APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

DAX ELLIOT CARPENTER,

Plaintiff-Appellant,

v

JULIE ELIZABETH CARPENTER,

Defendant-Appellee.

UNPUBLISHED
January 30, 2020

No. 344512
Eaton Circuit Court
LC No. 2008-000929-DM

Before: O'BRIEN, P.J., and GADOLA and REDFORD, JJ.

PER CURIAM.

Plaintiff-father appeals[1] the trial court's order denying his motion to set aside a Uniform Child Support Order (UCSO) that increased his child support obligation based on his receipt of veterans' disability benefits. The same order awarded defendant-mother $3,310.46 in sanctions, including attorney fees and reasonable costs. We affirm.

I. BASIC FACTS

The parties were divorced in July 2009, following an eight-year marriage. Two children were born during the marriage. The judgment of divorce granted the parties joint legal custody, with defendant having sole physical custody of the children. At that time, the parties stipulated to a UCSO indicating that plaintiff would pay $1,050 in child support monthly.

In 2010, defendant enlisted in the United States Army. Over the next two years, several support recommendations were prepared by the Friend of the Court (FOC), but each was met

[1] We note that the only portion of the order that is within the scope of an appeal of right is the portion of the order awarding attorney fees and costs. However, given that plaintiff's challenge to the provisions concerning the child-support-related provisions is directly related to the award of sanctions, we treat plaintiff's claim of appeal as an application for leave, and we grant leave in order to address the merits of plaintiff's assertions.

with objections. Thereafter, in September 2012, plaintiff was honorably discharged from the Army at his request due to disability incurred while in the service and motioned the court to recalculate his child-support obligation based on his part-time employment wages. Over a period of nine months, plaintiff's child support obligation was reduced by agreement of the parties to $168 monthly effective January 2014.[2] The UCSO also stated:

> a. Defendant reserves the right to petition to modify the order retroactively should it be determined that Plaintiff receives or is granted veteran's benefits that could have been included in his income under the child support formula and/or veteran's benefits that could be apportioned as child support.

Plaintiff personally agreed to this term as evidenced by his signature on the stipulations giving rise to the UCSO.

Over the years, plaintiff built up an arrearage, and several show-cause hearings were held. During those hearings, plaintiff denied applying for or receiving veterans' benefits. It was not until January 2017, when confronted with documentary evidence that he was awarded a service-connected disability benefit, that plaintiff acknowledged receipt of benefits. However, during the subsequent February 2017 show-cause hearing to determine whether plaintiff was in contempt of court for failing to disclose the income, plaintiff would not disclose when he applied for the benefits or when the benefits began. Nonetheless, at the time of the February 2017 show-cause hearing, plaintiff agreed to petition the United States Department of Veterans Affairs (VA) for an apportionment[3] of those benefits and indicated that when that was resolved, the parties would return to the court and work together to calculate retroactive support. However, plaintiff's request was denied by the VA, and the matter returned to the trial court in July 2017.

Plaintiff then acknowledged that he had applied for VA disability benefits in 2012 and began receiving them in 2014. He confirmed that he had listed the parties' minor children as dependents on his application. He further indicated that the payment amounts varied over the years, and he received some retroactive benefits. At that time, he was receiving $3,321 monthly in VA disability benefits, and records provided by the VA indicated that he had received over $131,000 in benefits through March 2017. Plaintiff also confirmed that the first time he disclosed receiving VA benefits to the FOC was in January 2017. However, he denied purposefully failing to disclose the VA benefits and argued that he should only be required to pay child support based on his earned income.

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[2] The decrease in child support was effectuated through the entry of three different child support orders with different effective dates, all entered on January 2, 2014.

[3] Apportionment is the VA's direct payment of the dependent's portion of VA benefits to a dependent spouse, child, or dependent parent. The VA decides whether and how much to pay by apportionment on a case-by-case basis. However, the request for apportionment must be submitted by the beneficiary on the required form. See <https://www.benefits.va.gov › WARMS › docs › admin21 › part3 › subptv>.

Defendant asked for an order providing a retroactive increase in plaintiff's child-support obligation as agreed to in 2014. However, plaintiff filed a brief arguing that because he was not eligible for retirement benefits, his service-connected disability compensation was not subject to consideration for child support purposes under a variety of federal statutes. He posited that these statutes barred the State of Michigan from enforcing child support obligations based on his status as a non-retiree and explicitly excluded state-court jurisdiction over VA benefits. Further, plaintiff argued that the power to apportion benefits fell to the VA, and defendant had not requested an apportionment. According to plaintiff, this was the procedure outlined by the Office of Child Support in Memorandum IM-98-03,[4] and was the only available option for defendant.

In August 2017, the FOC referee who had presided over the matter issued a proposed order in which he found that plaintiff "willfully concealed over $130,000.00 in income for a four-year period," and that plaintiff "misled" both defendant and the court because he made false statements during the show-cause proceedings and repeatedly refused to provide details about the receipt of VA disability benefits during the February hearing. Further, after concluding that by making those false statements, plaintiff had engaged in conduct that unreasonably protracted the hearing and resulted in an inaccurate child support calculation, the referee indicated that he believed plaintiff was subject to sanctions under MCR 2.114.[5] The proposed order was entered despite plaintiff's objection, motivating him to file a motion to set aside the order.

Shortly thereafter, the FOC office issued recommendations related to the retroactive modification of child support; however, defendant objected on the grounds that the calculations did not take into account plaintiff's earned income during the relevant times. Eventually, in January 2018, the parties entered into a stipulated child support order reflecting the agreed-upon retroactive modifications based on plaintiff's wages and VA benefits. Within the stipulated orders, the parties reserved the right to amend or modify based on plaintiff's motion to set aside the order and verification of plaintiff's income and insurance premiums.

In support of the motion to set aside the order, plaintiff's attorney continued to argue that because plaintiff's disability income was not based on retirement, Congress had protected plaintiff's benefits and that the federal statutes granting such protections preempted state statutes. However, defendant's counsel informed the court that the United States Supreme Court's decision in *Rose v Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987), had specifically held that veterans' disability benefits were susceptible to inclusion in child support calculations. Although plaintiff's attorney suggested that *Rose* had been superseded by *Howell v Howell*, ___ US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), the trial court confirmed that *Rose* was still

[4] We note that Memorandum IM-98-03 provides an alternative method for collection of benefits through apportionment in cases such as these, where garnishment of VA benefits is prohibited, but the support payer has not otherwise met their court-ordered obligation.

[5] MCR 2.114 was repealed effective September 1, 2018, and it was substantially relocated to current MCR 1.109(E). Former MCR 2.114(D)(1)-(3), (E), and (F) are identical to the current versions of MCR 1.109(E)(5)(a)-(c), (6), and (7), respectively.

good law before denying plaintiff's motion to set aside the order and making the stipulated child support orders, including the retroactive amounts, fully enforceable.

In addition, the trial court granted a request by defendant's counsel for sanctions. The court instructed defense counsel to present plaintiff's counsel with a bill and indicated that if there was a disagreement about the amount, that matter could be decided by the court. Defendant filed a statement of costs outlining $3,310.46 for services provided, transcript costs, mileage reimbursement, and postage costs, and plaintiff did not file any objections. Accordingly, the trial court entered a judgment of sanctions for this amount.

II. CHILD SUPPORT ORDER

Plaintiff argues that the trial court erred in finding that it had jurisdiction and authority to order modification of his child support orders based on his receipt of veterans' disability payments because federal law preempts those VA benefits that are not retired pay or in lieu of retired pay from being subject to consideration for payment of child support or spousal support. We disagree.

Modification of a child support order is within the trial court's discretion and is reviewed for an abuse of discretion. *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012). An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

The parents of a minor child have a duty to support that child. MCL 722.3; *Paulson v Paulson*, 254 Mich App 568, 571; 657 NW2d 559 (2002). The purpose of support is to ensure that a child's immediate needs are met on a continuing basis. *Milligan v Milligan*, 197 Mich App 665, 667; 496 NW2d 394 (1992). MCL 552.605(2) provides that unless an exception applies, "the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519." As relevant to this case, under the 2017 Michigan Child Support Formula Manual, "veterans' administration benefits" are a source of income to be considered by the trial court to calculate a parent's income for child support purposes. 2017 MCSF 2.01(C).

Further, "[w]hen determining whether federal law preempts a state statute, this Court must look to congressional intent." *American Med Security, Inc v Allstate Ins Co*, 235 Mich App 301, 305; 597 NW2d 244 (1999). Our United States Supreme Court has clarified that traditionally, "domestic relations is . . . the domain of state law." *Hillman v Maretta*, 569 US 483, 490; 133 S Ct 1943; 186 L Ed 2d 43 (2013). "There is therefore a 'presumption against pre-emption' of state laws governing domestic relations . . . ." *Id*., quoting *Egelhoff v Egelhoff*, 532 US 141, 151; 121 S Ct 1322; 149 L Ed 2d 264 (2001). "[F]amily and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law will be overridden." *Id*. at 490-491, quoting *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979).

Applying these principles, in *Rose*, 481 US 619, the United States Supreme Court previously addressed expressly whether federal law preempted state law permitting the

consideration of veterans' disability benefits as "income" for purposes of calculating support. In *Rose*, Mr. Rose, a totally disabled veteran of the Vietnam War, had income composed entirely of benefits received from the VA and the Social Security Administrations, and the trial court considered both benefits to calculate his child support obligations under Tennessee law. *Id*. at 622. When Mr. Rose was held in contempt for failure to pay his support obligation, he argued that 38 USC 3101(a) preempted a state court's jurisdiction over veterans' disability benefits and a state court's ability to enforce child support obligations. *Id*. at 630. Mr. Rose reasoned that only the VA could order him to pay child support with his disability benefits and that the state had no jurisdiction over those benefits. *Id*. at 623. Mr. Rose also argued that 42 USC 659(a) "embodies Congress' intent that veterans' disability benefits not be subject to *any* legal process aimed at diverting funds for child support . . . ." *Id*. at 635.

The United States Supreme Court disagreed, stating, "Neither the Veterans' Benefits provisions of Title 382 nor the garnishment provisions of the Child Support Enforcement Act of Title 423 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support." *Id*. at 636. Further, the United States Supreme Court determined that Congress intended veterans' disability benefits "to provide reasonable and adequate compensation for disabled veterans and their families," *id*. at 630 (quotation marks and citation omitted), and that veterans' disability benefits were "to be used, in part, for the support of veterans' dependents," *id*. at 631. Accordingly, the United States Supreme Court concluded that the state law, pursuant to which Mr. Rose's veterans' disability benefits were considered to determine his child support obligation, was not preempted by federal law. *Id*. at 636.

The analysis in *Rose* has since been accepted and applied in numerous state courts that have addressed the issue. See, e.g., *Lambert v Lambert*, 10 Va App 623; 395 SE2d 207 (1990); *Goldman v Goldman*, 197 So 3d 487 (Ala Civ App, 2015); *Belue v Belue*, 38 Ark App 81; 828 SW2d 855 (1992); and *Casey v Casey*, 79 Mass App 623; 948 NE2d 892 (2011). We agree that it is also applicable to this case.

In this case, plaintiff cites many of the same federal statutes that were rejected as controlling in *Rose*. However, he attempts to distinguish his circumstances from those in *Rose* by arguing that he does not receive his compensation as a result of waiving retirement or retainer pay, whereas the plaintiff in *Rose* was eligible for payments as a retiree. More specifically, plaintiff argues that after *Rose*, Congress decided that the only compensation subject to child support under 42 USC 659 is "for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation." 42 USC 659(h)(1)(A)(*ii*)(V). Accordingly, he posits that as a disabled veteran who is not eligible for retired pay, his compensation is specifically excluded from consideration under 42 USC 659(h)(1)(B)(*iii*), which excludes periodic benefits under title 38, except for the narrow exception carved out by 42 USC 659(h)(1)(A)(*ii*)(V). However, this argument is without merit.

First, we note that 42 USC 659 does not contain any language that precludes a state court from including VA disability benefits in plaintiff's income to determine the level of child support he is required to pay, nor does it discuss the computation of child support at all. Rather, the statute addresses the use of various collection methods for the enforcement of child support or

alimony orders when the support payer is compensated by the United States, District of Columbia, or Armed Forces. 42 USC 659(a). In this case, the trial court was not addressing the question of how defendant's disability payments could be levied or garnished; therefore, any restriction on the enforcement methods used to collect child support is irrelevant to this appeal. Indeed, as plaintiff indicated before the lower court, the Office of Child Support has previously acknowledged that there exist restrictions on the enforcement of unpaid child support obligations upon benefits paid by the VA and that such enforcement may be limited to apportionment. However, that plaintiff's benefits cannot be garnished is not dispositive of whether they can be considered for the purpose of calculating child support obligations.

