STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellee/Respondent,

SCT Docket No. 157705
COA Docket No. 324853
Circuit Court No. 07-15064-DM

vs.

RAY JAMES FOSTER,

Defendant/Appellant/Counter-Plaintiff/Petitioner

APPELLEE'S BRIEF
(ORAL ARGUMENTS REQUESTED)

Respectfully Submitted:
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Exhibit 1 - Applicable portions of the transcript and the exchange between the court and the attorneys from the December 3, 2008 final hearing

TABLE OF AUTHORITIES

Cases

Other Authorities

Court Rules

None

Constitutional Provisions

None

QUESTIONS PRESENTED

I.

Whether the principles set forth in *Howell, supra.* apply to Combat-Related Special Compensation (CRSC), 10 USC 1413a?

Appellant Answers: Yes

Appellee Answers: Yes

II.

Whether the principles set forth in *Howell, supra.* apply to the facts of the instant action?

Appellant Answers: Yes

Appellee Answers: No

III.

If federal preemption enumerated in *Howell* applies to CRSC, does *Megee v. Carmine,* 290 Mich App 551; 802 NW2d 669 (2010) remain good law?

Appellant Answers: No

Appellee Answers: Yes

IV.

Whether the Court of Appeals was correct in upholding the Dickinson County Circuit Court's November 6, 2014 contempt order against Defendant?

Appellant Answers: No

Appellee Answers: Yes

V.

Did the Court of Appeals err in denying Defendant-Appellant's Motion for a Stay of his ongoing payments where Appellant has already paid more than the challenged arrearages, all of which has been proven to be unauthorized and unlawful because the order under which Appellant was required to make those payments is and has always been preempted by federal law under 38 USC 5301(a)(3)(c)?

Appellant Answers: Yes

Appellee Answers: No. Appelle respectfully states that there has been no determination made by either the trial court, the Court of Appeal, and certainly no argument has been presented, to this Court to support Appellant's claim that he has already paid more than the challenged arrearages, nor has there been any "proof" that the arrearages and the order under which Appellant was required to make payments to Appellee "is and has always been preempted by federal law." The issue of whether or not Defendant-Appellant "has already paid more than the challenged arrearages" has not been litigated, and is not property before this Court.

VI.

Did the Court of Appeals err in denying Appellant's motion to nullify or terminate the bond where he filed an appearance, thereby satisfying the condition of the bond, and where both federal statutory law, 38 USC 5301(a)(3)(c), and Michigan Law prohibit the continuation of the bond and the lien securing it?

Appellant Answers: Yes

Appellee Answers: No

Court of Appeals Answer: No

STATEMENT OF FACTS

The parties were married on August 6, 1988, and Plaintiff-Appellee filed for divorce on November 20, 2007. Defendant-Appellant had served in the military during, and prior to, the marriage, and he retired from the Army in September 2007. Defendant-Appellant testified at the divorce hearing, which involved finalizing the parties' settlement, that he was receiving both military retirement pay and military disability benefits based on injuries he had sustained during the war in Iraq. Both parties waived their right to seek spousal support and agreed that Defendant-Appellant's disability benefits were not subject to division by the court because they were not considered marital property under federal law. However, pursuant to the property settlement, Plaintiff-Appellee was awarded 50 percent of Defendant-Appellant's retirement pay, or "disposable military retired pay," as calculated based on Defendant-Appellant's creditable military service during the marriage. The parties also agreed to the inclusion of the following provision in the divorce judgment, which shall be referred to as the "offset provision": "If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received

had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court."

At the divorce hearing, the trial court questioned the attorneys regarding the language of the offset provision, noting that it seemed to suggest that Defendant-Appellant was not currently receiving any disability benefits, which was not the case. Counsel for both parties acknowledged that the language was awkward, but explained that the intent was simply to address a scenario in which Defendant-Appellant became entitled to and accepted more disability benefits than currently being received, inversely diminishing the retirement benefits that were being divided and awarded to Plaintiff-Appellee. The purpose of the offset provision was to protect Plaintiff-Appellee in such a scenario.

Shortly after the entry of the divorce judgment, Defendant-Appellant became eligible for and began receiving increased disability benefits, which consequently reduced the amount of his retirement payments and the amount Plaintiff-Appellee received from Defendant-Appellant's military retirement pay. This was the precise circumstance that the parties had contemplated in drafting and agreeing to the offset provision. However, Defendant-Appellant failed to comply with the divorce judgment by paying Plaintiff-Appellee the difference between the reduced amount of retirement pay she received and the amount that she had received at the time of the divorce judgment. A number of show cause and contempt proceedings took place over several years, leading to the order that Defendant-Appellant now appeals, wherein the trial court held Defendant-Appellant in contempt for failure to pay Plaintiff-Appellee in compliance with the consent judgment of divorce. The court ordered him to pay Plaintiff-Appellee $1,000 per month, with $812 credited as current payments due under the divorce judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full.

