

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER JADE CLARK,

Plaintiff-Appellee,

v

JEFFREY ELBERT CLARK,

Defendant-Appellant.

UNPUBLISHED

March 4, 2014

No. 312434

Monroe Circuit Court

LC No. 11-035096-DM

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this divorce action, the parties were married in 1989, when they were both aged 25. At the time of the divorce proceedings, they had one remaining minor child. The trial court granted the judgment of divorce on July 30, 2012. Defendant, a former Marine, appeals one issue: he asserts that the trial court impermissibly divided his military disability pension. We agree. We therefore vacate the trial court's property, money, and support awards to the extent the parties initially contested them, and we remand for the trial court to craft a new set of such awards without dividing defendant's military disability pension.

The question raised on appeal is strictly a matter of law, which is reviewed de novo. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013). Defendant asserted to the trial court that his disability compensation was not divisible. Therefore, this issue is preserved for appeal. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

"[D]omestic relations are preeminently matters of state law." *Mansell v Mansell*, 490 US 581, 587; 109 S Ct 2023; 104 L Ed 2d 675 (1989). However, federal statutes governing military retirement pay, which can be in the form of nondisability retirement, disability retirement, or reserve retirement, completely conflict in word and in spirit with state courts treating such pay as community property *McCarty v McCarty*, 453 US 210, 213, 232-236; 101 S Ct 2728; 69 L Ed 2d 589 (1981). Consequently, military retirement pay is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," thereby federally preempting state law. *Mansell*, 490 US at 584, 587-588. The United States Supreme Court recognized that such a conclusion "may inflict economic harm on many former spouses," but that was what Congress had chosen to do. *Id.* at 594.

After *McCarty* was decided, Congress enacted the Uniformed Services Former Spouse Protection Act, 10 USC § 1408, which affirmatively permitted state courts some *limited* power to divide retirement pay. *Mansell*, 490 US at 588-589. Specifically, state courts may divide “disposable retired or retainer pay,” which explicitly excludes, “inter alia, military retirement pay waived in order to receive veterans’ disability payments.” *Id.* at 589. “In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay.” *Id.* at 583. Consequently, disability benefits are *not* “disposable retired pay.” Furthermore, as this Court recognized, the *Mansell* decision involved a community-property state, but its decision applies equally to equitable-distribution states like Michigan. *Megee v Carmine*, 290 Mich App 551, 564 n 4; 802 NW2d 669 (2010).

“Only that portion of plaintiff’s total retirement pay defined by statute as disposable retired pay is properly divisible.” *Keen v Keen*, 194 Mich App 72, 74; 486 NW2d 105 (1992). Although *Mansell* did not directly address an attempted division of V.A. disability benefits, *Megee*, 290 Mich App at 566, this Court has held that the decision in *McCarty* remained valid as to disability pensions because “10 USC. § 1408 does not allow distribution of a disability pension.” *King v King*, 149 Mich App 495, 500; 386 NW2d 562 (1986). This Court has held that such disability payments *may* be divisible to the extent a service member elects to waive retirement pay in favor of disability pay *after* a distribution is made on the basis of the retirement pay, to the extent of what the retirement pay should have been. *Megee*, 290 Mich App at 566-575. However, that is not the situation here. Defendant’s “military pension may not be considered ‘directly or indirectly’ in the distribution of the marital property.” *King*, 149 Mich App at 500.

The trial court therefore erred in dividing defendant’s Veterans’ disability compensation. However, the above analysis only applies to whether defendant’s V.A. disability benefits are marital property or in any way divisible. “In making an equitable distribution of property, a court may take into account both a discrepancy in the parties’ assets and one party’s income-producing assets.” *King*, 149 Mich App at 500. The trial court may not divide these disability benefits. Because defendant did not elect to waive retirement pay in favor of his disability pay after the trial court’s order was entered, the trial court must consider defendant’s disability pay to be a separate and non-divisible asset belonging solely to defendant. We note that although the trial court must craft a new division of assets and structure of support payments, the trial court already has the facts necessary to do so, therefore no new trial is necessary.

The trial court’s property, monetary, and support awards are vacated, and the matter is remanded for the trial court to craft new such awards not inconsistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause