

In The Supreme Court of the United States

JOSEPH A. JENNINGS III,

Petitioner,

v.

SUSAN W. JENNINGS,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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I. QUESTION PRESENTED

Whether in light of the decision of the United States Supreme Court in Howell v. Howell, 137 S Ct. 1400 (2017), veterans disability compensation may lawfully be included as a source of income in connection with a determination of spousal support, in a non community property state such as Ohio.

II. PARTIES

Petitioner, Joseph A. Jennings, III is a Vietnam era veteran who by reason of exposure to agent orange receives veterans disability benefits for service-connected disability.

Respondent, Susan Jennings, is the former spouse of Joseph A. Jennings, III.

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FEDERAL LAW PREEMPTS STATE LAW, INCLUDING OHIO SPOUSAL SUPPORT LAW, CONCERNING TREATMENT OF COMPENSATION FOR A SERVICE CONNECTED DISABILITY AWARDED UNDER 10 U.S.C. §1408(A)(4)(B) (2012), WITH THE RESULT THAT NO PORTION OF COMPENSATION FOR A SERVICE CONNECTED DISABILITY MAY LAWFULLY BE AWARDED TO A DIVORCING SPOUSE FOR SPOUSAL SUPPORT	12
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V. PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

VI. OPINIONS BELOW

December 12, 2017 Decision of the Tenth District Court of Appeals.
(Appendix A)

February 15, 2018 Memorandum Decision of the Tenth District Court of Appeals Denying Reconsideration.
(Appendix B)

June 20, 2018 Decision of the Ohio Supreme Court declining jurisdiction.
(Appendix C)

VII. JURISDICTION

The judgment of the Ohio Supreme Court declining jurisdiction was entered June 20, 2018. Jurisdiction here is based on 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATUTES:¹

10 U.S.C. §1408

38 U.S.C. §3101(a)

VIII. STATEMENT OF THE CASE

Petitioner, Joseph A. Jennings, III appealed the decision of the Franklin County Common Pleas Court, Domestic Relations Division, which entered an order under R.C. 3105.18, that required Mr. Jennings to pay spousal support, court costs, attorney fees and expenses to Respondent Susan Jennings.

The parties were married on December 26, 1982. Mr. Jennings filed a Complaint for divorce on November 19, 2014. The trial Court determined that on May 26, 2016, the parties had reached an agreement on all issues except spousal support, attorneys fee, court costs, and expense money.

Following a trial that was conducted during four separate hearings between May 26, 2016 and

¹All relevant portions of the statute are directly quoted within the body of the petition.

August 8, 2016, the trial Court made the following findings:

1. Petitioner is to pay permanent spousal support in the amount of \$1,000.00 per month commencing April 21, 2015, reduced to \$750.00 per month commencing June 15, 2016;
2. Petitioner is ordered to pay all court costs;
3. Petitioner is ordered to pay Mr. Jennings \$683.00 for trial related expense reimbursement; and
4. Petitioner is ordered to pay Mr. Jennings \$9,000.00 in trial related attorney fees.

See, September 23, 2016 Final Order of Franklin County Court of Common Pleas, Division of Domestic Relations, Order Case No. 14 DR004237

The trial Court's findings were based in significant measure on its belief that Petitioner had engaged in inequitable conduct by causing a trial and insisting that his Veterans disability benefits were

not divisible property. Specifically the trial court stated:

The Court finds that Defendant has prolonged this litigation and ultimately forced the case to trial due to his dogged refusal to have his Veteran's Benefits included in the consideration of spousal support despite the dictates of R.C. §3015.18(C)(1)(a), and Ohio case law (See, Cardone v. Cardone, 1998 WL 224934, 9th Dist. Court of Appeals, Summit County). Defendant failed to grasp the fact that all monies that are received in the home is compensation to be considered and all monies that are received during the marriage from all sources is marital. Defendant repeatedly referred to the Veteran's Benefits he received "that's my money." His characterization of the benefits as his money and his refusal to understand that although non-taxable, the Veteran's benefits are to be included in the income stream forced this case to trial. The Court must consider all

funds from all sources of income whether taxable income or not.

