No. __-____

In the Supreme Court of the United States

RAY J. FOSTER,

Petitioner,

v.

DEBORAH LYNN FOSTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDIX

CARSON J. TUCKER, JD, MSEL
Counsel of Record
LEX FORI, PLLC
DPT #3020
1250 W. 14 Mile Rd.
Troy, MI 48083-1030
(734) 887-9261
cjtucker@lexfori.org

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1.

Judgment of Dickinson County Circuit Court (Michigan), (December 3, 2008)

Atten: [redacted]

A TRUE COPY
Mary Girard Dyp
CLERK OF CIRCUIT COURT

STATE OF MICHIGAN
IN THE 41ST CIRCUIT COURT FOR THE COUNTY OF DICKINSON
FAMILY DIVISION

DEBORAH LYNN FOSTER,

Plaintiff,

File No. 07-15064-DM
Hon. Thomas D. Slagle

v.

RAY JAMES FOSTER,

Defendant.

Mikael G. Hahner (P34040)
RYAN LAW OFFICES
Attorneys for Plaintiff
307 East "C" Street – P.O. Box 638
Iron Mountain, MI 49801
(906) 774-3808 Fax (906) 774-6442

Michael P. Celello (P56694)
MOUW & CELELLO, P.C.
Attorneys for Defendant
100 East "C" St.- P.O. Box 747
Iron Mountain, MI 49801
(906) 774-2480 Fax (906) 774-2662

CONSENT JUDGMENT OF DIVORCE

In a session of said Court
in the Courthouse in the
City of Iron Mountain,
Dickinson County, State of Michigan
on December 3, 2008

Present: Honorable Thomas D. Slagle

Plaintiff filed a Complaint for Divorce and Defendant filed an Answer. Plaintiff appeared with her attorney, Mikael G. Hahner of RYAN LAW OFFICES and Defendant appeared with his attorney, Michael P. Celello of Mouw & Celello, P.C. Proofs were taken with regard to the allegations in the Complaint for Divorce. The Court is satisfied the material factual allegations in the Complaint are true; that the jurisdictional elements have been met, that Plaintiff is not pregnant; and there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and the marriage cannot be preserved.

This Court having jurisdiction of the parties, the marital status, the property of the parties, being fully advised in the premises and upon consideration of the facts and evidence;

IT IS ORDERED:

I. ABSOLUTE DIVORCE

That the marriage between Deborah Lynn Foster and Ray James Foster is hereby dissolved and the parties are divorced from the bonds of matrimony.

II. CHILD BORN DURING THE MARRIAGE

One child was born to the parties during their marriage to each other. The child's name and date of birth is: Melissa Marie Foster, born March 8, 1990. She graduated from high school in May of 2008.

III. HEALTH INSURANCE FOR CHILD - ASSIGNMENT OF GI BENEFITS

By virtue of the Defendant's years of service in the armed forces of the United States, the parties child may be eligible to receive medical, dental, vision care at no cost to either of the parties through the Veteran's Administration if she is determined to be an eligible dependant of a retired veteran.

The Defendant agrees to take all reasonable and necessary steps to assist the party's child in obtaining any of the medical, dental or vision benefits she is eligible to receive.

Neither party shall be obligated to pay any costs the child incurs in obtaining any medical, dental or vision treatment or as a result of the child participating in any programs offering any medical, dental or vision benefits.

Defendant agrees to assign and transfer to the parties child Melissa Marie Foster all of the benefits that he is eligible to receive under the "Post 9/11 GI Bill" that can be transferred to a dependant when the "Post 9/11 GI Bill" takes effect on August 1, 2009. The parties agree and acknowledge that the benefits available to the Defendant are greater than the benefits that can be transferred to a dependant of an eligible participant. To the extent benefits cannot be assigned under the "Post 9/11 GI Bill" those benefits remain awarded to the Defendant as his separate property.

Defendant agrees to perform all acts necessary and to cooperate with Melissa Marie Foster to effectuate and complete the assignment and transfer of the "Post 9/11 GI Bill" benefits in a timely manner.

IV. TAX DEDUCTIONS/EXEMPTIONS/CREDITS

Plaintiff shall be entitled to claim the parties' child Melissa Marie Foster, date of birth March 8, 1980, as her dependent each and every year for the purposes of local, state and federal income taxes.

V. SPOUSAL SUPPORT

Neither Plaintiff nor Defendant shall be entitled to spousal support and any right either party has to seek spousal support in the future is waived and forever barred.

Plaintiff agrees and acknowledges that she is waiving and foregoing any right she has under the law to request that Defendant pay her spousal support.

Defendant agrees and acknowledges that he is waiving and foregoing any right he has under the law to request that Plaintiff pay him spousal support.

Notwithstanding their respective waivers of their statutory rights to seek future spousal support, by signing this Judgment each party acknowledges that it is their intent that there be no deviation from their agreement, that neither of them shall request spousal support from, nor be obligated to pay spousal support to the other in the future.

VI. PROPERTY SETTLEMENT

The parties have accumulated marital assets and liabilities during their marriage to each other. The parties have agreed to divide their marital assets as follows:

Personal Property

Each party shall receive the items of personal property that are currently in their possession as their separate property free and clear of any claim by the other.

Real Property

Plaintiff shall receive the marital home at 1029 Cox Street, Quinnesec, Michigan. Plaintiff shall be responsible for paying any indebtedness associated with her ownership and use of the property including but not limited to: mortgage payments, utility bills, homeowners and casualty insurance premiums, property tax payments and any maintenance or repair costs. Plaintiff shall make reasonable efforts to have the mortgage holder release the Defendant from being obligated on the mortgage. In the alternative, Plaintiff shall make reasonable efforts to refinance the current mortgage on the marital home within ninety (90) days from the date this Judgment is entered and filed.

The Defendant shall execute a deed relinquishing his interest in the marital home upon being provided with proof that Plaintiff has refinanced the obligation or the mortgage lender has released him from being obligated on the mortgage on the marital home.

Vehicles

Plaintiff shall be awarded the vehicle currently in her possession. That vehicle is a 1999 Buick Century and a 1994 Pontiac Grand Prix. The 1994 Pontiac Grand Prix is currently being used by the parties' child, Melissa Marie Foster. Plaintiff shall be solely

responsible for paying any loans, license and registration fees, insurance and/or maintenance or operating costs associated with any vehicle being awarded to her.

Defendant shall be awarded the vehicles currently in his possession. Those vehicles are 1995 C1500 Pickup, 1993 Nissen 240SX and 2005 Harley-Davidson motorcycle. Defendant shall be solely responsible for paying any loans, license and registration fees, insurance and/or maintenance or operating costs associated with any vehicle being awarded to him.

Bank Accounts

Plaintiff shall be awarded any monies in any checking or savings accounts in any financial institutions or investment accounts, which are solely in her name.

Defendant shall be awarded any monies in any checking or savings accounts in any financial institutions or investment accounts, which are solely in his name.

Pension and Retirement Benefits

Each party by virtue of employment held during the marriage has participated in a pension or retirement plan sponsored by their employer.

Plaintiff is awarded one hundred percent (100%) of any interest she has acquired in any retirement and pension benefits as a result of any employment she has held during her marriage to the Defendant.

Plaintiff is awarded fifty percent (50%) of any military retirement benefits the parties have acquired as a result of military employment with the armed forces of the United States during the parties marriage to each other.

The Plaintiff is awarded a percentage of the Defendant's disposable military retired pay, to be computed by multiplying fifty percent (50%) times a fraction, the numerator of which is two hundred twenty-five (225) months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service. Plaintiff shall receive this portion of Defendant's military entitlement, together with Cost of Living increases.

Beginning December 1, 2008 until the Plaintiff begins to directly receive the portion of the retirement benefits she is eligible to receive under this Judgment the Defendant shall pay Plaintiff the amount of the retirement benefits she is entitled to within ten (10) days from the date he receives his retirement benefit check.

If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct

payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

Defendant did not earn any interest in any other pension or retirement benefits as a result of any nonmilitary employment he held during this marriage to the Plaintiff.

Defendant intends on canceling the survivors benefit coverage which currently lists Plaintiff as a beneficiary that he is currently paying for with military retirement pay. To the extent that any funds that were used to pay for that coverage are restored to his military pension it is the parties intention that those funds are to be included in Defendants military pension and divided between the parties in accordance with the formula set forth above.

VII. HEALTH INSURANCE FOR THE PARTIES

Plaintiff is currently covered under a policy of health insurance provided by her employer. Neither party shall be under any obligation to provide any health insurance coverage for the other after the divorce becomes final. Each party shall be solely responsible for paying all premiums, costs or fees associated with obtaining and maintaining health insurance coverage for themselves in the future.

VIII. DEBTS AND LIABILITIES

Plaintiff shall be responsible for paying the following debts and liabilities:

A. Any debt, obligation, lien or other encumbrance owed on any property being awarded to her in this Judgment of Divorce, except for any debt, obligations, lien or other encumbrance which has been specifically provided for in a different fashion under the terms and conditions of this Judgment of Divorce.

B. Plaintiff shall be responsible for payment of any debts incurred by her after she filed for divorce on November 20, 2007 except for any debt, obligation, lien or other encumbrance, which has been specifically provided for in a different fashion under the terms and conditions of this Judgment of Divorce.

C. All amounts currently owed on all credit cards in her name.

D. Any medical, dental, or ocular expenses she has incurred for herself, which have not been paid by any health insurance provider.

