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*.**

REPLY BRIEF OF APPELLANT

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Appellee makes much of the fact Appellant is employed and that this somehow makes it acceptable that his federal veterans' disability pay can be counted as "income" towards his child support obligations. In fact, this is irrelevant. "Veteran's disability benefits are nondiscretionary, statutorily mandated benefits." *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding a veteran's disability benefits are a constitutionally protected property interest). Upon the satisfaction of certain eligibility requirements, a veteran is entitled to these benefits. *Id*. These benefits are not based on need, but rather on the proof of a service-connected disability. *Id*. at 1297.

Congress began providing veterans' benefits in early 1789 and after every conflict in which the Nation has been involved. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Congress's authority under the Military Powers clauses of the constitution, which include, in part, designating and providing disability benefits for veterans, is "plenary and exclusive". *Tarble's Case*, 80 U.S. 397, 407-408 (1871). "[Congress] can determine, without question from any State authority…the compensation [a soldier] shall be allowed…." *Id*. at 408. "No state court, either by statute or judicial ruling, can infringe upon the exercise of this power by Congress. "Whenever…any conflict arises between the enactments of the two sovereignties [the state and the federal government], or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States." *Id*. at 407.

This absolute rule of federal preemption in the exercise by Congress of its enumerated military powers in the provision of veterans' benefits has been the prevalent rule to this day. See, e.g., *Wissner v. Wissner*, 338 U.S. 655 (1950); *United States v. Oregon*, 366 U.S. 643 (1961), *Johnson v. Robison*, 415 U.S. 361, 376 (1974), *McCarty v. McCarty*, 453 U.S. 210 (1981);

Ridgway v. Ridgway, 454 U.S. 46 (1981); *Mansell v. Mansell*, 490 U.S. 581 (1989), and *Howell v. Howell*, 137 S. Ct. 1400, 1404-1407 (2017), citing 38 U.S.C. § 5301(a)(1). And it has especially been held to apply as against the usual deference given to a state in matters of domestic and family law. Indeed, in a case directly from the state of Virginia, the Supreme Court stated that while the regulation of domestic relations and family law is traditionally the domain of state law, "family law is not entirely insulated from conflict pre-emption principles, and so we have recognized that state laws 'governing *the economic aspects* of domestic relations…must give way to clearly conflicting federal enactments.'" *Hillman v. Maretta*, 569 U.S. 483, 490-491 (2013) (emphasis added), quoting *Ridgway*, *supra* at 55. *Ridgway* held that the identical language to 38 U.S.C. § 5301 (which is at issue in this case) in the anti-attachment provision protecting a veteran's choice to designate a beneficiary of his or her life insurance benefits (there 38 U.S.C. § 770(g)), preempted a state court decision that sought to impose a constructive trust on the beneficiary of a deceased veteran's insurance in favor of the veteran's former spouse pursuant to a state court divorce decree. *Id*. at 55-62. *Ridgway* found that state courts were preempted by Congress's pervasive regulation of all aspects of veterans' benefits even in this area touching upon the economic relations between husband and wife arising out of matters of family and domestic law, and state law must yield. *Id*. at 55, citing *McCarty v. McCarty*, 453 U.S. 210 (1981) (holding state courts could not force a veteran to divide any of his or her benefits with a former spouse). As the Court said in *McCarty*, *supra* at 236, "in no area has the Court accorded Congress greater deference." Citing *Rostker v. Goldberg*, 453 U.S. 57 (1981).

As the Supreme Court recently reiterated in *Howell*, federal law in this area has *always preempted* state law. "McCarty with its rule of federal preemption still applies". 137 S. Ct. at 1404. This means, that *unless* Congress has lifted its absolute preemption, which it does only by statute,

and in *precise* and *limited* ways, see *Mansell v. Mansell*, 490 U.S. 581, 589 (1989), accord *Howell*, *supra*, the state law and state courts are preempted by federal supremacy. *Id*.