Order of Franklin Court Court of Common Pleas,
September 23, 2016, Case No. 14DR4237.

During settlement negotiations and during the course of trial, Petitioner, a Vietnam era veteran who received Veteran's disability benefits due to health-related complications from exposure to Agent Orange, insisted that his VA disability benefits should not be treated as property that is divisible under R.C. 3105.18.

In this connection, on May 26, 2016 Petitioner testified:

THE COURT: I have a couple of questions based on your testimony. Oftentimes when a veteran receives veteran's benefits, there is a portion for spouse or dependent children. Did your veteran's benefits include any portion for spouse?

THE WITNESS: You have to define that, Your Honor, because --

THE COURT: Well, when you get your award letter --

THE WITNESS: None of the benefits go directly to a spouse or a child. All benefits are issued to the veteran. If he has dependents, he must declare them...

THE COURT: Okay. So when you got your benefit award letter, did it tell you in that letter that your benefits were increased because you had a dependent spouse?

THE WITNESS: They allowed for a dependent spouse once I reached the 30 percent level of disability, yes.

THE COURT: Okay. When did you reach the 30 percent level?

THE WITNESS: That would have been sometime in the '90s.

THE COURT: So from the '90s up till now, you have received a portion that is designated for spouse that you did not give to

THE WITNESS: I'm not required to give it to anyone.

THE COURT: Okay.

THE WITNESS: There is no law in the VA manual or in Title 38 that says I have to give anything to anyone.

See, Trial Tr. Vol. I of II, p. 139, line 7 through p. 140, line 21. (Emphasis added.)

On August 1, 2016, Petitioner testified as follows:

THE WITNESS: I g e t nineteen-ninety-one-seventy-one per month from the VA which is compensation.

T H E C O U R T : Nineteen-ninety-one-seventy-one VA. I'm sorry. What was that?

THE WITNESS: It was compensation for my 90 percent disability which is tax free.

THE COURT: And compensation is money. Okay.

THE WITNESS: It is not income.

THE COURT: That is for the Court to determine.

THE WITNESS: That is for the federal government to determine. It is in Title 38.

MR. ROSS: Excuse me, Your Honor, for the record I would just state that Title

38 Section 3452, definitions of compensation to a veteran.

THE COURT: I understand your argument. You may continue with your questions.

See, August 1, 2016 Tr., p. 195 line 19 through p. 196 line 14. (Emphasis added.)

On August 8, 2016, Petitioner testified as follows:

A. That is correct; the sum of those three numbers, income, Social Security, and VA benefits.

Q. All right. So I add those three numbers together and I get 87,479. Is that a more accurate reflection of your 2015 receipts?

A. Adding those numbers together I would come up with the same figure, yes.

THE COURT: Which same figure, because we are looking at one figure on the paper? What figure do you come up with?

THE WITNESS: Whatever he came up with, I will stipulate it.

THE COURT: Okay. Well, Mr. Ross, your client is agreeing to stipulate to --

MR. ROSS: I still come up with --

THE COURT: -- with 2015 income.

MR. ROSS: My thing came up to \$82,037.

THE WITNESS: Can't be.

MR. ROSS: That is the only thing --

THE COURT: Just a second. I have a total of \$87,420 when I add 43,000, 20,528 and 28,892.

MR. PIPER: I thought it was 20,587.

THE WITNESS: Where are you getting these numbers?

MR. PIPER: I'm sorry. My error. I see where I slipped down to the line below that. So you had 87- --

THE COURT: 420.

MR. PIPER: - -420. All right.

THE COURT: And we have a stipulation that it is Mr. Jennings' income for 2015?

MR. ROSS: Yes, Your Honor.

MR. PIPER: Yes, Your Honor.

THE COURT: Thank you.

THE WITNESS: It's not income.

MR. ROSS: Pardon?

THE WITNESS: It's not income.

THE COURT: I will let you talk to your attorney just a second.

