Comment,
MILITARY PENSION DIVISION CASES POST-HOWELL: MISSING THE MARK, OR HITTING THE TARGET?[1]

I. Introduction

The United States takes pride in its outstanding military services and as a result, Congress has enacted numerous statutes to protect service members, veterans and retirees' interests, such as benefits received after retiring from the military. Individuals of the armed forces, who serve for a specific period of time may retire with retired pay.[2] The amount of retired pay the veteran will receive is based on the number of years the veteran served in the armed forces and the rank the member achieved upon retirement.[3] Veterans who are disabled as a result of their military service are eligible for disability benefits as well as retirement pay.[4] This benefit is calculated based on the seriousness of the disability the veteran sustained and the degree to which the veteran can earn a living with the disability.[5] However, wanting to prevent members from getting two payments, Congress mandated that a military retiree may receive disability benefits only to the extent that the member waives a corresponding amount of their military retirement pay.[6] These waivers are common with veterans because disability benefits are exempt from federal, state, and local taxation, and taking this waiver lowers members' after-tax income.[7]

Such retirement benefits and waivers have become increasingly important when the military member is involved in a divorce. In divorce cases, any property that is acquired during the marriage is deemed to be marital or community property and is

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1 Mark E. Sullivan, Esq., Raleigh, North Carolina provided significant guidance in the writing of this article.

2 10 U.S.C.A. § 3911(2013).

3 10 U.S.C.A. § 3926 (1996).

4 10 U.S.C.A. § 1201 (2013).

5 *Id.*

6 38 U.S.C.A. § 5305 (2004).

7 Mansell v. Mansell, 490 U.S. 581, 583-84 (1989).

subject to division by the court.[8] Based on this, any retirement benefits acquired during the marriage are subject to division between the spouses, and accordingly state courts have treated military retirement pay as marital or community property and have divided it. In direct response to these state court decisions, Congress passed the Uniform Services Former Spouses' Protection Act (USFSPA), which allowed "disposable retired or retainer pay" to be treated as community property.[9] This included all monthly pay to which the military member is entitled minus certain deductions, which included "any amounts waived in order to receive disability benefits."[10] This statute is still law today and was first considered in a case in 1989. This comment will walk through the original court interpretations of the USFSPA and analyze if court systems are correctly applying the Supreme Court's original ruling regarding the USFSPA and division of military disability pay.

II. *Mansell v. Mansell* Analysis

In the U.S. Supreme Court case *Mansell v. Mansell*, the Court made a landmark decision regarding military disability pay and its division of same upon divorce. Gerald and Gaye Mansell were married for twenty-three years, with Mr. Mansell being a member of the U.S. Air Force.[11] At the time of their divorce, Mr. Mansell was receiving retirement compensation and disability compensation, based on his waiver of a portion of his retirement compensation.[12] The parties executed a settlement agreement, in which Mr. Mansell agreed to pay fifty percent of his total military compensation, including the VA waiver taken by electing VA disability compensation, to Mrs. Mansell.[13] Four years later, Mr. Mansell petitioned the court to modify the divorce decree by removing the provision requiring Mr. Mansell to share his total retirement payments.[14] The Superior Court denied the petition and Mr. Mansell appealed to the California Court of Appeals,

8 *Id*. at 584.
9 *Id*. at 584 (citing 10 U.S.C § 1408(c)(1)).
10 *Id*. at 584-85 (citing 10 U.S.C § 1408(a)(4)(B)).
11 *Id*. at 585.
12 *Id*. at 585-86.
13 *Id*. at 586.
14 *Id*.

arguing that the USFSPA barred the court from dividing his disability benefits.[15] The Court of Appeals rejected this argument and the California Supreme Court denied Mr. Mansell's petition for review.[16]

The U.S. Supreme Court granted certiorari.[17] Addressing it as a statutory problem, the Court looked to the language of the USFSPA and read literally the statute's plain and precise language: "state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property."[18] The Court reversed the ruling by the California Court of Appeals and held that state courts cannot treat retirement pay that is waived to receive disability benefits as marital or community property, thus reversing the ruling by the California Court of Appeals.[19]

The Court's decision in *Mansell* was a crucial ruling for members of the military and their spouses. The way courts dealt with military disability benefits was completely reversed and it was not until 2017, with *Howell v. Howell,*[20] that the Court again made a substantial ruling in the area of military VA waivers and disability compensation.

