In The
Court of Appeals of Virginia

RECORD NO. 1711-18-4

ADEL ELIAS ALWAN,

***Appellant*,**

v.

AYLIN TUNC ALWAN, n/k/a AYLIN TUNC,

***Appellee*.**

BRIEF OF APPELLANT

William D. Wilkinson (VSB No. 92969)
Katherine Martell (VSB No. 77027)
FIRST POINT LAW GROUP, P.C.
10521 Judicial Drive, Suite 300
Fairfax, Virginia 22030
(703) 385-6868 (Telephone)
(703) 385-7009 (Facsimile)
wwilkinson@firstpointlaw.com
kmartell@firstpointlaw.com

Counsel for Appellant

Carson J. Tucker (pro hac vice)
LEXFORI, PLLC
117 North First Street, Suite 111
Ann Arbor, Michigan 48104
(734) 887-9261 (Telephone)
(734) 887-9255 (Facsimile)
cjtucker@lexfori.org

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

Table of Contents

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

Summary of the Arguments

Appellant respectfully requests this Court to apply preemptive federal law to the question presented in the underlying divorce proceedings, which arose from Appellant's request for a modification of his child support obligations. Appellant argues that the trial court erred by including his federal veteran's disability benefits in calculating his child support obligations. While Virginia state law allows "veterans' benefits" to be considered as part of "gross income" in a child support calculation, see Va. Code Ann. § 20-108.2, Appellant contends his specific veterans' disability benefits are not considered "income" by controlling federal law, see 42 U.S.C. § 659(h)(1)(B)(iii), and are therefore jurisdictionally protected by 38 U.S.C. § 5301 from any legal process. See Howell v. Howell, 137 S. Ct. 1400, 1404, 1405-1406 (2017).

Under the plain and unambiguous language of 42 U.S.C. § 659(a); (h)(1)(A)(v)(ii); and (h)(1)(B)(iii) of the Child Support Enforcement Act (CSEA), veterans' disability benefits paid to a non-retired servicemember are not considered remuneration for employment. Therefore, these monies are explicitly excluded by federal law from being available to state courts in considering a veteran's child support or spousal support obligations. A portion of veterans' disability pay can be counted towards a veteran's child support obligation if the veteran is also a retiree, and waives retirement pay to receive disability pay. See 10 U.S.C. §§ 1408(a)(2), (d)(1) and 42 U.S.C. §§ 659(h)(1)(A)(V)(ii) and (h)(1)(B)(iii). That amount of disability pay that replaces the waived retired pay is still considered remuneration for employment, i.e., income, and may therefore be considered as "income" for purposes of a veteran's support obligations. However, Appellant is not a retired servicemember and is therefore not entitled to, nor is he a recipient of, military retired pay that he may then waive to receive his disability pay. Rather, his specific veterans' disability benefits are not considered monies or assets available for disposition by state courts for any

purpose whatsoever. As a result of their exclusion from state court consideration, these benefits are jurisdictionally protected from all legal process by the direct federal mandate of 38 U.S.C. § 5301(a)(1). The latter provision signifies Congress's intent to exempt veterans disability benefits from "any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1) (emphasis added). See also Ridgway v. Ridgway, 102 S. Ct. 49, 58 (1981) (interpreting identical language in 38 U.S.C. § 770(g) protecting veteran's life insurance benefits).

While the United States Supreme Court has held that a veteran's disability benefits may be considered in determining his or her child support obligations, see Rose v. Rose, 107 S. Ct. 2029 (1987), the Court has not addressed the specific facts of this case. Virginia appellate courts, which have generally followed Rose, have also not addressed this issue, nor the precise facts covered by the statutory exclusion, i.e., a non-retiree veteran who receives disability benefits from the veterans administration (VA) for a service-connected disability as contemplated in 42 U.S.C. § 659(h)(1)(B)(iii). Appellant is among the latter category of veterans.

Section 5301 is a complete jurisdictional bar prohibiting any legal process to issue for control, disposition, or other forced or ordered diversion of the personal entitlements covered by this provision. As the Supreme Court stated long ago, it is to be liberally construed to protect the beneficiary. Porter v. Aetna Cas. & Sur. Co., 82 S. Ct. 1231, 1233 (1962). To be clear, when § 5301 applies to a particular benefit, a state court is without jurisdiction and authority to order a veteran to part with these monies by forcing him or her to pay them over to another. Howell, supra at 1405.

Appellant's disability pay is covered by this provision, because it is authorized and paid by the VA and it is excluded from being considered as income by 42 U.S.C. § 659(h)(1)(B)(iii). See, e.g., Ridgway v. Ridgway, 102 S. Ct. at 58, accord Howell, supra at 1405-1406 (2017). Cases in

which the Court has considered the same or similar language in other federal statutes identical to, or nearly identical to, § 5301 have concluded that it is not simply an "anti-attachment" provision but broad and sweeping in its coverage. Ridgway, 454 U.S. at 61.These provisions "pre-empt[] all state law that stand[] in [their] way[;] protect[] the benefits from legal process 'notwithstanding any other law…of any State'[;] prevent[] the vagaries of state law from disrupting the national scheme, and guarantee[] a national uniformity that enhances the effectiveness of congressional policy." Ridgway, supra (emphasis added) (internal citations omitted). Most recently, in Howell, the Supreme Court noted the distinction between federal disability benefits considered personal entitlements which are off limits to state courts and those benefits that may be divided. 137 S. Ct. at 1405-1406, citing § 5301(a)(1) and Rose, supra. The Court concluded § 5301 removes the jurisdiction and authority from state courts to order or otherwise allow any diversion or disposition of disability benefits that are in fact protected by federal preemption. The main reason the Supreme Court ruled this way is because federal law has always preempted state law and it continues to do so in this specific area unless Congress has specifically provided otherwise. The Virginia Supreme Court has agreed with this reading. See Maretta v. Hillman, 283 Va. 34, 40-46 (2012), affirmed at 133 S. Ct. 1943 (2013). Virginia courts have not considered the effect of § 5301 upon veterans' disability benefits that are not included as available income for child support or spousal support obligations under 42 U.S.C. § 659(h)(1)(B)(iii).

Appellant acknowledges that since Rose, supra, most, if not all state courts have construed it as a blanket allowance to include all veterans' disability pay as income for consideration in calculating a veteran's support obligations in state court family law proceedings. However, federal law has always preempted state law where Congress has exercised its Article I "military powers" to provide for our nation's veterans. Howell, supra at 1404, citing McCarty v. McCarty, 101 S. Ct.