Additionally, at the trial level, plaintiff argued that the United States Supreme Court's decision in *Howell*, ___ US ___; 137 S Ct 1400, overturned *Rose* and supported his assertion that veterans' disability benefits are not subject to division by state courts. Plaintiff has not raised the same argument on appeal, but rather he now indicates that *Howell* supports the proposition that veterans' disability funds remain expressly protected under 38 USC 5301(a)(1), leaving state courts without any authority to enter an order affecting these benefits. However, this argument also lacks merit because the *Howell* decision says nothing about the propriety of a state court's consideration of such benefits in calculating an award of child support. Rather, *Howell* addressed only the treatment and division of military disability benefits as "property" in divorce, not as income used to support a veteran's dependents. *Id. at* ___; 137 S Ct at 1403-1406. Accordingly, we disagree with plaintiff's contention that the *Howell* decision had any impact on the viability of the *Rose* decision. This is further buttressed by the fact that after the United States Supreme Court released its ruling in *Howell* in 2017, several state courts continued to hold that veterans' disability benefits could be considered as income for child support purposes. See, e.g., *Lesh v Lesh*, ___ NC App ___; 809 SE2d 890 (2018); *Nieves v Iacono*, 162 App Div 3d 669; 77 NYS2d 493 (2018).

Plaintiff also claims that 10 USC 1408 provides that a portion of veterans' disability benefits can be considered toward the calculation of child support obligations only "in certain specific cases." However, he cites no statutory language within 10 USC 1408 that expressly limits such consideration, and no such language is present within the statute. Further, plaintiff cites no authority to support his interpretation of the statute. We also note that 10 USC 1408, also known as the "Uniform Services Former Spouses' Protection Act," addresses the process for enforcing court orders for property division or support when a party receives retirement pay. However, it does not at any point discuss the process for calculation of such court orders or any limitations on the calculation of those orders. Moreover, as plaintiff repeatedly points out in his appellate brief, he does not receive retirement pay. Accordingly, the provisions of 10 USC 1408 have no application in this case.

In whole, we are not persuaded by plaintiff's argument that federal law preempts state law allowing his VA benefits to be considered for the purpose of calculating his child support obligation. Moreover, given the United States Supreme Court's decision in *Rose*, we conclude that the trial court did not abuse its discretion when it concluded that plaintiff's VA benefits were properly considered as income for the purpose of child support calculations.

III. SANCTIONS

Plaintiff further posits that because the arguments he advanced to the trial court had legal merit, the award of sanctions should be voided. We disagree.

A determination of whether a claim is frivolous depends upon the particular circumstances of each case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). A trial court's finding whether a claim or defense was frivolous will not be reversed on appeal unless clearly erroneous. *Id.* at 661. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id*. at 661-662. Further, the trial court's determination of the amount of sanctions imposed is reviewed for an abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 408; 824 NW2d 591 (2012). "An abuse of discretion occurs when the court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

A party pleading a frivolous claim is subject to costs and attorney fees as sanctions. MCR 1.109(E)(7);[6] MCR 2.625(A)(2); MCL 600.2591(1). Further, the trial court may also award attorney fees "when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

An action is considered frivolous when at least one of the following is true:

> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Under MCL 600.2591, upon motion of a party, if the court determines that a civil action or defense was frivolous, the court must award the costs and fees incurred by the prevailing party, MCL 600.2591(1), including "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees," MCL 600.2591(2). The party against whom sanctions are sought must be afforded reasonable notice and an opportunity to be heard. *Vittiglio*, 297 Mich App at 405.

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[6] The trial court did not indicate which court rule it applied when it concluded that sanctions were warranted in this case. However, the referee had originally suggested in his recommendation that sanctions were warranted under MCR 2.114. As previously noted, MCR 2.114 was repealed effective September 1, 2018, and it was substantially relocated to current MCR 1.109(E). Former MCR 2.114(D)(1)-(3), (E), and (F) are identical to the current versions of MCR 1.109(E)(5)(a)-(c), (6), and (7), respectively.

In determining reasonable attorney fees, a court must consider: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982) (quotation marks and citation omitted). "[A]ctual fees charged are not necessarily reasonable fees." *Vittiglio*, 297 Mich App at 410. The burden of proving the reasonableness of the fees is on the party requesting them. *Id.* at 409.

In this case, plaintiff does not argue that the amount of sanctions or attorney fees awarded was unreasonable. Rather, plaintiff's argument is based on his assertion that the arguments he advanced to the trial court had legal merit, and therefore, the award of sanctions should be voided. However, as discussed above, plaintiff's position is unsupported by any of the federal laws or cases he has cited. Moreover, given the United States Supreme Court's decision in *Rose*, plaintiff's position was devoid of arguable legal merit. MCL 600.2591(3)(a)(*iii*). Accordingly, the trial court did not clearly err by concluding that plaintiff's arguments were frivolous.

Further, despite agreeing in 2014 that his child support was subject to modification if he qualified for VA benefits, plaintiff failed to disclose his VA benefits until January 2017. Plaintiff had also denied receiving these benefits during prior court proceedings. Indeed, it was not until he was confronted with documentation showing the amounts and dates of payments he received that plaintiff admitted to receipt of the benefits. This kind of unreasonable and disingenuous conduct warrants an award of sanctions. Accordingly, we find that the trial court did not abuse its discretion in awarding defendant sanctions.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael F. Gadola
/s/ James Robert Redford

APPENDIX B

Order

Michigan Supreme Court
Lansing, Michigan

September 8, 2020

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

161111

DAX ELLIOT CARPENTER,
Plaintiff-Appellant,

v

SC: 161111
COA: 344512
Eaton CC: 2008-000929-DM

JULIE ELIZABETH CARPENTER,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the January 30, 2020 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 8, 2020

Clerk

p0831

APPENDIX C

Order

Michigan Supreme Court
Lansing, Michigan

November 24, 2020

Bridget M. McCormack,
Chief Justice

161111(88)

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

DAX ELLIOT CARPENTER,
Plaintiff-Appellant,

v

SC: 161111
COA: 344512
Eaton CC: 2008-000929-DM

JULIE ELIZABETH CARPENTER,
Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's September 8, 2020 order is considered, and it is DENIED, because we are not persuaded that reconsideration of our previous order is warranted. MCR 7.311(G).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 24, 2020

Clerk

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APPENDIX D

STATE OF MICHIGAN

IN THE CIRUIT COURT FOR THE COUNTY OF EATON

FAMILY DIVISION

DAX ELLIOT CARPENTER,

Plaintiff, File No. 08-929-DM

v

JULIE E. CARPENTER,

Defendant.

Joel Mendoza (P69557)
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ORDER DENYING MOTION TO SET ASIDE ORDER AND MAKING THE UNIFORM CHILD SUPPORT ORDER ENTERED BY THIS COURT ON JANUARY 23, 2018 FULLY EFFECTIVE AND ENFORCEABLE AND AWARDING DEFENDANT SANCTIONS

At a session of this Court
on this the 28th day of February, 2018.

PRESENT: HON. JOHN D. MAURER, Circuit Judge

This Court having entered an order on September 20, 2017 implementing the recommendation of the Eaton County Friend of the Court and having entered a Uniform Child Support Order modifying child support retroactively and into the future based upon the September 20, 2018 order, Plaintiff having filed an Amended Motion to Set Aside the September

20, 2017 order and an Objection to the Entry of the Child Support Order, Defendant having filed an Answer to Plaintiff's Amended Motion to Set Aside order requesting the award of sanctions against Plaintiff and his attorney under MCR 2.114 and MCR 3.215(F)(3), a hearing on Plaintiff's motion and objection having been conducted on February 28, 2018 and the Court being fully informed in the matter,

NOW THEREFORE IT IS ORDERED that Plaintiff's motion to set aside the September 20, 2017 order is hereby denied for the reasons stated by the Court on the record on February 28, 2018.

IT IS FURTHER ORDERED that this Court's Uniform Child Support Order dated January 23, 2018 is hereby fully effective and immediately enforceable, the reservation in paragraph 13 of said order having been removed by this Court's decision and this order.

IT IS FURTHER ORDERED that Defendant is awarded sanctions, including reasonable costs and attorneys fees, against Plaintiff and his attorney, jointly and severally, for the reasons stated by the Court on the record on February 28, 2018.

IT IS FURTHER ORDERED that the amount of sanctions awarded under this order shall be the amount set forth in a billing and cost statement submitted by Defendant within seven (7) days of this order, a copy of which shall be served upon Defendant's attorney on the date that it is filed, unless Plaintiff files with the Clerk of this Court written objections to the Defendant's statement specifying the billing or cost entry or item challenged and the reason for the challenge within fourteen (14) days after the date the statement is served upon him.

IT IS FURTHER ORDERED that if Plaintiff files objections to Defendant's statement as provided above, Defendant shall schedule a hearing on those objections with the Court Clerk.

JOHN D. MAURER, Circuit Judge

COUNTERSIGNED:

Court Clerk

State of Michigan

In the Family Court for the County of Eaton

Dax E. Carpenter,

Plaintiff,

v

Julie E. Carpenter,

Defendant.

Proposed Referee's Order and Notice of Submission of Order Pursuant to MCR 3.215(E)

Case No.: 08-929-DM
Hon. John D. Maurer

Joel Mendoza (P69557)
Attorney for Plaintiff
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Lansing, Michigan 48908

Lawrence Emery (P23263)
Attorney for Defendant
924 Centennial Way. Suite 470
Lansing, Michigan 48917

At a session of said Court held on the 20 day of September, 2017

Present: John D. Maurer, Circuit Court Judge

History of the Matter

On numerous occasions, the Friend of the Court scheduled Show Cause Hearings to enforce the court's child support orders regarding this matter. Plaintiff father, on numerous occasions, did not disclose his disability income as a source of income to the Friend of the Court. Ultimately, when confronted by Counsel for Defendant at one of the Show Cause Hearings, Plaintiff father finally acknowledged he

has been receiving disability income. When questioned by the Referee as to why Plaintiff father failed to disclose the disability income to the Friend of the Court, Plaintiff father stated he was advised by Child Support Enforcement Worker Luci Sharp that disability income was not considered income by the Friend of the Court. Child Support Caseworker Luci Sharp testified before the Referee that she does not recall ever making that statement to Plaintiff father.

After discussing the matter with the parties, the Referee believes the matter had been resolved. The Referee believed that the parties would recalculate Plaintiff father's child support obligation, incorporating his disability income for purposes of utilizing the Michigan Child Support Guidelines.

Thereafter, it became evident that Plaintiff father was still claiming, in some fashion, that his disability income should not be included in his income for purposes of calculating his child support obligation.

Ultimately, the Referee and the parties agreed that each party would draft a brief with the facts and law that supported their respective positions, and the Referee would issue an opinion regarding the matter.

Plaintiff father filed his brief on July 31, 2017. Pursuant to the agreement of the parties, Defendant mother would have seven additional days to file a Response Brief.

On August 7, 2017, Counsel for Defendant mother filed his Response Brief, with the Referee's opinion to be submitted within 21 days, or by August 28, 2017.

Discussion and Analysis

The issue involved in this case is simply whether or not veterans' benefits are

considered income for the purposes of the application and utilization of the Michigan Child Support Formula. Plaintiff father claimed that veteran's benefits are not considered income for the purposes of the Michigan Child Support Formula.

Defendant mother claimed that veteran's benefits are considered income for the purposes of the utilization and application of the Michigan Child Support Formula.

The Referee finds that the answer is quite simple. Veteran's benefits are considered income for the purposes of the utilization and application of the Michigan Child Support Formula.

The Michigan Child Support Formula Manual (2017 MCSF) directs that income shall be defined and determined in Chapter 2 of the manual as follows:

> **2.01(A) The term "net income" means all income minus the deductions and adjustments permitted by this manual. A parent's "net income" used to calculate support will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes.**
>
> **2.01(B) The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support.**
>
> **2.01(C) Income includes, but is not limited to, the following:**
>
> **(1) Wages, overtime pay, commissions, bonuses, or other monies from all employers or as a result of any employment (usually, as reported in the Medicare, wages, and tips section of the parent's W-2).**
> **(2) Earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals. §2.01(E). (a) Income (or losses) from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy.**
> **(3) Distributed profits or payments from profit-sharing, a pension or retirement, an insurance contract, an annuity, trust fund, deferred**

compensation, retirement account, social security, unemployment compensation, supplemental unemployment benefits, disability insurance or benefits, or worker's compensation.