STATEMENT OF THE CASE

This case involves Defendant-Appellant's attempts to evade/avoid an obligation he agreed to perform in a Consent Judgment of Divorce dated December 8, 2008 and a subsequent Order entered by the Trial Court on October 8, 2010. Those Orders were never appealed. Defendant-Appellant was subsequently held in contempt by the Trial Court on June 27, 2014. Defendant-Appellant filed a Claim of Appeal on December 1, 2014. The Michigan Court of Appeals affirmed the Trial Court ruling in an Unpublished Per Curium Decision on October 13, 2016 in *Foster v Foster* (Court of Appeals Docket No. 324853.

Defendant-Appellant's initial Application for Leave to Appeal was filed on November 30, 2016 after the Court of Appeals affirmed the Trial Court's order holding him in contempt of court for failing to comply with the Consent Judgment of Divorce entered in 2008. (*Foster v. Foster,* Unpublished Per Curium of the Court of Appeals, issued October 13, 2016). The Application for Leave to Appeal the October 13, 2016 Order of the Court of Appeals was considered by this Court and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the Order of the Court of Appeals was vacated and the matter was remanded to the Court of Appeals for reconsideration in light of *Howell v. Howell*, 581 U.S. _____; 137 S Ct 400; 197 L Ed 2d 781 (2017).

On March 22, 2018 the Court of Appeals once again affirmed the Trial Court's ruling. The Court of Appeals noted; "Given that the Supreme Court vacated the earlier opinion in its entirety, and in order to provide context for our discussion and analysis of *Howell*, we shall first set forth most of the previous opinion". (*Foster v. Foster*, (on remand) Unpublished Opinion Per Curium of the Court of Appeals, issued March 22, 2018, Docket No. 324853, Page 1). What followed in the Order on Remand is the Court of Appeals analysis of the facts, procedural history

and legal analysis as previously set forth in its Opinion and Order dated October 13, 2016. The only substantive difference is the Court's analysis and application of *Howell*.

COUNTER-STATEMENT OF JURISDICTION

The question of whether federal law preempts state law is not in dispute in this action. Any argument or detailed analysis as to that issue is unnecessary. Furthermore, it is not necessary to present argument on the powers vested in Congress in Article I of the US Constitution or the applicability of the Supremacy Clause to this action. Plaintiff/Counter-Defendant/Appellee asserts that the Judgment of Divorce, properly entered by the state court, does not, as part of a division of property, force appellant to part with anything with respect to his non-disposable veteran's disability benefits, that he/appellant had not already agreed to prior to the entry of the Judgment of Divorce. The Defendant/Counter-Plaintiff/Appellant was present in court when the terms of the Judgment were placed on the record. Additionally, he was represented by counsel at all times material to the divorce action generally, and at the final hearing specifically.

Defendant/Counter-Plaintiff/Appellant has asserted that; where federal preemption applies "state courts are without jurisdiction in the most elementary sense" and orders entered in contravention thereof are "void" for want of jurisdiction over the subject matter. This principle, which applies here, has a significant impact on the court's jurisdictional orientation to this case, and especially with respect to the court's question concerning the status of the circuit court's contempt orders, which were themselves based on a federally preempted, and therefore absolutely void judgment. (Appellant's Brief, page 2).

Defendant/Counter-Plaintiff/Appellant goes on to assert; "So, as it is this court's duty to consider first the question of the trial court's jurisdiction to have issued orders that it has issued

in contravention of federal law, Appellant would respectfully suggest that this court must question the circuit court's jurisdiction to have entered any order violative of then existing preemptive federal law in the first instance." (Appellant's Brief, page 6).

