Michigan Supreme Court
Lansing, Michigan

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

FOSTER v FOSTER

Docket No. 157705. Argued October 3, 2019 (Calendar No. 3). Decided April 29, 2020.

Deborah L. Foster brought an action in the Dickinson Circuit Court, Family Division, against Ray J. Foster, seeking to enforce a consent judgment of divorce (the consent judgment) between the parties that provided that defendant would pay plaintiff 50% of his military disposable retired pay accrued during the marriage or, if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, that he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits (the offset provision). Defendant retired from the United States Army in September 2007 after more than 22 years of service. Because defendant was injured during combat, he was eligible for combat-related special compensation (CRSC) under 10 USC 1413a, and defendant applied for CRSC around the time of his retirement. In February 2008, defendant received notice that he was eligible for CRSC retroactive to October 2007. Plaintiff had filed for divorce in November 2007, and the consent judgment was entered in December 2008. Plaintiff was receiving slightly more than $800 per month under the consent judgment until February 2010. When defendant began receiving CRSC, his disposable retirement benefit amount had been reduced, and plaintiff's monthly payment was reduced to a little more than $200 per month. Beginning in February 2010, defendant failed to pay plaintiff the difference between the reduced amount of retirement pay she was receiving and the amount that she had received shortly after entry of the consent judgment. Numerous hearings took place to compel defendant to pay plaintiff the difference between the amount plaintiff would have been entitled to under the consent judgment had defendant not received CRSC and the amount plaintiff actually received after the government commenced paying defendant CRSC. The trial court, Thomas D. Slagle, J., entered an order finding defendant in contempt of court for failure to pay plaintiff in compliance with the consent judgment. Defendant appealed in the Court of Appeals, arguing that the trial court erred by not finding plaintiff's attempts to enforce the consent judgment preempted by federal law. The Court of Appeals, MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., concluded that the matter was not preempted by federal law and affirmed the trial court's contempt order in an unpublished per curiam opinion issued on October 13, 2016 (Docket No. 324853). Defendant sought leave to appeal in the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400 (2017). 501 Mich 917 (2017). On remand, the Court of Appeals, in an unpublished per curiam opinion issued on March 22, 2018 (Docket No. 324853), again affirmed the trial court's finding of contempt, concluding

that *Howell* did not overrule the Court of Appeals' decision in *Megee v Carmine*, 290 Mich App 551 (2010). Defendant again sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 503 Mich 892 (2018).

In a unanimous opinion by Justice ZAHRA, the Supreme Court *held*:

Megee, which had held that the portion of retirement pay that the plaintiff waived to receive CRSC was compensable to the defendant in the division of assets pursuant to divorce proceedings, was overruled. Under 38 USC 1101 *et seq*., veterans who became disabled as a result of military service are eligible for disability benefits. However, in order to prevent veterans from receiving double payment in the form of retirement pay and disability benefits, federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits. An exception to the typical bar against receipt of both retirement pay and disability benefits—and the one most relevant to the instant matter—is CRSC, which is separate from standard disability benefits. Under the Uniformed Services Former Spouses' Protection Act, 10 USC 1408 *et seq*., state courts were authorized to treat "disposable retired pay" as divisible community property in a divorce. Under *Howell*, however, federal law completely preempts the states from treating waived military retirement pay as divisible community property. *Howell* held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. Disability pay cannot become divisible marital property through the use of an order requiring the veteran to "reimburse" or "indemnify" the spouse, rather than an order dividing a portion of waived retirement pay outright. To the extent that *Howell* was not concerned with CRSC specifically, the United States Supreme Court has signaled that *Howell* is nevertheless applicable to such benefits: on the basis of its decision in *Howell*, the United States Supreme Court has vacated state-court decisions ruling that veterans could be forced to reimburse former nonveteran spouses in divorce proceedings if they had waived retirement pay in order to receive CRSC under 10 USC 1413a, and those types of benefits were the very same kind at issue in this case. Accordingly, *Howell* and *Mansell v Mansell*, 490 US 581 (1989), preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC. A "reimbursement" or "indemnification" to compensate for the reduction of payments resulting from the nonveteran spouse's share of partially waived military retirement pay is effectively no different than a direct division of the disability benefits themselves. Furthermore, because CRSC is not "retired pay" under 10 USC 1413a(g), it would not be subject to division as a marital asset under 10 USC 1408(c). Any amounts waived that lead to the receipt of CRSC would likewise not be divisible in this manner. Additionally, the parties' agreement under the offset provision of the consent judgment that plaintiff continue to receive funds equal to those she would have received had defendant not elected to receive CRSC constituted an impermissible assignment under 38 USC 5301(a)(3)(A). Accordingly, the trial court was preempted under federal law from including the offset provision in the consent judgment. Plaintiff also argued that defendant's appeal was an impermissible collateral attack on the divorce judgment, and the Court of Appeals agreed. But the Court of Appeals analyzed the issue in a conclusory fashion. That portion of the Court of Appeals judgment had to be vacated and the case remanded for the Court of Appeals to address the effect of preemption on the trial

court's subject-matter jurisdiction to enter the consent judgment of divorce containing the offset provision and to address defendant's ability to challenge the consent judgment on collateral review.

Court of Appeals opinion and judgment concluding that defendant's contentions amounted to an improper collateral attack on the consent judgment vacated; remainder of the Court of Appeals opinion and judgment reversed. Case remanded to the Court of Appeals to address the effect of this holding on defendant's ability to challenge the terms of the consent judgment.

Justice VIVIANO, concurring, fully agreed with the majority's reasoning and holding that the trial court was preempted under federal law from including the offset provision in the consent judgment and also agreed that the case should be remanded to the Court of Appeals so that the Court of Appeals may consider whether defendant may challenge the offset provision on collateral review. Justice VIVIANO wrote separately to properly frame the inquiry, to clarify caselaw, and to point to some of the pertinent authorities that might aid the Court of Appeals as it addresses whether the particular type of preemption at issue in this case is jurisdictional. Defendant's assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment. Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. However, contrary to defendant's assertion, not all federal preemption deprives state courts of subject-matter jurisdiction; state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Furthermore, a majority of state courts have found that federal law does not deprive them of subject-matter jurisdiction over the type of veterans' and military disability benefits at issue in this case, instead holding that military benefits can be divided under the law of res judicata.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED April 29, 2020

STATE OF MICHIGAN

SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellee,

v No. 157705

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

BEFORE THE ENTIRE BENCH

ZAHRA, J.

This case involves a dispute between former spouses who entered into a consent judgment of divorce (the consent judgment), which provided that defendant would pay plaintiff 50% of his military retirement benefits. Beyond that, the parties agreed that if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits.

Defendant elected to increase his disability benefits when he applied for Combat-Related Special Compensation (CRSC), a form of military disability benefits, pursuant to 10 USC 1413a. He started receiving CRSC shortly after the divorce. As a result, defendant's retirement benefits decreased, which in turn decreased the share of the retirement benefits payable to plaintiff. When defendant failed to reimburse plaintiff for the reduced payment she received in connection with defendant's lowered military retirement benefits, plaintiff sought relief in the Dickinson Circuit Court, asking that the consent judgment be enforced. The trial court and the Court of Appeals enforced the plain terms of the consent judgment and required defendant to reimburse plaintiff for the reduction in her interest in defendant's retirement benefits. Defendant argues that federal law preempts state law in regard to the division of veteran benefits and, thus, the consent judgment is unenforceable.

