**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

DEBORAH LYNN FOSTER,

Plaintiff/Appellee,

v

RAY JAMES FOSTER

Defendant / Appellant / Counter-Plaintiff.

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

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# APPELLANT'S REPLY TO POST-ORAL ARGUMENT AMICUS CURIAE BRIEF OF THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

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Respectfully submitted by:

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## INTRODUCTION

Appellant replies to the late-filed, post-oral argument amicus brief filed by the Family Law Section of the State Bar of Michigan (the "Section"). The Section's brief represents a last-ditch effort to have this Court ignore the absolute preemptive effect of federal law in this very specific subject matter – the preservation and protection of the benefits provided by Congress to our Nation's veterans pursuant to its enumerated Military Powers in the Constitution. The amicus brief also misstates the facts and circumstances of this particular case. Finally, the brief demonstrates a fundamental misunderstanding of the applicable federal law in this subject and Michigan's jurisprudence concerning the status of judgments and orders preempted by federal law.

***1. The late-filed amicus brief***

Generally, amicus briefs are due 21 days after the last brief is filed. MCR 7.312(H)(3); MSC IOP's 7.312(H). Good cause is required for filings after the expiration of that time. MCR 7.316(B). Generally, a motion to submit a late amicus brief filed within two weeks of oral argument will be denied and the brief rejected.

(https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Pages/Amicus-Curiae.aspx)

The last brief was filed in this case on April 17, 2019. In support of its unusual post-oral argument filing, the Section states that the attorneys from the amicus committee were working on the brief when it learned that oral argument had been held. Section Motion, ¶ 5, pp 1-2. However, undersigned counsel sent the pleadings and briefs in this case in January 2019. (**ATTACHMENT A**) Thus, the Section was aware of this case well in advance of the scheduling of oral argument.

***2. Factual misstatements***

The Section also makes factually erroneous statements and misinformed implications that must be addressed to put this case in its proper context. First, the parties were not married for 30 years.

Section Brief, p. 2. Appellee and Appellant married in 1988 and divorced in 2008 (App. 31a). During the marriage, Appellee was employed as a full-time registered nurse and Appellant was a career enlisted soldier on active duty in the United States Army. Appellee continues to work and earn a pension and Appellant's career was cut short due to the physical and mental disabilities he incurred during combat defending our country and its interests. (Appellant's Appendix (App.) 207a-212a; 153a-154a)

Second, contrary to the assertion on page 2 that Appellee waived spousal support in consideration for the property settlement agreement, the trial court concluded that Appellee, as a full-time registered nurse was not entitled to spousal support based on the income disparities of the parties and future earning capacities of each. (App. 207a-212a) Even before the divorce judgment, the trial court found that Appellant was 80 percent disabled and his prospects for future employment were "doubtful at best." (App. 208a, 209a) Appellant is now 100 percent, permanently and totally disabled, and has a designated status of unemployable due to his specific physical and mental disabilities. Moreover, as pointed out at oral argument, all of the real property from the parties' marriage was awarded to Appellee. (App. 55a, 56a) Appellant also gave up any interest in Appellee's pension and retirement from her career as a full-time registered nurse and he waived any claim to spousal support (App. 55a, 56a)

The fact that Appellant gave up all of his real property and all interest in Appellee's pension, and waived spousal support (despite the income disparities and the fact he is totally and permanently disabled and will never work again), all the while agreeing to what was in essence a violation of federal law (to dispossess himself of his veterans' disability pay), see 38 USC § 5301(a)(1), (3)(A) and (C), is direct proof that Appellant's mental disabilities affected his decision-making and his ability to comprehend what he was agreeing to. This is, in fact, why federal law

explicitly prohibits the veteran from entering into such agreements. 38 USC § 5301(a)(3)(A) and (C). See also *Yake v Yake*, 170 Md 75, 76; 183 A 555 (1936) (noting that the anti-attachment provision in the World War Veterans' Act of 1924, 38 USC § 454 (identical to 38 USC § 5301) was to guard those unfortunates who had been disabled in the service of their country from imposition of others or the depletion of their maintenance and support by their own improvidence and to assure them a subsistence). Compare *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56, 60 (1938) (noting the same applies to protect against excessive attorney fees charged against the veterans' benefits) and *Porter v Aetna*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962), where the Court ruled that 38 USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*." (emphasis added).

Third, contrary to the Section's statement on page 3 of its brief that Appellant began to receive his combat-related special compensation (CRSC) only after the judgment (again without support from the record), Appellant was already considered 100-percent disabled and suffering from traumatic brain injuries and severe post-traumatic stress disorder (PTSD) *by the time the divorce judgment was entered into* in December 2008. (153a-161a) The disability benefits were awarded *before* the 2008 divorce retroactive to 2007. (App. 161a) Appellant suffered career-ending injuries as the result of an improvised explosive device attack on his convoy in Iraq; he suffered back and leg injuries, as well as a traumatic brain injuries and continues to suffer from severe PTSD. (App. 156a-159a; 161a, VA Medical Records) His injuries forced his medical retirement on September 30, 2007. (App. 153a, DD214 (statement of military service))

The CRSC is a retroactive award (as of October 2007) of what is considered non-disposable disability pay. See 10 USC § 1413a(g) (CRSC is not considered disposable retired pay; it is pay

that is protected by 38 USC § 5301 as veterans' non-disposable benefits). See also *Adams v United States*, 126 Fed Cl 645, 647-648 (2016) (CRSC benefits are "compensable under the laws *administered by the Secretary* of Veterans Affairs") (emphasis added) and 38 U.S.C.A. § 5301(a)(1) ( "[p]ayments of benefits due or to become due *under any law administered by the Secretary* shall not be liable to attachment, levy, or seizure by or under *any legal or equitable process whatever*….") (emphasis added).

He was suffering from these disabilities during his divorce proceedings, and he continues to suffer from them today. His disability rating of 100 percent, his unemployability status of 100 percent, and his entitlement to the protected VA benefits incepted in October 2007. (App. 161a) In other words, in December of 2008, when the "consent judgment" of divorce was entered into, the disabilities suffered by Appellant (including his reduced mental capacities) had already manifested due to his combat-related injuries. The fact that he began receiving these protected benefits only after the divorce was a consequence of the time it took for him to complete the application and eligibility process, not a result of his post-divorce waiver.

Because he is 100 percent totally and permanently disabled, none of his monies is available as property, for alimony, or for child support. Uniform Services Former Spouses Protection Act (USFSPA) 10 USC § 1408; Child Support Enforcement Act (CSEA) 42 USC § 659(h)(1)(B)(iii). Because of their status as pure veterans' disability benefits, they are protected by the absolute prohibitions in 38 USC § 5301.

In other words, Appellant was entitled to non-disposable disability pay before the divorce judgment. Therefore, at that time, there was no disposable property to partition. In fact, the Defense Finance and Accounting Service (DFAS) actually overpaid Appellee between 2008 and 2010, the latter year being when Appellant actually began receiving his non-disposable disability pay (even

though he was deemed eligible and entitled to it as of October 2007. (App. 166a-167a) Appellee was *never* entitled to these monies. As noted during oral argument, Appellant could have had Appellee repay the federal government for the overpayment, but he did not.

Nonetheless, under the errant state court judgment Appellant continues to pay these monies (the only income he has) to Appellee every month under threat of contempt and under the illegal collateral arrangement being held against his mother's home. See 38 USC § 5301(a)(3)(A) and (C) (a veteran cannot agree to dispossess himself or herself of these monies and collateral arrangements against such funds to force payment under such unlawful agreements are, like the agreements themselves, "*void from inception*.") (emphasis added).

This is a critical point because when the 2008 judgment and subsequent orders purported to divest Appellant of these monies, they were ordering Appellant to do something that is (and always has been) prohibited by federal law – no "legal or equitable process whatever" can be used to divest the veteran of these benefits – the state court has no jurisdiction or authority over these funds. See 38 USC § 5301(a)(1). This was confirmed by the unanimous opinion of the Supreme Court in *Howell v Howell*, 581 US ___; 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017) (citing 38 USC § 5301(a)(1) and holding state courts cannot vest in another that which they have no authority to give, i.e., veterans' benefits protected by this provision).

The Section's reference to the settlement agreement in *Mansell* as being analogous is misplaced. The Court in *Mansell* did not address the effect of § 5301 on veterans' disability benefits. Rather, it addressed the separate question of whether the value or the amount of the waived retired pay (not the disability pay itself) could be added back into the parties' divisible marital property. *Mansell v Mansell*, 490 US 581, 587, n 6; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (stating "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) [now renumbered as § 5301], independently protects such pay." *Howell*, on the other hand, did address direct application of 38 USC § 5301 to veterans' disability benefits (the benefits Appellant receives) and the Court unanimously concluded that 38 USC § 5301 jurisdictionally protects these particular benefits from state court authority and control and from "any legal or equitable process" whatever, *unless* federal law otherwise allows it. *Howell*, 137 S Ct at 1405-1406.

