congress recently established the United States Space Force as the 8th uniformed service.