2728 (1981). Moreover, exceptions to this absolute preemption must come from Congress, and when they do, they are precise and limited. Id. at 1404, citing Mansell v. Mansell, 109 S. Ct. 2023 (1989). The original and only intent of Congress in providing disability benefits to veterans was to reward the veteran with a personal entitlement intended for the benefit of the veteran only. Id. at 1403, citing McCarty, supra. The Court has also stated that only where Congress has lifted this preemption, i.e., allowed the states to exercise control or authority over these benefits, can state courts do so by issuing orders or legal process forcing the veteran to part with these benefits. Id. at 1404. But that is a precise and limited exception. Id. at 1405. "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give." Id., citing 38 U.S.C. § 5301(a)(1). In all other cases, Congress intends these benefits to be for the veteran alone and 38 U.S.C. § 5301 protects them from all legal process. Id.

It is important to get this right because today's veterans need every penny of these benefits for their own sustenance and survival. They are entitled to these funds free from any encumbrance. Moreover, the landscape has changed considerably since 1987 (the year Rose was issued). Every conflict leads to the return of wounded soldiers, and the wars in Iraq and Afghanistan are no exception. Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L. Rev. 1081, 1096-1097 (2010). Indeed, veterans with disabilities from these conflicts are returning home in large numbers. Id. For this subset of veterans, which, due to the last 3 decades of up-tempo, high-volume deployment and military operations in which the U.S. military has been involved are the largest population of disabled veterans in existence, the significance of this cannot be understated. See Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends

in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf. During the last three decades, over half the veterans returning from service are greater than 70-percent disabled. Because of military and medical advances, soldiers are surviving battlefield injuries that would have killed them in previous wars. Waterstone, supra. Whereas before they would not have come home at all, these soldiers are returning back to the United States with more severe short- and long-term disabilities. Id. These numbers will keep growing because of the dormancy and late-manifestation of other types of combat-related injuries. Id. For example, the nature of these most recent wars has yielded greater than ever numbers of soldiers suffering from traumatic brain injuries. Id. Whereas in previous wars, major depression or posttraumatic stress disorder may not have been counted as injuries, today soldiers are returning with these recognized disabilities in high numbers. Id.

Indeed, the country is no longer only faced with the waning population of disabled veterans from the post-Vietnam era and prior. Rose was, as noted, a 1987 case, and it necessarily addressed an entirely different population of aging and disabled veterans. Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, supra. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html. As of March 22, 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. Id. See also VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp. Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent of higher, with approximately 900,000 in

2011. VA, Trends, supra at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. Id.

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org. Thus, according to this data analysis, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims. See http://www.nvf.org/staggering-number-of-disabled-veterans/. Yet another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems. These veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. Physical injuries in these situations are understandably horrific. Id. See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ.

of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family perceptions of post-deployment healthcare needs of Iraq/Afghanistan military personnel, 7(3) Mental Health in Family Medicine 135-143 (2010). As one observer has stated: "assignments can shift rapidly from altruistic humanitarian work to the delivery of immense deadly force, leaving service members with confusing internal conflicts that are difficult to integrate. During deployment, even medical personnel are at times compelled to use deadly force to protect themselves, their patients, and their fellow soldiers." Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995). Indeed, an unsettlingly large percentage of these veterans experience domestic legal problems, including divorce. See Melvin, supra; Schwab, supra; DeBaun, The Effects of Combat Exposure on the Military Divorce Rate, Naval Postgraduate School, California (March 2012) (finding divorce rates since at least 2001 among all branches of service had increased (with a greater percentage of those veterans being women) and concluding combat exposure (weapons usage and casualty experience) have an even greater effect on the increasing percentages)).

State courts that assume, with little or no real analysis, that they may continue to simply exercise control over 100 percent of all veterans' disability benefits because a 1987 case says that, without considering the refinements of federal preemption, federal statutory law, and the Supreme Court's recent pronouncements in Howell confirming that important distinctions are to be drawn and state courts have limited deference in this area, are further exacerbating the disabled veterans' already deteriorated economic and mental status among the general population. If a veteran's only source of income is this disability pay, then state court orders that appropriate them for other uses effectively remove the purpose and intent of Congress for these benefits. Worse, the current system can completely deprive the disabled veterans of what could be his or her only means of support. Not only must the disabled veteran faced with divorce pay his or her own legal bills, but mounting costs and penalties associated with the inability to pay the basic support order, as well as the real prospect (as evidenced in this case) of paying for the other parties' legal fees as well, makes it nearly impossible for the veteran to even comprehend being able to come out of this gauntlet unscathed.

And, it is of no moment that the veteran may or may not work. While the trial court confused the analysis in this case, the funds are excluded from consideration as available income by federal legislation and regulations. This means that they must be excluded from consideration as assets that are available for veteran's alimony and / or child support obligations. They cannot be counted, period.

This younger population of disabled veterans are not entitled to retirement pay because they were injured or wounded during the first few years of their service to the country. Like Appellant, who was only a private first class when he was injured, many disabled veterans in this population do not and will never have the financial security and economic assurances of a

retirement pension and all the other benefits that come with being classified as retired. When it became apparent that this growing subset of disabled veterans were also being subjected to having their disability benefits taken by state courts to satisfy support orders in domestic relations cases, Congress acted to differentiate this class of veterans by amending the CSEA and adding 42 U.S.C. §§ 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) distinguishing the two subsets of veterans and the two classes of disability benefits, those which are available to former spouses and minor children from the former group of retiree veterans and those that are not from the latter group of non-retiree veterans.

Because federal law has always preempted state law in this very specific circumstance, any state-court domestic relations order awarding support (child and/or spousal) would be void and unenforceable, both going forward and retroactively. In this case, Appellant's federal disability benefits are specifically excluded from consideration as remuneration for employment, and therefore as income, by 42 U.S.C. §§ 659(a); (h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from any legal process whatever by 38 U.S.C. § 5301.

Appellant and many other disabled veterans throughout the state of Virginia find themselves in this impossible situation. They have not acquired the years in service, nor the rank and pay, of those veterans that are eligible for retirement. Yet, they have been rendered disabled in combat or in the service of the country and cannot continue on with their careers as before. This is why their disability pay is not considered "income" and is therefore protected from all state court process. See 42 U.S.C. § 659(h)(1)(B)(iii) and 38 U.S.C. § 5301. Their disability pay cannot be counted towards their state support obligations, period. Yet, state courts across the country continue to overgeneralize the application of Rose, supra, and ignore or fail to appreciate the

specific application of these provisions of federal law to the specific factual circumstances of the particular case.