There is a limited allowance in the USFSPA for state courts to allow division of up to 50 percent of the veteran's "disposable retired pay" as a marital property asset. There is also a limited exception under the CSEA to allow payments from veterans' disability pay when the veteran waives *a portion* of his or her retirement to receive disability pay. However, because Appellant is 100 percent disabled, there is no *portion* of waived retired pay that would otherwise be considered remuneration for employment and therefore available "income"; the monies that Appellant receives are not in any of the categories of monies that would be available in a state court divorce proceeding under federal law.

Appellant takes this opportunity to address the question raised by Justice Zahra at oral argument concerning whether the disability pay at issue here is available as alimony. While much is made of the statement in *Howell* that the parties might consider a substitute award of "alimony" in lieu of the lost property interest at the time the divorce is finalized, such an agreement would only be enforceable if the specific benefit the veteran receives is one that federal law treats as available income in a state court divorce proceeding. See *Howell*, 137 S Ct at 1406. Where, as here, the veteran is 100 percent disabled and receives disability benefits from the Veterans Administration in lieu of retired pay, regardless of whether or not he or she has waived retired pay,

was entitled to retired pay, or received what is or has been deemed concurrent retired and disability pay (CRDP), and/or combat related special compensation (CRSC), such benefits are not included or counted as income available for payment of spousal support or alimony. 42 USC § 659(a), (h)(1)(A)(ii)(V), and (h)(1)(B)(iii). Federal regulations also confirm this. See 5 CFR §§ 581.103; 581.104. Thus, 5 CFR § 581.103(c)(7) mirrors 42 USC § 659(h)(1)(A)(ii)(V) and (B)(iii) and states that "[m]oneys which are subject to garnishment" include "[a]ny payment by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived either the entire amount or a portion of the retired or retainer pay in order to receive such compensation. In such cases, only *that part of the Department of Veterans Affairs payment that is in lieu of the waived retired pay or waived retainer pay is subject to garnishment*." (emphasis added). An exemplar on the website of the Department of Health and Human Services to that federal regulation explains that the regulations "clarify that where the former member *has waived the entire amount* of his or her military retired pay, *that individual's disability compensation is not subject to income withholding for child support*." See Example #1 at: https://www.acf.hhs.gov/css/resource/income-withholding-and-veterans-benefits (emphasis added). See also *Sanchez Dieppa Rodriguez Pereira*, 580 F Supp 735, 736-737 (US Dist Ct P R 1984); *Veterans Admin v Kee*, 706 SW2d 10, 102-103 (Tex 1986).

State courts may exercise jurisdiction and authority over veteran's disability pay to satisfy a child support or spousal support award, *but only up to the amount of his or her waived retired pay*. 42 USC § 659(a), (h)(1)(A)(ii)(V), (B)(iii); 5 CFR § 581.103 (2018); *US v Murray*, 282 SE2d 372, 375 (1981). See also *In re Marriage of Cassinelli (On Remand)*, 20 Cal App 5th 1267, 1277; 229

Cal Rptr 3d 801 (2018) (on remand from the United States Supreme Court for consideration of *Howell*).

Only those federal veterans' benefits received in lieu of a portion of waived military retired pay are recoverable, because under such circumstance, the veteran is still receiving a portion of his or her pay as remuneration for past employment, i.e., retirement pension. When the veteran's disability rating is total and permanent, those benefits supplant the retirement benefits in toto; the funds received are no longer considered income, i.e., remuneration for employment, but rather, they are considered compensation for the veteran's permanent disability. In such case, there is no portion left that is considered remuneration for employment, and therefore, no portion available for disposition as property, alimony or child support. See 10 USC § 1408(a)(4)(A); 42 USC § 659(a), (h)(1)(A)(ii)(V); (h)(1)(B)(iii); (h)(2)(F)(i)(3)(B)(ii). See also Information Memorandum 98-03 (IM-98-03), published September 25, 1998 by the Office of Child Support Enforcement of the Veterans Administration (**ATTACHMENT B**)

As cogently explained by one court:

> Congress intended to assure that disabled veterans would have secured to them their disability benefits to the extent necessary to take care of their essential needs. To accomplish this intent, Congress provided that *retirement benefits, defined as current wages, are subject to garnishment for the payment of child support and alimony*. Congress further provided that if a veteran receiving retirement benefits elects to forego *a portion* of those retirement benefits to get a like amount of tax free disability benefits, *those disability benefits so acquired are subject to garnishment for the payment of child support and alimony*.
>
> We hold that this particular wording of the statute secures to a disabled veteran certain rights. If his retirement benefits do not equal or exceed the maximum disability benefits, he has the right to waive all the retirement benefits. This allows the veteran to get the higher amount in disability benefits, without making those benefits subject to garnishment. This is consistent with the holding of the United States Supreme Court that statutes waiving immunity are to be strictly construed, *McMahon v US,* 342 US 25, 72 S Ct 17, 96 L Ed 26 (1951), and with the holding of this court that disability benefits are solely for the use of the disabled veteran. *Ex Parte Johnson,* 591 SW2d 453, 456 (Tex 1979).

> Pursuant to the above reasoning, the Office of Personnel Management issued its regulation stating that *disability benefits would not be subject to garnishment if the veteran waived all his retirement benefits in order to receive the disability benefits*.
>
> ***
>
> In light of the legislative and regulatory scheme set out above, we hold that disability benefits received by a veteran in return for his having waived all his retirement benefits are not subject to garnishment for the payment of child support and alimony.
>
> [*Veterans Admin v Kee*, 706 SW2d 101, 102-103 (Texas 1986) (emphasis added).]

Thus, while federal law would permit a state court to take potential future waivers of military retirement pay into account at the time of the judgment to allow an award of alimony as a substitute, the validity of such an arrangement is contingent on the benefit being an asset which is available under federal law. *Howell*, 137 S Ct at 1406. If the veteran is receiving permanent disability benefits, then those benefits are protected by the absolute prohibition in 38 USC § 5301.

Thus, when *Howell* refers to a state court's ability "to take account of the contingency that *some military retirement pay might be waived*, or…take account of reductions in value when it calculates or recalculates the need for spousal support" it does not mean that a state court can ignore the limitations and restrictions placed upon it by preexisting and preemptive federal law – all veterans' benefits are off limits *unless* federal statutory law has *lifted* this preemption to allow disposition of these monies to someone *other than the beneficiary*. *Howell*, 137 S Ct at 1406.

Otherwise, these benefits are jurisdictionally protected from *all legal and equitable process* by the affirmative federal mandates in 38 U.S.C. § 5301(a)(1). In *Howell*, the Court confirmed, once and for all, that where veterans' disability benefits are concerned, they are considered personal entitlements, and thus, they are affirmatively protected by this provision. *Howell*, 137 S Ct at 1403, 1414, 1405-1406 (citing *McCarty v McCarty*, 453 US 210, 224-235; 101 S Ct 2728; 69 L Ed 2d 589 (1981) and stating that "the relevant legislative history referred to military retirement pay as a

'personal entitlement'"; "Congress intended that military retired pay 'actually reach the beneficiary'"; there was "conflict between the terms of the federal retirement statutes and the [state-conferred] community property right"; "the division of military retirement pay by the States threatened to harm clear and substantial federal interests"; "federal law preempted state law"; "*McCarty* with its rule of federal preemption *still applies*"; "[t]he basic reasons *McCarty* gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay")

Section 5301 signifies Congress's intent to exempt veterans' disability benefits from "*any legal or equitable process whatever*, either before or after receipt by the beneficiary." 38 USC § 5301(a)(1) (emphasis added). *Porter v Aetna*, 370 US 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962) where the Court said that 38 USC § 3101 (the predecessor of § 5301) was to be "liberally construed to protect funds granted by the Congress for the maintenance and support of the beneficiaries" and that these benefits "*should remain inviolate*." (emphasis added). Accord, *Ridgway v Ridgway*, 454 US 46, 60-61; 102 S Ct 49; 70 L Ed 2d 39 (1981) and *Howell*, 137 S. Ct. at 1405-1406 (citing 38 USC § 5301(a)(1) and stating "state courts cannot vest that that which (under governing federal law) they lack the authority to give."