III. *Howell v. Howell* Analysis

In *Howell*, the parties were divorced in Arizona in 1991 and they signed a property settlement.[21] In accordance with the parties' agreement, the judge ordered that Mrs. Howell was to receive fifty percent of her husband's military retired pay.[22] Mr. Howell retired from the Air Force in 1992.[23] About thirteen years later, Mr. Howell applied for VA disability compensation.[24] His VA rating was twenty percent, meaning that he would re-

15 *Id*.
16 *Id*.
17 *Id*. at 586-87.
18 *Id*. at 589.
19 *Id*. at 595-96.
20 137 S. Ct. 1400, 1404 (2017).
21 *Id*.
22 *Id*.
23 *Id*.
24 *Id*.

ceive about $250.00 a month from the VA as disability compensation.[25] This also meant, based on the VA waiver, that he would forfeit the same amount of his pension to get the tax-free VA funds.[26] Mr. Howell's VA waiver was done without the permission of the court and without his ex-wife's consent.[27] That resulted in Mrs. Howell receiving about $125.00 a month less of the pension.[28] Mrs. Howell filed a petition to enforce the original order and require Mr. Howell to make the payments regardless of the loss from the VA waiver.[29] The trial court agreed, ordering pay-back by Mr. Howell, and this was upheld by the Supreme Court of Arizona.[30] Mr. Howell petitioned for review to the U.S. Supreme Court.[31]

The Supreme Court reversed the Arizona decision. It held that, under the USFSPA,[32] the judge may not order reimbursement to a former spouse because the military retiree has elected a VA waiver, thus losing an equal amount of retired pay.[33] The Court pointed to the language in the USFSPA, which states that only "disposable retired pay" may be divided between the parties upon divorce.[34] The amount of military retired pay which is waived by taking VA disability compensation is not disposable retired pay; so it is an exception under the USFSPA.[35] Justice Steven Breyer pointed to the *Mansell* decision as the previous pronouncement of this rule, that state courts may not divide waived military retired pay.[36]

Most states that had dealt with the issue of military disability division under the USFSPA had upheld the authority of a judge to order indemnification, based on the idea that it is unjust to allow the retiree to unilaterally reduce the amount the former spouse is to receive from the member's retirement pay. These

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25 *Id*.
26 *Id*.
27 *Id*.
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*.
32 10 U.S.C. § 1408.
33 *Howell* 137 S. Ct. at 1406.
34 *Id*.
35 10 U.S.C. § 1408.
36 *Howell*, 137 S. Ct. at 1406.

unilateral decisions by one spouse completely contradict the judge's considerations of balancing the interests of both parties, when deciding what property to give to whom or overriding the marital settlement of the parties. The U.S. Solicitor General even urged upholding of the Arizona court's ruling.[37]

To determine if courts are adequately dealing with VA waivers after *Howell*, it is important to understand the context of the Court's ruling. In *Howell*, there was no agreement by the parties for the husband to pay back any waived money and there was no previous unappealed court order for indemnification. Based on this, the Court's ruling was very narrow. The decision made no ruling and issued no dicta on the issue of VA waivers in respect to express contractual indemnification or res judicata. To truly understand where the courts go wrong, it is important to first understand what these two concepts mean.

IV. Express Contractual Indemnification

Indemnity is "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."[38] Contractual indemnification never came up in the *Howell* case because there was no agreement to indemnify involved, just a property settlement for a 50/50 division of the pension, approved by the court. In *Mansell*, the husband argued that federal law did not allow for agreement by the parties to divide these benefits, but the Court did not consider the husband's arguments, leaving such agreements open for later decision. The Supreme Court has left open the ability for parties to contract for indemnification of the spouse with an agreement to pay the spouse a portion of the VA disability compensation or the waived retired pay. However, numerous state courts have read into the Supreme Court's decision in *Howell* a ruling that parties cannot contract in such a manner. This is wrong, since it is a conjecture that is beyond the facts in *Howell* and the holding of the Supreme Court.

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37 *Id*. at 1405.