(a) Consider insurance or other similar payments received as compensation for lost earnings, but do not count payments that compensate for actual medical bills or for property loss or damage. 2017 Michigan Child Support Formula Manual—Chapter 2: Determining Income Page 6 State Court Administrative Office

(b) If retired parent receives payments from an IRA, defined contribution, or deferred compensation plan, income does not include contributions to that account that were previously considered as the parent's income used to calculate an earlier child support obligation for a child in this case.

(4) Military specialty pay, allowance for quarters and rations, housing, veterans' administration benefits, G.I. benefits (other than education allotment), or drill pay. (*empahasis added*).

2017 MCSF(C)(4) clearly directs that Veterans Administration Benefits are to be utilized as income for the purposes of the Michigan Child Support Formula. Plaintiff father cryptically continues to argue that for some administrative purpose, the federal government has determined that Veterans Administration benefits potentially should be apportioned with the result that some or all of the benefit should not be utilized as income when calculating Plaintiff father's child support obligation to Defendant mother.

The Referee finds Plaintiff's argument inapplicable, unsupported, confusing, legally-contorted, and totally unpersuasive of the position Plaintiff father efforts to prove.

The Referee was led to believe that Plaintiff father was to produce the definitive statement of controlling law that would prevent the Eaton County Friend of the Court from utilizing Plaintiff father's Veterans Benefit as income for child support purposes. Despite that assurance, the Referee is left with Plaintiff father's apparent

position that he simply wants to retain the entirety of his veteran's benefit as his sole property, for the sole benefit of himself, as apparently he has done since May 12, 2013.

The Referee finds Plaintiff's argument is based on nothing more than a selfish, self-serving desire to avoid being responsible for and paying any meaningful child support to Defendant mother for the support of the parties' minor child.

Plaintiff has made a rather confusing claim, seemingly suggesting that the state of Michigan cannot enter an order in the absence of an apportionment ruling, made by the Secretary of the Department of Veterans Affairs. The Referee is not aware of any such apportionment ruling in this case, and moreover is not aware of any ruling that is contrary to the enforcement of a child support obligation based on and utilizing Plaintiff's Veteran's benefits. In fact, Plaintiff father presented a letter from the Veterans Administration, dated July 3, 2017, denying a request for apportionment.

Plaintiff father has failed to provide any persuasive argument that disability benefits are exempted from inclusion in Plaintiff's income for the purposes of calculation of his child support obligation.

The Referee believes the bulk of Plaintiff father's brief and the authority cited by Plaintiff father are inapplicable and irrelevant to this proceeding.

Counsel for Defendant claimed that evidence provided to the Referee supports that Plaintiff father willfully concealed over $130,000 in income over a four-year period. The Referee concurs with that statement. Plaintiff provided neither a

reasonable nor excusable explanation for failing to disclose the receipt of that income.

Counsel for Defendant claimed that by signing the Uniform Child Support Order that reduced his income, Plaintiff father attested to the accuracy of the income information upon which that order was based. The Referee concurs with that claim.

Simply but, Plaintiff father has refused to provide an honest statement and disclosure of his income, but rather misrepresented and misled Plaintiff mother and the court about the true amount of his actual income. Plaintiff's claim that he received errant information from Friend of the Court staff was totally unpersuasive.

Plaintiff's credibility was hardly bolstered by his false statements made to the Referee as well as his curious and repeated use of the 5th Amendment to avoid honestly answering questions regarding his veteran's benefits during the Referee Hearing.

Moreover, the Referee finds that Plaintiff father failed to honestly disclose his income for a protracted period of time to the Friend of the Court, which induced and caused the Friend of the Court to rely on his assertions, resulting in an unreasonably inaccurate child support order. Accordingly, the Referee believes pursuant to MCL 552.603(b), Plaintiff father's child support obligation should be retroactively corrected.

Furthermore, based on Plaintiff father's false statements and conduct which has unreasonably protracted these proceedings, the Referee believes Plaintiff is subject to sanctions pursuant to MCR 2.114.

Order

Based on the foregoing, the Referee believes the entry of the following order is appropriate:

IT IS ORDERED:

1. The Veterans disability benefits received by Plaintiff father since May 12, 2013 are includable in his income for purposes of calculating Plaintiff father's child support obligation utilizing the Michigan Child Support Guidelines
2. The calculation of Plaintiff father's child support obligation shall be based on the Veterans disability income received by Plaintiff father retroactive to May 12, 2013. The Referee specifically finds that Plaintiff father intentionally misrepresented and intentionally failed, refused and/or neglected to disclose the true nature of his income since that date. Moreover, the Referee believes Plaintiff father conceded to retroactive application of the correct amount of his income for purposes of the calculation of his child support obligation.
3. The correspondence provided by the Veteran's Administration detailing the amount of Veterans disability benefits received by Plaintiff father shall be used to determine the actual total income received from May 12, 2013 to the present for purposes of calculating Plaintiff father's child support obligation, utilizing the Michigan Child Support Guidelines.
4. The Uniform Child Support Order entered by the court shall include a

determination of the appropriate amount of child support arrearages owed by Plaintiff father, and a schedule to repay the same.

5. To effect the award of sanctions against Plaintiff father pursuant to MCR 2.114, Counsel for Defendant mother shall prepare and submit a statement to Plaintiff and the Friend of the Court stating the amount of hours he has expended representing Defendant mother regarding this child support matter. The Referee shall then issue a separate proposed order regarding MCR 2.114 sanctions under the 21 day rule.
6. Except as specifically modified by this order, the terms and conditions of the prior orders of the court shall remain in full force and effect.

John D. Maurer, Circuit Judge

Drafted and Approved by:

Allen Schlossberg,
Eaton County Family Court Referee

Notice of Submission of Order for Entry

The Parties have twenty-one (21) days to file a written Objection to this Recommended Order with the Clerk of the Court, with a copy of the Objection served to the opposing Party and the Friend of the Court. If neither Party files an Objection with the Court, this Recommended Order shall remain as the Order of the Court pursuant to MCR 3.215(E).

Pursuant to MCR 3.215(E)(5), the party who requests a judicial hearing must draft and serve the Objection and a notice of hearing (after first obtaining a hearing date from the office of the judge assigned to the case) on the opposing party or counsel representing the opposing party in the manner provided in MCR 2.119(C), that provides such items must be served as follows: (a) at least 9 days before the time set for the hearing, if served by mail, or (b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2).

An objecting party must also order the transcripts of the Referee Hearing during the above referenced 21-day time limit. The transcripts of the Referee Hearing may be ordered by contacting Luci Sharp, (517) 543-7500, x1319. The objecting party will need to file a statement with the Objection and notice of hearing stating the date the objecting party actually ordered the transcripts of the Referee Hearing regarding the order that is being objected to.

The objecting party must also file a Proof of Service with the Clerk of the Court stating that a copy of the Objection, notice of hearing, and statement of ordering transcript has been served, and on what date, to the other party and the Friend of the Court.

Pursuant to MCR 3.215(E)(4), the objection must include a clear and concise statement of the specific findings or application of law to which an objection is made. Objections regarding the accuracy or completeness of the recommendation must state with specificity the inaccuracy or omission.

If an Objection is properly and timely filed by either party, the matter shall be heard before the Judge assigned to the case.

CERTIFICATE OF MAILING

I hereby certify that on this date I mailed a copy of the foregoing Referee's Order to the Parties at the addresses as stated above by U.S. mail.

August 29**, 2017** Jenna Harris

Jenna Harris, Office Manager

Plaintiff father's Brief Due: 7/31/17
Defendant mother's Response Brief due: 8/7/17
Referee Order due: 8/28/17
Referee Order completed: 8/28/17
21-day Objection Due 09-19-17

STATE OF MICHIGAN
IN THE 56TH CIRCUIT COURT FOR THE COUNTY OF EATON

DAX E. CARPENTER, Plaintiff.	**BRIEF**
v.	Case No. 08-929-DM
JULIE E. CARPENTER, Defendant.	Hon. John D. Maurer

Joel Mendoza (P69557) Attorney for Plaintiff 7201 W. Saginaw Hwy, 302 Lansing, MI 48908 (517) 862-8023	Lawrence Emery (P23263) Attorney for Defendant 924 Centennial Way, Ste 470 Lansing, MI 48917 (517) 337-4866

PLAINTIFF'S TRIAL BRIEF

1. **45 Code of Federal Regulations § 302.56** provides guidelines for setting child support awards. Pursuant to any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the 2017 MSCF for both setting and modifying child support award amounts is the correct amount to be awarded and shall state the amount of support that would have been required under appropriate and just procedural due process guidelines and include the required justification proof.

2. Mr. Dax Carpenter is a former U.S. Army PFC who served his country honorably for almost three years.

Pursuant to 38 CFR 3.750(a) "Definition of military retired pay.

For the purposes of this part, military retired pay is payment received by a veteran that is classified as retired pay by the Service Department, including retainer pay, based on the recipient's service as a member of the Armed Forces". Mr. Carpenter was unable to serve the required 20 year minimum to qualify for military retired pay. By definition, he did not waive a

portion of military retired pay in order to receive his Department of Veterans Affairs (VA) service-connected disability compensation benefit award. Mr. Carpenter is a 100% disabled veteran since 2013; therefore, as legally defined in the Uniformed Services Former Spouses' Protection Act of 1982 ("USFSPA") at **10 U.S.C. § 1408(a)(4)(B)**, his Title 38 disposable retired pay is $0.00 for compliance with any child support consideration by the State of Michigan. and does show a congressional intent to exempt such benefits from a contentious legal process outside the exclusive jurisdiction of the VA courts as established in the **Veterans' Judicial Review Act of 1988**.

USFSPA does not grant state courts the power to award any of the items deducted from gross retired pay such as VA disability benefits. See ***Mansell v. Mansell* 490 U.S. at 594-95**. Also, **5 CFR 581.103(c)(7**) prohibiting the State of Michigan from garnishing a VA disability compensation benefits award.

3. Barred consent from a VA disability compensation benefits award is further confirmed in ***DD Form 2293, APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY***.

This Form governs an application for direct payment from retired pay of a Uniformed Service member in response to court ordered division of property, Child Support or Alimony as applied under the authority of 10 USC 1408."

"...I hereby acknowledge that any payment from me must be paid from disposable retired pay as defined by the statute and implementing regulations...."

4. **42 U.S.C. § 659(a) & (h)(1)(B)(iii)** bars consent of the United States to income withholding, garnishment, and similar proceedings for enforcement of child support obligations by a State to any of a Service Member's service-connected disability compensation benefit award provisioned by the Secretary of the Department of Veterans Affairs that has not been waived in lieu of retired or retainer pay in order to receive such compensation. *See* 42 U.S.C. § 659(h)(1)(A)(ii)(V) – Attached.

Since Mr. Carpenter has never waived a portion of military retired pay in order to receive his service connected VA disability benefits, his service-connected disability is NOT

based on his earnings records, retired pay or retainer pay – a differentiation that was emphasized and added to the 2017 MCSF §2.01(I). The 2017 MCSF reads as "disposable income"

5. **5 C.F.R. §§ 581.102 & 581.401** as well as **15 U.S.C. §§ 1672 & 1673** establishes that the disposable earnings, when used in reference to the amounts due from, or payable by, the United States or the District of Columbia which are garnishable under the Federal Consumer Credit Protection Act for child support, are the obligor's remuneration for employment.

Mr. Carpenter's VA disability benefits award is not premised upon remuneration for employment, it is not "compensation paid or payable for personal services" and so does not count toward his disposable earnings.

6. **26 U.S.C. § 104(b)(2)(D)** also codifies his VA disability compensation as "**not gross income**".

ROSE V. ROSE, 481 U. S. 619 (1987) - REBUTTAL

7. From the U.S. Supreme Court ruling of ROSE V. ROSE, 481 U. S. 619 (1987), the late Associate Justice Antonin Scalia, concurring in part and concurring in the judgment, writes "I would not reach the question whether the State may enter a support order that conflict with an apportionment ruling made by the Administrator [now Secretary of the Department of Veterans Affairs], or whether the Administrator may make an apportionment ruling that conflicts with a support order entered by the State. Ante, at 627. Those questions are not before us, since the Administrator has made no such ruling." ... "I am not persuaded that if the Administrator makes an apportionment ruling, a state court may enter a conflicting child support order. It would be extraordinary to hold that a federal officer's authorized allocation of federally granted funds between two claimants can be overridden by a state official." Page 481 U.S. 641

8. Justice Scalia continues, "I also disagree with the Court's construction of 38 U.S.C. 211(a), which provides that '[d]ecisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.' The Court finds this [§ 211]

inapplicable because it does not explicitly exclude state-court jurisdiction, as it does federal; ante, at 629." Ibid.