We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*, which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay

that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC.[1] This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Ray Foster, commenced service in the United States Army in 1985, prior to his marriage to plaintiff, Deborah Foster. During the marriage, defendant was deployed in the Iraq war and suffered serious and permanently disabling combat injuries. Thereafter, defendant continued his military career and, after more than 22 years of service, he retired in September 2007. Because defendant was injured during combat, he was eligible for CRSC under 10 USC 1413a, and defendant applied for CRSC around the time of his retirement. In February 2008, defendant received notice that he was eligible for CRSC retroactive to October 2007.

Plaintiff filed for divorce in November 2007, and a final consent judgment of divorce was entered in December 2008. Before entering that judgment, the trial court conducted a hearing regarding the proposed consent judgment. Defendant testified that he was receiving both military retirement pay and military disability benefits based on his combat-related injuries. The litigants, through counsel, agreed that defendant's disability benefits were not subject to division by the court because they were not marital property under federal law. At the time of the divorce, plaintiff was gainfully employed as a registered nurse.

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[1] *Megee v Carmine*, 290 Mich App 551, 574-575; 802 NW2d 669 (2010).

The proposed property settlement awarded plaintiff 100% of any interest she acquired in retirement and pension benefits as a result of her employment during the marriage. Additionally, plaintiff was to receive 50% of defendant's disposable retirement pay that accrued during the marriage.[2] The parties also agreed to the inclusion of the following provision (the offset provision) in the proposed consent judgment:

> 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 inquired as to why the language of this provision suggested that defendant was not currently receiving any disability benefits when, in fact, he was. Counsel explained that it was intended to apply in the event that defendant was offered an increase in disability benefits because such an increase would diminish the retirement benefits owed to plaintiff under the proposed settlement. The trial court inquired into defendant's understanding of this provision:

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[2] The consent judgment provided that plaintiff would receive 50% of defendant's disposable retirement pay based on that portion of the retirement that accrued during the course of the marriage. Plaintiff understood that this meant she would receive something slightly less than a 50/50 split because defendant was employed in the military before the marriage.

> *The Court*: . . . Mr. Foster, you do acknowledge that if you were to defer any of your current military retirement pay or convert it to disability pay, or if your military retirement pay were reduced because the level of your disability pay was increased, you acknowledge this Court's ability to enforce payment to Ms. Foster [of] the level of benefits that she would be entitled [to] presently from your retirement pay?
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> [*Defendant*]: Yes.

No specific amounts were mentioned at the hearing or in the actual consent judgment. Suffice it to say, however, that plaintiff received slightly more than $800 per month until February 2010. When defendant began receiving CRSC,[3] his disposable retirement benefit amount was reduced, and plaintiff's monthly payment was reduced to a little more than $200.[4]

Defendant nonetheless failed to pay plaintiff the difference between the reduced amount of retirement pay she received beginning in February 2010 and the amount that she had received shortly after entry of the consent judgment. Consequently, numerous hearings took place in the trial court over several years, all of which were designed to compel defendant to pay plaintiff the difference between the amount plaintiff would have been entitled to under the consent judgment had defendant not received CRSC and the amount

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[3] Retirement pay is taxable, whereas disability benefits are not, and so defendant was economically incentivized to waive retirement pay in favor of disability benefits. See *Howell v Howell*, 581 US ___, ___; 137 S Ct 1400, 1403; 197 L Ed 2d 781 (2017), citing *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981).

[4] The Court of Appeals concluded that defendant became eligible to receive CRSC after entry of the consent judgment. This is contrary to defendant's testimony, and we have found nothing in the record to support this conclusion. Defendant testified at the September 30, 2010 show-cause hearing that he applied for CRSC when he applied to retire and that he received correspondence from the Veteran's Administration that he was approved to receive those benefits retroactive to October 2007. Defendant claimed that he shared this correspondence with his lawyer.

plaintiff actually received after the government commenced paying defendant CRSC. These proceedings culminated in the order from which defendant appeals that found him in contempt of court for failure to pay plaintiff in compliance with the consent judgment. The court ordered him to pay plaintiff $1,000 per month, with $812 credited as current payments due under the consent judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full. Defendant has been paying plaintiff in monthly installments since the contempt order was entered. Payments were guaranteed by an "appearance bond" in the amount of $9,500 and secured with a lien on his mother's home.

Defendant appealed in the Court of Appeals, arguing that the trial court erred by not finding plaintiff's attempts to enforce the consent judgment preempted by federal law. The Court of Appeals concluded that the matter was not preempted by federal law and affirmed the trial court's contempt order.[5] Defendant sought leave to appeal in this Court. In lieu of granting leave to appeal, we vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of the opinion of the Supreme Court of the United States in *Howell v Howell*.[6] On remand, the Court of Appeals again affirmed the trial court's finding of contempt, concluding that *Howell* did not overrule the Court of Appeals' decision in *Megee*.[7] The panel reasoned that *Howell* was distinguishable because it involved general service-connected disability benefits and because the *Howell* opinion

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[5] *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 324853), pp 1, 5 (*Foster I*), vacated 501 Mich 917 (2017).

[6] *Foster v Foster*, 501 Mich 917 (2017), citing *Howell*, 581 US ___; 137 S Ct 1400.

[7] *Foster v Foster (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853) (*Foster II*), pp 1, 7.

rested squarely on the 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[.]"[8] The Court of Appeals also observed that the *Megee* decision distinguished CRSC from general service-connected disability pay found in Title 38 on the basis of CRSC's status as *Title 10* compensation.[9] Given that CRSC is at issue in the instant case, and that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC, the Court of Appeals concluded that *Megee* was on point and remained binding precedent.[10] Defendant again sought relief in this Court, and we granted his application for leave to appeal to consider the federal-preemption question, the continuing viability of *Megee*, and the propriety of the contempt order entered against defendant.[11]

II. ANALYSIS

Defendant argues that under federal law as outlined in *Howell*, veterans' disability benefits are—and always have been—nondisposable, indivisible benefits that constitute a personal entitlement free from state legal process. He contends that CRSC is categorically precluded from being considered disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) and that federal law thus preempts the states

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[8] *Id*. at 7, citing *Howell*, 581 US at ___; 137 S Ct at 1402-1404.

[9] *Foster II*, unpub op at 7.

[10] *Id*., citing MCR 7.215(J)(1).

[11] *Foster v Foster*, 503 Mich 892 (2018).

from an exercise of authority that would result in the division of such benefits. This remains true, defendant asserts, even when a consent judgment of divorce uses language effectively "indemnifying" or "reimbursing" a nonveteran spouse for payments that would have been received if retirement pay had not been waived in order to receive disability benefits, as opposed to language dividing received disability benefits outright.

A. LEGAL BACKGROUND

Background information on the framework providing for military retired pay and military disability benefits, including CRSC, is useful to review before assessing the merits of the parties' arguments. "Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay."[12] Retirement pay is calculated on the basis of the years served and the rank attained by the retiring veteran.[13]

In *McCarty v McCarty*, the Supreme Court of the United States held that federal law precludes state courts from treating military retirement pay as divisible marital property in divorce proceedings.[14] Specifically, the Supreme Court interpreted federal statutes governing retirement benefits and concluded that it was the intent of Congress that military

[12] *Mansell v Mansell*, 490 US 581, 583; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (citations omitted).

