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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellant,

v

RAY JAMES FOSTER

Defendant / Counter-Plaintiff / Appellee.

SCT Docket No. 161892
Prior SCT Docket No. 157705
COA Docket No. 324853
Circuit Court No. 07-15064-DM

MCR 7.312(I) STATEMENT OF SUPPLEMENTAL AUTHORITY

Respectfully submitted by:

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On **November 5, 2021**, the Alabama Court of Appeals issued its decision in *Williams v Burks*, 2021 Ala. Civ. App. LEXIS 118 (Ala. Civ. Ct. App. 2021) (see attached) addressing whether 38 U.S.C.S. § 5301 precluded a trial court from enforcing a 2001 divorce judgment in which the veteran agreed to pay 40 percent of his disability pay to his former spouse. In 2018 the wife filed contempt proceedings against the veteran. *Id*. at *5-6. The trial court held the veteran in contempt and ordered him to pay $191,040 to his former spouse in arrears. *Id*. at *7-8. He was jailed and released on condition he make payments towards the arrearage. *Id*. at *8. The veteran appealed arguing that federal law preempted state law and the state court had no authority to order him to pay his former spouse.

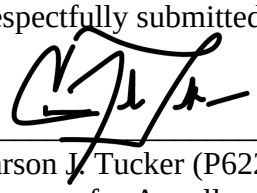
The Court of Appeals agreed, holding that under 38 U.S.C.S. § 5301, as interpreted and applied in *Howell v Howell*, 137 S Ct 1400, 1405 (2021), the state court had no jurisdiction or authority to force the disabled veteran to pay his disability benefits or any equivalent amount. The court noted "so long as they are paid to [the veteran at issue] under existent provisions of the federal law, they can not be reached or affected by decree of [the trial] court." *Id*. at *15-16. The Court also held the trial court was without power to hold the veteran in contempt for failing to comply with the portion of its order requiring payment of half of the benefits to his former wife. "The division of property…was not permissible [under § 5301], so that portion of the decree making the award *was void*. It necessarily follows that the contempt adjudication, attempting to enforce a void decree or provision thereof, would also be void and unenforceable." *Id*. at *16 (emphasis supplied).

As with this Court's unanimous opinion in April 2020, the Court ruled that 38 U.S.C.S. § 5301 applied to "preclude[] the former wife from enforcing 'by legal or equitable process' her claim to a portion of the VA disability benefits, 'either before or after receipt by [the veteran].'" *Id*. at 19.

The Court also found without merit the former spouse's argument that the veteran's failure to appeal precluded him from challenging the validity of the award in the contempt proceedings. The Court reasoned that "the strong language of *Howell* suggests that the lack of power to award VA disability benefits as part of a property settlement is the type of defect that would make any such award *void*." *Id*. at *18 (emphasis added), citing *Howell*¸137 S. Ct. at 1405. The Court found "no exception to preemption for purposes of an enforcement proceeding; what § 5301 prohibited as to the divorce judgment, it likewise prohibits as to an order purporting to enforce the divorce judgment." *Id*. at *20. The Court cited post-*Howell* decisions overruling previous cases which had held that "principles of contract and res judicata could render a stipulated decree indemnifying an ex-spouse enforceable, even if it ran afoul of *Mansell*," and further noting that "*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption.'" *Id*. at *18-20, citing *Mattson v Mattson*, 903 NW2d 233, 241 (Minn. Ct. App. 2017). The Court even noted that with the broad language of § 5301 and its application in *Howell*, state court reliance on the doctrine of res judicata was not reconcilable.

This case demonstrates yet again that where federal preemption applies under 38 U.S.C.S. § 5301, post-*Howell*, principles of res judicata, collateral estoppel, and sanctity of contract do not defeat the plain application of 38 U.S.C.S. § 5301(a)(1) and (3) and the consequences of federal preemption.

Respectfully submitted by:



Carson J. Tucker (P62209)
Attorney for Appellee

Dated: December 16, 2021

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1. *Williams v. Burks, 2021 Ala. Civ. App. LEXIS 118*
   Client/Matter: Foster

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Williams v. Burks

Court of Civil Appeals of Alabama

November 5, 2021, Released

2200169

Reporter

2021 Ala. Civ. App. LEXIS 118 *; 2021 WL 5143756

Dwight Alexander Williams v. Tenesha Maria Burks

Notice: THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE ADVANCE SHEETS OF THE SOUTHERN REPORTER.

Prior History: [*1] Appeal from Coffee Circuit Court. (DR-00-144.01).