9. Justice Scalia continues, "Had the Administrator granted or denied an application to apportion benefits, state court action providing a contrary disposition would arguably conflict with the language of § 211 making his decisions 'final and conclusive' -- and, if so, would, in his view, be preempted, regardless of the Court's perception that it does not conflict with the 'purposes' of § 211. But there is absolutely no need to pronounce upon that issue here. Because the Administrator can make an apportionment only upon receipt of a claim, Veterans' Administration Manual M21-1, ch. 26, § 26.01 (Aug. 1, 1979), and because no claim for apportionment of the benefits at issue here has ever been filed, the Administrator has made no 'decision' to which finality and conclusiveness can attach." ... "The Court again expresses views on a significant issue that is not presented." Page 642.

10. It is very remarkable here that immediately following the noted *Rose* deficiencies, U.S. Congress passed The **Department of Veterans Affairs Act of 1988** (Pub.L. 100–527) transforming the former Veterans Administration into a Cabinet-level Department of Veterans Affairs. It was signed into law by President Ronald Reagan on October 25, 1988. And as previously mentioned, the previously noted **Veterans' Judicial Review Act of 1988** granted exclusive jurisdiction of the VA Apportionment Claim process within the newly created federal court system and **Title 38 § 211 was amended** to overcome the noted lacking exclusivity language. Congress subsequently codified § 211 as § 511 in 1991 to properly engross "Secretary" language consistent with the new Department of Veterans Affairs Act. **38 U.S. Code § 511 now explicitly excludes state-court jurisdiction.**

11. Most noteworthy, **38 U.S.C. § 511 is the Decisions of the Secretary;** finality and such decisions lie solely with the Secretary of the Department of Veterans Affairs, not the State of Michigan. Section 511(a) was signed into the U.S. Code four years after the Rose decision. Pursuant to the Secretary's authority in **38 U.S.C. §§ 511(a) & 5307** and **38 CFR Sections 3.450-3.458**:

> "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or

the dependents...of veterans...**the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise**." (emphasis added)

12. Another noteworthy shortcoming discussed in the Rose case; "the implementing regulations, which simply authorize apportionment if "the veteran is not reasonably discharging his or her [child support] responsibility…", contain few guidelines for apportionment and no specific procedures for bringing claims. Page 481 U.S. 619. And continuing, "it seems certain that Congress would have been more explicit had it meant the VA's apportionment power to displace state court authority." Pages 619-620

13. Those sparse guidelines were resolved in 1998 when Federal Commissioner for the Office of Child Support Enforcement (OCSE), David Gray Ross, published Information Memorandum IM-98-03, with Congressional oversight, to every state and commonwealth Title IV-D Agency. IM-98-03 is entitled *Financial Support for Children from Benefits Paid by Veterans Affairs* and is a Federal OCSE policy directive that now instructs state OAG - Child Support Division's on how to properly submit a claim for apportionment to the Department of Veterans Affairs for those veterans whose benefits are legally defined, during due process, as "not remuneration for employment".

There are four specific instructions for proper submission of a VA Apportionment claim; VA FORM 21-0788**:** ***INFORMATION REGARDING APPORTIONMENT OF BENEFICIARY'S AWARD***, to be followed are:

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

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

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

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

14. Pursuant to 38 CFR 3.458, Veteran's benefits will not be apportioned: (g) "If there are any children of the veteran not in his or her custody an apportionment will not be authorized unless and until a claim for an apportioned share is filed in their behalf."

15. What's more and from 1997, the VA Office of General Counsel Precedent Opinion, 4-97, holds that a regional office must not consider a state court support order as an apportionment claim. Additional findings of OGC 4-97:

> "11. Pursuant to 38 U.S.C. § 7104(a), the Board has jurisdiction to review [a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary. Section 511(a) authorizes the Secretary to decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. See also 38 C.F.R. § 20.101(a) (Board's jurisdiction extends to review of all decisions 'under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors.). Thus, the Board's appellate jurisdiction is generally coextensive with the Secretary's authority under 38 U.S.C. § 511(a) to render initial decisions."

This further supports that, "*Neither the State nor the Division of Child Support Services has authority to enforce child support on a Veteran's disability compensation....*"

16. Since the 1987 Rose decision, U.S. Congress has actively legislated to preclude both the state and it's officials from overriding Apportionment rulings between family claimants. However, this is now the instant case question presented to the State of Michigan, and this county that must be answered without disregard and contempt of presented post 1987 federal laws, regulations, directives and high court rulings.

17. It must be reiterated here that the Rose v. Rose SCOTUS ruling was based upon the fact that disabled veteran Charlie Wayne Rose was never afforded a proper VA Apportionment claim review. "Those questions are not before us, since the Administrator has made no such ruling." A VA Apportionment Claim ruling was never before the 1987 Court. However, in his

evidence and assertions before the Attorney Referee, Mr. Allen Schlossberg, Mr. Carpenter had not yet properly been afforded his VA Apportionment claim review pursuant to IM-98-03.

18. **38 U.S.C. § 5301** is the *Nonassignability and Exempt Status of Benefits*. Mr. Carpenter's VA service connected disability benefits award is protected by 38 U.S.C. § 5301.

38 U.S.C. § 5301(a) states that: "(1) 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."

19. From the VA Office of General Counsel, Precedent Opinion 2-2002 on the Nonassignability of Benefits – 38 U.S.C. § 5301(a) Citation:

> "4. An ASSIGNMENT is a transfer of property or some other right from one person to another that confers a complete and present right to the assignee in the subject matter of the assignment. 6 Am. Jur. 2d Assignments § 1 (1999)…An assignment is by its nature a voluntary transfer. 6 Am. Jur. 2d Assignments § 2 (1999)."

This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity 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 and include deposits into a joint account from which such other person may make withdrawals, or otherwise, such agreements shall be deemed to be an ASSIGNMENT and IS PROHIBITED."

Section (3)(C) states that any AGREEMENT or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also PROHIBITED and is VOID from its inception." (emphasis added)

20. **31 CFR Part 212 Final Rule June 2013** is the Garnishment of Accounts Containing Federal Benefits. His service connected VA disability compensation benefits award is such a

protected federal benefit. The preamble of the Final Rule directs me to cite, invoke, and assert the protections of 38 U.S.C. § 5301(a):

> …federal payments subject to garnishment by child support enforcement agencies under 42 U.S.C. 659 are limited to payments based on remuneration for employment. This does not include VA payments other than those representing compensation for a service-connected disability paid to a former member of the Armed Forces who is in receipt of retired or retainer pay and who has waived a portion of the retired or retainer pay in order to receive such compensation...

21. **Code Violations.** In addition to previously cited federal civil rights, his current child support calculation must not take into consideration any of his VA award as this would violate numerous potential 18 U.S. Code violations, including Sections 241, 246, 249(a)(2), 371, 641, & 666.

22**.** **Lack of Subject-Matter Jurisdiction Pursuant to 5 C.F.R. § 581.401**.

Mr. Carpenter's true "aggregate disposable earnings" are not to include his VA benefits award, for demonstrated lack of subject-matter jurisdiction by the family court, in both establishment or assignment in any legal process.

> "'We conclude that we lack jurisdiction to afford such relief because Congress, in its discretion, has elected to place judicial review of claims relate to the provision of veterans' benefits beyond our reach and within the exclusive purview of the United States Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit... Without jurisdiction the court cannot proceed at all in any cause." *See*, *Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012)*,

23. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868) ... we conclude that granting VCS its requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system--a system that Congress has actively legislated to preclude. See Walters v. Nat'/ Assn. of Radiation Survivors, 473 U.S. 305, 323-24, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). The Due Process Clause does not demand such a system."

24. ***Anestis v. United States, No. 13-6062, 8 (6th Cir. 2014)***, "In 2012, the Ninth Circuit synthesized the case law and concluded that '[38 U.S.C.] § 511precludes jurisdiction over a claim if it requires the district court to review "VA decisions that relate to benefits decisions," including "any decision made by the Secretary in the course of making benefits determinations."'"

25. ***Rankin v. Howard, No. 78-3216. 633 F.2d 844 (9th Cir.1980)*** "...when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See Bradley v. Fisher, 80 U.S. (13 Wall.) at 351 ('when the want of jurisdiction is known to the judge, no excuse is permissible'); Turner v. Raynes, 611 F.2d 92, 95 (5th Cir.1980) (Stump is consistent with the view that 'a clearly inordinate exercise of unconferred jurisdiction by a judge-one so crass as to establish that he embarked on it either knowingly or recklessly-subjects him to personal liability')."

26. Furthermore, pursuant to 45 CFR 302.56(g), before any determination can be made on Mr. Carpenter's **"refusal"** to pay any child support from his VA benefits award, all the federal laws, regulations, and policy directives as contracted with the Federal Office of Child Support Enforcement should be made in accordance with the Veterans' Judicial Review Act of 1988 on any alleged arrears based upon the child support order(s) following a proper apportionment application submission by the Title IV-D agency. The only jurisdiction for an appeal of the VA Apportionment ruling will be Board of Veterans' Appeal as stated in VA Form 4107c.

Dated: July 31, 2017

Respectfully submitted,

_____

Joel Mendoza
Attorney for Plaintiff
7201 W. Saginaw Hwy, 302
Lansing, MI 48917
(517) 862-8023

State of Michigan

In the Family Court for the County of Eaton

Dax E. Carpenter,

Plaintiff,

v

Julie E. Carpenter,

Defendant.

Proposed Referee's Order and Notice of Submission of Order Pursuant to MCR 3.215(E)

Case No.: 08-929-DM
Hon. John D. Maurer

Joel Mendoza (P69557)
Attorney for Plaintiff
7201 W. Saginaw Highway, 302
Lansing, Michigan 48908

Lawrence Emery (P23263)
Attorney for Defendant
924 Centennial Way. Suite 470
Lansing, Michigan 48917

At a session of said Court held on the 20 day of September, 2017

Present: John D. Maurer, Circuit Court Judge

History of the Matter

On numerous occasions, the Friend of the Court scheduled Show Cause Hearings to enforce the court's child support orders regarding this matter. Plaintiff father, on numerous occasions, did not disclose his disability income as a source of income to the Friend of the Court. Ultimately, when confronted by Counsel for Defendant at one of the Show Cause Hearings, Plaintiff father finally acknowledged he

has been receiving disability income. When questioned by the Referee as to why Plaintiff father failed to disclose the disability income to the Friend of the Court, Plaintiff father stated he was advised by Child Support Enforcement Worker Luci Sharp that disability income was not considered income by the Friend of the Court. Child Support Caseworker Luci Sharp testified before the Referee that she does not recall ever making that statement to Plaintiff father.

After discussing the matter with the parties, the Referee believes the matter had been resolved. The Referee believed that the parties would recalculate Plaintiff father's child support obligation, incorporating his disability income for purposes of utilizing the Michigan Child Support Guidelines.

Thereafter, it became evident that Plaintiff father was still claiming, in some fashion, that his disability income should not be included in his income for purposes of calculating his child support obligation.

Ultimately, the Referee and the parties agreed that each party would draft a brief with the facts and law that supported their respective positions, and the Referee would issue an opinion regarding the matter.

Plaintiff father filed his brief on July 31, 2017. Pursuant to the agreement of the parties, Defendant mother would have seven additional days to file a Response Brief.

On August 7, 2017, Counsel for Defendant mother filed his Response Brief, with the Referee's opinion to be submitted within 21 days, or by August 28, 2017.

Discussion and Analysis

The issue involved in this case is simply whether or not veterans' benefits are

considered income for the purposes of the application and utilization of the Michigan Child Support Formula. Plaintiff father claimed that veteran's benefits are not considered income for the purposes of the Michigan Child Support Formula.

Defendant mother claimed that veteran's benefits are considered income for the purposes of the utilization and application of the Michigan Child Support Formula.

The Referee finds that the answer is quite simple. Veteran's benefits are considered income for the purposes of the utilization and application of the Michigan Child Support Formula.

The Michigan Child Support Formula Manual (2017 MCSF) directs that income shall be defined and determined in Chapter 2 of the manual as follows:

> **2.01(A) The term "net income" means all income minus the deductions and adjustments permitted by this manual. A parent's "net income" used to calculate support will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes.**
>
> **2.01(B) The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support.**
>
> **2.01(C) Income includes, but is not limited to, the following:**
>
> **(1) Wages, overtime pay, commissions, bonuses, or other monies from all employers or as a result of any employment (usually, as reported in the Medicare, wages, and tips section of the parent's W-2).**
> **(2) Earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals. §2.01(E). (a) Income (or losses) from a corporation should be carefully examined to determine the extent to which they were historically passed on to the parent or used merely as a tax strategy.**
> **(3) Distributed profits or payments from profit-sharing, a pension or retirement, an insurance contract, an annuity, trust fund, deferred**

compensation, retirement account, social security, unemployment compensation, supplemental unemployment benefits, disability insurance or benefits, or worker's compensation.

