

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

DONNA LYNN NORTH,

Plaintiff,

vs.

Case No. 2001-073-DM

JAMES TODD NORTH,

Defendant.

OPINION AND ORDER

Plaintiff moves to adopt the Friend of the Court child support recommendation issued June 2, 2004; defendant objects.

The parties entered into a consent judgment for divorce on December 3, 2001. As part of the property settlement, the parties agreed that plaintiff would receive 50% of defendant's pension plan and VA benefits from the military from the date of the marriage to the date of the entry of judgment. Plaintiff submitted a qualified domestic relations order (QDRO) to the United States Department of Defense Finance and Accounting Service, which was accepted. Prior to the QDRO's acceptance, plaintiff had filed a motion and obtained an order for defendant to show cause concerning past due payments. A hearing was held on April 5, 2004, resulting in an Order of Enforcement of Orders. The April 5, 2004, order provided, among other things, that defendant must pay \$225.00 per month from the date of the judgment of divorce, representing a portion of defendant's VA disability payments, as well as back payments. Defendant moved for reconsideration of that order on April 19, 2004, asking that a formula from the Defense Finance and Accounting Service ("DFAS") be used to compute the dollar amount plaintiff is to

receive from defendant's VA disability benefits. The Court granted the reconsideration on September 3, 2004, and ultimately held that the order of April 5, 2004, is amended to provide that defendant shall make payments to plaintiff of \$162.95 per month for her 50% share of defendant's VA disability benefits, and allowing defendant until October 5, 2004, to pay the back payments of the VA disability benefits, in the amount of \$4,562.60. Plaintiff now moves to adopt the FOC child support recommendation issued June 2, 2004.

As part of her motion to adopt the FOC child support recommendation, plaintiff also refers to the April 5, 2004, court order in which the Court ordered defendant to pay the arrearage owing to plaintiff for her portion of disability benefits, pursuant to the Judgment of Divorce, in the amount of \$225.00 per month. Plaintiff again asks the Court to order payment of that amount, among other relief.

Defendant initially responded and objected to the FOC recommendation by filing a brief in pro per. Defendant makes the following objections: (1) disagrees that the issue of child support should be referred to the FOC; (2) disagrees that he should comply with the April 4, 2004, order in the following respects: (a) entering into a contract for Kacey's braces, (b) paying plaintiff \$853 for medical bills within 60 days, and (c) giving plaintiff 50% of defendant's military disability pay; (3) disagrees that defendant should pay plaintiff's attorney fees; (4) disagrees that defendant should pay child support of \$2081 per month and child care of \$199 per month pending the evidentiary hearing; and (5) disagrees that defendant should pay \$80.00 per month in arrears.¹ Since filing his initial response, defendant obtained counsel.

¹ The dental coverage issue has been resolved, pursuant to an order dated October 6, 2004.

At the time of defendant's motion for reconsideration of the Court's April 5, 2004 order awarding a share of disability benefits to plaintiff, defendant was represented by counsel, and, as stated, the Court was asked to apply a different formula to arrive at the correct amount of disability benefits to be given. At this juncture, defendant has retained new counsel, who requests that the Court determine that no amount of disability benefits be awarded to plaintiff, despite the agreement of the parties in the consent judgment. In supplemental brief, defense counsel argues first that while the divorce decree sets forth that plaintiff is to receive 50% of defendant's military pension and VA disability benefits, the law does not permit a division or payment of VA disability benefits. Defendant maintains this is so even in cases involving a consent judgment for same, and even though a veteran may elect to waive part of his retirement for a greater disability benefit. Defendant contends that the law prohibits the division of a disability pension to thwart the formation of contracts for consideration to pay veterans' benefits to individual other than the veteran him- or herself. Defendant argues that in the divorce context, "consideration" arguably includes the agreement to entirely waive alimony, as was done here. Defendant contends that this provision of the divorce decree is void ab initio.

Second, defendant contends that the June 2, 2004, FOC recommendation neglects to address the disability benefits issue, and as a result inaccurately characterizes income and confuses veterans' benefits with military retirement. Defendant concludes that because the FOC child support recommendation is based on assumptions of the parties' respective incomes which are inaccurate, it should not be adopted.

Plaintiff responds in supplemental brief that it would be unjust not to permit the division of the disability benefit. Plaintiff notes that the amount defendant seeks in

disability benefits would be deducted from the amount of retirement pension he receives. Hence, defendant can unilaterally change his benefits package, resulting in plaintiff receiving less than 50% of the total military package benefit. In the alternative, plaintiff requests that if the Court finds that disability benefits are not divisible as marital property, the Court set aside the judgment of divorce as to the property settlement and alimony, and award alimony in lieu of the benefits both parties bargained for.

The Court will now address whether a stipulation to equally divide all military retirement and VA benefits is enforceable. The Consent Judgment of Divorce provides as follows:

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, pursuant to a Qualified Domestic Relations Order, shall be awarded 50% of the Defendant pension plan and VA Benefits from the Military from the date of the marriage to the date of the entry of this Judgment. Further, Defendant shall fully cooperate in obtaining any and all information that is necessary for said Order and that until implementation of the QDRO, Defendant shall pay 50% of these benefits directly to the Plaintiff.

The federal Uniformed Services Former Spouses' Protection Act ("FSPA") permits state courts to treat all "disposable retired pay" as divisible marital property. *See* 10 USC 1408(c)(1) (1998); *White v White*, 152 NC App 588, 593; 568 SE2d 283 (2002). 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). However, the FSPA defines "disposable retired pay" to expressly exclude military retirement pay waived to receive a corresponding amount of VA disability benefits pursuant to Title 38 of the United States Code, or military disability retirement pay pursuant to Chapter 61 of Title 10. *See* 10 USC 1408(a)(4) (1998). In *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), faced with "one of those rare

instances where Congress has directly and specifically legislated in the area of domestic relations,” *Mansell*, 587, the Supreme Court held that the FSPA “does not grant state courts the power to treat as [marital property] military retirement pay that has been waived to receive veterans['] disability benefits.” *Mansell*, 594-95.