The Court in *Ridgway* stated of these provisions appearing in multiple veterans' benefits statutes that they "generally…ensure[] that the benefits actually reach the beneficiary…[and they] pre-empt[] *all state law that stands in [their] way*. [They] protect[] the benefits from legal process '*notwithstanding any other law of any State*' [and] prevent[] the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." *Ridgway*, 454 U.S. at 61 (emphasis added). Noting the "unqualified sweep" of this provision, the Court stated its language is presented "in the broadest

of terms, any 'attachment, levy, or seizure by or under *any legal or equitable process whatever*,' whether accomplished '*either before or after receipt* by the beneficiary'" is prohibited. *Id*. (emphasis added). Any "diversion, as directed by the state court, of future payments to be received by the beneficiary would be a 'seizure' prohibited by the anti-attachment provision." *Id*. at 55. As noted by the Court in *Ridgway*, the same absolute preemption principle was followed in *McCarty*, *supra*, with respect to 38 USC § 3101 (now § 5301), and finally in *Howell*, *supra*, which confirmed that this provision divests state courts of authority to divert these benefits at any time in the future.

***3. The Issue of Collateral Attack on Void Judgments or Orders***

This Court's rules also state that post-oral argument pleadings "may be beneficial to further explain or correct a statement made at oral arguments." MSC IOP's 7.314(B)-5. The Section claims in its motion that it seeks to clarify a question raised at oral argument concerning collateral attack on the judgment of divorce. In "reformulating" the question presented, the Section then asks whether the principles set forth in the 1989 decision of *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), *reh'g denied*, *cert denied*, 498 US 806; 111 S Ct 237 (1990), and *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), prevent enforcement of a consent judgment of divorce involving combat-related special compensation (CRSC), 10 USC § 1413a. Section Brief, p. 2.

The question concerning collateral attack and res judicata of the judgment (and contempt order) has been raised and addressed multiple times at nearly every stage of the appellate litigation in this case. Appellee and the Court of Appeals have erroneously asserted that the void judgment and subsequent contempt orders in this case cannot be collaterally attacked. The Section repeats this argument, ignoring the unique exception extensively recognized by Michigan jurisprudence that

where a state court order is preempted by federal law (even one that is based on purported consent), the judgment is void, as are subsequent contempt orders based on the void judgment.

The Section overstates the premise that the consent agreement can circumvent federal preemption. First, as already noted, a party cannot consent to a judgment or order that is preempted by federal law. Second, agreements to divest oneself of his or her federally protected veterans' benefits are directly prohibited by federal law, 38 USC § 5301(a)(3)(A), as are collateral arrangements to assure such agreements, 38 USC § 5301(a)(3)(C). Both of these prohibited circumstances exist in this case.

To the extent that further "clarification" on this issue is needed, Appellant provides a summary of the controlling Michigan jurisprudence on the subject. While the Section cites to a footnote in the 1989 decision in Mansell regarding whether and to what extent the state of California could reopen a "pre-*McCarty* settlement", it does not acknowledge extensive Michigan jurisprudence holding that where federal law preempts state law, a judgment (and any subsequent order entered based on that judgment) is void and subject to collateral attack.

Appellant acknowledges that generally, collateral attack is not allowed. The Court of Appeals and Appellee have repeatedly cited to state case law, particularly, *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999). However, the unique exception in this case, which is relatively uncommon in domestic family law cases generally, is that this Court has consistently held that federal preemption operates to *void* a state court judgment or order entered in contravention of the federal rule.

Michigan law is very clear on this point. If a state court order or judgment (even one that is by consent) is contrary to federal law, it is void *ab initio* and therefore subject to collateral attack because the state court lacked authority (i.e., jurisdiction) to contravene preexisting federal law.

*Town & Country Motors Inc v Local Union No 328*, 355 Mich 26, 54-55; 94 NW2d 442 (1959); *Henry v Laborers' Local 1191*, 495 Mich 260, 287 n 82; 848 NW2d 130 (2014) ("preemption is a question of subject-matter jurisdiction"; "as such this Court must consider it"; and "preemption is a claim that the state court has *no power to adjudicate the subject matter* of the case") (emphasis added). In such cases, the state court lacks subject-matter jurisdiction *over the issue* and the extent of its authority is limited. The state court may not encroach upon the federal realm. *Town & Country Motors*, *supra*. The very fact that it lacks jurisdiction over the subject matter means that its orders, to the extent they exceed its authority, are *void ab initio* and may be challenged at any time. *Henry*, *supra*. See also *Kalb v Feurstein*, 308 US 433, 440, n 12; 60 S Ct 343; 84 L Ed 370 (1940); *Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923); and *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56, 60 (1938) (applying the same principle to Congress' exercise of its Military Powers, the enumerated powers under which Congress provides the veterans' benefits at issue in this case).

Since providing veterans' benefits is a function reserved for Congress under Article I of the Constitution, see *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1950); *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Johnson v. Robison*, 415 U.S. 361, 376, 385; 94 S Ct 1160; 39 L Ed 2d 389 (1974); and *McCarty*, 453 US at 236, the issue involves more than the jurisdiction of a state court over ordinary divorce proceedings in which there are no constitutionally protected property rights. *Cushman v Shinseki*, 576 F 3d 1290, 1296-1297 (Fed Cir 2009) (veterans' benefits are constitutionally protected property rights), following *Mathews v Eldridge*, 424 US 319, 332; 96 S Ct 893; 47 L Ed 2d 18 (1976) (disability benefits are constitutionally protected property rights).

Here, the vitiating defect lies at the very heart of the state court's assumption of authority over a subject within the sole realm of Congress, premises deemed to be among the most respected of those within which Congress exercises its limited, but reserved powers. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981). "[P]erhaps in no other area has the Court accorded Congress greater deference." *Rostker*, *supra*. As with all matters of federal preemption, where Congress acts in furtherance of its constitutional powers under Article I, state law must yield. *Ridgway*, 454 US at 55.

Simply put, the state has no authority or jurisdiction over federally protected veterans' benefits. Since the Constitution first delegated to Congress the authority to provide for national defense, "Congress has directly and specifically legislated in the area" concerning the division of veterans' benefits as property. *United States v Oregon*, 366 US at 649. See also *Mansell*, 490 US at 587. The provisioning of these benefits has been deemed by the Court as "a legitimate one within the congressional powers over national defense". *Wissner*, 338 US at 660-661. Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, *must give way to clearly conflicting federal enactments*." *Ridgway*, 454 US at 55 (emphasis added). See also *Hillman v Maretta*, 569 US 483, 491; 133 S Ct 1943; 186 L Ed 2d 43 (2013).

State law is and always has been preempted by federal law in this specific subject. *McCarty*, 453 US at 220, citing *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979) and *In re Burris*, 136 US 586, 593-94; 10 S Ct 850; 34 L Ed 500 (1890). See also *Wissner*, 338 US at 660-661. The Supreme Court has repeatedly recognized that while "[t]he whole subject of the domestic relations of husband and wife…belongs to the law of the States and not to the laws of the United States…the application [by state courts] of community property law conflicts with the federal military retirement scheme." *McCarty*, *supra*. State law is overridden in these

cases because to recognize state authority over these benefits does "major damage" to "clear and substantial federal interests." *Ridgway*, 454 US at 54. The Court has reiterated this principle in each of its successive cases addressing state court jurisdiction over funds designated by Congress for the sole benefit of veterans. See, inter alia, *Wissner*, *supra*; *McCarty, supra*; *Ridgway*, *supra*; *Rose v Rose*, 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987); *Mansell*, *supra*; *Hillman*, *supra*; and *Howell*, *supra*. In each instance, the Court has concluded state courts were preempted by pervasive federal laws protecting these benefits. *Howell*, 137 S Ct at 1404-1406. Indeed, *Howell* reconfirmed the sweeping and absolute preemption rule established by this unbroken line of Supreme Court precedent. "*McCarty* with its rule of federal preemption *still applies*." *Howell*, *supra* at 1404 (emphasis added).

In *Ridgway*, the Court noted that "[n]otwithstanding the limited application of Federal law in the field of domestic relations generally, this Court even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by Federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Ridgway*, 454 US at 54. Pointing out that applicable federal law gave the servicemember the absolute right over his or her benefits, the Supreme Court said: "[The] relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id*. at 54-55, citing *Free v Bland*, 369 US 663, 665; 82 S Ct 1089; 8 L Ed 2d 180 (1962).

Therefore, a state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law –

*lose jurisdiction* to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb*, 308 US at 440 n 12 (emphasis added). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439, citing *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56, 60 (1938); *Davis v Weschler*, 263 US at 24. Remarkably, the Court in *Hines*, *supra*, reiterated this rule with respect to Congress' exercise of its enumerated powers under the Military Powers Clauses to provide benefits under the World War Veterans' Act, stating "Congress clearly intended to protect all veterans, competent and incompetent, in all courts, state and federal, against the imposition or payment of fees in excess of the amount fixed by statute." This very rule applies in the instant case.