Off the record.

Thereupon, a discussion was held off the record.

THE COURT: Mr. Jennings, I get to determine what is the income -- we are back on the record. Let me explain something. The difference between nontaxable income and income is the fact that you don't pay tax on it, but it's classified as nontaxable income.

THE WITNESS: I beg to differ.

THE COURT: Well, you can beg to differ, but when I get through writing --

THE WITNESS: I have been doing this for 16 years. It is nontaxable compensation.

THE COURT: Compensation is money. That is what compensation means.

See, Trial Tr., p. 293, line 3 through p. 295, line 12.
(Emphasis added.)

Notwithstanding Petitioner's unrebutted testimony and repeated assertion that his Veteran's Disability benefits should not be included in the trial Court's analysis of future payments to Mr. Jennings, the trial Court based its spousal support finding, in part, on Petitioner's VA disability benefits. The Court also imposed punitive measures such as court costs, expenses and attorney fees on Petitioner due to his profound belief and insistence that his disability benefits were exempt.

**IX. REASONS FOR GRANTING
THE PETITION**

**A UNIFORM RULE OF DECISION
IS REQUIRED IN ORDER TO
PREVENT FEDERAL LAW
CONCERNING VETERANS
DISABILITY BENEFITS FROM
RECEIVING DISPARATE
TREATMENT BASED UPON STATE
RATHER THAN FEDERAL LAW**

ARGUMENT IN SUPPORT

**FEDERAL LAW PREEMPTS STATE
LAW, INCLUDING OHIO SPOUSAL
SUPPORT LAW, CONCERNING
TREATMENT OF COMPENSATION
FOR A SERVICE CONNECTED
DISABILITY AWARDED UNDER 10
U.S.C. §1408(A)(4)(B) (2012), WITH
THE RESULT THAT NO PORTION
OF COMPENSATION FOR A
SERVICE CONNECTED
DISABILITY MAY LAWFULLY BE
AWARDED TO A DIVORCING
SPOUSE FOR SPOUSAL SUPPORT.**

The Ohio Court must be reversed and this matter remanded for further proceedings for the reason the Appellate Court ignored relevant provisions of the Federal Uniformed Services Former

Spouses' Protection Act (USFSPA), 10 U.S.C. §1408, which preempts state law, here R.C. 3015.18, with respect to inclusion of certain VA disability benefits in the calculations of future spousal support and 38 U.S.C. §3101(a), which preempts state law and exempts VA disability benefits from the reach of state courts.

In Mansell v. Mansell, 490 U.S. 581 (1989) this Court stated that USFSPA limited the authority of a state to divide future veterans disability benefits upon equitable distribution or entering a state court order directing that spousal support or maintenance be paid out of veterans' disability benefits. Mansell dealt with this specific issue of whether USFSPA prohibits any final divorce decree that orders payment of a portion of veterans' disability payments that result from a waiver of military retirement pay. However, the rationale for the decision was based on the status of disability benefits. In other words Mansell held that USFSPA rendered military retirement available for division in a divorce, except that portion of the retirement pay consisting of veterans disability benefits , if any, that is attributable to a waiver.

Title 10 U.S.C. §1408(a)(4)(B) preempts the authority of state Courts to consider Veteran's disability benefits as property divisible upon

termination of a marriage. For example see, Hoskins v. Skojec, 265 A.P. 2d 706, 707a 696 N.Y.S. 2d 303 [3d Dept. 1999], Supreme Court Appellate Division.

The prohibition against including Veteran's disability benefits as divisible property was explained in Mansell as follows:

In McCarty v. McCarty, 453 U. S. 210 (1981), we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. *Id.*, at 232-235. We reasoned that Congress intended that military retirement pay reach the veteran and no one else. *Id.*, at 228. In reaching this conclusion, we relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. *Id.*, at 228-232. Finally, noting the distressed plight of many former spouses of military members, we

observed that Congress was free to change the statutory framework. Id., at 235-236.

In direct response to McCarty, Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. 10 U. S. C. § 1408(c)(1). " `Disposable retired or *585 retainer pay' " is defined as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).