In *Mansell*, the parties 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 which was subsequently waived so that Major Mansell could receive disability benefits. *Mansell*, 585-586. In 1983, Major Mansell asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell. *Mansell*, 586. In arriving at the conclusion that the FSPA “does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans’ disability benefits,” the Court opined:

We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it. *Mansell*, 595.

The Court has reviewed other state case law which notes that the holding of *Mansell* is narrow. Many states have found that while *Mansell* held that state courts could not treat veterans’ disability pay as marital or community property, it does not prohibit military spouses from contracting away their disability benefits. *White, supra*, 592, n 1. For example, the *Mansell* Court did not consider whether such disability benefits could be divided and distributed to a former spouse pursuant to a contract entered into between the parties. *White, supra*, 592, n 1. Indeed, the *Mansell* Court

specified that “[b]ecause we decide that the [FSPA] precludes States from treating as community property retirement pay waived to receive veterans’ disability benefits, we need not decide whether the anti-attachment clause [38 USC 3101(a)], independently protects such pay.” *Mansell*, 587, n 6. “In fact, on remand, the California Court of Appeals held that the parties could agree to treat the husband's gross retirement pay as community property (even though, under *Mansell*, the trial court itself could not do so), and that the court could enforce this agreement between the parties.” *White*, 592; see *In re Marriage of Mansell*, 217 Cal App 3d 219; 265 Cal Rptr 227 (1989). Significantly, the United States Supreme Court denied petitions for *certiorari* and *mandamus* to review this holding. *White*, 592; see *Mansell v Mansell*, 498 US 806; 111 S.Ct. 237, 112 LEd2d 197 (1990).

Most recently, the Minnesota Court of Appeals, decided that “[n]either the Supreme Court's holding in *Mansell* nor the Uniformed Services Former Spouses Protection Act precludes a veteran from voluntarily entering into a contract whereby he or she agrees not to waive retirement pay in favor of disability benefits and to indemnify a former spouse for any loss the spouse might incur should the veteran choose to waive any portion of retirement pay.” *Gatfield v Gatfield*, 682 NW2d 632, 636 (Minn App, 2004). The Minnesota Court further relied upon other state’s cases, e.g., *Krapf v Krapf*, 439 Mass 97; 786 NE2d 318, 326 (2003) (“Nothing in 10 USC 1408 or in the *Mansell* case precludes a veteran from voluntarily entering into a contract whereby he agrees to pay a former spouse a sum of money that may come from the VA disability benefits he receives.”); *Shelton v Shelton*, 78 P3d 507, 511 (Nev 2003) (holding states are not precluded from applying contract law, even when military disability benefits are

involved); *Hisgen v Hisgen*, 554 NW2d 494, 498 (SD 1996) (holding trial court could order husband to pay wife part of disability pay based on parties' divorce settlement agreement).

After careful consideration, the Court is persuaded that *Mansell* does apply to the language of the provision in the consent judgment in this case, and this case is distinguishable from the other state cases. Again, the pertinent provision in the subject consent judgment is phrased, "Plaintiff, pursuant to a Qualified Domestic Relations Order, shall be awarded 50% of the Defendant pension plan and VA Benefits from the Military from the date of the marriage to the date of the entry of this Judgment." This is roughly the same language reportedly used by the Mansells, i.e., that Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay. The other state cases employed slightly different language—including agreements to provide X amount, which amount may be paid by the military member from his disability benefits, and an agreement not to waive retirement pension in favor of disability benefits. The Court is persuaded that, based on *Mansell*, it cannot enforce a consent judgment or order that provides that plaintiff shall receive 50% of defendant's disability benefits. Federal law holding to the contrary preempts this Court's powers. Thus, the amount of income attributable to each party will have to be recalculated to correct for the disability benefit awarded to plaintiff. The Court cannot therefore adopt the FOC recommendation as currently calculated.

The Court further advises that it will entertain a motion by plaintiff to amend the consent judgment as she requests. Property settlement provisions in a divorce judgment are typically final and cannot be modified by the court. *Quade v Quade*, 238 Mich App

222, 226; 604 NW2d 778 (1999). Modifications of property settlements in divorce judgments are disfavored and generally cannot be ordered except under limited circumstances. *Norman v Norman*, 201 Mich App 182, 189; 506 NW2d 254 (1993). Absent fraud, duress, or mutual mistake, courts are bound to uphold property settlements reached through negotiations and agreement by the parties in a divorce action. *Quade, supra*, 226. While plaintiff requests the Court set aside the consent judgment, the Court needs to have arguments and proofs on the record before taking such action; the Court will entertain a proper motion brought by either party.

For the foregoing reasons plaintiff's motion to adopt the FOC child support recommendation is DENIED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

MSS/vs

Dated: November 30, 2004

Cc: James M. Simasko
Attorney at Law
319 N. Gratiot
Mt. Clemens, MI 48043

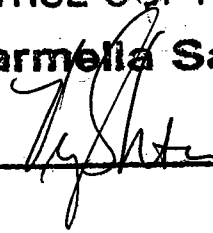
James Todd North
In Pro Per
38100 Hazel
Harrison Twp., MI 48045

MARK S. SWITALSKI

Mark S. Switalski, Circuit Judge

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Carmella Sabaugh
COUNTY CLERK

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