Of the exercise by the Congress of its enumerated powers, Chief Justice Marshall said: "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and subject to collateral attack. *Kalb*, *supra*.

> [S]tate courts may deal with that as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept *as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds*.
>
> [*Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923) (emphasis added).]

Where a state court fails to honor federal rights and duties, the United States Supreme Court has "power over the state court to correct them *to the extent that they incorrectly adjudge federal*

*rights.*" *Ridgway*, 454 US at 55 (emphasis added), citing *Herb v Pitcairn*, 324 US 117, 125-126; 65 S Ct 459; 89 L Ed 789 (1945). Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgway*, *supra*.

Michigan follows, as it must. "[W]here congress have exercised a power over a particular subject given them by the Constitution, it is not competent for [the State] to add to the provisions of congress upon that subject; for that the will of congress upon the whole subject is as clearly established by what it has not declared as by what it has expressed." *Petranek v Minneapolis, S P & SS M R C*, 240 Mich 655, 660; 216 NW 467 (1927), citing *Houston v Moore*, 18 US 1; 5 L Ed 19 (1820). In such cases, the "power of the State *ceases to exist*." *Id*. (emphasis added), quoting *Erie R Co v New York*, 233 US 671, 681; 34 S Ct 756; 58 L Ed 1149 (1914).

Michigan has a robust body of scholarly treatment to accompany and supplement its jurisprudence in this regard. Where a state court "assumes to act in a case over which the law *does not give it authority*, the proceeding and judgment will be altogether void, and the *rights of property cannot be divested by means of them*." Cooley, Constitutional Limitations (7th ed) (1903), p 575 (emphasis added). Justice Cooley observed that the Supremacy Clause requires "[a] State law [to] yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision." Cooley, Constitutional Law (1880), p 32.

This is why "the propriety of permitting collateral attacks [of federally pre-empted judgments] is premised upon the issue of subject-matter jurisdiction." *In re Waite*, 188 Mich App 189, 196; 468 NW2d 912 (1991). "[C]ourts…can only redress wrongs *within their jurisdiction*." *Cameron v Adams*, 31 Mich 426, 429 (1875) (CAMPBELL, J.) (emphasis added). The term jurisdiction refers

*both* to the authority a court has to hear and determine a case *and the power of the court to act*. *Waite*, 188 Mich App at 196-197, citing *State Highway Comm'r v Gulf Oil Corp,* 377 Mich 309, 312-313; 140 NW2d 500 (1966).

When a court is without jurisdiction of the subject matter, its subsequent acts are of no force and validity; they are void. *In re Hague,* 412 Mich 532, 544; 315 NW2d 524 (1982); *Fox v Bd of Regents of Univ of Michigan,* 375 Mich 238, 242; 134 NW2d 146 (1965). Thus, a judgment or order entered without jurisdiction may be challenged collaterally, as well as directly. *Shane v Hackney,* 341 Mich 91; 67 NW2d 256 (1954); *Attorney General v Ambassador Ins Co,* 166 Mich App 687, 696; 421 NW2d 271 (1988). Such a challenge can be raised at any time, even on appeal, and even after a case is concluded. *Henry*, 495 Mich at 287 n 82. Such defects cannot be waived. *Travelers v Detroit Edison*, 465 Mich 185, 204; 631 NW2d 733 (2001) (citing *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992) and stating "[a] court either has, or does not have, subject-matter jurisdiction over a particular case.").

It is important to point out that there are three jurisdictional defects that void and nullify a court's actions. There has been an unfortunate tendency to oversimplify the inquiry and ask only whether a court has jurisdiction over the subject matter and the parties. If it is seen as having both, then its judgment and orders, even if wrong, cannot be collaterally attacked. At least, this is the facile iteration. See, e.g., *Dir of Workers Comp Agency v Macdonald's Indus Prods*, 305 Mich App 460, 477; 853 NW2d 467 (2014) (collateral attack "is permissible only if the court never acquired jurisdiction over the persons or the subject matter"). Of course, such a rule would preclude questioning a state court's ruling, even if it was clearly contrary to the constitution or the laws passed pursuant thereto (whether state or federal), a proposition this Court has soundly rejected. See *Strauss v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (stating "a court at all times is required to question

sua sponte its own jurisdiction over a person, the subject matter of an action, *or the limits of the relief it may afford*") (emphasis added). Accord *Davis*, 263 US at 24-25.

The more refined approach, which, as explained, is followed by Michigan despite the gross overgeneralizations, is that a judgment or order entered by a court that undoubtedly has subject matter jurisdiction may still be unauthorized, and will, as a result, be considered *void ab initio*. A proper, although perhaps less than clear, statement is found in *Bowie*, *supra* at 54. However, *Bowie* did not concern a question of federal preemption. Further, with approval, the Court cited *Ward v Hunter Machinery Co*, 263 Mich 445, 449; 248 NW 864 (1933), which, as explained herein, follows the more refined approach of requiring jurisdiction over person, subject matter (generally), *and* authority of the court to act on the particular issue. And, in keeping with this three-part inquiry, the Court recognized that the circuit court could not act beyond its authority despite having properly assumed jurisdiction over the subject matter of the case. *Id*. As recognized by this Court, federal preemption, which applies here, demonstrates this nuanced, but very substantive, distinction. *Town & Country Motors*, 355 Mich at 54-55; *Henry*, 495 Mich at 287, n 82.

As explained by Abraham Freeman in his influential treatise on Judgments: "There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person *and the power or authority to render the particular judgment*." 1 Freeman, Judgments (5th ed) (1925) § 226, pp 444-445 (emphasis added). "It is well settled by the authorities that a judgment may be void for want of authority in a court to render the particular judgment rendered *though the court may have had jurisdiction over the subject matter and the parties*." *Id*., § 354, p 733 (emphasis added).

If a judgment is, in part, beyond the power of the court to render, it is void as to the excess. *Ex Parte Rowland*, 104 US 604, 612; 26 L Ed 861 (1881) (stating "if the command was in whole or

in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements.") See also, Freeman, *supra*, § 226, p 443 ("[T]he court may strike from the judgment *any portion of it which is wholly void*.") (emphasis added). "It is settled law that a judgment may be good in part, and bad in part, – good to the extent it is authorized by law, and bad for the residue." *Semmes v United States*, 91 US 21, 27; 23 L Ed 193 (1875). See also *Barney v Barney*, 216 Mich 224, 228; 184 NW 860 (1921) and *Koepke v Dyer*, 80 Mich 311, 312; 45 NW 143 (1890) (the latter cited in Freeman, *supra*, § 324, pp 648-649 (discussing the severability of and the effects of judgments or orders void for lack of the court's authority to enter them from otherwise valid judgments)).

As noted, Michigan adheres to these three general jurisdictional elements, and thus, is in accord with the susceptibility to collateral attack of judgments rendered in contravention of the third element, to wit, judgments rendered on matters which are beyond the court's authority. Relying upon United States Supreme Court authority, this Court stated:

> It is a general rule that the judgment of a court having jurisdiction of the *subject-matter* and of the parties is, unless appealed from, final and conclusive. By jurisdiction is meant the authority which the court has to hear and determine a case. Jurisdiction lies at the foundation of all legal adjudications. The court must have [1] cognizance of the class of cases to which the one to be adjudicated belongs; [2] it must have jurisdiction of the parties, and [3] *the question decided must be within the issue*.
>
> [*Ward v Hunter Machine Co*, 263 Mich 445, 449; 248 NW 864 (1933) (POTTER, J.) (emphasis added), citing *Reynolds v Stockton*, 140 US 254; 11 S Ct 773; 35 L Ed 464 (1891).]

In a case issued the very same term, Justice Potter, again, further explained:

> Jurisdiction, in its fullest sense, *is not restricted to the subject-matter and the parties*. If the court *lacks jurisdiction to render*, or *exceeds its jurisdiction in rendering*, the *particular judgment in the particular case*, such judgment is subject to collateral attack, *even though the court had jurisdiction of the parties and of the*

> *subject- matter*. The supreme court of the United States, the ultimate authority, has so ruled in *Windsor v. McVeigh,* 93 U.S. 274; *Ex Parte Rowland,* 104 U.S. 604; *Ex Parte Lange,* 18 Wall. (85 U.S.) 163.
>
> ***
>
> [I]t is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, *and does not transcend, in the extent or character of its judgment, the law which is applicable to it*.
>
> [*Driver v Union Indus Trust & Savings Bank*, 264 Mich 42, 50-51; 249 NW 459 (1933) (POTTER, J.) (emphasis added) (some internal citations omitted).]