[13] *Id*. Additional retired pay may be warranted when a service member is recalled to active duty. *McCarty*, 453 US at 223 n 16, citing 10 USC 1402.

[14] *McCarty*, 453 US at 223-232.

retired pay "actually reach the beneficiary."[15] Thus, under *McCarty*, "[r]etired pay [could not] be attached to satisfy a property settlement incident to the dissolution of a marriage."[16]

Congress responded with the enactment of the USFSPA.[17] Under the new statutory scheme, state courts were authorized to treat "disposable retired pay" as divisible community property in a divorce.[18] The pertinent statutory text reads:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.[19]

The Act defines "disposable retired pay" as follows:

> [T]he total monthly retired pay to which a member is entitled less amounts which—
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> (i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
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> (ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
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> (iii) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date

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[15] *Id*.

[16] *Id*. at 228.

[17] 10 USC 1408 *et seq*. See also *Mansell*, 490 US at 584; *King v King*, 149 Mich App 495, 498; 386 NW2d 562 (1986).

[18] 10 USC 1408(c)(1). See also *Mansell*, 490 US at 584.

[19] 10 USC 1408(c)(1).

> when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
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> (iv) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.[20]

Nearly eight years after the USFSPA was enacted, the Supreme Court of the United States in *Mansell v Mansell* confirmed that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[21] *Mansell* concluded that *McCarty* had not been abrogated by the USFSPA, leaving in place the general rule that state-court authority over veterans' benefits is preempted by federal law.[22]

"Veterans who became disabled as a result of military service are eligible for disability benefits."[23] Nonetheless, in order to prevent veterans from receiving double payment in the form of retirement pay *and* disability benefits, "federal law typically insists that, to receive disability benefits, a retired veteran must give up an equivalent amount of retirement pay. And, since retirement pay is taxable while disability benefits are not, the veteran often elects to waive retirement pay in order to receive disability benefits."[24]

An exception to the typical bar against receipt of both retirement pay and disability benefits—and the one most relevant to the instant matter—is CRSC, which is separate from

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[20] 10 USC 1408(a)(4)(A).

[21] *Mansell*, 490 US at 594-595.

[22] *Id*. at 588-594.

[23] *Id*. at 583.

[24] *Howell*, 581 US at ___; 137 S Ct at 1403, citing *McCarty*, 453 US at 211-215.

standard VA disability benefits.[25] "To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a combat-related disability."[26] CRSC is calculated as the amount of monthly retirement pay the veteran would be entitled to under Title 38, "determined without regard to any disability of the retiree that is not a combat-related disability."[27] The maximum amount of allowable CRSC is "the reduction in retired pay that is applicable to the retiree for that month under sections 5304 and 5305 of title 38."[28]

B. FEDERAL PREEMPTION

We now turn to defendant's contention that the offset provision of the consent judgment was preempted by federal law. Whether federal law preempts state action is a question of law that this Court reviews de novo.[29] Likewise, the interpretation of a statute is a question of law that we review de novo.[30] A court's refusal to enter a stay is reviewed for an abuse of discretion,[31] as is the decision to impose a security bond.[32] A court abuses

[25] 10 USC 1413a.

[26] 10 USC 1413a(c).

[27] 10 USC 1413a(b)(1).

[28] 10 USC 1413a(b)(2).

[29] *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

[30] *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

[31] *Larion v Detroit*, 149 Mich App 402, 410; 386 NW2d 199 (1986).

[32] *In re Surety Bonds for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997).

its discretion when its decision falls outside the range of reasonable and principled outcomes.[33]

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[34]

Federal law may preempt state law in multiple ways, one of which has come to be known as "field preemption."[35] This type of preemption recognizes that "Congress may have intended 'to foreclose any state regulation in the *area*,' irrespective of whether state law is consistent or inconsistent with 'federal standards.' "[36] Where applicable, the duly enacted laws passed by Congress effectively forbid the states from taking action in the field preempted.[37] In assessing defendant's claims, we are mindful of guidance provided by the Supreme Court of the United States, which stated that " '[t]he purpose of Congress is the ultimate touchstone' in every preemption case"[38] and that "Congress may indicate its preemptive intent in two ways: 'explicitly . . . in a statute's language' or, by implication,

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[33] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[34] US Const, art VI, cl 2.

[35] *Oneok, Inc v Learjet, Inc*, 575 US 373, 377; 135 S Ct 1591; 191 L Ed 2d 511 (2015). See also *Mich Canners & Freezers Ass'n, Inc v Agricultural Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984).

[36] *Oneok, Inc*, 575 US at 377, quoting *Arizona v United States*, 567 US 387, 401; 132 S Ct 2492; 183 L Ed 2d 351 (2012).

[37] *Oneok, Inc*, 575 US at 377.

[38] *Arbuckle v Gen Motors LLC*, 499 Mich 521, 532; 885 NW2d 232 (2016), quoting *Retail Clerks Int'l Ass'n v Schermerhorn*, 375 US 96, 103; 84 S Ct 219; 11 L Ed 2d 179 (1963).

through a statute's 'structure and purpose.' "[39] In determining whether field preemption functions as a bar to state law, we must examine whether the trial court's order in this case obstructs "the accomplishment and execution of the full purposes and objectives of Congress."[40]

In *Howell v Howell*, the Supreme Court of the United States reiterated its conclusion from *Mansell*, stating that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property."[41] From this, the *Howell* Court broadly held that a state court may not order a veteran to indemnify a former spouse for any loss in a former spouse's share of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.[42] Further, it makes no difference whether a military veteran waives retirement pay postjudgment or prejudgment as part of an overall divorce settlement.[43] Disability pay cannot become divisible marital property through the use of an order requiring the veteran to "reimburse" or "indemnify" the spouse, rather than an order dividing a portion of waived retirement pay outright.[44]

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[39] *Arbuckle*, 499 Mich at 532, quoting *Jones v Rath Packing Co*, 430 US 519, 525; 97 S Ct 1305; 51 L Ed 2d 604 (1977).

[40] See *Hines v Davidowitz*, 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941).

[41] *Howell*, 581 US at ___; 137 S Ct at 1405.

[42] *Id*. at ___; 137 S Ct at 1402, 1406.

[43] *Id*. at ___; 137 S Ct at 1405.

[44] *Id*. at ___; 137 S Ct at 1406. The *Howell* Court was not ignorant of the hardship that this holding might work on divorcing spouses. *Id*. at ___; 137 S Ct at 1406. Indeed, the Court noted that state courts remained free to account for the waiver of military retirement pay when calculating or recalculating the need for spousal support. *Id*. at ___; 137 S Ct at

To the extent that *Howell* was not concerned with CRSC specifically, the Supreme Court has signaled that *Howell* is nevertheless applicable to such benefits. For example, in *Merrill v Merrill*, the Supreme Court of Arizona addressed the application of a state law to a divorce involving a veteran and a nonveteran former spouse.[45] The statute stated that in dividing property in a proceeding for the dissolution of a marriage, Arizona state courts could not:

> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code § 1413a or 38 United States Code chapter 11.
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> 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.
>
> 3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.[46]

In cases of postdecree reductions of military retirement pay caused by the veteran spouse's election to receive CRSC, however, the Arizona Supreme Court held that, so long as the decree was entered before the statute's effective date, the statute did not preclude entry of an order indemnifying the nonveteran spouse to compensate for the lesser payments that resulted from the reduction.[47] Similarly, in *In re Marriage of Cassinelli*, the California

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1406, citing *Rose v Rose*, 481 US 619, 630-634, 632 n 6; 107 S Ct 2029; 95 L Ed 2d 599 (1987); 10 USC 1408(e)(6).

