No. _____

IN THE

Supreme Court of the United States

ROXANE M. MARSCHNER,
Petitioner,

v.

RICHARD A. MARSCHNER,
Respondent.

On Petition for a Writ of Certiorari
to the North Dakota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Uniformed Services Former Spouses' Protection Act ("USFSPA"), Congress provided that a State may treat veterans' longevity-based retirement pay as divisible property in divorce. 10 U.S.C. § 1408(c). But Congress further provided that retirement pay that was waived to receive disability pay, as well as certain retirement pay received due to disability-related retirements, would be indivisible. 10 U.S.C. § 1408(a)(4)(A)(ii), (iii).

In *Howell v. Howell*, 581 U.S. 214 (2017), a divorced veteran waived a portion of his longevity-based retirement pay in order to receive disability pay, causing his ex-wife's share of his retirement pay to decrease. The divorce court ordered him to indemnify his ex-wife for that reduction. This Court held that the USFSPA preempted that indemnification order. *See id.* at 222.

In this case, unlike in *Howell*, the parties agreed as part of their divorce settlement that the veteran would indemnify his ex-wife if her share of his retirement pay were reduced because he later waived his retirement pay to receive disability benefits or because he received disability-based retirement pay. Even though the veteran agreed to the indemnification provision at the time of the divorce, the North Dakota Supreme Court nonetheless held that, under *Howell*, enforcement of the indemnification provision was preempted.

The question presented is:

Does the USFSPA require state courts to refuse enforcement of indemnification provisions in divorce settlement agreements?

PARTIES TO THE PROCEEDING

Roxane M. Marschner is petitioner here and was plaintiff-appellee below.

Richard A. Marschner is respondent here and was defendant-appellant below.

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PETITION FOR WRIT OF CERTIORARI

Roxane M. Marschner petitions for a writ of certiorari to review the judgment of the North Dakota Supreme Court.

OPINIONS BELOW

The decision of the North Dakota Supreme Court (Pet. App. 1a) is reported at 33 N.W.3d 9. The opinions and orders of the North Dakota District Court (Pet. App. 14a, 28a, 59a, 90a, 100a) are not reported.

JURISDICTION

The judgment of the North Dakota Supreme Court was entered on March 4, 2026. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

Pertinent provisions of the Uniformed Services Former Spouses' Protection Act are in the appendix to this brief.

INTRODUCTION

This case presents a recurring question, on which state supreme courts are divided, concerning divorce courts' authority to enforce divorce settlements involving military benefits.

Following their retirement from the military, certain veterans are eligible for retirement pay based on their length of service. Additionally, certain veterans who retire from the military for medical reasons are entitled to disability-based retirement pay.

Separate from retirement pay, veterans who have service-related disabilities are entitled to disability pay. In certain cases, veterans who receive disability pay are required to waive a corresponding portion of their retirement pay. Veterans generally execute such waivers because disability pay receives more favorable tax treatment than retirement pay.

The Uniformed Services Former Spouses' Protection Act ("USFSPA"), 10 U.S.C. § 1408, governs the treatment of military benefits in divorce. At a high level, Congress provided that longevity-based retirement pay is divisible in divorce. By contrast, disability-based retirement pay, as well as retirement pay that was waived in order to receive disability pay, is not divisible. 10 U.S.C. § 1408(a)(4)(A)(ii), (iii).

In *Howell v. Howell*, 581 U.S. 214 (2017), this Court addressed how the USFSPA applies when a veteran begins receiving disability benefits after a divorce. In that case, the parties' divorce decree entitled the veteran's ex-wife to half of the veteran's retirement pay. Years after the divorce, the veteran waived a portion of his retirement pay in order to receive disability pay, resulting in a decrease in the amount his ex-wife received as her share of his retirement pay. To make the ex-wife whole, the divorce court ordered the veteran to indemnify his ex-wife for the waiver—that is, to pay her, each month, an amount of money equivalent to half of his waived retirement pay. This Court held that the USFSPA preempted the divorce court's order because "such reimbursement and indemnification orders displace the federal rule" that waived retirement pay is not divisible. *Id.* at 222.

In the wake of *Howell*, numerous state courts have encountered a scenario that *Howell* did not address: cases in which the veteran and ex-spouse explicitly agreed—and stipulated as part of their divorce settlement—that the veteran would indemnify the ex-spouse based on a reduction of retirement pay if the veteran began receiving disability benefits after the divorce. Most state supreme courts have held that, under *Howell*, such indemnification provisions are enforceable. They have reasoned that *Howell* bars courts from forcing veterans *involuntarily* to indemnify their ex-spouses but does not purport to bar veterans from *voluntarily* agreeing to indemnification provisions in divorce settlements.

In the decision below, however, the North Dakota Supreme Court departed from that consensus. Expressly disagreeing with other state supreme courts, the court held that *Howell* bars enforcement of voluntary indemnification provisions in divorce decrees, and hence prevents divorcing spouses from entering into mutually agreeable settlement agreements containing such provisions.

The Court should grant certiorari to resolve the conflict of authority on the scope of federal preemption under the USFSPA.

STATEMENT OF THE CASE

A. Statutory Framework

The Federal Government provides veterans with several types of benefits. First, it provides a longevity-based pension for veterans who retire after a minimum number of years of service (typically twenty). *Howell*, 581 U.S. at 216; *see* 10 U.S.C. § 7311(a) (Army); *id.* § 8323(a)(1) (Navy and Marine Corps); *id.* § 9311(a) (Air Force). This petition refers to such pay based on length of service as "longevity-based retirement pay."

Second, under Chapter 61 of Title 10, veterans who retire due to disability may in some cases receive a monthly pension which is calculated according to a complex statutory formula. *See* 10 U.S.C. §§ 1201, 1401. To avoid confusion with other kinds of disability benefits, this petition will refer to that disability-based retirement pay as "Chapter 61 retirement pay."

Third, veterans who experience a service-connected disability are eligible for disability pay from the Veterans Administration. *See* 38 U.S.C. §§ 1110, 1131, 1155. In certain cases, however, veterans who wish to receive disability pay must waive an equal amount of their retirement pay (no matter the type). 38 U.S.C. § 5305. Eligible veterans typically execute such waivers because retirement pay is taxable, while disability pay is not. *See* 38 U.S.C. § 5301(a)(1).

This Court first addressed the disposition of veterans' benefits in divorce proceedings forty-five years ago. In *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court held that federal law did not allow states to treat retirement pay as divisible property in divorce. The Court reasoned that Congress conferred retirement pay as a "personal entitlement" to a service member, and that state courts therefore could not award an interest in a veteran's retirement pay to a former spouse in adjudicating a divorce. *Id.* at 232.

One year later, Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part by authorizing state courts to treat retirement pay as divisible property. 10 U.S.C. § 1408(c)(1). If a state court divides a veteran's retirement pay, an ex-spouse may serve the divorce decree on the Department of Defense,[1] and the Department will pay the allotted percentage of that retirement pay to the veteran's ex-spouse. *Id.* § 1408(d)(1).

But the USFSPA defines divisible property to exclude the portion of retirement pay that is waived in order to obtain disability pay. 10 U.S.C. § 1408(a)(4)(A)(ii), (c)(1). The USFSPA's definition of divisible property also excludes the disability-based component of Chapter 61 retirement pay. 10 U.S.C. § 1408(a)(4)(A)(iii), (c)(1).

This Court first interpreted the USFSPA in *Mansell v. Mansell*, 490 U.S. 581 (1989), in which it held 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." 490 U.S. at 594–95. Gerald Mansell was a veteran who had waived part of his retirement pay to receive disability compensation. Gerald and his wife Gaye Mansell divorced, entering into a divorce decree

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[1] The lower-court opinions in this case use the term "Department of Defense" rather than "Department of War," so this petition follows that convention.

that obliged Gerald to pay Gaye "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [Gerald] could receive disability benefits." *Id.* at 586. Gerald later petitioned the state courts to modify the decree to remove this provision, but they refused to do so. This Court reversed, explaining that under the USFSPA, any portion of the retirement pay waived to receive disability compensation is non-divisible. *Id.* at 592–94.

In *Howell v. Howell*, 581 U.S. 214 (2017), this Court revisited the USFSPA in the context of a veteran who began receiving disability benefits after the divorce. John and Sandra Howell, upon their divorce, entered a decree that awarded Sandra "as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins." *Id.* at 218–19 (quotation marks omitted) (alteration in original). Several years after the divorce, John was determined to be 20% disabled. He thus waived a portion of his retirement pay to receive disability benefits, resulting in a reduction in the amount Sandra received each month. *Id.* at 219. At Sandra's request, the Arizona divorce court ordered that John reimburse Sandra each month for that reduction, and the Arizona Supreme Court upheld that order. *Id.* This Court reversed, finding the divorce court's order to be preempted. It reasoned that the reimbursement award to Sandra was, in practical effect, indistinguishable from awarding Sandra the portion of retirement pay that John waived to obtain disability benefits—relief the USFSPA expressly forbade. *Id.* at 221–22.

B. Proceedings Below

Petitioner Roxane M. Marschner and Respondent Richard A. Marschner divorced in 2016. Prior to their divorce, Richard had completed twenty years of military service and had been informed by the Department of Defense that he would become eligible for longevity-based retirement pay when he turned sixty. Pet. App. 28a–29a.[2]

The parties resolved the divorce via a settlement agreement. Pet. App. 29a. On February 9, 2016, the North Dakota District Court entered an initial divorce judgment. Pet. App. 29a, 100a–129a. Richard and Roxane's attorneys then worked together to draft a mutually agreeable order under which Roxane would receive a share of Richard's military retirement pay. Pet. App. 30a. Approximately two months after the initial judgment, Roxane's attorney submitted that proposed order to the court without objection from Richard's attorney. *Id.* On July 5, 2016, the District Court entered an amended order in accordance with that agreement, again without objection from Richard's attorney. Pet. App. 34a, 90a–99a.

The settlement, as reflected in the amended order, addresses the disposition of Richard's retirement pay in detail. The formula set forth in the settlement agreement yields the result that Roxane's marital share of Richard's "military retirement" would be 27.907%. Pet. App. 16a, 56a. Anticipating that Richard

[2] Under the Department of Defense's regulations, the eligible age was ultimately adjusted to 59 years and 3 months as a result of Richard's combat service. Pet. App. 35a.

might later receive disability benefits, the order defines "military retirement" to include not only "retired pay" based on "longevity," but also "all payments paid or payable under … Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane)," as well as "all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability." Pet. App. 94a.

Thus, the amended order departs in multiple ways from the USFSPA's default allocation: whereas the USFSPA's definition of divisible property excludes Chapter 61 (*i.e.*, disability-based) retirement pay as well as retirement pay waived to receive disability benefits, 10 U.S.C. § 1408(a)(4)(A)(ii), (iii), the amended order defines divisible property to include both those amounts. Pet. App. 94a.

The amended order further provides that the "appropriate military pay center" would pay the specified amount directly to Roxane. Pet. App. 96a. Anticipating that the military pay center would not pay Roxane her allotted share given the settlement's departure from the USFSPA's default allocation, the parties included several provisions designed to ensure that Roxane would receive the full amount to which she is entitled under the decree. To wit:

- "If the amount paid by the military pay center to Former Spouse is less than the amount specified above, Member shall initiate an allotment to Former Spouse in the amount of any such difference, to be paid from any federal allotments due Member." Pet. App. 96a.

- If "no federal entitlement exists against which such an allotment may be initiated, … Member shall pay the amounts called for above herein directly to Former Spouse." Pet. App. 97a.
- "If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder," including "by application for or award of disability compensation," "Member shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the action taken by Member." Pet. App. 97a.

Needless to say, these concessions from Richard did not come for free. The judgment provided that Roxane would pay Richard $50,500 from a retirement account and would pay him a further $90,000 within 90 days of the judgment "to make the property distribution equitable." Pet. App. 37a–38a, 105a, 113a.

In 2021, Richard was medically retired from the Army National Guard due to his failure to meet Army medical standards. His disability rating was determined to be 60% (all combat-related). Pet. App. 14a, 35a.

Due to his medical retirement, Richard became eligible to receive $4,406 per month in Chapter 61 retirement pay. Pet. App. 17a, 35a, 40a. Richard waived $3,846.25 of his Chapter 61 retirement pay in order to receive disability pay from the Veterans Administration in the same amount. Pet. App. 17a.[3]

Roxane filed a request with the Defense Finance and Accounting Service (DFAS) to begin receiving monthly payments. Recall, however, that under the USFSPA, waived retirement pay and Chapter 61 retirement pay are both considered indivisible. 10 U.S.C. § 1408(a)(4)(A)(ii), (iii). As a result, DFAS denied her application on August 6, 2021, stating in a letter: "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA." Pet. App. 36a.[4] Despite

[3] In addition to that disability pay, Richard also received a separate monetary benefit, known as Combat-Related Special Compensation ("CRSC"), awarded to veterans injured in combat. Pet. App. 35a, 40a.

In some cases, veterans who are more than 50% disabled are eligible for Concurrent Retirement and Disability Pay ("CRDP"), meaning that they can receive disability pay without waiving a corresponding portion of their retirement pay. 10 U.S.C. § 1414(a). But prior to April 2026 (when he attained the age of 59 years and 3 months), Richard was not eligible for CRDP because he was not yet eligible for longevity-based retirement pay. *See* 10 U.S.C. § 1414(b)(1) (recipients of Chapter 61 retirement pay must waive that pay to receive disability benefits if their Chapter 61 retirement pay exceeds longevity-based retirement pay to which they were otherwise eligible); Pet. App. 42a (Richard became eligible for longevity-based retirement pay in April 2026).

[4] As noted in the previous footnote, in April 2026, Richard became eligible for CRDP. But he is virtually certain to waive CRDP so that he can continue receiving CRSC, which is not divisible in

Richard's assurances in text messages, Roxane never received any portion of Richard's retirement pay. Pet. App. 15a, 36a.

Roxane sought relief from the District Court, pointing to the indemnification provisions in the divorce decree. Pet. App. 36a. Richard opposed, arguing that under *Howell*, the indemnification provision was unenforceable. Pet. App. 36a–37a.

In a thoroughly reasoned order, the District Court ruled in Roxane's favor.[5] The court noted that "[s]ince *Howell*, state courts who have addressed the issue of post-divorce indemnification have reached various outcomes," and catalogued cases on both sides of the divide. Pet. App. 50a. In finding the indemnification agreement enforceable, the court explained that "the parties agreed to distribute the marital estate based on a belief Roxane would eventually receive a marital share of Richard's military retirement." Pet. App. 55a. "The post judgment orders indicated Richard would make an allotment or pay Roxane directly if she did not receive her share of his benefits." *Id.* "This has not happened."

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divorce and is more financially advantageous for him. Pet. App. 41a, 42a; *see* 10 U.S.C. § 1414(d) (noting that veterans must elect between CRDP and CRSC). Moreover, because Richard is receiving Chapter 61 retirement pay, Roxane will not receive any money from DFAS regardless of his election. Pet. App. 42a ("[R]egardless of whether Richard receives [CRSC] or [CRDP], DFAS will deem his benefits as non-disposable and will not honor any state court order to divide them.").

[5] The District Court issued an initial order (Pet. App. 59a–89a) and a corrected order (Pet. App. 28a–58a). This petition cites the corrected order.

Id. The court found that Richard owed Roxane $51,232, based on non-payment dating back to 2021. Pet. App. 18a–19a. The court therefore required Richard to compensate Roxane for that arrearage and to pay over her share of his retirement pay each month going forward. Pet. App. 17a–22a.

The North Dakota Supreme Court reversed, finding the District Court's order to be preempted under *Howell*. It acknowledged the District Court's conclusion that "several state courts after *Howell* distinguished between voluntary indemnification agreements and court-imposed indemnification, applying *Howell* only to the latter." Pet. App. 5a–6a. But it noted that "[c]ourts in other jurisdictions have interpreted *Howell* to hold that indemnification provisions requiring a veteran to compensate a former spouse for retirement pay lost due to a waiver in favor of disability benefits are void ab initio and do not bind the veteran"—and it sided with those courts. Pet. App. 7a. The North Dakota Supreme Court reasoned that "[e]ven if the parties' agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders that obligation unenforceable" because "*Howell* … holds that property division orders that affect a veteran's disability pay, regardless of form, are preempted." Pet. App. 7a–8a. Chief Justice Fair McEvers filed a concurring opinion, reasoning that although the decision was legally correct, the result was inequitable to Roxane. Pet. App. 9a–13a.

REASONS FOR GRANTING THE PETITION

I. State Courts Are Squarely Divided On The Question Presented.

As the North Dakota Supreme Court acknowledged, the decision below deepens a conflict of authority on whether *Howell* bars enforcement of indemnification provisions in divorce settlements.

A. Several state courts, including four state supreme courts, have held that *Howell* does not prohibit enforcement of indemnification provisions.

The North Dakota Supreme Court's opinion conflicts with decisions of the highest courts of Virginia, Illinois, Nevada, and Alaska, as well as intermediate appellate courts in Tennessee and Washington. Those courts have interpreted *Howell* to permit enforcement of indemnification provisions in divorce settlements.

The Virginia Supreme Court has held that the USFSPA does not preempt enforcement of an indemnification provision regarding disability benefits in a negotiated divorce decree. *Yourko v. Yourko*, 884 S.E.2d 799 (Va. 2023). Michael and Lee Ann Yourko negotiated a division of Michael's military pension as part of their divorce, which the circuit court memorialized as a final order. The order stipulated that the parties had "agreed upon the level of payments to [Lee Ann] to guarantee income to her." *Id.* at 801. It further provided that if Michael took "any action, including additional waiver of retired pay for disability compensation which reduces [Lee Ann's] share she is entitled to receive, then he shall indemnify her by giving to her directly the amount by which her share or amount is reduced as additional property division payments." *Id.* Michael subsequently moved to strike those provisions as void ab initio under federal law.

The Virginia Supreme Court held that "federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits," nor does it "bar courts from upholding such agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties." *Id.* at 805–06 (internal quotation marks omitted). It reasoned that "federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed, it expressly permits such usage." *Id.* at 804.

The court distinguished *Mansell* and *Howell*: "[N]either [of those precedents] involved a property settlement agreement that contained an indemnification provision," and "neither opinion can be read as addressing the enforceability of such a provision." *Id.* The court explained that *Mansell* "simply proscribes state courts from treating military retirement pay that had been waived to receive disability benefits as community property," while *Howell* "only makes clear that state courts cannot *order* a veteran who elects to waive retirement pay for disability pay to indemnify a former spouse." *Id.* (internal quotation marks omitted). Since the present case was "limited to the parties' contractual obligations," neither precedent dictated the outcome. *Id.*

The Illinois Supreme Court has reached the same conclusion. *Tronsrue v. Tronsrue (In re Marriage of Tronsrue)*, 272 N.E.3d 84 (Ill. 2025). In 1992, Elsa and George Tronsrue divorced. The judgment incorporated a settlement agreement stating that George would pay Elsa a specified percentage of his "Army Disability Retirement pay and V.A. disability pension." *Id.* at 87. In 2019, Elsa filed a petition for contempt, alleging that she believed George's disability pay had increased but that her payments had not increased commensurately, as the decree required. George argued that the provision of the decree that purported to divide those benefits was "void under federal law." *Id.* at 88.

The Illinois Supreme Court sided with Elsa. *Id.* at 92. The court explained that George's argument "[r]el[ied] primarily on" *Howell* and *Mansell* but that those cases were "distinguishable" because neither case "involved parties agreeing to an indemnification provision in a judgment of dissolution property settlement agreement" and thus neither "can be read as addressing the enforceability of such a provision." *Id.* at 93. It reasoned that enforcing negotiated settlements promotes "the value of allowing divorcing spouses to agree to certain terms, regardless of whether those terms reflect what a court could or would order," and that federal law places no limitation on a veteran's discretion to "us[e] the disability payments he receives in any way he chooses." *Id.* at 94–95.

The Nevada Supreme Court has come down on the same side of the split. *Martin v. Martin*, 520 P.3d 813

(Nev. 2022). Erich and Raina Martin divorced in 2015. Their marital settlement agreement, incorporated into the divorce decree, allotted to Raina half of Erich's military retirement benefits and provided that, "[s]hould Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." *Id.* at 818 (alteration in original). After Erich retired in 2019 and then waived all retirement pay for full disability benefits, DFAS notified Raina that she would no longer receive payments. *Id.* at 816. Raina moved to enforce the divorce decree; Erich argued that *Howell* and the USFSPA preempted the reimbursement provision.

The Nevada Supreme Court held that state courts have the authority to "divide disability pay when they enforce the terms of a negotiated property settlement … even if the parties agreed on a reimbursement provision that the state court would lack authority to otherwise mandate." *Id.* at 815. It distinguished *Howell* on the ground that *Howell* did not "involve[] the parties agreeing to an indemnification provision in the divorce decree property settlement." *Id.* at 817. The court explained: "By its plain language, nothing in [the USFSPA] addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute … limits what divisions a state court may impose based on community property laws." *Id.* at 818.