Later cases in Michigan confirm the holding expressed in both *Ward* and *Driver* concerning the efficacy of orders entered in excess of the state court's authority. *Bowie*, 441 Mich at 54, citing *Ward*, *supra*. This principle is followed where preemptive federal law controls the issue. State courts do not have jurisdiction, i.e., authority, to incorrectly adjudicate those issues. See, inter alia, *Town & Country Motors*, 355 Mich at 54-55; *Henry*, 495 Mich at 287 n 82.

Regarding the exposure of such judgments to collateral attack, the Supreme Court has stated: "The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority…." *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876). In an earlier case, the Court stated of such judgments:

> [T]hey…form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings…. [T]he rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States.

> [*Lessee of Hickey v Stewart*, 44 US (3 How) 750, 762; 11 L Ed 814 (1845). See also *In re Sawyer*, 124 US 200, 221-222; 8 S Ct 482; 31 L Ed 402 (1888); Freeman, *supra*, § 322, pp 643-645.]

Two additional principles stem from this proper view of jurisdiction and of void judgments based on a lack thereof, and they respond directly to the issue of whether a judgment preempted by federal law (and subsequent orders based on that judgment) may be collaterally attacked even after the time for appeal has passed.

First, a party cannot consent to exercise by a court of jurisdiction where it has none over the particular issue. *Bowie*, 441 Mich at 56, citing *Straus v Barbee,* 262 Mich 113, 114; 247 NW 125 (1933). See also *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939). "The jurisdiction of a court arises *by law*, not by the consent of the parties." *Id*., citing *Straus*, 262 Mich at 114. See also *In re Estate of Fraser*, 288 Mich at 394 ("Jurisdiction cannot rest on waiver or consent."). Justice Cooley directly addressed this in his treatise on constitutional limitations. As to whether a party could consent to a judgment of a state court that was in excess of its authority, he wrote:

> If [the court] assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and the *rights of property cannot be divested by means of them…. [C]onsent can never confer jurisdiction: by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law*."
>
> ***
>
> [W]here a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, *notwithstanding he may once have consented to its action*, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, *or by any other formal or informal action*. This right he may avail himself of *at any stage of the case*; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, *but a total want of power to act at all*…. [T]here can be no waiver of rights by laches in a case where consent would be altogether nugatory.
>
> [Cooley, Constitutional Limitations (7th ed) (1903), pp 575-576 (emphasis added).]

Appellant's consent agreement in the 2008 judgment (which contained the federally preempted anticipatory language wherein he was to indemnify Appellee using his federally protected disability pay, see 38 USC § 5301(a)(3)(A) and (C)), and the subsequent contempt orders forcing him to pay Appellee using these monies are void because the state court, as confirmed by *Howell*, never had jurisdiction to enter a judgment that violated preexisting federal law. *Howell*, 137 S Ct at 1405 (*McCarty* with its rule of preemption *still applies*.") (emphasis added).

Second, as Appellant pointed out at oral argument, § 5301 provides that where such benefits are involved, the veteran himself or herself cannot even consent to or agree to pay them over to another party and no collateral can be held to enforce such an unlawful agreement. See 38 USC § 5301(a)(3)(A) and (C). Such an agreement is prohibited and "*void from its inception*". *Id*. (emphasis added). Federal law expressly protects these benefits from state courts.

Appellant could not have "consented" or "agreed" to pay Appellee monies that were not property and which are protected by federal law, see 38 USC § 5301(a)(3)(A) ("in any case where a beneficiary [the veteran] entitled to compensation…enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation…such agreement shall be deemed an assignment and is prohibited"), and 38 USC § 5301(a)(3)(C) ("[a]ny agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception."). Thus, even if one were to read the consent decree as a waiver by Appellee of spousal support in exchange for 50 percent of Appellant's veterans' disability (and ignoring that Appellant (while suffering from a traumatic brain injury, severe PTSD and other combat-incurred disabilities) waived 100 percent of an interest in Appellee's equally valuable pension from her full-time position as a registered nurse, all interest in the parties' real property, and any claim for

spousal support for himself), the agreement to pay over his disability benefits is "void from its inception" because it would constitute "an agreement with another person…where such other person acquire[d] for consideration the right to receive such benefit by payment of such compensation", 38 USC § 5301(a)(3)(C)). As the Court in *Howell* unanimously concluded regarding 38 USC § 5301: "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Howell*, 137 S Ct at 1405-1406.

Moreover, in 2008, the controlling case law was the United States Supreme Court's decisions in *McCarty* and *Mansell*, which, when applied by this Court, as they must be, see *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994), absolutely preempted the language of the judgment purporting to require Appellant to divest himself of his disability pay at some point in the future. *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), with its errant (and now debunked) reasoning, did not even exist, and the USFSPA, as confirmed by *Mansell*, only gave state courts "precise and limited" authority over *disposable* retired pay, which was *never* available in this case. *Mansell*, 490 US at 588. Therefore, the state court had no jurisdiction to enter a judgment contrary to then-existing federal law. *Howell* confirmed the rule of preemption still applies and § 5301 deprives state courts of authority or control over these monies, as much as it also prohibits contracts or agreements whereby the veteran purports to divest himself or herself of these personal benefits.

Second, and directly to the point of post-judgment orders, or, the contempt order here, where the original judgment of a court is void because it was preempted by federal law, subsequent orders dependent upon the ostensible legitimacy of the original order will not be sustained. *Bowie*, 441 Mich at 57. Justice Campbell put it quite succinctly: "Where the order which is alleged to have been violated was made without jurisdiction, and required what the court *had no right to require*

*as a matter of legal authority*, of course it has no force…." *Haines v Haines*, 35 Mich 138, 143 (1876) (emphasis added). See also *Lessee of Hickey*, 44 US (3 How) at 762 and Freeman, *supra*, § 322, pp 643-645.: Freeman elaborated:

> Whether the court lacked power to act in the first instance by reason of its failure to acquire jurisdiction over the subject matter or the parties, *or* having been invested with such power*, proceeded to make a determination outside or beyond the legitimate scope thereof,* the result is the same*. In either case, the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment.* Hence, though the court may have acquired the right to act in the cause and been put in possession of *full jurisdiction to go ahead and dispose of the issues involved,* its judgment in excess of the jurisdiction thus acquired or *which transcends the judicial powers which it may rightfully exercise* under the law of its organization is subject to collateral attack for want or excess of jurisdiction.
>
> [Freeman, *supra*, § 354, pp 734-735 (emphasis added).]

Subsequent orders of the trial court, including the 2010 and 2014 contempt orders were themselves nullities because they were based on the original 2008 judgment which contravened then-existing preemptive federal law. *Howell*, 137 S Ct at 1405. "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." *Id*.

"[T]he fundamental purpose of the Supremacy Clause is to establish the priority of federal rights '*whenever* they come into conflict with state law.'" Babich, The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose, 64 Admin L Rev 1 (Winter 2012), p 7 (emphasis added), quoting *Golden State Transit Corp v City of LA*, 493 US 103, 107; 110 S Ct 444; 107 L Ed 2d 420 (1989). Undoubtedly, the circuit court in this case had jurisdiction over the general subject matter of the divorce. However, it had no jurisdiction to order a diversion of Appellant's disability benefits, because it had no authority to contravene federal law concerning

the disposition of these federally protected property rights. See Freeman, supra, § 354, p 733 (stating "[i]t is very easy to conceive of judgments which, though entered in cases over which the court had undoubted jurisdiction, are void because *they decided questions which it had no power to decide*, or *granted some relief which it had no power to grant*….") (emphasis added)

This Court has long held where federal law occupies the field and preempts state law, "[t]he State courts are without jurisdiction in the most elementary sense." *Town & Country Motors Inc*, 355 Mich at 54-55. Speaking directly to contempt orders based on federally preempted orders, this Court continued:

> The order of the court being void for want of jurisdiction over the subject matter, we cannot remit to such court the fruitless task of ascertaining whether or not certain acts of the defendants constituted a "contempt" of the void order.
>
> [*Id*.]

Federal preemption implicates the question of subject matter jurisdiction. *Henry*, 495 Mich at 287, n 82. Indeed, while state courts in Michigan have assumed jurisdiction to litigate disputes in which the issue of federal preemption has arisen, when such preemption is found to apply, the lower court is deemed not to have had authority to issue a contrary ruling. *Id*. In such cases, an inquiry must always be had of the jurisdiction of the court to exercise authority over the subject about which the issue turns. *Thompson v Whitman*, 85 US 457, 462; 21 L Ed 897 (1873). Accord *Henry*, *supra*. Upon a determination that the lower court lacked such authority, the ruling is void and must be annulled. Cooley, Constitutional Limitations (7th ed) (1903), pp 575-576.