[45] *Merill v Merill*, 238 Ariz 467, 468; 362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017).

[46] Ariz Rev Stat Ann 25-318.01.

[47] *Merrill*, 238 Ariz at 470.

Court of Appeals upheld an order forcing a retired and disabled veteran to reimburse his former spouse for the reduction of her share of his retirement pay in a community property settlement resulting from his waiver of retirement pay to receive disability pay that included CRSC.[48] Specifically, the California Court of Appeals held that a state court "could properly order [the veteran spouse] to reimburse [the nonveteran spouse] for her lost community property interest" without violating "either federal law or finality principles."[49]

In both cases, the Supreme Court of the United States granted certiorari and vacated the judgments of the state courts before remanding for reconsideration in light of *Howell*.[50] That is, on the basis of its decision in *Howell*, the Supreme Court vacated state court decisions ruling that veterans could be forced to reimburse former nonveteran spouses in divorce proceedings if they had waived retirement pay in order to receive CRSC under 10 USC 1413a. Such benefits are of the very same kind at issue in this case.

Applying these principles to the matter at hand, we conclude that *Howell* and *Mansell* preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the

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[48] *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1291, 1297; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US ___; 138 S Ct 69 (2017).

[49] *Cassinelli*, 4 Cal App 5th at 1291. See also *id*. at 1299 ("[A] state court can order a military spouse who has waived retired pay to reimburse a civilian spouse for the latter's loss of a community property interest in the retired pay without violating *Mansell*.").

[50] *Merrill*, 581 US ___; 137 S Ct 2156; *Cassinelli*, 583 US ___; 138 S Ct 69.

veteran former spouse had not waived his or her retirement pay in order to obtain CRSC.[51] The *Howell* Court broadly stated that, in the wake of *Mansell*, "federal law *completely pre-empts the States from treating waived military retirement pay as divisible community property*."[52] A "reimbursement" or "indemnification" to compensate for the reduction of payments resulting from the nonveteran spouse's share of partially waived military retirement pay is effectively no different than a direct division of the disability benefits themselves.[53]

Plaintiff asserts that, under the plain language of 10 USC 1408(a)(4)(A)(ii), only those reductions in retired pay stemming from waivers required in order to receive compensation under *Title 5 or Title 38* are excluded from "disposable retired pay." This implies that reductions in funds resulting from waivers to receive benefits under *Title 10*, like CRSC, may not be excluded from "disposable retired pay." Therefore, maintains plaintiff, the reduction can be accounted for in a marital-asset division under 10 USC 1408(c)(1). The Court of Appeals was apparently persuaded by this logic.[54] But plaintiff and the panel below ignored the language of 10 USC 1413a(g) stating that "[p]ayments

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[51] Plaintiff does not appear to argue that *Howell* is inapplicable to the instant case simply because it was decided more than eight years after the parties entered into the consent judgment at issue. To assuage any doubt as to the applicability of *Howell* to this matter for this reason, however, it is important to note that *Howell* is merely a clarification of *Mansell*. See *Howell*, 581 US at ___; 137 S Ct at 1405 ("This Court's decision in *Mansell* determines the outcome here."). Because *Mansell* was decided in 1989—long before the parties were divorced—the date of the *Howell* opinion's issuance is of no matter.

[52] *Howell*, 581 US at ___; 137 S Ct at 1405 (emphasis added).

[53] *Id*. at ___; 137 S Ct at 1405-1406.

[54] See *Foster II*, unpub op at 7.

under this section[, which provides for CRSC payments,] are not retired pay." Pursuant to 10 USC 1408(a)(4)(A), disposable retired pay is calculated, prior to accounting for reductions (including those resulting from waivers of retired pay), by totaling the amount of "monthly retired pay" to which a veteran is entitled. Because CRSC is not "retired pay" under Title 10, it would not be subject to division as a marital asset under 10 USC 1408(c). Any amounts waived that lead to the receipt of CRSC would likewise not be divisible in this manner.[55]

This analysis is not undone by plaintiff's insistence that this case is distinguishable from *Howell* because the parties *consented* to plaintiff's continued receipt of funds equal to those she would have received had defendant not elected to receive CRSC. Under 38 USC 5301(a)(1):

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[55] The Court of Appeals misunderstood the nature of CRSC benefits in this regard. See *id*. (distinguishing the case from *Howell* because *Howell* "did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay"); *Megee*, 290 Mich App at 565 (distinguishing the case from *Mansell* because the "plaintiff here did not waive his right to retirement pay in order to receive compensation under title 5 or title 38, but to receive title 10 compensation"). Defendant's election of CRSC did not directly require a waiver of retired pay. Rather, defendant's election to receive CRSC benefits would have been contingent on receiving disability benefits, 10 USC 1413a(b), and the increase in disability benefits was what would have legally triggered the decrease in retirement pay. See 38 USC 5304; 38 USC 5305. A letter dated April 14, 2010, from the Defense Finance and Accounting Service to plaintiff confirms that the reduction in the amount paid to plaintiff "was due to the increase in [defendant's] Va Disability" benefits.

Moreover, it makes sense that 10 USC 1408(a)(4)(A)(ii) would not include language allowing for the deduction of amounts waived to receive CRSC under Title 10 because the limitation to consideration of amounts waived in order to receive compensation under Title 5 or Title 38 was enacted in 1982. PL 97-252, § 1002; 96 Stat 718. The provision in Title 10 allowing for CRSC, 10 USC 1413a, was not enacted until 20 years later, in 2002. PL 107-314, § 636; 116 Stat 2458.

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title [38 USC 1901 *et seq*.], or of servicemen's indemnity.

Subsection (a)(3)(A) further states that

> in any case where a beneficiary 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, pension, or dependency and indemnity compensation, as the case may be, . . . such agreement shall be deemed to be an assignment and is prohibited.

"A consent judgment is in the nature of a contract, and is to be construed and applied as such."[56] Among the key elements of any contract in Michigan is consideration.[57] Thus, the consent judgment in this case effectively amounted to "an agreement . . . under which agreement . . . [plaintiff] acquire[d] for consideration the right to receive" an amount equivalent to what she would have received had defendant not waived retirement pay to receive CRSC.[58] This is, under federal statute, an impermissible "assignment."[59]

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[56] *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008).

[57] *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545 (1937).

[58] See 38 USC 5301(a)(3)(A).

[59] See *id*.

C. EFFECT ON *MEGEE v CARMINE*

With the preceding analysis in mind, it is appropriate to conclude that *Howell* overruled the Michigan Court of Appeals' judgment in *Megee v Carmine*. In *Megee*, the veteran spouse (the plaintiff) elected to receive CRSC, which resulted in a diminution of his retirement pay and the nonveteran spouse's (the defendant's) 50% award stemming from that amount.[60] The *Megee* panel held:

> [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 judgment's property division when the military spouse makes a unilateral and voluntary postjudgment 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. 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. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired.[61]

This is, however, exactly the conduct that *Howell* and *Mansell* endeavored to preclude. Regardless of the voluntary nature of the waiver or the temporal relation of the waiver to the consent judgment, the *Megee* panel ultimately held that the portion of retirement pay that the plaintiff waived to receive CRSC was compensable to the defendant in the division of assets pursuant to divorce proceedings. We therefore overrule *Megee.*

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[60] *Megee*, 290 Mich App at 561.