E. The consolidation loans at the Iron Mountain-Kingsford Community Federal Credit Union.

F. Plaintiff agrees to indemnify and hold Defendant harmless from the payment of any and all debts set forth above.

Defendant shall be responsible for paying the following debts and liabilities:

A. Any debt, obligation, lien or other encumbrance owed on any property being awarded to him in this Judgment of Divorce, except for any debt, obligations, lien or other encumbrance which has been specifically provided for in a different fashion under the terms and conditions of this Judgment of Divorce.

B. Defendant shall be responsible for payment of any debts incurred by him after Plaintiff filed for divorce on November 20, 2007 except for any debt, obligation, lien or other encumbrance, which has been specifically provided for in a different fashion under the terms and conditions of this Judgment of Divorce.

C. All amounts currently owed on all credit cards in his name.

D. Any medical, dental, or ocular expenses he has incurred for himself, which have not been paid by any health insurance provider.

E. Defendant agrees to indemnify and hold Plaintiff harmless from the payment of any and all debts set forth above.

IX. DISCLOSURE OF ASSETS AND LIABILITIES

All property, personal, real or mixed of any type or nature whatsoever, whether tangible or intangible, and all other assets as well as the debts accumulated during the marriage are addressed by this Judgment of Divorce. Both parties represent that they have each fully and accurately disclosed all of the marital assets, debts and liabilities they have acquired, accumulated or incurred during their marriage to each other.

X. PROVISION IN LIEU OF DOWER

The property division of the Judgment of Divorce shall fully satisfy all claims of dower and other claims which either party may have against the other, excepting for obligations and reservations contained in this Judgment and both parties hereto are forever barred from any dower interest or their claims in any property, which the other party has an interest in, owns or acquires hereafter.

XI. STATUTORY INSURANCE PROVISION

Except as set forth herein the rights of either party as a beneficiary otherwise in and to any policy or contract of life insurance, endowment or annuity insurance on the life of the other, are hereby extinguished and any such contracts or policies of insurance shall hereafter be payable to the estate of the party who owns it, or to such other persons or institutions as that party may hereafter designate as the beneficiary of any insurance policy. This provision shall not extinguish Plaintiff's right to receive any military survivor benefit as long as the Defendant is paying for that benefit from his

military retirement benefits and Plaintiff is listed as the beneficiary of the survivor benefits.

XII. ATTORNEY FEES

Each party shall be solely responsible for paying the litigation costs and attorney's fees they incurred while the above captioned litigation was pending.

XIII. EXECUTION OF DOCUMENTS

The parties shall promptly execute and deliver to each other any document required to carry out the terms of this Judgment of Divorce. A certified copy of this Judgment may be recorded or filed with the Register of Deeds, Secretary of State, or any other agency necessary to effectuate this Judgment.

XIV. PROBATE PROVISION

The rights of each of the parties hereto as defined by the Probate Code and any subsequent amendments thereto, in and to the estate and property of the other, are hereby extinguished and waived by virtue of the property settlement order herein unless otherwise specifically preserved by this Judgment and all benefits which would otherwise pass to either party by intestate succession or by virtue of the provisions of any Will executed prior to this Judgment of Divorce are hereby abolished, waived and forever extinguished.

XV. BANKRUPTCY

The parties intend and the Court specifically finds that the provisions in this Judgment are for the support of each of the parties. Further, the parties intend, and the Court specifically finds that the parties' assumption of debts and hold harmless obligations are for the support of each other. Accordingly, those obligations are intended by the parties to be non-dischargeable in bankruptcy. The parties each warrant that neither of them has a present intention of filing for bankruptcy.

XVI. CONTINUING JURISDICTION

IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction over this cause of action and the parties hereto and shall supervise completion of the provisions of this Judgment of Divorce.

XVII. TERMINATION OF ORDERS

Any orders entered during the pendency of these proceedings are hereby terminated upon execution and Clerk's entry of this Judgment of Divorce.

XVIII. JUDGMENT DISPOSES OF ALL CLAIMS

This Judgment disposes of the last pending claims of the parties and closes the case.

Date: December 3, 2008

Deborah Lynn Foster, Plaintiff

Date: December 3, 2008

Mikael G. Hahner (P34040)
Attorney for Plaintiff

Date: December 3, 2008

Ray James Foster, Defendant

Date: December 3, 2008

Michael P. Celello (P56694)
Attorney for Defendant

Date: December 3, 2008

P43334

Honorable Thomas D. Slagle
Circuit Court Judge, Family Division

2.

Order of Dickinson County Circuit Court
(Michigan) (November 6, 2014)

STATE OF MICHIGAN
IN THE 41st CIRCUIT COURT FOR THE COUNTY OF DICKINSON
FAMILY DIVISION

DEBORAH LYNN FOSTER,

Plaintiff/Counter-Defendant, File No. 07-15064-DM

v Honorable Thomas D. Slagle

RAY JAMES FOSTER,

Defendant/Counter-Plaintiff.

Mikael G. Hahner (P34040)
HAHNER LAW OFFICES, P.C.
Attorneys for Plaintiff
321 S. Stephenson Ave. - PO Box 827
Iron Mountain, MI 49801
(906) 828-1408 Fax (906) 828-1410

Michael B. Gawecki (P71598)
LAW OFFICES OF MICHAEL BRUCE GAWECKI
Attorneys for Defendant
P.O. Box 1190
Okemos, MI 48805
(517) 214-2096

ORDER ON PROCEEDINGS HELD ON SEPTEMBER 22, 2014

At a session of said Court held in the Courthouse in the City of Iron Mountain, County of Dickinson, State of Michigan on September 22, **2014**

Present: Honorable Thomas D. Slagle
Family Court Judge

A hearing having been held on Plaintiff's Motion to Have Defendant show cause as to why he shouldn't be held in contempt, the parties having appeared with counsel, argument having been held and the Court being fully advised in the premises thereof;

IT IS HEREBY ORDERED AND ADJUDGED that:

Defendant is in contempt for failure to pay Plaintiff ~~the portion of the military~~ in compliance with the ~~retirement benefits he agreed to pay her under the Consent~~ Judgment of Divorce entered on December 3, 2008.

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1. At the time the terms of the Consent Judgment of Divorce were placed on the record on December 3, 2008, Defendant acknowledged when he was questioned by the Court that if he were to defer any of his military retirement pay or convert it to disability pay or if the amount of his military retirement benefits was reduced because the level of his disability pay was increased, that the Court would have the ability to enforce payment to Plaintiff that she would have been entitled to receive from his military retirement benefits. (Page 28 of the December 3, 2008 transcript of the proceedings held on that date attached.)

2. Defendant agreed his military disability pay could be used to pay Plaintiff the amount of Defendant's military retirement pay she was entitled to receive pursuant to the Consent Judgment of Divorce if the amount of his military retirement benefits was reduced because the level of his disability retirement benefits would be increased.

3. Defendant is to continue paying Plaintiff the sum of $1,000.00 per month by the 7th day of every month beginning on July 7, 2014, until the arrearage is paid in full.

   Out of every $1,000.00 payment, $188.18 will be credited against the arrearage and the remaining $811.82 will be credited for the payment due under the Judgment of Divorce.

4. The total arrearage of $34,397.93 and the monthly payment amount owed under the Judgment of Divorce in the amount of $811.82 shall remain owing until all of the payments have been made and the Judgment is satisfied or the Judgment of Divorce has been modified. The total arrearage shall be adjusted as monthly payments are made.

5. Defendant's request for sanctions is denied for the reasons stated on the record on September 22, 2014.

6. A review hearing will take place on the 18th day of December, 2014 at 8:15 a.m.

7. If Ray James Foster is in compliance with this Court's Order, Ray James Foster and Counsel(s) may appear by telephone conference.

8. At said next hearing on the 18th day of December, 2014, if Ray James Foster is complying with this Order, then Honorable Thomas D. Slagle may use his discretion to modify the bond over Ray James Foster.

Date: ~~October~~ November 6, 2014

Honorable Thomas D. Slagle
Family Court Judge

I, Dolly L. Cook, Clerk of the County of Dickinson and of the Circuit Court do hereby certify that this is a true and correct copy of the record filed in this office.
Date Issued: Dec 23 2014
Dolly L. Cook Clerk
By: Dep. Clerk

3.

Foster v. Foster, 2016 Mich. App. LEXIS 1850
(October 13, 2016)

STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNN FOSTER,

Plaintiff/Counter-Defendant-Appellee,

v

RAY JAMES FOSTER,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 13, 2016

No. 324853
Dickinson Circuit Court
LC No. 07-015064-DM

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right an order holding him in contempt of court for failure to pay plaintiff in compliance with the parties' consent divorce judgment that was entered in December 2008. Defendant argues that the contempt order and the divorce judgment itself are unenforceable because their effect is to require defendant to pay plaintiff a portion of his military disability benefits as part of the property settlement in violation of federal law. Defendant also presents arguments regarding alleged problematic factual findings and other legal shortcomings tied to entry of the divorce judgment. Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms; however, he never appealed that judgment, nor has he moved for relief from that judgment, MCR 2.612. Thus, defendant is engaging in an improper collateral attack on the divorce judgment. See *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) (the defendant's failure to appeal the original divorce judgment precluded collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions). Indeed, defendant agreed to the very provision in the divorce judgment that he now assails. Nevertheless, for the reasons set forth below, we also substantively reject defendant's arguments. In sum, we affirm.