As this Court has ruled on multiple occasions, where federal law preempts state law, state courts have no authority to enter a contravening judgment. *Town & Country Motors*, 355 Mich at 54-55. To the extent that they do so, such judgments, and any orders based on such judgments, are of no effect and therefore void *ab initio*. Cooley, *supra*.

To be sure, some state courts have respected the proper boundaries of their authority in this subject matter, even before *Howell*, and they have directly addressed the unique circumstances where preemptive federal law is raised (even after the time for appeal has passed) to collaterally attack a prior agreement to divide indivisible veterans' disability pay. As early as 1981, the Supreme Court of Texas addressed whether a state court divorce decree wherein a veteran agreed to divest himself of protected veterans' disability benefits could be collaterally attacked. *Ex Parte Burson*, 615 SW2d 192 (1981). With respect to these specific benefits, which are the same as those at issue here, the Court held that the former spouse was not entitled to receive these benefits and discharged the veteran from being held in contempt. The Court reasoned:

> A district court, under our decisions, has the power to enforce a decree ordering a spouse to make payments out of the Air Force disability retirement pay. If there is no appeal from the divorce court's division of the property, that decree may not be collaterally attacked….
>
> [V]eterans Administration benefits, unlike Air Force disability retirement benefits, are not divisible or assignable. They are not property. 38 USC § 3101 [now § 5301]
>
> ***
>
> The trial court, at the contempt hearing, while recognizing the statutory distinction between…retirement disability pay and Veterans Administration benefits, concluded that Burson could not by his voluntary act defeat the force of the divorce decree that had adjudicated community property as it existed and had vested at the time of the divorce….
>
> Military retirement pay, even after it is a vested right and a part of the community, under federal law, is subject to defeasance. This defeasance may occur through the service person's breach of good conduct, by his death, or by the service person's waiver of the retirement pay….
>
> We now hold that a divorce decree cannot prohibit Burson from doing that which the federal law properly gave him a right to do.
>
> Veterans Administration benefits are not divisible property…. [T]he federal supremacy clause and congressional intent will not permit the frustration of a federal law which grants benefits as a gratuity. Federal preemption of veterans benefits for disability does not leave room for their defeat, either by implication nor indirection.

[*Ex parte Burson*, 615 SW2d 192, 196 (Tex, 1981) (internal citations omitted)]

Consider also the conclusion reached by the Supreme Court of Nebraska in *Ryan v Ryan*, 600 NW2d 739; 257 Neb 682 (Neb 1999). There, the former spouse and the veteran were divorced in 1986. The judgment, as in this case, required the veteran to pay his VA disability to his former spouse so long as he received such income. *Id*. at 741-42. The veteran subsequently challenged that part of the judgment requiring him to pay half of his disability pay to his former spouse and requested a new trial. *Id*. The district court denied the veteran's motion. Over two years later, the veteran was in arrears in the amount of $4,489.50. The district court ordered that, going forward, the veteran's wages be garnished in an amount equal to the half payments he was obligated to make in the original judgment. In a subsequent hearing, the district court determined that the veteran was still in arrears, but modified the amount of the monthly payment downwards to reflect a decrease in the veteran's disability pay.

Eight years later, the former spouse filed a motion to show cause why the veteran should not be held in contempt for refusing to comply with the district court's order to pay her half of his disability pay. The district court granted the motion to show cause and ordered the veteran to appear. The veteran filed a responsive pleading asserting that the original divorce judgment requiring him to split his VA disability income was preempted by federal law. *Id*. The district court agreed and concluded that the veteran did not owe any arrearages under the terms of the divorce decree. *Id*. at 743.

As in this case, the former spouse asserted that the doctrines of res judicata and collateral estoppel foreclosed the district court's jurisdiction and authority to cancel the veteran's obligation. *Id*. The former spouse argued that the veteran could have asserted federal preemption at any of the prior hearings during the nearly 10 years of legal proceedings encompassing the parties' divorce

case. *Id*. at 744. Further, the former spouse contended that the original divorce judgment was final on the merits in a court of competent jurisdiction, which barred future litigation of issues that were or could have been litigated. *Id*.

The Supreme Court of Nebraska affirmed the district court. It held that collateral estoppel did not bar the challenge "if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court *without subject matter jurisdiction are void and subject to collateral attack.*" *Id*. (emphasis added), citing 50 CJS Judgments, § 702 (1997) (emphasis added) (some internal citations omitted). The Court continued:

> [J]udgments entered by a court without subject matter jurisdiction are void and subject to collateral attack.
>
> In keeping with that, the longstanding rule in Nebraska is that a void judgment may be attacked at any time in any proceeding. Likewise, a district court has the power to question sua sponte at any time its statutory authority to exercise subject matter jurisdiction.
>
> *Because res judicata does not bar collateral attacks on void judgments*, the outcome of this issue hinges on whether the district court had subject matter jurisdiction to divide Howard's VA disability income. As illustrated by our foregoing analysis, if the district court lacked subject matter jurisdiction to divide the VA disability income, *then that portion of the order dividing such income was void and subject to collateral attack in any subsequent enforcement action*.
>
> The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases, such as dissolutions of marriage or accounting actions; it also involves determining *whether a court is authorized to address a particular question that it assumes to decide or to grant the particular relief requested*.
>
> It is well established that military retirement benefits cannot constitute divisible marital property except to the extent permitted by the Uniformed Services Former Spouses' Protection Act (USFSPA). Disability benefits, such as Howard's are not divisible marital property under the USFSPA.
>
> The question whether the decree is subject to collateral attack, therefore, turns on an examination of the nature of the federal law on this point. Specifically, we must determine if federal law operates to preclude state courts from exercising subject matter jurisdiction over disability-based military retirement benefits.

> [*Ryan v Ryan*, 600 NW2d 739, 744-746; 257 Neb. 682 (Neb. 1999) (emphasis added) (internal citations omitted)

After discussing the absolute preemption of federal law from *McCarty*, the USFSPA, and *Mansell*, the Court concluded:

> Based on the preemptive effect of the USFSPA, we conclude that federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits. Therefore, in the instant case, that portion of the decree purporting to divide Howard's VA disability income is void for want of jurisdiction. Sharon's assignment of error on this point is without merit.
>
> [*Ryan v Ryan*, 600 NW2d 739, 744-746; 257 Neb. 682 (Neb. 1999) (emphasis added) (internal citations omitted)

More recently, the Kansas Court of Appeals addressed the question, post-*Howell. In re Babin*, 437 P 3d 985; 56 Kan App 2d 709 (2019). First, addressing the situation in the present case, the Court recognized that unlike military retirement pay, "military disability benefits cannot be classified as marital property subject to division and are instead treated as the retiree's separate property." *Id*. at 989, citing *In re Marriage of Pierce*, 26 Kan App 2d 236, 240; 982 P 2d 995 (1999) and including the parenthetical: "state district courts *have no jurisdiction over military disability benefits*". (emphasis added). The Court summarized prior cases in Kansas:

> Although the state courts cannot generally divide disability pay, in this instance the recipient former spouse argued that it was divisible because *the veteran had expressly agreed to do so in a settlement agreement*. The district court ruled the veteran spouse in contempt for failure to turn over additional amounts of his disability pay… A panel of this court remanded the matter, holding that the district court failed to take 10 USC § 1408 and *Mansell* into account regarding jurisdiction. The court held that "the district court made an error of law in not considering and making appropriate conclusions of law regarding the jurisdictional implications of this federal statute."
>
> [*Id*. at 990 (internal citations omitted)]

The Court explained the pre-*Howell* state cases and *Howell's* rejection of them:

Since *Mansell* resulted in a harsh result for some former spouses of veterans, throughout the years many state courts have found ways to distinguish the facts of cases from those in *Mansell*. For example, the Virginia Court of Appeals determined that an agreement to provide a certain percentage of retirement pay to a former spouse— along with an indemnification provision— allowed the district court to enforce the agreement by ordering payment from other sources other than disability pay. The Idaho Court of Appeals determined that a property settlement agreement that fixed a certain dollar amount from military pay can be enforced even if the disability pay later reduces the retirement pay as long as the court orders the payment from other sources. The Florida Supreme Court held that even though *Mansell* prohibited the district court from dividing disability benefits, it did not prohibit the voluntary assignment of such benefits under the terms of a settlement agreement.