(a) Consider insurance or other similar payments received as compensation for lost earnings, but do not count payments that compensate for actual medical bills or for property loss or damage. 2017 Michigan Child Support Formula Manual—Chapter 2: Determining Income Page 6 State Court Administrative Office

(b) If retired parent receives payments from an IRA, defined contribution, or deferred compensation plan, income does not include contributions to that account that were previously considered as the parent's income used to calculate an earlier child support obligation for a child in this case.

(4) Military specialty pay, allowance for quarters and rations, housing, veterans' administration benefits, G.I. benefits (other than education allotment), or drill pay. (*empahasis added*).

2017 MCSF(C)(4) clearly directs that Veterans Administration Benefits are to be utilized as income for the purposes of the Michigan Child Support Formula. Plaintiff father cryptically continues to argue that for some administrative purpose, the federal government has determined that Veterans Administration benefits potentially should be apportioned with the result that some or all of the benefit should not be utilized as income when calculating Plaintiff father's child support obligation to Defendant mother.

The Referee finds Plaintiff's argument inapplicable, unsupported, confusing, legally-contorted, and totally unpersuasive of the position Plaintiff father efforts to prove.

The Referee was led to believe that Plaintiff father was to produce the definitive statement of controlling law that would prevent the Eaton County Friend of the Court from utilizing Plaintiff father's Veterans Benefit as income for child support purposes. Despite that assurance, the Referee is left with Plaintiff father's apparent

position that he simply wants to retain the entirety of his veteran's benefit as his sole property, for the sole benefit of himself, as apparently he has done since May 12, 2013.

The Referee finds Plaintiff's argument is based on nothing more than a selfish, self-serving desire to avoid being responsible for and paying any meaningful child support to Defendant mother for the support of the parties' minor child.

Plaintiff has made a rather confusing claim, seemingly suggesting that the state of Michigan cannot enter an order in the absence of an apportionment ruling, made by the Secretary of the Department of Veterans Affairs. The Referee is not aware of any such apportionment ruling in this case, and moreover is not aware of any ruling that is contrary to the enforcement of a child support obligation based on and utilizing Plaintiff's Veteran's benefits. In fact, Plaintiff father presented a letter from the Veterans Administration, dated July 3, 2017, denying a request for apportionment.

Plaintiff father has failed to provide any persuasive argument that disability benefits are exempted from inclusion in Plaintiff's income for the purposes of calculation of his child support obligation.

The Referee believes the bulk of Plaintiff father's brief and the authority cited by Plaintiff father are inapplicable and irrelevant to this proceeding.

Counsel for Defendant claimed that evidence provided to the Referee supports that Plaintiff father willfully concealed over $130,000 in income over a four-year period. The Referee concurs with that statement. Plaintiff provided neither a

reasonable nor excusable explanation for failing to disclose the receipt of that income.

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Simply but, Plaintiff father has refused to provide an honest statement and disclosure of his income, but rather misrepresented and misled Plaintiff mother and the court about the true amount of his actual income. Plaintiff's claim that he received errant information from Friend of the Court staff was totally unpersuasive.

Plaintiff's credibility was hardly bolstered by his false statements made to the Referee as well as his curious and repeated use of the 5th Amendment to avoid honestly answering questions regarding his veteran's benefits during the Referee Hearing.

Moreover, the Referee finds that Plaintiff father failed to honestly disclose his income for a protracted period of time to the Friend of the Court, which induced and caused the Friend of the Court to rely on his assertions, resulting in an unreasonably inaccurate child support order. Accordingly, the Referee believes pursuant to MCL 552.603(b), Plaintiff father's child support obligation should be retroactively corrected.

Furthermore, based on Plaintiff father's false statements and conduct which has unreasonably protracted these proceedings, the Referee believes Plaintiff is subject to sanctions pursuant to MCR 2.114.

Order

Based on the foregoing, the Referee believes the entry of the following order is appropriate:

IT IS ORDERED:

1. The Veterans disability benefits received by Plaintiff father since May 12, 2013 are includable in his income for purposes of calculating Plaintiff father's child support obligation utilizing the Michigan Child Support Guidelines
2. The calculation of Plaintiff father's child support obligation shall be based on the Veterans disability income received by Plaintiff father retroactive to May 12, 2013. The Referee specifically finds that Plaintiff father intentionally misrepresented and intentionally failed, refused and/or neglected to disclose the true nature of his income since that date. Moreover, the Referee believes Plaintiff father conceded to retroactive application of the correct amount of his income for purposes of the calculation of his child support obligation.
3. The correspondence provided by the Veteran's Administration detailing the amount of Veterans disability benefits received by Plaintiff father shall be used to determine the actual total income received from May 12, 2013 to the present for purposes of calculating Plaintiff father's child support obligation, utilizing the Michigan Child Support Guidelines.
4. The Uniform Child Support Order entered by the court shall include a

determination of the appropriate amount of child support arrearages owed by Plaintiff father, and a schedule to repay the same.

5. To effect the award of sanctions against Plaintiff father pursuant to MCR 2.114, Counsel for Defendant mother shall prepare and submit a statement to Plaintiff and the Friend of the Court stating the amount of hours he has expended representing Defendant mother regarding this child support matter. The Referee shall then issue a separate proposed order regarding MCR 2.114 sanctions under the 21 day rule.
6. Except as specifically modified by this order, the terms and conditions of the prior orders of the court shall remain in full force and effect.

John D. Maurer, Circuit Judge

Drafted and Approved by:

Allen Schlossberg,
Eaton County Family Court Referee

Notice of Submission of Order for Entry

The Parties have twenty-one (21) days to file a written Objection to this Recommended Order with the Clerk of the Court, with a copy of the Objection served to the opposing Party and the Friend of the Court. If neither Party files an Objection with the Court, this Recommended Order shall remain as the Order of the Court pursuant to MCR 3.215(E).

Pursuant to MCR 3.215(E)(5), the party who requests a judicial hearing must draft and serve the Objection and a notice of hearing (after first obtaining a hearing date from the office of the judge assigned to the case) on the opposing party or counsel representing the opposing party in the manner provided in MCR 2.119(C), that provides such items must be served as follows: (a) at least 9 days before the time set for the hearing, if served by mail, or (b) at least 7 days before the time set for the hearing, if served by delivery under MCR 2.107(C)(1) or (2).

An objecting party must also order the transcripts of the Referee Hearing during the above referenced 21-day time limit. The transcripts of the Referee Hearing may be ordered by contacting Luci Sharp, (517) 543-7500, x1319. The objecting party will need to file a statement with the Objection and notice of hearing stating the date the objecting party actually ordered the transcripts of the Referee Hearing regarding the order that is being objected to.

The objecting party must also file a Proof of Service with the Clerk of the Court stating that a copy of the Objection, notice of hearing, and statement of ordering transcript has been served, and on what date, to the other party and the Friend of the Court.

Pursuant to MCR 3.215(E)(4), the objection must include a clear and concise statement of the specific findings or application of law to which an objection is made. Objections regarding the accuracy or completeness of the recommendation must state with specificity the inaccuracy or omission.

If an Objection is properly and timely filed by either party, the matter shall be heard before the Judge assigned to the case.

CERTIFICATE OF MAILING

I hereby certify that on this date I mailed a copy of the foregoing Referee's Order to the Parties at the addresses as stated above by U.S. mail.

August 29**, 2017** Jenna Harris

Jenna Harris, Office Manager

Plaintiff father's Brief Due: 7/31/17
Defendant mother's Response Brief due: 8/7/17
Referee Order due: 8/28/17
Referee Order completed: 8/28/17
21-day Objection Due 09-19-17

STATE OF MICHIGAN

56TH CIRCUIT COURT (EATON COUNTY)

DAX CARPENTER,

Plaintiff,

v File #08-929-DM

JULIE CARPENTER,

Defendant./

MOTION TO SET ASIDE ORDER

BEFORE THE HONORABLE JOHN D. MAURER, CIRCUIT JUDGE

Charlotte, Michigan - Wednesday, February 28, 2018

APPEARANCES:

For the Plaintiff:	JOEL MENDOZA (P69557) 5208 West Saginaw Highway, Suite 80111 Lansing, Michigan 48908 (517) 862-8023
For the Defendant:	LAWRENCE J. EMERY (P23263) 924 Centennial Way, Suite 470 Lansing, Michigan 48917 (517) 337-4866
Also present:	STEPHAN E. HOLLAND (P60956) Appearing on behalf of Friend of the Court
Recorded and transcribed by:	Kathy Bond, CER/CSR-2779 Certified Electronic Recorder Certified Shorthand Reporter (517) 543-4327

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EXHIBITS:

None

Charlotte, Michigan

Wednesday, February 28, 2017 - At 8:37 a.m.

THE COURT: This is case number 08-929, Carpenter versus Carpenter.

We have Mr. Mendoza here for the plaintiff. Mr. Emery here for the defendant.

And this is the time set for a motion filed by plaintiff, a motion to set aside order.

Mr. Mendoza, it's your motion.

MR. MENDOZA: Yes, Your Honor. Good morning, Your Honor.

THE COURT: Good morning.

MR. MENDOZA: Your Honor, we -- we submitted that motion because the plaintiff is being penalized for the fact that he did not have the funds to pay for the transcript in advance of -- of putting in his objection. They have been requested. The motion was timely. Just the money -- getting the money together for the transcript took about another 11 days. And by that time, he already --

THE COURT: Mr. Mendoza, what -- what calculations are inaccurate? What are they? 'Cause his objections, this one-pager here --

MR. MENDOZA: Yes, Your Honor.

THE COURT: -- and it says:

"Friend of the Court calculations are are inaccurate

and incorrect as to the amounts received by plaintiff-father."

MR. MENDOZA: Yes, Your Honor.

THE COURT: What -- what is that?

MR. MENDOZA: Well, we have a question of law as far as whether Eaton County can take my plaintiff's VA benefits into consideration for child support, Your Honor.

THE COURT: Well, according to this 201(C) -- and it's on page four of Mr. Schlossberg's order -- it says:

"Military specialty pay, allowance for quarters..." "...veterans' administration benefits."

And that's, basically, what this is. Doesn't that cover that?

MR. MENDOZA: Yes, Your Honor. The only thing that -- that the Friend of the Court fails to realize is, under 201 -- 2.01(I), which kind of -- it -- it expounds on what veterans' benefits can be applied, and they are misreading that section.

There are two types of veterans' benefits. There's the veterans' benefits that me, being a service member and being eligible for retirement pay -- okay -- get injured while on duty -- so, I can waive my retirement pay and receive VA benefits in lieu of retirement ben --

THE COURT: So, it would be like workers' comp; right?

MR. MENDOZA: Right. And --

THE COURT: But, workers' comp is covered under this, and it's included as income.

MR. MENDOZA: Right. But, the military pay, Your Honor, that's the earnings -- that's the veteran's benefits based on the earning records of the service member.

THE COURT: But -- but if your -- your client's receiving benefits 'cause he served his country --

MR. MENDOZA: Right.

THE COURT: -- and he received some type of injury.

MR. MENDOZA: Right.

THE COURT: And because of this injury, he's not able to work and have the income that he would normally have.

MR. MENDOZA: Right.

THE COURT: So, we, as a society, said that we're going to -- because he -- he did something very honorable and he served his country, he gets this money; correct?

MR. MENDOZA: Right.

THE COURT: But, then, isn't that in lieu of income he could've earned, so it should count as child support?

MR. MENDOZA: No, Your Honor, that -- that's incorrect because --

THE COURT: So, where does the law specifically says (sic) it doesn't count as income? Because it's --

MR. MENDOZA: Well --

THE COURT: -- nowhere in your brief.

MR. MENDOZA: -- that is -- we were -- I hadn't sub -- submitted the brief or -- or, the brief to -- to Friend of the Court you're -- you're saying, Your Honor?

THE COURT: Right.

MR. MENDOZA: Yeah, I kept pointing to -- to I and the -- the statutory -- the preemptions from --

THE COURT: But, it's not in your motion. There's -- there's -- it -- there's -- you didn't put the law into your motion to set aside it. And I don't really know military law, Mr. Mendoza.

MR. MENDOZA: That's fine, Your Honor.

THE COURT: They wouldn't --

MR. MENDOZA: It's just --

THE COURT: -- take me.

MR. MENDOZA: -- I was taking it one step at a time. I was taking the fact that it was put in front of you before he had a -- he had a proper chance to object and file his objection. So, that's why it -- it's a -- it's an objection to -- to entering the order.

THE COURT: But, then you stipulated to an order with Mr. Emery later, saying the order can take place.

MR. MENDOZA: No, Your Honor. That -- that wasn't up till after our hearing to -- as to what were you going to decide on whether we were gonna get in front of you to argue the -- the point, or you were going to leave the default in

place, so.