38 CAL. CIV. CODE § 2772 (1872).

V. Res Judicata

Another key to understanding this area of law is the concept of res judicata. This means that a cause of action or a legal issue cannot be relitigated once it has already been decided on the merits; the claim is therefore precluded from being re-evaluated.[39] A court can cite res judicata as a reason why an individual cannot come back and later attack an issue that had been previously decided. This may appear to create problems, because even cases that are decided wrong, if not appealed, become valid law and have to be followed. However, the courts have made it clear that finality and judicial economy are paramount, and that decisions based on res judicata in the area of military pension division will not be subject to late statutory or constitutional challenges.[40] *Mansell* was the first Supreme Court case that dealt with military pensions and res judicata.

The following cases fall into three categories the following cases will fall into, based on their interpretation of the *Howell* decision. These categories are (1) cases that had a narrow holding and followed *Howell* correctly; (2) cases that did not get it wrong but were not inconsistent with *Howell*; and (3) cases that completely misinterpreted *Howell* and took their rulings to the extreme.

VI. Narrow Holdings of *Howell*

A small number of courts have correctly applied *Howell* by giving a narrow holding and not over-extending the Supreme Court's decision in regard to res judicata or contractual agreements.

The first case came in July of 2018, where a husband and a wife married in 2004, had three children during the marriage and eventually divorced in 2017.[41] There was no agreement and the trial court entered a decree of dissolution after a three-day trial.[42] Applying Arizona community-property law, the court awarded the wife one-half of the husband's military retirement

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39 RESTATEMENT (SECOND) OF JUDGEMENTS § 1 (1982).

40 *Mansell*, 490 U.S. at 582-84

41 Barron v. Barron, No. 1CA-CV 17-0413 FC, 2018 WL 3722815 at *1 (Ariz. Ct. App. July 31, 2018).

42 *Id*.

benefits earned during the marriage.[43] The same federal statute that governed *Howell* governed the decision here.[44] Based on the decision in *Howell*, the state court of appeals found that the lower court did not have the authority to order the husband to indemnify the wife for military benefits.[45]

This holding in *Barron* was a straightforward and faithful interpretation of what the *Howell* Court wrote in its decision. As stated previously, the *Howell* Court ruled that a court cannot order indemnification for the money lost when a veteran waives part of his or her military retired pay for VA disability.[46] There was no discussion by the Supreme Court as to what the result of the case would be if there was an agreement or the issue of res judicata involved. The Court made no ruling on indemnification in these regards. *Barron* correctly interpreted the issue and ruled that based on *Howell*, the Court could not order indemnification of one spouse to another for VA waiver. The court here did exactly what the court system is supposed to do. It looked at precedent set out by the Supreme Court of the United States. It read and interpreted the cases narrowly, only applying law that was explicitly implicated in those decisions and came to the right result based on the law.

The Colorado Court of Appeals was faced with a similar issue in 2017, although this case dealt with military disability retired pay, not the "VA waiver." The parties in this case divorced in 2008 and the court entered permanent orders that forced the husband to pay the wife monthly payments from his military retirement pay, and there was no agreement between the parties.[47] Several years later, the husband was placed on the permanent disability retired list by the military. This is referred to as Chapter 61 disability retirement.[48] A military disability retirement is involuntary. The military requires a member who is unfit for duty to retire under Chapter 61. When this happens, the member's net pay is exempt from division if it is based on his percentage of disability. With this compensation, veterans can also waive mili-

43 *Id*. at *5.

44 *Id*. at *6.

45 *Id*.

46 *Howell*, 137 S. Ct. at 1405.

47 *In re* the Marriage of Tozer, 410 P.3d 835, 836 (Colo. App. 2017).

48 *Id*.

tary retirement pay in favor of monthly disability payments, which is what the husband did in this case, making all his retirement pay based on disability.[49] In 2014, the wife moved to enforce the order, because the husband was not making the payments.[50] However, the court denied the wife's motion, since disability benefits are not subject to division under federal law.[51] In 2015, the wife refiled the same motion, this time requesting equitable relief, based on the argument that the husband had unilaterally waived his retirement pay for disability pay, and eliminated any payments to her.[52] Again, the court denied the wife's motion because disability benefits are not subject to division.[53] The wife appealed this decision and the Colorado Court of Appeals ruled that Chapter 61 disability retirement is not disposable retired pay under USFSPA and cannot be divided by the court.[54] Based on the fact that the husband only received Chapter 61 disability and VA disability benefits, there was nothing the court could divide, thus the trial court did not err in denying the wife's motion.[55]

This decision by the Colorado Court of Appeals lands this case in the category of cases that correctly interpreted *Howell* and the USFSPA. The precedent that the *Howell* Court set was very narrow, and this court correctly ruled, with no agreement or res judicata involved, that it could not divide the husband's Chapter 61 and VA disability benefits. However, *Howell* dealt with longevity retired pay and the VA waiver, while *Tozer* was a case involving military disability retired pay, payable under Chapter 61 of Title 10, as opposed to ordinary military retired pay pursuant to Chapter 71.