The Alaska Supreme Court reached the same conclusion in *Jones v. Jones*, 505 P.3d 224 (Alaska 2022). The divorce settlement of Vieanna and Kendre Jones awarded Vieanna "$1,200.00 per month . . . of [Kendre's] military retirement monthly benefit" and expressly defined "military retirement" to include all amounts Kendre "actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any post-divorce waiver made in order to qualify for Veterans Administration [disability] benefits." *Id.* at 227. The agreement's indemnification provision further required that Kendre, if he took "any action that prevents, decreases, or limits the collection by [Vieanna] of the sums to be paid hereunder (by application for or award of disability compensation[] . . . or in any other way)" to "make payments to [Vieanna] directly in an amount sufficient to neutralize[] . . . the effects of the action." *Id.* After the divorce, Kendre began receiving 100 percent disability pay, and the payments to Vieanna stopped. *Id.*

The Alaska Supreme Court held that federal law did not bar enforcement of the indemnification provision. It drew a sharp distinction between the situation in *Howell*—in which the divorce decree contained no indemnification clause and the trial court imposed a division of the disability pay by judicial order—and the situation before it—in which the division of disability pay merely reflected a requirement that Kendre "keep the terms of his promise." *Id.* at 230. The Supreme Court explained further that, "[a]lthough *Howell* makes clear that state courts cannot simply order a military spouse who elects disability pay to reimburse or indemnify the other on a dollar for dollar basis, *Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement."

Id. Thus, the court concluded, federal law did not "preclude[] the superior court from enforcing [the indemnification] contract term." *Id.* at 231.

Intermediate appellate courts in Tennessee and Washington have similarly held that indemnification provisions in divorce settlements are enforceable under *Howell*. *See Hammond v. Hammond*, 680 S.W.3d 269, 279 (Tenn. Ct. App. 2023) ("[N]othing in *Howell* suggests that service members cannot determine on their own, without court intervention, how to spend their future disability pay."); *Weiser v. Weiser (In re Marriage of Weiser)*, 475 P.3d 237, 249 (Wash. Ct. App. 2020) (permitting enforcement of indemnification provision because "nothing in the superior court's order modified the original property disposition terms").

B. Other state courts, including the court below, have held that *Howell* prohibits enforcement of indemnification provisions.

In the decision below, the North Dakota Supreme Court parted ways from other state supreme courts and held that indemnification provisions in divorce settlements are unenforceable. Pet. App. 7a ("Even if the parties' agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable."). The Michigan Supreme Court, as well as intermediate appellate courts in Minnesota, Kansas, and Alabama, have reached similar conclusions.

In *Foster v. Foster*, 949 N.W.2d 102 (Mich. 2020), Ray Foster began receiving benefits for combat-related disabilities shortly after he and Deborah Foster divorced in 2008. Their negotiated consent judgment awarded Deborah 50 percent of Ray's disposable retirement pay and provided further that, if Ray collected disability pay, he would be responsible to indemnify Deborah for the same sum to which she would have been entitled absent the disability benefits. At the divorce hearing, the trial court specifically inquired about and confirmed Ray's understanding of that provision:

> *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?
> [*Mr. Foster*]: Yes.

Id. at 105 (last bracket added).

Nevertheless, after the divorce, Ray fell short on his payments. The Michigan divorce court issued an order enforcing the indemnification provision in the decree, which the Michigan Court of Appeals affirmed. *Id.* at 106.

The Michigan Supreme Court reversed. Applying *Howell*, the Supreme Court held that state courts were precluded from enforcing any provision of a divorce judgment requiring that a 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 disability benefits. *Id.* at 111. That was so, the court reasoned, because "[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." *Id.* at 111–12.

The court rejected Deborah's argument that voluntary consent distinguished this case from *Howell*. Because a consent judgment is in the nature of a contract, the court reasoned, it effected an assignment of disability benefits that was impermissible under the USFSPA. *Id.* at 112. Similar to the North Dakota Supreme Court, the Michigan Supreme Court concluded that a contractual indemnification obligation makes no difference to the preemption analysis, because the economic effect on the veteran's disability benefits is identical irrespective of the source of the law subjecting them to division. *Id.* at 113–14.

The Michigan Supreme Court remanded for further consideration on the question whether, under state law, Ray was engaging in an impermissible collateral attack on a final decree. *Id.* On remand, the Michigan Court of Appeals held that *Howell* required nullifying the decree, but the Michigan Supreme Court reversed again. *Foster v. Foster*, 983 N.W.2d 373, 376 (Mich. 2022). The court held that even though the divorce court was prohibited from entering the decree, state-law principles of res judicata required the decree to remain in place: "[T]he doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle." *Id.* at 379.

It held that the USFSPA would require undoing the decree only if it implicated divorce courts' subject-matter jurisdiction, which it did not. *Id.* at 384.

The upshot of the two *Foster* cases is that indemnification provisions are illegal going forward, but will not be stripped from pre-existing final decrees—a less extreme version of the North Dakota Supreme Court's decision, which retroactively invalidated the indemnification provision in Richard and Roxane's decree.[6]

Three state intermediate appellate courts have reached the same conclusion as the high courts of Michigan and North Dakota. *See Berberich v. Mattson (In re Marriage of Berberich)*, 903 N.W.2d 233, 235, 241 (Minn. Ct. App. 2017) (holding that "[f]ederal law preempts state courts from dividing a veteran's military disability compensation as marital property, even where, as here, the parties agreed to the division" and that *Howell* had "effectively overruled cases relying on the sanctity of contract to escape federal preemption"); *Babin v. Babin (In re Marriage of Babin)*, 437 P.3d 985, 987, 991 (Kan. Ct. App. 2019) (holding that divorce court "lacked jurisdiction to order such a division of benefits," even where the veteran "agreed to give 43% of his military disability benefits" to his former spouse and that "the sanctity of contract" cannot be used to "escape federal preemption"); *Williams v. Burks*, 353 So. 3d 549,

[6] The North Dakota Supreme Court also cited *Parish v. Parish*, 991 N.W.2d 1 (Neb. 2023) as a decision on its side of the split, but *Parish*'s mention of the issue is dictum; the court holds that a court may consider disability benefits for purposes of alimony. *Id.* at 6–7.

557 (Ala. Civ. App. 2021) (holding that *Howell* barred enforcement of settlement agreement and "the strong language used by the Court in *Howell* suggests that the lack of power to award VA disability benefits as part of a property settlement is the type of defect that would make any such award void").

* * *

To sum up, the high courts of Virginia, Illinois, Nevada, and Alaska, as well as intermediate courts in Tennessee and Washington, enforce settlements with indemnification provisions. By contrast, the high courts of North Dakota and Michigan, as well as intermediate courts in Minnesota, Kansas, and Alabama, treat such settlements as unenforceable.

As courts on both sides of the split have recognized, the conflict is direct and entrenched. *See* Pet. App. 5a–6a, 7a (distinguishing the approaches after *Howell* as split between courts that "distinguish[] between voluntary indemnification agreements and court-imposed indemnification, applying *Howell* only to the latter" and "[c]ourts in other jurisdictions" applying *Howell* to both circumstances); *Hammond*, 680 S.W.3d at 275–76 ("contrast[ing]" the courts that "apply *Mansell* and *Howell* … expansively" to mean that "federal law preempts even negotiated settlements in which the military spouse agrees to indemnify the non-military spouse in the event of a future retirement waiver" with courts that hold that *Howell* "does not prohibit a service member from agreeing to future indemnification in a negotiated settlement").

Nearly a decade after *Howell*, the issue on which these courts are divided has been fully aired. Absent this Court's intervention, state courts that have not yet ruled will be left to choose between the two fully developed positions that are already on offer. This Court should grant review to decide which of these competing interpretations of federal law is correct.

II. This Case Presents A Recurring Issue Of National Importance.

This Court's review is warranted because the question presented is of vital importance to the Nation's veterans and their former spouses.

The number of veterans drawing benefits is large—and increasing over time. Approximately 2 million veterans received retirement pay in 2022. Office of the Actuary, U.S. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2022*, at 7–9 (2023) [hereinafter "DOD Report"]. That number has grown steadily and by about 36 percent over the past three decades. *Id.* at 16. Roughly one quarter of current military retirees have waived a portion of retirement pay in favor of disability compensation, *id.* at 57, and that does not account for the servicemembers who obtain Chapter 61 retirement pay.

Retirement pay and disability compensation are often a significant source of economic support. The average waiver to receive disability benefits from the VA in 2022 was $382 per month—just over 5% of the median household income in the United States the same year. *See* DOD Report at 57; Gloria Guzman & Melissa Kollar, U.S. Census Bureau, *Income in the United*

States: 2022, at 2 (2023). As the law stands, many former spouses of veterans are being deprived of a significant—and contracted-for—source of support based on an erroneous reading of federal law, or, alternatively, many veterans are being wrongfully denied benefits that federal law dictates they receive. Either eventuality warrants the Court's review.

This case underscores the stakes for individual families. Petitioner relinquished more than $140,000 in exchange for the contractual right to receive a share of Richard's military retirement, including disability benefits. Pet. App. 37a–38a (noting that Roxane paid Richard over $140,000 up front "to make the property distribution equitable"). Under the decision below, that entire consideration is forfeited. As this case illustrates, barring enforcement of indemnification provisions leads to grave economic consequences for military spouses. This Court's review is warranted to decide whether federal law demands that harsh result.

III. The Decision Below Is Incorrect.

Finally, the North Dakota Supreme Court's decision warrants this Court's review because it is wrong.

A veteran's rights derived from the USFSPA may be waived by agreement. Statutory rights are presumptively waivable: "[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995); *see Evans v. Jeff D.*, 475 U.S. 717, 730–32 (1986) (holding that a party may waive statutory eligibility for attorney's fees); *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."). That presumption may be rebutted by "the intention of Congress as manifested in the particular statute" or by a determination that allowing waivers of a particular statutory right would contravene public policy. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704–06 (1945); *see Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (noting that "the policies underlying [a] statute may in some circumstances render [a] waiver unenforceable").

The USFSPA contains no indication that Congress intended to preclude waiver of the rights it confers. The Act makes disability compensation non-divisible by excluding it from the definition of divisible retirement benefits. 10 U.S.C. § 1408(a)(4). But it contains no indication that Congress intended to reserve disability benefits—in inalienable fashion—to the veteran to whom they accrue. That silence certainly cannot amount to the required "affirmative indication" that Congress sought in the Act to bar waiver. *See Mezzanatto*, 513 U.S. at 201.

Moreover, allowing veterans to waive their rights under the USFSPA does not undermine—and, to the contrary, promotes—the Act's purposes. The USFSPA was designed to protect former spouses—hence the name, "Uniformed Services Former Spouses Protection Act"—not to induce them to enter into settlement agreements that would later prove unenforceable. The USFSPA protects veterans too by excluding disability benefits from the definition of divisible property. But it does not go so far as to ban veterans from making independent decisions on how to treat their military benefits in settlements. That makes sense, because permitting veterans to waive those benefits is beneficial to veterans. As this case illustrates, if veterans can waive those benefits, they can receive up-front compensation in exchange for that waiver that they may view as more advantageous.

The North Dakota Supreme Court and other courts on that side of the split have based their holdings on an erroneous reading of *Howell*. *Howell* did not involve—and had no occasion to pass on—the validity of a decree expressly dividing benefits including disability compensation. Instead, the agreement in *Howell* simply awarded Sandra Howell 50 percent of John Howell's "military retirement" pay as her "sole and separate property." 581 U.S. at 218–19. When John subsequently reduced the payments to Sandra by waiving a portion of his retirement pay for disability, an Arizona court ordered indemnification. *Id.* at 219. That court-imposed modification—which was not provided for in the agreement and effectuated precisely the same disability benefits division that the USFSPA forbade—was preempted. *Id.* at 221–22. But a division of disability benefits in this and similar cases is very different: It entails not a court-imposed modification of a divorce decree, but court enforcement of bargained-for terms.[7]

[7] Indeed, at the *Howell* oral argument, both Justice Sotomayor and Justice Ginsburg inquired as to whether the case would come out differently if the divorce court was enforcing a pre-existing settlement agreement, and they were assured that it would. Tr. of Oral Arg. at 5, *Howell v. Howell*, No. 15-1031 (U.S. Mar. 20, 2017)

That distinction between contracted-for and court-imposed indemnification is significant and commonsense. The USFSPA bars state courts from treating disability benefits as divisible in divorce proceedings. *See* 10 U.S.C. § 1408. But it does not purport to regulate settlements. Nothing in the statute—or in *Howell*—suggests federal law preempts state law where the parties themselves, through negotiation, have chosen to contractually allocate the risk of a future disability election. *See* 2 Mark E. Sullivan, *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families* 670, 691 n.7 (3d ed. 2019) ("It's one thing to argue about a judge's power to require … a duty to indemnify," but "another matter entirely to require a litigant to perform what he has promised in a contract.").

At minimum, the North Dakota Supreme Court erred by interpreting federal law to require that Roxane be *retroactively* stripped of her rights under the decree. The divorce decree, including the indemnification provision, was a final judgment. Under ordinary res judicata principles, it should have stayed in place. But the North Dakota Supreme Court nonetheless found the judgment unenforceable, relying on case law finding that indemnification provisions in divorce decrees are "void

("Our position today has nothing to do with the enforcement of settlements. … [I]f Petitioner had agreed to express indemnification provision and thereby[] … waived his rights under the USFSPA, we think that litigation waiver would be okay[] [and] would be enforceable, just like any other waiver in litigation."); *see also id.* at 47 (reiterating that the USFSPA did not "imping[e] on settlements").

ab initio and do not bind the veteran." Pet. App. 7a; *see* Pet. App. 8a (characterizing indemnification order as "preempted by federal law and void"). That conclusion was wrong. Nothing in *Howell* suggests that the USFSPA renders final decrees "void" in derogation of basic principles of finality.

The rule of the North Dakota Supreme Court creates grossly inequitable results. When a veteran voluntarily agrees, in exchange for substantial consideration, to indemnify a former spouse for the consequences of a disability election, he is not being subjected to a court-imposed burden; he is being held to his own promise. Interpreting the USFSPA and extending *Howell* to bar enforcement of such promises undermines reliance interests in a manner that Congress cannot have intended. In this case, for example, Richard accepted $140,500 in present-value consideration in exchange for an indemnification provision that he was later able to strip from the decree, leaving Roxane with *nothing* from his military benefits. Federal law does not require that result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2026

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Appendix A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2026 ND 66

Roxane M. Marschner,

Plaintiff, Appellee, and Cross-Appellant

v.

Richard A. Marschner,

Defendant, Appellant, and Cross-Appellee

No. 20250066

Filed March 4, 2026

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Jackson J. Lofgren, Judge.

REVERSED.

Opinion of the Court by Tufte, Justice, in which Chief Justice Fair McEvers and Justices Jensen and Bahr joined. Chief Justice Fair McEvers filed a concurring opinion.

Erica J. Shively, Bismarck, N.D., for plaintiff, appellee, and cross-appellant.

Leah M. Warner, Fargo, N.D., for defendant, appellant, and cross-appellee.

Marschner v. Marschner
No. 20250066

Tufte, Justice.

[¶1] Richard Marschner appeals from an amended judgment enforcing an indemnification provision in the divorce decree that dissolved his marriage to appellee Roxane Marschner. Richard argues that the district court erred by ordering him to indemnify Roxane for the loss of her share of his military retirement pay after he waived that pay in favor of disability retired pay, asserting that federal law preempts state courts from enforcing such provisions. Roxane contends that the parties contractually agreed to indemnification, that federal law does not bar enforcement of such agreements, and that the district court properly awarded her spousal support as a remedy. We conclude that federal law prohibits North Dakota district courts from dividing military disability retired pay. We reverse.

I

[¶2] Richard joined the North Dakota Army National Guard in 1985 and married Roxane in 1994. The parties were divorced in 2016. At that time, they reached a settlement agreement dividing their marital estate. Under the agreement, Richard immediately received $50,500 from Roxane's 403(b) retirement account, and Roxane was to receive a portion of Richard's Army National Guard pension and Federal Employees' Retirement System benefits when he retired. Roxane paid Richard a $90,000 equity payment within 90 days of entry of judgment. The settlement agreement reserved the court's authority to redistribute property if either party failed to comply with the judgment's terms, and both parties waived spousal support.

[¶3] The district court entered a post-judgment order specifying additional details about the division of Richard's retirement benefits. The order stated that Roxane would receive a percentage of Richard's military retirement as her sole and separate property, payable from Richard's disposable retired or retainer pay. The order defined "military retirement" to include "all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability." The order further provided that if Richard took any action that prevented, decreased, or limited Roxane's collection of these sums—including application for or award of disability compensation—he would indemnify Roxane directly from his "disposable retired or retainer pay." Finally, the order retained the court's jurisdiction to "make an award of alimony (in the sum of benefits payable plus future cost of living adjustments)" if Richard failed to comply with the payment provisions "by any means, including the application for a disability award."

[¶4] Richard was subsequently separated from the National Guard for medical reasons and began receiving military disability retired pay. Richard waived an equivalent portion of his retirement pay. The court found that Richard will never receive retirement pay even upon reaching his eligible retirement age because he waived all his retirement pay in favor of disability retired pay.

[¶5] When Roxane filed a request with the Defense Finance and Accounting Service to receive a share of Richard's disability retired pay, DFAS denied her application, explaining: "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA [the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408]."

[¶6] Roxane subsequently filed a Motion for Amended Judgment Pursuant to N.D.R.Civ.P. 60 or to Redistribute the Marital Estate Pursuant to N.D.C.C. § 14-05-24. After several hearings, the district court issued an order and corresponding amended judgment. The court determined that the 2016 divorce judgment and post-judgment orders required Richard to indemnify Roxane and awarded her spousal support in an amount equivalent to her share of the pre-waiver retirement pay, retroactive to when Richard began receiving disability retired pay. Richard appeals from the amended judgment.

II

[¶7] This Court reviews questions of law de novo. *Gomm v. Winterfeldt*, 2022 ND 172, ¶ 16, 980 N.W.2d 204. Whether a federal statute preempts state law is a question of law subject to de novo review when it is a question of statutory interpretation. *Envtl. Driven Solutions, LLC v. Dunn County*, 2017 ND 45, ¶¶ 6-7, 890 N.W.2d 841. The interpretation of a divorce judgment is a question of law that is fully reviewable on appeal. *Boumont v. Boumont*, 2005 ND 20, ¶ 5, 691 N.W.2d 278. Here, we apply the de novo standard of review because the dispositive question in this appeal is a legal one: does a federal statute preempt the district court's enforcement of the indemnification provision in the parties' divorce judgment?

III

[¶8] Richard argues the district court erred by enforcing the indemnification clause in the 2016 divorce judgment that required the division of his non-disposable, disability retired pay. He asserts that the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, preempts state law and prevents state courts from dividing non-disposable pay in property settlements. Citing *Howell v. Howell*, 581 U.S. 214, 217-18 (2017), he argues that disability retired pay is non-divisible even if the veteran spouse agreed to divide it in a property settlement.

[¶9] The district court cited *Howell* for the proposition that courts may account for reductions in retirement pay when calculating spousal support, and held that *Howell* did not prevent it from enforcing the indemnification clause through an award of spousal support. The court noted that several state courts after *Howell* distinguished between voluntary indemnification agreements and court-imposed indemnification, applying *Howell* only to the latter. *See In re Marriage of Weiser*, 475 P.3d 237, 246-47 (Wash. Ct. App. 2020); *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022); *Martin v. Martin*, 520 P.3d 813, 818 (Nev. 2022); *Hammond v. Hammond*, 680 S.W.3d 269, 279 (Tenn. Ct. App. 2023); *Yourko v. Yourko*, 884 S.E.2d 799, 804 (Va. 2023).

[¶10] The district court found that awarding spousal support to restore Roxane's lost portion of the retirement pay was an available remedy under the divorce judgment and post-judgment orders. The court reasoned that amending the judgment to award Roxane spousal support in an amount equal to what she lost through Richard's waiver was appropriate because the parties' agreement to distribute the marital estate was based on a belief that Roxane would eventually receive a share of Richard's military retirement pursuant to the property division.

[¶11] We agree with Richard that the district court misinterpreted *Howell* and erred by dividing his disability retired pay. Under the Act as interpreted in *Howell*, when a divorce decree divides military retirement pay as part of the property division between the two former spouses and the veteran spouse subsequently elects to waive retirement pay in favor of disability pay, a state court cannot award a portion of the disability pay to restore the former spouse's lost portion. *Howell*, 581 U.S. at 221 (citing *Mansell v. Mansell*, 490 U.S. 581, 589 (1989)). A state court may not order the veteran to divide his disability pay by any form of order. *Howell*, 581 U.S. at 222 ("Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.”).

[¶12] Courts in other jurisdictions have interpreted *Howell* to hold that indemnification provisions requiring a veteran to compensate a former spouse for retirement pay lost due to a waiver in favor of disability benefits are void ab initio and do not bind the veteran. *See Berberich v. Mattson*, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017) (holding that court orders providing for indemnification of a former spouse, even when entered into voluntarily, are not enforceable because of federal preemption, and that *Howell* effectively overruled cases relying on the sanctity of contract to avoid federal preemption); *see also In re Marriage of Babin*, 437 P.3d 985, 991-92 (Kan. Ct. App. 2019) (holding that state courts cannot do indirectly what they are prohibited by federal law from doing directly, and that federal preemption foreclosed offsetting a loss through enforcement of an indemnification agreement); *Parish v. Parish*, 991 N.W.2d 1, 6-7 (Neb. 2023) (holding that under the Act and *Howell*, a state court may not order indemnification for waiver of retirement pay in favor of disability pay, although it may consider disability benefits in assessing the parties’ financial condition for purposes of alimony).