In response to the state courts' differing interpretations of *Mansell*, the United States Supreme Court readdressed the preemptive effect of the Act in *Howell*. In *Howell*, the divorce decree awarded 50% of a veteran's future military retired pay to his former spouse. As is often the case, years later the veteran waived a portion of his retired pay in favor of disability benefits, thereby reducing the former spouse's award. The nonmilitary former spouse sought to enforce the decree in order to restore the amount of her share of the veteran's retired pay. The Arizona court concluded that the former spouse had received a vested interest in the original decree and ordered the veteran to make up the difference lost due to the disability waiver. The Arizona court ruled that federal law did not preempt the court's order. The United States Supreme Court reversed the Arizona court, holding 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. The Supreme Court stated that the district court could not vest the former spouse with that which it lacked the authority to give. The *Howell* Court also specifically rejected the argument that a nonmilitary spouse can be reimbursed or indemnified if disability pay is obtained, as these rulings displace the purpose of the statute and are an obstacle to the purposes and objectives of Congress. Although *Howell* involved a divorce decree and not a property settlement agreement, the Supreme Court *expressly stated that it was abrogating several cases dealing with property settlement agreements*. And significantly, the Court impliedly endorsed *Mansell* and its restriction on using a property settlement agreement to divide pay. *The Court overruled cases relying on the sanctity of contract to escape federal preemption*.

Roslyn's contentions rely almost exclusively on contractual arguments. She asserts that Nickey agreed to give her 43% of his disability benefits as part of a mediation agreement, and he could voluntarily allocate a portion of his disability payments to her. She asserts it is "no more objectionable than it would be if he decided to use that disability payment to buy groceries and gas at the local convenience store." Roslyn asserts that "[o]nly if the holding in *Howell* is construed so as to prevent a service member from spending his or her disability pay as he or she deems fit, would

> the action of the trial court below be subject to reversal." Although creative, we believe this argument does not follow the intent of Congress, which is to ensure that the disability benefit goes to the support of the veteran, not to the support of others. We are convinced that the division of Nickey's disability compensation—*even through a mediated settlement agreement*—is simply not permitted by federal law. The *district court lacked jurisdiction to order such a division of benefits*, especially over Nickey's objection to the division of property. *The district court's ruling that Nickey contracted away his right to his full disability pay must be reversed*. The Act does not allow for the treatment of disability compensation as marital property, and it specifically excludes from marital property those amounts of retired pay that are waived in favor of disability compensation. 10 USC § 1408(a)(4)(A). In *Howell*, the Supreme Court held that state courts "cannot 'vest' that which (under governing federal law) they lack the authority to give." Military disability compensation is not among the military benefits that may be divided as marital property, and the district court lacked jurisdiction to enforce such a division of property.
>
> [*Id*. at 990-991 (internal citations omitted) (emphasis added).]

## CONCLUSION

The power to regulate the armed forces given to Congress in the Constitution admits only of exceptions found in that document itself. The courts have provided no greater deference to Congress's supreme lawmaking powers than in this area. The United States Supreme Court has, time and again, specifically stated that these powers are the source for veterans' benefits. In confirming this, the Court has sought to protect the beneficiaries from the diverse whims of local state court judges tempted by the desire to do what they think is just or fair in the given case over what the law actually commands for an entire population of disabled veterans. Indeed, the second sentence of the supremacy clause was expressly designed to avoid the exercise of such impulsive proclivities.

It is no surprise then, that in this unique, and relatively rare circumstance, any judgment (whether by consent or otherwise) that violates the supreme law, is void ab initio. It is free from the restraint of being unassailable by collateral attack for the very reason that by federal statute the benefit is untouchable by "any legal or equitable process whatever", 38 USC § 5301(a)(1) and the

beneficiary himself or herself is automatically deemed incapable of agreeing (that is consenting) to pay these monies over to another, § 5301(a)(3).

For at least 30 years (since 1989) and truly since the passage of the USFSPA in 1982, state courts have been trying to force veterans to part with their non-disposable, non-divisible personal entitlements. This was the case even though the Supreme Court in *Mansell* put to rest the notion that state courts had any jurisdiction over veterans' disability benefits. At the time of the Court's decision in *Howell*, at least 32 states in one way or another (including Michigan) continued to defy federal law and create mechanisms to unlawfully dispossess veterans of their protected benefits. The federal laws already in place, and particularly 10 USC § 1408 and 38 USC § 5301, as confirmed by the Supreme Court in *Howell*, serve as an affirmative assurance that these funds dedicated by Congress to specific beneficiaries for specific purposes cannot be repurposed by aberrant state court machinations. Nonetheless, state courts continue to seek ways to foil these protections.

Much is made of the question of how following federal law (rather than trying to get around it) will affect veterans and their former spouses. What number of the current population of disabled veterans and their former spouses might be affected by a simple declaration by this Court that federal law has always preempted state law and it must be followed? The rulings from this Court for nearly a century that state court orders that violate federal law are unenforceable and void should be sufficient to allow that preemptive law to simply take effect. Of all that is made of what consequences will occur if these agreements are nullified, as they must be, should not we be asking the equally important question of what effect ignoring federal law has had for these many decades on our nation's disabled veterans? At oral argument it was conceded by all that the last three decades have seen an especially significant increase in the disabled veteran population. The amicus

curiae brief prepared by undersigned in *Howell* demonstrated that as of 2017, 70 percent of that disabled veteran population (approximately 4.5 million) have an effective disability rating of greater than 70 percent. Such a percentage effectively puts these veterans in a subset of the disabled veteran population deemed to be permanently and totally disabled.

As confirmed by *Howell*, state courts have always been preempted by federal law from dividing veterans' disability benefits in marital property divisions upon divorce. Moreover, the Court held 38 USC 5301 presents a jurisdictional bar to state courts asserting any authority over funds protected by this provision. Michigan recognizes the principle that where federal law pre-empts state law, the state court has no jurisdiction to enter or enforce judgments or orders to the contrary. Where jurisdiction is lacking over the particular subject matter, the state court's judgments and orders may be attacked at any time. Where federal pre-emption is present, ordinary rules of state law concerning collateral attack of judgments do not apply. Recognizing a rule of preclusion in these cases would itself be a direct affront to the Supremacy Clause.

*Howell* quelled the last ill-conceived, indeed unlawful, stratagem devised by recalcitrant state courts to defy federal law. Moreover, *Howell* confirmed that federal preemption in this area has always existed, because Congress, through its enumerated Military Powers and by operation of the Supremacy Clause, has always had primary authority and control to authorize and direct veterans' benefits even where contrary to state family and property law, notwithstanding that the state has traditionally been deemed to have reserved its powers in these subjects.

Specifically addressing *Megee*, it would be troubling indeed if interim state law in the form of the decision of a state court (and here only an intermediate appellate court with limited statutory powers), could subvert the supremacy of federal law expressed through the delegated powers of the national government. The mere statement of the proposition provides sufficient

cause to refute it. A system that allows widely disparate disposition of the constitutional rights and entitlements of citizens, which are granted and protected by Congress's enumerated Article I powers, cannot be tolerated if the Constitution is, indeed, the Supreme Law of the Land. State courts that enter orders violating it *must be* "void".

The only historical anomalies in the law were those wayward state courts, including those in Michigan, that chose to ignore the federal directive and connive ways around it. To be sure, at least half the states did this. But, the swell of defiance in this direction did not make these states any more correct, nor did it insulate their judgments and orders from collateral attack by those who seek to regain and restore to themselves their constitutional entitlements. The passage of time and the din of dissension cannot erode the underlying structure guaranteeing the rights bestowed. Retroactive application is only so because the state courts strayed from the correct path in the first instance. The *law* that preempted state courts *always applied*. State court judgments to the contrary were, of necessity, void from their inception. Restitution of Appellant's rights is not only warranted but required. He cannot be permanently deprived of those constitutional property rights and entitlements for which he sacrificed so much.

It is no justification to say that because former spouses have been recipients of awards that state courts had no power to make, that such awards must be allowed to continue. No matter how appealing this "policy" argument may be, it would require state courts to disregard federal law and the rulings of the United States Supreme Court, which this Court has recognized it is not at liberty to do. Indeed, the Supreme Court's statement that the trial court never had power to "vest" former servicemembers' benefits in anyone other than the designated beneficiary is an explicit recognition that such state court orders *could never have done this*. That the benefits to which Appellee was entitled was subject to future defeasance by virtue of federal law cannot be defeated by an anticipatory state court order that would later take effect to defeat that law (especially by

way of an agreement forced upon a veteran who even the trial court recognized was suffering from the mentally and physically incapacitating disabilities incurred during service to the nation).

With the prior judgment erased by this Court's vacatur, and *Howell* directly stating that (1) federal law *always preempted* state law in this particular subject matter; (2) 38 USC 5301 deprives state courts of jurisdiction to vest, or otherwise divert by anticipation, Appellant's federally protected veterans' benefits; and (3) state courts have no authority to either approve or craft "equitable" work arounds to this preemptive federal law, the slate is wiped clean to correctly adjudicate Appellant's rights.