The parties were married on August 6, 1988, and plaintiff filed for divorce on November 20, 2007. Defendant had served in the military during, and prior to, the marriage, and he retired from the Army in September 2007. Defendant testified at the divorce hearing, which involved finalizing the parties' settlement, that he was receiving both military retirement pay and military disability benefits based on injuries he had sustained during the war in Iraq. Both parties waived their rights to seek spousal support and agreed that defendant's disability benefits were not subject to division by the court because they were not considered marital property under federal

law. However, pursuant to the property settlement, plaintiff was awarded 50 percent of defendant's retirement pay, or "disposable military retired pay," as calculated based on defendant's creditable military service during the marriage. The parties also agreed to the inclusion of the following provision in the divorce judgment, which we shall refer to as the "offset provision:"

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

At the divorce hearing, the trial court questioned the attorneys regarding the language of the offset provision, noting that it seemed to suggest that defendant was not currently receiving any disability benefits, which was not the case. Counsel for both parties acknowledged that the language was awkward, but explained that the intent was simply to address a scenario in which defendant became entitled to and accepted more disability benefits than currently being received, inversely diminishing the retirement benefits that were being divided and awarded to plaintiff. The purpose of the offset provision was to protect plaintiff in such a scenario. The trial court also discussed the offset provision with defendant in the following exchange:

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

Shortly after the entry of the divorce judgment, defendant became eligible for and began receiving increased disability benefits, which consequently reduced the amount of his retirement payments and the amount plaintiff received from defendant's military retirement pay. This was the precise circumstance that the parties had contemplated in drafting and agreeing to the offset provision. However, defendant failed to comply with the divorce judgment by paying plaintiff the difference between the reduced amount of retirement pay she received and the amount that she had received at the time of the divorce judgment. A number of show cause and contempt proceedings took place over several years, leading to the order that defendant now appeals, wherein the trial court held defendant in contempt for failure to pay plaintiff in compliance with

the consent divorce judgment. The court ordered him to pay plaintiff $1,000 per month, with $812 credited as current payments due under the divorce judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full.

Defendant's primary argument on appeal is that the divorce judgment and the trial court's order enforcing the judgment were legally invalid because they required him to pay plaintiff a portion of his disability benefits in violation of federal law. We disagree. Defendant's argument entails statutory construction and questions of law in general, which we review de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

"Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay." *Mansell v Mansell*, 490 US 581, 583; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (citations omitted). And retired or retirement pay is generally subject to division in state court divorce proceedings under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408. *Id.* at 584-585; *Megee v Carmine*, 290 Mich App 551, 562; 802 NW2d 669 (2010). With respect to disability pay, "[m]ilitary veterans in general are entitled to compensation for service-connected disabilities under 38 USC 1101 *et seq.*," sometimes referred to as "VA disability benefits." *Megee*, 290 Mich App at 560. Pursuant to 10 USC 1414(a)(1), as effective January 1, 2004, " 'a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability . . . is entitled to be paid both for that month . . . .' " *Id.* at 560-561 (ellipses in *Megee*). "This concurrent receipt of military retirement pay and VA disability benefits is commonly referred to as CRDP, which stands for 'concurrent retirement and disability pay.' " *Id.* at 561 (citation omitted). Another form of military disability pay, separate from standard VA disability benefits, is combat-related special compensation (CRSC), 10 USC 1413a. *Id.* at 552-553. "To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a *combat-related* disability." *Id.* at 560, citing 10 USC 1413a(c) (emphasis added). A veteran who is qualified for CRDP (retirement pay plus VA disability pay) and who is also qualified for CRSC (combat-related disability pay), may elect to receive CRDP or CRSC, but not both. *Megee*, 290 Mich App at 561.

According to defendant, he became entitled to receive CRSC, which determination was apparently made retroactive to a date preceding entry of the divorce judgment. Defendant elected to receive CRSC, which resulted in a diminution of his retirement pay and plaintiff's 50 percent award of that pay. See *Megee*, 290 Mich App at 561 ("Plaintiff elected CRSC, which effectively discontinued his retirement pay that had been subject to the QDRO, halting payments to defendant."). The *Megee* panel observed the following concerning CRSC and the division of waived retirement pay related to CRSC, i.e., retirement pay that is not being received because of a CRSC election:

> The trial court here effectively divided plaintiff's CRSC and, although *Mansell* did not directly address division of disability pay, the USFSPA clearly does not allow such a division. Subsection (c)(1) of the USFSPA, 10 USC 1408(c)(1), permits a court to treat only "disposable retired pay" as "property of the member and his spouse," and CRSC is "not retired pay," 10 USC 1413a(g). Accordingly, the trial court erred by dividing plaintiff's CRSC and forcing

plaintiff to pay a portion of his CRSC to defendant. However, on the subject addressed in *Mansell*, i.e., dividing waived retirement pay, the *Mansell* decision actually supports making plaintiff in the case at bar pay defendant half of the retirement pay that he would be receiving but for his election to take CRSC. The *Mansell* Court concluded that waived retirement pay could not be divided as property in circumstances in which the pay had been waived in favor of title 38 VA disability benefits, given that the definition of "disposable retired pay" in 10 USC 1408(a)(4)(B) excludes consideration of amounts waived in order to receive title 5 or title 38 compensation. Under the reasoning and rationale of *Mansell*, there would be no prohibition here against considering for division waived retirement pay under the USFSPA because we are addressing a waiver of title 10 CRSC not mentioned in 10 USC 1408(a)(4)(B). Thus, all of plaintiff's envisioned yet waived military-retirement pay can be divided without offending the USFSPA or *Mansell*. Accordingly, there is no bar to ordering plaintiff to compensate defendant in an amount equal to 50 percent of plaintiff's envisioned retirement pay as intended under the terms of the divorce judgment after plaintiff made a unilateral and voluntary postjudgment election to waive his retirement pay in favor of disability benefits contrary to the terms of the judgment.

* * *

We hold that a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]

Megee governs and dictates, given the involvement of CRSC, that the offset provision in the consent divorce judgment is fully enforceable through the trial court's contempt powers. Defendant attempts to distinguish *Megee* on the basis that, because of the retroactive nature of the CRSC award, he effectively became entitled to and elected CRSC and waived retirement pay *prior* to entry of the divorce judgment, whereas *Megee* concerned a unilateral, *postjudgment* election to waive retirement pay and opt for CRSC. Defendant's argument construes *Megee* much too narrowly and misses the broader legal principle that emanates from *Megee*, which is that a state divorce court has the authority to divide waived retirement pay, which waiver had

resulted from a veteran's decision to elect CRSC, so long as the court does not directly order payment from CRSC funds.[1] Thus, assuming for the sake of argument that defendant's waiver of retirement pay and election of CRSC must be treated as having already occurred when the divorce judgment was entered, the offset provision contemplating the division of waived retirement benefits was nonetheless valid and enforceable under *Megee*.

Defendant presents an alternative argument under 38 USC 5301, which regards the nonassignability and exempt status of veterans' benefits. Defendant's argument is woefully undeveloped and we deem it waived. See *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Moreover, as ruled earlier, the argument reflects an improper collateral attack on the judgment of divorce. See *Kosch*, 233 Mich App at 353. Finally, 38 USC 5301(a)(1) speaks of precluding the assignment of benefits "except to the extent specifically authorized by law[.]" As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575.

Finally, defendant poses arguments regarding alleged mistakes of fact by the trial court, along with purported fraud and unconscionable advantage, all tied to the procurement of the divorce judgment. These arguments are an improper and untimely attempt to relitigate the divorce action that was settled years ago absent appeal, and the arguments are therefore rejected. We additionally note that defendant's assertion that the trial court was factually mistaken with respect to whether defendant was suffering from a disability at the time of the divorce hearing is belied by the record. The trial court expressly recognized that defendant was currently receiving disability benefits and sought clarification from the parties concerning the language in the offset provision that suggested otherwise. In sum, defendant's arguments are unavailing.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause

[1] The contempt order does not require payment from CRSC funds, nor do we construe the divorce judgment's offset provision as ordering payment from CRSC funds, and any such construction must be avoided.

4.

Foster v. Foster (After Remand),
2018 Mich. App. LEXIS 809 (March 22, 2018)

STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNN FOSTER,

Plaintiff/Counter-Defendant-Appellee,

v

RAY JAMES FOSTER,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
March 22, 2018

No. 324853
Dickinson Circuit Court
LC No. 07-015064-DM

ON REMAND

Before: MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appealed an order holding him in contempt of court for failing to comply with the parties' 2008 consent divorce judgment. We previously affirmed that ruling. *Foster v Foster*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2016 (Docket No. 324853). The case is once again before us after our Supreme Court entered the following order with respect to defendant's application for leave to appeal:

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Howell v Howell*, __ US __; 137 S Ct 400; 197 L Ed 2d 781 (2017). [501 Mich 917.]

On reconsideration, we again affirm the trial court's ruling.