Congress, through its enumerated Article I "military powers," has specifically designated that veterans' benefits are to be protected, and specifically intends that these monies be retained by and be used for support of the disabled veteran. To allow a state court to "count" these monies as available assets in calculating a disabled veteran's support obligation is to allow a disposition that is contrary to and in fact preempted by federal law. Appellant respectfully seeks reversal of the trial court's decision to include these monies in calculating his support obligation.

The trial court also erred by concluding that Appellant owed Appellee her attorney's fees for lack of merit in his legal arguments. The trial court did not appreciate the specific arguments made by Appellant in light of his status as a non-retiree, disabled veteran. Federal law by way of United States Supreme Court jurisprudence as well as federal statutory laws passed by Congress plainly dictate that his veterans' disability benefits are excluded from consideration as monies available for child support orders in the specific circumstances of his case. Appellant presented these exact arguments to the trial court.

Assignments of Error

I. The trial court erred in concluding that Appellant's federal veterans' disability benefits could be considered in the calculation of his child support obligations under Virginia law. (See (Tr. 139-142; 143-151; 159-167 08/31/2018); (Tr. 181-183; 186-189 08/31/2018); Appendix (App.) 51-63; 236-239; 262-265; 332)

II. The trial court erred in concluding that Appellant was responsible for Appellee's attorney fees because his argument that his federal veterans' disability benefits could not be considered in the calculation of his child support obligations lacked merit. (See (Tr. 139-142; 143-151; 159-167 08/31/2018); (Tr. 181-183; 186-189 08/31/2018); Appendix (App.) 51-63; 236-239; 262-265; 332)

Statement of Facts and Proceedings

Appellant Adel Alwan and Aylin Tunc were previously married and had 2 children (App. 11, Appellee's Motion for Pendente Lite Attorney Fees, ¶2). The couple was divorced on June 2, 2017 (*Id*., ¶1). The final order of divorce awarded "sole custody" of the minor children to Appellee (App. 13, ¶10). Appellee lives with her parents and "helps out in her parent's hair salon" when she does not have the minor children (*Id*., ¶11). The final order of divorce ordered Appellant to pay spousal support in the amount of $750.00 per month and child support in the amount of $1,866.00 per month (*Id*., ¶13).

Appellant served in the United States Marine Corps from 2007 to 2011 (App. 6, Appellant's Form DD214). He was deployed to Afghanistan (Id.). While on active duty Appellant suffered combat-related injuries (Id.) He received the Purple Heart, among other decorations and awards for his service to the United States (Id.).

Due to these service-connected injuries Appellant was classified as disabled and medically discharged (App. 7-8). Appellant is designated by the Department of Veterans Affairs (VA) as 100 percent disabled (Id.). As a result, Appellant receives VA disability benefits in the amount of $3,627.58 per month (Id.).

The Relevant Legal Proceedings

On March 23, 2018, Appellee filed a "Motion to Increase Spousal and Child Support" (App. 20-22). On the same date, Appellant, acting in pro per, filed a "Motion to Modify Child Support and Spousal Support" (App. 1-10). Appellant claimed that federal law prohibited the state trial court from counting his VA disability pay towards his financial support obligations to Appellee and the minor children (App. 2-4). In a follow up "Memorandum of Law" in response to Appellee's motion, Appellant further expounded on the legal arguments (App. 51-63).

Appellant argued that federal law broadly and absolutely preempted all state law concerning the disposition and division of VA disability benefits in state court divorce proceedings (App. 52-62). Appellant further argued that under its enumerated Military Powers, Congress had supremacy in the disposition of veterans' disability benefits (App. 52-54). As such, Appellant contended, only Congress could pass laws allowing state courts to exercise authority and jurisdiction over these monies, and to divide them or otherwise divert them in a manner other than the default position they hold under federal law as being for the sole benefit and use of the beneficiary, i.e., the veteran (Id.).

Appellant further argued that Congress has made exceptions allowing state courts to divide veterans' benefits in certain circumstances (App. 54-57). One was Congress' allowance under the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 and the Child Support Enforcement Act (CSEA), 42 U.S.C. § 659. Per these statutes, Congress allows state courts to exercise authority over a portion of veterans' disability pay to pay state court support orders, but only where the former servicemember was eligible for retirement, and waived retired pay to receive disability pay (Id.). Appellant demonstrated that he was not a retired veteran (App. 68-69). As such, he did not receive nor was he eligible for retirement pay, and therefore he could not waive such pay to receive disability pay. Thus, Appellant argued, Congress had not lifted its absolute preemption over state courts concerning the disposition of his particular disability benefits. Appellant further pointed out that 38 U.S.C. § 5301 raised a jurisdictional bar and prohibited state courts from exercising any legal process whatever over his VA benefits (App. 57-61). Appellant attached correspondence from the General Counsel's office of the Veteran's Administration explaining this distinction (App. 64-67). Appellant also cited to the recent Supreme Court decision in Howell v. Howell, 137 S. Ct. 1400 (2017), which also acknowledged the

distinction between monies that are subject to state court process, see id. at 1406, citing Rose v. Rose, 481 U.S. 619 (1987), and monies that were totally off limits and beyond the authority and jurisdiction of state courts. Id. at 1405, citing 38 U.S.C. § 5301 (App. 59-60).

In opposition, Appellee argued that Rose had ruled that state courts could consider veterans' disability pay in calculating his or her child support obligations (App. 70-72). Without acknowledging Howell, supra, Appellee correctly noted that Virginia law had generally followed Rose (Id.). According to Appellee, Appellant's veterans' disability benefits was "income" and therefore countable in the calculation of his child support obligations (Id.).

Oral argument was held on the competing motions regarding modification of Appellant's support (App. 77-306). Appellant had filed a reply brief, which the trial court refused to accept, but Appellant was allowed to argue its contents. Appellant argued Congress delegated authority to state courts to issue support orders only with respect to disability pay received by a veteran who is also eligible for retirement (App. 220-221). Appellant pointed out that he is not a retiree and therefore he did not waive retired pay to receive disability pay (App. 221). Appellant also argued Rose, supra, was a 1987 case which preceded amendments to the CSEA which clarified a non-retiree's disability benefits from being considered as calculable in the determination of a veteran's support obligations in state court divorce proceedings (App. 221-222). Second, Appellant pointed out that the Virginia precedent relied on by Appellee did not account for this fact, and had simply followed the statement in Rose that ostensibly constituted a blanket rule enunciated by the Supreme Court that veterans' disability benefits were available and countable by state courts to determine a veteran's support obligation in state court divorce proceedings without qualification (App. 222-224, citing Lambert v. Lambert, 10 Va. App. 623 (1990)).