Disposition: REVERSED AND REMANDED WITH INSTRUCTIONS.

Core Terms

disability benefits, former husband, former wife, benefits, trial court, veteran's, disability, divorce, divorce judgment, waived, federal law, military-retirement, contempt, military retirement pay, retirement pay, preemption, decree, community property, state court, military, indemnification, reimbursement, preempted, spouse, property settlement, retirement, purposes, void

Case Summary

Overview

HOLDINGS: [1]-Trial court lacked the authority to award the former wife any portion of the former husband's VA disability benefits; 38 U.S.C.S. § 5301(a)(1) precluded the former wife from enforcing by legal or equitable process her claim to a portion of the VA disability benefits, either before or after receipt by the former husband, and that protection extended to payments of benefits due or to become due. There was no exception to preemption for purposes of an enforcement proceeding; what § 5301 prohibited as to the divorce judgment, it likewise prohibited as to an order purporting to enforce the divorce judgment.

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Outcome

Reversed and remanded with instructions.

LexisNexis® Headnotes

Family
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans
Law > Servicemembers > Allowances & Pay

Military & Veterans
Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans
Law > Servicemembers > Families

HN1[] **Retirement Benefits, Military Benefits**

Veteran's disability benefits associated with retirement are governed by *10 U.S.C.S. § 1201 et seq.* *10 U.S.C.S. § 1408* governs, in part, property-settlement awards of the disposable retired pay of a member of the military. *Section 1408(a)(4)(A)* defines disposable retired pay to exclude from the total monthly retired pay to which a member is entitled an amount equal to the amount of retired pay of the member under *10 U.S.C.S. § 1201 et seq.* computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).

Family
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans
Law > Servicemembers > Retirement

HN2[] **Retirement Benefits, Military Benefits**

In the context of military-retirement benefits, 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. Such waivers are common because disability benefits are exempt from federal, state, and local taxation.

Family
Law > ... > Classification > Retirement Benefits > Military Benefits

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HN3[] **Retirement Benefits, Military Benefits**

Can the State subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not. Cases and the statute make clear that the answer to the indemnification question is no.

Family Law > ... > Property Distribution > Characterization > Community Property

Military & Veterans Law > Servicemembers > Families

Family Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

HN4[] **Characterization, Community Property**

10 U.S.C.S. § 1408 provided a precise and limited grant of the power to divide federal military retirement pay. It did not grant the States the authority to treat total retired pay as community property. Rather, Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, in respect to the waived portion of retirement pay, McCarty v. McCarty, with its rule of federal preemption, still applies.

Family Law > ... > Property Distribution > Characterization > Community Property

Military & Veterans Law > Servicemembers > Families

Real Property Law > ... > Present Estates > Marital Estates > Community Property

Family Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > Servicemembers > Retirement

HN5[] **Characterization, Community Property**

Federal law completely preempts the States from treating waived military retirement pay as divisible community property.

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Governments > Courts > Authority to Adjudicate

HN6[] **Courts, Authority to Adjudicate**

State courts cannot vest that which (under governing federal law) they lack the authority to give.

Family Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > Servicemembers > Retirement

HN7[] **Retirement Benefits, Military Benefits**

The basic reasons McCarty v. McCarty gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay. And those reasons apply with equal force to a veteran's post-divorce waiver to receive disability benefits to which he or she has become entitled.

Military & Veterans Law > Veterans > General Benefits > Compensation for Service Connected Death & Disability

HN8[] **General Benefits, Compensation for Service Connected Death & Disability**

So long as VA disability compensation benefits are paid to the veteran at issue under existent provisions of the federal law, they can not be reached or affected by decree of the trial court.

Constitutional Law > Supremacy Clause > Federal Preemption

HN9[] **Supremacy Clause, Federal Preemption**

State courts may not simply circumvent federal preemption as to disability compensation by relying on arguments rooted in semantics. To recognize the legitimacy of such an argument would eviscerate federal preemption. A court may not do indirectly what it cannot do directly.

Military & Veterans Law > Veterans > Claim Procedures

HN10[] **Veterans, Claim Procedures**

Veteran's disability benefits are not considered to be property. The benefits are statutorily exempt from all claims other than claims of the United States, and are not divisible or assignable.