The Court of Appeals, in its unpublished opinion dated October 13, 2016 summarized the matters before the court and concluded as follows: "Defendant appeals as of right an order holding him in contempt of court for failing to pay plaintiff in compliance with the parties' consent divorce judgment that was entered in December 2008. Defendant argues that the contempt order and the divorce judgment itself are unenforceable because their effect is to require defendant to pay plaintiff a portion of his military disability benefits as part of the property settlement in violation of federal law. Defendant also presents arguments regarding alleged problematic factual findings and other legal shortcomings tied to the entry of the divorce judgment. Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms; however, he never appealed that judgment, nor has he moved for relief from the judgment, MCR 2.612. See *Kosch v. Kosch,* 223 Mich. App. 346, 353; 592 NW2d 434 (1999) (the defendant's failure to appeal the original divorce judgment and effectively constituted a stipulation to its provisions). Indeed, defendant agreed to the very provision in the divorce judgment that he now assails." (*Foster v. Foster*, Unpublished Opinion, Michigan Court of Appeals dated March 22, 2018, page 2).

Defendant/Counter-Plaintiff/Appellant has elected to ignore the above referenced conclusion reached by the Court of Appeals. The fact that Defendant/Counter-Plaintiff/Appellant failed to appeal the Judgment of Divorce, entered in 2008, is clear from the record. Additionally, the fact that Defendant/Counter-Plaintiff/Appellant never sought relief from the judgment is also supported by the record. As noted, repeatedly, the Judgment of

Divorce was filed/entered on December 2008. No appeal was filed until 2014 when, after the trial court gave Defendant/Counter-Plaintiff/Appellant multiple opportunities to comply with the terms of the judgment, the trial court entered an order holding him in contempt for failure to comply with the terms of the judgment. As the Court of Appeals noted in its March 22, 2018 Opinion: "Defendant's primary argument on appeal is that the divorce judgment and the trial court's order enforcing the judgment were legally invalid because they required him to pay plaintiff a portion of his disability benefits in violation of federal law." (March 22, 2018 Opinion, page 3).

The Court of Appeals in its final analysis of Appellant's arguments noted: "Finally, defendant poses arguments regarding alleged mistakes of fact by the trial court, along with purported fraud and unconscionable advantage, all tied to the procurement of the divorce judgment. These arguments are an improper and untimely attempt to relitigate the divorce action that was settled years ago, absent appeal, and the arguments are therefore rejected." (March 22, 2018 Opinion, page 6).

Plaintiff/Counter-Defendant/Appellee respectfully asserts that the only issue properly before this Court is Defendant-Appellant's appeal of the trial court's order holding him in contempt for failure to pay Plaintiff-Appellee in compliance with the Consent Judgment of Divorce entered in December 2008. Defendant/Counter-Plaintiff/Appellant waited nearly 6 years to challenge the validity of the 2008 judgment and/or to seek relief from it. For the reasons that will be stated herein, there are no issues regarding the validity of the 2008 Judgment of Divorce. Since the 2008 Judgment of Divorce is valid, the trial court's 2014 order holding Defendant/Counter-Plaintiff/Appellant in contempt for failure to abide by the terms of the judgment is also valid and was properly affirmed by the Court of Appeals.

This Court, in its order dated November 7, 2018 stated, "The application for leave to appeal the March 22, 2018 judgment of the Court of Appeals is considered, and it is granted. The parties shall include among the issues to be briefed, (1) whether the principles set forth in *Howell v. Howell,* ____ US ____; 137 S. Ct. 1400; 197 L Ed 2d 781 (2017), apply to combat-related special compensation (CRSC), 10 USC 1413a; (2) if so, whether *Megee v. Carmine*, 290 Mich. App. 551 (2010) remains good law in light of *Howell*…"

Plaintiff/Counter-Defendant/Appellee asserts that *Howell*, *supra* does apply to Combat-Related Special Compensation. There is no questions that a state trial court in contested divorce actions cannot treat Combat-Related Special Compensation as a marital asset and then enter an order in a contested divorce action requiring the recipient to pay a portion of it to his or her spouse as part of the division of assets. There is also no question that an order entered to that effect would be preempted by applicable federal law. As a corollary, any subsequent order entered by the trial court seeking to enforce its previous order would also be void.

The case of *Megee v. Carmine,* simply put, is a case involving an order enforcing the terms of a judgment of divorce and a Qualified Domestic Relations Order that awarded, by consent of the parties, a non-military spouse a share of the husband's military disability benefits. Without the benefit of careful analysis it could be argued that the court in *Megee* was precluded from entering such an order in light of the *Howell* opinion. *Megee,* like the instant action, and unlike *Howell*, involved terms of a divorce judgment that was entered into by consent of the parties. The trial court was not seeking to impose its will on a military spouse by awarding a non-military spouse a share of applicable disability benefits in violation of federal law. Based on that analysis, *Howell* can be distinguished from the instant action. There is also support for the argument that *Megee* remains good law notwithstanding the decision in *Howell.*