Appellant also noted the recent Supreme Court decision in Howell supported the argument that "[d]isposition of federal military benefits [has] always been delegated to Congress through its enumerated powers in Article I, the Military Power Clause" and that for retirees who have waived retiree pay, they may be obligated by state courts to use their disability pay for support orders, but that where the former servicemember is a recipient of pure veterans' disability benefits, and is not a retiree, and could not have waived retirement pay, federal law, especially 42 U.S.C. § 659(h)(1)(B)(iii) applies to exclude such benefit from the state court's authority and disposition (App. 224-225). Appellant explained that what then becomes operative is 38 U.S.C. § 5301 "because this statute applies to [prohibit] any legal process, whatsoever, with respect to disability funds authorized by the Secretary of Veterans Affairs, and received by the former servicemember (App. 225-226, citing Lambert, supra). In conclusion, Appellant argued that where federal law preempts state law, the state courts lack jurisdiction and authority to issue an order contrary to such controlling federal law (App. 226-227). While Virginia law allows state courts to consider disability benefits as income, the pure disability pay that is received by Appellant is exempted from consideration by state courts as income (App. 227-228).

In response, Appellee's counsel argued that Rose stands for the proposition that the United States Supreme Court has said it does not want to get involved in state domestic relations cases and once the money is paid to the veteran the state court can consider it (App. 232).

At the conclusion of this part of the hearing, the trial court opined that federal law and state law allowed for the consideration of Appellant's disability benefits in the ultimate calculation of his child support obligation. The court reasoned that 38 U.S.C. § 5301 provides that Appellant's disability benefits are not "assignable, except to the extent specifically authorized by law" (App. 236). The trial court then stated that there is an "exception under 42 U.S.C. § 659 to the

prohibition…where the veteran or beneficiary has waived all or part of his military retirement pay, in order to receive military disability pay" (App. 236-237). The trial court then correctly concluded that Appellant is not "eligible for military retirement pay" and "has not waived retirement pay in order to receive military disability" (App. 237). However, the trial court further concluded "the exception, as set out in 42 U.S.C. § 659, does not apply to the father; the facts don't apply in this case" (Id.). The trial court reasoned that just because Appellant's disability pay cannot be assigned or garnished, does not mean it cannot be considered as income by the trial court in setting the support award (App. 238-239).

The trial court entered an order in which it held Appellant's disability pay could be used in calculating Appellant's support obligations (App. 331). The trial court also awarded "attorney fees" to be paid by Appellant for Appellee's attorney fees in the amount of $20,331, concluding that his arguments had "no merit" (App. 262-265; 332).

Legal Argument

I. Federal law excludes and prohibits consideration of Appellant's veterans' disability benefits from consideration in calculating his child support and spousal support obligations. The trial court erred in concluding that these monies could be considered in the calculation required by Virginia law.

Standard of Review

Whether federal law preempts state law is a question reviewed de novo by this Court. Maretta v. Hillman, 283 Va. 34, 40, 722 S.E.2d 32, 34 (2012).

A. Applicable Legal Principles

1. The Supremacy Clause

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the

Contrary notwithstanding." U.S. Const., art. VI., cl. 2 (emphasis added). Federal law preempts state law where Congress has intended to foreclose any state regulation in the subject matter regardless of whether state law is consistent or inconsistent with federal standards. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594-1595 (2015).

"States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Arizona v. United States, 132 S. Ct. 2492, 2501 (2012). When a state law is preempted by federal law, the state law is "without effect." Maryland v Louisiana, 101 S. Ct. 2114, 2129 (1981). See also Kalb v. Feuerstein, 60 S. Ct. 343, 346 (1940). Justice Story said of the phrase that every state "shall be bound" that it "was but an expression of the necessary meaning of the former [that the Constitution and laws made in pursuance thereof shall be the supreme law], introduced from abundant caution, to make its obligation more strongly felt by the state judges" and "it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." Story, Commentaries on the Constitution, vol. II, § 1839, p. 642 (3rd ed.) (1858).

Where Congress passes legislation pursuant to its enumerated powers, state law must give way. Free v. Bland, 369 U.S. 663, 666 (1962); Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824). See also Tarble's Case, 80 U.S. 397 (1871). In this latter case, it was held that Congress' enumerated powers under Article I of the constitution regarding military affairs completely and absolutely preempteed state law. See also Ridgway v. Ridgway, 102 S. Ct. 49 (1981). As Chief Justice Marshall said long ago: "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 436; 4 L. Ed. 579 (1819) (MARSHALL, CJ) (emphasis added).

2. Veterans' Benefits Spring from Congress' Enumerated Military Powers[1]

Congress' authority for enacting legislation benefitting veterans springs from its enumerated "military powers". U.S. Const., art. I, sec. 8, cls. 12-14. United States v. Oregon, 81 S. Ct. 1278, 1281 (1961) ("Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…[to] veterans."). See also Johnson v. Robison, 94 S. Ct. 1160, 1170 (1974). Congress has exercised legislative authority in these premises since the earliest days of the Republic. Hayburn's Case, 2 U.S. (Dall) 409, 1 L. Ed. 436 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, Returning Veterans and Disability Law, 85:3 Notre Dame L Rev 1081, 1084 (2010). Where Congress explicitly relies on this power in passing legislation, the Supreme Court has nowhere else accorded Congress greater deference. McCarty v. McCarty, 101 S. Ct. 2728, 2741 (1981), citing Rostker v. Goldberg, 101 S. Ct. 2646, 2651-2652 (1981). As with all matters of federal preemption, where Congress acts in furtherance of its enumerated constitutional powers under Article I, state law must yield. Ridgway, 102 S. Ct. at 54-55. As one commentator has noted: "The legal basis rest[s] on the principal of federal supremacy, which generally means that a state court lacks subject matter jurisdiction over uniquely federal programs, specifically military compensation schemes, unless Congress specifically confers such authority." Kirchner, Division

[1] Hartzman, Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations, 162 Mil L Rev 50, 54 (1999) (stating while cases often refer to "war powers," when discussing military matters falling outside the domain of "war," it is analytically more accurate to speak in terms of "military powers," that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect).

of Retired Military Pay, 43 Fam. L. Q. 367, 371 (2009 – 2010) (emphasis added), citing McCarty. And, as the Supreme Court recently stated: "McCarty, with its rule of federal pre-emption still applies." Howell, supra at 1404 (emphasis added).