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Family Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > Veterans > Claim Procedures

HN11[] **Retirement Benefits, Military Benefits**

VA disability benefits attributable to a spouse are reduced upon divorce. *38 U.S.C.S. § 5112(b)(2)*; *38 C.F.R. § 3.501(d)(2)*.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN12[] **Reviewability of Lower Court Decisions, Preservation for Review**

In the absence of a conditional cross-appeal, the court cannot entertain an argument from the appellee attacking the judgment.

Constitutional Law > Supremacy Clause > Federal Preemption

Family Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans Law > Veterans > Department of Veterans Affairs

HN13[] **Supremacy Clause, Federal Preemption**

38 U.S.C.S. § 5301(a)(1) is straightforward and precludes the former spouse from enforcing by legal or equitable process a claim to a portion of the VA disability benefits, either before or after receipt by the other former spouse. That protection extended, and extends, to payments of benefits due or to become due. In short, there is no exception to preemption for purposes of an enforcement proceeding; what *§ 5301* prohibited as to the divorce judgment, it likewise prohibits as to an order purporting to enforce the divorce judgment. The prohibition against attachment, seizure, or other legal or equitable process does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support, in part because the disability benefits include additional compensation for the veteran's dependent children.

Judges: EDWARDS, Judge. Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.

Opinion by: EDWARDS

Opinion

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EDWARDS, Judge.

Dwight Alexander Williams ("the former husband") appeals from a judgment entered by the Coffee Circuit Court ("the trial court") holding him in contempt of court for failing to pay Tenesha Maria Burks ("the former wife") an amount equal to 40% of his veteran's disability benefits, which the trial court awarded to the former wife in a divorce judgment entered on November 28, 2001.

The parties married on December 27, 1989, and separated in June 1999. After the separation, the former wife moved to South Carolina and the former husband remained in Alabama. In the summer of 2000, the former husband was honorably discharged from the United States Army after almost 18 years of service. Based on a claim that the former husband filed with the Department of Veterans Affairs ("the VA"), he was awarded "service connected disability benefits" ("the VA disability benefits"). See *38 U.S.C. § 101(16)* (defining "service connected"). The VA disability benefits were based on injuries the former husband had suffered to his back and feet, among **[*2]** other injuries, as well as the status of his dependents. His initial combined disability rating from the VA was 50%.

Based on a May 1, 2001, letter to the former husband from the VA, the effective date of his claim for the VA disability benefits was August 1, 2000, at which time he was entitled to $689 per month based on his disabilities and his having three dependent children. The letter stated that there would be a reduction in the amount of VA disability benefits as each child attained 18 years of age and noted that the former husband had failed to provide dependent information as to the former wife.[1] Regarding the latter, the letter stated that no additional benefits could be paid to him based on the former wife's status as a spouse until the former husband provided additional information. The letter also stated that, despite the fact that the former husband was entitled to receive payments beginning September 1, 2000, because he had received $49,809.98 as separation pay from the military, the VA was required to "hold back all of [the former husband's] VA disability [benefits] until this separation amount is paid in full." Per the letter, after that amount had been collected, the **[*3]** former husband would "start receiving [his] full VA disability [benefits]."[2]

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[1] The parties were not yet divorced. However, compensation associated with VA disability benefits is reduced upon divorce. See *38 U.S.C. § 5112(b)(2)*. Reductions also are made based on changes in a veteran's physical condition or employability. See *§ 5112(b)(6)*.

[2] The former husband also testified that he had had to repay an approximately $13,000 deficiency that was associated with a VA mortgage that was foreclosed and that that repayment had also delayed his receipt of payments of the VA disability

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At some point in 2000, the former husband filed a complaint in the trial court seeking a divorce from the former wife. After ore tenus proceedings, the trial court entered a divorce judgment on November 28, 2001, that stated, in pertinent part:

> "[The former husband] separated from the U.S. Army on August 31, 2000. ... [H]e received a lump sum separation pay, however, subsequent to this payment was awarded VA disability [benefits] and had to pay this lump sum back at approximately $631.00 per month[3] before he [could] receive the VA disability [benefits]. ...
>
> "....
>
> "10. The [former wife's] request for an award of a portion of [the former husband's] separation pay is denied as the [former husband] is paying this amount back to the government. However, as a part of the property settlement in this divorce, the [former husband] is awarded [sic] to pay to the [former wife] an amount equal to forty percent (40%) of his disability income to begin when he starts to receive said benefits. The [former husband] is further ORDERED, if eligible, to elect Survivor Benefit Plan coverage for the [former wife]. The [former husband] **[*4]** shall name the [former wife], if eligible, as the beneficiary of forty percent (40%) of the monthly payment of his benefits."[4]

(Capitalization in original.) We note that, at $631 per month, the repayment of the former husband's military-separation pay would have taken approximately six and one-half years. The former husband does not dispute that he never paid the former wife any portion of the VA disability benefits, and the former wife testified that she had never received any payments from the VA, although she apparently had attempted to obtain such from the VA.