Given that the Supreme Court vacated the earlier opinion in its entirety, and in order to provide context for our discussion and analysis of *Howell*, we shall first set forth most of the previous opinion:

> Defendant appeals as of right an order holding him in contempt of court for failure to pay plaintiff in compliance with the parties' consent divorce judgment that was entered in December 2008. Defendant argues that the contempt order and the divorce judgment itself are unenforceable because their

effect is to require defendant to pay plaintiff a portion of his military disability benefits as part of the property settlement in violation of federal law. Defendant also presents arguments regarding alleged problematic factual findings and other legal shortcomings tied to entry of the divorce judgment. Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms; however, he never appealed that judgment, nor has he moved for relief from that judgment, MCR 2.612. Thus, defendant is engaging in an improper collateral attack on the divorce judgment. See *Kosch v Kosch*, 233 Mich App 346, 353; 592 NW2d 434 (1999) (the defendant's failure to appeal the original divorce judgment precluded collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions). Indeed, defendant agreed to the very provision in the divorce judgment that he now assails. Nevertheless, for the reasons set forth below, we also substantively reject defendant's arguments. . . . .

The parties were married on August 6, 1988, and plaintiff filed for divorce on November 20, 2007. Defendant had served in the military during, and prior to, the marriage, and he retired from the Army in September 2007. Defendant testified at the divorce hearing, which involved finalizing the parties' settlement, that he was receiving both military retirement pay and military disability benefits based on injuries he had sustained during the war in Iraq. Both parties waived their rights to seek spousal support and agreed that defendant's disability benefits were not subject to division by the court because they were not considered marital property under federal law. However, pursuant to the property settlement, plaintiff was awarded 50 percent of defendant's retirement pay, or "disposable military retired pay," as calculated based on defendant's creditable military service during the marriage. The parties also agreed to the inclusion of the following provision in the divorce judgment, which we shall refer to as the "offset provision:"

"If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court."

At the divorce hearing, the trial court questioned the attorneys regarding the language of the offset provision, noting that it seemed to suggest that defendant was not currently receiving any disability benefits, which was not the case. Counsel for both parties acknowledged that the language was awkward, but

explained that the intent was simply to address a scenario in which defendant became entitled to and accepted more disability benefits than currently being received, inversely diminishing the retirement benefits that were being divided and awarded to plaintiff. The purpose of the offset provision was to protect plaintiff in such a scenario. The trial court also discussed the offset provision with defendant in the following exchange:

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

Defendant. Yes."

Shortly after the entry of the divorce judgment, defendant became eligible for and began receiving increased disability benefits, which consequently reduced the amount of his retirement payments and the amount plaintiff received from defendant's military retirement pay. This was the precise circumstance that the parties had contemplated in drafting and agreeing to the offset provision. However, defendant failed to comply with the divorce judgment by paying plaintiff the difference between the reduced amount of retirement pay she received and the amount that she had received at the time of the divorce judgment. A number of show cause and contempt proceedings took place over several years, leading to the order that defendant now appeals, wherein the trial court held defendant in contempt for failure to pay plaintiff in compliance with the consent divorce judgment. The court ordered him to pay plaintiff $1,000 per month, with $812 credited as current payments due under the divorce judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full.

Defendant's primary argument on appeal is that the divorce judgment and the trial court's order enforcing the judgment were legally invalid because they required him to pay plaintiff a portion of his disability benefits in violation of federal law. We disagree. Defendant's argument entails statutory construction and questions of law in general, which we review de novo on appeal. *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

"Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay." *Mansell v Mansell*, 490 US 581, 583; 109 S Ct 2023; 104 L Ed 2d 675 (1989) (citations omitted). And retired or retirement pay is generally subject to division in state court divorce proceedings under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408. *Id.* at 584-585; *Megee v Carmine*, 290 Mich App 551, 562; 802 NW2d 669 (2010). With respect to disability pay, "[m]ilitary veterans in general are entitled to compensation for service-connected disabilities under 38

USC 1101 *et seq.*," sometimes referred to as "VA disability benefits." *Megee*, 290 Mich App at 560. Pursuant to 10 USC 1414(a)(1), as effective January 1, 2004, " 'a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability . . . is entitled to be paid both for that month . . . .' " *Id.* at 560-561 (ellipses in *Megee*). "This concurrent receipt of military retirement pay and VA disability benefits is commonly referred to as CRDP, which stands for 'concurrent retirement and disability pay.' " *Id.* at 561 (citation omitted). Another form of military disability pay, separate from standard VA disability benefits, is combat-related special compensation (CRSC), 10 USC 1413a. *Id.* at 552-553. "To be eligible for CRSC, a person must be a member of the uniformed services who is entitled to retired pay and who has a *combat-related* disability." *Id.* at 560, citing 10 USC 1413a(c) (emphasis added). A veteran who is qualified for CRDP (retirement pay plus VA disability pay) and who is also qualified for CRSC (combat-related disability pay), may elect to receive CRDP or CRSC, but not both. *Megee*, 290 Mich App at 561.

According to defendant, he became entitled to receive CRSC, which determination was apparently made retroactive to a date preceding entry of the divorce judgment. Defendant elected to receive CRSC, which resulted in a diminution of his retirement pay and plaintiff's 50 percent award of that pay. See *Megee*, 290 Mich App at 561 ("Plaintiff elected CRSC, which effectively discontinued his retirement pay that had been subject to the QDRO, halting payments to defendant."). The *Megee* panel observed the following concerning CRSC and the division of waived retirement pay related to CRSC, i.e., retirement pay that is not being received because of a CRSC election:

"The trial court here effectively divided plaintiff's CRSC and, although *Mansell* did not directly address division of disability pay, the USFSPA clearly does not allow such a division. Subsection (c)(1) of the USFSPA, 10 USC 1408(c)(1), permits a court to treat only "disposable retired pay" as "property of the member and his spouse," and CRSC is "not retired pay," 10 USC 1413a(g). Accordingly, the trial court erred by dividing plaintiff's CRSC and forcing plaintiff to pay a portion of his CRSC to defendant. However, on the subject addressed in *Mansell*, i.e., dividing waived retirement pay, the *Mansell* decision actually supports making plaintiff in the case at bar pay defendant half of the retirement pay that he would be receiving but for his election to take CRSC. The *Mansell* Court concluded that waived retirement pay could not be divided as property in circumstances in which the pay had been waived in favor of title 38 VA disability benefits, given that the definition of "disposable retired pay" in 10 USC 1408(a)(4)(B) excludes consideration of amounts waived in order to receive title 5 or title 38 compensation. Under the reasoning and rationale of *Mansell*, there would be no prohibition here against considering for division waived retirement pay under the USFSPA because we are addressing a waiver of title 10 CRSC not mentioned in 10 USC 1408(a)(4)(B). Thus, all of plaintiff's envisioned

yet waived military-retirement pay can be divided without offending the USFSPA or *Mansell*. Accordingly, there is no bar to ordering plaintiff to compensate defendant in an amount equal to 50 percent of plaintiff's envisioned retirement pay as intended under the terms of the divorce judgment after plaintiff made a unilateral and voluntary postjudgment election to waive his retirement pay in favor of disability benefits contrary to the terms of the judgment.

* * *

We hold that a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]"

Megee governs and dictates, given the involvement of CRSC, that the offset provision in the consent divorce judgment is fully enforceable through the trial court's contempt powers. Defendant attempts to distinguish *Megee* on the basis that, because of the retroactive nature of the CRSC award, he effectively became entitled to and elected CRSC and waived retirement pay *prior* to entry of the divorce judgment, whereas *Megee* concerned a unilateral, *postjudgment* election to waive retirement pay and opt for CRSC. Defendant's argument construes *Megee* much too narrowly and misses the broader legal principle that emanates from *Megee*, which is that a state divorce court has the authority to divide waived retirement pay, which waiver had resulted from a veteran's decision to elect CRSC, so long as the court does not directly order payment from CRSC funds.[1] Thus, assuming for the sake of argument that defendant's waiver of retirement pay and election of CRSC must be treated as having already

[1] The contempt order does not require payment from CRSC funds, nor do we construe the divorce judgment's offset provision as ordering payment from CRSC funds, and any such construction must be avoided.

occurred when the divorce judgment was entered, the offset provision contemplating the division of waived retirement benefits was nonetheless valid and enforceable under *Megee*.

Defendant presents an alternative argument under 38 USC 5301, which regards the nonassignability and exempt status of veterans' benefits. Defendant's argument is woefully undeveloped and we deem it waived. See *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Moreover, as ruled earlier, the argument reflects an improper collateral attack on the judgment of divorce. See *Kosch*, 233 Mich App at 353. Finally, 38 USC 5301(a)(1) speaks of precluding the assignment of benefits "except to the extent specifically authorized by law[.]" As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575.

Finally, defendant poses arguments regarding alleged mistakes of fact by the trial court, along with purported fraud and unconscionable advantage, all tied to the procurement of the divorce judgment. These arguments are an improper and untimely attempt to relitigate the divorce action that was settled years ago absent appeal, and the arguments are therefore rejected. We additionally note that defendant's assertion that the trial court was factually mistaken with respect to whether defendant was suffering from a disability at the time of the divorce hearing is belied by the record. The trial court expressly recognized that defendant was currently receiving disability benefits and sought clarification from the parties concerning the language in the offset provision that suggested otherwise. In sum, defendant's arguments are unavailing. . . . . [*Foster*, unpub op at 1 to 5 (alterations in original opinion).]

Now, we turn our attention to our Supreme Court's remand order and the decision in *Howell* issued by the United States Supreme Court. In *Howell*, 137 S Ct at 1402, the Court stated and ruled:

A federal statute provides that a State may treat as community property, and divide at divorce, a military veteran's retirement pay. See 10 USC 1408(c)(1). The statute, however, exempts from this grant of permission any amount that the Government deducts "as a result of a waiver" that the veteran must make "in order to receive" disability benefits. § 1408(a)(4)(B).[2] We have held that a State cannot treat as community property, and divide at divorce, this portion (the waived portion) of the veteran's retirement pay.