3. Federal Law Concerning Military Benefits Completely Preempts State Domestic Relations and Family Law

Legislation passed by Congress for the provision of veterans' benefits directly addresses and preempts state law, even in domestic family law matters, a subject matter traditionally reserved to state courts. Ridgway, supra at 54-55. There, the Court noted "[n]otwithstanding the limited application of Federal law in the field of domestic relations generally, this Court even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies [of servicemembers and veterans] established by Federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." Id. at 54, citing McCarty, supra. Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." Id. at 55. See also Hillman v. Maretta, 133 S. Ct. 1943 (2013) (same). Absolute federal preemption of state law in these matters is the prevailing rule. Howell, 137 S. Ct. 1400 at 1404, 1405-1406, stating "McCarty, with its rule of federal pre-emption, still applies" and citing 38 U.S.C. § 5301(a)(1) as the federal statute that prohibits state courts from exercising jurisdiction or authority over any veterans' benefits other than those explicitly allowed for by Congress and stating further that "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give. Cf. 38 U.S.C. § 5301(a)(1)." (emphasis added).

Thus, the Court has stated multiple times that while "the whole subject of domestic relations between husband and wife belongs to the laws of the States and not to the laws of the United States," and "state family and family-property law must do 'major damage' to 'clear and

substantial' federal interests before the Supremacy Clause will demand that state law be overridden," state family law "conflicts with the federal military retirement scheme" and is completely preempted unless Congress has otherwise provided. McCarty, 101 S. Ct. at 2737. See also Ridgway, supra at 54, citing McCarty, supra and stating that "[n]otwithstanding the limited application of federal law in the field of domestic relations generally…this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." (emphasis added).

In McCarty, the Court ruled Congress had completely preempted state law from exercising jurisdiction or authority over veterans' benefits in state court divorce proceedings. In this unique field, the Court explained, Congress had historically intended all military benefits to be property of the servicemember. Id. at 2739. After explaining the historical underpinnings of veterans' benefits and that in this area of the law, Congress has occupied the entire field of state law, the Court noted that veterans' retirement benefits were the personal entitlement of the retiree. Id. They were intended to "actually reach the beneficiary". Id. Thus, the Court held state courts are not free to reduce the amounts that Congress had determined are necessary for the servicemember without reference to federal law. Id. at 2741. Finally, since Congress intended all pay to reach the beneficiary, state courts could not attach or assign funds to satisfy a property settlement incident to the dissolution of a marriage. Id. at 2740-2741, citing and referring to the anti-attachment provisions, 38 U.S.C. § 3101, the predecessor of 38 U.S.C. § 5301.

4. The USFSPA Lifted Preemption Only for Marital Property Division

In 1982, after McCarty, Congress recognized a limited and specific exception to federal pre-emption in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C.

§ 1408. See Mansell v. Mansell, 109 S. Ct. 2023 (1989), accord Lambert v. Lambert, 10 Va. App. 623, 395 S.E.2d 207 (1990); McLellan v. McLellan, 33 Va. App. 376, 381, 533 S.E.2d 635, 637-38 (2000). Thereafter, the USFSPA allowed state courts to treat only one small portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 U.S.C. § 1408(c)(1); Mansell, supra. All other military benefits (non-disposable retirement benefits (defined in 10 U.S.C. §§ 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service remain federally protected veterans' benefits and are not subject to division by state courts. Howell v. Howell, 137 S. Ct. at 1404-1406.

5. Federal Legislation Provides When State Courts Can and Cannot Count Disability Pay Towards a Former Servicemembers' Child Support and Spousal Support Obligations

Title 10 U.S.C. § 1408 (the Uniformed Services Former Spouses Protection Act (USFSPA)) and 42 U.S.C. § 659 (the Child Support Enforcement Act (CSEA)) also represent a Congressional lifting of this absolute preemption over state law with respect to certain support obligations in state court family law and domestic proceedings. These provisions provide, in certain specific cases, that state courts may count a portion of a veterans' disability benefits towards his or her marital property, child support and/or spousal support obligations in divorce proceedings. See 10 U.S.C. §§ 1408(a)(4)(A)(ii); (d)(1); (e)(6); 42 U.S.C. § 659(h)(1)(A)(ii)(V).

However, 42 U.S.C. § 659(h)(1)(B)(iii) specifically excludes from this allowance disability benefits paid to a disabled military veteran who is not a retiree and who has therefore not waived retirement pay to receive disability pay.

In such case, 38 U.S.C. § 5301 further provides an affirmative jurisdictional protection of veteran's disability benefits and a positive prohibition on the exercise of subject matter jurisdiction

by state courts over veterans' disability benefits and prohibits "any legal process whatever" from being used to force or otherwise redirect such benefits to anyone other than the federally designated beneficiary. Where benefits are protected by this provision, state courts have no power or authority to order that they vest in anyone other than the designated beneficiary. Howell, 137 S. Ct. at 1406, citing 38 U.S.C. § 5301(a)(1).

In 1987, the United States Supreme Court ruled state courts could include veteran's disability benefits when considering a veteran's child support obligations for retiree veterans. See Rose v Rose, 481 US 619, 625; 17 S. Ct. 2029; 95 L. Ed. 2d 599 (1987), citing 42 U.S.C. § 659. However, Congress excluded from this allowance disability benefits paid to certain veterans (those who are not eligible for retirement and who therefore receive no retirement pay and do not and cannot waive retirement pay to receive disability pay). See 10 U.S.C. §§ 1408(a)(4)(A)(ii); (d)(1); (e)(6) and 42 U.S.C. §§ 659(h)(1)(A)(ii)(V); (h)(1)(B)(iii). This positive federal legislation made a simple, but important clarification to the ostensibly all-encompassing ruling in Rose. Section (h)(1)(A) and (B), when read together, preclude state courts from exercising any jurisdiction or authority over veteran's disability benefits paid to the non-retiree servicemember who waived retirement pay to receive disability pay. Indeed, when federal disability benefits are covered by this provision, as are Appellant's benefits here, the federal government will not honor a state court order of garnishment seeking to have those benefits paid directly to the state. In other words, the federal government, recognizing that federal law preempts state law in this area, will not honor a state court order asking the government to transfer these funds directly to another. (App. 64-67). The VA will not pay a state court order if the military servicemember is not a retiree who has waived retirement pay to receive disability pay. Id. In such circumstances, 38 U.S.C. § 5301 applies to forbid any legal process from being used to effectuate that which the federal government

refuses to do because of controlling and preemptive federal law. Id. Of course, where Congress passes legislation that directly addresses the disposition of federal veterans' benefits, the federal statutory law will prevail as the authoritative final word in the constitutional hierarchy.