Rudolph v. Jamieson[56] is a third example for all courts to follow. Here, the parties were married in 1993 and divorced in 2009, by an agreed upon divorce decree.[57] Both parties served in the military during the marriage and their divorce decree pro-

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49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.* at 837.
54 *Id.*
55 *Id.*
56 No. 03-17-00693-CV, 2018 WL 2648514 at *1 (Tex. App. June 5, 2018).
57 *Id.*

vided that Mr. Rudolph would be awarded twenty-four percent of the wife's military retired pay and his wife would be awarded part of his, when he actually retired.[58] Also included in the decree was language that stated:

> It is so ordered that the same percentage interest awarded in this decree to Debra Ann Jamieson includes all amounts of retired pay John Karl Rudolph actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to . . . any sum taken in addition to or in lieu of retirement benefits.[59]

The wife filed a motion for enforcement of the order, because the husband was not paying, since he had retired.[60] The husband was determined to be one hundred percent disabled by the military and the court held hearings to determine if the husband was receiving any disposable retirement pay and, if not, if he was bound by the order to pay the wife, even after this waiver.[61] The lower court awarded forty-one percent of the husband's military benefits to the wife and the husband appealed, arguing that he received no disposable retired pay and the court could not divide non-disposable pay.[62] The court of appeals denied the husband's arguments based on the husband's agreement of the provision referenced above and affirmed the lower court's ruling ordering the husband to pay the wife forty-one percent of his military retired pay.[63] His remedy for that assertion would have been a direct appeal from the divorce decree, an avenue that he appears not to have pursued. Having failed to do so, he could not then collaterally attack the trial court's division of property, even if it was allegedly unlawful.[64]

Rudolph v. Jamieson is one of the only decisions that properly read the decision in *Howell* and made the correct ruling based on contractual indemnification. The parties agreed to indemnification in their divorce decree and this court upheld the contract between the two parties and the husband's agreement to

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58 *Id*.

59 *Id*.

60 *Id*. at *2.

61 *Id*.

62 *Id*. at *3.

63 *Id*. at *4-5.

64 *Reiss v. Reiss,* 118 S.W.3d 439.

make payments, even if he waived retired pay for disability. This is what *Howell* held.[65]

VII. Right Law, Inconsistent Reasoning

There are a number of cases that came to the right decision in the end, but took a different route, "not inconsistent" with the *Howell* decision. These cases made correct rulings in regard to the military disability benefits but did not apply the law as *Howell* had explained it.

The first of these "not inconsistent" decisions was *Foster v. Foster*.[66] The parties were married in 1988, the husband retired from the military in September 2007 and the divorce was filed in November 2007.[67] At the time the divorce was filed, the husband was receiving military retirement pay and military disability benefits.[68] Both parties agreed that the husband's disability benefits could not be divided by the court, but their property settlement agreement provided that the wife would be awarded fifty percent of the husband's disposable military retired pay.[69] The parties also included an "offset provision" that stated that "if Defendant should ever become disabled, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not been disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled."[70] Attorneys for both sides stated that this provision was intended to protect the wife, if the husband chose to waive part of his retirement pay for more disability benefits.[71] After the judgment was entered, the husband waived part of his retirement and started receiving more disability pay, which reduced the amount he paid to the wife. Despite the agreement reached by the parties during the divorce, the husband did not comply and stopped paying the wife the amount he agreed to.[72] The husband appealed the trial court's decision, holding him in

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65 *Howell*, 137 S. Ct. at 1406.

66 No. 324853, 2018 WL 1436945, at *1 (Mich. Ct. App. Mar. 22, 2018).

67 *Id*.

68 *Id*.

69 *Id*.

70 *Id*. at *1-2.

71 *Id*. at *2.