[¶13] The district court’s rationale for enforcing the indemnification clause through spousal support cannot be reconciled with *Howell* and its state court progeny. Even if the parties’ agreement obligated Richard to indemnify Roxane for waived retired pay, federal law renders the obligation unenforceable. It makes no difference that the court found that spousal support was an available option to restore Roxane's lost portion of Richard's retirement pay. The court's award of spousal support is merely a semantic reframing of the division of Richard's disability pay. *See Howell*, 581 U.S. at 222. But for Richard's election to waive retirement pay, the court would not have ordered the "spousal support." Importantly, the court did not determine the award by considering the *Ruff-Fischer* guidelines required for awards of spousal support. *See Heinle v. Heinle*, 2010 ND 5, ¶ 22, 777 N.W.2d 590 (requiring consideration of the *Ruff-Fischer* factors for spousal support awards). The effect of the court's order is thus to divide Richard's non-disposable disability pay, not to award spousal support.

[¶14] The *Howell* decision holds that property division orders that affect a veteran's disability pay, regardless of form, are preempted. *Howell*, 581 U.S. at 222. Accordingly, the district court erred when it awarded Roxane spousal support to restore her lost portion of Richard's waived retired pay. Any order of the court requiring indemnification of a veteran's former spouse for military retirement pay waived for disability pay is preempted by federal law and void.

IV

[¶15] The district court erred as a matter of law by ordering spousal support on the basis of void indemnification provisions. We reverse the amended judgment.

[¶16] Lisa Fair McEvers, C.J.
Jerod E. Tufte
Jon J. Jensen
Douglas A. Bahr

[¶17] The Honorable Daniel J. Crothers, a member of the Court when this case was heard, retired effective February 28, 2026, and did not participate in this decision.

Fair McEvers, Chief Justice, concurring.

[¶18] I agree with and have signed with the majority, but I write because the case should be remanded as the result is inequitable to Roxane Marschner.

[¶19] Under N.D.C.C. § 14-05-24(1), a district court must equitably distribute the parties' marital property and debts. The original property division was based on an agreement that appeared equitable at the time and was based on the stipulation of the parties. It was only after Roxane Marschner was denied the military benefits she expected under the stipulation that she requested relief from the judgment. The underlying motion was brought under N.D.R.Civ.P. 60(b) and N.D.C.C. § 14-05-24. As noted by the district court:

> Under Rule 60(b)(5) relief may be granted if applying the judgment prospectively is "no longer equitable." "There must be an unforeseen change of circumstances and a judgment with prospective application." *Kuehl v. Lippert*,

401 N.W.2d 523, 525 (N.D. 1987). Rule 60(b)(6), N.D.R.Civ.P., allows the district court to grant reprieve for "any other reason that justifies relief." "The catch-all clause in N.D.R.Civ.P. 60(b)(vi) gives the court 'a grand reservoir of equitable power to do justice in a particular case.'" *Olander Contracting Co. v. Gail Wachter Invs.*, 2003 ND 100, ¶ 9, 663 N.W.2d 204 (quoting *Compton v. Alton Steamship Co., Inc.*, 608 F.2d 96, 106 (4th Cir. 1979)). "'. . . [It] provides the ultimate safety valve to avoid enforcement by vacating the judgment to accomplish justice.'" *Id.* (quoting *Kopp v. Kopp*, 2001 ND 41, ¶ 10, 622 N.W.2d 726). But, it "does not have an unlimited reach." *Id.* Relief under Rule 60(b)(6) "should only be invoked when 'extraordinary circumstances are present.'" *Hoffarth v. Hoffarth*, 2020 ND 218, ¶ 10, 949 N.W.2d 824 (citing *Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197 (internal citations omitted)).

[¶20] The district court found:

> The parties agreed how to divide the marital estate and agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account. Roxane also agreed to pay Richard $90,000.00 within 90 days of entry of

judgment to make the property distribution equitable. Richard was required to elect the Survivor's Benefit Plan with Roxane as the sole beneficiary so that if he died she would be entitled to benefits. *It is clear from the Settlement Agreement, and the two post-judgment orders, Roxane receiving a portion of Richard's military pay was an important consideration for the parties in distributing the marital estate.*

. . . .

Here, the parties agreed to distribute the marital estate based on a belief Roxane would eventually receive a marital share of Richard's military retirement. Richard immediately received $50,500.00 from Roxane's 403(b) retirement account and Roxane agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. The post judgment orders indicated Richard would make an allotment or pay Roxane directly if she did not receive her share of his benefits. This has not happened. *The Court therefore could, under N.D.C.C. § 14-05-24, redistribute the [marital] estate.* If the Court were to take this avenue the primary focus would likely be on the value

> of what Roxane believed she would receive versus what she will receive.
>
> However, the simpler remedy is the one repeatedly outlined in the post-judgment orders-the award of spousal support. The Court finds this is the appropriate remedy in this matter.

(Emphasis added.) The court opted for what it deemed the simpler method of achieving equity. That method was legally incorrect. But there could be other avenues for granting Roxane Marschner equitable relief.

[¶21] That the court has inherent power to vacate or otherwise grant relief from a judgment in the interest of justice has long been recognized in this state. *Kopp*, 2001 ND 41, ¶ 9; *see Hamilton v. Hamilton*, 410 N.W.2d 508, 513-515 (N.D. 1987) (discussing the equitable powers of the court to entertain a separate independent action in equity which is a separate legal claim from relief under N.D.R.Civ.P. 60(b)). In *Kopp*, ¶ 10, this Court stated:

> Rule 60(b)(vi), N.D.R.Civ.P., has been broadly construed as a grant of ample power to a trial court to vacate a judgment whenever that action is appropriate to accomplish justice. The rule provides for relief when the movant demonstrates it would be manifestly unjust to enforce a court order or judgment, and provides an escape from the judgment, unhampered by detailed restrictions. When it is disclosed that a judgment is so blatantly one-sided

> or so rankly unfair under the uncovered circumstances that courts should not enforce it, N.D.R.Civ.P. 60(b)(vi) provides the ultimate safety valve to avoid enforcement by vacating the judgment to accomplish justice.

(Cleaned up.)

[¶22] Here, equity has not yet been achieved. A district court does not generally "retain continuing jurisdiction to modify a final property distribution." *Keita v. Keita*, 2012 ND 234, ¶ 28, 823 N.W.2d 726. However, under N.D.C.C. § 14-05-24(3), a court may redistribute property and debts in a post-judgment proceeding when a party fails to comply with an order distributing property and debts. In addition, the parties' settlement agreement reserved the court's authority to redistribute property if either party failed to comply with the judgment's terms. Richard Marschner may not have deliberately failed to comply with the judgment, but the result was the same. While upsetting any judgment should be a rare circumstance in our jurisprudence, the results here beg for relief. Because equity still has not been achieved, I would remand for further consideration of alternative relief as the district court deems equitable, including further proceedings if necessary.

[¶23] Lisa Fair McEvers, C.J.

Appendix B

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
Roxanne M. Marschner Plaintiff v. Richard A. Marschner, Defendant.	Case No. 08-2015-DM-00080 **AMENDED JUDGMENT**

Plaintiff Roxane M. Marschner (hereafter "Roxane") and Defendant Richard A. Marschner (hereafter "Richard") entered into an Agreement for divorce that resolved all issues related to their marriage. Pursuant to the agreement, a Judgment was entered on February 9, 2016. (Doc. ID# 34). The Judgment awarded Roxane a share of Richard's retired military pay. In 2021, Richard was medically retired and, as a result of that medical retirement, Roxane did not receive her bargained-for share of Richard's medical retirement, either through Richard or through the military. To obtain enforcement, Roxane filed a Motion to Amend Judgment or Redistribute the Marital Estate in September of 2023. Trial was held on this issue over three dates, concluding on October 4, 2024. The Court issued its Order on Motion for Amended Judgment or

Redistribute the Marital Estate on December 31, 2024. (Doc ID #243). A Corrected Order on Motion for Amended Judgment or Redistribute the Marital Estate was issued on March 21, 2025. (Doc ID #269).

Accordingly, the Court here makes the following Findings of Fact, Conclusions of Law, and Amended Judgment:

FINDINGS OF FACT

1. Richard agreed and it was subsequently ordered that Roxane would receive a share of Richard's non-traditional military retired pay.

2. The parties' Agreement included indemnity language to protect Roxane receiving her share of the non-traditional or non-regular military retired pay in the event that Richard was retired under Chapter 61 of Title 10 of the United States Code (hereinafter "Chapter 61"). The language used in this clause contains terminology that makes it contradictory or difficult to interpret on certain issues.

3. Richard was medically retired from the military in May of 2021 under Chapter 61.

4. Roxane has not received any payments of the marital share of Richard's medical retired pay. The Judgment clearly states that the "military retirement" of which Roxane is to receive a marital share includes Chapter 61 retirement.

5. The Judgment also provides that the Court retains jurisdiction to enter further orders as necessary to enforce the award of the marital share of Richard's military retirement which includes Chapter 61 retirement. The Judgment requires Richard to indemnify Roxane for her share of the military retirement if the payments are not directly made by the military. It further extends the Court's ability to correct issues caused if Richard fails to indemnify Roxane.

6. Following the parties' divorce, both an Order Dividing Military Retired Pay and an Amended Order Dividing Military Retired pay were entered without objection by Richard or his counsel.

7. The remaining Findings of Fact present in the Court's Order, and Corrected Order on Motion for Amended Judgment or Redistribute the Marital Estate and any amendments thereto, are hereby incorporated by reference.

8. An award for spousal support should be entered requiring Richard to pay to Roxane spousal support in the amount equivalent to the pension-share amount to which she is entitled. This entitlement commences as of June of 2021 and shall include a spend-down payment of 20% on the arrears owed by Richard to Roxane. Cost of living adjustments (COLA) should also apply.

9. <u>**MARITAL SHARE FOR THE PLAINTIFF:**</u> One-half of the marital share of Richard's military retirement is due to Roxane, and this is defined in the Judgment as 27.907%.

10. <u>CURRENT RETIRED PAY FOR DEFENDANT:</u> Richard is a military retiree. According to his Retiree Account Statement (RAS) from DFAS (Defense Finance and Accounting Service), his monthly income (as of October 2024) is as follows:

a. $4,406 per month in gross retired pay.

b. Deduction of $3,846.25 for the "VA waiver."

c. Deduction of $286.53 for the former-spouse coverage for Roxane attributable to the Survivor Benefit Plan (SBP).

d. Remaining amount of $173.22, which is named "Taxable income" on the RAS.

11. <u>CALCULATION OF PAYMENTS/ARREARS DUE TO ROXANE:</u> Roxane is entitled to her share of the net retired pay of Richard, defined as gross pay minus only the cost of SBP (i.e., $4,406 gross - $287 SBP premium = $4,119 net retired pay). The Court has rounded off the SBP cost and the numbers below to full dollar amounts, without cents, for simplicity in calculations. Roxane's $1,149 share over 12 months (December 2023 to November 2024) is $1,149 X 12 = $13,788 for back payments due to her arrears.

Since the entitlement for Roxane goes back to June 1, 2021, the calculation of arrears going backward makes it necessary to adjust the $4,119 above to show the "net retired pay" for each of the previous years, taking into account the COLAs for each year. COLAs are found at Chapter 8, Vol. 7b, Department of Defense

Financial Management Regulation ("DoDFMR" below). These COLAs for the applicable periods are as follows:

a. 12/2024 - COLA of 2.5% for December 2024 - November 2025;

b. 12/2023 - COLA of 3.2% for December 2023 - November 2024;

c. 12/2022 - COLA of 3.2% (Dec. 2022 - Nov. 2023);

d. 12/2021 COLA of 8.7% (Dec. 2021 - Nov. 2022); and,

e. 12//2020 COLA of 4.4% (Dec. 2020 - Nov. 2021) for those whose retirement was in April - June 2021.

The result of these COLA adjustments to the monthly $4,119 net retired pay shown above (and also accounting for Roxane's share at 27.907% of the net retired pay) are as follows:

a. $4,119 net retired pay for December 2023 to November 2024 is $1,149, with Roxane's share = $1,149, and with 12 months due for a total of $13,788;

b. $3,991 net retired pay for December 2022 through November 2023, with Roxane's share = $1,114, and with 12 months due for total of $13,368;

c. $3,672 net retired pay for December 2021 - Nov. 2022, with Roxane's share = $1,025, and with 12 months due for total of $12,300;

d. $3,516 net retired pay for June - Nov. 2021, with Roxane's share = $981, and with 6 months due for total of $5,886; and,

e. Adjusting for the 2.5% COLA made effective 12/31/24 for military retired pay, Richard's net retired pay of $4,119 is increased to $4,222 at present. Roxane's share of this (at 27.907%) is $1,178 per month. That amount over five months (i.e., from December 2024 through April 2025) is a total of $5,890.

12. <u>TOTAL ARREARS DUE TO ROXANE:</u> The total of the above sums, from June 2021 through April 2025, is $51,232. Richard shall be ordered to make monthly payments directly to Roxane after April 2025 to avoid the continued accumulation of unpaid arrears.

13. <u>GARNISHABLE AMOUNTS FOR PAYMENT OF ARREARS:</u> There are three sources of potential garnishment for the Court to use for income-withholding. These are: A) VA disability compensation; B) Combat-Related Special Compensation; and C) military retired pay. The maximum allowable for said garnishment for spousal support is 50% for a payor with a current spouse to support, as is the case here.

14. <u>VETERANS ADMINISTRATION DISABILITY COMPENSATION (VADC):</u> The most likely source for obtaining a monthly garnishment for current payments of spousal support to Roxane is the monthly VA waiver of Richard. See paragraph 5 in

Conclusions of Law, below, for rules about why it is Richard's "VA waiver," and not the full amount of Richard's VA payment, which is the subject of garnishment. On Richard's May 2024 RAS, his "VA waiver" was $3,946, and the maximum amount subject to garnishment at the 50% rate is $1,968. To get the amount due as of October 2024 to Roxane, the VA (Department of Veterans Affairs) shall be required to withhold 29.2% of Richard's waived VA amount (29.2% X $3,936 VA waiver = $1,149/mo.), and disburse this percentage amount each month to Roxane, to be set out in a separate order for garnishment/income-withholding. The Court imposes this monthly garnishment percent, pending confirmation by the VA that the above-estimated calculations are correct regarding the monthly garnishment for spousal support pursuant to 42 U.S.C. 659 and applicable regulations.

15. COLLECTION OF ARREARS: The Court also imposes a 20% spend-down payment requirement from the following sources of money for Richard:

a. Combat-Related Special Compensation (10 U.S.C. 1413a and Ch. 63, Vol. 7b, DoDFMR): This is subject to garnishment for spousal support, and the current amount that Richard was receiving as of October 2024 was $1,486 per month. A spend-down of 20% of this, to begin catching up the arrears, would yield $297 per month. The maximum payable for a spousal support garnishment (at 50%) would be $743 per month.

b. <u>Military Retired Pay (10 U.S.C. 1408 and Ch. 27, Vol. 7b, DoDFMR):</u> This is subject to garnishment for spousal support. The above regulation specifies that only "disposable earnings" may be garnished, which means gross pay less the deductions for the VA waiver and the SBP premium in this case. According to Richard's RAS from 2024, this would be $4,406 gross - $3,936 VA waiver - $287 SBP premium = $173 "disposable earnings." A 20% spend-down would mean $35 payable on arrears; the maximum amount (at 50%) would be $86 per month.

c. <u>Veterans Administration Disability Compensation (42 U.S.C. 659 and other sources cited in the Conclusions of Law below):</u> Since only 29.2% is to be withheld from Richard's VA waiver amount, there is still room for an additional 20% to be withheld as the "spend-down" amount. The VA waiver of $3,936 times 20% equals $787 per month toward the arrears total.

d. <u>The total payable toward arrears in the above sections is $1,119 per month</u> ($787 + $297 + $35). If this is paid out on a monthly basis to Roxane, against an arrears total of $51,232 (see paragraphs 11-13, above) less $10,000 (see Amended Judgment paragraph 2 below), then it would take approximately four years for the spousal support arrearage payments to catch up all the arrears and interest, at which time the 20% spend-down percent would end.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this case.

2. The facts above are true and they entitle the parties to the relief granted below.

3. The facts above are incorporated herein by reference to the extent they represent conclusions of law.

4. Roxane is entitled to a garnishment as set forth herein for the payment of spousal support from Richard.

5. As to VA payments and the Court's ability to garnish those payments for Plaintiffs support:

a. Disability compensation is paid by the VA for injuries, illnesses, wounds or other conditions that are service-connected, and such compensation is generally not subject to seizure or attachment. 38 U.S.C. § 5301.

b. When a military retiree applies for VA disability compensation, he must waive an equivalent amount of military retired pay to receive disability payments from the VA. 38 U.S.C. § 5304-5305.

c. To ensure the payment of court-ordered support, federal law allows the garnishment of VA disability compensation for family support when the recipient has waived military retired pay to obtain this disability pay. 42 U.S.C. § 659. That is the situation in this case.

d. The United States is paying Defendant moneys which are subject to withholding for spousal support.

e. Pursuant to 5 C.F.R. 581.103, payments by the Secretary of Veterans Affairs for a service-connected disability to Defendant, who is in receipt of retired pay which has been waived so as to receive such compensation, are subject to garnishment. That portion of the VA payment for disability compensation which is taken in lieu of the waived retired pay is subject to garnishment. That is the amount of $3,300 per month.

f. Only the amount of VA disability compensation paid in lieu of military retired pay can be garnished to satisfy spousal support obligations. 42 U.S.C. §§ 659(a) and (h)(l)(A)(ii(V). Under 5 C.F.R. § 581.305(a)(2) and (3), the VA must comply with the legal process (i.e., a court order for garnishment or income-

> withholding) seeking the withholding of funds for spousal support unless the garnishment order "would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment." VA compensation paid in lieu of military retired pay qualifies as remuneration for employment. 42 U.S.C. § 659(h)(l)(A)(ii)(V).

6. Also subject to garnishment is Combat-Related Special Compensation, pursuant to the Department of Defense Financial Management Regulation, Vol. 7B, Chapter 63, Section 630101.C.3., which states, "Debt Collection". CRSC is subject to a Treasury offset to recover a debt owed to the United States as well as to garnishment for child support or alimony." Military retired pay is also subject to garnishment for spousal support, pursuant to Chapter 27 of Vol. 7b, DoDFMR. The amount which may be garnished is "disposable earnings," which in this case means gross retired pay less the deductions for the VA waiver and the SBP premium.

7. Based on the information stated above, the Court concludes that the garnishment shall be implemented by requiring monthly payments for current spousal support and for arrears as shown above in the Findings of Fact. The payments as detailed in the Findings are incorporated by reference herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

AMENDED JUDGMENT

1. <u>CURRENT PAYMENT TO PLAINTIFF:</u> The Court is ordering the payment of $1,149 per month to the plaintiff, Roxane Marschner, from the defendant, Richard Marschner, as follows:

a. Current amount starting May 1, 2025, and due the first day of each month thereafter, Richard shall pay $1,149 per month directly to Roxane as set forth in the above Findings. This direct payment shall be made from Richard to Roxane until Roxane begins to receive the full amount shown above (i.e., $1,149 per month) as a 29.2% garnishment from the VA.

b. Garnishment/income-withholding through the Department of Veterans Affairs to be accomplished with a separate garnishment/income-withholding order from this Court for 29.2% as set out in the Findings above; once Roxane begins to receive this entire current amount as contemplated by the Court and as stated herein, Richard may stop making the payments to her for current spousal support.

2. <u>ARREARS:</u> Richard shall make an arrearage payment to Roxane of $10,000 within sixty (60) days of Notice of Entry of Judgment. The remaining arrears of $41,232 shall be paid from the three sources of garnishment on a monthly basis as stated in the Findings of Fact above. The statutory interest rate shall apply to

any unpaid arrearages starting on the date of the Notice of Entry of Amended Judgment. In the event of Richard's death, Roxane shall have a cause of action against Richard's estate for any unpaid arrearages and interest. Richard may elect to make additional lump sum payments to Roxane so as to avoid interest. The arrearage garnishments shall cease as soon as payment of all arrearages and interest on arrearages are fully paid.

3. ENTRY OF SEPARATE ORDER TO ACCOMPLISH GARNISHMENT/INCOME - WITHHOLDING: The Court will enter a separate order for garnishment/income-withholding to accomplish the terms of this Amended Judgment. Said order will specify that each agency will provide verification of the garnishment by communicating with Erica J. Shively, Plaintiffs attorney, at Elsberry & Shively, 2800 N Washington Street, Bismarck, North Dakota. The phone number is 701-557-3384 and the email for Erica J. Shively is erica@nodaklaw.com.

4. RESERVATION OF JURISDICTION: This Court reserves jurisdiction over this matter to implement the garnishments, to make any adjustments necessary when information becomes available to the parties on how much money is being withheld and disbursed, to adjust the Court's orders to ensure that Plaintiff receives COLAs (cost-of-living adjustments), and to enter such orders as may be just and necessary if there need to any amendments to the above terms.