Moreover, as such benefits are authorized by the Secretary of Veterans Affairs, they are protected further by 38 U.S.C. § 5301 from any legal process whatever. The latter statute removes jurisdictional authority of state courts over funds that are protected within this provision. Section 5301 is to be liberally construed to effectuate its purpose. Porter v. Aetna Cas. & Sur. Co, 82 S. Ct. 1231, 1233 (1962).

Analysis

As most recently acknowledged by the Court in Howell, supra at 1406, federal law says when a state court may order a former servicemember to use some of his or her disability pay (specifically when he or she waives retirement pay to receive disability pay) to satisfy state court child support and spousal support orders. Id., citing 10 U.S.C. § 1408(e)(6) and Rose, supra. Federal law also says when such pay is protected from any legal process whatever, including assignment, garnishment, and/or indemnity or reimbursement orders. Id. at 1405-1406 (citing 38 U.S.C. § 5301(a)(1) and stating "state courts cannot 'vest' that which (under governing federal law) they lack the authority to give. Cf. 38 U.S.C. § 5301(a)(1) (providing that disability benefits are generally nonassignable)."). See also 42 U.S.C. § 659(h)(1)(B)(iii).

Federal law, through the Uniformed Services Former Spouses Protection Act (USFSPA) 10 U.S.C. § 1408 and 38 U.S.C. § 5301, prohibit disposition of any federally authorized benefits, that is benefits designated via Article I enumerated powers of Congress by federal statute for the benefit and use of the veteran (i.e., retirement pay, disability pay, and retirement pay that may be waived to receive disability pay, inter alia), except for a specific portion reserved for payment of

alimony and child support only from waived pay received by military retirees. See 10 U.S.C. §§ 1408(a)(4)(B) and (e)(6); the Child Support Enforcement Act (CSEA) 42 U.S.C. §§ 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii); and 38 U.S.C. § 5301(a)(1).

To explain how this applies to Appellant and, more importantly, how it restricts what a state court can and cannot do (i.e., what "authority and jurisdiction" it has), one must walk through each of the relevant sections of these controlling federal statutes.

Section 1408(a)(2) of the USFSPA first describes court orders that are subject to the federal allowances and limitations as:

> [A] final decree of divorce, dissolution, annulment, or legal separation issued by a court…(including a final decree modifying the terms of a previously issued decree…, or a support order…which provides for (i) payment of child support (as defined in…42 U.S.C. § 659(i)(2));[and] (ii) payment of alimony (as defined in…42 U.S.C. § 659(i)(3)).
>
> [10 U.S.C. § 1408(a)(2) (emphasis added).]

Section 1408(d)(1) then defines where a court's order is recognized by the federal government to satisfy a child support and/or spousal support order:

> After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony…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…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.
>
> [*Id*. (emphasis added).]

Section (a)(4)(A)(ii) next defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled less amounts which…are deducted from the retired pay of such member…as a result of a waiver of retired pay required by law in order to receive [disability] compensation under title 5 or title 38". *Id*. (bracketed information provided for context). So far,

under these provisions, Congress authorizes state courts (and in fact recognizes orders from state courts) dividing "disposable retired pay" to satisfy child support and spousal support orders. What is also important about this definition is that it leads to a consideration of when a state court may also force a veteran to pay to his or her former spouse some of his or her disability pay that the veteran receives when he or she waives retirement pay in a child support or spousal support scenario.

Consider from the discussion on applicable federal law, infra at pp 16-23, that federal law preempts, and has always preempted, state law in this specific area: family law and domestic relations law where federal military benefits (retirement and disability) are concerned, unless otherwise provided by Congress. McCarty, Rose, Mansell, and finally, Howell, inter alia, each contain this statement of the absolute rule concerning disposition of federal benefits authorized by Congress under its enumerated Article I "military" powers. In 1982, Congress then lifted this preemption for veterans benefits only for a small subset of circumstances by passage of the USFSPA. It allowed a division of a portion of a former servicemembers "disposable retired pay". In conjunction with the CSEA, it also allowed a division of veterans' disability pay for payment to former spouses for child support and spousal support, but only for those former servicemembers who are entitled to claim retired pay, and who have waived that retirement pay to receive disability pay. See 42 U.S.C. § 659(h)(1)(B)(iii). Otherwise, per the recent unanimous opinion of the Supreme Court in Howell, "McCarty with its rule of federal preemption still applies." Howell, 137 S. Ct. at 1404. That rule was an absolute rule of federal preemption over all state domestic and family law regarding veterans' benefits and their disposition by states in state court proceedings. In other words, unless Congress has made an exception to the preexisting federal preemption that exists by virtue of its enumerated powers under Article I of the Constitution and as enforced by

the Supremacy Clause, federal law prohibits exercise by state courts over protected federal benefits.

Now, consider the USFSPA and CSEA. 10 U.S.C. § 1408 and 42 U.S.C. § 659 represent a Congressional lifting of this absolute preemption. These provisions (and accompanying federal regulations and policy) spell out in plain language when federal veterans disability pay may and may not be subject to state court legal process.

Section 659 constitutes federal recognition of state court authority over otherwise federally protected veterans' disability benefits, which recognition allows state courts to garnish or order through legal process that the veteran use disability pay to satisfy a child support or spousal support order. Subsection (a) simply lays out the federal government's "[c]onsent to support enforcement", as follows:

> Notwithstanding any other provision of law (including…section 5301 of Title 38…)…moneys (the entitlement to which is based upon remuneration for employment [i.e., retirement benefits based on years in service]) due from or payable by, the United States…to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States…were a private person, to withholding in accordance with State law…and to any other legal process…to enforce the legal obligation of the individual to provide child support or alimony.
>
> [42 U.S.C. § 659(a) (emphasis added) (bracketed information provided for context, see 5 CFR 581.103 defining disposable income and remuneration for employment).]