72 *Id*.

contempt for not making those payments.[73] The husband argued that paying part of his disability benefits to the wife was a violation of the USFSPA; however, the court ruled that the husband was still responsible for paying the wife the share of the retirement ordered by the court based on the parties' agreement.[74]

This is the correct ruling based on *Howell*, but not the right reasoning. Here, the court reasoned that *Howell* involved disability benefits under 10 U.S.C. § 1408(a)(4)(A)(ii), which defines disposable retired pay as the total monthly payment minus any deductions for a VA waiver, and that is not what was at issue in *Foster*.[75] The benefits in *Foster* were Combat Related Special Compensation (CRSC) and the court made a distinction between those benefits and VA waivers, stating that *Howell* did not address CRSC waivers for disability pay and thus the husband was still responsible for making payments to the wife.[76]

This analysis is flawed. There is no distinction between CRSC waivers and VA waivers under Title 38, though the court in *Foster* tries to create one. CRSC waivers is a similar receipt of benefits for veterans who have combat related disabilities, however CRSC wipes out the restoration of waived pay regardless of what the VA rating is for the veteran. However, the ruling, ordering the husband to make payments to the wife, is consistent with the ruling in *Howell*. This is because *Howell* did not ban contractual indemnification for reductions due to the election of disability benefits. Parties have the ability to agree that when a retiree waives retired pay for disability benefits, that spouse has to indemnify the other spouse for the difference in what the payments were originally. This is exactly what the parties did in *Foster*; they signed an agreement that if the husband did decide to take disability, he would agree to keep making payments at the amount the wife would receive, as if he was not on disability. Under *Howell*, this is the right outcome, however the court used the wrong rationale, instead of just applying the idea of contractual indemnification.

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73 *Id*.

74 *Id*. at *2-4.

75 *Id*. at *5 (citing 10 U.S.C. § 1408(a)(4)(B)).

76 *Foster,* No. 324853, 2018 WL 1436945, at *5

Another case involving the right ruling, but the wrong reasoning was *Gross v. Wilson*,[77] in which the parties married in 1992, the divorced was filed in 2012, and the parties agreed and signed a property settlement agreement in 2014.[78] The agreement provided that the wife was to receive fifty percent of the military and disability benefits that the husband received and also stated that:

> should Mr. Gross elect to take any action that might reduce what would otherwise be retirement benefits for which Ms. Wilson would have a claim, he will be responsible for reimbursing her. . . . The parties today tried to reach a fair result, such that they have in essence, agreed to divide the retirement, which includes disability, which is received in lieu of what would have otherwise been retirement, on a 50-50 basis.[79]

The husband later reduced the payments "by an amount equal to fifty percent of his disability payments" and the wife filed a motion for enforcement of their agreement.[80] The husband argued that the USFSPA denies the division of VA benefits and that he did not properly understand the agreement he was signing; however, the court rejected this argument and ordered that the husband resume payments.[81] The court found the husband's arguments to be a motion for relief from judgment under Rule 60(b), but said that because the husband had "made no claim of newly discovered evidence or fraud that would support relief under Rule 60(b)(2) or (3), and because his cross-motion was filed more than a year after the divorce decree and property division, he was also time-barred from seeking relief."[82] The court then addressed the husband's argument, under *Howell*, that it had violated the USFSPA, by ordering the husband to indemnify the wife.[83] In this case, the husband did not waive retirement benefits for disability pay, he just stopped paying the amount he was obligated to pay under the agreement.[84] The court held that "*Howell* does not hold that a state court cannot enforce a prop-

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77 424 P.3d 390 (Alaska 2018).
78 *Id*.
79 *Id*. at 393.
80 *Id*. at 390.
81 *Id*.
82 *Id*. at 396.
83 *Id*. at 401.
84 *Id*.

erty division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages."[85]

The court in *Gross* came to the right result, even though it has both different facts and reasoning than found in *Howell*. The court could have made this a very simple decision by ruling that the agreement was a contractual indemnification, which could be upheld under *Howell* or the court could have relied on res judicata under *Mansell*. Instead, the court tried to complicate the matter by discussing the requirements for Rule 60 motions and timeliness. This was unnecessary. The only analysis needed was that of contractual indemnification.

VIII. Taking It to the Extreme

There are some cases that have taken the decision in *Howell* to the extreme. These cases hold that there is no remedy for indemnification based on VA waiver, and they simply ignore arguments based on contractual agreements and res judicata or – in considering them – hold that these claims lack merit. They represent a complete misinterpretation of all precedent and the following cases should not be relied upon.