THE COURT: In order to set aside the default, you have to do -- and I'm going back to my civil days, way back to Jay Bergamini. You have to have good cause and a meritorious defense.

MR. MENDOZA: Yes, Your Honor.

THE COURT: But, there's nothing in this motion that I would consider a meritorious defense because you haven't outlined it. If -- if you have -- if you can show that his income is somehow exempt from Friend of the Court, then you'd have a winning argument here, but you haven't shown that.

MR. MENDOZA: Your Honor, it's because Friend of the Court does not want to -- doesn't want to read the -- 'cause we -- we brief it, Your Honor. It's in -- it's in the court record. They just don't want to read 2.0(I) (sic) and differentiate from the two incomes that military -- that -- that disabled veterans receive. They -- they choose not to.

And this jurisdiction isn't the only one. I mean, it -- it's -- it is a wide-spread, kind of, interpretation that we are fighting. And we're fighting on -- on all levels.

THE COURT: The only -- the only exemption I've ever seen from child support would be an award for pain and suffering. And I just can't imagine the federal government ever giving our soldiers pain and suffering. Not that they don't have pain and suffering, but the country would go broke.

And I just don't see that as a -- I -- I just don't see how they would not exclude that, and -- and you haven't shown it.

And, Mr. Mendoza, if you could -- if -- if you could show the case law, I'd be more than happy to look at it, but you haven't shown that here today.

MR. MENDOZA: Well, we go -- we fall under the preemption statutes for the federal government over the state statutes. And -- and Congress has -- has protected the veterans' benefits that are received not in lieu of retirement but for the disability, strictly for the disability, 100 percent.

THE COURT: Well, where's that in your motion? None of this is in the motion.

MR. MENDOZA: It's all in the -- in the brief that I submitted to Friend of the Court, Your Honor. It's all in there.

THE COURT: Well, I read the file, and I didn't see it. So, maybe I'll have to reread it.

Mr. Holland, did you see anything in there regarding that?

MR. HOLLAND: I didn't review the file. And I think this hearing was initially before Mr. Schlossberg.

MR. MENDOZA: Mr. Schlossberg.

THE COURT: Come on up. We can't hear you. Sorry, Stephen.

MR. HOLLAND: I didn't review the file. I think the referee hearing was before Mr. Schlossberg. So, I don't know if the brief was tendered at that time or -- so. And Mr. Schlossberg will be here this morning. He's running a little late but --

THE COURT: That's fine. That's fine. I'm gonna give Mr. Emery a chance here in a minute.

MR. HOLLAND: Okay.

THE COURT: Anything else, Mr. Mendoza?

MR. MENDOZA: No, Your Honor.

THE COURT: All right, thank you.

Mr. Emery, what say you?

MR. EMERY: Can I address you from here, Your Honor?

THE COURT: Wherever you're most comfortable.

MR. EMERY: First of all, Your Honor, I apologize for my client not being here. She --

THE COURT: I'm fine with that.

MR. EMERY: Okay. Judge, now I hear something entirely different than what I thought we were here for today. We did have a chance to fully brief and present case law, statutes, all of which Mr. Schlossberg rejected, and properly so, because I will tell you there is a United States Supreme Court decision, Rose versus Rose. It was decided in 1987. Opinion by Justice Marshall that specifically held that veterans' disability benefits not only are susceptible to child

support, but that federal law that requires states to have child support guidelines require its inclusion.

So, we don't just have, well, can ya or can't ya, we also have federal statutes that create those guidelines that specifically say that they are included, are required to be included.

We argued all this before Judge Schlossberg -- Referee Schlossberg, and he made his decision fully aware of all that.

There is no merit to the claim that these benefits are not susceptible to child support calculations, are not income for purposes of the child support guidelines in Michigan or any other state.

So, it's not an arguable point. And that's what Mr. Schlossberg said. And not only that, he sanctioned the plaintiff for trying to make such a spacious argument.

So, now, I thought we were here today because I, allegedly, obtained benefit calculations -- or, excuse me, benefits records that show how much the plaintiff had received over the last four years, all of which was unknown to anyone including the Friend of the Court because he didn't disclose it. I obtained those from general counsel's office, the VA general counsel, pursuant to a very specific statute that allows those benefit amounts to be released. That's why I thought we were here today. That's the only thing I found in

-- in my copy of the objection.

The objection to the Friend of the Court was reading from was never filed with this Court, as far as I know. It might've been attached to this motion, but it wasn't filed in a timely fashion.

So, first of all, the initial question is can this Court even decide this issue, because there was failure of default by the plaintiff in preserving any of these issues for this Court to review pursuant to a very specific court rule, MCR 2 point -- or, 3.215, that outlines the procedure for the referee making a determination and referring it to this Court on recommendation and order.

These objections were never filed. I've looked through the court file several times. There are no objections filed prior to the date of the entry of this order, the order we're talking about today. So, there's a procedural default here, in addition to the fact that there is no merit to the objection that I know about or to the objection that we're now hearing about today. Those were all fully vetted.

Due process was provided to this plaintiff. We're just here to delay this matter further. We're talking about retroactive support back to May 1st, 2013 that should be payable. We're talking about tens of thousands of dollars this man owes because he concealed his income, reportable income, from the Friend of the Court and from this Court, because every

time he went to a show cause, he was even arrear -- in arrears on the very low order that he obtained from this Court without disclosing these things. And every time that you issued a show cause order, you said, "You must disclose your sources of income." He ignored that order each time, time after time after time.

So, the Friend of the Court, pursuant to the prior order of the Court and pursuant to the findings made at the referee hearing, ordered retroactive support.

We're here because we're trying to delay the execution of this order. This order needs to be executed now.

A hundred and thirty thousand dollars worth of veterans' benefits. And if you look at the calculation of veterans' benefits, they're based on the fact that he has two dependents, these two children. The amount of benefits is based on that. And yet, he still didn't pay anything to the support of these children other than the $168 a month that he chicanered (sic) the Friend of the Court and I into reducing.

THE COURT: Mr. Emery, isn't the order that was signed by the Court on the 30th or oc -- October 30th, 2017 in place? So, the higher support's not in place right now?

MR. EMERY: The order of -- there was an order entered on September 20th.

THE COURT: Child Support Order/Recommendation Modification, that -- that has not taken place?

MR. EMERY: It -- it has now been -- we -- we've -- we have stipulated that it should enter.

THE COURT: Okay.

MR. EMERY: Mr. Mendoza did. We all signed it. You signed it on January 23rd.

THE COURT: January 23rd.

MR. EMERY: This year.

THE COURT: Okay.

MR. EMERY: But, we had a provision in there that it was subject to this hearing, and I thought that was proper because it hadn't been resolved.

THE COURT: So, that's what that portion --

MR. EMERY: That's right.

THE COURT: -- of that meant. All right. Well, thank you, Mr. Emery.

MR. EMERY: Thank you.

THE COURT: Mr. Mendoza, it's your motion. I'll give you the last word.

MR. MENDOZA: Yes, Your Honor.

THE COURT: What about this Rose case?

MR. MENDOZA: Your Honor, that --

THE COURT: I've never -- I know Mr. Emery. I've tangled with him when I was a lawyer --

MR. MENDOZA: Yeah, I know.

THE COURT: -- and I've never known him not to cite a

case correctly.

MR. MENDOZA: I know. That -- that state is -- that case is 30 years old and has been super -- superceded by Howell, that was entered -- that was decided, Your Honor, in 2017.

THE COURT: Who wrote that opinion; do you know?

MR. MENDOZA: (No verbal response).

THE COURT: What's the -- give us a case number, so my law clerk --

MR. MENDOZA: Sure, case number -- Howell v Howell, 137 Supreme Court 1400, or 1-4-0-0, 2017.

THE COURT: And is it true that your client, basically, got higher benefits because he had the two kids?

MR. MENDOZA: Your Honor, he gave that money. He -- it's -- the defendant's counsel is -- is making it seem that he received all this money. What VA does is it apportions an amount, which was $192, to the children, and that money had been given on a monthly basis.

THE COURT: That's not the right cite.

MR. MENDOZA: Oh, it's not the right cite?

MR. EMERY: In addition, Your Honor, even if the Supreme Court had reversed Rose, it's not retroactive unless he can show retroactivity.

He says this opinion occurred in 2017. I'm sorry, he talked about --

THE COURT: I thought he said two-oh-seven.

MR. MENDOZA: It's 2017.

THE COURT: Oh.

MR. EMERY: We're talking about support that's ended back to 2013.

And the -- this was never cited, Judge. I had no opportunity to review this case.

MR. MENDOZA: It was cited in -- in our -- in our brief to -- to Friend of the Court. It's in there. It just -- it was pending at the time; now it's been decided.

THE COURT: Do you have the cite on Rose?

MR. EMERY: Yes, I do, Your Honor. I think -- I don't know if Mr. Schlossberg put it in there, but I have it.

Find my brief?

THE COURT: I didn't see it in -- in the -- the brief that you filed, your -- your Brief in Support of Her Answer of Motion.

MR. EMERY: No, because I didn't think that was an issue today.

Rose versus Rose, 481 US 619.

LAW CLERK: (Inaudible).

THE COURT: Pardon?

LAW CLERK: It's still good law.

THE COURT: Okay, Rose hasn't been reversed.

All right, thank you, Mr. Mendoza.

MR. MENDOZA: Yes, Your Honor.

THE COURT: All right. Mr. Mendoza, I'm gonna deny your motion. I -- I -- Mr. Emery's brief -- I'm gonna incorporate his brief in my ruling. I think his brief was accurate. In addition to that, I'm going to -- and if -- and you have -- if -- if you believe I'm wrong, that's why we have a Court of Appeals.

MR. MENDOZA: Yes, Your Honor.

THE COURT: I -- I'm -- I'm not trying to be mean or vindictive here.

MR. MENDOZA: No, Your Honor.

THE COURT: But, it -- it looks here that veterans' administration benefits are income. And when I went to New Judges School, Judge Tahvonen said, "Income is income, and all income has to be included."

So, I'm going to deny your motion.

If -- if -- Judge Deming, who's one of my three founding fathers up here on the wall, always indicated that facts win cases and case law wins cases. And -- but I don't believe in -- he never believed in technicalities taking someone's right away from having justice.

And so, I'm not ruling because you filed your objection late. I'm ruling because there's no case law that I've seen that supports your position.

And if this Howell case actually overrules Row (sic)

and it says -- and -- and if Congress has indicated that this income does not have to be calculated for child support, then the Friend of the -- or, I'm sorry, then the Court of Appeals can reverse me, and then all the judges in Michigan can know that there's a new case in the land.

But, as I read the case law right now, Rose -- and -- and I -- I've known Mr. Emery for many years. And I trust you, also, Mr. Mendoza. Don't get me wrong. But I have found -- and I'm not trying to give Mr. Emery a big head here, but I found his research to be on par with my former law partner, Sheila Deming. And -- and they -- they have it. And I've read his brief.

Also, Mr. Schlossberg's order, I believe, calculates, it also that income is income.

And if your client made a mistake and didn't realize this was income, well, he still has to pay retroactively because it was. And it's kinda like when you pay your -- you don't realize you have income with the IRS and they come back three years later. They don't want to hear it. They want their money.

And this is a case where I have to look out for the -- I believe it's Christopher and Nicholas. I have to look out for the best interest of the children. And the best interest of the children is that they need the child support because that's what our legislature has ruled.

So, for these reasons, I'm gonna deny your -- your motion to set aside the default order. I don't believe that a meritorious defense or a -- a reason has -- has been litigated to show that it should be set aside. I -- and even if the objection was timely, I would deny the objection because I find that it -- it's not with merit because the law, as -- as I see it, is pretty clear that income is income, and disability benefits are part of the income. So, that's the order of this Court.

Mr. Emery, would you prepare the order?

MR. EMERY: Judge, I had prepared an order, but I also requested sanctions in this case and would ask the Court to rule on that.

THE COURT: What have you requested?

MR. EMERY: I'm sorry?

THE COURT: What -- what amount in sanctions?

MR. EMERY: I -- I've -- I've requested an opportunity to present a statement to the Court, give Mr. Mendoza a chance to object to it, and then have the Court determine that based on --

THE COURT: That can be -- be included in the order. And if it can't be agreed upon, I'll hear it.

MR. EMERY: Then, I'll present this order.

THE COURT: Here.

MR. EMERY: I also --

THE COURT: Has Mr. Mendoza seen this order?

MR. EMERY: No. I will present it to him right now, Judge.

THE COURT: Okay.