5. All terms of the Judgment not amended herein shall retain their full force and effect.

BY THE COURT:

4/23/2025 1:21:40 PM

Jackson J. Lofgren, District Judge
South Central Judicial District

Appendix C

STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	IN DISTRICT COURT SOUTH CENTRAL JUDICIAL DISTRICT
Roxanne M. Marschner, Plaintiff, v. Richard A. Marschner, Defendant.	**Case No. 08-2015-DM-00080** CORRECTED ORDER ON MOTION FOR AMENDED JUDGMENT OR REDISTRIBUTE THE MARITAL ESTATE

BACKGROUND

[¶1] The Defendant, Richard A. Marschner ("Richard"), joined the Army National Guard in 1985. (R:148). On September 2, 1994, he married the Plaintiff, Roxane M. Marschner ("Roxane"), in Bismarck, North Dakota. In 2005 Richard was deemed eligible for disability compensation through the VA (Department of Veterans Affairs). (R:67). As Richard was still serving in the Army National Guard, he had to waive drill payments to offset the Veteran's Administration disability pay. (R:67). This was financially advantageous as the Department of Veterans Affairs disability compensation was not subject to income tax. (R:67). In 2005 Richard also received his "Twenty Year Letter" from the Department of Defense notifying him that he had completed the required years of service and would be eligible for retired pay upon application at age 60. (R:149).

[¶2] In January 2015 Roxane commenced this divorce action. (R:3). Both parties were represented by experienced family law attorneys. Roxane was represented by Sherry Mills Moore and Richard was represented by Theresa Kellington. In February 2016 the parties reached a *Settlement Agreement.* (R:27). As part of the distribution of the marital estate they agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account and Roxane would receive a portion of Richard's Army National Guard pension and Federal Employee's Retirement System benefits when he retired. (R:27:5-6). Richard was required to select the Survivor Benefit Plan with Roxane as the beneficiary. Roxane agreed to pay Richard $90,000.00 within 90 days of entry of the *Judgment* to make the property distribution equitable. (R:27:7:25). A *Judgment* was entered based on the *Settlement Agreement* on February 9, 2016. (R:34).

[¶3] The *Settlement Agreement* and *Judgment* contained the following language:

> Redistribution. This property settlement and division of assets and debts is an equitable division of the parties' marital assets and debts and is not subject to modification. However, the parties understand that the court may redistribute property in a post-judgment proceeding if a party fails to comply with the terms of a court order or judgment

> distributing property or debts. (R:27:9:30; R:33:9:35).
>
> Spousal Support. Neither party shall be obligated to pay spousal support, alimony, or maintenance to the other. Richard and Roxane hereby waive and release each other forever from any and all claims against each other to temporary or permanent alimony, spousal support, or maintenance. The Court shall be divested of jurisdiction to modify the alimony, spousal support, or maintenance provision now and forever. (R:27:9:31; R:33:9:36)

[¶4] Approximately two months later Roxane's attorney submitted a proposed *Order Dividing Military Retirement Pay*. (R:47). The entire *Order* dealt with the division of Richard's intended military retirement pay. No motion was submitted with the proposed order and there was no objection from Richard's attorney. It appears the attorneys were working to draft an order that would ensure Roxane received her share of Richard's military retirement pay. The *Order* included the following language:

> Payments to Former Spouse shall be made as called for in this Order beginning on the first month following Member's first eligibility for longevity retirement. If member should remain in military service after becoming eligible for retirement, so that Former Spouse receives a percentage of a hypothetical retirement that Member

would have been eligible to receive, and Member actually retires thereafter, the spousal percentage payable to Former spouse shall be recalculated as a percentage of the benefits Member actually receives so as to provide for direct payment to Former Spouse by the military pay center of the correct sum owed.

Former Spouse shall receive a percentage of Member's military retirement per month as Former Spouse's sole and separate property, payable from Member's disposable retired or retainer pay, to be calculated as follows: Roxane M. Marschner receive a percentage of Richard's military retirement per month as Roxane's sole and separate property, payable from Richard's disposable retired or retainer pay, to be calculated as follows: the sum of retirement benefits payable each month divided by two, and multiplied by a fraction, the numerator of which is the number of points accumulated from the date of marriage (September 3, 1994) until the date of divorce judgment (February 9, 2016) and the denominator of which is the total number of points of military service creditable for retirement. Roxane shall further receive an identical percentage of any cost of living increases in said retired or retainer pay, computed from the gross sum thereof. For the purpose of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Richard would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane). It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability, or reduction in pay or benefits because of other federal employment, including FERS. It also includes any sum taken by Richard in addition to or in lieu of retirements benefits, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of military retirement benefits normally payable to a retired Richard. All sums payable to Roxane as a portion of military retirement shall be payable from Richard's

> disposable retired or retainer pay to the creditable service accrued. The Defense Finance and Accounting Service (or successor military pay center) is directed to pay the funds as set out in this order directly to Former Spouse. (R:47:4-5).

[The Court notes that "Chapter 38" in the above text and below should be "Title 38," which provides for veterans' benefits and is so titled.] The *Order* also included language about the Court retaining jurisdiction in this matter. Specifically, "[t]he Court retains jurisdiction to amend this Order so that it will constitute an acceptable order under the Uniformed Services Former Spouses' Protection Act even though all other matters incident to this action or proceeding have been fully and finally adjudicated. If it is determined at any time that changes in the law, the administration of the military retired pay, or any other circumstances make it impossible to calculate the portion of a distribution awarded to the former spouse by this Order and so notifies the parties, either or both parties shall immediately petition the Court for reformation of this Order." (R:47:3:6).

[¶5] The *Order* required Richard to elect the Survivor's Benefit Plan with Roxane being the sole intended beneficiary. (R:47:6:12). If the amounts paid to Roxane by the military were less than the agreed amounts Richard was to initiate an allotment in the amount of the difference. (R:47:14:). The *Order* indicated if Richard took any action that prevented, decreased, or limited the collection by Roxane, including the application for or award of disability complementation, he should pay Roxane directly. (R:47:7-17). Finally, the *Order* included the following language:

> The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including....an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments to Former Spouse by any means, including the application for a disability award or filing of bankruptcy, or if military or government regulations or other restrictions interfere with payments to the Former Spouse as set forth herein, of if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

[¶6] On July 5, 2016, an *Amended Order Dividing Military Retired Pay* was entered. (R:55). Again, there was no motion or objection from Richard's attorney. It included additional language clarifying how Roxane's percentage of Richard's military retire pay would be calculated. (R:55:1:2). It included the language regarding the Court's retention of jurisdiction to enter orders necessary to enforce the award of military retirements benefits to Roxane including through an award of alimony. (R:55:7-8)

[¶7] Richard was deployed to Iraq and Kosovo during his time in the Army National Guard. The National Defense Authorization Act of 2008 allows servicemembers to lower their retirement age based upon consecutive days of service in a combat zone. 10 U.S.C. § 12731. Due to periods of qualified service, Richard's eligible retirement date was moved to April 8, 2026, when he would be 59 years and 3 months of age. (R:148:4; R:176:4).

[¶8] Richard was still serving in the Army National Guard in 2020. He was also employed by the Army National Guard as a Federal Technician in a civilian capacity. This position was conditioned on his continued military service. In April 2020, the Medical Determination Review Board met and concluded Richard no longer met Army medical standards. (R:150). He was referred to the Medical Evaluation Board. Richard testified that at approximately this same period the Qualitative Retention Board also determined he should be separated from the Anny National Guard.

[¶9] The Informal Physical Evaluation Board found Richard to be physically unfit and recommended a disability rating of 40% and that he be permanently medically retired. (R:152:1). Richard contested the recommendation. (R:153). Richard's disability rating was increased to 60% with the continued recommendation he be permanently medically retired. (R:154). In addition to the resulting disability retired pay he received under Chapter 61 of Title 10, U.S. Code, Richard later applied for, and was approved for, Combat-Related Special Compensation with a 60% total combat related disability rating.

[¶10] In April 2021, Richard communicated with Roxane indicating he was working on paperwork in preparation for retirement. (R:182). The parties' text messages clearly depict they believed Roxane would be receiving a portion of Richard's retirement pay. (R:182-184). Roxane filed a request with the Defense Finance and Accounting Service ("DFAS") to begin receiving a portion of Richard's retirement pay. DFAS denied her application on August 6, 2021, in a letter stating: "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA." (R:83; R:173).

[¶11] In September Roxane communicated the result of the denial with Richard through text messages and retained counsel. (R:184:1-3; R:187). In August 2023, Roxane filed a *Motion for Amended Judgment Pursuant to N.D.R.Civ.P. Rule 60 or to Redistribute the Marital Estate Pursuant to N.D.C.C. 14-05-24*, supporting *Brief* and *Declaration of Roxane Marschner*. (R:60-65). Roxane argues the parties stipulated to the distribution of the marital estate and agreed she would receive the marital portion of Richards' pension through the Army National Guard. (R:63:1:3-4). Because Richard received disability retired pay, in lieu of longevity retired pay, she indicates she will not receive her share of his military pension. (R:63:2:5). She requests the Court amend the *Judgment* under Rule 60, N.D.R.Civ.P., or alternatively, redistribute the marital estate under N.D.C.C. § 14-05-24.

[¶12] On August 31, 2023, Richard filed a *Brief in Response to Motion for Amended Judgment Pursuant to N.D.R.Civ.P Rule 60 or to Redistribute the Marital*

Estate Pursuant to N.D.C.C. 14-05-24, *Declaration of Richard A. Marschner*, and attached exhibits. (R:66-R:70). An amended brief was filed the following day. (R:70). Richard argues Roxane's motion is premature as he has not reached the age of 60 which will happen in 2026. (R:70:1-3). Richard asserts there has been no showing he has failed to comply with the *Judgment* and it should not be amended. (R:70:3-7).

[¶13] The Court held a three-part motion hearing on August 12, September 18, and October 4, 2024. Roxane was represented by attorney, Erica J. Shively, and Richard was represented by attorney, Leah M. Warner. Testimony was provided from Roxane and Richard. Both sides provided expert witnesses. Mark Sullivan ("Mr. Sullivan") testified on behalf of Roxane. Mr. Sullivan is an attorney practicing primarily in North Carolina. (R:170). He retired as a Colonel with the Judge Advocate General's Corps, U.S. Army Reserves. He is the author of *The Military Divorce Handbook*. Johanna Clybome ("Ms. Clyborne") appeared on behalf of Richard. Ms. Clybome is an attorney practicing in the State of Minnesota. (R:146). She served 34 years in the United States Army/Army National Guard obtaining the rank of Major General.

FACTUAL FINDINGS

[¶14] At the time of divorce the parties agreed how the marital estate should be divided. (R:27). They agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account and Roxane' would receive a portion of Richard's Army National Guard pension and Federal Employee's Retirement System benefits. (R:27:5-6). Roxane was required to pay Richard

$90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Two subsequent orders were entered focusing solely on Roxane's anticipated share of Richard's military retirement. (R:47; R:55).

[¶15] Based upon Richard's testimony, his separation from the Army National Guard was not voluntary. He was either going to be medically retired or separated from the military by the Qualitative Retention Board. Being medically retired was advantageous to Richard as it allowed him to receive medical disability retirement prior to age 60 and he was able to keep his Federal Employee Retirement that he would have lost had the Qualitative Retention Board ended his service.

[¶16] From the text messages, both parties initially believed Roxane would receive a portion of Richard's retirement pay. (R:182-184). However, because Richard's disability retired pay is based on disability and considered "non-disposable" DFAS will not divide it as marital property or remit a share of it to Roxane. *See* 10 U.S.C. § 1408(a)(4)(A).

[¶17] As noted by Roxane, Richard's argument regarding her share of his retirement pay is not entirely clear. (R:231). Richard initially argued Roxane's motion was premature. (R:70:2:5). Specifically, had he not been medically retired Roxane would not have received her portion of his military retirement until he reached age 60 in 2026. (R:70:1-3). However, it appears Richard is now arguing Roxane should receive nothing ever. (R:230:8:22)("Mr. Marschner's disposable retired pay is less than zero, which means that nothing is divided as retired pay... ")(R:230:21:52)("Ms. Marschner has provided no evidence nor shown any need for spousal maintenance after it had been waived in the parties Judgment and Decree merely because she was no longer eligible to receive a share of Mr. Marschner's military retired pay.").

[¶18] Richard had already received his Twenty-Year Letter at the time of divorce. He was entitled to receive military retirement pay. The parties agreed how to divide the marital estate and agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account. (R:27:5-6). Roxane also agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Richard was required to elect the Survivor's Benefit Plan with Roxane as the sole beneficiary so that if he died she would be entitled to benefits. It is clear from the *Settlement Agreement*, and the two post-judgment orders, Roxane receiving a portion of Richard's military pay was an important consideration for the parties in distributing the marital estate.

[¶19] The language used by the parties in the post-judgment orders appears to have been an attempt to cover multiple scenarios regarding Richard's military pay. Unfortunately, it is hard to interpret and is contradictory. It states Roxane should begin receiving payments "on the first month following Member's first eligibility for longevity retirement." (R:55:5:10). "Longevity retirement" could be interpreted to mean the Non-Regular Retirement Pay normally given to Army National Guard soldiers with 20 years of service at age 60. Richard had put in the required years of service to receive Non-Regular Retirement Pay at the time the parties divorced. The parties agree Richard will not receive Non-Regular Retirement Pay. He currently receives military disability retired pay under Chapter 61 of Title 10, U.S. Code, which is based on disability, not longevity. He also receives Combat-Related Special Compensation under 10 U.S.C. §1413a. Combat-Related Special Compensation is based on disability rather than longevity.

[¶20] Similarly, the orders repeatedly state Roxane's payments shall come from Richard's "disposable retired or retainer pay." The orders further state "military retirement" includes "... all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code." The parties agree Combat-Related Special Compensation falls under Chapter 61 of Title 10. But Combat-Related Special Compensation Richard is not considered "disposable retired pay." 10 U.S.C. § 1408(a)(4)(A). Military disability retired pay is not "disposable retired pay" when it is based on the percentage of the individual's disability, as is the case here. 10 U.S.C. §1408(a)(4)(a)(III).

[¶21] Also, the formula used by the parties to calculate Richard's anticipated retirement pay is inconsistent with how disability retired pay is calculated. The parties included the formula that would have applied had Richard received the Non-Regular Retirement Pay normally given to Army National Guard soldiers with 20 years of service at age 60. Richard's disability retired pay was calculated using "Method A" which determines compensation based on multiplying the Department of Defense disability percentage against the pay base.

[¶22] The parties disagree about what will happen in April 2026 when Richard reaches the age of 59 years and 3 months of age. This is the date Richard would have become eligible to receive his Nonregular Retirement Pay. Ms. Clybome testified that when Richard reaches the age of 59 years and 3 months there will be a recalculation and he will either continue to receive Combat-Related Special Compensation or possibly begin receiving Concurrent Retirement Disability Pay. However, she acknowledged that the recalculation would "not likely switch anything." She testified Concurrent Retirement Disability Pay is disposable but that Richard could not be compelled to elect it in place of Combat-Related Special Compensation.

[¶23] On rebuttal, Mr. Sullivan testified no recalculation will occur. Citing to the Department of Defense Financial Management Regulation, Volume 7B, chapter 3 at § 2.2.3 and 10 U.S.C. § 12731 he indicated there will be no recalculation when Richard reaches the age of 59 years and 3 months. Mr. Sullivan indicated a retiree could switch from Combat-Related Special Compensation to Concurrent Retirement Disability Pay but in his decades of dealing with military retirement he had never heard of a person making that election. Combat-Related Special Compensation is non-taxable and non-divisible. Mr. Sullivan related Combat-Related Special Compensation to the non-stick substance "Teflon."

[¶24] Mr. Sullivan further testified that Concurrent Retirement Disability Pay is not clearly divisible. He testified the rules indicate it should be divisible and there is an administrative ruling indicating it is divisible.

However, general counsel for DFAS has taken the position Concurrent Retirement Disability Pay is not divisible. As such, DFAS will not honor any attempt by a state court to divide Concurrent Retirement Disability Pay.

[¶25] When questioned by Richard's counsel Mr. Sullivan acknowledged Richard could make an election to receive Concurrent Retirement Disability Pay after turning 59 years and 3 months. If Richard did make this election during open enrollment, it would cause a recalculation of his pay.

[¶26] In summary, Richard was separated from service with the Army National Guard based upon disability, and he began receiving disability retired pay in June 2021, and Combat-Related Special Compensation thereafter. He will never receive the Non-Regular Retirement Pay normally paid to Army National Guard members with the required years of service at age 60. In April 2026 Richard will be 59 years and 3 months of age which is the month he would have been eligible to receive Non-Regular Retirement Pay. At that point, he could elect to receive Concurrent Retirement Disability Pay rather than Combat-Related Special Compensation. However, that election would be disadvantageous to Richard and it is unlikely he would voluntarily make that election. He cannot be compelled to elect Concurrent Retirement Disability Pay. Finally, regardless of whether Richard receives Combat-Related Special Compensation or Concurrent Retirement Disability Pay, DFAS will deem his benefits as non-disposable and will not honor any state court order to divide them. Roxane will receive no portion of Richard's military benefits and Richard will reap the windfall he accuses Roxane of seeking.

LAW AND DECISION

[¶27] Rule 60(b), N.D.R.Civ.P, allows a Court to relieve a party or its legal representative from a final judgment, order, or proceeding. "A party requesting relief under Rule 60(b) bears the burden of establishing sufficient grounds for relief." *Sadek v. Weber,* 2023 ND 14, ¶ 10, 985 N.W.2d 672 (citing *Allery v. Whitebull,* 2022 ND 140, ¶ 7, 977 N.W.2d 726). "Rule 60 movants must provide 'specific details' underlying their claim for relief." *Id.* (citing *DC! Credit Servs., Inc. v. Plemper,* 2021 ND 215, ¶ 8, 966 N.W.2d 904). "'The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances.'" *AE2S Constr., LLC v. Hellervik Oilfield Techs. LLC,* 2021 ND 35, ¶ 16, 955 N.W.2d 82 (quoting *Shull v. Walcker,* 2009 ND 142, ¶ 14, 770 N.W.2d 274). A decision on a Rule 60(b) motion is viewed for an abuse of discretion. *Sadek,* 2023 ND 14 at ¶ 10.

[¶28] Under Rule 60(b)(5) relief may be granted if applying the judgment prospectively is "no longer equitable." "There must be an unforeseen change of circumstances and a judgment with prospective application." *Kuehl v. Lippert,* 401 N.W.2d 523, 525 (N.D. 1987). Rule 60(b)(6), N.D.R.Civ.P., allows the district court to grant reprieve for "any other reason that justifies relief." "The catch-all clause in N.D.R.Civ.P. 60(b)(vi) gives the court 'a grand reservoir of equitable power to do justice in a particular case.'" *Olander Contracting Co. v. Gail Wachter lnvs.,* 2003 ND 100, ¶ 9, 663 N.W.2d 204 (quoting *Compton v. Alton Steamship Co., Inc.*, 608 F.2d 96, 106 (4th Cir.1979)). "'... [It] provides the ultimate safety valve to avoid enforcement by vacating the judgment to accomplish justice.'" *Id.* (quoting *Kopp v. Kopp*, 2001 ND 41, ¶ 10, 622 N.W.2d 726). But, it "does not have an unlimited reach." *Id.* Relief under Rule 60(b)(6) "should only be invoked when 'extraordinary circumstances are present.'" *Hoffarth v. Hoffarth*, 2020 ND 218, ¶ 10, 949 N.W.2d 824 (citing *Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197 (internal citations omitted)).

[¶29] Richard receives disability retired pay and also Combat-Related Special Compensation, neither of which DFAS will remit to Roxane. While Richard may someday elect to receive Concurrent Retirement Disability Pay it is also deemed non-divisible by DFAS. The post-judgment orders contained contingencies should Roxane not receive the military retirement pay agreed to by the parties. They state:

> If the amount paid by the military pay center to Fonner Spouse is less than the amount specified above, Member shall initiate an allotment to former Spouse in the amount of any such difference, to be paid from any federal entitlements due Member, with said allotment to be initiated by Member immediately upon notice of such difference, and making up any arrearages in amount or longer in term than the arrearages accrued. (R:55:5:16).

If in any month direct payment is not made to Former Spouse, unless also not made to the Member, by the military pay center, and not federal entitlement exists against which such an allotment may be initiated, or for whatever reason full payment by allotment is not made in that month, or if the amount paid through the allotment is insufficient to pay the difference stated above, Member shall pay the amounts called for above herein directly to Former Spouse by the fifth day of each month in which the military pay center and/or allotment fails to do so, beginning upon Member's eligibility for retirement. (R:55:7:17).

If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder (by application for or award of disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), Member shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the action taken by Member. Any sums paid to Member that this court order provides are to be paid to Former Spouse shall be held by Member in constructive

> trust until actual payment to Former Spouse. (R:55:7:19).

The orders further contained language indicating the Court retained jurisdiction "to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including....an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments to Fonner Spouse by any means... or if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

[¶30] Richard has been receiving disability retired pay and Combat-Related Special Compensation since 2021. (R:159). Presently, his total disability retired pay, including his retirement pay offset by VA compensation, is $4,406.00 per month. He has not initiated an allotment to Roxane. He has not paid Roxane directly.

[¶31] The parties agreed how to divide the marital estate and agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account. (R:27:5-6). Roxane also agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Roxane has not, and will not, receive any of the portion of Richard's military retirement pay that was agreed to in the stipulated property settlement. Applying the judgment prospectively is "no longer equitable" and Roxane has established she is entitled to relief under Rule 60(b)(5).

[¶32] Roxane argues awarding spousal support is the appropriate remedy. The post-judgment orders indicated "an award of alimony (in the sum of benefits payable plus future cost of living adjustments)" was a remedy if Roxane was unable to receive her share of Richard's military retirement. (R:47:7-8). Mr. Sullivan testified DFAS would honor an award of spousal support.