In *Hurt v. Jones-Hurt*,[86] the parties were married in 1972 and divorced in 2004.[87] Pursuant to the divorce decree, the wife was to receive one-third of the husband's military pension.[88] She was unaware that the husband was already receiving disability benefits.[89] In 2009, the husband's disability rating was changed from ten to thirty percent, reducing his military pension.[90] In 2011, the court reopened the case, with the argument that "any portion of the Service Member's Disposable Retired Pay that he waives in order to receive military disability retired pay . . . shall be added back in, and any deficiency resulting from any such waiver that affects the amount paid directly to Wife shall be paid to her directly by Husband."[91] The husband argued that this violated the

85 *Id*.
86 168 A.3d 992, 994 (Md. Ct. Spec. App. 2017).
87 *Id*.
88 *Id*.
89 *Id.*
90 *Id*.
91 *Id*. at 995.

USFSPA, but the court rejected this argument and in 2014, it ordered that the wife was entitled to twenty-six percent of the husband's disposable retired pay.[92] The husband appealed.[93] The Maryland Court of Special Appeals reversed the decision of the lower court based on the *Howell* decision, stating that *Howell* "changed the superseding federal law on the question before us in this case, and compels us to reverse the circuit court."[94]

The court reached the correct outcome in this case; however, the court extended the holding in *Howell* unnecessarily by ruling that the ability of a veteran to elect VA disability compensation, thereby reducing the share of money going to the former spouse, is superior to any agreement made between the parties or any order of the court.[95] This ruling effectively overruled three previous cases, where indemnification was ordered based on an agreement between the parties for such payments.[96] The *Howell* decision did not hold that parties could not contract for indemnification or any sort of restitution/damages and it did not disallow a claim based on res judicata. The Court of Special Appeals in *Jones-Hurt* completely misinterpreted the Supreme Court's ruling in *Howell* and read provisions into the decision that are not there.

Other cases followed the *Jones-Hurt* case, both in time and in erroneous reasoning. The next four cases all made the wrong ruling and based their incorrect decision and dicta on *Howell.*

In *Mattson v. Mattson*,[97] the husband joined the military in 1984 and married the wife in 1992.[98] and they separated in 2014.[99] The husband retired from the military in 2004 and was given a disability rating of seventy percent.[100] Upon divorce, the parties entered into a stipulated agreement that stated that the wife was to receive forty percent of the husband's "gross monthly

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92 *Id*.

93 *Id*. at 616-19.

94 *Id*. at 628.

95 *Id*.

96 *See* Wilson v. Wilson, 117 A.3d 138 (Md. Ct. Spec. App. 2015); Allen v. Allen, 941 A.2d 510 (Md. Ct. Spec. App. 2008); Dexter v. Dexter, 661 A.2d 171, 172 (Md. Ct. Spec. App. 1995).

97 903 N.W.2d 233, 235 (Minn. Ct. App. 2017).

98 *Id*.

99 *Id*.

100 *Id*.

military retirement pay" as well as forty percent of "the gross amount of Husband's military disability compensation."[101] The wife filed a motion to enforce these payments and the district court ordered the husband to pay the military retired and disability pay owned to the wife.[102] The husband appealed, arguing that this order violated federal law under USFSPA.[103] The lower court relied on a previously decided case, which held that both contract principles and res judicata could make an agreement enforceable, even if it did not agree with *Mansell*, because "parties are free to bind themselves to obligations that a court could not impose."[104] The Minnesota Court of Appeals ruled that the *Howell* decision makes such equitable compensation unenforceable and found in favor of the husband.[105] In fact, no such issue was raised or decided in *Howell*.

In *Vlach v. Vlach*, the parties were married in November 1982 and they divorced in December 2002.[106] The parties entered into a Marital Dissolution Agreement ("MDA"), which provided that the wife would receive

> twenty-six percent of Husband's disposable retirement pension from the United States Army, with no consideration for disability until the Husband is classified as seventy-four percent disabled . . . for the purpose of this agreement, disposable retirement pension will include, any and all VA, any early-out or separation bonus such as VSI or SSB, or other disability pension to which the Husband is entitled. It is the Court's intention that if the Wife receives a deduction from his military pension, such as for an election of VA disability, then the percentage of the military retirement pension will be adjusted to equal the same dollar sum as if no disability or similar deduction was made, up to seventy-four percent.[107]

The wife filed a motion for clarification, and the court ruled on it that the wife was entitled to "twenty-six percent of the husband's retirement and if the husband becomes classified as seventy-four percent or more disabled, he may petition this court for relief,"

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101 *Id*. at 236.