[2] The language in 10 USC 1408(a)(4)(B) is now found in 10 USC 1408(a)(4)(A)(ii). See *Howell*, 137 S Ct at 1403.

> In this case a State treated as community property and awarded to a veteran's spouse upon divorce a portion of the veteran's total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive nontaxable disability benefits from the Federal Government instead. Can the State subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not. Our cases and the statute make clear that the answer to the indemnification question is "no." [Citation omitted.]

The *Howell* Court also made clear that characterizing an order as merely requiring reimbursement or indemnification could not avoid the rule, as "[t]he difference is semantic and nothing more." *Howell*, 137 S Ct at 1406.

Howell involved general service-connected disability benefits, and the Supreme Court's opinion rested squarely on the language in former 10 USC 1408(a)(4)(B), which provided and still provides in 10 USC 1408(a)(4)(A)(ii), that "disposable retired pay" means a member's total monthly retired pay less amounts that "are deducted from the retired pay . . . as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]" *Howell*, 137 S Ct at 1402-1404. CRSC (combat-related special disability pay), at issue in this appeal, is compensation under Title 10, not Title 5 or Title 38 as referenced when arriving at "disposable retired pay." In our earlier opinion, we relied on this Court's opinion in *Megee*, 290 Mich App 551, which distinguished CRSC from general service-connected disability pay found in title 38 on the basis that the panel was addressing a waiver of retirement pay in favor of *title 10* CRSC compensation. Given that CRSC is at issue in the instant case, that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay, and that *Megee* is on point and remains binding precedent, MCR 7.215(J)(1), we again affirm the trial court's ruling.

Affirmed. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Amy Ronayne Krause

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Foster v. Foster (Foster I),
505 Mich. 151; 949 N.W.2d 102 (April 29, 2020)

Michigan Supreme Court
Lansing, Michigan

Syllabus

FOSTER v FOSTER

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

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

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

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

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

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

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

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

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED April 29, 2020

STATE OF MICHIGAN

SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellee,

v

No. 157705

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

BEFORE THE ENTIRE BENCH

ZAHRA, J.

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

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

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

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

I. FACTS AND PROCEDURAL HISTORY

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

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

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

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

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

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

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

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

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

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

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

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

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

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

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

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

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

rested squarely on the language in former 10 USC 1408(a)(4)(B), which provided—and still provides in 10 USC 1408(a)(4)(A)(ii)—that "disposable retired pay" means a member's total monthly retired pay less amounts that "are deducted from the retired pay . . . as a result of . . . a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]"[8] The Court of Appeals also observed that the *Megee* decision distinguished CRSC from general service-connected disability pay found in Title 38 on the basis of CRSC's status as *Title 10* compensation.[9] Given that CRSC is at issue in the instant case, and that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC, the Court of Appeals concluded that *Megee* was on point and remained binding precedent.[10] Defendant again sought relief in this Court, and we granted his application for leave to appeal to consider the federal-preemption question, the continuing viability of *Megee*, and the propriety of the contempt order entered against defendant.[11]

II. ANALYSIS

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

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

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

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

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

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

A. LEGAL BACKGROUND

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

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

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

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

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

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

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

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

The Act defines "disposable retired pay" as follows:

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

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[15] *Id.*

[16] *Id.* at 228.

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

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

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

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

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

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

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

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

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

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

[23] *Id.* at 583.

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

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

B. FEDERAL PREEMPTION

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

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[25] 10 USC 1413a.

[26] 10 USC 1413a(c).

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

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

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

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

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

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

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

The Supremacy Clause of the United States Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] Ariz Rev Stat Ann 25-318.01.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> in any case where a beneficiary entitled to compensation . . . enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, . . . such agreement shall be deemed to be an assignment and is prohibited.

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

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

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

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

[59] See *id.*

C. EFFECT ON *MEGEE v CARMINE*

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

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired.[61]

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

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

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

D. PROCEEDINGS ON REMAND

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

III. CONCLUSION

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

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

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

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

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

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

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

STATE OF MICHIGAN

SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellee,

v No. 157705

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

VIVIANO, J. (*concurring*).

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

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

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

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

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

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

with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.

The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:

> There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.

[*Buczkowski*, 351 Mich at 221-222 (cleaned up).]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

David F. Viviano

6.

Foster v. Foster (On Second Remand),
2020 Mich. App. LEXIS 4880 (July 30, 2020)

STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellee,

v

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
July 30, 2020

No. 324853
Dickinson Circuit Court
LC No. 07-015064-DM

ON SECOND REMAND

Before: MARKEY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Our Supreme Court has again remanded this case to us to "address the effect of [its] holdings on defendant's ability to challenge the terms of the consent judgment." *Foster v Foster*, __ Mich __, __; __ NW2d __ (2020); slip op at 3. We reverse the trial court's order requiring defendant, under the offset provision in the consent judgment, to make payments to plaintiff to cover the reduction in his retirement pay.

The following introductory paragraphs of the Michigan Supreme Court's opinion provide a concise setup for our analysis:

> This case involves a dispute between former spouses who entered into a consent judgment of divorce (the consent judgment), which provided that defendant would pay plaintiff 50% of his military retirement benefits. Beyond that, the parties agreed that if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such supplemental disability benefits. Defendant elected to increase his disability benefits when he applied for Combat-Related Special Compensation (CRSC), a form of military disability benefits, pursuant to 10 USC 1413a. He started receiving CRSC shortly after the divorce. As a result, defendant's retirement benefits decreased, which in turn decreased the share of the retirement benefits payable to

plaintiff. When defendant failed to reimburse plaintiff for the reduced payment she received in connection with defendant's lowered military retirement benefits, plaintiff sought relief in the Dickinson Circuit Court, asking that the consent judgment be enforced. The trial court and the Court of Appeals enforced the plain terms of the consent judgment and required defendant to reimburse plaintiff for the reduction in her interest in defendant's retirement benefits. Defendant argues that federal law preempts state law in regard to the division of veteran benefits and, thus, the consent judgment is unenforceable.

We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. . . . This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment. [*Foster*, __ Mich at __; slip op at 1-3,]

State courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds in *Sprietsma v Mercury Marine*, 537 US 51, 63-64; 123 S Ct 518; 154 L Ed 2d 466 (2002); *People v Kanaan*, 278 Mich App 594, 602; 751 NW2d 57 (2008); *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000). And an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992); *Workers' Compensation Agency Dir v MacDonald's Indus Prod, Inc (On Reconsideration)*, 305 Mich App 460, 477; 853 NW2d 467 (2014) (a collateral attack is allowed if the court never acquired jurisdiction over the subject matter). Moreover, "[s]ubject-matter jurisdiction cannot be granted by implied or express stipulation of the litigants." *Harris v Vernier*, 242 Mich App 306, 316; 617 NW2d 306 (2000); see also *Teddy 23, LLC v Mich Film Office*, 313 Mich App 557, 564; 884 NW2d 799 (2015) ("Nor can subject-matter jurisdiction be conferred by the consent of the parties"). Accordingly, in the instant case, defendant did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption.

We reverse and remand for further proceedings or actions, if any, as the trial court may deem necessary. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause

7.

Foster v. Foster (Foster II),
509 Mich. 109; ___ N.W.2d ___ (April 5, 2022)

Michigan Supreme Court
Lansing, Michigan

Syllabus

FOSTER v FOSTER

Docket No. 161892. Argued November 9, 2021 (Calendar No. 2). Decided April 5, 2022.

Plaintiff, Deborah L. Foster, sought to hold defendant, Ray J. Foster, in contempt in the Dickinson Circuit Court, Family Division, for failing to abide by a provision in their consent judgment of divorce. The judgment stated that defendant would pay plaintiff 50% of his military disposable retired pay accrued during the marriage or, if defendant waived a portion of his military retirement benefits in order to receive military disability benefits, that he would continue to pay plaintiff an amount equal to what she would have received had defendant not elected to receive such disability benefits (the offset provision). Defendant subsequently elected to receive increased disability benefits, including Combat-Related Special Compensation (CRSC) under 10 USC 1413a. That election reduced the amount of retirement pay defendant received, which, in turn, reduced plaintiff's share of the retirement benefits from approximately $800 a month to approximately $200 a month. Defendant did not comply with the offset provision by paying plaintiff the difference. In response to plaintiff's petition seeking to hold him in contempt, defendant argued that, under federal law, CRSC benefits may not be divided in a divorce action. The court, Thomas D. Slagle, J., denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the consent judgment. Defendant failed to do so, and plaintiff again petitioned for defendant to be held in contempt. Defendant did not appear at the hearing but argued in his written response that the federal courts had jurisdiction over the issue. The court found defendant in contempt, granted a money judgment in favor of plaintiff, and issued a bench warrant for defendant's arrest because of his failure to appear at the hearing. At a show-cause hearing in June 2014, defendant argued that 10 USC 1408 and 38 USC 5301 prohibited him from assigning his disability benefits and that the trial court had erred by not complying with federal law. The court found defendant in contempt and ordered him to pay the arrearage and attorney fees. Defendant appealed in the Court of Appeals, arguing that the trial court erred when it failed to hold that plaintiff's attempts to enforce the consent judgment were preempted by federal law. In an unpublished per curiam opinion, issued October 13, 2016 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ., affirmed the trial court's contempt order, reasoning that the matter was not preempted by federal law. Defendant sought leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400 (2017). 501 Mich 917 (2017). On remand, in an unpublished per curiam opinion issued March 22, 2018 (Docket No.