[¶33] Richard argues awarding spousal support as a remedy for lost military retirement violates the Uniformed Services Former Spouses' Protection Act ("UFFSPA"), 10 U.S.C. § 1408. "The Fonner Spouses' Act...authoriz[es] a state court to treat 'disposable retired pay ... as property of the member and his spouse in accordance with the law of the jurisdiction of such court.'" *Knoop v. Knoop*, 542 N.W.2d 114, 116-17 (N.D. 1996)(quoting 10 U.S.C.S. § 1408(c)(l)). "The Former Spouses' Act enables a state court to treat a member's 'disposable retired pay' as marital property which is subject to property division in a divorce proceeding, but limits '[t]he total amount of the disposable retired pay of a member payable under all court orders ... [to] 50 percent of such disposable retired pay.'" *Id.* (quoting 10 U.S.C.S. § 1408(e)(l)). "'Disposable retired pay' is defined by the Former Spouses' Act to mean 'total monthly retired pay to which a member is entitled' minus certain deductions, including amounts required by law to be waived to receive veterans' disability benefits, or to receive compensation under the Dual Compensation Act." *Id.* (quoting 10 U.S.C.S. § 1408(a)(4)).

[¶34] Richard relies heavily on *Howell v. Howell*, 581 U.S. 214, 137 S. Ct. 1400 (2017) which was decided shortly after the Marschners' divorced. In *Howell*, the United States Supreme Court discussed the Former Spouses' Act. The Howells divorced in 1991 and the following year Mr. Howell retired from the Air Force and began receiving military retirement pay. *Id.* at 218-19. Half of his retirement went to Mrs. Howell. *Id.* Over a decade later the Department of Veterans Affairs found Mr. Howell to be 20% disabled due to a service-related injury. *Id.* He elected to received non-taxable disability benefits which required waiving $250.00 per month in retirement pay. *Id.* This reduced the amount received by Mrs. Howell. *Id*

[¶35] An Arizona family court held the original divorce decree had given Mrs. Howell a "vested" interest in the pre-waiver amount of retirement pay and ordered Mr. Howell to ensure she received the full 50% previously ordered. *Id.* The Arizona Supreme Court affirmed the family court. The Arizona Supreme Court concluded Mr. Howell had made his waiver after the family court divided his military retirement pay and thus federal law did not preempt the family court's reimbursement order. *Id.* Certiorari was granted.

[¶36] The United States Supreme Court noted "the nonmilitary spouse and the family court were likely to have assumed that a full share of the veteran's retirement pay would remain available after the assets were distributed." *Id.* at 221. However, the Supreme Court went on to state:

> We see nothing in this circumstance that makes the reimbursement award to [Mrs.

> Howell] any the less an award of the portion of military retirement pay that [Mr. Howell] waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse. That the Arizona courts referred to [Mrs. Howell's] interest in the waivable portion as having "vested" does not help. State courts cannot "vest" that which (under governing federal law) they lack the authority to give. Cf. 38 U.S.C. § 530l(a)(l) (providing that disability benefits are generally nonassignable). Accordingly, while the divorce decree might be said to "vest" [Mrs. Howell] with immediate right to half of [Mr. Howell's] military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: [Mr. Howell's] possible waiver of that pay.

Id. at 221 (internal citations omitted).

[¶37] The Supreme Court went on to state that describing the family court order as an order requiring Mr. Howell to "reimburse" or to "indemnify" Mrs. Howell rather than an order that divides property was "semantic and nothing more." *Id.* at 222. "The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, *i.e.*, to restore that portion of retirement pay lost due to the postdivorce waiver." *Id.* "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." "All such orders are thus pre-empted." *Id.*

[¶38] Since *Howell*, state courts who have addressed the issue of post-divorce indemnification have reached various outcomes. Several states have determined that although *Howell* prohibits a court from ordering post-divorce indemnification or reimbursement as a result of retirement waivers, it does not prohibit a service member from agreeing to future indemnification in a stipulation. *See Yourko v. Yourko*, 884 S.E.2d 799, 804 (Va. 2023)("[N]either Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit."); *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022)("*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement."); *Martin v. Martin*, 520 P.3d 813, 818 (Nev. 2022) ("By its plain language, nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute in this regard limits what divisions a state court may impose based on community property laws."); *In re Marriage of Weiser*, 475 P.3d 237, 246-47

(Wash. Ct. App. 2020)(applying res judicata to negotiated property settlement requiring indemnification and holding that "the superior court did not err when it concluded that [the husband] had agreed to reimburse [the wife] for any amount she lost due to the disability waiver."); *Hammond v. Hammond,* 680 S.W.3d 269, 279 (Tenn. Ct. App. 2023) (holding "nothing in *Howell* suggests that service members cannot determine on their own, without court intervention, how to spend their future disability pay.").

[¶39] Other courts have reached different conclusions. Richard points to the Court of Appeals of Minnesota's decision in *Mattson v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017) which was decided shortly after *Howell.* In *Mattson,* Mr. Mattson enlisted in the U.S. Navy in 1984 and married in 1992. *Mattson* 903 N.W.2d at 235. He retired from the military in 2004 and was granted a 70% disability rating for injuries suffered during active duty service. *Id.* Mr. Mattson and his wife separated in June 2014, and the following October, she filed for divorce in Minnesota. *Id.* The parties finalized their divorce in February 2015 via a stipulated decree approved by the district court. *Id.* The parties agreed there was a need for spousal maintenance but agreed to reserve it based upon the wife's receipt of a share of Mr. Mattson's disability compensation. *Id.* at 236.

[¶40] Following the divorce Mr. Mattson only made sporadic payments on his divorce obligations resulting in substantial arrearages. *Id.* In January 2016 his ex-wife attempted to enforce the terms of the divorce decree seeking the military retired pay and disability owed under the decree. *Id.* The district court ordered Mr.

Mattson to immediately pay the military retired pay and disability compensation due and owing pursuant to the divorce decree and he appealed. *Id.*

[¶41] The Court of Appeals reversed holding:

> In light of *Howell*, we conclude that our holding in *Gatfield* has been functionally overruled. In *Gatfield*, we held that principles of contract and res judicata could render a stipulated decree indemnifying an ex-spouse enforceable, even if it ran afoul of *Mansell*, because "parties are free to bind themselves to obligations that a court could not impose." 682 N.W.2d at 637. But, as clarified in *Howell*, such equitable compensation degrees do not escape federal preemption and are simply unenforceable. 137 S.Ct. at 1401-02.
>
> Berberich maintains that Mattson is contractually bound by the terms of their stipulated agreement to pay his agreed-upon portion of the property division, and she argues that Mattson has not challenged the decree, which remains a valid judgment. But this argument runs headlong into *Howell*, which makes clear that state courts "cannot 'vest' that which (under governing federal law) they lack the authority to give." 137 S.Ct. at 1406. Moreover, *Howell* effectively overruled cases relying on the sanctity of contract to

> escape federal preemption. *See id* at 1404-05 (listing *Krapf*, 786 N.E.2d at 318, as among the state court cases that failed to properly interpret *Mansell)*. Simply put, state laws are preempted in this specific area.

Mattson, 903 N.W.2d at 241 (internal citations omitted).

[¶42] As noted by Richard, the Court of Appeals did leave open the possibility of spousal support stating "[a]nd district courts may account for reductions in the value of these assets when calculating or recalculating the need for spousal support." *Id.* (citing *Howell*, 137 S.Ct. at 1406). "We encourage district courts to keep these avenues in mind as they navigate the changing landscape involving military disability compensation." *Id.*

[¶43] Richard argues the Court is barred from awarding spousal support as the initial *Settlement Agreement* and *Judgment* expressly waived spousal support reading:

> <u>Spousal Support.</u> Neither party shall be obligated to pay spousal support, alimony, or maintenance to the other. Richard and Roxane hereby waive and release each other forever from any and all claims against each other to temporary or permanent alimony, spousal support, or maintenance. The Court shall be divested of jurisdiction to modify the alimony, spousal support, or maintenance provision now and forever. (R:27:9:31; R:33:9:36).

[¶44] However, the post-judgment orders contained the following language:

> The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including....an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments to Former Spouse by any means, including the application for a disability award or filing of bankruptcy, or if military or government regulations or other restrictions interfere with payments to the Former Spouse as set forth herein, of if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

These post-judgment orders were issued on the heels of the *Judgment* without objection and in apparent agreement of the parties. The Court finds the award of spousal support is an available remedy and the post-judgment orders identify the amount as "the sum of benefits payable plus future cost of living adjustment."

[¶45] The other available remedy is for the Court to redistribute the martial estate. The *Judgment* stated "... the parties understand that the court may redistribute property in a post-judgment proceeding if a party fails to comply with the terms of a court order or judgment distributing property or debts." (R:33:9:35). The post-judgment orders indicated the Court "shall retain jurisdiction to enter such further orders as are necessary to care its indented division into practice..." (R:55:8:19). "Generally, a district court does not retain continuing jurisdiction to modify a final property distribution." *Lewis v. Smart*, 2017 ND 214, ¶ 11, 900 N.W.2d 812 (citing *Keila v. Keila*, 2012 ND 234, ¶ 28, 823 N.W.2d 726). "Under N.D.C.C. § 14-05-24(3), however, a court may redistribute property and debts in a post-judgment proceeding when a party fails to comply with an order distributing property and debts. *Id.* "The district courts distribution of property and debts also includes recognizing valid settlement agreements." *Id.* at ¶ 12 (citing *Eberle v. Eberle*, 2009 ND 107, ¶ 15, 766 N.W.2d 477). "Even when parties enter into a settlement agreement, however, a district court retains the duty to make a just and proper distribution of the marital estate under N.D.C.C. § 14-05-24." *Id.* at ¶ 13.

[¶46] Here, the parties agreed to distribute the marital estate based on a belief Roxane would eventually receive a marital share of Richard's military retirement. Richard immediately received $50,500.00 from Roxane's 403(b) retirement account and Roxane agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:5-6; R:27:7:25). The post judgment orders indicated Richard would make an allotment or pay Roxane directly if she did not receive her share of his benefits. This has not happened. The Court therefore could, under N.D.C.C. § 14-05-24, redistribute the martial estate. If the Court were to take this avenue the primary focus would likely be on the value of what Roxane believed she would receive versus what she will receive.

[¶47] However, the simpler remedy is the one repeatedly outlined in the post-judgment orders-the award of spousal support. The Court finds this is the appropriate remedy in this matter.

[¶48] The post-judgment orders indicate Roxane should begin receiving payments "on the first month following Member's first eligibility for longevity retirement." (R:55:5:10). While Richard will not receive "longevity retirement" the Court finds the parties intended for Roxane to begin receiving benefits at the same time as Richard. This is supported by the language in the post-judgment orders which indicates an allotment should be initiated "... in any month direct payment is not made to Former Spouse, unless also not made to the Member..." (R:55:7:17). Roxane's spousal support should commence with the month Richard began receiving disability retired pay, which was June 1, 2021. (R:159).

[¶49] Richard's gross Combat-Related Special Compensation has changed since he began receiving benefits. It appears he initially received $3,764.00 per month. (R:180). Therefore, Roxane's martial share (27.907%) must be calculated against the gross pay Richard received at the time for determining any arrearage. Unless the parties agree otherwise, the Court would intend Ricard's [sic] spousal support obligation be increased by 20% until any arrearage is paid in full.

[¶50] Richard argues if spousal support is awarded the amount he is paying towards the Survivor Benefit Plan (6.5% of gross pay) should be debited from his gross military pay before calculating Roxane's share. The Court finds this is reasonable as the survivor benefit is solely for the protection of Roxane. Finally, Roxane should be responsible for all federal and state income taxes "... on all payments received by the Former Spouse..." as outlined in the post-judgment orders. (R:55:8:21).

[¶51] Finally, Roxane requests the Court award her attorney's fees, indicating she has attained these fees in an effort to obtain her rightful share of Richard's military retirement when it did not have to be handled through litigation. (R:231:25:61).

[¶52] The district court has broad discretion to award attorney's fees. *Nelson v. Nelson*, 2019 ND 221, ¶ 21, 932 N.W.2d 386. Authorizations of attorney's fees for frivolous claims are not meant to chill enthusiasm and creativity in pursuing factual or legal theories, and a court should not use the wisdom of hindsight to determine whether claims are frivolous but instead intended to deter the pursuit of wholly groundless and meritless claims, not to punish inartful drafting. *See Strand v. Cass Cnty.*, 2008 ND 149, ¶ 11, 753 N.W.2d 872. Frivolous claims are those which have 'such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person's] favor.'" *Id.* at ¶ 11 (quoting *Deacon's Development, LLP, v. Lamb*, 2006 ND 172, ¶ 12, 719 N.W.2d 379). When a party requests attorney's fees under N.D.C.C. § 28-26-01(2), the court "must first determine whether a claim is frivolous. If the Court makes that determination, the court must then award reasonable attorney's fees to the prevailing party." *Id.* (quoting *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 84 (N.D.1991)).

[¶53] There is no evidence to show Richard's claims regarding federal case law, and his assertion that Roxane's demand for payments was premature were made in bad faith or frivolous. Both parties have agreed this is a novel and complex issue of law. This is evidenced by the retention of out-of-state experts, multiple hearings, and extensive exhibits and briefing. As such, the Court will not award attorney's fees.

[¶54] Based on the foregoing,

[¶55] **IT IS HEREBY ORDERED,** Richard shall pay Roxane spousal support in the amount identified in the post-judgment orders and this *Order*. The parties shall have forty-five (45) days to confer regarding proposed language sufficient to effectuate the award of spousal support. If the parties cannot agree, each party may submit proposed language by filing a copy with the Clerk of Court along with a copy in an editable electronic format to the Court.

Dated March 21, 2025.

BY THE COURT

Jackson F. Longren
District Judge
South Central Judicial
District

Appendix D

STATE OF NORTH DAKOTA	IN DISTRICT COURT SOUTH CENTRAL JUDICIAL DISTRICT
COUNTY OF BURLEIGH	

Roxanne M. Marschner, Plaintiff, v. Richard A. Marschner, Defendant.	**Case No. 08-2015-DM-00080** ORDER ON MOTION FOR AMENDED JUDGMENT OR REDISTRIBUTE THE MARITAL ESTATE

BACKGROUND

[¶1] The Defendant, Richard A. Marschner ("Richard"), joined the Army National Guard in 1985. (R:148). On September 2, 1994, he married the Plaintiff, Roxane M. Marscher ("Roxane"), in Bismarck, North Dakota. In 2005 Richard was deemed eligible for disability pay through the Veteran's Administration. (R:67). As Richard was still serving in the Army National Guard, he had to waive drill payments to offset the Veteran's Administration disability pay. (R:67). This was financially advantageous as the Veteran's Administration disability pay was not subject to income tax. (R:67). In 2005 Richard also received his "Twenty

Year Letter" from the Department of Defense notifying him that he had completed the required years of service and would be eligible for retired pay upon application at age 60. (R:149).

[¶2] In January 2015 Roxane commenced this divorce action. (R:3). Both parties were represented by experienced family law attorneys. Roxane was represented by Sherry Mills Moore and Richard was represented by Theresa Kellington. In February 2016 the parties reached a *Settlement Agreement.* (R:27). As part of the distribution of the marital estate they agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account and Roxane would receive a portion of Richard's Army National Guard pension and Federal Employee's Retirement System benefits when he retired. (R:27:5-6). Richard was required to select the Survivor Benefit Plan with Roxane as the beneficiary. Roxane agreed to pay Richard $90,000.00 within 90 days of entry of the *Judgment* to make the property distribution equitable. (R:27:7:25). A *Judgment* was entered based on the *Settlement Agreement* on February 9, 2016. (R:34).

[¶3] The *Settlement Agreement* and *Judgment* contained the following language:

> Redistribution. This property settlement and division of assets and debts is an equitable division of the parties' marital assets and debts and is not subject to modification. However, the parties understand that the court may redistribute property in a post-judgment proceeding if a party fails to comply with

> the terms of a court order or judgment distributing property or debts. (R:27:9:30; R:33:9:35).
>
> Spousal Support. Neither party shall be obligated to pay spousal support, alimony, or maintenance to the other. Richard and Roxane hereby waive and release each other forever from any and all claims against each other to temporary or permanent alimony, spousal support, or maintenance. The Court shall be divested of jurisdiction to modify the alimony, spousal support, or maintenance provision now and forever. (R:27:9:31; R:33:9:36)

[¶4] Approximately two months later Roxane's attorney submitted a proposed *Order Dividing Military Retirement Pay*. (R:47). The entire *Order* dealt with the division of Richard's intended military retirement pay. No motion was submitted with the proposed order and there was no objection from Richard's attorney. It appears the attorneys were working to draft an order that would ensure Roxane received her share of Richard's military retirement pay. The *Order* included the following language:

> Payments to Former Spouse shall be made as called for in this Order beginning on the first month following Member's first eligibility for longevity retirement. If member should remain in military service after becoming eligible for retirement, so that Former Spouse receives a percentage

of a hypothetical retirement that Member would have been eligible to receive, and Member actually retires thereafter, the spousal percentage payable to Former spouse shall be recalculated as a percentage of the benefits Member actually receives so as to provide for direct payment to Former Spouse by the military pay center of the correct sum owed.

Former Spouse shall receive a percentage of Member's military retirement per month as Former Spouse's sole and separate property, payable from Member's disposable retired or retainer pay, to be calculated as follows: Roxane M. Marschner receive a percentage of Richard's military retirement per month as Roxane's sole and separate property, payable from Richard's disposable retired or retainer pay, to be calculated as follows: the sum of retirement benefits payable each month divided by two, and multiplied by a fraction, the numerator of which is the number of points accumulated from the date of marriage (September 3, 1994) until the date of divorce judgment (February 9, 2016) and the denominator of which is the total number of points of military service creditable for retirement. Roxane shall further receive an identical percentage of any cost of living increases in said retired or retainer pay, computed from the gross sum thereof. For the purpose of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Richard would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane). It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability, or reduction in pay or benefits because of other federal employment, including FERS. It also includes any sum taken by Richard in addition to or in lieu of retirements benefits, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of military retirement benefits normally payable to a retired Richard. All sums payable to Roxane as a portion of military

> retirement shall be payable from Richard's disposable retired or retainer pay to the creditable service accrued. The Defense Finance and Accounting Service (or successor military pay center) is directed to pay the funds as set out in this order directly to Former Spouse. (R:47:4-5).

The *Order* also included language about the Court retaining jurisdiction in this matter. Specifically, "[t]he Court retains jurisdiction to amend this Order so that it will constitute an acceptable order under the Uniformed Services Former Spouses' Protection Act even though all other matters incident to this action or proceeding have been fully and finally adjudicated. If it is determined at any time that changes in the law, the administration of the military retired pay, or any other circumstances make it impossible to calculate the portion of a distribution awarded to the former spouse by this Order and so notifies the parties, either or both parties shall immediately petition the Court for reformation of this Order." (R:47:3:6).

[¶5] The *Order* required Richard to elect the Survivor's Benefit Plan with Roxane being the sole intended beneficiary. (R:47:6:12). If the amounts paid to Roxane by the military were less than the agreed amounts Richard was to initiate an allotment in the amount of the difference. (R:47:14:). The *Order* indicated if Richard took any action that prevented, decreased, or limited the collection by Roxane, including the application for or award of disability complementation, he should pay Roxane directly. (R:47:7-17). Finally, the *Order* included the following language:

> The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including … an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments to Former Spouse by any means, including the application for a disability award or filing of bankruptcy, or if military or government regulations or other restrictions interfere with payments to the Former Spouse as set forth herein, of if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

[¶6] On July 5, 2016, an *Amended Order Dividing Military Retired Pay* was entered. (R:55). Again, there was no motion or objection from Richard's attorney. It included additional language clarifying how Roxane's percentage of Richard's military retire pay would be calculated. (R:55:1:2). It included the language regarding the Court's retention of jurisdiction to enter orders necessary to enforce the award of military retirements benefits to Roxane including through an award of alimony. (R:55:7-8)

[¶7] Richard was deployed to Iraq and Kosovo during his time in the Army National Guard. The National Defense Authorization Act of 2008 allows servicemembers to lower their retirement age based upon consecutive days of service in a combat zone. 10 U.S.C. § 12731. Due to periods of qualified service, Richard's eligible retirement date was moved to April 8, 2026, when he would be 59 years and 3 months of age. (R:148:4; R:176:4).

[¶8] Richard was still serving in the Army National Guard in 2020. He was also employed by the Army National Guard as a Federal Technician, in a civilian capacity. This position was conditioned on his continued military service. In April 2020, the Medical Determination Review Board met and concluded Richard no longer met Army medical standards. (R:150). He was referred to the Medical Evaluation Board. Richard testified that at approximately this same period the Qualitative Retention Board also determined he should be separated from the Army National Guard.

[¶9] The Informal Physical Evaluation Board found Richard to be physically unfit and recommended a disability rating of 40% and that he be permanently medically retired. (R:152:1). Richard contested the recommendation. (R:153). Richard's disability rating was increased to 60% with the continued recommendation he be permanently medically retired. (R:154). Richard was approved for Combat-Related Special Compensation with a 60% total combat related disability rating.