Mansell at 584.

Also see:

Veterans' benefits "shall not be assignable except to the extent specifically authorized by law, and . . .

shall be exempt from the claim[s] 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 [veteran]."

38 U. S. C. § 3101(a) (1982 ed. and Supp. V).

Mansell makes clear that the provisions cited above from both Titles 10 and 38 preempt the authority of state courts to divide Veteran's disability benefits. Congress has made it clear veterans disability benefits are for the veteran alone. It was Petitioner who was exposed to Agent Orange; not the Respondent. Accordingly the Court stated in Mansell any payment that is attributable or derived from Veteran's disability benefits is exempt from State court reach.

In this case, Petitioner's veterans disability benefits were included in all of the Ohio Court's spousal support analyses.

In addition to the above in Howell v. Howell, 581, the United States Supreme Court reiterated in Mansell, Howell is a reaffirmation of the holding of the United States Supreme Court in Mansell v. Mansell, 490 U.S. 581 (1989). In Howell, it was

determined that the Uniformed Services Former Spouses' Protection Act 10, U.S.C. §1408 expressly excluded from its definition of "disposable retired pay" amounts deducted from military retirement pay as a result of a waiver required by law in order to receive disability benefits. The exception operates to assure that veterans disability benefits are not treated the same by state courts as military retirement pay. Veterans' disability benefits are exempt for reasons discussed in McCarty and are not therefore to be treated as "marital" property or in the calculation of a family's assets.

The Court stated: state courts cannot "vest" that which (under governing federal law) they lack authority to give. Although Ohio is not a community property state, in determining a right to spousal support, Ohio Courts take into account all marital property. The Howell Opinion requires that veterans disability benefits be excluded from the ambit of "marital property." Veterans disability benefits should not be included in the calculation of a family's assets. In this connection Howell states:

We recognize, as we recognized in Mansell, the hardship that congressional pre-emption can sometimes work on divorcing spouses.

See, 490 U.S., at 594. But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support. See, Rose v. Rose, 481 U.S. 619, 630-634, and n. 6 (1987); 10 U.S.C. §1408(e)(6).

Further support is found in the persuasive opinion of the State of Minnesota Court of Appeals issued October 2, 2017, in Berberich v. Mattson, Case No. A16-1535.

In Berberich, the Court addressed extensively the national landscape concerning treatment of VA disability benefits in light of the decision of the United States Supreme Court in Howell v. Howell, 137 S. Ct. 1400 (2017). The Opinion is helpful here for the reason Minnesota like Ohio is not a community property state. The decision in Berberich reverses its previous position and concludes that spouses may not by reason of federal preemption be

awarded any portion of Veteran's disability compensation.

Berberich states in footnote 10 that it was not addressed the specific issue of spousal support, however the analysis includes the statement in footnote 5 that reference to VA disability in the parties' dissolution decree was an unlawful property division because it would be a contradiction to both award and reserve a maintenance (or support).

In light of the analysis in Berberich, the Appellate Court's Opinion should be reversed.

Following the original appeal in this matter, this Court decided Howell v. Howell, 581 U.S. ____ 137, S. Ct. 1400 (2017) to this appeal.

Howell is a reaffirmation of the holding of the United States Supreme Court in Mansell v. Mansell, 490 U.S. 581 (1989). In Howell, it was determined that the Uniformed Services Former Spouses' Protection Act 10, U.S.C. §1408 expressly excluded from its definition of "disposable retired pay" amounts deducted from military retirement pay as a result of a waiver required by law in order to receive disability benefits. The exception operates to assure that veterans disability benefits are not treated the same by state courts as military retirement pay. Veterans' disability benefits are exempt for reasons discussed in McCarty and are not therefore to be

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619, 630-634, and n. 6 (1987); 10 U.S.C.
§1408(e)(6).

X. CONCLUSION

In view of the above arguments, it is respectfully requested that a Writ of Certiorari issue.

September 18, 2018

Respectfully submitted,

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