324853), the same panel of the Court of Appeals again affirmed the trial court's contempt finding, reasoning that defendant's appeal was an improper collateral attack on the consent judgment. The Court of Appeals also distinguished *Howell* and determined that it was still bound by *Megee v Carmine*, 290 Mich App 551 (2010), which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC. Defendant again sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 503 Mich 892 (2018). In a unanimous opinion, the Michigan Supreme Court overruled *Megee*, concluding that federal law preempted state law such that the consent judgment was unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her because of his election to receive CRSC. The Michigan Supreme Court vacated the portion of the Court of Appeals' opinion regarding collateral attack and remanded to the Court of Appeals for that Court to address the effect of the Michigan Supreme Court's holdings on defendant's ability to challenge the terms of the consent judgment. 505 Mich 151 (2020). On second remand, in an unpublished per curiam opinion issued July 30, 2020 (Docket No. 324853), the Court of Appeals, MARKEY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ., reversed, concluding that the state trial court was deprived of subject-matter jurisdiction because of principles of federal preemption, that defendant did not engage in an improper collateral attack on the consent judgment, and that the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision because of federal preemption. Plaintiff sought leave to appeal in the Michigan Supreme Court, and the Michigan Supreme Court granted the application. 506 Mich 1030 (2020).

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

Federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was a mistake in the exercise of undoubted jurisdiction, that consent judgment was not subject to collateral attack. Because there was no other justification for a collateral attack on the consent judgment, the judgment of the Court of Appeals was reversed, and the case was remanded to the Dickinson Circuit Court for further proceedings. The statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction" was disavowed, and *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132 (2010), was overruled to the extent it suggested that all types of federal preemption may deprive a state court of subject-matter jurisdiction; the preemption doctrine does not deprive state courts of subject-matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.

1. The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. A judgment of divorce dividing marital property is res judicata and not subject to collateral attack even if the judgment may be have been wrong or rested on a subsequently overruled legal principle; in other words, the doctrine of res judicata applies to a valid but erroneous judgment. A divorce decree that has become final may not have its property-settlement provisions modified except for fraud or for

other such causes as any other final decree may be modified. The doctrine of res judicata in this context is an issue of state law. Thus, a provision in a consent judgment of divorce that divides a veteran's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law.

2. There is a distinction between a court's jurisdiction of the parties and the subject matter of the action, on the one hand, and the court's erroneous exercise of that jurisdiction. To that end, when a court has personal jurisdiction over the parties and has jurisdiction over the subject matter of the action but erroneously exercises jurisdiction—such as when a property settlement in a divorce action conflicts with federal law—any error in the exercise of jurisdiction by the trial court can only be corrected by direct appeal. In contrast, when the trial court lacks personal jurisdiction over the parties or subject-matter jurisdiction, any judgment by the court is void and may be assailed by both direct appeal and collateral attack. The preemption doctrine does not deprive state courts of subject-matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum. Generally, state law controls matters of domestic relations. For that reason, before state law governing domestic relations will be overridden as preempted by federal law, it must do major damage to clear and substantial federal interests. To determine whether Congress has impliedly preempted state law, a court must (1) determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case and (2) if Congress has, the court must determine whether it has also vested exclusive jurisdiction of that subject matter in the federal court system. Regarding the division of military benefits, 38 USC 511(a) provides that the Secretary of Veterans Affairs 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 and generally precludes review of the Secretary's decision as to any such question by any other official or by any court, with a limited number of exceptions. In turn, 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. The trial court in this case did not review a decision of the Secretary of Veterans Affairs under 38 USC 511(a). There is no exclusive federal forum for dividing military disability benefits in divorce actions. Thus, while the Secretary has authority under 38 USC 511 over the distribution of military benefits, 38 USC 511 does not refer to, restrict, or displace state court jurisdiction in divorce actions. Because of that, federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive Michigan state courts of subject-matter jurisdiction over a divorce action involving the division of marital property that includes the division of military retirement pay and disability benefits contrary to federal law.

3. In this case, even though the offset provision in the consent judgment was contrary to federal law, the judgment was not void or subject to collateral attack, because the type of federal preemption at issue does not deprive Michigan courts of subject-matter jurisdiction and there was no other justification for a collateral attack on the consent judgment. Accordingly, the Court of Appeals erred when it concluded that the type of federal preemption at issue in this case deprived state courts of subject-matter jurisdiction.

Court of Appeals judgment reversed; case remanded to the trial court for further proceedings.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED April 5, 2022

STATE OF MICHIGAN

SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Counterdefendant-Appellant,

v

No. 161892

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellee.

BEFORE THE ENTIRE BENCH

VIVIANO, J.

At issue presently in this case is whether defendant can collaterally attack a provision in the parties' consent judgment of divorce related to the division of defendant's military retirement benefits on the ground that it conflicts with federal law. We previously held, among other things, that "[t]he trial court was preempted under federal law from including in the consent judgment the . . . provision on which plaintiff relies." *Foster v*

Foster, 505 Mich 151, 175; 949 NW2d 102 (2020) (*Foster I*). But we "express[ed] no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment" and, instead, "remand[ed] the case to the Court of Appeals so that the panel [could] address the effect of our holdings on defendants' ability to challenge the terms of the consent judgment." *Id.* at 175, 175-176. On remand, the Court of Appeals held that "[s]tate courts are deprived of subject-matter jurisdiction when principles of federal preemption are applicable." *Foster v Foster (On Second Remand)*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2020 (Docket No. 324853) (*Foster II*), p 2. Because "an error in the exercise of a court's subject-matter jurisdiction can be collaterally attacked," the Court of Appeals concluded that "defendant did not engage in an improper collateral attack on the consent judgment . . . ." *Id.* We disagree. Instead, we hold that the type of federal preemption at issue in this case does not deprive state courts of subject-matter jurisdiction. As a result, we conclude that defendant's challenge to enforcement of the provision at issue is an improper collateral attack on a final judgment.

I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are adequately set forth in our previous opinion, *Foster I*, 505 Mich at 157-161, and need not be restated in their entirety here. For purposes of this opinion, it is sufficient to highlight the following points.

The parties' consent judgment of divorce was entered in December 2008. At the time of the divorce, defendant was receiving both military retirement pay and military disability benefits for injuries he sustained during the Iraq War. Pursuant to their property

settlement, plaintiff was awarded 50% of defendant's retirement pay, also known as "disposable military retired pay." She was not awarded any of defendant's military disability benefits. To protect plaintiff in the event that defendant became entitled to (and accepted) more disability benefits than he currently received, consequently diminishing the retirement benefits that were divided and awarded to plaintiff, the parties agreed to include a provision in the consent judgment of divorce that has become known as the "offset provision." In the offset provision, if defendant elected to receive an increase in disability pay, he agreed to pay plaintiff an amount equal to what she would have received had defendant not elected to do so.[1]

In February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat-Related Special Compensation (CRSC).[2] As a

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[1] The offset provision states as follows:

> If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.

[2] Under federal law, a retired veteran's retirement pay can be divided with a former spouse in divorce proceedings, but disability pay cannot. See 10 USC 1408(c) (permitting division of "disposable retired pay"); 10 USC 1408(a)(4)(A) (defining "disposable retired pay"). See generally Sullivan & Raphun, *Dividing Military Retired Pay: Disability Payments and*

result, the amount plaintiff received each month decreased from approximately $800 to approximately $200. Defendant failed to comply with the offset provision by paying plaintiff the difference.

In May 2010, plaintiff filed a petition seeking to hold defendant in contempt for failing to comply with the consent judgment. A few months later, defendant argued, for the first time, that under federal law, CRSC benefits are not subject to division in a divorce action. In an opinion and order dated October 8, 2010, the trial court denied plaintiff's request to hold defendant in contempt but ordered defendant to comply with the provisions of the judgment. The trial court acknowledged that it did not have the power to divide military disability pay but noted that the parties here had agreed upon the division and neither party had moved to set aside the judgment on the ground of mutual mistake. The

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the Puzzle of the Parachute Pension, 24 J Am Acad Matrimonial L 147, 148-150, 152-153 (2011). In order to prevent retired veterans from double-dipping from retirement and disability entitlements, federal law generally requires that a retired veteran receiving both retirement pay and disability benefits give up an amount of retirement pay equal to the amount of disability benefits the veteran is receiving. See 38 USC 5304 (generally prohibiting duplication of benefits); 38 USC 5305 (allowing waiver of retirement pay to receive other benefits). This waiver is sometimes referred to as the "VA waiver." See *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 152. The VA waiver reduces the amount of retired pay the veteran receives, which reduces the sum of money being divided with a former spouse. *Id.* CRSC is an exception to the antidouble-dipping rule. CRSC payments "are not retired pay." 10 USC 1413a(g). CRSC is an additional payment to a veteran, on top of disability pay, in the same amount as the reduction to the veteran's retired pay as a result of the VA waiver. However, CRSC payments, like disability payments, are also not divisible with a former spouse in divorce proceedings. See *Foster I*, 505 Mich at 171; Defense Finance and Accounting Service, *Comparing CRSC and CRDP* <https://www.dfas.mil/retiredmilitary/disability/comparison.html> (accessed March 9, 2022) [https:perma.cc/77E7-CAS9]. See generally *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J Am Acad Matrimonial L at 163.

trial court warned that if defendant failed to comply with the order that he would be held in contempt.