However, sections 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) go on to clearly separate VA disability pay into two categories, one category that is subject to this withholding and legal process, and one category that is not, as follows:

> (h) Moneys subject to process.
>
> (1) In general. Subject to paragraph (2) [moneys already pre-excluded for tax and personal debt purposes not relevant here], moneys payable to an individual which are considered to be based upon remuneration for

> employment [and thus fall within subsection (a) as being subject to legal process by state courts], for purposes of this section…
> (A) consist of…
> (iii) periodic benefits…or other payments…
> (V) by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired pay or retainer pay in order to receive such compensation;…
> (B) do not include any payment…
> (iii) of periodic benefits under title 38, United States Code [where Title 38 (an expansive Title in the United States Code addresses the requirements of and provision for service-connected disability benefits)], except as provided in subparagraph (A)(ii)(V) [addressing those disability benefits that may be counted where they are received when the veteran actually is entitled to retired pay and waives that retired pay to receive that Title 38 disability pay, see 38 U.S.C. § 5305]."

[*Id*. (emphasis added) (bracketed information provided for context).]

First, 42 U.S.C. § 659 is a statute of consent by the United States to the respective states allowing, as the title suggest, states and state courts to issue and enforce, respectively, withholding orders, garnishment orders, and effect "similar proceedings" for child support and spousal support and/or alimony with respect to certain federal monies. The reason that a federal statute exists providing this allowance in the first place is because federal monies and benefits (and here, specifically, veterans' benefits) are off limits to state courts, period, unless and until Congress says otherwise. Howell, supra at 1404 ("McCarty with its rule of preemption still applies.").

State courts have no authority over these funds, nor do they possess the authority to force the beneficiary to part with these funds. In this latter respect, 38 U.S.C. § 5301 reinforces that state courts may not effectuate any legal process whatever, and this includes a state court ordering a veteran to pay over these funds to another, over federal veterans benefits.

Subsection (a) of 659 states that notwithstanding any other provision of law, and it mentions 38 U.S.C. § 5301, "moneys (the entitlement to which is based on remuneration for

employment) due from, or payable by, the United States...(including any agency, subdivision, or instrumentality thereof) to any individual…shall be subject, in like manner and to the same extent as if the United States…were a private person, to withholding in accordance with State law. Appellant's benefits are excluded from consideration as "remuneration". Thus, they cannot be income under Va. Code Ann. 20-108.2(C).

Appellant fits within the category of those veterans whose disability pay is excluded from all consideration as disposable income (or remuneration for employment) by state courts to pay spousal support and/or child support. Appellant is not a retiree, did not waive retired pay to receive disability pay, and receives only disability pay authorized by the Secretary of Veterans Affairs under Title 38 (App. 6-8). These benefits are further protected by the positive language of 38 U.S.C. § 5301 from "all legal process whatever" (App. 64-67).

The positive enactment by Congress of 42 U.S.C. § 659 applies directly to this case. While this may appear, at first glance, to be a convoluted statutory argument, as it relates to those servicemembers who were never eligible for retirement (because they did not have the requisite length of time in service (and the rank achieved therewith) to be able to collect retirement pay), but who are still entitled to disability benefits under Title 38 because they were injured and incurred service-connected disabilities during their active duty service, the federal provisions allowing state courts to order servicemembers to use their federal disability pay for child support or spousal support are not applicable. It is also noteworthy to point out the distinction is made between "remuneration for employment", i.e., income, where retirement pay, and even disability pay that replaces retired pay due to a waiver under 38 U.S.C. § 5305, is considered to be received as a result of the servicemembers time in service, resulting pension eligibility and amount, i.e., his or her prior employment; whereas, the pure Title 38 disability pay for service-connected disability is not

considered remuneration for employment because it is paid to the servicemember due to his or her injuries incurred during service, not because of time in service, i.e., employment. Federal regulations also confirm this. 5 C.F.R. § 581.103(c)(7) mirrors 42 U.S.C. § 659 and states that "[m]oneys which are subject to garnishment" include "[a]ny payment by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived either the entire amount or a portion of the retired or retainer pay in order to receive such compensation. In such cases, only that part of the Department of Veterans Affairs payment that is in lieu of the waived retired pay or waived retainer pay is subject to garnishment." (emphasis added).

In sum, there are two categories of federal veterans' disability benefits for purposes of this analysis:

> (1) disability pay that can be taken by states to pay child support and alimony orders, but only if the veteran is also a recipient of retirement pay, and only if he or she waives that pay to receive VA disability pay. 42 U.S.C. § 659(h)(1)(A)(ii)(V). In this situation, and in this situation only, the statutes, 10 U.S.C. § 1408 and 42 U.S.C. § 659, allow states to order that a percentage of the VA disability pay be paid to satisfy such orders; and
>
> (2) disability pay that cannot be taken by the states to pay such orders, because the veteran is not also a recipient of military retired pay – these funds – pure VA disability pay and/or VA authorized special compensation – are protected by federal law from all legal process that the states might employ against the veteran. 42 U.S.C. § 659 (h)(1)(B)(iii). See 38 U.S.C. § 5301 (a)(1).

With respect to this second category of pay, pursuant to 38 U.S.C. § 5301(a)(1), states may not attach, seize, garnish, or otherwise effect any legal process (equitable or otherwise) whatever with respect to these types of funds. Relevant to this case, 38 U.S.C. § 5301(a)(1) states plainly:

> Payments of benefits *due* or *to become due* under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent

specifically authorized by law, and such payments made to, or on account of, a beneficiary…shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary…."

[*Id*. (emphasis added).]

This statutory prohibition springs from Congress's war powers for purposes of protecting veterans' benefits. Atlanta v. Stokes, 175 Ga. 201, 210-212; 165 S.E. 270 (Ga. 1932); In re Ballard's Estate, 293 N.Y.S. 31, 32-33; 161 Mis. 785 (N.Y. 1937). Its purpose was to afford "continuous support" of persons suffering because of their military service. Yake v. Yake, 183 A. 555; 170 Md. 75 (Md. 1936). The Supreme Court stated 38 U.S.C. § 5301 is to be liberally construed to protect funds granted by Congress "for maintenance and support for beneficiaries thereof" and such funds "remain inviolate." Porter v. Aetna Cas. & Sur. Co. 82 S. Ct. 1231, 1233 (1962). Such payments are exempt "either before or after receipt by the beneficiary". Id. As such, "[t]he monies which are paid are preserved by statute for the sole use of the veteran, 'regardless of the technicalities of title and other formalities.'" American Training Serv's Inc. v. Veterans Admin, 434 F. Supp. 988, 995-996 (DNJ 1977), citing Porter, supra. Thus, "[a]ny legal formulation or arrangement which could dilute or evade the literal and historical thrust of the statute's protective provisions must be viewed with appropriate caution." Id.