[61] *Id*. at 566-567, 574-575.

D. PROCEEDINGS ON REMAND

Plaintiff argues that the instant appeal constitutes an impermissible collateral attack on the consent judgment. The panel below agreed with her in this regard (before ruling on the merits of the parties' contentions), but did so in a conclusory fashion, stating that "defendant is engaging in an improper collateral attack on the divorce judgment" and citing *Kosch v Kosch*, a 1999 decision of the Court of Appeals.[62] But *Kosch* merely held that the defendant's failure in that case to file an appeal from the original judgment of divorce categorically precluded a collateral attack on the merits of that decision.[63] This is ordinarily true *except in cases concerning jurisdictional error*.[64] The *Kosch* opinion did not discuss this particular nuance. With this in mind, we leave it to the Court of Appeals on remand to address the effect of our holdings today on the trial court's subject-matter jurisdiction to enter the consent judgment of divorce containing the offset provision at issue and to address defendant's ability to challenge the consent judgment on collateral review.

III. CONCLUSION

The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies. The broad language of *Howell* precludes a provision requiring that plaintiff receive reimbursement or indemnification payments to compensate for reductions in defendant's military retirement pay resulting

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[62] *Foster II*, unpub op at 2, 6, citing *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) (quotation marks and citation omitted).

[63] *Kosch*, 233 Mich App at 353.

[64] See *Pettiford v Zoellner*, 45 Mich 358, 361; 8 NW 57 (1881); *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935); *Couyoumjian v Anspach*, 360 Mich 371, 386; 103 NW2d 587 (1960).

from his election to receive *any disability benefits*, including CRSC as provided for under Title 10.

Nevertheless, we express no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment. The Court of Appeals did not substantively review this point or the effect of federal preemption on the trial court's subject-matter jurisdiction. We therefore vacate that portion of the March 22, 2018 opinion and judgment of the Court of Appeals concluding that defendant's contentions amounted to an improper collateral attack on the consent judgment, and we reverse the balance of the panel's opinion. We remand the case to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment.

Brian K. Zahra
Bridget M. McCormack
Stephen J. Markman
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh

S T A T E O F M I C H I G A N

SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellee,

v No. 157705

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

VIVIANO, J. (*concurring*).

I concur fully in the reasoning of the majority opinion and its holding that the trial court was preempted under federal law from including the offset provision on which plaintiff relies in the consent judgment of divorce.[1] I also agree with the majority's decision to remand this case to the Court of Appeals so that it may consider whether defendant may challenge this provision of the consent judgment on collateral review. I write separately to more fully address questions that will arise on remand and that are, in my view, inadequately developed by the parties' briefs.

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[1] I believe a more precise way to state the Court's holding is that MCL 552.18, the statute that provides the trial court's authority to divide pension, annuity, or retirement benefits as part of the marital estate in a divorce judgment, is preempted by federal law to the extent it otherwise permits division of the type of veterans' and military disability benefits at issue in this case.

I. THE PARTIES' DIVORCE JUDGMENT IS FINAL AND MAY NOT BE MODIFIED UNLESS THE FAMILY COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION OVER THE PARTIES' DIVORCE ACTION

Although some portions of a divorce judgment are subject to modification, such as alimony or child support, the property-settlement provisions of a divorce judgment "are final and, as a general rule, cannot be modified." *Colestock v Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984), citing *Boucher v Boucher*, 34 Mich App 213; 191 NW2d 85 (1971). Thus, "[a] judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle." *Colestock*, 135 Mich App at 397-398, citing *McGinn v McGinn*, 126 Mich App 689; 337 NW2d 632 (1983).

In *Buczkowski v Buczkowski*, 351 Mich 216, 222-223; 88 NW2d 416 (1958), this Court examined whether a spouse could move to vacate a separate-maintenance decree when the moving spouse did not appeal the decree, had already accepted money under the settlement, and waited four years after entry of the decree to assert defects with it. The sole challenge to the decree was that the court lacked jurisdiction to enter it because it contained a legally invalid provision. *Id*. at 220-221. The Court declined to vacate the decree, explaining as follows:

> We are cited to no authority to support this contention and it is manifestly in error. The court had jurisdiction of the parties and it had jurisdiction of the subject matter of the suit, that is, support and maintenance. Having such jurisdiction it also had jurisdiction to make an error if, indeed, it did. . . .
>
> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. * * * The judgment of a court of general jurisdiction, with the parties before it, and

> with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.
>
> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:
>
> > There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.
>
> [*Buczkowski*, 351 Mich at 221-222 (cleaned up).]

We have often cited *Jackson City Bank* for this proposition, including most recently last term in *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), in which we quoted the very next paragraph from that case:

> "[W]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called in question collaterally." [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545.]

In *McGinn*, a case also involving military pensions, the Court of Appeals explained the importance of finality in the context of divorce judgments:

> Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the husband as his separate property would flaunt the rule of res judicata and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn*, 126 Mich App at 693 (citation omitted).]

As defendant appears to concede, these finality concerns are certainly implicated in this case because defendant's assertion of federal preemption as a defense to a contempt proceeding brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment. See generally *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt").

Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. See *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013) ("[T]he [l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it.") (quotation marks and citation omitted). But instead of focusing his analysis on whether the federal statutes governing veterans' and military disability benefits deprive the state courts of subject-matter jurisdiction, defendant makes the sweeping assertion that all types of federal preemption

deprive state courts of subject-matter jurisdiction.[2] Although I believe defendant's assertion is demonstrably incorrect, some of our precedents do appear at first glance to support it. And, as defendant acknowledges, the issue could also have implications far beyond this case if the entire spectrum of federal-preemption claims could potentially be raised to mount collateral attacks on final judgments in myriad types of cases. See Defendant's Brief on Appeal (February 27, 2019) at 6 ("There should be no doubt that an order . . . preempted by federal law is void and may be attacked, challenged, and nullified at any time, even on appeal, indeed, even after the time for appeal has passed."). Therefore, before addressing the precise legal issue in this case, I will first explain why defendant's assertion that all types of federal preemption deprive state courts of subject-matter jurisdiction is wrong as a matter of law.

II. CONTRARY TO DEFENDANT'S SWEEPING ASSERTION, NOT ALL TYPES OF FEDERAL PREEMPTION DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION

The law in this area has been aptly summarized as follows:

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[2] See Defendant's Brief on Appeal (February 27, 2019) at 2 ("As a *prima facie* jurisdictional matter, this Court has long held where federal law preempts state law, as it absolutely does in this case, the courts of this state lack subject matter jurisdiction to enter an order contrary to the prevailing federal rule."); *id*. ("Where subject-matter jurisdiction is lacking due to federal preemption, any judgments and orders entered in contravention of the prevailing federal law are void and subject to collateral attack, notwithstanding consent of the parties or the length of time that has passed since such judgments or orders were entered."); *id*. at 33 ("Where federal pre-emption applies to bar a state court's actions, a reviewing court must address the preemptive effect of the federal law on the lower court's jurisdiction because state courts do not have subject matter jurisdiction to enter orders contrary to the federal mandate."); *id*. ("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.").

