

IN THE SUPREME COURT OF THE STATE OF NEVADA

JO D. HAID,
Appellant,
vs.
TERRY B. HAID,
Respondent.

No. 42313

FILED

APR 14 2005

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a post-decree order concerning the distribution of a military pension under the divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Lisa Brown, Judge.

Respondent Terry B. Haid and appellant Jo D. Haid were divorced in 1992. They entered into a property settlement agreement which stated, "The parties agree that there is a community interest in the Husband's retirement with the Air force [sic], that the Wife's interest in said retirement shall be determined as follows: 1/2 of his military retirement benefits pursuant to 10 U.S.C. Section 1408(c)(4)" The property settlement agreement was incorporated into the divorce decree.

In 2001, Terry retired from the military and began receiving monthly retirement benefits and Jo received a fifty percent share that amounted to \$918.50. In 2003, Terry was determined to be thirty percent disabled, and he elected to waive a portion of his retirement benefits in order to receive disability benefits. Jo's share of the retirement benefits was subsequently reduced. Terry moved the district court for declaratory relief, alleging that the military was erroneously paying Jo fifty percent of his entire retirement pension, rather than only the marital portion. Jo opposed the motion and filed a countermotion for equitable relief from

Terry's waiver of retirement benefits in favor of disability benefits. After a hearing on the motions, the district court entered an order on September 26, 2003 confirming the fifty-fifty pension distribution under the divorce decree, but determining that Terry was entitled to 100% of his disability benefits. This appeal followed.¹

On appeal, Jo contends that there is a nationwide trend in which courts aim to equitably protect spouses against unilateral, post-judgment waivers of military retirement pay in favor of disability benefits. Absent such equitable relief, Jo argues that ex-spouses of retired military personnel face the potential of unjustly losing their marital property rights in the event of a large-scale conversion of retirement benefits into disability pay. Although federal law precludes a state court from treating disability benefits as community property, Jo concludes that state courts are not precluded from enforcing decrees fairly and reasonably and/or taking other corrective action.

In 1981, the Supreme Court of the United States issued its decision in McCarty v. McCarty,² holding that federal law preempted states from dividing military retirement benefits between a retiree and his former spouse. In response, Congress passed the Uniformed Services Former Spouses' Protection Act ("USFSPA"), which superseded McCarty and permitted "state courts to treat 'disposable retired or retainer pay' as

¹Terry cross-appealed the district court's order denying his motion for declaratory relief, but it was dismissed pursuant to a stipulation between the parties. See Haid v. Haid, No. 42313, Order Dismissing Appeal of Terry B. Haid.

²453 U.S. 210, 223-36 (1981), superseded by 10 U.S.C. § 1408(c)(1) (2003).

community property.”³ The USFSPA defines “disposable retired pay” as “the total monthly retired pay to which a member is entitled,” excluding certain deductions.⁴ “Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits.”⁵ A military retiree can receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay, a trade-off implemented to prevent double dipping.⁶ In Mansell v. Mansell, the Supreme Court of the United States formally held that state courts could not treat veterans’ disability benefits as community property.⁷

On October 29, 2003, this court decided Shelton v. Shelton.⁸ In that case, we noted that since Mansell was decided,

[m]any courts have determined that a recipient of military disability payments may not deprive a former spouse of marital property. The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay. Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res

³Mansell v. Mansell, 490 U.S. 581, 584 (1989) (quoting 10 U.S.C. § 1408(c)(1)).

⁴10 U.S.C. § 1408(a)(4) (2003).

⁵Mansell, 490 U.S. at 585.

⁶Id. at 583.

⁷Id. at 589 n.1.

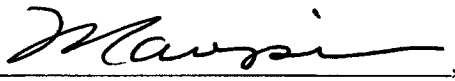
⁸119 Nev. 492, 78 P.3d 507 (2003), cert. denied, 542 U.S. 960 (2004).

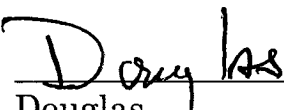
judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved.⁹

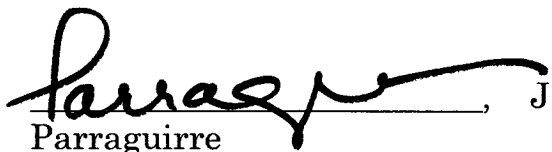
We proceeded to apply contract principles and held that, in that case, the husband could not deprive his ex-wife of her portion of community assets by voluntarily choosing to forfeit his retirement pay.¹⁰

Here, the district court's order preceded our decision in Shelton. Shelton now supersedes that order with regard to military disability payments. We conclude that it is unfair for Terry to unilaterally deprive Jo of her community property interest in his retirement benefits simply by waiving a portion of it in exchange for disability pay. While this court applied contract principles in Shelton, the district court may address this unfairness using an alternative applicable theory. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

⁹Id. at 496, 78 P.3d at 509.

¹⁰Id. at 497-98, 78 P.3d at 510-11.

cc: Hon. Lisa Brown, District Judge, Family Court Division
Gregory G. Gordon
Terry B. Haid
Clark County Clerk