As noted by the Supreme Court in Howell, veterans' benefits are a personal entitlement. 137 S. Ct. at 1403. Unless federal law lifts the preemptive effect of legislation providing veterans with such benefits, the states cannot exercise authority over these funds. Howell ruled that pursuant to this provision, state courts could not exercise authority over any non-disposable veterans' benefits under 38 U.S.C. § 5301(a)(1). Howell, 137 S. Ct. at 1405. The Court said: "State courts cannot 'vest' that which (under governing federal law) they lack authority to give. Cf. 38 U.S.C. § 5301(a)(1) (providing that disability benefits are generally non-assignable)." The court also

noted that equity cannot be used to force the veteran to part with these monies because such orders have the same effect of depriving the veteran of the benefit that Congress intended to be solely for the veteran. Id. at 1406. "All such orders are thus preempted." Id. See also Ridgway v. Ridgway, 102 S. Ct. 49, 54-55 (holding that under the anti-attachment provision (identical in all respects to 38 U.S.C. § 5301) a state court could not impose a "constructive trust" on the proceeds in favor of the servicemember's former spouse, stating that such measures by state courts "fail[] to give effect to the unqualified sweep of the federal statute," and that such anti-attachment provisions "ensure[] that the benefits actually reach the beneficiary[,] preempts all state law that stands in its way[,] protects the benefits from legal process '[notwithstanding] any other law of any State[,] prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." (internal quotations and brackets removed).

As noted previously, while the Supreme Court in Howell recognized the exception for child support and spousal support, citing Rose v. Rose, 107 S. Ct. 2029 (1987), the latter case did not address the precise federal statutory language as applied to current disability benefits being paid to Appellant. Federal statutory law now excludes disability pay (other than that portion received if the veteran is also a recipient of retirement pay). Compare, 42 U.S.C. § 659(h)(1)(A)(ii)(V) with 42 U.S.C. § 659(h)(1)(B)(iii), and Rose, supra, interpreting the now-repealed 42 U.S.C. § 662(f)(3) (the predecessor section), which did not contain this exact exclusion in subsection (h)(1)(B)(iii). When Rose was decided, Congress had not written in this flat exclusion for non-retiree veterans' disability pay. See Rose, supra at 644-647, White, J., dissenting. Moreover, the Court in Rose was addressing the circumstance of a servicemember who is entitled to retired pay and waives that retired pay to receive the disability pay. That is not the case here.

The purpose of Congress in enacting 38 U.S.C. § 5301 was to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." Rose, supra at 2036.

Even if 42 U.S.C. § 659 is seen just as a limited allowance to garnishment of the federal government, it does define out what funds are not considered remuneration for employment, i.e., income. And then, 38 U.S.C. § 5301 states that with respect to all other veterans' disability benefits paid by the VA, state courts have no authority or jurisdiction through any legal process to order a veteran to part with those funds and pay them over to another, at any time. The Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected" New Dimensions, Inc. v. Tarquini, 286 Va. 28, 35, 743 S.E.2d 267, 270 (2013) (internal citations and quotations omitted). "[F]amily law is not entirely insulated from conflict pre-emption principles, and so [the Supreme Court has] recognized that state laws "governing the economic aspects of domestic relations . . . must give way to clearly conflicting federal enactments." Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013). Finally, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." Id. at 1953.

Conclusion

As the Supreme Court has most recently, and unanimously, ruled that federal law preempts state law in this area unless Congress has said otherwise, and Congress has indicated that Appellant's disability benefits are not to be considered remuneration for employment, it will not honor a garnishment order issued by a state court with respect to such benefits, and by positive legislation affirmatively it protects these benefits from all legal process as a matter of jurisdiction,

the trial court erred in considering these monies in the calculation of Appellant's child support obligations. Appellant is not a retired servicemember. He did not waive retired pay to receive disability pay. His disability pay consists of those benefits that are addressed in 42 U.S.C. § 659(h)(1)(B)(iii). Thus, they are jurisdictionally protected by 38 U.S.C. § 5301. State courts simply do not have authority or jurisdiction to order otherwise. These entitlements are personal entitlements and unless federal law says that they can be diverted, state courts are simply and absolutely preempted from directing otherwise.

Appellant respectfully requests this Court reverse the trial court's decision counting his federal disability benefits towards his child support obligation. As a result of the meritorious arguments set forth in this brief, and, as made by Appellant during the underlying proceedings based on the unanimous Supreme Court case of Howell v. Howell, reconfirming that federal law has always preempted state law in this particular subject, unless Congress has provided otherwise, Appellant also respectfully requests this Court to reverse the trial court's decision to award Appellee her attorney fees.

Respectfully submitted by:

Carson J. Tucker (pro hac vice)
LexFori, PLLC
117 N. First St., Suite 111
Ann Arbor, MI 48104
(734) 887-9261 (Telephone)
(734) 887-9255 (Facsimile)
cjtucker@lexfori.org

William D. Wilkinson
Katherine Martell
First Point Law Group, P.C.
10521 Judicial Drive, Suite 300
Fairfax, VA 22030
(703) 385-6868 (Telephone)
(703) 385-7009 (Facsimile)
wwilkinson@firstpointlaw.com
kmartell@firstpointlaw.com

Counsel for Appellant

Dated: March 11, 2019

Certificate of Service

I hereby certify that on this 11th day of March, 2019, pursuant to Rules 5A:19(f) and 5A:25(b), three paper copies of the Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of the Court of Appeals of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

Walter C. Jacob, Esq., VSB 12019
Attorney at Law
116-B Edwards Ferry Road
Leesburg, Virginia 20178
(703) 669-4500 (Telephone)
(703) 669-4505 (Facsimile)
waltercjacob@aol.com

Counsel for Appellee

This Brief contains 10,357 words.

Counsel for the Appellant respectfully requests oral argument.

Respectfully submitted by:

Carson J. Tucker (pro hac vice)
LexFori, PLLC
117 N. First St., Suite 111
Ann Arbor, MI 48104
(734) 887-9261 (Telephone)
(734) 887-9255 (Facsimile)
cjtucker@lexfori.org

William D. Wilkinson
Katherine Martell
First Point Law Group, P.C.
10521 Judicial Drive, Suite 300
Fairfax, VA 22030
(703) 385-6868 (Telephone)
(703) 385-7009 (Facsimile)
wwilkinson@firstpointlaw.com
kmartell@firstpointlaw.com

Counsel for Appellant