> State courts have subject-matter jurisdiction over federal preemption defenses. The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.
>
> Accordingly, where state and federal courts have concurrent jurisdiction over a federal cause of action, and a state proceeding on such cause of action presents a federal preemption issue, the proper course is to seek resolution of that issue by the state court. Similarly, there are some cases in which a state law cause of action is preempted by federal law, but only a state court has jurisdiction to so rule. A finding of preemption will generally not remove the case from the jurisdiction of the state court but will only alter the law applied by that court. [21 CJS Courts, § 272 (emphasis added; citations omitted).]

It is well settled that "[s]tate courts are adequate forums for the vindication of federal rights." See *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013). See *id*. ("The States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.") (cleaned up). See also *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 493; 697 NW2d 871 (2005) ("It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever, by their own constitution, they are competent to take it. State courts possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent

jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.") (cleaned up).

Notably, these same principles apply when federal courts are analyzing whether a preemption claim deprives the federal courts of subject-matter jurisdiction. In *Violette v Smith & Nephew Dyonics, Inc*, 62 F3d 8, 11 (CA 1, 1995), cert den 517 US 1167 (1996), the defendant argued for the first time on appeal that the plaintiff's state-law products-liability claims were preempted by certain provisions of a federal statute. Relying upon *Int'l Longshoremen's Ass'n, AFL-CIO v Davis*, 476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986), the defendant argued that "preemption is a jurisdictional matter which cannot be waived and may be raised at any time." *Violette*, 62 F3d at 11. Distinguishing between "choice-of-forum" and "choice-of-law" preemption, the federal court explained:

> [W]here Congress has designated another forum for the resolution of a certain class of disputes, such as the National Labor Relations Board in *Davis*, such designation deprives the courts of jurisdiction to decide those cases. Where, however, the question is whether state tort or federal statutory law controls, preemption is not jurisdictional and is subject to the ordinary rules of appellate adjudication, including timely presentment and waiver. [*Id*. at 11-12 (citation omitted).]

Since the type of preemption at issue in *Violette* presented a "choice-of-law" question, it was "not . . . jurisdictional, and was waived when not presented in the district court." *Id*. at 12.

Our Court of Appeals correctly explained the two-part preemption inquiry as follows:

> Where preemption exists, . . . state courts will not always be prevented from acting. A litigant may still enforce rights pursuant to the Federal law in state courts unless the Constitution or Congress has, expressly or impliedly, given a Federal court exclusive jurisdiction over the subject matter. *Mondou v New*

> *York, N H & H R Co*, 223 US 1; 32 S Ct 169; 56 L Ed 327 (1912); *Claflin v Houseman*, 93 US 130; 23 L Ed 833 (1876). See Hart and Wechsler, *The Federal Courts and The Federal System* (2d ed), pp 427-438. Thus, we must determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case, and, if it has, whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system. [*Marshall v Consumers Power Co*, 65 Mich App 237, 244-245; 237 NW2d 266 (1976).]

Defendant cites *Henry v Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), for the proposition that federal preemption deprives state courts of subject-matter jurisdiction. In *Henry*, after observing that the defendants first raised the issue of preemption in the Court of Appeals, we stated that "preemption is a question of subject-matter jurisdiction" and that, "[a]s such, this Court must consider it." *Id*. at 287 n 82. Although our statement that "preemption is a question of subject-matter jurisdiction" was made without qualification, the above statements were supported by the following quotation from *Davis*, 476 US at 393: "A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." Thus, our assertion was made in the context of *Garmon* preemption and was indisputably correct in that context since Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act (NLRA).[3] And, even if the Court purported to make such a broad holding, it would be

[3] The term "*Garmon* preemption" was coined after the United States Supreme Court's decision in *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959). See *id*. at 245 ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."). Our Court and the Court of Appeals have found preemption under

dicta since it was "not necessarily involved nor essential to determination of the case . . . ." See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (quotation marks and citation omitted). For these reasons, I do not believe that *Henry* may properly be read as supporting defendant's sweeping assertion that all types of preemption deprive the state courts of subject-matter jurisdiction.[4]

Defendant also cites *Ryan v Brunswick Corp*, 454 Mich 20, 40; 557 NW2d 541 (1997), in which after finding that plaintiff's common-law products-liability claims were preempted under the Federal Boat Safety Act (FBSA), 46 USC 4301 *et seq*., this Court

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Garmon in a number of cases. See, e.g., *Henry*, 495 Mich 260; *Bebensee v Ross Pierce Electric Corp*, 400 Mich 233; 253 NW2d 633 (1977); *Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 266; 685 NW2d 313 (2004); *Sargent v Browning-Ferris Indus*, 167 Mich App 29, 33-36; 421 NW2d 563 (1988); *Bescoe v Laborers' Union Local No 334*, 98 Mich App 389, 395-409; 295 NW2d 892 (1980). See also *Town & Country Motors, Inc v Local Union No 328*, 355 Mich 26; 94 NW2d 442 (1959) (holding before *Garmon* was decided that the circuit court had no jurisdiction over the case because the NLRA preempted the area of labor law at issue).

[4] The same analysis applies to other "choice-of-forum" federal-preemption cases. In *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1992), the Court of Appeals held that "the issue of federal preemption is one of jurisdiction, and questions of subject-matter jurisdiction can be raised at any time, even if not raised before the appeal is taken." (Citation omitted.) However, as in *Henry*, this broad assertion was made in the context of a choice-of-forum preemption question, i.e., whether the Public Service Commission lacked jurisdiction to disallow recovery of costs approved by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 USC 717 *et seq.*, which gives exclusive authority to FERC to set interstate natural gas rates. See also *Mississippi Power & Light Co v Mississippi ex rel Moore*, 487 US 354, 377; 108 S Ct 2428; 101 L Ed 2d 322 (1988) (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

held that "summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) was proper."[5] In reciting the applicable legal principles, the Court stated that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." *Id*. at 27. However, the Court did not cite any authority whatsoever for this assertion. Nor did we address whether Congress had designated a federal forum for resolution of these types of disputes. And, in any event, our preemption holding in *Ryan* was abrogated by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002), which

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[5] After finding that the plaintiff's tort claim was preempted by federal law, the trial court explained its ruling as follows:

> [T]he Court necessarily lacks jurisdiction to hear this matter and, accordingly, partial summary disposition is appropriate under (C)(4) for the lack of subject matter jurisdiction, and also as I think correctly argued by the defendant, it fails to state a claim upon which relief can be granted because the failure to equip its product with a propeller guard or to warn of its absence is something that the manufacturer of an outboard or inboard outdrive boat propulsion unit cannot be held liable for. Since that is the case, I grant the defendant's motion for partial summary disposition under both (C)(4) and (C)(8) for those reasons I've indicated. [*Id*. at 22 n 3 (quotation marks omitted).]

