

No. 21-1594

In the
Supreme Court of the United States

PRESTON L. DRANE,
Petitioner,

v.

STEPHANIA DRANE,
Respondent.

**On Petition for Writ of Certiorari to the
Fifth District Court of Appeal, Florida**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's statement of the question presented is an inaccurate portrayal of what occurred in this case. Stated accurately, the question is whether in a dissolution of marriage proceeding, a state court may consider military documentation as well as expert testimony and determine that a veteran is receiving military retirement payments which are subject to equitable distribution under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(a)(4)(c). When accurately presented, the clear answer to this question is that the court may and certiorari should be denied.

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

Petitioner Preston L. Drane was the Appellant in the court below.

Respondent, who was the Appellee in the court below, is Mr. Drane's former wife, Stephania Drane.

Petitioner nor Defendant is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- *Drane v. Drane*, Case No. 05-2017-DR-22905, Fla. 18th Jud. Cir. 2017). Supplemental Final Judgment of Dissolution of Marriage entered on December 16, 2020.
- *Drane v. Drane*, 333 So. 3d 1128 (Fla. 5th DCA 2022). Supplemental Final Judgment of Dissolution of Marriage per curiam affirmed on February 22, 2022.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
STATEMENT OF RELATED PROCEEDINGS ...	iii
TABLE OF AUTHORITIES	v
RESPONSE TO PETITION FOR WRIT OF CERTIORARI	1
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
CONCLUSION	8

TABLE OF AUTHORITIES**CASES**

<i>Howell v. Howell</i> , 137 U.S. 1400 (2017).....	2, 6, 7
<i>Mansell v. Mansell</i> , 490 U.S. 581 (1989).....	2, 6, 7

STATUTES

10 U.S.C. § 1408(a).....	5
10 U.S.C. § 1408(a)(4)(c)	1, 2, 3, 7
10 U.S.C. § 3101(a).....	6
10 U.S.C. § 9311(a).....	3, 6

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Stephania Drane, respectfully responds to the petition for writ of certiorari filed by Petitioner to review the decision of Florida's Fifth District Court of Appeal, which affirmed a judgment holding that Petitioner's military retirement pension is subject to equitable distribution upon dissolution of the parties' marriage.

DECISIONS BELOW

The Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, entered a Supplemental Final Judgment of Dissolution of Marriage. Petitioner's App. 3.

On appeal and following oral argument, Florida's Fifth District Court of Appeal issued an order per curiam affirming the decision without a written opinion. That order is published at 333 So. 3d 1128 (Fla. 5th DCA 2022) and reproduced in Petitioner's appendix. Petitioner's App. 1.

STATEMENT OF JURISDICTION

The statutes and case law relied upon by Petitioner on the issue of jurisdiction are inapplicable because the evidence in this case supports the trial court and district court of appeal rulings that this case involves military longevity retirement benefits which are subject to equitable distribution in a state court dissolution of marriage action, *see* 10 U.S.C. § 1408(a)(4)(c) and not military disability benefits. As Respondent noted in the district court of appeal,

Petitioner's reliance on this Court's decisions in *Howell v. Howell*, 137 U.S. 1400 (2017) and *Mansell v. Mansell*, 490 U.S. 581, 583 (1989) is entirely misplaced as those decisions, unlike this case, involved non-taxable military disability benefits which the veteran received after specifically waiving retirement pay.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(a)(4)(c), provides as follows:

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay

of the member as property of the member and the member's spouse or former spouse.

10 U.S.C. § 1408(a)(4)(c).

STATEMENT OF THE CASE

While serving in the United States Air Force, Petitioner suffered a back injury in 2008 while performing duties as a litter carrier (R 813). At the time he had been in the Air Force for 21 years. Petitioner retired in 2010 after 23 years of service (R 817). Having accrued over 20 years of full-time active-duty military service, Petitioner accrued sufficient years to retire with full, unreduced benefits. *See* 10 U.S.C. § 9311(a).

Petitioner received a military disability rating of 40% (R 809, 819). The Air Force performed a Retired Pay Calculation Worksheet for Petitioner (R 809). This Worksheet showed in Method A calculation that based on the 40% disability rating Petitioner would receive gross benefits of \$1,598.00 (*Id.*). Calculation B based on Petitioner's 23 years of service (longevity) results in gross retirement benefits of \$2,297.00 (*Id.*). According to the Worksheet, Petitioner's "pay is based upon the calculation which yields the greater gross pay" (*Id.*; R 819). Petitioner received the greater amount based on his longevity (R 858). In addition, \$102.15 in federal income taxes is withheld from his monthly retirement benefits (R 858).