ARGUMENT I
HOWELL v. HOWELL

In support of the argument that the award of a portion of Appellant's military disability benefits and/or Combat-Related Special Compensation to Plaintiff-Appellee in the Judgment of Divorce rendered the Judgment "void", Defendant-Appellant cites the following: "The United States Supreme Court held in *Howell* that all military retired and disability pay is protected by federal preemption from consideration as a marital property asset in state court divorce proceedings, except that which is defined as disposable retired pay in the USFSPA. *Howell,* 136 S. Ct. at 1403-1406 (app 17a, 19a-21a). The Court noted that the protected benefits are personal entitlements intended to actually reach the beneficiaries." (Emphasis added) (Appellant's Brief, page 11).

The Court of Appeals, in its March 22, 2018 order, noted that in *Howell*, the state court treated as community property and awarded to a veteran's spouse upon divorce a portion of the veterans' total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive non-taxable disability benefits from the Federal Government instead. Can the state subsequently increase, pro rata the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not. Our cases and the statute make it clear that the answer to the indemnification question is "no". [Citation omitted]. (Unpublished Court of Appeals Opinion dated March 22, 2018 citing *Howell*, page 7).

The facts in Howell, as recited by the Supreme Court are, John Howell, the Petitioner, and Sandra Hall, the Respondent, were divorced in 1991, while Petitioner was serving in the Air Force. Anticipating John's eventual retirement, the divorce decree treated John's eventual

retirement pay as community property. It awarded Sandra as her sole and separate property fifty percent of John's military retirement when it begins. In 1992, John retired from the Air Force and began to receive military retirement pay, half of which went to Sandra. About 13 years later, the Department of Veterans' Affairs found that John was 20% disabled due to a service-related shoulder injury. John elected to receive disability benefits and consequently had to waive about $250.00 per month of the roughly $1,500.00 of military retirement pay he shared with Sandra. Doing so reduced the amount of retirement pay that he and Sandra received by about $125.00 per month.

Sandra then asked the trial court to enforce the original decree, in effect restoring the value of her share of John's total retirement pay. The trial court held that the original divorce decree had given Sandra a vested interest in the pre-waived amount of that pay, and ordered John to ensure that Sandra received her full fifty percent of the military retirement without regard to the disability. The Supreme Court concluded that the trial court's order, i.e. that John reimburse or indemnify Sandra for the reduction in the benefits she received, resulted in what can be characterized as an order invading exempt military disability pay. The court held that, "All such orders are thus preempted." It is unclear whether the divorce decree at issue in *Howell* was entered by consent or following a contested hearing. Either way, the provision awarding Respondent fifty percent of Petitioner's military retirement did not account for the possibility that the award might or could be reduced in the event that Petitioner elected to receive non-assignable disability benefits. The Supreme Court noted, "We recognize, as we recognized in *Mansell*, the hardship that congressional preemption can sometimes work on a divorcing spouse." (Citation omitted). In other words, even though the reduction or elimination of benefits, received by the non-military spouse resulting from an election by the receipt of military benefits,

results in significant financial hardship, any order by the trial court that divides or invades protected benefits is void or unenforceable.

With respect to the reimbursement issue, the Court in *Howell* held: "We see nothing in this circumstance that makes the reimbursement award to Sandra any less an award of the portion of military retirement pay that John waived in order to obtain disability benefits. And this is the portion that Congress omitted from the Act's definition of 'disposable retired pay', namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse, *Mansell, supra* at 589. That the Arizona courts referred to Sandra's interest in the waivable portion as having 'vested", does not help. State courts cannot 'vest' that which under governing federal law they lack authority to give. Accordingly, while the divorce decree might be said to 'vest' Sandra with an immediate right to half of John's military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition; John's possible waiver of that pay. Neither can the state avoid *Mansell* by describing the family court order as an order requiring John to 'reimburse' or 'indemnify' Sandra, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e. to restore that portion of retirement pay lost due to the post divorce waiver… 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." *Howell, supra,* pages 7-8.

The *Howell* opinion makes it clear that service-connected disability benefits as the sole property of the recipient, are protected by the language of 10 USC 1408 and that pursuant to

federal law the same shall not be considered by a state court as a marital asset and divided as such as part of an order for property division. It stands to reason that since service-connected disability benefits are the "sole property" of the recipient, then the recipient should be free to agree to the disposition of those benefits as part of a property settlement in a divorce action.