That part of the 2008 judgment that violated the federal law was void. Its propriety, as well as the contempt orders based upon it, may be challenged at any time. Appellee was never entitled to these monies. There is no act, voluntary or otherwise, whether it be Appellant's purported agreement or a state court judgment, order of contempt, execution of arrest or imprisonment, that can obfuscate the clarity of prevailing federal law or defeat its natural consequence. The order required (and continues to this day to require) Appellant to divest himself of benefits received for his mortal sacrifices in satisfaction of an obligation to which the law declares he cannot consent, and indeed, in which the law prohibits him from engaging. One cannot discount the impropriety of foisting such an unlawful command upon Appellant who was admittedly suffering from the severe trauma of a lifetime at war. The state, for all the sovereignty it has retained by virtue of the open-ended grant of those rights and powers not expressly reserved to the federal government, must yield to the latter if the integrity of the Constitution is to be maintained.

## RELIEF REQUESTED

Appellant respectfully requests the Court to reverse the Court of Appeals and overrule *Megee v Carmine*, which in light of the Supreme Court's unanimous opinion in *Howell*, is no longer good law; vacate the 2008 judgment, and all orders subsequent thereto, which required Appellant to use, and continue to use, his non-disposable veterans' disability pay in a manner contrary to federal law. Appellant also respectfully requests this Court to order that he is entitled to restitution of the amounts he has overpaid to Appellee on the basis of the void judgment and subsequent orders and to forthwith cancel the "appearance" bond and the lien securing it.

Respectfully submitted by:

Carson J. Tucker (P62209)
Attorney for Appellant
117 N. First St., Suite 111
Ann Arbor, MI 48104
(734) 887-9261

Dated: December 2, 2019

# ATTACHMENT A

## January 2019 Email Correspondence with Family Law Section

**From:** Anne Argiroff. Attorney at Law
**To:** Carson J. Tucker
**Subject:** RE: Thank you - I have everything except the application itself. Re: Foster v Foster
**Date:** Wednesday, January 16, 2019 1:21:59 PM

Thank you Carson. Anne

Anne Argiroff PLC

-----Original Message-----
From: "Carson J. Tucker"
Sent: Jan 16, 2019 7:38 AM
To: "Anne Argiroff. Attorney at Law"
Subject: RE: Thank you - I have everything except the application itself. Re: Foster v Foster

Hi, Anne, here is the application (without the attachments). I will try and send that in a separate email. Please let me know you have received.
Thanks, Carson

Carson J. Tucker, JD, MSEL

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cjtucker@lexfori.org



**From:** Anne Argiroff. Attorney at Law <anneargiroff@earthlink.net>

**Sent:** Tuesday, January 15, 2019 03:11 PM
**To:** Carson J. Tucker <cjtucker@lexfori.org>
**Subject:** Thank you - I have everything except the application itself. Re: Foster v Foster

Carson - I have everything except the Application -- would you be willing to send that (again, if I missed it). Thank you so much, Anne

Anne Argiroff PLC

-----Original Message-----
From: "Carson J. Tucker"
Sent: Jan 9, 2019 3:41 PM
To: "Anne Argiroff. Attorney at Law"
Subject: Re: Foster v Foster - Supreme Court Appeal - Anicus

Hi Anne, Happy New year. Thanks for reaching out. I will send you the briefs. This one has a very long appellate docket. I will try to send you as much relevant information as I can. Thanks.

Sent from my Samsung Galaxy smartphone.

-------- Original message --------
From: "Anne Argiroff. Attorney at Law" <anneargiroff@earthlink.net>
Date: 09/01/2019 21:34 (GMT+01:00)
To: "Carson J. Tucker" <cjtucker@lexfori.org>
Subject: Re: Foster v Foster - Supreme Court Appeal - Anicus

Mr. Tucker - my name is Anne Argiroff and I am co-chair of the Family Law Section Amicus Committee. We have reviewed the November 2018 Supreme Court order granting
the application for leave in Foster, and we are looking at exploring the issues further to see if we should file an amicus brief.

Would you be willing to send your briefs in the Court of Appeals and any other material you think relevant? Thank you and please let me know if you have questions. Anne

**Anne Argiroff**

**Attorney at Law**

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# ATTACHMENT B

## Information Memorandum (IM-98-03) Published by Veterans Administration Office of Child Support Enforcement

# Financial Support for Children from Benefits Paid by Veterans Affairs

## IM-98-03

Published: September 25, 1998

**Information Memorandum IM-98-03**

**DATE:** September 25, 1998

**TO:** STATE AGENCIES ADMINISTERING CHILD SUPPORT ENFORCEMENT PLANS UNDER TITLE IV-D OF THE SOCIAL SECURITY ACT AND OTHER INTERESTED INDIVIDUALS.

**SUBJECT:** Obtaining financial support for children from benefits paid by the Department of Veterans Affairs.

**ATTACHMENT:** VA Form 21-4138

**BACKGROUND:** Section 459 of the Social Security Act, as amended, provides for the garnishment of certain Federal payments for the enforcement of child support and alimony obligations. However, benefits paid by the Department of Veterans Affairs (VA) are specifically excluded with one exception [42 U.S.C. 659(h)(1)(B)(iii)]. The test to determine if a payment is subject to garnishment is whether the payment is remuneration for employment as defined in section 459 [42 U.S.C. 659(a) and (h)]. While Federal salaries fit this test, and Title II Social Security Old-Age, Survivors, and Disability Insurance benefits (OASDI) can be garnished (entitlement to these benefits is based on employee contributions into FICA), VA monetary benefits, entitlement to which is generally based on either the veteran's disability and wartime service (pension) or disability from service-connected injury or disease (compensation), is generally not considered remuneration for employment.

However, the Social Security Act and the statutes governing benefit payment by the Department of Veterans Affairs do provide for processes by which dependents may obtain financial support from veterans' benefits under certain circumstances. Below are two examples highlighting the laws or regulations under which benefits paid by the Department of Veterans Affairs can be paid to dependents to fulfill child support obligations.

Example #1: The Social Security Act [42 U.S.C. 659(h)(1)(A)(ii)(V)] provides that if a veteran is eligible to receive military retired/retainer pay and has waived a portion of his/her retired/retainer pay in order to receive disability compensation from VA, that portion of the VA benefit received in lieu of retired/retainer pay is subject to garnishment.

Example #2: The Department of Veterans Affairs has issued regulations pursuant to 38 U.S.C. 5307 that provide for an apportionment of VA benefits between the veteran and his/her dependents under certain circumstances. VA regulations at 38 CFR Section 3.450(a)(1)(ii) provide that, if the veteran is not residing with his or her spouse, or if the veteran's children are not residing with the veteran and the

veteran is not reasonably discharging his or her responsibility for the spouse's or children's support, all or any part of the veteran's pension, compensation, or emergency officers' retirement pay may be apportioned.

Additionally, where a hardship is shown to exist, 38 CFR Section 3.451 authorizes a special apportionment of a beneficiary's pension, compensation, emergency officers' retirement pay, or dependency and indemnity compensation between the veteran and his or her dependents. The apportionment is based on the facts in the individual case, and may not cause undue hardship to the other persons in interest. Factors which determine the basis for special apportionment include the amount of veteran benefits payable, other resources and income of the veteran and those dependents in whose behalf apportionment is claimed, and special needs of the veteran, the dependents, and those applying for apportionment. Ordinarily, the VA considers that an apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship on the veteran, while an apportionment of less than 20 percent would not provide a reasonable amount for any apportionee.

**GARNISHMENT:** To arrange for garnishment, contact the VA Regional Office that provides the non custodial parent's benefits. VA provides a toll free number to help in determining which regional office is appropriate (1-800-827-1000), or refer to 5 CFR Part 581 - (Appendix A). The VA office will determine if the veteran has waived any portion of his/her retired/retainer pay in order to receive VA benefits. Send service of process for garnishment to the regional office serving the veteran.

**SPECIAL APPORTIONMENTS:**

**1.** The IV-D agency (state child support enforcement office) should write the Department of Veterans Affairs using agency letterhead to request an apportionment review. The letter should be signed by both the appropriate IV-D official and the custodial parent. The letter should be addressed to the VA Regional Office servicing that veteran's benefits. Use the toll free number to determine which regional VA office is appropriate (1-800-827-1000).

**2.** Complete and attach VA Form 21-4138 "Statement in Support of Claim." The normal VA procedure is to request this after receiving an apportionment application, so time can be saved by doing this as part of the first step. This is where information regarding income and net worth may be provided.

**3.** Attach a copy of the current support order, to assist VA in the development of the apportionment award.

**4.** Attach a copy of the arrearage determination sheet, payment ledger, payment records, etc.

**CONTACTS:** For more information on obtaining payments from veterans benefits, contact your ACF regional office.

David Gray Ross

Commissioner
Office of Child Support Enforcement

cc: Regional Administrators
Regional Program Managers