[¶10] In April 2021, Richard communicated with Roxane indicating he was working on paperwork in preparation for retirement. (R:182). The parties' text messages clearly depict they believed Roxane would be receiving a portion of Richard's retirement pay. (R:182-184). Roxane filed a request with the Defense Finance and Accounting Service ("DFAS") to begin receiving a portion of Richard's retirement pay. DFAS denied her application on August 6, 2021, in a letter stating: "The entire amount of the member's retired/retainer pay is based on disability, thus there are no funds available for payment under the USFSPA." (R:83; R:173).

[¶11] In September Roxane communicated the result of the denial with Richard through text messages and retained counsel. (R:184:1-3; R:187). In August 2023, Roxane filed a *Motion for Amended Judgment Pursuant to N.D.R.Civ.P. Rule 60 or to Redistribute the Marital Estate Pursuant to N.D.C.C. 14-05-24*, supporting *Brief* and *Declaration of Roxane Marschner.* (R:60-65). Roxane argues the parties stipulated to the distribution of the marital estate and agreed she would receive the marital portion of Richards' pension through the Army National Guard. (R:63:1:3-4). Because Richard received disability pay, in lieu of retirement, she indicates she will not receive her share of his military pension. (R:63:2:5). She requests the Court amend the *Judgment* under Rule 60, N.D.R.Civ.P., or alternatively, redistribute the marital estate under N.D.C.C. § 14-05-24.

[¶12] On August 31, 2023, Richard filed a *Brief in Response to Motion for Amended Judgment Pursuant to N.D.R.Civ.P Rule 60 or to Redistribute the Marital Estate Pursuant to N.D.C.C. 14-05-24*, *Declaration of Richard A. Marschner*, and attached exhibits. (R:66-R:70). An amended brief was filed the following day. (R:70). Richard argues Roxane's motion is premature as he has not reached the age of 60 which will happen in 2026. (R:70:1-3). Richard asserts there has been no showing he has failed to comply with the *Judgment* and it should not be amended. (R:70:3-7).

[¶13] The Court held a three-part motion hearing on August 12, September 18, and October 4, 2024. Roxane was represented by attorney, Erica J. Shively, and Richard was represented by attorney, Leah M. Warner. Testimony was provided from Roxane and Richard. Both sides provided expert witnesses. Mark Sullivan ("Mr. Sullivan") testified on behalf of Roxane. Mr. Sullivan is an attorney practicing primarily in North Carolina. (R:170). He retired as a Colonel with the Judge Advocate General's Corps, U.S. Army Reserves. He is the author of *The Military Divorce Handbook*. Johanna Clyborne ("Ms. Clybome") appeared on behalf of Richard. Ms. Clybome is an attorney practicing in the State of Minnesota. (R:146). She served 34 years in the United States Army/Army National Guard obtaining the rank of Major General.

FACTUAL FINDINGS

[¶14] At the time of divorce the parties agreed how the marital estate should be divided. (R:27). They agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account and Roxane would receive a portion of Richard's Army National Guard pension and Federal Employee's Retirement System benefits. (R:27:5-6). Roxane was required to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Two subsequent orders were entered focusing solely on Roxane's anticipated share of Richard's military retirement. (R:47; R:55).

[¶15] Based upon Richard's testimony, his separation from the Army National Guard was not voluntary. He was either going to be medically retired or separated from the military by the Qualitative Retention Board. Being medically retired was advantageous to Richard as it allowed him to receive Combat-Related Special Compensation prior to age 60 and he was able to keep his Federal Employee Retirement that he would have lost had the Qualitative Retention Board ended his service.

[¶16] From the text messages, both parties initially believed Roxane would receive a portion of Richard's retirement pay. (R:182-184). However, because Richard's retirement pay is based on disability and considered "non-disposable" DFAS will not divide it as marital property or remit it to Roxane. *See* 10 U.S.C. § 1408(a)(4)(A).

[¶17] As noted by Roxane, Richard's argument regarding her share of his retirement pay is not entirely clear. (R:231). Richard initially argued Roxane's motion was premature. (R:70:2:5). Specifically, had he not been medically retired Roxane would not have received her portion of his military retirement until he reached age 60 in 2026. (R:70:1-3). However, it appears Richard is now arguing Roxane should receive nothing ever. (R:230:8:22)("Mr. Marschner's disposable retired pay is less than zero, which means that nothing is divided as retired pay...")(R:230:21:52)("Ms. Marschner has provided no evidence nor shown any need for spousal maintenance after it had been waived in the parties Judgment and Decree merely because she was no longer eligible to receive a share of Mr. Marschner's military retired pay.").

[¶18] Richard had already received his Twenty Year Letter at the time of divorce. He was entitled to receive military retirement pay. The parties agreed how to divide the marital estate and agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account. (R:27:5-6). Roxane also agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Richard was required to elect the Survivor's Benefit Plan with Roxane as the sole beneficiary so that if he died she would be entitled to benefits. It is clear from the *Settlement Agreement*, and the two post-judgment orders, Roxane receiving a portion of Richard's military pay was an important consideration for the parties in distributing the marital estate.

[¶19] The language used by the parties in the post-judgment orders appears to have been an attempt to cover multiple scenarios regarding Richard's military pay. Unfortunately, it is hard to interpret and is contradictory. It states Roxane should begin receiving payments "on the first month following Member's first eligibility for longevity retirement." (R:55:5:10). "Longevity retirement" could be interpreted to mean the Non-Regular Retirement Pay normally given to Army National Guard soldiers with 20 years of service at age 60. Richard had put in the required years of service to receive Non-Regular Retirement Pay at the time the parties divorced. The parties agree Richard will not receive Non-Regular Retirement Pay. He currently receives Combat-Related Special Compensation. Combat-Related Special Compensation is based on disability rather than longevity.

[¶20] Similarly, the orders repeatedly state Roxane's payments shall come from Richard's "disposable retired or retainer pay." The orders further state "military retirement" includes "... all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code." The parties agree Combat-Related Special Compensation falls under Chapter 61 of Title 10. But Combat-Related Special Compensation Richard is not considered "disposable." 10 U.S.C. § 1408(a)(4)(A).

[¶21] Also, the formula used by the parties to calculate Richard's anticipated retirement pay is inconsistent with how Combat-Related Special Compensation is calculated. The parties included the formula that would have applied had Richard received the Non-Regular Retirement Pay normally given to Army National Guard soldiers with 20 years of service at age 60. Richard's Combat-Related Special Compensation was calculated using "Method A" which determines compensation based on multiplying the Department of Defense disability percentage against the pay base.

[¶22] The parties disagree about what will happen in April 2026 when Richard reaches the age of 59 years and 3 months of age. This is the date Richard would have become eligible to receive his Non-Regular Retirement Pay. Ms. Clybome testified that when Richard reaches the age of 59 years and 3 months there will be a recalculation and he will either continue to receive Combat-Related Special Compensation or possibly begin receiving Concurrent Retirement Disability Pay. However, she acknowledged that the recalculation would "not likely switch anything." She testified Concurrent Retirement Disability Pay is disposable but that Richard could not be compelled to elect it in place of Combat-Related Special Compensation.

[¶23] On rebuttal, Mr. Sullivan testified no recalculation will occur. Citing to the Department of Defense Financial Management Regulation Volume 7B chapter 3 § 2.2.3 and 10 U.S.C. § 12731 he indicated there will be no recalculation when Richard reaches the age of 59 years and 3 months. Mr. Sullivan indicated a retiree could switch from Combat-Related Special Compensation to Concurrent Retirement Disability Pay but in his decades of dealing with military retirement he had never heard of a person making that election. Combat-Related Special Compensation is non-taxable and non-divisible. Mr. Sullivan related Combat-Related Special Compensation to the non-stick substance "Teflon."

[¶24] Mr. Sullivan further testified that Concurrent Retirement Disability Pay is not clearly divisible. He testified the rules indicate it should be divisible and there is an administrative ruling indicating it is divisible. However, general counsel for DFAS has taken the position Concurrent Retirement Disability Pay is not divisible. As such, DFAS will not honor any attempt by a state court to divide Concurrent Retirement Disability Pay.

[¶25] When questioned by Richard's counsel Mr. Sullivan acknowledged Richard could make an election to receive Concurrent Retirement Disability Pay after turning 59 years and 3 months. If Richard did make this election during open enrollment, it would cause a recalculation of his pay.

[¶26] In summary, Richard was separated from service with the Army National Guard based upon disability and began receiving Combat-Related Special Compensation in June 2021. He will never receive the Non-Regular Retirement Pay normally paid to Army National Guard members with the required years of service at age 60. In April 2026 Richard will be 59 years and 3 months of age which is the month he would have been eligible to receive Non-Regular Retirement Pay. At that point, he could elect to receive Concurrent Retirement Disability Pay rather than Combat-Related Special Compensation. However, that election would be disadvantageous to Richard and it is unlikely he would voluntarily make that election. He cannot be compelled to elect Concurrent Retirement Disability Pay. Finally, regardless of whether Richard receives Combat-Related Special Compensation or Concurrent Retirement Disability Pay, DFAS will deem his benefits as non-disposable and will not honor any state court order to divide them. Roxane will receive no portion of Richard's military benefits and Richard will reap the windfall he accuses Roxane of seeking.

LAW AND DECISION

[¶27] Rule 60(b), N.D.R.Civ.P, allows a Court to relieve a party or its legal representative from a final judgment, order, or proceeding. "A party requesting relief under Rule 60(b) bears the burden of establishing sufficient grounds for relief." *Sadek v. Weber*, 2023 ND 14, ¶ 10, 985 N.W.2d 672 (citing *Allery v. Whitebull*, 2022 ND 140, ¶ 7, 977 N.W.2d 726). "Rule 60 movants must provide 'specific details' underlying their claim for relief." *Id.* (citing *DCI Credit Servs., Inc. v. Plemper*, 2021 ND 215, ¶ 8, 966 N.W.2d 904). "'The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances.'" *AE2S Constr., LLC v. Hellervik Oilfield Techs. LLC*, 2021 ND 35, ¶ 16, 955 N.W.2d 82 (quoting *Shull v. Walcker*, 2009 ND 142, ¶ 14, 770 N.W.2d 274). A decision on a Rule 60(b) motion is viewed for an abuse of discretion. *Sadek*, 2023 ND 14 at ¶ 10.

[¶28] Under Rule 60(b)(5) relief may be granted if applying the judgment prospectively is "no longer equitable." "There must be an unforeseen change of circumstances and a judgment with prospective application." *Kuehl v. Lippert*, 401 N.W.2d 523, 525 (N.D. 1987). Rule 60(b)(6), N.D.R.Civ.P., allows the district court to grant reprieve for "any other reason that justifies relief." "The catch-all clause in N.D.R.Civ.P. 60(b)(vi) gives the court 'a grand reservoir of equitable power to do justice in a particular case.'" *Olander Contracting Co. v. Gail Wachter lnvs.*, 2003 ND 100, ¶ 9, 663 N.W.2d 204 (quoting *Compton v. Alton Steamship Co., Inc.*, 608 F.2d 96, 106 (4th Cir.1979)). "'... [It] provides the ultimate safety valve to avoid enforcement by vacating the judgment to accomplish justice.'" *Id.* (quoting *Kopp v. Kopp*, 2001 ND 41, ¶ 10, 622 N.W.2d 726). But, it "does not have an unlimited reach." *Id.* Relief under Rule 60(b)(6) "should only be invoked when 'extraordinary circumstances are present.'" *Hoffarth v. Hoffarth*, 2020 ND 218, ¶ 10, 949 N.W.2d

824 (citing *Hildebrand v. Stolz*, 2016 ND 225, ¶ 16, 888 N.W.2d 197 (internal citations omitted)).

[¶29] Richard receives Combat-Related Special Compensation which DFAS will not remit to Roxane. While Richard may someday elect to receive Concurrent Retirement Disability Pay it is also deemed non-divisible by DFAS. The post-judgment orders contained contingencies should Roxane not receive the military retirement pay agreed to by the parties. They state:

> If the amount paid by the military pay center to Former Spouse is less than the amount specified above, Member shall initiate an allotment to former Spouse in the amount of any such difference, to be paid from any federal entitlements due Member, with said allotment to be initiated by Member immediately upon notice of such difference, and making up any arrearages in amount or longer in term than the arrearages accrued. (R:55:5:16).
>
> If in any month direct payment is not made to Former Spouse, unless also not made to the Member, by the military pay center, and not federal entitlement exists against which such an allotment may be initiated, or for whatever reason full payment by allotment is not made in that month, or if the amount paid through the allotment is insufficient to pay the difference stated above, Member shall pay the amounts called for above herein directly to Former Spouse by the

> fifth day of each month in which the military pay center and/or allotment fails to do so, beginning upon Member's eligibility for retirement. (R:55:7:17).
>
> If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder (by application for or award of disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), Member shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the action taken by Member. Any sums paid to Member that this court order provides are to be paid to Former Spouse shall be held by Member in constructive trust until actual payment to Former Spouse. (R:55:7:19.).

The orders further contained language indicating the Court retained jurisdiction "to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including....an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments to Former Spouse by any means... or if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

[¶30] Richard has been receiving Combat-Related Special Compensation since June 1, 2021. (R:159). Presently, his total retired pay, including his retirement pay offset by VA compensation, is $4,406.00 per month. He has not initiated an allotment to Roxane. He has not paid Roxane directly.

[¶31] The parties agreed how to divide the marital estate and agreed Richard would immediately receive $50,500.00 from Roxane's 403(b) retirement account. (R:27:5-6). Roxane also agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:7:25). Roxane has not, and will not, receive any of the portion of Richard's military retirement pay that was agreed to in the stipulated property settlement. Applying the judgment prospectively is "no longer equitable" and Roxane has established she is entitled to relief under Rule 60(b)(5).

[¶32] Roxane argues awarding spousal support is the appropriate remedy. The post-judgment orders indicated "an award of alimony (in the sum of benefits payable plus future cost of living adjustments)" was a remedy if Roxane was unable to receive her share of Richard's military retirement. (R:47:7-8). Mr. Sullivan testified DFAS would honor an award of spousal support.

[¶33] Richard argues awarding spousal support as a remedy for lost military retirement violates the Uniformed Services Former Spouses' Protection Act

("UFFSPA"), 10 U.S.C. § 1408. "The Former Spouses' Act... authoriz[es] a state court to treat 'disposable retired pay ... as property of the member and his spouse in accordance with the law of the jurisdiction of such court.'" *Knoop v. Knoop*, 542 N.W.2d 114, 116-17 (N.D. 1996)(quoting 10 U.S.C.S. § 1408(c)(l)). "The Former Spouses' Act enables a state court to treat a member's 'disposable retired pay' as marital property which is subject to property division in a divorce proceeding, but limits '[t]he total amount of the disposable retired pay of a member payable under all court orders ... [to] 50 percent of such disposable retired pay.'" *Id.* (quoting 10 U.S.C.S. § 1408(e)(l)). "'Disposable retired pay' is defined by the Former Spouses' Act to mean 'total monthly retired pay to which a member is entitled' minus certain deductions, including amounts required by law to be waived to receive veterans' disability benefits, or to receive compensation under the Dual Compensation Act." *Id.* (quoting 10 U.S.C.S. § 1408(a)(4)).

[¶34] Richard relies heavily on *Howell v. Howell*, 581 U.S. 214, 137 S. Ct. 1400 (2017) which was decided shortly after the Marschners divorced. In *Howell*, the United States Supreme Court discussed the Former Spouses' Act. The Howells divorced in 1991 and the following year Mr. Howell retired from the Air Force and began receiving military retirement pay. *Id.* at 218-19. Half of his retirement went to Mrs. Howell. *Id.* Over a decade later the Department of Veterans Affairs found Mr. Howell to be 20% disabled due to a service-related injury. *Id.* He elected to received non-taxable disability benefits which required waiving $250.00 per month in retirement pay. *Id.* This reduced the amount received by Mrs. Howell. *Id*

[¶35] An Arizona family court held the original divorce decree had given Mrs. Howell a "vested" interest in the pre-waiver amount of retirement pay and ordered Mr. Howell to ensure she received the full 50% previously ordered. *Id.* The Arizona Supreme Court affirmed the family court. The Arizona Supreme Court concluded Mr. Howell had made his waiver after the family court divided his military retirement pay and thus federal law did not preempt the family court's reimbursement order. *Id.* Certiorari was granted.

[¶36] The United States Supreme Court noted "the nonmilitary spouse and the family court were likely to have assumed that a full share of the veteran's retirement pay would remain available after the assets were distributed." *Id.* at 221. However, the Supreme Court went on to state:

> We see nothing in this circumstance that makes the reimbursement award to [Mrs. Howell] any the less an award of the portion of military retirement pay that [Mr. Howell] waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse. That the Arizona courts referred to [Mrs. Howell's] interest in the waivable portion as having "vested" does not help. State

> courts cannot "vest" that which (under governing federal law) they lack the authority to give. Cf. 38 U.S.C. § 5301(a)(l) (providing that disability benefits are generally nonassignable). Accordingly, while the divorce decree might be said to "vest" [Mrs. Howell] with immediate right to half of [Mr. Howell's] military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: [Mr. Howell's] possible waiver of that pay.

Id. at 221 (internal citations omitted).

[¶37] The Supreme Court went on to state that describing the family court order as an order requiring Mr. Howell to "reimburse" or to "indemnify" Mrs. Howell rather than an order that divides property was "semantic and nothing more." *Id.* at 222. "The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, *i.e.*, to restore that portion of retirement pay lost due to the postdivorce waiver." *Id.* "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." "All such orders are thus pre-empted." *Id.*

[¶38] Since *Howell*, state courts who have addressed the issue of post-divorce indemnification have reached various outcomes. Several states have determined that although *Howell* prohibits a court from ordering post-divorce indemnification or reimbursement as a result of retirement waivers, it does not prohibit a service member from agreeing to future indemnification in a stipulation. *See Yourko v. Yourko*, 884 S.E.2d 799, 804 (Va. 2023)("[N]either Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit."); *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022)("*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement."); *Martin v. Martin*, 520 P.3d 813, 818 (Nev. 2022) ("By its plain language, nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute in this regard limits what divisions a state court may impose based on community property laws."); *In re Marriage of Weiser*, 475 P.3d 237, 246-47 (Wash. Ct. App. 2020)(applying res judicata to negotiated property settlement requiring indemnification and holding that "the superior court did not err when it concluded that [the husband] had agreed to reimburse [the wife] for any amount she lost due to the disability waiver."); *Hammond v. Hammond*, 680 S.W.3d 269, 279 (Tenn. Ct. App. 2023) (holding "nothing in *Howell* suggests that service members cannot determine on their own, without court intervention, how to spend their future disability pay.").

[¶39] Other courts have reached different conclusions. Richard points to the Court of Appeals of Minnesota's decision in *Mattson v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017) which was decided shortly after *Howell*. In *Mattson*, Mr. Mattson enlisted in the U.S. Navy in 1984 and married in 1992. *Mattson* 903 N.W.2d at 235. He retired from the military in 2004 and was granted a 70% disability rating for injuries suffered during active duty service. *Id.* Mr. Mattson and his wife separated in June 2014, and the following October, she filed for divorce in Minnesota. *Id.* The parties finalized their divorce in February 2015 via a stipulated decree approved by the district court. *Id.* The parties agreed there was a need for spousal maintenance but agreed to reserve it based upon the wife's receipt of a share of Mr. Mattson's disability compensation. *Id.* at 236.

[¶40] Following the divorce Mr. Mattson only made sporadic payments on his divorce obligations resulting in substantial arrearages. *Id.* In January 2016 his ex-wife attempted to enforce the terms of the divorce decree seeking the military retired pay and disability owed under the decree. *Id.* The district court ordered Mr. Mattson to immediately pay the military retired pay and disability compensation due and owing pursuant to the divorce decree and he appealed. *Id.*

[¶41] The Court of Appeals reversed holding:

> In light of *Howell*, we conclude that our holding in *Garfield* has been functionally overruled. In *Garfield*, we held that principles of contract and res judicata could render a stipulated decree indemnifying an ex-spouse enforceable,

> even if it ran afoul of *Mansell*, because "parties are free to bind themselves to obligations that a court could not impose." 682 N.W.2d at 637. But, as clarified in *Howell*, such equitable compensation degrees do not escape federal preemption and are simply unenforceable. 137 S.Ct. at 1401-02.
>
> Berberich maintains that Mattson is contractually bound by the terms of their stipulated agreement to pay his agreed-upon portion of the property division, and she argues that Mattson has not challenged the decree, which remains a valid judgment. But this argument runs headlong into *Howell*, which makes clear that state courts "cannot 'vest' that which (under governing federal law) they lack the authority to give." 137 S.Ct. at 1406. Moreover, *Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption. *See id.* at 1404-05 (listing *Krapf*, 786 N.E.2d at 318, as among the state court cases that failed to properly interpret *Mansell)*. Simply put, state laws are preempted in this specific area.

Mattson, 903 N.W.2d at 241 (internal citations omitted).

[¶42] As noted by Richard, the Court of Appeals did leave open the possibility of spousal support stating "[a]nd district courts may account for reductions in the value of these assets when calculating or recalculating the need for spousal support." *Id.* (citing *Howell*, 137 S.Ct. at 1406). "We encourage district courts to keep these avenues in mind as they navigate the changing landscape involving military disability compensation." *Id.*

[¶43] Richard argues the Court is barred from awarding spousal support as the initial *Settlement Agreement* and *Judgment* expressly waived spousal support reading:

> Spousal Support. Neither party shall be obligated to pay spousal support, alimony, or maintenance to the other. Richard and Roxane hereby waive and release each other forever from any and all claims against each other to temporary or permanent alimony, spousal support, or maintenance. The Court shall be divested of jurisdiction to modify the alimony, spousal support, or maintenance provision now and forever. (R:27:9:31; R:33:9:36).