ARGUMENT II
APPLICABILITY OF *HOWELL* TO THE INSTANT ACTION

There is an important distinction between *Howell* and other cases in which a trial court in contested divorce actions divides military disability benefits or orders military disability benefits to be used as an offset when a non-military spouse's benefits are reduced due to an election that reclassifies the nature of the benefits and this matter. Here, the Defendant-Appellant was receiving military disability benefits at the time of the divorce. As the Court of Appeals noted, Defendant-Appellant testified at the divorce hearing that he was receiving both military retirement pay and military disability benefits based on injuries sustained during the war in Iraq. The parties agreed that Plaintiff-Appellee would received fifty percent (50%) of Defendant-Appellant's retirement pay or "disposable military retired pay," as calculated based on Defendant-Appellant's creditable military service during the marriage. Defendant-Appellant also agreed to the inclusion of the following language in the Consent Judgment of Divorce: "If Defendant should ever become disabled either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military thereby reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly

to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any cost of living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the court."

The disposition of Defendant-Appellant's military benefits was not based on a finding by the court that his benefits were marital assets subject to division under any and all circumstances and a corresponding order to that effect. The trial court in the instant action did not treat Appellant's military benefits as marital property. The court acknowledged, on the record, that military disability benefits in the state of Michigan are not considered to be marital property. (Transcript of December 3, 2008 hearing, page 32). There is nothing in *Howell, Megee*, or any of the other cases cited by Defendant-Appellant or in Defendant-Appellant's argument that states, unequivocally, that even though service-connected disability benefits are the sole property of the recipient, the recipient is barred from voluntarily consenting to the disposition of said benefits as part of a negotiated property settlement in a divorce action, or that any order entered by a state court that contains any such language so agreed upon is void and not subject to enforcement.

The Defendant-Appellant makes this sweeping statement in his brief to this Court: "Since only retired pay is 'disposable' and therefore 'divisible' under USFSPA any state court order that allows or forces diversion of any other veterans' benefits (those benefits considered non-disposable, which include disability pay and, necessarily CRSC pay, which is based on the service member's combat-incurred disability), is and always has been preempted by federal law because Congress has total and absolute authority over the designation and provision of veteran's benefits under Article 1, Section 8, Clauses 12 through 13 of the US Constitution. (Emphasis

added) (Appellant's Brief, page 5). The word "allows" is presumably intended to refer to "consent judgments" or orders entered by stipulation. The word "allow" does not appear in the language of the USFSPA.

Defendant-Appellant references the case of *Roberts v. Roberts,* ____ SW 3d ___; 2018 Tenn. App. Lexis 195, at *22 (Ct. App., Apr. 16, 2018). In that case the court noted, "… although the Supreme Court did not make a distinction between divorce decrees ordered by the court and agreements entered by the parties, the holding in *Howell* casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefits other than disposable retired pay." (Appellant's Brief, page 45).

The foregoing is hardly support for the argument that Appellant wants to make which is that any order entered by the court, whether by consent, or following a contested hearing, that divides military disability benefits is preempted by federal law.

In its analysis of *Howell* the Court of Appeals on remand noted: *Howell* involved general service-connected disability benefits, and the Supreme Court's opinion rested squarely on language in former 10 USC 1408(a)(4)(B), which provided and still provides in 10 USC 1408(a)(4)(A)(ii) that 'disposable retired pay' means a member's total monthly retired pay less amounts that are deducted from the retired pay… as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 or Title 38 (Citation omitted). CRSC (Combat-related Special Disability pay) at issue in this appeal is compensation under Title 10, not Title 5 or Title 38 as referenced when arriving at 'disposable retired pay.' Opinion of the Court of Appeals dated March 22, 2018, page 7.

The distinction between Combat-Related Special Disability pay, general service-connected disability benefits and disposable retired pay is not as critical as an analysis of what

happens when an election is made that changes the nature of the benefit to be received. The important point is that if the recipient of disposable retired pay elects, at some point, to receive Combat-Related Special Disability Compensation, or general service-connected disability benefits, the amount of the disposable retired pay is reduced. Plaintiff-Appellee's attorney in the divorce action anticipated that there would be a change in the nature of the benefits received by Defendant-Appellant based on an election he intended to make to receive Combat-Related Special Disability pay. Plaintiff-Appellee's counsel and Defendant-Appellant's counsel knew that if Defendant-Appellant made such an election there would be a corresponding reduction in the benefits to be received by Plaintiff-Appellee, hence the inclusion of the "offset provision" agreed to by Defendant-Appellant and included in the Judgment of Divorce. (Transcript of December 5, 2008 Final Divorce Hearing, pages 26-29). The court questioned counsel and Defendant-Appellant about the disposition of his military benefits at the time of the final hearing. The applicable portions of the transcript and the exchange between the court and the attorneys from the December 3, 2008 final hearing are attached hereto as **Exhibit 1**.