The former wife remarried in October 2006, and the former husband also remarried at some point. He also worked for a few years but testified that he had not been employed since 2006. The former husband was incarcerated at some point, according to him from 2008 until 2010, and, at one point, his

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benefits. However, the trial court sustained the former wife's objection to that testimony as irrelevant.

[3] It is unclear why the judgment reflects a different monthly repayment amount than that indicated in the May 2001 letter from the VA.

[4] The record from the divorce proceedings is not before us. On December 23, 2020, the former wife filed a motion with the trial court requesting that the record in the present case be supplemented with the transcripts from the divorce proceedings. However, the trial court denied the former wife's motion to supplement the record, noting that the transcripts were not offered into evidence or considered by the trial court in the contempt proceedings. Based on certain statements made by the former wife in the record, it appears that the transcripts might have been purged by the court reporter.

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daughter with the former wife received an apportionment of some of the VA disability benefits, which were paid in care of the former wife.

After the entry of the divorce judgment, the former husband apparently received cost-of-living adjustments to the VA disability benefits, which increased the amount of VA disability benefits, and he **[*5]** filed a claim with the VA as to additional disability. On September 24, 2012, the VA sent the former husband a letter indicating that, effective December 1, 2010, the amount of VA disability benefits to which he was entitled had been increased to $2,870 per month based on various unemployability and compensation adjustments, and that, effective December 1, 2011, the amount of VA disability benefits had been increased to $2,972 per month based on another cost-of-living adjustment.[5] The letter noted that the former husband's combined disability rating had increased to 90%. In addition to the adjustments reflected in the September 2012 letter, the former husband continued to receive additional cost-of-living adjustments that increased the amount of the VA disability benefits, generally in December of each year. At trial, the former husband stated that he was receiving $3,500 per month from the VA and $1,400 in Social Security disability payments and that those were his only sources of income.

On June 18, 2018, the former wife, appearing pro se, filed a complaint in the trial court requesting "the 40% of [the former husband's] disability which was granted .... For years I have not been able **[*6]** to receive benefits from the [VA]." The former wife alleged that the former husband had refused to pay her in accordance with the divorce judgment and that she had "ask[ed] the court for help ...." The former husband filed an answer to the former wife's complaint. He alleged that the former wife was "not eligible to receive alimony or military disability benefits under color of law."

After the former husband filed his answer, an attorney entered a notice of appearance for the former wife, and the trial court allowed the former wife to file an amended complaint. The amended complaint alleged that the former wife "was awarded forty percent (40%) of the [former husband's] disability income to begin when he started receiving said benefits and which he has failed and refused to pay." The former wife requested that the trial court find the former husband in contempt of court and requested such other relief as the trial court deemed appropriate, including payment of all unpaid amounts plus interest, attorney fees, and court costs.

[5] The September 2012 letter also noted that additional benefits were being paid for a minor child.

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The trial court held ore tenus proceedings on July 8, 2020. At trial, the former wife requested that the trial court determine whether the VA disability benefits **[*7]** awarded to the former wife in the divorce judgment were a property settlement or alimony, noted that the former husband had failed to appeal from the divorce judgment, and requested that a judgment be entered regarding the amount of the former husband's arrearage of the VA disability benefits allegedly owed to the former wife.[6] The former husband contended that the VA disability benefits awarded to the former wife could not be recharacterized as an alimony award because, he said, the VA disability benefits were not associated with any retirement and, "[b]y statute, ... he doesn't have to pay anything that's associated with the VA."

On September 17, 2020, the trial court entered a judgment stating that, pursuant to the divorce judgment, the former husband had been

> "ordered to pay to the [former wife], an amount equal to 40% of his disability income as a property settlement. The [former husband] failed or refused to pay the property settlement, despite having the ability to pay, and is in arrears in the principal sum of $191,040.14 for payments due from December 4, 2001, through July 31, 2020. Therefore, judgement is rendered in favor of the [former wife for such amount] ...."[7]

The trial **[*8]** court's September 2020 judgment further stated that the former husband was in contempt of the divorce judgment and taxed court costs against him. The September 2020 judgment continued:

> "As punishment for [the former husband's] contempt and to coerce his compliance with the order to pay, he is sentenced to serve one day of confinement in the Coffee County Jail, and from day to day thereafter, until the found arrearages are paid in full. Said sentence is SUSPENDED on the condition that the [former husband] pay, along with any current property settlement due, the additional sum of $250 per month toward the total arrearages

[6] The former wife conceded that, if the award was alimony, it should have terminated when she remarried in October 2006.