[¶44] However, the post-judgment orders contained the following language:

> The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits herein, including ... an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Richard fails to comply with the provision contained above requiring said payments

> to Former Spouse by any means, including the application for a disability award or filing of bankruptcy, or if military or government regulations or other restrictions interfere with payments to the Former Spouse as set forth herein, of if Member fails to comply with the provisions contained above required said payments to Former Spouse." (R:47:7-8).

These post-judgment orders were issued on the heels of the *Judgment* without objection and in apparent agreement of the parties. The Court finds the award of spousal support is an available remedy and the post-judgment orders identify the amount as "the sum of benefits payable plus future cost of living adjustment."

[¶45] The other available remedy is for the Court to redistribute the martial estate. The *Judgment* stated "... the parties understand that the court may redistribute property in a post-judgment proceeding if a party fails to comply with the terms of a court order or judgment distributing property or debts." (R:33:9:35). The post-judgment orders indicated the Court "shall retain jurisdiction to enter such further orders as are necessary to care its indented division into practice..." (R:55:8:19). "Generally, a district court does not retain continuing jurisdiction to modify a final property distribution." *Lewis v. Smart,* 2017 ND 214, ¶ 11, 900 N.W.2d 812 (citing *Keita v. Keita,* 2012 ND 234, ¶ 28, 823 N.W.2d 726). "Under N.D.C.C. § 14-05-24(3), however, a court may redistribute property and debts in a post-judgment proceeding when a party fails to comply with an order distributing property and debts. *Id.* "The district courts distribution of property and debts also includes recognizing valid settlement agreements." *Id.* at ¶ 12 (citing *Eberle v. Eberle*, 2009 ND 107, ¶ 15, 766 N.W.2d 477). "Even when parties enter into a settlement agreement, however, a district court retains the duty to make a just and proper distribution of the marital estate under N.D.C.C. § 14-05-24." *Id.* at ¶ 13.

[¶46] Here, the parties agreed to distribute the marital estate based on a belief Roxane would eventually receive a marital share of Richard's military retirement. Richard immediately received $50,500.00 from Roxane's 403(b) retirement account and Roxane agreed to pay Richard $90,000.00 within 90 days of entry of judgment to make the property distribution equitable. (R:27:5-6; R:27:7:25). The post judgment orders indicated Richard would make an allotment or pay Roxane directly if she did not receive her share of his benefits. This has not happened. The Court therefore could, under N.D.C.C. § 14-05-24, redistribute the martial estate. If the Court were to take this avenue the primary focus would likely be on the value of what Roxane believed she would receive versus what she will receive.

[¶47] However, the simpler remedy is the one repeatedly outlined in the post-judgment orders-the award of spousal support. The Court finds this is the appropriate remedy in this matter.

[¶48] The post-judgment orders indicate Roxane should begin receiving payments "on the first month following Member's first eligibility for longevity retirement." (R:55:5:10). While Richard will not receive "longevity retirement" the Court finds the parties intended for Roxane to begin receiving benefits at the same time as Richard. This is supported by the language in the post-judgment orders which indicates an allotment should be initiated "... in any month direct payment is not made to Former Spouse, unless also not made to the Member..." (R:55:7:17). Roxane's spousal support should commence with the month Richard began receiving Combat-Related Special Compensation which was June 1, 2021. (R:159).

[¶49] Richard's gross Combat-Related Special Compensation has changed since he began receiving benefits. It appears he initially received $3,764.00 per month. (R:180). Therefore, Roxane's martial share (27.907%) must be calculated against the gross pay Richard received at the time for determining any arrearage. Unless the parties agree otherwise, the Court would intend Ricard's spousal support obligation be increased by 20% until any arrearage is paid in full.

[¶50] Richard argues if spousal support is awarded the amount he is paying towards the Survivor Benefit Plan (6.5% of gross pay) should be debited from his gross military pay before calculating Roxane's share. The Court finds this is reasonable as the survivor benefit is solely for the protection of Roxane. Finally, Roxane should be responsible for all federal and state income taxes "... on all payments received by the Former Spouse..." as outlined in the post-judgment orders. (R:55:8:21).

[¶51] Finally, Roxane requests the Court award her attorney's fees, indicating she has attained these fees in an effort to obtain her rightful share of Richard's military retirement when it did not have to be handled through litigation. (R:231:25:61).

[¶52] The district court has broad discretion to award attorney's fees. *Nelson v. Nelson*, 2019 ND 221, ¶ 21, 932 N.W.2d 386. Authorizations of attorney's fees for frivolous claims are not meant to chill enthusiasm and creativity in pursuing factual or legal theories, and a court should not use the wisdom of hindsight to determine whether claims are frivolous but instead intended to deter the pursuit of wholly groundless and meritless claims, not to punish inartful drafting. *See Strand v. Cass Cnty.*, 2008 ND 149, ¶ 11, 753 N.W.2d 872. Frivolous claims are those which have 'such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person's] favor.'" *Id* at ¶ 11 (quoting *Deacon's Development, LLP, v. Lamb*, 2006 ND 172, ¶ 12, 719 N.W.2d 379). When a party requests attorney's fees under N.D.C.C. § 28-26-01(2), the court "must first determine whether a claim is frivolous. If the Court makes that determination, the court must then award reasonable attorney's fees to the prevailing party." *Id.* (quoting *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 84 (N.D.1991)).

[¶53] There is no evidence to show Richard's claims regarding federal case law, and his assertion that Roxane's demand for payments was premature were made in bad faith or frivolous. Both parties have agreed this is a novel and complex issue of law. This is evidenced by the retention of out-of-state experts, multiple hearings, and extensive exhibits and briefing. As such, the Court will not award attorney's fees.

[¶54] Based on the foregoing,

[¶55] **IT IS HEREBY ORDERED,** Richard shall pay Roxane spousal support in the amount identified in the post-judgment orders and this *Order*. The parties shall have forty-five (45) days to confer regarding proposed language sufficient to effectuate the award of spousal support. If the parties cannot agree, each party may submit proposed language by filing a copy with the Clerk of Court along with a copy in an editable electronic format to the Court.

Dated December 31, 2024.

BY THE COURT

Jackson J. Lofgren
District Judge
South Central
Judicial District

Appendix E

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2015-DM-00080

Roxane M. Marschner, Plaintiff,

{CONFIDENTIAL} vs. {CONFIDENTIAL}

Richard A. Marschner, Defendant.

AMENDED ORDER DIVIDING MILITARY RETIRED PAY

[¶1] The Court ordered in its Judgment issued on February 9, 2016, that plaintiff, Roxane M. Marschner, receive a percentage of Richard's military retirement per month as Roxane's sole and separate property, payable from Richard's disposable retired or retainer pay, to be calculated as follows:

[¶2] The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 2,731, which is the number of points accumulated from the date of the marriage (September 3, 1994) until the date of the divorce judgment (February 9, 2016) and the denominator of which is the total number of points of military service creditable for retirement. Roxane shall further receive an identical percentage of any cost of living increases in said retired or retainer pay, computed from the gross sum thereof. For the purpose of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Richard would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane). It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability, or reduction in pay or benefits because of other federal employment, including FERS. It also includes any sum taken by Richard in addition to or in lieu of retirement benefits, including but not limited to REDUX lump sum payments, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired Richard. All sums payable to Roxane as a portion of military retirement shall be payable from Richard's disposable retired or retainer pay to the creditable service accrued. Richard will select the survivors benefit plan with Roxane as the survivor. He will notify the appropriate pension administrator of the survivor's status within 9 months of entry of judgment and provide Roxane with a copy of the submission.

[¶3] Pursuant to the Uniformed Services Former Spouse' Protection Act, the following information is provided.

[¶4] Richard A. Marschner (hereinafter Member) is currently a military person in the North Dakota Army National Guard. His date of enlistment is 24 May, 1985. Roxane M. Marschner, is the former spouse of Richard A. Marschner (hereinafter Former Spouse).

[¶5] The pertinent information about the parties is as follows:

	NAME	SOCIAL SECURITY NUMBER, TAXPAYER IDENTIFICATION #, FINANCIAL ACCOUNT NUMBER; AND BIRTH DATE
Plaintiff	Roxane M. Marschner 1001 19th Street SE MANDAN ND 58554 PH: 701-400-2687	SSN: [redacted] DOB: [redacted]
Defendant	Richard A. Marschner 740 North 23rd Street BISMARCK ND 58501 PH: 701-226-7256	SSN: [redacted] DOB: [redacted]

The marriage was over 21 years. Richard A. Marschner had at least 21 years of creditable service.

[¶6] **IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

[¶7] The Court retains jurisdiction to amend this Order so that it will constitute an acceptable order under the Uniformed Services Former Spouses' Protection Act even though all other matters incident to this action or proceeding have been fully and finally adjudicated. If it is determined at any time that changes in the law, the administration of the military retired pay, or any other circumstances make it impossible to calculate the portion of a distribution awarded to the former spouse by this Order and so notifies the parties, either or both parties shall immediately petition the Court for reformation of the Order.

[¶8] This Court has complete jurisdiction in the premises, both as to the subject matter and the parties, under both the North Dakota Century Code and 10 U.S.C. § 1408 *et seq.*; the Court has jurisdiction over Richard A. Marschner by reason of his North Dakota residency; all applicable portions of the Servicemembers Civil Relief Act of 2003 have been complied with by waiver or otherwise. The parties were married for more than 21 years during Member's creditable military service.

[¶9] The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 2,731, which is the number of points accumulated from the date of the marriage

(September 3, 1994) until the date of the divorce judgment (February 9, 2016) and the denominator of which is the total number of points of military service creditable for retirement. Roxane shall further receive an identical percentage of any cost of living increases in said retired or retainer pay, computed from the gross sum thereof. For the purpose of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Richard would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane). It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability, or reduction in pay or benefits because of other federal employment, including FERS. It also includes any sum taken by Richard in addition to or in lieu of retirement benefits, including but not limited to REDUX lump sum payments, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired Richard. All sums payable to Roxane as a portion of military retirement shall be payable from Richard's disposable retired or retainer pay to the creditable service accrued. Richard will select the survivors benefit plan with Roxane as the survivor. He will notify the appropriate pension administrator of the survivor's status within 9 months of entry of judgment and provide Roxane with a copy of the submission.

[¶10] Payments to Former Spouse shall be made as called for in this Order beginning on the first day of the first month following Member's first eligibility for longevity retirement. If Member should remain in military service after becoming eligible for retirement, so that Former Spouse receives a percentage of a hypothetical retirement that Member would have been eligible to receive, and Member actually retires thereafter, the spousal percentage payable to Former Spouse shall be recalculated as a percentage of the benefits Member actually receives so as to provide for direct payment to Former Spouse by the military pay center of the correct sum owed.

[¶11] The amount called for herein shall not be modifiable by the direct or indirect action of either party, either by way of increase or decrease, except as expressly set forth herein. It is contemplated that future cost of living adjustments will be granted by the United States government, by means of which the gross military retirement benefits specified above will increase, thus raising the amount being paid to Former Spouse.

[¶12] The payments called for herein from Member's retired or retainer pay shall continue irrespective of the future marital status of either of them.

[¶13] The appropriate military pay center shall pay the sums called for above directly to Former Spouse, to the extent permitted by law, at the same times as Member receives retired or retainer pay, and that this Decree is intended to qualify under the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 *et seq.*, with all provisions to be interpreted to make the Decree qualify.

[¶14] The Member must elect the Survivor's Benefit Plan and will submit all necessary paperwork within 9 months of entry of judgment to the appropriate military pay center to assure that the Former Spouse shall be the sole beneficiary of the Survivor's Benefit Plan and shall provide Roxane with a copy. No later than January 30th of each year, Richard will give Roxane a statement showing that she is the beneficiary of the balance.

[¶15] With the exception of the amounts specifically awarded to Former Spouse, the balance of Member's retired or retainer pay is awarded to Member as his sole and separate property.

[¶16] If the amount paid by the military pay center to Former Spouse is less than the amount specified above, Member shall initiate an allotment to Former Spouse in the amount of any such difference, to be paid from any federal entitlements due Member, with said allotment to be initiated by Member immediately upon notice of such difference, and making up any arrearages in installments not less in amount or longer in term than the arrearages accrued.

[¶17] If in any month direct payment is not made to Former Spouse, unless also not made to the Member, by the military pay center, and no federal entitlement exists against which such an allotment may be initiated, or for whatever reason full payment by allotment is not made in that month, or if the amount paid through the allotment is insufficient to pay the difference specified above, Member shall pay the amounts called for above herein directly to Former Spouse by the fifth day of each month in which the military pay center and/or allotment fails to do so, beginning upon Member's eligibility for retirement.

[¶18] If Member takes any steps to merge the military retirement with another retirement program of any kind, that retirement system, program, or plan is directed to honor this court order to the extent of Former Spouse's interest as set out above, to the extent that the military retirement is used as a basis of payments or benefits under such other retirement system, program, or plan.

[¶19] If Member takes any action that prevents, decreases, or limits the collection by Former Spouse of the sums to be paid hereunder (by application for or award of disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), Member shall make payments to Former Spouse directly in an amount sufficient to neutralize, as to Former Spouse, the effects of the action taken by Member. Any sums paid to Member that this court order provides are to be paid to Former Spouse shall be held by Member in constructive trust until actual payment to Former Spouse.

[¶20] The Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to Former Spouse of the military retirement benefits awarded herein, including the re-characterization thereof as a division of Civil Service or other retirement benefits, or to make an award of alimony (in the sum of benefits payable plus future cost of living adjustments) in the event that Member fails to comply with the provisions contained above requiring said payments to Former Spouse by any means, including the application for a disability award or filing of bankruptcy, or if military or government regulations or other restrictions interfere with payments to Former Spouse as set forth herein, or if Member fails to comply with the provisions contained above requiring said payments to Former Spouse.

[¶21] The Court shall retain jurisdiction to enter such further orders as are necessary to carry its intended division into practice by entering a later order construing the sum payable as a percentage of the sums ultimately paid. For example, if Former Spouse made an irrevocable election under *Gillmore* before Member's actual retirement, or the original division of benefits was in the form of a hypothetical award, or if any other projection or supposition was made in dividing the military retired pay that proved, ultimately, to be inaccurate or not directly enforceable, the Court retains jurisdiction to carry its original intent into practice in the interest of equity and for the avoidance of unjust enrichment.

[¶22] The Member has waived any privacy or other rights as may be required for Former Spouse to obtain information relating to Member's date of retirement, last unit assignment, final rank, grade, and pay, present or past retired pay, or other such information as may be required to enforce the award made herein, or required to revise this order so as to make it enforceable.

[¶23] It is the intention of the Court and the parties that federal and state income taxes on all payments received by the Former Spouse under this Order shall be borne by the Former Spouse and not by the Service member, and the Former Spouse is ordered to indemnify and hold the Service Member harmless with respect to any federal or state income tax imposed on the Service Member as a result of the Former Spouse's receipt of her payments.

Dated:

BY THE COURT:

Signed: 7/5/2016 9:22:29 AM
SONNA ANDERSON
DISTRICT JUDGE

Appendix F

STATE OF NORTH DAKOTA	IN DISTRICT COURT
	SOUTH CENTRAL JUDICIAL DISTRICT
COUNTY OF BURLEIGH	
	CASE NO. 08-2015-DM-00080

Roxane M. Marschner, Plaintiff,

vs.

Richard A. Marschner, Defendant.

JUDGMENT

[¶1] This action, having been filed in this Court in the Burleigh County Courthouse in the City of Bismarck, and the State of North Dakota, the defendant having been served with the summons and complaint, the parties having executed a Parenting Plan, a Partial Settlement Agreement, and a Settlement Agreement, and the Court, having duly considered the same, together with the affidavit submitted by the plaintiff, and being fully advised in the premises, and having made and filed its **FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER FOR JUDGMENT,**

[¶2) NOW, THEREFORE, IT IS

[¶3] ADJUDGED, DETERMINED, AND DECREED THAT:

[¶4] The Court has jurisdiction of the parties and of the subject matter of this action.

[¶5] There are irreconcilable differences between the parties. Each party is hereby granted an absolute divorce from the other on the grounds of irreconcilable differences.

[¶6] The parties entered into a Parenting Plan, a Partial Settlement Agreement, and a Settlement Agreement which determine residential responsibility, decision-making authority, parenting, child support, and related matters in the best interests of the minor child and make an equitable division of the property and debts, including spousal support, as follows:

> [¶7] <u>Residence</u>. The parties are now, and for more than six months have been, residents of the state of North Dakota.
>
> [¶8] <u>Marriage</u>. The parties were married on September 3, 1994, in Bismarck, North Dakota, and have been, at all times since then, and are now husband and wife.
>
> [¶9] <u>Irreconcilable Differences</u>. During the course of the marriage, irreconcilable differences have arisen making continuation of the marriage impossible.
>
> [¶10] <u>Identifying Information</u>. The addresses and identifying information of the parties will be submitted in

accordance with the North Dakota Rules of Court.

[¶11] Parenting Plan. The parties believe the following parenting plan to be in the best interest of the minor child:

[¶12] Roxane will have primary residential responsibility of the minor child with Richard receiving liberal parenting time. There will not be a set schedule for the parenting time as the parties request that it be open and flexible taking into consideration the parties schedules and also the schedules of the child. However, the parties agree as a fall-back schedule that Richard will have RM two weekends a month and a couple of evenings each week. For holidays, RM will be with Roxane each and every Christmas Eve and commencing at 9:00 a.m. on the Christmas Day, RM will be with Richard every Christmas Day. In odd-numbered years, RM will be with Richard on Thanksgiving. In even-numbered years she will be with her mother on Thanksgiving. Should Richard not be able to exercise any of his parenting time, he will notify Roxane as soon as is possible. Otherwise, it will be assumed that he will exercise said parenting time.

[¶13] The parties will have joint-decision making on major decisions regarding the child. If there Is an emergency situation, the parent with the child will make the decision. In the event of a dispute regarding a major decision, Roxane will make the final decision.

[¶14] Roxane's address will be used for the child for school attendance purposes.

[¶15] <u>Identification of Property</u>. The parties specifically and knowingly confirm that they are each separately aware of the identify [sic] and value of the items awarded to each other and have been each given the right to examine, appraise, and independently confirm the identity and value all of the property. The parties are secure in their knowledge of this property and are secure in their understanding that the distribution of assets as identified herein is a fair and equitable distribution of all assets in which the parties have any ownership interest of any nature.

[¶16] In the event any assets are later identified by either party as being owned during the marriage which have not been identified herein, the parties shall immediately disclose this asset to the other and work cooperatively to make an equitable distribution of the same or return to court to amend the Judgment so as to provide for the equitable distribution of any undisclosed assets.

[¶17] Vehicles. Roxane shall be entitled to all right, title, and interest in the all vehicles in her possession, including the 2015 Kia Sorento, subject to any debt or encumbrance thereon, but free and clear of any claim by Richard. Richard shall be entitled to all right, title, and interest in the 2006 Dodge Ram, the 2007 Keystone camper, the 2003 Honda motorcycle (and parts), subject to any debt or encumbrance thereon, but free and clear of any claim by Roxane. The jeep will be put in Roxane's name and then put in R.M.'s name when it is appropriate to do so. The hail check for the camper will be split equally between Richard and Roxane.

[¶18] Investment and Retirement Accounts. Except as otherwise provided herein, the parties shall each be entitled to the exclusive ownership, right, title, and interest in any life insurance policy, investment, 401k, retirement, pension, Individual retirement account (IRA), Roth IRA, stock, annuity, Keogh plan accounts, or other investment or retirement accounts in his/her name, whether joint or individual accounts, and each hereby waives any and all claims he or she may have to said accounts of the other party. The Gilchrest Account ****0457 shall be divided equally between the parties. Richard shall receive the joint accounts at Wells Fargo ***1312, ***7032. Roxane shall be entitled to one-half of Richard's military pension and one-half of his FERS on a marital fractional formula. She shall have the survivor's benefit and Richard shall execute all paperwork necessary for that to happen within 9 months of entry of judgment. Roxane is entitled to receive military benefits based on the 20/20/20 policy. Richard shall receive $50,500 from the 403(b) plus any gains or losses on this share from January 20, 2016 to the date the division of this asset to Richard is effectuated.

[¶19] Her share of the North Dakota Army National Guard pension shall be as follows:

> A percentage of Richard's military retirement per month as Roxane's sole and separate property, payable from Richard's disposable retired or retainer pay, to be calculated as follows: the sum of retirement benefits payable each month divided by two, and multiplied by a fraction, the numerator of which is the number of points accumulated from the date of the marriage (September 3, 1994) until the date of the divorce judgment and the denominator of which is the total number of points

of military service creditable for retirement. Roxane shall further receive an Identical percentage of any cost of living increases in said retired or retainer pay, computed from the gross sum thereof. For the purpose of interpreting this Court's intention in making the division set out in this Order, "military retirement" includes retired pay paid or to which Richard would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied (except for deductions because of an election to provide a survivor benefit annuity to Roxane). It also includes all amounts of retired pay Richard actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any waiver made in order to qualify for Veterans Administration benefits including disability, or reduction in pay or benefits because of other federal employment, including FERS. It also includes any sum taken by Richard in addition to or in lieu of retirement benefits, including but not limited to REDUX lump sum payments, exit bonuses, voluntary separation incentive pay, special separation benefit, or any other form of compensation attributable to separation from military service instead of or in addition to payment of the military retirement benefits normally payable to a retired Richard. All sums payable to Roxane as a portion of military retirement shall be payable from Richard's disposable retired or retainer pay to the creditable service accrued. Richard will select the survivors benefit plan with Roxane as the survivor. He will notify the appropriate pension administrator of the survivor's status within 9 months of entry of judgment and provide Roxane with a copy of the submission.