Indeed, as Appellant argued below and before this Court, *Howell* recognized where Congress made exceptions to this absolute preemption to allow states to *count as income*, i.e., consider as "remuneration for employment", certain disability benefits for purposes of child support or spousal support, and where it was prohibited. *Howell*, 137 S. Ct. at 1406. Stating that state family law courts are free to take into consideration that "some military *retirement pay might be waived*" and take account of reductions in the former spouses share when it "calculates or recalculates the need for spousal support." *Id*. (emphasis added), citing *Rose v. Rose*, 481 U.S. 619, 630-634, and n. 6 (1987), and 10 U.S.C. § 1408(e)(6).

Thus, Congress provides *all* circumstances where state courts may order a veteran to part with his or her federal benefits: state courts may order a veteran to ***(1)*** pay his or her former spouse divisible property from the veteran's disposable retired pay, 10 U.S.C. § 1408(d)(1) of the Uniformed Services Former Spouses Protection Act (USFSPA); ***(2)*** to pay child support or spousal support from disability pay received in lieu of only a waived *portion* of retired pay, 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V), but not when the veteran waives 100 percent of retired pay, see, e.g., *Sanchez Dieppa v. Rodriguez Pereira*, 580 F. Supp. 735, 736-737 (U.S. Dist. Ct. P.R. 1984) (noting that the federal government will not honor an order from a state court if the veteran has waived *all his retirement pay* to receive disability pay); and ***(3)*** ***not*** from disability benefits that are not received in lieu of retired pay, 42 U.S.C. § 659(h)(1)(B)(iii). What this means is that the federal government will not honor, and therefore will not pay directly to the state agency or to the former spouse, a state court order that seeks garnishment or direct pay from the federal government of the child support or spousal support obligation. To seek such benefits, the state has to go around

these prohibitions and order the veteran to pay these benefits over to the former spouse. This is what occurred in the instant case. However, states cannot do indirectly what they cannot do directly, where such actions violate federal law. Here, 38 U.S.C. § 5301(a)(1), by its plain and straightforward language, jurisdictionally protects Appellant's veterans' disability benefits from all legal process whatever (whether equitable or legal) and whether before or after Appellant's receipt of these benefits.

After its decision in *Howell*, the Supreme Court remanded to California the case of *Cassinelli v. Cassinelli*, 138 S. Ct. 69 (2017). On remand, the California Court of Appeals noted *Howell* had effectively overruled California case law that had previously held state courts were allowed to use or count a retired servicemembers' disability or other military benefits in state court divorce proceedings with few exceptions. Specifically citing the federal law governing the question, the Court noted that state courts could still count veterans disability benefits as income for purposes of spousal maintenance and child support, "*although only* up to the amount of his waiver or retired pay", and the Court specifically cited 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V), and (B)(iii) as the source of federal law prohibition. *In re Marriage of Cassinelli (On Remand)*, 2018 Cal. App. LEXIS 177, *15 (March 2, 2018) (emphasis added).

Appellee argues that 42 U.S.C. § 659 only exists to avoid sovereign immunity because it is a statute that merely identifies when a state court order may be presented to and paid directly by the federal government to the beneficiary rather than to the veteran. Appellee further implies that this does not prohibit a state court from requiring a veteran, once he or she is in receipt of these benefits, from using them (or a portion of them) in satisfying a support obligation. Appellee's Brief, pp. 8-9. However, this argument does not hold sway.