ARGUMENT III
MEGEE v. CARMINE

In *Megee*, Defendant, pursuant to what was identified as a consent judgment, was awarded fifty percent of Plaintiff's Navy disposable retirement pay as part of the property division. A Qualified Domestic Relations Order that was entered pursuant to the consent judgment in order to effectuate the award to Defendant. The QDRO also contained language preventing Plaintiff from making another benefit election that would otherwise reduce the monthly pension allotment without the written consent of Defendant. Subsequent to the entry of the Judgment of Divorce and the QDRO, Plaintiff elected to receive Combat-Related Special Compensation (CRSC) resulting in the termination of his retirement pay and the cessation of

funds paid to Defendant. Defendant moved to enforce the divorce judgment and the QDRO asserting that Plaintiff elected to receive Combat-Related Special Compensation instead of retirement pay without Defendant's written consent, in violation of the applicable order.

The Court of Appeals noted that, "The parties had also agreed that their mutual intent was to provide Defendant with fifty percent of Plaintiff's retirement pay and that the decision to elect CRSC and to waive in its entirety the retirement pay was inconsistent with the declared mutual intent."

In *Megee* the court recognized that the trial court, by ordering Plaintiff to act as Trustee for the benefit of Defendant with respect to half of the plaintiff's benefits and then deliver those funds to defendant, effectively divided plaintiff's CRSC in violation of the USFSPA. Plaintiff citing *Mansell v. Mansell,* 490 US 581, 109 S. Ct. 2023, 104 L. Ed. 2d, 675 (1989), argued that federal law precluded the court from ordering him to give any of his CRSC to defendant.

The Court of Appeals, in *Megee*, framed the issue before it as follows: "Whether a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgments' property division when the military spouse makes a unilateral and voluntary post judgment election to waive retirement pay in favor of disability benefits contrary to the terms of the divorce judgment." *Megee,* page 676.

The judgment of divorce in *Megee* was entered by consent and, as the court noted, the mutual intent of the parties was that defendant receive fifty percent of plaintiff's retirement pay. It appears from the language of the QDRO that the possibility of a change in the classification of the benefits was contemplated. The QDRO stated that plaintiff was precluded from making

another benefit election, "that would otherwise reduce the monthly pension allotment without the written consent of defendant."

Following an extensive analysis of the Uniformed Services Former Spouses' Protection Act, 10 USC 1408, 104 L.Ed 2d. 675 (1989) and a number of other cases involving the distribution of VA disability benefits, the court held that, "… a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgments' property division when the military spouse makes a unilateral and voluntary post judgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. (Emphasis added). Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court." *Megee*, *supra.*

The decision in *Howell* prohibits a state court from considering military disability benefits as marital property subject to division in a divorce action. Furthermore, it prohibits the entry of orders that result in the invasion of exempt benefits such as reimbursement and indemnification orders as discussed herein. *Howell* does not, however, preclude a military spouse from agreeing to a division of such benefits and to any contingencies related to future elections regarding the nature/classification of such benefits as was the case in *Megee*. In the

instant action, the parties (in particular Plaintiff-Appellee's counsel), in contemplation of a "contingency", i.e. a future reduction in benefits, negotiated the "offset provision" in the judgment of divorce. While the "offset provision" may not have been artfully drafted, it set forth the intent of the parties which was that plaintiff's agreed upon benefit amount would remain the same regardless of defendant's future election to receive CRSC. In *Megee* the intent of the parties with respect to the disposition of military benefits was set forth in the judgment of divorce entered with the consent of the parties and the QDRO. The order in *Megee* was entered to enforce the terms of the agreement reached by the parties. The court in *Megee* did not conclude that a state court has the authority to divide a military spouse's CRSC, the court divided waived retirement pay in order to honor the terms and intent of the divorce judgment.

While it is maybe important for all of the reasons articulated in Appellant's Brief to protect military disability benefits from division by a state court in a divorce action, it is equally as important that court orders entered into by consent of the parties be enforced. Military spouses should not be permitted to enter into agreements regarding the disposition of military disability benefits and then be allowed to violate the terms of the agreement with impunity while hiding behind the USFSPA and the *Howell* opinion to the financial detriment of his or her former spouse. There is nothing in the federal law that compels a military spouse to agree to the division of disability benefits. Since a trial court can't order it, it is generally non-negotiable. If, however, an agreement is reached with regard to the disposition of military benefits, then such an agreement should be enforceable.