On March 25, 2011, plaintiff filed a petition to hold defendant in contempt, alleging that he had not made any payments as ordered. Although he did not appear at the hearing, defendant filed a response, arguing that he was not in contempt and, for the first time, arguing that the issue was within the jurisdiction of the federal courts. On May 10, 2011, the trial court entered an order holding defendant in contempt, granting a money judgment to plaintiff, and issuing a bench warrant for defendant's arrest because he did not appear at the hearing.

At a show-cause hearing on June 27, 2014, defendant, relying on 10 USC 1408 and 38 USC 5301, argued that he could not assign his disability benefits and that the trial court had erred by not complying with federal law. The trial court observed, "[W]e have litigated this issue and re-litigated this issue and it has not been properly appealed." The trial court ordered plaintiff to pay the arrearage.

On September 22, 2014, the trial court entered an order holding defendant in contempt and ordering him to pay the arrearage and attorney fees. Defendant appealed that order in the Court of Appeals.

The Court of Appeals initially affirmed the trial court order. *Foster v Foster*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2016 (Docket No. 324853). Defendant sought leave to appeal in this Court. We vacated the judgment and remanded the case to the Court of Appeals for reconsideration in light of *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017). *Foster v Foster*, 501 Mich 917 (2017). The Court of Appeals again affirmed. *Foster v Foster (On Remand)*,

unpublished per curiam opinion of the Court of Appeals, issued March 22, 2018 (Docket No. 324853).

Defendant again sought leave to appeal in this Court. After granting the application, the Court held as follows:

> We conclude that federal law preempts state law such that the consent judgment is unenforceable to the extent that it required defendant to reimburse plaintiff for the reduction in the amount payable to her due to his election to receive CRSC. Although the Court of Appeals indicated its agreement with plaintiff's assertion that defendant was engaging in an improper collateral attack against the consent judgment, the panel did not discuss the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal. Because these questions remain important, we vacate that portion of the Court of Appeals' opinion agreeing with plaintiff that defendant was engaging in an improper collateral attack and reverse the balance of the Court of Appeals' opinion in this case. Moreover, we overrule the Court of Appeals' opinion in *Megee v Carmine*, [290 Mich App 551, 574-575; 802 NW2d 669 (2010),] which held that a veteran is obligated to compensate a former spouse in an amount equal to the share of retirement pay that the nonveteran spouse would have received, pursuant to a divorce judgment, had the veteran not elected to waive military retirement pay in favor of CRSC. This case is remanded to the Court of Appeals so that the panel may address the effect of our holdings on defendant's ability to challenge the terms of the consent judgment. [*Foster I*, 505 Mich at 156 (citation omitted).]

On the second remand, the Court of Appeals reversed in *Foster II*. After a lengthy block quote of this Court's opinion in *Foster I*, the Court of Appeals dedicated a single paragraph to the issue of subject-matter jurisdiction. It cited *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds in *Sprietsma v Mercury Marine*, 537 US 51, 63-64 (2002); *People v Kanaan*, 278 Mich App 594, 602; 751 NW2d 57 (2008); and *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000), for the proposition that state courts are deprived of subject-matter

jurisdiction when principles of federal preemption are applicable. The Court concluded that "defendant did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption." *Foster II*, unpub op at 2.

Plaintiff sought leave to appeal in this Court, and we granted plaintiff's application to address

> whether the defendant has the ability to challenge the relevant term of the consent judgment in this case given that federal law precludes a provision requiring that the plaintiff receive reimbursement or indemnification payments to compensate for reductions in the defendant's military retirement pay resulting from his election to receive any disability benefits. See *Howell v Howell*, 581 US ___; 137 S Ct 400; 197 L Ed 2d 781 (2017). [*Foster v Foster*, 506 Mich 1030 (2020).]

II. STANDARD OF REVIEW

The application of the doctrine of res judicata is a question of law that we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Questions of subject-matter jurisdiction are also questions of law that we review de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

This Court previously held that the offset provision in the parties' consent judgment of divorce impermissibly divides defendant's military disability pay in violation of federal law. See *Foster I*, 505 Mich at 175 ("The trial court was preempted under federal law from including in the consent judgment the offset provision on which plaintiff relies."). We

must now answer the question we left open in *Foster I*: whether defendant may challenge this provision of the consent judgment on collateral review.

A. THE DOCTRINE OF RES JUDICATA APPLIES TO JUDGMENTS THAT DIVIDE MILITARY RETIREMENT AND DISABILITY BENEFITS

We have previously explained the doctrine of res judicata as follows:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citation omitted).]

Importantly for purposes of this case, the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle. See *Colestock v Colestock*, 135 Mich App 393, 397-398; 354 NW2d 354 (1984) ("A judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequently overruled legal principle."); *Detwiler v Glavin*, 377 Mich 1, 14; 138 NW2d 336 (1965) (holding that the doctrine of res judicata applies to "a valid but erroneous judgment"). See also *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 LEd2d 103 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

This Court has long recognized as "a settled rule of law that a divorce decree which has become final may not have its property settlement provisions modified except for fraud

or for other such causes as any other final decree may be modified." *Pierson v Pierson*, 351 Mich 637, 645; 88 NW2d 500 (1958).[3] The Court of Appeals has explained why finality in this context is extremely important:

> Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the husband as his separate property would flaunt the rule of res judicata and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn v McGinn*, 126 Mich App 689, 693; 337 NW2d 632 (1983) (citation omitted).][4]

The United States Supreme Court has recognized that the application of the doctrine of res judicata in this context is an issue of state law. See *Mansell v Mansell*, 490 US 581, 586 n 5; 109 S Ct 2023; 104 L Ed 2d 675 (1989) ("Whether the doctrine of res judicata . . . should have barred the reopening of pre-*McCarty* [*v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981),] settlements is a matter of state law over which we have no jurisdiction."). See also 2 Turner, Equitable Distribution of Property (4th ed), § 6:6, p 49 (noting that the Court had dismissed in *Sheldon v Sheldon*, 456 US 941 (1982),

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[3] See also *Keeney v Keeney*, 374 Mich 660, 663; 133 NW2d 199 (1965); *Greene v Greene*, 357 Mich 196, 201; 98 NW2d 519 (1959); and *Roddy v Roddy*, 342 Mich 66, 69; 68 NW2d 762 (1955).

[4] See also *Staple v Staple*, 241 Mich App 562, 579; 616 NW2d 219 (2000) ("The Family Law Section of the State Bar, representing more than three thousand family law specialists, elaborates on the public policy value of finality in divorce cases: 'There is probably not a single family law practitioner in the State of Michigan who would not advocate the importance of finality in their divorce cases. Divorce cases, by their nature, involve parties coming together and resolving contentious matters. . . . The parties, after the divorce, wish to go on in their separate lives and not . . . be subject to future petitions for relief . . . .' ").

for want of a substantial federal question, a petition raising the issue of whether " 'federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law' ").[5]

Applying these principles, the provision of the parties' consent judgment of divorce that divides defendant's military retirement and disability benefits is generally enforceable under the doctrine of res judicata even though it is preempted by federal law. See generally *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt").[6]

B. THE PARTIES' DIVORCE JUDGMENT IS NOT VOID AND THEREFORE IS NOT SUBJECT TO COLLATERAL ATTACK

Even though it is otherwise enforceable, defendant argues that because the offset provision is preempted by federal law, it is automatically void and, therefore, subject to

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[5] As this Court has recognized, this type of dismissal indicates "that all the issues properly presented to the Supreme Court have been considered on the merits and held to be without substance; for this reason, the adjudication is binding precedent under the doctrine of stare decisis with respect to those issues when raised in subsequent matters." *Gora v Ferndale*, 456 Mich 704, 713; 576 NW2d 141 (1998) (quotation marks and citations omitted).

[6] It is worth noting that our holding places us in good company because the majority of state courts have held that "military benefits of all sorts can be divided under the law of res judicata." Turner, § 6:9, p 72. See *id.* at 72-73 n 4 (listing cases). A minority of state courts hold to the contrary. See *id.* at 74 n 9 (listing cases and text accompanying). However, as the author observes, "[n]one of these decisions cite either *Sheldon* or footnote 5 in *Mansell*," and "[n]one have showed any awareness of the postremand history of *Mansell*[.]" *Id.* at 74.

collateral attack at any time.[7] As an initial matter, defendant asserts that a judgment containing a provision that exceeds the limits of the trial court's authority is void. However, as we explained in *Buczkowski v Buczkowski*, 351 Mich 216, 221-222; 88 NW2d 416 (1958), there is an important distinction between the court's jurisdiction of the parties and the subject matter of the suit, on the one hand, and the court's erroneous exercise of that jurisdiction, on the other:

> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. The judgment of a court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.
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> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine

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[7] This Court has long recognized a distinction between a judgment that is void and one that is voidable. See *Clark v Holmes*, 1 Doug 390, 393 (1844) ("It is a well settled doctrine that, when proceeding to exercise the powers conferred, [inferior courts of special and limited jurisdiction] must have jurisdiction of the person, by means of the proper process or appearance of the party, as well as of the subject matter of the suit; and when they thus have jurisdiction of the person and the cause, if in the further proceedings they commit error, the proceedings are not void, but only voidable, and may be reversed for error by the proper court of review where a power of review is given; . . . but on the contrary, when they have not such jurisdiction of the cause and of the person, their proceedings are absolutely void, and cannot afford any justification or protection, and they became trespassers by any act done to enforce them."). See also 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2612.13, pp 624-625 (discussing the distinction between void and voidable judgments).