[7] The divorce judgment had awarded the former wife primary physical custody of the parties' minor child (born in 1990) and had ordered the former husband to pay the former wife $174 per month as child support. The former wife's amended complaint also sought to hold the former husband in contempt based on his failure to pay such support and on his failure to pay a child-support arrearage in the amount of $2,964.80 that had accrued during the divorce proceedings. In the September 2020 judgment, the trial court directed the former husband to pay $14,300.80 as a child-support arrearage, plus accrued interest of $11,081.66. The former husband discusses the child-support-arrearage determination in his appellate brief, but he makes no argument for reversal as to that issue.

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> owed, beginning October 1, 2020, and continuing each month thereafter until the balance is paid in full. Should the [former husband] fail to timely make said payment, [he] shall be arrested by the Sheriff and confined in Jail for the term defined herein."

(Capitalization in original.) The trial court denied all other claims.

The former husband timely filed a postjudgment motion, and, on October 15, 2020, the trial court entered an order denying that motion. On November 27, 2020 the former husband timely filed a notice of appeal to this court. See *Rule 4(a), Ala. R. App. P.*; *Rule 6(a), Ala. R. Civ. P.*

On appeal, the former **[*9]** husband argues that the provisions in the parties' divorce judgment relating to the VA disability benefits were "preempted by federal law" and that those benefits were not "within the [trial] court's authority to award." He contends therefore that the trial court erred by holding in him "in contempt for failing to pay [the former wife] her portion of [the VA disability benefits that] she would otherwise be preempted from being awarded in divorce." See, e.g., *Radio Broad. Technicians Loc. Union No. 1264 v. Jemcon Broad. Co., 281 Ala. 515, 522, 205 So. 2d 595, 600 (1967)* ("Preemption rests upon the *supremacy clause of the Federal Constitution, United States Constitution, Art. VI, Cl. 2*, and deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complementary to, or opposes the federal congressional expression. ... Accordingly, congressional action in the area ... precludes state enforcement of its own legislation in that area, unless Congress has also legislated to allow the states to act in areas where Congress normally would be deemed to have preempted the field."). In support of his argument, the former husband relies on federal statutes addressing the exclusion of a veteran's disability benefits from military-retirement benefits for purposes of property division in a divorce proceeding. See *10 U.S.C. § 1408(a)(4)(A)(iii)*.[8] The former **[*10]** husband also refers to precedents construing *§ 1408(a)(4)* in the context of military-retirement benefits that were waived for purposes of receiving veteran's

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[8] *HN1*[↑] Veteran's disability benefits associated with retirement are governed by *10 U.S.C. § 1201 et seq.* *Section 1408* governs, in part, property-settlement awards of the "disposable retired pay" of a member of the military. *Section 1408(a)(4)(A)* defines "disposable retired pay" to exclude from "the total monthly retired pay to which a member is entitled ... [an amount] equal to the amount of retired pay of the member under [*10 U.S.C. § 1201 et seq.*] computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)."

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disability benefits, relying for the most part on *Howell v. Howell, 581 U.S. , 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017)*, and *Brown v. Brown, 260 So. 3d 851 (Ala. Civ. App. 2018)*.

In Howell, John Howell's military-retirement benefits were divided between him and his wife, Sandra Howell, as a part of the division of their community property. As allowed by federal law, John subsequently elected to waive a portion of his military-retirement benefits in order to receive veteran's disability benefits. See *Mansell v. Mansell, 490 U.S. 581, 583-84, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989)* (noting that, *HN2*[⬆] in the context of military-retirement benefits, "[i]n 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" and that such waivers are common because "disability benefits are exempt from federal, state, and local taxation"). Thereafter, Sandra, who had been awarded 50% of John's military-retirement benefits in the parties' divorce judgment, filed a claim against John seeking indemnification or reimbursement for the loss to her military-retirement-benefits award that was attributable to John's waiver. The Howell Court described the circumstances **[*11]** as follows:

> "In this case a State treated as community property and awarded to a veteran's spouse upon divorce a portion of the veteran's total retirement pay. Long after the divorce, the veteran waived a share of the retirement pay in order to receive nontaxable disability benefits from the Federal Government instead. *HN3*[⬆] Can the State subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not. Our cases and the statute make clear that the answer to the indemnification question is 'no.'"