The Court of Appeals affirmed on both grounds, *Ryan v Brunswick Corp*, 209 Mich App 519, 526; 531 NW2d 793 (1995), and, as mentioned above, so did this Court. Since the referenced court rules provide alternate grounds for summary disposition (under (C)(4) for lack of subject-matter jurisdiction and under (C)(8) for failure to state a claim on which relief can be granted), it is unclear which of these holdings is precedentially binding. The ambiguity in the Court's holding can perhaps best be explained by the fact that the Court did not need to focus on whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment. Thus, to the extent that the Court erred by affirming summary disposition under (C)(4)—which, in the absence of an exclusive federal forum for resolution of claims under the FBSA, seems apparent—it was only a labeling error since dismissal under (C)(8) was the proper way to dispose of the case after finding the type of preemption at issue.

held that the FBSA does not expressly or implicitly preempt state common-law claims. In light of the ambiguous nature of our holding (noted above), the lack of authority for it, and its abrogation by the United States Supreme Court, I do not think the jurisdictional assertion in *Ryan* carries much precedential weight.[6] Finally, and perhaps most significantly, such

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[6] The broad assertion from *Ryan*—that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction"—has been cited on a number of occasions. In two cases, the Court of Appeals cited *Ryan* but found no preemption and thus did not need to apply *Ryan*'s broad assertion. See, e.g., *People v Kanaan*, 278 Mich App 594; 751 NW2d 57 (2008) (holding that 42 USC 1320a-7b does not preempt the Medicaid False Claim Act, MCL 400.601 *et seq*.); *Konynenbelt v Flagstar Bank FSB*, 242 Mich App 21; 617 NW2d 706 (2000) (holding that the plaintiff's state-law claims were not preempted by the Home Owners' Loan Act, 12 USC 1461 *et seq*., or the Depository Institutions Deregulation and Monetary Control Act, 12 USC 1735f-7a). In a third case, the Court of Appeals cited *Ryan* and found preemption but remanded to the trial court for entry of summary disposition in favor of the defendant without specifying whether the dismissal was for lack of subject-matter jurisdiction. See *Martinez v Ford Motor Co*, 224 Mich App 247; 568 NW2d 396 (1997) (holding that the plaintiff's state-law tort claim was preempted by the National Motor Vehicle Safety Act, 15 USC 1381 *et seq*.).

But in *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010), citing *Ryan*, the Court of Appeals affirmed the circuit court's order granting summary disposition for defendant under MCR 2.116(C)(4) on the ground that it lacked subject-matter jurisdiction over the claim. In that case, the Court of Appeals determined that the trial court correctly held that it lacked subject-matter jurisdiction over plaintiff's wrongful-discharge claim since it was preempted by the Labor-Management Reporting and Disclosure Act, 29 USC 401 *et seq*. *Id*. at 149. But the Court of Appeals did not ground its holding on a designation by Congress of an alternate federal forum for resolution of these types of disputes. Moreover, it is not entirely clear on which basis the circuit court granted summary disposition, since defendant's motions were brought under MCR 2.116(C)(4), (C)(8), and (C)(10), and since on reconsideration, the trial court clarified that "summary disposition of plaintiff's claim had been granted under the substantive-preemption doctrine, not the jurisdictional-preemption doctrine." *Id*. at 138. Finally, although the Court of Appeals noted that *Ryan* had been "overruled in part on other grounds," *id*. at 140, the majority did not discuss whether the broad assertion from *Ryan* remained good law once its operative preemption holding was abrogated by the United States Supreme Court. Like in *Ryan*, the ambiguity in the Court's holding in *Packowski* is perhaps best thought of as a labeling error since the Court did not need to focus on the issue

a broad reading of this one statement in *Ryan* would conflict with the holding and basic jurisdictional principles set forth in *Office Planning Group* and other cases finding that our state courts have concurrent jurisdiction over certain claims governed by federal law.[7] It would also leave Michigan citizens without any forum to enforce federal laws when Congress has conferred exclusive jurisdiction upon state courts to enforce them.[8]

Thus, contrary to the sweeping assertions in defendant's brief, not all federal preemption deprives state courts of subject-matter jurisdiction. Instead, state courts are only deprived of jurisdiction when Congress has designated a federal forum for resolution of the class of disputes at issue. Although two of our cases might have caused some confusion on this point, I do not believe that they may fairly be read as supporting the demonstrably incorrect proposition of law for which defendant cites them.

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of whether the preemption at issue was jurisdictional—for example, to decide if preemption could be raised for the first time on appeal or in a collateral attack on a final judgment.

[7] See, e.g., *Arbuckle v Gen Motors LLC*, 499 Mich 521, 533-534; 885 NW2d 232 (2016) (holding that since state courts have concurrent jurisdiction over cases involving collective-bargaining agreements under § 301(a) of the Labor Management Relations Act, 29 USC 185(a), a state court had jurisdiction to decide the merits of the case even though § 301 preempts state substantive law); *Betty v Brooks & Perkins*, 446 Mich 270, 287 n 21; 521 NW2d 518 (1994) (same); *Flanagan v Comau Pico*, 274 Mich App 418, 429-431; 733 NW2d 430 (2007) (same); *Local 495 UAW v Diecast Corp*, 52 Mich App 372, 377-379; 217 NW2d 424 (1974) (same). See also *In re Lager Estate*, 286 Mich App 158, 164; 779 NW2d 310 (2009) (noting that "federal courts generally have subject-matter jurisdiction over ERISA claims" but that state courts have concurrent jurisdiction over claims brought by a beneficiary to recover benefits due under a personal savings plan).

[8] See, e.g., *Wade v Blue*, 369 F3d 407, 410 (CA 4, 2004).

III. FOLLOWING UNITED STATES SUPREME COURT PRECEDENT, A MAJORITY OF OUR SISTER STATE COURTS HAVE HELD THAT FEDERAL LAW DOES NOT DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION OVER THE TYPE OF VETERANS' AND MILITARY DISABILITY BENEFITS AT ISSUE IN THIS CASE

As the majority notes, in *McCarty v McCarty*, the United States Supreme Court held that "upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws." *McCarty v McCarty*, 453 US 210, 211; 101 S Ct 2728; 69 L Ed 2d 589 (1981). In response, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408, which permits state courts to treat veterans' "disposable retired pay" as divisible property during divorce proceedings. 10 USC 1408(c).

In *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), the United States Supreme Court addressed whether the USFSPA allows state courts to treat retirement pay waived by a retired service member in order to receive disability benefits as property divisible upon divorce. The Court rejected the civilian spouse's argument that the USFSPA was intended to broadly reject *McCarty* and completely restore to state courts the authority they had prior to *McCarty*. *Id*. at 588, 593-594. Instead, the majority found that the USFSPA only partially superseded *McCarty*, holding that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id*. at 594-595. Importantly, in a footnote, the *Mansell* Court discussed the state court's application of the doctrine of res judicata:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69

> L.Ed.2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us. [*Mansell*, 490 US at 586 n 5.]

On remand in *Mansell*, the California Court of Appeal rejected the veteran spouse's argument that the "judgment was void for want of subject matter jurisdiction." *In re Marriage of Mansell*, 217 Cal App 3d 219, 227; 265 Cal Rptr 227 (1989). The California Court of Appeal characterized the *McCarty* holding as merely "that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction." *Id*. at 228. The United States Supreme Court subsequently denied the petition for certiorari. *Mansell v Mansell*, 498 US 806 (1990).