102 *Id*.

103 *Id*.

104 *Id*. at 241 (citing Gatfield v. Gatfield, 682 N.W.2d 632, 637 (2004)).

105 *Mattson*, 903 N.W.2d at 241.

106 Vlach v. Vlach, No. M2015-01569-COA-R3-CV, 2017 WL 4864991, at *1 (Tenn. Ct. App. Oct. 27, 2017).

107 *Id*.

which is exactly what the husband did in 2015, when he was given a disability rating of one hundred percent.[108] The husband argued that the wife was no longer entitled to any of his military retirement, because it was all based on disability.[109] However, the court disagreed and ruled that the husband still had an obligation to pay the wife her twenty-six percent.[110] The husband appealed and the Tennessee Court of Appeals ruled that the language in the MDA was unenforceable based on the decision in *Howell*.[111]

Brown v. Brown, an Alabama case[112] is yet another example of misinterpretation of *Howell* by an appellate court. In 2010, the Alabama Circuit Court entered a judgment of dissolution for the parties and incorporated their separation agreement into the court's final ruling.[113] This agreement stated that the wife was to

> receive twenty-five percent of Husband's disposable retired pay and said agreement is non-modifiable, that this is done without regard to any reductions or setoffs based on disability compensation. If the Husband shall do anything—actively or passively—to reduce the share of the amount of the Wife, then he shall indemnify and reimburse her for such loss.[114]

In 2016, the husband's disability rating was determined to be one hundred percent and when the wife attempted to collect her portion of the pension, the Defense Finance and Account Service notified her that the husband's entire retirement pay was disability and thus there would be no payments to her.[115] The wife filed a petition with the court to receive the twenty-five percent she believed she was entitled to and the trial court found in her favor.[116] The husband appealed.[117] The husband argued that division of Chapter 61 disability was a violation of federal law, under USFSPA.[118] Based on the decision in *Howell*, which determined

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108 *Id*. at *2.
109 *Id*.
110 *Id*.
111 *Id*. at *5.
112 No. 2160812, 2018 WL 1559790, at *1 (Ala. Civ. App. Mar. 30, 2018).
113 *Id*.
114 *Id*.
115 *Id*. at *2.
116 *Id*.
117 *Id*.
118 *Id*. at *3.

that "state courts cannot subsequently increase the spouse's share of the military member's retirement benefits, pro rata, or otherwise indemnify the spouse for the shortfall that occurs when disability pay reduces the amount of retirement pay from which the spouse is to receive a share,"[119] the Alabama Court of Appeals overturned the lower court's ruling and decided the agreement was unenforceable.[120] The *Brown* court could find no differences between the facts in *Howell* and the facts in the instant case and thus ruled in favor of the husband.[121]

Colorado followed suit in misinterpreting Howell in *In re Marriage of Longmire*[122] a case in which the parties signed a separation agreement, which included a provision that the husband would pay the wife part of his future disposable military retired pay and further stated that:

> Husband agrees not to merge or diminish his retired or retainer pay with any other pension and he agrees not to pursue any course of action that would defeat or diminish wife's rights to her portion of husband's retired or retainer pay. If husband's retired pay is diminished, wherein wife's interests are detrimentally affected, the court shall reserve jurisdiction to compensate wife for such diminution.[123]

Several years later, the husband was given a one hundred percent disability rating by the military and given the option to receive either disability or retired pay.[124] The husband made the decision to receive the Chapter 61 disability benefits, while also receiving disability benefits from the VA and Social Security.[125] This meant that all the payments the husband received were based on his disability.[126] The wife filed a motion to enforce the separation agreement the parties had filed.[127] The husband argued that all the benefits he received were not divisible by the court, but the district court agreed with the wife, forcing the husband to con-

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119 *Brown*, 2160812, 2018 WL 1559790 at *5-6 (citing *Howell*, 137 S. Ct. at 1402, 1405-06).

120 *Id.*

121 *Brown*, 2160812, 2018 WL 1559790 at *6.

122 No. 17CA1294, 2018 WL 4144196 at *1 (Colo. App. Aug. 30, 2018).

123 *Id.*

124 *Id*.

125 *Id*.

126 *Id*.