PROCEDURAL HISTORY - CONTEMPT ORDER

On May 24, 2010, Plaintiff-Appellee filed a Motion and Order to Show Cause which was heard on September 30, 2010. At the hearing it was established that Plaintiff-Appellee began

receiving approximately $811.82 per month, representing her share of Defendant-Appellant's military benefits in April 2009. She continued to receive monthly payments through February 2010. At the end of February 2010 Plaintiff-Appellee received a postcard informing her that her monthly benefit amount was being reduced to at the most $212.00 per month. Since the benefit amount was reduced, Defendant-Appellant did not, pursuant to the terms of the judgment of divorce, make payments to Plaintiff-Appellee in any amount to cover the differential between what Plaintiff-Appellee had been receiving and the reduced amount.

At the September 30, 2010 hearing, the trial court did not find the Defendant-Appellant to be in contempt. An order was entered directing Defendant-Appellant to make payments to the Plaintiff-Appellee to make up the difference between what she had been receiving beginning in April 2009 and the reduced amount which began in March 2010. At that time, Defendant was receiving CRSC and knew then that he would be required to pay Defendant-Appellee from those funds in order to comply with the court's directive. No appeal was filed.

Defendant-Appellant was not found to be in contempt of court until a hearing held on April 26, 2011. The order following that hearing was entered on May 11, 2011. No appeal was filed. At that time, the Plaintiff-Appellee had filed another motion to have Defendant-Appellant show cause as to why he should not have been held in contempt for failing to obey court orders that had been entered on December 3, 2008 and October 8, 2010. On June 27, 2014, Defendant-Appellant was before the court for a determination of whether he should, once again, be held in contempt for failing to obey court orders. During the course of the June 27, 2014 hearing, Defendant-Appellant made a number of excuses as to why he had failed to comply with the terms of the Judgment of Divorce and the court's subsequent orders concerning same. He claimed that the Judgment of Divorce was entered in violation of federal law and was, therefore

unenforceable. Defendant-Appellant also claimed that at the time the judgment was entered he was suffering from PTSD, that he was "incoherent of what he was signing", and that his attorney failed to adequately represent his interests as they related to his military disability benefits. (Transcript of June 27, 2014 hearing, pages 11-13). In response to Defendant-Appellant's arguments, the trial judge asserted: "Mr. Foster, we have litigated this issue and re-litigated this issue and it has not been properly appealed. You have repeatedly asserted that federal law makes what the court ordered improper or illegal. You have repeatedly asserted that you didn't understand what you were doing. The court has entered orders. You haven't appealed those orders, you haven't followed the orders so I found you in contempt for failure to comply with the order of the court. Now you've been arrested on a bench warrant for failing to comply with the order of the court and you're coming in here with the same arguments that you've made previously. You don't get to keep coming back and making the same arguments. (Transcript of June 27, 2014 hearing, page 15).

When Defendant-Appellant argued that his Combat-Related Disability Compensation was his only source of income and, therefore, not subject to division or, more specifically, was not subject to the offset provision set forth in the terms of the judgment, the trial court stated: "And what I'm telling you is that your judgment of divorce was a consent judgment. It was a judgment that was entered that orders you to pay out of your pocket certain monies to her, not assign a portion of your disability to her… that has been the interpretation that this court has given it, you were entitled to appeal that. You haven't appealed it, and it's a final order and judgment of the court and you want me to just say, 'well, you know what? I'm going to change my mind this time based upon the same arguments that you've made on at least a couple prior

occasions.' I'm not going to do that. You've had your opportunities to properly appeal this and you have not. (Transcript of June 27, 2014 hearing, page 15).

At the conclusion of the June 27, 2014 hearing the court ordered Defendant-Appellant to begin paying Plaintiff-Appellee $1,000.00 per month. The court scheduled additional appearance dates in order to monitor Defendant-Appellant's progress. The court noted that if the payments were made as ordered, Defendant-Appellant would not be required to appear at future court hearings. (Transcript of June 27, 2014 hearing, page 41).

An order was entered following the June 2014 hearing on July 28, 2014. Defendant-Appellant did not appeal the order entered following the June 27, 2014 hearing.

A status conference was conducted on August 27, 2014. The court summarized the status of the case as follows: "This matter came before the court on June 27th for a hearing -- a show cause hearing as to why Ray James Foster should not be found in contempt of court. An order was later submitted to the court on July 21st. There was a notice of presentment dated July 18th. A proof of service indicated a date of July 21st and I believe that reflected – that was reflected as the date received by the court. The court did sign the order as presented on July 28th." (Transcript of August 27, 2014 Status Conference, page 2).