MR. EMERY: But, I did also include in this order -- when we had the order of January 23rd, 2018, we put provisions in there that it would be subject to a decision on this issue. So, I included in this order an order that that become now fully effective, that those child support calculations in the order of January 23rd also now become fully effective, since you have resolved that issue.

THE COURT: That is my intent for that to happen, yes.

MR. EMERY: So, I would present a copy of this order to Mr. Mendoza and submit it to the Court, so we can enter it as soon as possible.

THE COURT: Mr. Mendoza, I know you don't like my ruling and don't agree with my ruling, and I understand that, but does the order comport with my ruling is my question to you, sir.

MR. MENDOZA: This order that's been handed to me, Your Honor?

THE COURT: Yes, sir. Do you have any objections as to this order based on my ruling? And I'll read it, also.

MR. MENDOZA: Except for the sanctions, Your Honor.

I don't agree with -- with the -- the sanctions portion of this order.

THE COURT: Well, what's gonna happen is -- is Mr. Emery's gonna present you with a bill. And if your client disagrees with it, specifically outline what he disagrees with and send it back to Mr. Emery. If you can come up with an agreement, then that will be the end of it.

MR. EMERY: And if we can't, Judge, I have the burden of coming back before the Court to have an argument on that.

THE COURT: That's correct. I'll -- I understand your objection as this is calculated. But, Mr. Mendoza, you can object to the -- you can object to the attorney fees as not being reasonable, not being proper, not being accurate, and I'll have a hearing as to that. And there might be additional sanctions at that time if your objection's without merit. There may be -- there may be additional sanctions against Mr. Emery if I find that his billing is unreasonable. But, there will be sanctions on this because, as I see it, the law was clear.

So, for those reasons, I'm gonna sign this order over your objection. And if I see you back here, it's always great to see you, but I'll -- I'll make the decision. And if it's not agreeable to you, well, we'll go from there.

So, Mr. Emery, would you be so kind as to take the file to the Clerk's Office?

MR. EMERY: I -- I will, Your Honor.

THE COURT: Thank you, both.

MR. EMERY: Thank you, Judge.

THE COURT: That's all for the record.

(At 9:00 a.m., proceedings concluded)

- - -

CERTIFICATION OF COURT RECORDER

STATE OF MICHIGAN)

COUNTY OF EATON)

I certify that this transcript consisting of 22 pages, is a complete, true and accurate transcript, to the best of my ability, of the proceedings and testimony taken in this case on Wednesday, February 28, 2018.

Dated: March 7, 2018

/S/

Kathy Bond, CSR/CER-2779
56th Circuit Court
1045 Independence Blvd.
Charlotte, Michigan 48813
(517) 543-4327

STATE OF MICHIGAN

IN THE SUPREME COURT

DAX ELLIOT CARPENTER,

Plaintiff / Petitioner,

vs.

JULIE ELIZABETH CARPENTER,

Defendant / Respondent.

MSC Docket No. 161111
COA Docket No. 344512
Circuit Court No. 08-929-DM

MOTION FOR RECONSIDERATION

*****FILED UNDER AO 2019-6*****

CARSON J. TUCKER (P62209) LEX FORI, PLLC FOR APPELLANT / PETITIONER 117 N. FIRST ST., SUITE 111 ANN ARBOR, MI 48104-1354 (734) 887-9261 cjtucker@lexfori.org	LAWRENCE J. EMERY (P23263) LAWRENCE J. EMERY, P.C. FOR APPELLEE / RESPONDENT 924 CENTENNIAL WAY, SUITE 470 LANSING, MI 48917 (517) 337-4866 ljemery@prodigy.net

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MOTION FOR RECONSIDERATION

Pursuant to Michigan Court Rule (MCR) 7.311(G), Petitioner seeks reconsideration of the September 9, 2020 order of the court denying leave to appeal in the case of *Carpenter v Carpenter*, unpublished opinion per curiam of the Court of Appeals, issued January 30, 2020 (Docket No. 344512)).

> I [] disagree with the Court's construction of 38 U.S.C. § 211(a), which provides that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents…shall be final and conclusive and no other official or any court of the United States *shall have power or jurisdiction to review any such decision*." The Court finds this inapplicable because it does not *explicitly exclude state-court jurisdiction*, *as it does federal*…and because its underlying purpose of "achiev[ing] uniformity in the administration of veterans' benefits and protect[ing] the Administrator from expensive and time-consuming litigation…would not be impaired. *Rose v Rose*, 481 US 619, 641-642; 107 S Ct 2029; 95 L Ed 2d 599 (1987) (emphasis added).

So stated Justice Scalia, speaking to the applicability of 38 USC § 211 as applied to a state court order forcing a disabled veteran to dispossess himself of his veterans' disability pay in order to pay a child support order. Congress responded and changed 38 USC § 211 just after *Rose* to do exactly what Justice Scalia referred to, i.e., *explicitly exclude state court jurisdiction* altogether. See 38 USC § 511(a) (in 1988 in direct response to *Rose*, reference in § 211(a) to courts "of the United States" was removed and replaced with a separate sentence that excludes review of benefits determinations as to "*any other official or by any court*"). Moreover, the first sentence was changed to make it clear that

the Secretary primarily "*shall decide* all questions of law and fact", as opposed to the prior language which merely provided that the "decisions of the Administrator" would be deemed final and conclusive as to courts of the United States. These were fundamental changes in the law that removed any doubt about the primacy and exclusivity of jurisdiction over all claims for veterans' benefits by both veterans and their dependents.

Prior to 1988, federal law did not give the Secretary initial (and therefore *primary*) jurisdiction to "decide all questions of law or fact" regarding veterans' benefits, and it limited the jurisdiction of the Veterans Administration over claims to such benefits to *federal* courts – "court[s] of the *United States*". See 38 USC § 211(a) (1970) (emphasis added). Placing the primary and initial decision over *all* questions of *law and fact* concerning the division of benefits to veterans *and* dependents within the exclusive jurisdiction of the executive agency created for that purpose and creating an internal and wholly "federal" court system for review of that agency's decisions, with a linear appellate track straight to the Supreme Court, was a change in the law designed to remove any doubts and uncertainties created by having multiple concurrent jurisdictional decision-making authorities and

therefore multiple states addressing the diverse considerations necessary when considering a disabled veteran's needs for his or her own benefits and, consequently, any potential needs of his or her dependents. See, e.g., *Henderson v Shinseki*, 562 US 428, 441; 131 S Ct 1197; 179 L Ed 2d 159 (2011). As explained by one court, "[i]n order to dissuade the judiciary from ignoring 'the explicit language that Congress used in isolating decisions of the Administrator from judicial scrutiny,'…Congress overhauled both the internal review mechanism and § 211 in the [Veterans Judicial Review Act] VJRA. Pub. L. No. 100-687, 102 Stat. 4105." *Veterans for Common Sense v Shinseki*, 678 F 3d 1013, 1021 (9th Cir 2012), cert denied 568 US 1086 (2013).

Congress has explicitly excluded other courts from second guessing individual benefits determinations and adjudications – these types of decisions have been deemed by Congress to be without the jurisdiction of the courts and within the exclusive jurisdiction and final adjudicative authority of the VA. *Veterans for Common Sense*, *supra*. Section 511 dictates that the Board of Veterans' Appeals and the VA makes the ultimate decision on claims for benefits and provides one, and only one, reviewing body. *Moore v Peake*, 2008 US App Vet Claims LEXIS 1640 (2008).

Not only did Congress remove any doubt that state courts could not intervene with the veteran's disability benefits absent a decision by the agency with exclusive jurisdiction over such claims, but it also created an Article I Court (the United States Court of Appeals for Veterans Claims) to exclusively review such decisions. See 38 USC §§ 7251 and 7261, respectively. See Public Law 100-687, November 18, 1988, 38 USC § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.").

Finally, since *Rose*, *supra*, the Supreme Court of the United States has confirmed what Justice Scalia and Justice White surmised in their separate statements in that case, to wit, 38 USC § 5301 does in fact apply to prohibit state court orders that force a veteran to use his or her disability benefits to satisfy a state court order, even one that merely makes the veteran pay a sum of money that will necessarily implicate the restricted benefits. See *Rose*, 481 US at 642-644 (SCALIA, J., concurring), 644-647 (WHITE, J., dissenting). In *Howell v Howell*, 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017), the Court addressed this concern directly and held that all such orders are preempted and that under 38 USC § 5301 state courts have *no authority* to vest these

benefits in anyone other than the beneficiary. "Regardless of their form, such reimbursement and indemnification orders *displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress*. *All such orders are thus preempted*." *Id.* at 1406 (emphasis added). The Court reiterated that under preexisting federal law, only Congress could lift the absolute preemption and give the state permission to count a veteran's disability as disposable income. *Id*. at 1404.

Indeed, *Howell* acknowledged that in some circumstances involving disability pay that is received in lieu of waived retired pay the state may allow division for purposes of support of dependents, see 137 S Ct at 1406 (citing *Rose*) and 42 USC § 659(a), (h)(1)(A)(ii)(V) (authorizing the federal government to honor state court orders when there is "income" being paid in the form of military disability retired pay (a portion of retired pay owed to the veteran is replaced with "partial" disability pay). But see 42 USC § 659(h)(1)(B)(iii) (excluding from this federal allowance all regular disability pay paid to disabled veterans with service-connected disability exceeding the retirement allowance and/or with service-connected disabilities incurred prior to eligibility for retirement). State courts may exercise jurisdiction and

authority over veteran's disability pay to satisfy a child support or spousal support award, *but only up to the amount of his or her waived retired pay*. 42 USC § 659(a), (h)(1)(A)(ii)(V), (B)(iii); 5 CFR § 581.103 (2018). See also *In re Marriage of Cassinelli (On Remand)*, 20 Cal App 5th 1267, 1277; 229 Cal Rptr 3d 801 (2018) (on remand from the United States Supreme Court for consideration of *Howell*).

Howell reaffirmed that all other disability benefits are protected *unless* Congress has made an exception. *Id*. at 1404-1406. Here, there is no exception and thus, Petitioner's benefits are protected by the affirmative and sweeping prohibitions from "*any* legal or equitable process *whatever*, either before or after receipt" found in 38 USC § 5301(a)(1).

No such federal permission exists in this case because Petitioner is a permanently and totally disabled veteran who never attained time in service sufficient to even be eligible for benefits that *might* be available as a disposable asset subject to state court support orders.

This Court has recently confirmed the overarching principles in *Howell*. State courts have always been preempted in this subject matter unless federal law allows exercise of jurisdiction and authority over the

federal benefits at issue. *Foster v Foster*, ___ Mich ___; ___ NW2d ___ (April 29, 2020), Slip Opinion (Op) at 11-18. Moreover, the Court applied 38 USC § 5301, recognizing that it jurisdictionally prohibited the veteran from dispossessing himself of the benefits at issue and it also prohibited state courts from entering orders that would force the veteran to use these benefits to pay orders in contravention of federal law. *Id.* at 2-3, 19 (overruling *Megee v Carmine*, 290 Mich App 551, 574-575; 802 NW2d 669 (2010)).

Petitioner has presented the Court with the facts demonstrating that there is a fundamental jurisdictional defect in the exercise by the state over the disposition of his federal veterans' disability benefits. As this Court has recognized where another governmental agency has primary (and in this case exclusive *federal*) jurisdiction over a claim or issue, the state courts lack subject matter jurisdiction to enter any rulings that would contravene the disposition of that claim by the agency which retains such jurisdiction. *Travelers v Detroit Edison*, 465 Mich 185, 204; 631 NW2d 733 (2001) (citing *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992) and stating "[a] court either has, or does not have, subject-matter jurisdiction over a particular case."). State courts are precluded "from inquiring into and adjudicating" claims and issues that

reside solely and exclusively within the federal agency designated for that purpose. *Id*. at 194. As the United States Supreme Court has recognized, the doctrine of primary jurisdiction applies to federal agencies that have been tasked with exercising the full scope of Congress's enumerated powers under the Constitution. *Id*.

As jurisdictional defects may be raised at any time, even collaterally or after the time for appeal has passed, and a court must always, sua sponte, question its own authority and jurisdiction over a particular matter, see *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (emphasis added), citing *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965), Petitioner respectfully submits that here, as the Court of Appeals' opinion contravened the primary and exclusive jurisdiction of a federal agency designated by Congress as the sole arbiter of claims for veterans' benefits, reconsideration is warranted. The Court of Appeals' opinion cannot stand, regardless of the time that has passed or the multitude of actions that have been taken against Petitioner in his quest to correct the grave errors of law that have occurred and that have severely prejudiced his constitutional rights.