127 *Id*.

tinue making payments.[128] The district court cited language from the agreement about "service related benefits" and used this language to reject the husband's argument that Chapter 61 benefits are excluded from disposable retired pay.[129] The husband appealed.[130] The Colorado Court of Appeals reversed the lower court ruling, citing *Howell* and *Mansell*, by stating that the USFSPA precludes the wife from having an entitlement to the husband's military disability benefits.[131] The court in the instant case ruled that the decision in *Howell* determined that courts enforcing these waiver provisions was incorrect.

These five cases blatantly misread the ruling in *Howell*, because the Supreme Court did not hold that contractual indemnification agreements were unenforceable. As stated previously, *Howell* made no binding precedent with regard to contractual indemnification and res judicata. Therefore, parties are free to make contracts between themselves as to indemnification if the military spouse elects VA waivers. These courts have read *Howell* to mean there are no remedies for the non-military spouse, since disability benefits are never divisible. This is misguided. The court cannot order indemnification and the parties are free to contract for results that the court cannot order on its own. These cases represent misinterpretations of the Supreme Court's ruling and are examples of a court reading language into a decision that was never intended. *Mattson*, *Vlach*, and *Brown*, like *Hurt*, should not be relied upon as good law.

Roberts v. Roberts[132] is a case in which the Tennessee Court of Appeals created a rationale to reach the result it ultimately wanted. In 2012, the wife filed a complaint for divorce, asking the court to enforce an agreement between the parties that included division of the husband's military retired pay.[133] In the agreement, the parties agreed that the wife was entitled to fifty percent of the husband's disposable military retired pay, including:

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128 *Id*.

129 *Id*.

130 *Id*.

131 *Id*.

132 No. M2017-00479-COA-R3-CV, 2018 WL 1792017, at *1 (Tenn. Ct. App. Mar. 12, 2018).

133 *Id*.

> retired pay paid or payable for longevity or active duty and/or reserve component military service and all payments paid or payable under the provisions of Chapter 61 of Title 10, of the United States Codes. Military retired pay also includes all amounts of retired pay the Husband actually or constructively waives or forfeits in any manner and for any reason.[134]

The parties executed a new agreement giving the wife forty-five percent of the husband's disposable military retired pay. It stated:

> it is the Court's intention that if the Plaintiff receives a deduction from his military retirement provision, such as for an election of VA disability, then the percentage of the military retirement pension will be adjusted to equal the same dollar sum as if no disability or similar deduction was made.[135]

Several years later, the wife filed a motion for enforcement of the agreement and after a lengthy trial process, the trial court found that the wife was entitled to the forty-five percent and ordered the payments to the wife starting in 2012.[136] The husband appealed, asserting that he did not retire until 2015.[137] In the husband's oral argument at trial, he had argued that the retirement he was currently receiving was not divisible by the court based on federal law, but he did not make this argument on appeal.[138] The appeals court stated that the wife clearly had an interest in the disposable retired pay of the husband under the parties' agreement and that the disposable retired pay was defined as including Chapter 61 pay in the agreement.[139] The court further held that because the husband did not preserve the argument regarding federal law on appeal he was barred from doing so and thus required the husband to continue payments to the wife.[140]

The ruling in the instant case is completely misguided. *Howell* makes no mention of such a ruling. The court here could have simply made a res judicata ruling, stating that the claim was barred from being judged on the merits and moved on. However, it failed to do this and instead made a complicated argument.

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134 *Id*.
135 *Id*. at *2.
136 *Id*. at *2-4.
137 *Id*. at *5.
138 *Id*.
139 *Id*. at *7.
140 *Id*.

IX. Conclusion

Howell v. Howell was a very narrow ruling on how courts should deal with military disability benefits, the "VA waiver," the reduction of the spouse's share of the pension, and how to approach the pension division. In short, a court cannot itself order a military member to indemnify his or her former spouse after the military member waives part of his or her retired pay for disability.[141] However, *Howell* made no merits ruling and issued no binding precedent with regard to contractual indemnification, allowing parties to freely contract for it. The issue of res judicata was decided previously by the Supreme Court and the Supreme Court ruled that res judicata was something that remained in effect for the former spouse as to remedies and reimbursement. Unfortunately, some courts have read the decision more broadly, holding that contracts for indemnification are unenforceable.

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141 *Howell*, 138 S. Ct. at 1406.