> of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co. v Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:
>
> > There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.[8]

In *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), again quoting from *Jackson City Bank*, we explained that only judgments entered without personal jurisdiction or subject-matter jurisdiction are void and subject to collateral attack:

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

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[8] *Buczkowski*, 351 Mich at 221-222 (cleaned up). See also *People v Washington*, 508 Mich ___; ___ NW2d ___ (2021), slip op at 10-11 ("The prosecutor is correct that there is a widespread and unfortunate practice among both state and federal courts of using the term 'jurisdiction' imprecisely, to refer both to the subject-matter and the personal jurisdiction of the court, and to the court's general authority to take action."); *id.* at ___ n 5; slip op at 12 n 5 (noting that "the terms 'power' and 'authority' are generally used to refer to errors in the exercise of jurisdiction and other nonjurisdictional errors").

As these authorities make clear, defendant's assertion that the judgment is void and subject to collateral attack simply because it conflicts with federal law is "manifestly in error." *Buczkowski*, 351 Mich at 221.

Next, defendant argues that the judgment is void and subject to collateral attack because Congress deprived state courts of subject-matter jurisdiction over the division of military disability benefits.[9] To prevail on this argument, defendant must demonstrate that Congress has given exclusive jurisdiction over the division of military disability benefits in a divorce action to a federal forum. See, e.g., 21 CJS, Courts, § 272, p 288 ("The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.").[10] However, as discussed later in this opinion, defendant has failed to persuade

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[9] To the extent defendant continues to assert that all types of federal preemption deprive state courts of subject-matter jurisdiction—the position he advanced during his prior trip to this Court—we disagree with this assertion. Instead, we adopt the analysis on this point in the concurring opinion in *Foster I* and clarify our caselaw in this area. See *Foster I*, 505 Mich at 181-188 (VIVIANO, J., concurring). In particular, although in *Henry v Laborers' Local 1191*, 495 Mich 260, 287 n 82; 848 NW2d 130 (2014), we asserted that "preemption is a question of subject-matter jurisdiction," it is clear that "our assertion was made in the context of *Garmon* preemption [see *San Diego Bldg Trades Council v Garmon*, 359 US 236; 79 S Ct 773; 3 L Ed 2d 775 (1959),] and was indisputably correct in that context given that Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act . . . ." *Foster I*, 505 Mich at 184. We also disavow our statement in *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), that "[w]here the principles of federal preemption apply, state courts are deprived of subject matter jurisdiction." Finally, to the extent it reached a different conclusion, we overrule *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132; 796 NW2d 94 (2010).

[10] See also *Marshall v Consumers Power Co*, 65 Mich App 237, 245; 237 NW2d 266 (1976) (setting out a two-part test for determining whether Congress has impliedly preempted state law, under which a court must (1) "determine whether Congress has

us that the Veteran's Administration or any other federal forum has exclusive jurisdiction over the division of military disability benefits in a divorce action.

The United States Supreme Court rejected a similar argument in *Rose v Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987), after first observing:

> We have consistently recognized that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be pre-empted. Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests. [*Id.* at 625 (cleaned up).]

Relying on 38 USC 3107(a)(2), the veteran spouse argued that the Veteran's Affairs administrator had exclusive authority over all issues involving the disposition of military disability benefits. Rejecting that argument, the Court explained:

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preempted states from legislating or regulating the subject matter of the instant case," and (2) "if it has, [determine] whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system"). The second part of the test is not satisfied in this case because Congress has not "vested exclusive jurisdiction of th[is] subject matter," i.e., division of military disability benefits in a divorce action, in a federal forum. See *Veterans for Common Sense v Shinseki*, 678 F3d 1013, 1025-1026 (CA 9, 2012) (en banc) ("[W]e conclude that [38 USC 511] precludes 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 . . . . If that test is met, then the district court must cede any claim to jurisdiction over the case, and parties must seek a forum in the Veterans Court and the Federal Circuit.") (quotation marks and citations omitted; emphasis added). And *Kalb v Feuerstein*, 308 US 433, 438-439; 60 S Ct 343; 84 L Ed 370 (1940), cited by defendant, only serves to confirm this point. At issue in *Kalb* was whether a state court had jurisdiction in a foreclosure matter over property that fell under the jurisdiction of the bankruptcy court. But Congress has established an exclusive federal forum for bankruptcy matters. *Id.* at 439.

> This jurisdictional framework finds little support in the statute and implementing regulations. Neither [38 USC 3107(a)(2) nor 38 CFR 3.450 through 3.461 (1986)] mentions the limited role appellant assigns the state court's child support order or the restrictions appellant seeks to impose on that court's ability to enforce such an order. . . . Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. . . .
>
> . . . Given the traditional authority of state courts over the issue of child support, their unparalleled familiarity with local economic factors affecting divorced parents and children, and their experience in applying state statutes . . . that do contain detailed support guidelines and established procedures for allocating resources following divorce, we conclude that Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support. Thus, we do not agree that the implicit pre-emption appellant finds in § 3107(a)(2) is "positively required by direct enactment," or that the state court's award of child support from appellant's disability benefits does "major damage" to any "clear and substantial" federal interest created by this statute. [*Rose*, 481 US at 627-628, quoting *Hisquierdo v Hisquierdo*, 439 US 572, 581; 99 S Ct 802; 59 L Ed 2d 1 (1979).][11]

Although the Court in *Rose* found that the state child support statute was not preempted by federal law, its analysis is still helpful in determining whether Congress has established an exclusive forum for dividing military disability benefits in a divorce action.

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[11] The Court further described the purpose of the federal statutes as follows:

> The interest in uniform administration of veterans' benefits focuses, instead, on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules. These are the issues Congress deemed especially well-suited for administrative determination insulated from judicial review. Thus, even assuming that [38 USC] 211(a) covers a contempt proceeding brought in state court against a disabled veteran to enforce an order of child support, *that court is not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits*. [*Rose*, 481 US at 629 (cleaned up; emphasis added).]

Defendant here contends that the Secretary of Veterans Affairs has exclusive jurisdiction over all issues concerning veteran's benefits, including the division of those benefits in a state court divorce action. Defendant correctly notes that appellate jurisdiction from a decision by the Secretary is limited to the federal courts.[12] 38 USC 511(a) establishes 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" and generally precludes review of the Secretary's decision "as to any such question" "by any other official or by any court," with a limited number of exceptions. And 38 USC 5307 provides for a process of requesting apportionment of a veteran's benefits. But just as the Court in *Rose* was "not reviewing the Administrator's decision finding the veteran eligible for specific disability benefits," *Rose*, 481 US at 629, the trial court in this case was not reviewing a decision of the Secretary of Veterans Affairs under 38 USC 511(a). Therefore, contrary to defendant's assertion, there is no exclusive federal forum for dividing military disability benefits in divorce actions. We agree with plaintiff that 38 USC 511—just like 38 USC 211(a), which was at issue in *Rose*—does not refer to, restrict, or displace state court jurisdiction.

In sum, we hold that federal preemption under 10 USC 1408 and 38 USC 5301 does not deprive our state courts of subject-matter jurisdiction over a divorce action involving

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[12] Specifically, 38 USC 7104(a) provides for an appeal from the Secretary's decision under 38 USC 511(a) to the Board of Veterans' Appeals. In turn, the United States Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals, 38 USC 7252(a), and the United States Court of Appeals for the Federal Circuit has jurisdiction to review a decision of the Court of Appeals for Veterans Claims, 38 USC 7292.

the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was "a mistake in the exercise of undoubted jurisdiction," *Jackson City Bank*, 271 Mich at 544, that judgment is not subject to collateral attack.[13]

IV. CONCLUSION

Because the Court of Appeals erroneously concluded that the type of federal preemption at issue in this case deprives state courts of subject-matter jurisdiction, and because there is no other justification for a collateral attack on the consent judgment in this case, we reverse the judgment of the Court of Appeals and remand this case to the Dickinson Circuit Court for further proceedings not inconsistent with this opinion.

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

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[13] We believe the law in this area is correctly described in Turner, § 6:6, p 50:

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

8.

Foster v. Foster (Opinion Amended, Rehearing Denied) (Foster III), 509 Mich. 988; 974 N.W.2d 185 (May 27, 2022)

Order

Michigan Supreme Court
Lansing, Michigan

May 27, 2022

Bridget M. McCormack,
Chief Justice

161892 (193)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

DEBORAH LYNN FOSTER,
Plaintiff/Counterdefendant-
Appellant,

v

SC: 161892
COA: 324853
Dickinson CC: 07-015064-DM

RAY JAMES FOSTER,
Defendant/Counterplaintiff-
Appellee.

/

On order of the Court, the motion for rehearing of the Court's April 5, 2022 opinion is considered and, in lieu of granting rehearing, we AMEND the opinion of the Court by replacing the sentence in section I stating, "In February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat-Related Special Compensation (CRSC)" with the following: "In February 2010, defendant began receiving increased disability benefits, which included Combat-Related Special Compensation (CRSC)." In all other respects, the motion for rehearing is DENIED. MCR 7.311(F).

t0524

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.

May 27, 2022

Clerk