First, it should be noted that the Supreme Court has stated that statutes waiving immunity are to be strictly construed, *McMahon v. U.S.*, 342 U.S. 25, 27 (1951). In keeping with this principle, other similar statutes have not been interpreted as allowing state courts to exercise unfettered authority over funds in the hands of veterans just because there was also a direct pay mechanism in the provision. For example, the USFSPA also has a direct pay mechanism – the federal government will honor and directly pay to a former military spouse those property settlements that require the veteran to pay 50 percent of his or her disposable retired pay. 10 U.S.C. § 1408(d)(1). *All other* state court orders attempting to force the veteran to part with *more than* his or her share of disposable retired pay as marital property are preempted and void. *Howell*, 137 S. Ct. at 1406 ("All such orders are thus preempted."). The Court long ago addressed the argument (the same argument made by Appellee with respect to § 659) that the USFSPA was a provision which allowed garnishment and said nothing of a state court's authority over other monies once in the possession of the veteran. *Mansell v. Mansell*, 490 U.S. 581, 588-589 (1989). The USFSPA clearly restricted state courts from considering veterans' benefits as disposable property, except 50 percent of the amount of disposable retired pay as defined. Since *Mansell*, the Court has now clarified that the restriction on the states applies to *all other benefits*, the amount of retired pay that is waived cannot be considered in the equation, *Mansell*, *supra*; disability pay cannot be considered, *Howell*, 137 S. Ct. at 1406, and state courts cannot enforce agreements or enter orders to force the veteran to indemnify or reimburse the former spouse for the latter's lost share as a result of the veteran's waiver. *Id*. at 1404-1406. Indeed, unlike the Court in *Mansell*, the Court in *Howell* went even further and ruled that with respect to *all* veterans' benefits, which include the amount of *non-disposable*, and therefore *non-divisible* retired pay, as well as disability pay, 38 U.S.C. § 5301(a)(1) *affirmatively* protected them from any state court control. *Howell*, *supra* at

1405 (stating directly that "State courts cannot 'vest' that which (under *governing federl law*) they lack the authority to give. *Cf*. 38 U.S.C. § 5301(a)(1) (providing that disability benefits are generally nonassignable)."

Thus, 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V), and (h)(1)(B)(iii) is merely a provision detailing when the federal government will honor a direct payment to the state pursuant to a compliant state court order – that is a state court order that requests that part of federal disability benefits that *may be* paid in satisfaction of a state court support award. Moreover, as with the *other monies*, and particularly here, as in cases of disability pay and special compensation addressed by USFSPA, 38 U.S.C. § 5301(a)(1) affirmatively protects these benefits; they are *off limits even if they are in the possession of the beneficiary*; the plain language of this provision protects these benefits from "attachment, levy, or seizure *by or under any legal or equitable process whatever*, *either before or after receipt by the beneficiary*." It is hard to envision a clearer and more sweeping statement.

Indeed, the federal government itself will cite these rules in refusing to honor state court orders that request the government to directly pay these funds over to a former spouse in satisfaction of a child support or spousal support award. See Appellant's Appendix, pp. 64-67. This correspondence, which is a routine and usual correspondence seen in many similar cases lays out the complete reasoning that Appellant has been arguing prohibits the state court in his particular case from ordering him to part with funds which are protected by federal law, and particularly here 38 U.S.C. § 5301. First, the letter, from the office of the regional counsel of the Department of Veterans Affairs to the Attorney General of Texas (dated May 19, 2003, which it should be noted is *after* the *Rose* decision), provides several important points. First, the letter starts by quoting 38 U.S.C. § 5301(a)(1)'s sweeping language. *Id*., p. 65. The letter next explains, as

Appellant has been arguing, that there is a limited exception to § 5301's prohibitions where the obligor has waived military retirement pay. *Id*. The letter then states:

> The exception does not apply to this case. According to the Defense Finance and Accounting records, the obligor has not waived military retirement pay. No benefits can be garnished. [*Id*.]

The letter goes on to detail the difference between disability received in lieu of retired pay which is considered "remuneration for employment" and therefore subject to process, and disability pay paid as a periodic Title 38 benefit. *Id*., citing 42 U.S.C. §§ 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii). The letter concludes: "In situations where there is no waiver of military pay and no VA pay can be garnished, a custodial parent may apply for an apportionment of the veteran's benefit for a minor child or children." *Id*. at 67.

The latter point brings to the forefront another aspect of Congress's absolute, exclusive and plenary authority over the disposition of veterans' benefits. Why would Congress prohibit any legal process, both *equitable* and *legal*, and forbid state courts from exercising jurisdiction or authority over certain veterans' disability benefits both *before* and *after* receipt by the beneficiary if this provision is not intended to prevent a state court from ordering a veteran to part with these benefits and pay them over to another? There is, in fact, a specific allowance for certain disability benefits to be counted, and then a broad preemption as to all other cases. "*McCarty* with its rule of federal preemption *still applies*." *Howell*, 137 S. Ct. at 1404 (emphasis added).