When a court exceeds it jurisdiction or authority it acts without jurisdiction over the subject matter and those acts are simply void *ab initio*. As Justice Potter of this Court explained long ago, drawing on the decisions of the United States Supreme Court concerning same:

> Jurisdiction, in its fullest sense, is not restricted to the subject-matter and the parties. If the court *lacks jurisdiction to render*, or *exceeds its jurisdiction in rendering*, the *particular judgment in the particular case*, such judgment is subject to collateral attack, *even though the court had jurisdiction of the parties and of the subject-matter*. The supreme court of the United States, the ultimate authority, has so ruled in *Windsor v McVeigh*, 93 US 274; *Ex Parte Rowland*, 104 US 604; *Ex Parte Lange*, 18 Wall (85 US) 163.
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> *Driver v Union Indus Trust & Savings Bank*, 264 Mich 42, 50-51; 249 NW 459 (1933) (POTTER, J.) (emphasis added) (some internal citations omitted).

Later cases in Michigan adhere to this three-pronged query concerning the exercise of proper jurisdiction and authority. See, e.g., *Straus*, 459 Mich at 532; *Fox*, 375 Mich at 242. See also *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992).

A state court that "transcend[s] the limits of its authority" in rendering a judgment issues a void decree. *Windsor v McVeigh*, 93 US 274, 282; 23 L Ed 914 (1876). Such a decree can neither be consented to (as the federal statute expressly provides here in the form of 38 USC

§ 5301(a)(3)), nor can it serve as the basis for a subsequent finding of contempt or other penalty. *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939); *Bowie*, 441 Mich at 57. See also Cooley, Constitutional Limitations (7th Ed) (1903), pp 575-576, stating:

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

There is no question that the state has exceeded its jurisdiction and authority in this case. See 38 USC § 511(a). The Court of Appeals'

conclusion that Petitioner is jurisdictionally and substantively precluded from challenging the state's power in this case is jurisdictional error and can neither be waived or surrendered. Not one jot or tittle of state sovereignty remains to divert or otherwise decide the use of Petitioner's benefits. They are also protected by affirmative and positive federal legislation. 38 USC § 5301(a)(1). See also *United States v Hall*, 98 US 343, 349-355; 25 L Ed 180 (1878). The Court, in 1878, stated of canvassing the anti-attachment provisions in veterans' benefit legislation that "[t]hese diverse selections from the almost innumerable list of acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted *the exclusive use and benefit of the money appropriated and paid for that purpose*. *Id.* at 352 (emphasis added).

All of the legislative authority concerning the provision of veterans' benefits and their disposition are a direct exercise by Congress of its enumerated powers over military affairs. *Id*. at 346-356. See also *Hines v Lowrey*, 305 US 85, 90-91; 59 S Ct 31; 83 L Ed 56 (1938); *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424

(1949); *United States v Oregon*, 366 US 643, 648-649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *Free v Bland*, 369 US 663, 666; 82 S Ct 1089; 8 L Ed 2d 180 (1962); *McCarty v McCarty*, 453 US 210, 220-223; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981); *Mansell v Mansell*, 490 US 581, 587; 109 S Ct 2023; 104 L Ed 2d 675 (1989); *Howell v Howell*, 137 S Ct 1400, 1404; 197 L Ed 2d 781 (2017). As this Court has most recently acknowledged in its unanimous opinion, federal law preempts state law control over military benefits absent congressional authority. *Foster v Foster*, __ Mich ___; ___ NW2d ____, (April 29, 2020), Slip Opinion at 11-18 and n 51. See also *Foster v Foster (On Second Remand)*, Unpublished Per Curiam Opinion of the Michigan Court of Appeals, issued July 30, 2020 (Docket No. 324853) (holding simply that "[s]tate courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable" and therefore, due to the principles of federal preemption of state law concerning veterans' disability benefits, the disabled veteran there "did not engage in an improper collateral attack on the consent judgment with respect to the offset provision" and the subsequent contempt orders requiring him to pay his

former spouse using his restricted veteran's disability benefits were null and void. *Id.* at 2.

Federal preemption goes to the subject matter jurisdiction of the state courts because where federal preemption applies, the federal government has retained its sovereign authority over the issue. The state court has no authority to exceed its constitutional jurisdiction in such matters. The delegated powers of the federal government have not been surrendered to the states. The states may only exercise jurisdiction and authority over those matters that have been granted to it by Congress. If the rule were otherwise, then 50 states could have 50 different rules (or even one consistent but erroneous rule) than that established as the Supreme Law under the Constitution. Justice Story described this as a situation that would be "truly deplorable". *Martin v Hunter's Lessee*, 14 US 304, 348; 4 L Ed 97 (1816).

Against this backdrop the conclusion is quite simple. Not only has Congress been delegated absolute preemptive authority over these matters, but in 1988, after the *Rose* decision that the Court of Appeals' relies on here to assert state authority over the federal benefits, Congress amended 38 USC § 211 (now 38 USC § 511) to remove any of the reservations concerning potential concurrent state jurisdiction

over claims by dependents for veterans' benefits. See *Rose v Rose*, 481 US at 628. A decision by a state court that forces a disabled veteran to use his or her restricted benefits to pay for support of dependents, is a decision that necessarily interferes with and ostensibly supersedes (albeit erroneously) the primary and exclusive jurisdiction of the VA. Any decision by the Secretary under its authority as provided in 38 U.S.C. § 511(a) to provide benefits is prima facie insulated from any subsequent state court authority with respect to those benefits. That provision states that "[t]he Secretary *shall decide all questions of law and fact* necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans *or the dependents* or survivors of veterans." (emphasis added). The second sentence of that provision continues: "[T]he decision of the Secretary *as to any such question* shall be final and conclusive and *may not be reviewed* by *any other official or by any court*, whether by an action in the nature of mandamus *or otherwise*." (emphasis added).

Jurisdiction is exclusively vested in the Secretary as to "any court". Federal law nowhere allows for the benefits at issue to be without the jurisdictional protections afforded by federal law and Congress's assurance that only the Secretary can make the *initial* benefits

determination and, necessarily, any subsequent request to apportion them in a manner that differs from the original disposition.

Any claim or decision that relates to or involves the disposition of a veterans' federal disability benefits necessarily affects a decision that has *already been made* by the VA Secretary concerning a claim for those benefits by the veteran and his or her dependents. 38 USC § 511(a). The VA's decision as to how much of those benefits should be paid to the veteran and the reasons those payments are made cannot be interfered with or disrupted by a contrary ruling by any other person or court. *Id*. This disrupts the federal appropriation, the congressional scheme for military compensation, and most importantly the delegated and exclusive powers of Congress over military affairs. To be clear, any decision by a state court that would cause a diversion of these protected funds away from the federally designated beneficiary (usually the veteran) to any other person or entity would be an extra-jurisdictional act and in direct conflict with the provisions of 38 USC § 511, the VJRA and the anti-attachment provision, 38 USC § 5301. So, to conclude that a state court is without *authority*, is to say that it has no jurisdiction, and here, that is constitutional jurisdiction, to issue a contrary ruling. See *Howell*, 137 S Ct at 1405-1406.

Finally, as an affirmative protection that directly prohibits state courts from entering indemnification or direct reimbursement orders that invade the restricted assets, 38 USC § 5301 provides an additional layer of positive protection with its expansive prohibition on "*any* legal *or* equitable process *whatever*, either before or after receipt." (emphasis added).

Respondent can point to no direct, federal law that allows the state to count or otherwise include Petitioner's benefits as disposable assets or available income for purposes of satisfying a child support order. Congress unequivocally removed any ambiguity when it provided in 38 USC § 511 after *Rose* that the Secretary of Veterans Affairs "shall decide *all questions of law and fact*" with respect to claims for benefits by both the veteran and their dependents, and further removed any doubt that the exclusivity of jurisdiction applied to *any* court that might otherwise preside over or review a claim for the veteran's disability benefits.

CONCLUSION

The 2017 unanimous opinion of the United States Supreme Court in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017) 137 S Ct 1400 (2017) explicitly ruled that the states were (and always have been) preempted from contradicting federal statutory law that governed the disposition of veterans' disability benefits. "[F]ederal law, as construed in *McCarty*, completely preempted the application of state community property law to military retirement pay" and stating that "*McCarty*, with its rule of federal preemption, *still applies*." (emphasis added). *Howell*, *supra* at 1403-1404.

As this Court recently confirmed in *Foster v Foster*, where an apportionment occurs by virtue of settlement of the veteran's disability claim, federal law prohibits state courts from asserting authority or control over the decision in a manner that would be contrary to the decision made by the Veterans Administration. The reason for this is simple. Under 38 USC § 511, a claim for veterans' benefits is exclusive and final and may not be contradicted by any other court or tribunal.

Moreover, the Court noted that the plain and unambiguous language of 38 USC § 5301 directly applies to jurisdictionally bar all state courts

from attempting to dispossess veterans of their disability benefits whether before or after receipt – in other words, no legal or equitable process can be used to either redirect payment (through garnishment, attachment, levy or seizure – before receipt by the beneficiary), or direct payment by the beneficiary *after* receipt by him or her of these benefits. It simply cannot be done and no contractual agreement or other form of coercive mechanism can be instituted to get around this absolute prohibition. See 38 USC § 5301(a)(1), (3)(A) and (C).

Because federal law has always preempted state law in this very specific circumstance, any state-court domestic relations order awarding support (child and/or spousal) would be void and unenforceable, both going forward and retroactively. In this case, Petitioner's federal disability benefits are specifically excluded from consideration as remuneration for employment, and therefore as income, by 42 USC § 659(a); (h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from *any legal process* whatever by 38 USC § 5301. Federal law is very clear and has been strengthened to exclude state courts from interfering with the disposition of veterans' disability benefits.

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, including all subsequent contempt and related orders are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v Feurstein*, 308 US 433, 440, n 12; 60 S Ct 343; 84 L Ed 370 (1940); *Davis v Wechsler*, 263 US 22, 24-25; 44 S Ct 13; 68 L Ed 143 (1923); and *Hines v Lowrey*, 305 US 85, 90, 91; 59 S Ct 31; 83 L Ed 56, 60 (1938) (applying the same principle to Congress' exercise of its Military Powers, the enumerated powers under which Congress provides the veterans' benefits at issue in this case).

"The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb*, 308 US at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 U.S. (4 Wheat)

316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

This Court has the constitutional authority and indeed the duty to say what federal law requires and to abide by that law pursuant to the Supremacy Clause of the United States Constitution. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994) (stating that "[w]here federal questions are involved [this Court] is bound to follow the prevailing opinions of the United States Supreme Court.") (internal citations omitted); *City of Detroit v Ambassador Bridge*, 481 Mich 29, 36; 748 NW2d 221 (2008). Indeed, where a state law proceeding is preempted by federal law the state court lacks subject matter jurisdiction and authority to act in a manner contrary to the prevailing federal rule. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled on other grounds by *Sprietsma v Mercury Marine*, 537 US 31; 123 S Ct 518; 154 L Ed 2d 466 (2002). It is necessary for this Court to address Court of Appeals' opinions "that misapplied constitutional principles and United States Supreme Court precedent…." *People v Bryant*, 491 Mich 575, 583, n 5; 822 NW2d 124 (2012). See also *Fletcher v Fletcher*, 447 Mich 871, 881; 526

NW2d 889 (1994) (stating: "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.").

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

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

Simply put, the state has no authority or jurisdiction over federally protected veterans' benefits. Since the Constitution first delegated to Congress the authority to provide for national defense, "Congress has directly and specifically legislated in the area" concerning the division of veterans' benefits as property. *United States v Oregon*, 366 US at 649. See also *Mansell*, 490 US at 587. The provisioning of these benefits has been deemed by the Court as "a legitimate one within the congressional powers over national defense". *Wissner*, 338 US at 660-661. Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, *must give way to clearly*

conflicting federal enactments." *Ridgway*, 454 US at 55 (emphasis added). See also *Hillman v Maretta*, 569 US 483, 491; 133 S Ct 1943; 186 L Ed 2d 43 (2013).

MCR 7.311(G) provides that motions for reconsideration are subject to the restrictions contained in MCR 2.119(F)(3). That rule in turn states that "without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

Here, since this Court's recent decision in *Foster v Foster* has confirmed that federal preemption applies unless *Congress* says otherwise, and Congress clearly strengthened the law to jurisdictionally exclude state courts from making a disposition of a veteran's disability benefits in a manner contrary to the determination made by the agency with primary and exclusive jurisdiction to do so, palpable error has occurred in binding Petitioner to a void state court order.

RELIEF REQUESTED

Petitioner respectfully requests this Court to grant his motion for reconsideration and consider his appeal of the Court of Appeals' opinion on the merits.

Respectfully submitted by:

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Dated: September 29, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 5,067 words (as identified by the Microsoft Word "word count" function) and was prepared using the proportional font typeface Times New Roman set at 14-point.