An objection to the proposed order was filed by Defendant-Appellant's counsel after the order was already entered by the court. In deference to Defendant-Appellant's counsel, the court allowed him to state his objection on the record. Counsel for Appellant stated that he was not objecting to "the entire order" but rather that part of the order that included in the amount of money Defendant-Appellant owed to Plaintiff sanctions/attorney fees for repeated violations of the court's orders. Counsel made a number of excuses as to why the objection to the order was not timely filed in compliance with the applicable court rule, yet despite the fact that the

objection was not filed in compliance with the court rule, the court scheduled the matter for hearing on September 22, 2014.

At a hearing held on September 22, 2014, the court noted that Defendant-Appellant sent Plaintiff-Appellee one-thousand dollar payments in July, August, and September 2014. (Transcript of September 22, 2014 hearing, page 4). After argument on the issue, the court declined to award Plaintiff-Appellee sanctions. As to the issue of bond, the court held: "I will do this, Mr. Gawecki, I will indicate for the record that if Mr. Foster continues to comply with the order of this court and make [sic] the $1,000 payment on or before the seventh of each month for October, November and December, I will set a continued show cause hearing in December… if he made the payments timely and I will at that time either dismiss the bench warrant or grant the personal recognizance bond. So I'm going to have the bond amount in effect for another ninety days. If he demonstrates performance over those ninety days, then his mother will have that relief unless, you know, maybe Mr. Foster's got something the bondsmen would take a lien on in substitution of that home in the next ninety days." (Transcript of December 22, 2014 hearing, page 29)

A continued hearing was held on December 22, 2014. By that time the matter had been appealed. At the hearing held December 22, 2014, the court noted that, "The fact that his mother's home is security for the bond really doesn't have anything to do directly with any court order. I set the bond amount. What he and the bonding agent negotiated as security has nothing to do with this court's order." (Transcript of December 22, 2014 hearing, page 18).

The court went on to indicated for the record that Defendant-Appellant was, as of December 22, 2014, in compliance with the court's order dated November 6, 2014 from the hearing of September 22, 2014, that the representation of counsel is that the matter is pending

before the Court of Appeals therefore, the orders remain in full force and effect and any request for a stay at this time is denied for the reasons stated on the record. (Transcript of December 22, 2014 hearing, page 18).

ARGUMENT IV
CONTEMPT ORDER

Defendant-Appellant appealed the order holding him in contempt of court for failure to pay Plaintiff-Appellee in compliance with the parties' Consent Judgment of Divorce. The Court of Appeals citing *Mansell v. Mansell,* 490 US 581; 109 S.Ct. 2023; 104 L.Ed.2d. 675 (1989) and *Megee v. Carmine*, 209 Mich. App. 551; 802 NW2d 669 (2010) affirmed the trial court. The panel noted, "The contempt order does not require payment from CRSC funds, nor do we construe the divorce judgment's offset provision as ordering payment from CRSC funds, and any such construction must be avoided. (October 13, 2016 Unpublished Opinion, page 5). This ruling was affirmed on remand in an unpublished opinion dated March 22, 2018.

Even if this Court finds that the validity of the 2008 Judgment is properly before this Court based on the analysis of *Howell* and *Megee* as set forth herein the Plaintiff-Appellee argues that the Consent Judgment of Divorce is not preempted by federal law. Plaintiff-Appellee further argues that any court orders entered to enforce the judgment, including the order holding Defendant-Appellant in contempt, are valid and were properly affirmed by the Court of Appeals.

The amount of the bond and the security for the bond was established to make certain that Defendant-Appellant complied with the trial court's orders. This also gave Plaintiff-Appellee added assurances that she would receive the applicable monthly payments as agreed and as ordered by the court. Plaintiff-Appellee request that the decision of the Court of Appeals regarding Defendant-Appellant's motion to nullify or terminate the bond be affirmed.

RELIEF REQUESTED

Plaintiff-Appellee respectfully requests that this Court affirm the Court of Appeals, affirm *Megee v. Carmine*, order that Appellant's payments to Plaintiff-Appellee continue, affirm the trial court's opinion/order regarding the "appearance bond" and deny Defendant-Appellant's request that he be allowed to recoup money paid to Plaintiff-Appellee to date, pursuant to the terms of the Judgment of Divorce.

Respectfully submitted by:

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