During 9.22 years of his service Petitioner was married to Respondent. Respondent also served in the Air Force for 12 years. The parties were divorced by final judgment of dissolution of marriage entered on

February 21, 2020 (R 651-52). Pursuant to the parties Marital Settlement Agreement, the parties reserved “on all issues related to [Petitioner’s Air Force pension] payment” (R 633).

The trial court subsequently took testimony, including testimony from Respondent’s expert, Timothy Voit, on the issue of the parties’ pensions, and reviewed documentary evidence. The evidence established at the time of trial that Petitioner receives his monthly Air Force retirement pension of \$2,487.00 as well as a monthly Veterans Affairs (VA) disability pension of \$3,352.41. A VA waiver reduces the Air Force retirement monthly pension to \$2,202.42 (R 990) and in addition the federal income taxes of \$102.15 are withheld monthly from Petitioner’s Air Force retirement pension (R 858, 975-980).

Petitioner claimed his entire Air Force pension is a disability pension exempt from equitable distribution. Timothy Voit, a financial analyst whose curriculum vitae reflects he authored numerous articles on military and federal pensions, testified that based on review of Petitioner’s pertinent military documents and the fact that federal income taxes are withheld from Petitioner’s Air Force pension, that pension is primarily retired pay and not a disability pension. Mr. Voit testified that based on 9.22 years of marriage which overlapped with Petitioner’s 23 years of military service, the marital portion of the monthly Air Force retirement benefit was \$875.90 of which Respondent would be entitled to one-half or \$437.95 per month (R 959, 987). In the supplemental judgment, the trial

court awarded Respondent the after tax amount of \$412.82 per month.

The parties' Marital Settlement Agreement provided that the parties agreed to waive all rights pertaining to the other spouse "[t]o receive any Survival Benefits from the other's estate." However, as noted above, the Agreement also included a specific proviso that the parties agreed to reserve on "all issues" related to Petitioner's Air Force pension (R 633). Thus, the trial court additionally directed Petitioner to name Respondent as beneficiary of survivor benefits as related to his Air Force pension (R 881).

On appeal, Petitioner did not challenge admissibility of Mr. Voit's testimony. Following briefing and oral argument, the Fifth District Court of Appeal affirmed.

REASONS FOR DENYING THE WRIT

The decision of the Fifth District Court of Appeal comports with the evidence presented and applicable statutory and decisional law. Accordingly, the petition for review should be denied.

The federal Uniformed Services Former Spouses' Protection Act authorizes states to treat veterans "disposable retired pay" as property divisible upon divorce but the definition of "disposable retired pay" does not include disability payments. 10 U.S.C. § 1408(a). Petitioner, realizing that "disposable retired pay" is marital property, argued below that his entire Air Force pension consists of disability benefits which he claims are not marital property. In doing so he cited

to this Court's decisions in *Howell v. Howell*, 137 S. Ct. 1400, 1403 (2017) and *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). Petitioner's reliance on these cases is completely misplaced.

In *Mansell*, this Court stated that "disability benefits are exempt from federal, state, and local taxation," citing 10 U.S.C. § 3101(a), and in *Howell*, the service-related disability payments deemed not to be a marital asset were identified as being non-taxable. 137 U.S. at 1402. More significantly, both *Howell* and *Mansell* involved situations where the veteran had waived retirement pay in order to receive greater disability benefits.

Petitioner did not waive retirement pay, and in fact the Air Force pension he receives is specifically calculated based on his 23 years of service which far exceeds any disability payments he would have been eligible to receive based on his 40% disability (R 809, 819, 1003). 10 U.S.C. § 9311(a) provides that an enlisted member of the military such as Petitioner is entitled to retirement pay after 20 years of service.

This is not a case where Petitioner was ineligible for any military retirement benefits but for his disability or waived longevity retirement pay. In fact, his Air Force pension was explicitly calculated based on his 23 years of military service because such calculation was substantially greater than what he would have received as disability payments (R 809). Petitioner was informed of these calculations and never objected to receiving the greater Air Force pension based on longevity rather than calculated based on a 40% disability.

Further, unlike in *Howell* and *Mansell*, the documentary evidence in this case reflects that Petitioner's Air Force pension is subject to \$102.15 in federal income tax withholding (R 858) confirming it is not in the nature of disability benefits.

Because all of his benefits are not based on his disability, 10 U.S.C. § 1408(a)(4)(c), provides Petitioner's benefits are divisible as marital property. The statute provides in pertinent part as follows:

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C. § 1408(a)(4)(c).

The trial court and state district court of appeal correctly decided this case.

CONCLUSION

For all the foregoing reasons, Petitioner has failed to demonstrate a basis for certiorari review and Respondent respectfully requests that this Court deny the petition for review.

Respectfully submitted,

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