[¶20] Her share of FERS shall be as follows:

A percentage of Richard's FERS annuity month as Roxane's sole and separate property, in an amount equal to 50% of the Marital Portion of the Richard's Gross

Monthly Annuity (including any military benefits payable by the OPM) determined as of the Employee's date of retirement. For purposes of calculating Roxane's share of Richard's benefit, the Marital Portion shall be determined by multiplying Richard's Gross Monthly Annuity by a fraction (less than or equal to 1.0) the numerator of which is the total number of months of Creditable Service under the FERS, if any earned during the marriage (from September 3, 1994 until date of judgment and the denominator of which is the total number of months of Richard's Creditable Service accrued under the FERS (including military service credited to FERS should Richard opt out of receiving his military retainer pay. She shall be entitled to all COLAS applied to Richard's retirement benefits and any salary adjustments after the date of the divorce decree and before the date of retirement shall be incorporated into the calculation of Roxane's share of the Employee Annuity. With respect to Roxane's share of Richard's Gross Monthly Annuity, such portion shall be calculated without regard to any amounts that are withheld from Richard's annuity for any reason (other than amounts withheld for the purpose of providing Roxane a former spouse survivor annuity. If Richard leaves Federal service before retirement and applies for a refund of employee contributions under the FERS, Roxane shall be entitled to a pro rata share of the refund of such employee contributions. Richard will name Roxane as the surviving spouse for annuity coverage and will execute all documents in a timely manner to assure she is named as the surviving spouse.

[¶21] The parties recognize that the retirement and pension assets will need to be divided by QDRO's or Order Acceptable for Processing, or the equivalent for these assets. Each party will cooperate in the processing and execution of the orders. Richard will be responsible to draft the QDRO for the 403(b) and Roxane for the FERS and military pensions. Both parties shall cooperate and equally share the task of ensuring that the financial assets are transferred as set forth in this paragraph. The Court shall retain jurisdiction over the retirement assets in the event additional orders are needed to transfer ownership.

[¶22] Real Property. The parties own one residence together at 1001 19th Street SE, Mandan, North Dakota, legally described as:

> Lot 4, Block 1O, Replat of Plainview Heights First Addition to the City of Mandan, Morton County, North Dakota.

The parties agree that Roxane shall have full ownership of and responsibility for this property. Within ten days of entry of judgment, Richard will sign a Quit Claim Deed, passing ownership of the above property to Roxane. Roxane shall be responsible for all liability and debts and shall be entitled to all rights and benefits attendant to this property.

[¶23] Richard has purchased a house at 740 N. 23rd Street, Bismarck, North Dakota. The parties agree that Richard shall have full ownership of and responsibility for this property. Within ten days of entry of judgment, Roxane will sign a Quit Claim Deed, passing ownership of the above property to Richard. Richard shall be responsible for all liability and debts and shall be entitled to all rights and benefits attendant to this property.

[¶24] Personal Property. Roxane shall be entitled to all household goods, including furniture, tools, equipment, dishes, appliances, and the like in her possession and at the house in Mandan. Rick believes there may be some personal documents at the house and if Roxane locates these she will return them to him. Rick shall be entitled to all household goods, including furniture, tools, equipment, dishes, appliances, and the like in his possession and at the house in Bismarck except he will return the power washer to Roxane. They agree the items need not be listed on the 8.3 Property and Debt Listing.

[¶25] Roxane and Richard shall have all right, title, interest, and equity, free and clear of any claim on the part of the other party, in and to the household goods, furnishings, and all other tangible personal property currently in his or her possession. Richard will return the power washer to Roxane.

[¶26] The parties further agree to execute the necessary documents as to effectuate a transfer of ownership, title, and financing obligations consistent with the foregoing division of personal property. In addition, the parties mutually agree that each shall be individually responsible for the debt, insurance, and other obligations associated with the personal property to which each is entitled under this agreement.

[¶27] Except as otherwise set forth in this agreement, each party is entitled to the exclusive right, title, and possession of all personal property of the parties, joint or several, which such party now owns, possesses, holds, or hereafter acquires. Unless specifically set out in this agreement, each party shall assume and pay all outstanding indebtedness incurred by the parties for property which is hereby possessed or controlled by each party.

[¶28] Bank Accounts. Richard shall have all right, title, interest, and equity, free and clear of any claim on the part of Roxane, in and to any cash, savings, money market, and checking accounts in Richard's sole name, and Roxane hereby waives any and all claims she may have to said accounts. Likewise, Roxane shall have all right, title, interest, and equity, free and clear of any claim on the part of Richard in and to any cash, savings, money market, and checking accounts in Roxane's sole name or under her control, and Richard hereby waives any and all claims he may have to said accounts. Roxane will keep all Mor-Gran-Sou capital credits.

[¶29] Life Insurance. Each party will keep his or her own life insurance policies.

[¶30] Balancing Payment. The parties agree that Roxane shall pay Richard the sum of $90,000 within 90 days of the entry of judgment. The division of property is outlined on Attachment A.

[¶31] Debts and Obligations. Each party agrees to assume any debts he or she assumed during the course of the marriage. Roxane shall assume responsibility for the debt associated with her vehicle. The parties believe that all debts have been addressed. Richard certifies he has not incurred any obligations in the name of Roxane that are not disclosed in this agreement. Roxane certifies that she has not incurred any obligations in the name of Richard that are not disclosed in this agreement. In addition, each party shall hold the other party harmless and indemnify the other from financial or legal responsibility for the above-identified distribution of debts and any future debts incurred by either. The parties agree to indemnify the other to the extent of any future payments made on the debts for which the other has agreed to make payment, including reasonable attorneys' fees and costs associated with enforcing this provision.

Each party agrees not to incur any further debts or obligations for which the other party may be liable to a third party creditor, with each of the parties to obtain re-issuance of any credit cards which they are retaining and concerning which the other party may presently be liable.

[¶32] The parties acknowledge that the mere assumption of a joint debt by one of the parties may not relieve the other party of that financial obligation in the event the assuming party fails to make the payments as agreed upon.

[¶33] Rule 60 Relief. The division of property and debts in this Agreement is made with the understanding that the party assuming a debt has sufficient assets and income to service the debt, that neither party intends to file bankruptcy, and that the net equity received by either party would be substantially impaired if debts or obligations of one are imposed on the other. Accordingly, if bankruptcy, judgment, or other compelling grounds result in one party having to pay any of the debts or obligations of the other under this Agreement, then the aggrieved party is entitled to seek relief under Rule 60 of the North Dakota Rules of Civil Procedure and the parties agree that the grounds for relief will exist within the meaning of this rule.

[¶34] Each party shall use reasonable good faith efforts to assume individual liability on debts that are not the responsibility of the other. Each party shall hold harmless and indemnify the other against liability for any claims of creditors for debts that are the responsibility of the other. This hold harmless and indemnity provision and any payments owed by one party to the other under this Agreement are non-dischargeable in bankruptcy.

[¶35] Redistribution. This property settlement and division of assets and debts is an equitable division of the parties' marital assets and debts and it is not subject to modification. However, the parties understand that the court may redistribute property in a post-judgment proceeding if a party fails to comply with the terms of a court order or judgment distributing property or debts.

[¶36] Spousal Support. Neither party shall be obligated to pay spousal support, alimony, or maintenance to the other. Richard and Roxane hereby waive and release each other forever from any and all claims against each other to temporary or permanent alimony, spousal support, or maintenance. The Court shall be divested of jurisdiction to modify the alimony, spousal support, or maintenance provision now and forever.

[¶37] Health Insurance of Parties. The parties shall not be required to provide health insurance for the other subsequent to the date of entry of Judgment herein. The parties shall be entitled to protection under all state and federal laws which protect their rights to continue health insurance coverage under any plan provided by the other party's employer.

[¶38] **Child Support**. Richard shall pay child support in the amount of $970 per month for the support of the parties' minor child. The defendant's child support obligation is based his net income of $5,409 per month. Child support payments shall commence the first full month following entry of Judgment, and shall be payable on the first day of each and every month thereafter while an obligation for child support continues. The child support obligation will accrue Interest if not timely paid.

[¶39] Duration. Richard's obligation to pay child support shall continue until the end of the month in which the minor child turns 18, unless the child has not yet graduated from high school. In that event, the defendant's obligation to pay support for the oldest child shall continue until the end of the month during which the oldest child is graduated from high school or attains the age of 19 years, whichever occurs first, if: (1) the child is enrolled and attending high school and is 18 years of age prior to the date the child is expected to be graduated; and (2) the child resides with the plaintiff. The support will then cease.

[¶40] Form of Payment. All child support payments required by the Judgment shall be paid by certified check, money order, or personal check payable to the State Disbursement Unit for remittance to the obligee. Payments shall be sent to: State Disbursement Unit, P.O. Box 7280, Bismarck, ND 58507-7280.

[¶41] Notice of Income Withholding Provision. Pursuant to N.D.C.C. § 14-09.09.24, the Judgment shall act as an immediate Order to withhold wages or other income for the child support ordered herein. Accordingly, the defendant's employer shall withhold child support as ordered pursuant to the Judgment and transmit such child support payments to the State Disbursement Unit as follows:

State Disbursement Unit
P.O. Box 7280
Bismarck, ND 58507-7280

[¶42] The defendant shall notify the Clerk of District Court and the State Disbursement Unit of any change in his employment, including the name and address of his employer and the date such employment began.

[¶43] **Modification of Support Obligation**. The parties are notified that child support may, in addition to any other basis for modification, be amended under the provisions of N.D.C.C. § 14-09-08.9, which provides, in relevant part, that:

> An obligor or an obligee may request review under section 16 of chapter 148 of the 1989 Session Laws or section 14-09-08.4, by applying to the child support agency for child support services, and indicating, in the manner there provided, a desire to have a child support order reviewed.... If a party to a child support matter is receiving services from the child support agency and an order for current child support has issued out of that matter, the child support agency shall provide notice of the right to request a review or further review of that child support order, to the obligor and obligee, not more than three years after the most recent child support order, review

> of that child support order, or notice of right to request a review of that child support order.

[¶44] The parties are further informed that they may seek review of a current child support obligation at any time upon a showing of a material change of circumstances and pursuant to N.D.C.C. § 14-09-08.4 if the order sought to be amended was entered at least one year before the filing of a motion or petition for amendment the order will be reviewed without a showing of a material change of circumstances. Section 14-09-08.4, N.D.C.C., requires the child support agency to seek review of every child support order no less frequently than 36 months after the establishment of the order or review of the order by the Court or child support agency unless (a) neither the obligor nor the obligee has requested review or (b) In the case of an order with respect to which there is in effect an assignment under Chapter 50-9, N.D.C.C., relating to Aid to Dependent Children or Chapter 50-24.1, N.D.C.C., relating to Medical Assistance for Needy Persons, the child support agency has determined that a review is not in the best interest of the child and neither the obligor nor the obligee has requested review.

[¶45] Tax Dependency Exemption. The parties rotate the child exemption for R.M. with Roxane claiming her for even-numbered years commencing with the 2016 tax year and with Richard claiming her for odd-numbered years commencing with the 2015 tax year. Once their child is no longer a minor, the child will make his or her own decisions about how he wishes to file for taxes. The parties will file separately beginning in 2014.

[¶46] Health Insurance and Expenses for the Child. Subject to the following, Richard will continue to provide health insurance for the child as long as it is available at reasonable cost. Roxane will continue to provide dental and vision insurance for the children as long as it is available at reasonable cost. Should Richard lose his employment or retire from his employment, the parties shall discuss alternative health insurance for the child including Roxane covering health insurance. The parties' obligation to cover health insurance shall terminate upon the child turning the age of eighteen (18) years or graduation from high school, whichever comes later. Richard will continue to provide health insurance for Jacob until R.M. turns the age of eighteen (18) years or graduates from high school, whichever occurs later.

[¶47] The parties will split equally all patient-responsibility medical (including prescriptions), dental, orthodontia (including braces), optometric (including eye glasses and contacts), and mental health, etc. expenses for R.M. The parties agree to submit the actual bills and insurance EOBs to each other once a month to seek reimbursement. The parties further agree that they will continue to split the patient-responsibility expenses of R.M. until the she is no longer on their insurance policies.

[¶48] The parties agree to share equally in the transportation responsibilities of the child for parenting time with Richard.

[¶49] <u>Other Expenses of the Child</u>. The parties both agree to split R.M.'s one child's auto insurance expenses up to $100 a month. Anything over $100 is that child's responsibility. The parties agree to continue to provide auto insurance for RM until she turns the age of eighteen (18) years or graduates from high school, whichever is later.

[¶50] The parties agree to split equally all school activity fees and expenses associated with the school activities their child participates in. For all extra-curricular activities, the parents will provide each other with written prior notice of said extra-curricular activities and, if both parties agree by written consent to the child participating in the activity, the parents will split the costs. If a parent does not consent to an extra-curricular activity and the other parent still chooses to have the child participate in the extra-curricular activity, the parent signing the child up for that activity shall be fully responsible for all fees and expenses associated with that activity. Roxane will try to get information about school and other events to Richard. Richard shall also monitor the sports and other activity schedules on the school's website to inform himself. He will contact the school and request that any mailings to parents be sent to him at his address in addition to Roxane. Roxane will provide information to Richard about camps in which RM wishes to participate. As soon as humanly possible, Roxane will provide information to Richard about last minute changes to their daughter's extracurricular activities.

[¶51] <u>Implementation of Judgment.</u> Each party shall, within 21 days from and after the date of entry of Judgment, or upon presentation, whichever occurs first, execute any document, transfer papers, titles, deeds or other documents required to effect the terms and provisions of the Judgment and decree. In the event that a party fails to sign such documents, as required, the Judgment shall operate to convey title to property, as stated above.

[¶52] Indemnification. Each party shall absolutely indemnify and hold harmless the other party with regard to debts ordered to be the sole and exclusive responsibility and obligation of a party.

[¶53] Incorporation Clause. With the approval of the Court where divorce proceedings have been instituted, this agreement shall be incorporated in any decree of divorce which may be issued by said Court. In the event that the Court shall fail or decline to incorporate this agreement or any of its provisions in its decree, the parties for themselves and their respective heirs, personal representatives and assigns agree that they will nevertheless abide by and carry out all of the provisions herein.

[¶54] Modification Clause. No representations, warranties, assurances or promises have been made by either party as an inducement to enter into this agreement other than those set forth herein and this agreement contains all of the terms and conditions of the contract between the parties. There can be no modification of this agreement, no waiver of its provisions or of any rights, conditions or releases from obligation imposed hereby except by written instrument mutually agreed upon and duly executed.

[¶55] Independent Covenants. Each of the respective rights and obligations of the parties herein shall be deemed independent and may be enforced independently irrespective of other rights and obligations set forth herein.

[¶56] Reconciliation. In the event of reconciliation, the provisions of this agreement as to the property rights of each shall be effective as otherwise provided in this agreement unless a new agreement is entered into in writing, mutually revoking and rescinding this agreement.

[¶57] Conduct of the Parties. The parties having agreed to voluntarily live separately and apart, hereby agree to continue to do so. Neither of the parties shall interfere with or molest the other or in any way attempt to exercise any marital control or right over the other, or to exert or demand any right to reside in the home of the other.

[¶58] Remarriage. Either party may remarry at any time after the entry of Judgment herein.

[¶59] Entire Agreement. This Settlement Agreement is the entire agreement of the parties. It is contractual in nature and is intended as a complete and conclusive settlement of all marital rights and claims between the parties. Each party hereby releases and discharges the other absolutely and forever from all claims or demands, past, present, or future, for alimony, spousal support or maintenance and all claims and demands contrary to the terms hereof.

[¶60] Filing of Documents. Both parties understand and agree that regardless of the date of filing of this matter with the Court and the date of a Judgment associated herewith, this Settlement Agreement is a legal contract. Both parties voluntarily and knowingly have executed this legal contract and agree to be bound by it. In the event either party seeks to modify or alter in any capacity the terms herein, such shall be considered a breach of contract. The parties understand that such breach can, and likely will, result in damages to the opposing party which may be recoverable under contract law.

[¶61] Waiver of Rights to Inherit. It is mutually agreed between the parties that each shall waive all rights to inherit the estate of the other at his or her death, to take property from the other by devise or bequest (unless under a Will executed subsequent to the effective date of this agreement), or act as Personal Representative of the estate of the other.

[¶62] Acknowledgment and Consent. Both parties acknowledge that they are fully aware of the estate and the assets of the other, believe that this agreement is fair and reasonable and consent and agree to abide by the same; that they enter into the same with full knowledge of the consequences and import thereof, and that each sign this agreement freely and voluntarily and intending thereby that this agreement should benefit and be binding upon the parties hereto and their respective personal representatives, heirs, legatees, devisees, distributees and assigns and all persons claiming by or through them or any of them.

[¶63] Representation. The parties acknowledge that each is aware of his or her right to consult with an attorney prior to signing any settlement agreement or allowing this case to proceed to judgment without his or her being present. Each further acknowledges that he or she has read and fully understands the settlement agreement herein.

[¶64] Roxane is represented by Sherry Mills Moore, Bismarck, North Dakota. Richard is represented by Theresa Kellington.

WITNESS THE HONORABLE SONNA ANDERSON, JUDGE OF THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, BISMARCK, NORTH DAKOTA, AND THE SEAL OF SAID COURT OF BURLEIGH COUNTY, NORTH DAKOTA.

Dated: February 9, 2016

Michele Bring
Clerk of the District Court

ATTACHMENT A - Marschner Plaintiff's Proposal for Property

1	**REAL PROPERTY**	**HUSBAND**	**WIFE**
2	1001 19th Street SE- Mandan	0	235,000
3	740 N. 23rd Street - Bismarck	229,900	0
4	**Real Property Subtotal**	**229,900**	**235,000**
5	**RETIREMENT ASSETS**	**HUSBAND**	**WIFE**
6	Gilchrist Roth IRA x4474 (W)	0	4,197
7	Gilchrist IRA x2452 (H)	3,631	0
8	FERS	Marital Fractional Formula	Marital Fractional Formula
9	Military Defined Benefit	Marital Fractional Formula	Marital Fractional Formula
10	St. Alexius 403(b) (W)	50,500	116,955
11	Hartford Funds St. A's (W)	0	36,565
12	NDPERS x6089 (H)	29,139	
13	TSP (Drill) (H)	31,810	
14	TSP (Technician) (H)	77,432	
15	**Retirement Assets Subtotal**	**192,512**	**157,717**
16	**FINANCIAL ASSETS**	**HUSBAND**	**WIFE**
17	GCB x5858 (W)		1,262
18	GCB x7956 (W)		52
19	VUE x8800 (W)		45
20	WF x1312 (J)	10	
21	WF x7032 (J)	157	
22	Nat'l Mut. Benefit x4465 (W)		7,782
23	Gilchrest x0457 (J)	7,686	7,686
24	Principal Life x9600 (W)		22,147
25	Thrivent Fin x9974 (H)	5,810	
26	WF x2234 (H)	1,976	
27	**Subtotal Financial Assets**	**15,639**	**38,974**
28	**VEHICLES/HOUSEHOLD**	**HUSBAND**	**WIFE**
29	Kia Sorento		24,853
30	2006 Dodge Ram 2500 Truck	24,101	
31	2003 Honda Motorcycle	3,677	
32	2002 Jeep Cherokee	R.M.	R.M.
33	2007 Keystone Camper	12,304	
34	**Subtotal Vehicles**	**40,082**	**24,853**
35	**DEBTS**	**HUSBAND**	**WIFE**
36	GCB x1166 (Kia) (W)		20,923
37	AmEx x1008 (W)		2,370
38	James Hirsch (W)		5,000
39	US Bank VISA x8097 (W)		10,151

ATTACHMENT A - Marschner Plaintiff's Proposal for Property

40	Flagstar x1866 (H)	227,695	
41	WF VISA x1908 (H)	7,928	
42	Barsness (H)	5,000	
43	Face and Jaw Surgery	0	546
44	**Subtotal Debts**	**240,623**	**38,990**
45	**SUMMARY**	**HUSBAND**	**WIFE**
46	REAL PROPERTY	229,900	235,000
47	RETIREMENT ASSETS	192,512	157,717
48	FINANCIAL ASSETS	15,639	38,974
49	VEHICLES/HOUSEHOLD	40,082	24,853
50	TOTAL ASSETS	**478,133**	**456,544**
51	TOTAL LIABILITIES	-240,623	-38,990
52	**NET EQUITY**	**237,510**	**417,554**
53	Payment	90,000	-90,000
54	**Final Net**	**327,510**	**327,554**

Appendix G

Statutory Provisions Involved

10 U.S.C. § 1408

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.--In this section:

* * * *

(4)(A) The term "disposable retired pay" means the 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 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.

* * * *

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

* * * *

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

* * * *

38 U.S.C. § 5305

§ 5305. Waiver of retired pay

Except as provided in section 1414 of title 10, any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Secretary if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.