581 U.S. at , 137 S. Ct. at 1402.

In rejecting Sandra's argument that the law permitted such indemnification or reimbursement, the Howell Court discussed Mansell as controlling:

> "Major Gerald E. Mansell and his wife had divorced in California. At the time of the divorce, they entered into a 'property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits.' [*Mansell, 490 U.S.] at*

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586, 109 S. Ct. 2023. The divorce **[*12]** decree incorporated this settlement and permitted the division. Major Mansell later moved to modify the decree so that it would omit the portion of the retirement pay that he had waived. The California courts refused to do so. But this Court reversed. It held that federal law forbade California from treating the waived portion as community property divisible at divorce.

"Justice Thurgood Marshall, writing for the Court, pointed out that federal law, as construed in McCarty [v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981)], 'completely pre-empted the application of state community property law to military retirement pay.' 490 U.S., at 588, 109 S. Ct. 2023. He noted that Congress could 'overcome' this pre-emption 'by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.' Ibid. He recognized that Congress, with its new Act[, 10 U.S.C. § 1408], had done that, but only to a limited extent. HN4[] The Act provided a 'precise and limited' grant of the power to divide federal military retirement pay. Ibid. It did not 'gran[t]' the States 'the authority to treat total retired pay as community property.' Id., at 589, 109 S. Ct. 2023. Rather, Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, **[*13]** in respect to the waived portion of retirement pay, McCarty, with its rule of federal pre-emption, still applies. Ibid."

581 U.S. at , 137 S. Ct. at 1403-04. After noting that "state courts have come to different conclusions on the matter" whether an award of military-retirement benefits could be enforced as to the waived portion of those benefits for purposes of the veteran's receipt of disability benefits, 581 U.S. , 137 S. Ct. at 1404, the Howell Court stated: "This Court's decision in Mansell determines the outcome here. In Mansell, the Court held that HN5[] federal law completely pre-empts the States from treating waived military retirement pay as divisible community property." 581 U.S. at , 137 S. Ct. at 1405. The Court in Howell continued:

> "We see nothing in this circumstance that makes the reimbursement award to Sandra any the less an award of the portion of military retirement pay that John waived in order to obtain disability benefits. And that is the portion that Congress omitted from [10 U.S.C. § 1408's] definition of 'disposable retired pay,' namely, the portion that federal law prohibits state

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courts from awarding to a divorced veteran's former spouse. *Mansell, supra, [409 U.S.] at 589, 109 S. Ct. 2023*. That the Arizona courts referred to Sandra's interest in the waivable portion as having 'vested' does not help. *HN6*[⬆] State courts cannot 'vest' that which **[*14]** (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). ...

"Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to 'reimburse' or to 'indemnify' Sandra, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.

"*HN7*[⬆] The basic reasons *McCarty[v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981)*,] gave for believing that Congress intended to exempt military retirement pay from state community property laws apply a fortiori to disability pay. See *453 U.S., at 232-235, 101 S.Ct. 2728* (describing the federal interests in attracting and retaining **[*15]** military personnel). And those reasons apply with equal force to a veteran's postdivorce waiver to receive disability benefits to which he or she has become entitled."

581 U.S. at , 137 S. Ct. at 1406;[9] see also *Brown, 260 So. 3d at 856* (stating that "the evidence presented in this case indicates that [Michael L. Brown's temporary-disability-retired-list] pay was disability pay that, under federal law, is not to be considered marital property subject to division" and rejecting

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[9] Unlike Howell, Mansell did not address the protection afforded by *38 U.S.C. § 5301(a)*, because it was unnecessary for purposes of the Supreme Court's decision. *Mansell, 490 U.S. at 587 n.6*. Likewise, the Court declined to address in *Mansell* whether the doctrine of res judicata might have barred reopening a marital settlement that had been entered into before the decision in *Mansell, 490 U.S. at 586 n.5*, but that likewise was in the absence of any consideration of *§ 5301(a)*. See discussion, infra.

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Sinead M. Brown's attempt to enforce her property award as against that disability pay via a contempt proceeding); *Ex parte Pummill, 606 S.W.2d 707, 709 (Tex. Civ. App. 1980)* ("[T]he trial court was without the power to divide the V.A. disability compensation benefits; and ... *HN8*[↑] so long as they are paid to [the veteran at issue] under existent provisions of the federal law, they can not be reached or affected by decree of that court. Accordingly, the trial court was likewise without power to hold [the veteran at issue] in contempt for failing to comply with the portion of its order requiring payment of half of the benefits to his former wife. (The division of property attempted was not permissible, so that portion of the decree making the award was void. It necessarily follows that the contempt adjudication, attempting to enforce **[*16]** a void decree or provision thereof, would also be void and unenforceable.)").