One prominent commentator describes the denial of the second petition for certiorari as "one of the most important facts in all of the *Mansell* litigation," explaining as follows:

> It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of res judicata was outside the scope of federal appellate jurisdiction; it refused to reverse *or even review on the merits* a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision—a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court's denial of review is a very strong statement that division of military benefits on a theory of res judicata is not prohibited by federal law.
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> If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA *would* have been void. The Supreme Court's unanimous refusal to hear the case a second time, and its

> sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote 5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. [2 Turner, Equitable Distribution of Property (4th ed), § 6:6, pp 54-55.][9]

Shortly after *McCarty* was decided, the United States Supreme Court was presented with an issue similar to that in the present case. In *In re Marriage of Sheldon*, the California Court of Appeal declined to apply *McCarty* retroactively. *In re Marriage of Sheldon*, 124 Cal App 3d 371, 376-384; 177 Cal Rptr 380 (1981). The military spouse filed a petition for certiorari. See *Sheldon v Sheldon*, 456 US 941 (1982). Specifically, one of the issues raised was:

> Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law? [Turner, § 6:6, p 49.]

The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Sheldon*, 456 US at 941. Unlike denial of a petition for certiorari, "[a] dismissal for want of a substantial federal question is an adjudication on the merits, and it carries the same precedential value as a full opinion." Turner, § 6:6, p 49, citing *Hicks v Miranda*,

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[9] See also Turner, *State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update*, 16 Divorce Litig 76, 80 (2004) ("Because *Mansell* ultimately permitted the division of the benefits at issue, it is clearly wrong to hold, as a few decisions have held, that federal law deprives state courts of subject-matter jurisdiction over veteran's and military disability benefits. *Mansell* is not a rule of subject-matter jurisdiction; rather, it is a rule of substantive law. When no prior order and no prior agreement exists, federal law requires that disability benefits be awarded to the owning spouse, and it preempts any state law to the contrary. When a prior order exists, however, federal law permits state courts to divide military and veteran's disability benefits, as they were actually divided in the *Mansell* litigation.").

422 US 332, 344; 95 S Ct 2281; 45 L Ed 2d 223 (1975) (emphasis omitted).[10] Therefore, according to the author, *Sheldon* "establish[es] that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits are not void for lack of subject matter jurisdiction." Turner, § 6:6, p 49 (emphasis omitted).

As the author explains, because *McCarty* is not retroactive and thus does not void final state court orders, military benefits can be divided by state courts under the law of res judicata:

> Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue—if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases—*Sheldon* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final. [*Id*. at 50.]

The author notes that "[a] strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only." *Id*. at 55.[11] And, perhaps of even more relevance here, "[a] strong majority of state court cases likewise hold that military benefits of all sorts

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[10] See also *White v White*, 731 F2d 1440, 1443 (CA 9, 1984); *Evans v Evans*, 75 Md App 364, 374; 541 A2d 648 (1988).

[11] See *id*. at n 24 (listing cases). The author also notes that "[a] minority of state courts persist in holding to the contrary." *Id*. at 55. See also *id*. at n 25 (listing cases).

can be divided under the law of res judicata." *Id*. at § 6:9, p 72.[12] The issue of res judicata was not presented in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), and therefore, *Howell* does not appear to provide any guidance on this issue.[13]

One case exemplifies the difficulty our courts have had in applying the law in this complex area.[14] In *Biondo v Biondo*, 291 Mich App 720; 809 NW2d 397 (2011), the Court of Appeals allowed the defendant to challenge enforcement of the Social Security equalization provision in his divorce judgment on federal-preemption grounds, even

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[12] See *id*. at 72-73 n 4 (listing cases). Again, the author notes that a minority of state courts hold to the contrary. See *id*. at 74 n 9 (listing cases) and text accompanying. However, he observes that "[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*," and "[n]one have showed any awareness of the postremand history of *Mansell*[.]" *Id*. at 74.

[13] See Turner, § 6:9, p 72 ("The issue of res judicata was not presented on the facts in the most recent Supreme Court decision on division of military service benefits, *Howell v. Howell*. The author sees nothing in that decision which questions the strong statement in footnote 5 of *Mansell* that division of military benefits under the law of res judicata would not violate federal law.") (citation omitted). The subsequent orders from the United States Supreme Court vacating two state court decisions for further consideration in light of *Howell* also do not shed any further light on this issue. In *Merrill v Merrill*, 238 Ariz 467, 468; 362 P3d 1034 (2015), vacated 581 US ___; 137 S Ct 2156 (2017), the original divorce judgment split only the veteran spouse's retirement pay, and the non-veteran spouse petitioned for an award in the amount of the reduced share once the veteran spouse started receiving combat-related special compensation. In *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1292; 210 Cal Rptr 3d 311 (2016), vacated sub nom *Cassinelli v Cassinelli*, 583 US ___;138 S Ct 69 (2017), the non-veteran spouse had "filed a motion to modify the judgment by ordering [the veteran spouse] to pay the amount of her share of his retired pay as 'non-modifiable spousal support.' " In other words, both cases involved a later attempt to modify a divorce judgment, not a situation like the present case, in which a provision in the original divorce judgment violated federal law but was not challenged on direct appeal and instead was challenged later in response to a motion to hold the veteran-spouse in contempt for failing to comply with that judgment.

[14] See Turner, § 6:2, p 4 (boldly asserting that "[t]he complexity of classifying, valuing, and dividing [retirement] plans is unmatched by any other issue in any area of modern law").

though it rejected his claim—similar to the one appellant is making here—that 42 USC 407 of the Social Security Act, 42 USC 301 *et seq*., divests the state courts of subject-matter jurisdiction in divorce cases. The Court stated as follows:

> In reaching this conclusion, we specifically reject James Biondo's suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. That federal law has preempted a portion of the parties' consent judgment of divorce in no manner deprives the circuit court of subject-matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:
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> > The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [*Buczkowski v Buczkowski*, 351 Mich 216, 222; 88 NW2d 416 (1958).]
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> Although the circuit court erred by ordering the social security equalization, it did not exceed its subject-matter jurisdiction in doing so. Const 1963, art 6, § 13; MCL 552.6(1). [*Biondo*, 291 Mich App at 727-728.]

Apparently not recognizing the finality implications of its finding that the trial court had subject-matter jurisdiction to enter the parties' divorce judgment, the Court held that, on remand, the circuit court could modify the property-settlement provisions of the divorce judgment on the ground that inclusion of the Social Security equalization provision was a mutual mistake. However, the court did not cite or discuss the applicability of MCR 2.612, the court rule that governs requests for relief from a final judgment, or explain why, if that

rule was applicable, the one-year limitations period for requests on the ground of mistake did not apply. See MCR 2.612(C)(1)(a) and (C)(2). Nor did the Court discuss *Sheldon*, footnote 5 in *Mansell*, or the other authorities noted above holding that federal retirement benefits may be divided on a theory of res judicata.

IV. CONCLUSION

Contrary to defendant's sweeping assertion, it is clear that not all federal preemption deprives state courts of subject-matter jurisdiction. On remand, the Court of Appeals will have an opportunity to address whether the particular type of preemption at issue in this case is jurisdictional. The purpose of my concurrence is to properly frame the inquiry, to clarify our caselaw, and to point to some of the pertinent authorities that may aid the Court of Appeals in resolving this complex and jurisprudentially significant issue.

David F. Viviano