Appellant does not contend that veterans' disability pay should never be considered in the calculation of child support or spousal support. Certainly, federal law explicitly sets out the circumstances in which it can be used in that determination. See 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(V). However, Appellant's disability pay is pure, VA-authorized disability pay contemplated under 38 U.S.C. § 5301(a)(1). Finally, it must be pointed out that 42 U.S.C. § 659

contains its own exception to the allowance for states to receive certain disability pay in satisfaction of child support or spousal support orders. Subsection (a) provides that "notwithstanding" 38 U.S.C. § 5301, the federal government *will honor* garnishment orders for monies that are considered remuneration for employment; but, *it then excludes* from this "notwithstanding clause", monies that are not considered remuneration for employment. See 42 U.S.C. § 659(h)(1)(B)(iii).

Finally, Appellee argues that *Rose* while never specifically identified as a case in which the veteran waived retirement pay to receive disability pay, stands for the sweeping proposition that veterans' disability pay is *supposed to be used to support the family*. This argument is belied by decades of post-*Rose* jurisprudence in which courts have explained that Congress, again under its exclusive and plenary powers in this area, established an administrative system for granting service-connected death or disability benefits to veterans, which is based on "service connection" not "upon need". *Walters v Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985). The Court explained that the benefits are based only on a determination of whether the veteran's disability is causally related to an injury sustained in the service and the degree of incapacity caused by the disability. *Id*. The initial disability determination has nothing to do with need, nor of a consideration of the amount of that disability pay that may or should be devoted to considering the needs of or support obligations for the veteran's dependents.

Appellee also contends that Appellant's diligence in arguing of these points merits the sanction of paying Appellee's attorney's fees. Given that *Howell*, 137 S. Ct. at 1404, 1405-1406, recently confirmed that federal law has always preempted state law in the area of family and domestic matters when addressing the economic relations of the parties, and further *confirmed* that 38 U.S.C. § 5301(a)(1) removes authority and jurisdiction from state courts over all benefits unless

Congress allows it, Appellant's arguments were far from meritless. Indeed, where federal law preempts state law, the state courts are always required to consider the effect of its rulings on the questions posed. Appellant has done nothing more than refer to the plain and unambiguous language of 42 U.S.C. § 659 and 38 U.S.C. § 5301, which clearly exclude Appellant's benefits from being considered as income under Virginia law. Appellant has also relied on Supreme Court jurisprudence interpreting not only the meaning of Congressional federal preemption where Congress exercises its enumerated Article I powers to provide veterans with benefits, but also on those limited and precise acts of that same body, which have *allowed* state courts the authority to consider the disposition of these benefits in a manner permitting diversion to someone other than the actual beneficiary, the veteran.

A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. Such rulings, and the judgments they spring from, including all subsequent contempt and related orders are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb v. Feurstein*, 308 U.S. 433, 440, n 12 (1940). "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id*. at 439. "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). Absent such power, any attempt by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

CONCLUSION

To the extent that Virginia law allows a state court to consider or count Appellant's specific veterans' disability benefits as income and to therefore include these funds in the calculation of a child support obligation, it is preempted by federal law, and particularly, 38 U.S.C. § 5301(a)(1), which admits of no exceptions from its sweeping and liberal construction that protects Appellant's benefits from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

Appellant respectfully requests this Court reverse the trial court's ruling that his disability benefits be considered as income in the calculation of his support obligations, reverse the trial court's order requiring Appellant to pay Appellee's attorneys fees, and remand the case to the trial court for a calculation of Appellant's support obligation based on his income without the excluded federal benefits.

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Dated: May 14, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 14h day of May, 2019, pursuant to Rules 5A:19(f) and 5A:25(b), three paper copies of the Reply Brief of Appellant were hand-filed with the Clerk of the Court of Appeals of Virginia and an electronic copy of the Reply Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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Counsel for the Appellant respectfully requests oral argument.

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