The present case does not involve military-retirement benefits or the waiver of military-retirement benefits. The former husband apparently was not qualified for military-retirement benefits when he separated from the military, and he repeatedly testified that the payments he had received from the VA were not for retirement. Instead, the VA disability benefits appear to have been a part of the veteran's benefits governed by *38 U.S.C. § 101 et seq.* Specifically, the former husband was receiving payment for service-connected disabilities that were related to his military service. See *38 U.S.C. § 1101 et seq.* Nevertheless, based on the discussions regarding the protected status of disability benefits in Howell and Brown and on the Court's references in Howell to the pertinent federal statute as to such benefits, namely, *38 U.S.C. § 5301(a)*, as hereinafter discussed, it is clear that the trial court lacked the authority to award the former wife any portion of the VA disability benefits. At trial, the former wife essentially conceded that such an award would be legal error.[10] Nevertheless, she contends, as she did at trial, that she was not awarded 40% of **[*17]** the VA disability benefits but, instead, was awarded an amount

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[10] The issue whether such benefits are divisible as part of a property settlement in a divorce proceeding is well settled in other jurisdictions; they are not. See, e.g., *In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa Ct. App. 1984)* (*HN10*[↑] "[V]eteran's disability benefits are not considered to be property. The benefits are statutorily exempt from all claims other than claims of the United States, and are not divisible or assignable."); ***Ex parte Johnson, 591 S.W.2d 453, 456 (Tex. 1979)*** ("[T]he award to relator's spouse of 50 percent of his anticipated future disability benefits from the Veterans' Administration conflicts with the clear intent of Congress that these benefits be solely for the use of the disabled veteran. The diversion of future payments as soon as they are paid to him by the Veterans' Administration amounts to a seizure of the veteran's benefits for community property purposes and is in conflict with the exemption provision of [*38 U.S.C. § 5301*]."

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equal to 40% of the VA disability benefits. We must reject this argument as the type of semantic exercise that has been foreclosed by *Howell*. See also *Mattson v. Mattson, 903 N.W.2d 233, 241 (Minn. Ct. App. 2017)* ("[A]s recognized in Howell, *HN9*[↑] state courts may not simply circumvent federal preemption [as to disability compensation] by relying on arguments rooted in semantics. *137 S. Ct. at 1406*. To recognize the legitimacy of such an argument would eviscerate federal preemption."); *In re Marriage of Pierce, 26 Kan. App. 2d 236, 240, 982 P.2d 995, 998 (1999)* ("The trial court in this case cannot order [the veteran at issue] to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to [his spouse]. We conclude the court may not do indirectly what it cannot do directly."); cf. *Ex parte Billeck, 777 So. 2d 105, 109 (Ala. 2000)* ("When a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits, the trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law. *Mansell, supra*, and *[10 U.S.C.] § 1408*.").[11]

The former wife also argues, as she did at trial, that the former husband's failure to appeal from the divorce judgment precluded him from challenging **[*18]** the validity of the award of VA disability benefits in the contempt proceeding.[12] We find this argument to be without merit. First, the strong language used by the Court in Howell suggests that the lack of power to award VA disability benefits as part of a property settlement is the type of defect that would make any such award void. *581 U.S. at , 137 S. Ct. at 1405* ("State courts cannot 'vest' that which (under governing

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[11] The former wife also attempts to argue that the apportionment provisions for dependents in *38 U.S.C. § 5307* support her argument. *HN11*[↑] She fails to note, however, that VA disability benefits attributable to a spouse are reduced upon divorce. See *38 U.S.C. § 5112(b)(2)*; *38 C.F.R. § 3.501(d)(2)*; see also *Batcher v. Wilkie, 975 F.3d 1333 (Fed. Cir. 2020)* (affirming a determination that the veteran's former wife was eligible for apportionment of his disability benefits from the time she filed her claim for apportionment until the entry of the divorce judgment at issue). Thus, the apportionment provisions do not support the conclusion that compensation for service-connected disabilities was intended to be for the benefit of a divorced spouse, at least for purposes of a property-settlement award.

Also, the former wife contends that the award in the parties' divorce judgment could be characterized as alimony. That argument, however, contradicts the finding in the September 2020 judgment, and the former wife failed to file a conditional cross-appeal. Thus, we are precluded from considering that argument. See *Huntsville City Bd. of Educ. v. Frasier, 122 So. 3d 193, 202 n.17 (Ala. Civ. App. 2013)* (explaining that, *HN12*[↑] in the absence of a conditional cross-appeal, we cannot entertain an argument from the appellee attacking the judgment).

[12] On appeal, the former wife argues that that issue is barred by the doctrine of res judicata, but she did not expressly reference that doctrine at trial or otherwise discuss the issue of collaterally attacking a judgment.

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federal law) they lack the authority to give. Cf. *38 U.S.C. § 5301(a)(1)* (providing that disability benefits are generally nonassignable)."); *Stone v. Stone, 26 So. 3d 1232, 1238 (Ala. Civ. App. 2009)* ("State courts lack the power to treat a military member's VA disability payments as property subject to division in divorce cases."); see also *Old Dominion Tel. Co. v. Powers, 140 Ala. 220, 227, 37 So. 195, 197 (1904)* ("[T]here can be no contempt in the disobedience of a void order."). Indeed, amidst the various cases from other jurisdictions that the former wife references in her appellate brief is the unreported case of *Foster v. Foster (No. 324853, 2018 Mich. App. LEXIS 809, Mar. 22, 2018) (Mich. Ct. App. 2018)* (not reported in N.W.2d) ("Foster I"), which she fails to note was reversed in part and vacated in part. See *Foster v. Foster, 505 Mich. 151, 949 N.W.2d 102 (2020)* ("*Foster II*") (vacating in part and reversing in part Foster I and remanding the case for consideration of whether a consent divorce decree dividing the veteran at issue's disability **[*19]** benefits could be collaterally attacked on jurisdictional grounds). On remand from *Foster II*, the Michigan Court of Appeals concluded that collateral attack was permissible on jurisdictional grounds associated with federal preemption, see *Foster v. Foster (No. 324853, 2020 Mich. App. LEXIS 4880, July 30, 2020) (Mich. Ct. App. 2020)* (not reported in N.W.2d); however, we note that the Michigan Supreme Court has entered an order granting an application for leave to appeal following the decision on remand, see *Foster v. Foster, 506 Mich. 1030, 951 N.W.2d 681 (2020)*. The former wife's reliance on *Foster I* is therefore unpersuasive.

Second, *§ 5301(a)(1)* states:

> "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 be exempt from taxation, shall be exempt from the claim of creditors, and 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."[13]

HN13[↑] This language is straightforward and precludes the former wife from enforcing "by legal or equitable process" her claim to a portion of the VA disability benefits, "either

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[13] The prohibition against attachment, seizure, or other legal or equitable process "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support," in part because the disability benefits include additional compensation for the veteran's dependent children. *Rose v. Rose, 481 U.S. 619, 634, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987)*.

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before or [*20] after receipt by the [former husband]." That protection extended, and extends, to "[p]ayments of benefits due or to become due." *Ex parte Johnson, 591 S.W.2d 453, 454 (Tex. 1979)* (holding that a veteran could not be imprisoned for his failure to comply with a divorce decree that required him to deposit one-half of his disability benefits for the benefit of his former wife); cf. *Brown, supra.* In short, there is no exception to preemption for purposes of an enforcement proceeding; what *§ 5301* prohibited as to the divorce judgment, it likewise prohibits as to an order purporting to enforce the divorce judgment. See *Mattson, 903 N.W.2d at 241* (overruling, in light of Howell, previous precedents that "held that principles of contract and res judicata could render a stipulated decree indemnifying an ex-spouse enforceable, even if it ran afoul of *Mansell*," and further noting that "Howell effectively overruled cases relying on the sanctity of contract to escape federal preemption").[14]

Based on the foregoing, we pretermit discussion of the remaining issues raised by the former husband. The September 2020 judgment is reversed, and the cause is remanded to the trial court for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., [*21] and Moore, Hanson, and Fridy, JJ., concur.

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[14] We acknowledge that, after Howell was decided, at least one court has continued to rely on the doctrine of res judicata in enforcing state-court orders as to disability-retirement benefits. See *In re Marriage of Kaufman, 17 Wash. App. 2d 497, 512, 485 P.3d 991, 999 (2021)*. As to the VA disability benefits at issue in the present case, however, we cannot square such an approach with the broad language of *§ 5301* and Howell.