IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 1, 2023

KATY ELIZABETH HAMMOND v. WILLIAM GEORGE HAMMOND

Appeal from the Circuit Court for Montgomery County
No. CC-2018-CV-1635 Kathryn Wall Olita, Judge

No. M2022-01253-COA-R3-CV

A husband and wife entered into a marital dissolution agreement in 2019. Part of the agreement provided that once the husband retired from the United States Army, he would pay the wife alimony in futuro in an amount equal to the amount of military retirement to which the wife was entitled under the agreement. In 2021, the wife filed a motion for contempt alleging, *inter alia*, that the husband was not complying with the alimony requirements. The husband argued that the parties' agreement was unenforceable because it is pre-empted by federal law. Following a hearing, the trial court found that the husband had failed to comply with the agreement but that the contempt was not willful. The husband appeals. Discerning no error, we affirm. We also grant the wife's request for her appellate attorney's fees.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Justin Matthew Hilliard, Clarksville, Tennessee, for the appellant, William George Hammond.

Amy C. Bates, Clarksville, Tennessee, for the appellee, Katy Elizabeth Hammond.

OPINION

BACKGROUND

This is a post-divorce dispute over military retired pay and military disability benefits. William George Hammond ("Husband") and Katy Elizabeth Hammond ("Wife")

married in 2003 in North Carolina and separated in 2018 while living in Clarksville, Tennessee. Wife filed a complaint for divorce on August 17, 2018, alleging irreconcilable differences and inappropriate marital conduct as grounds. She also sought temporary support from Husband, who at the time was a member of the United States Army. The parties attended mediation and agreed to a property settlement and alimony arrangement. The parties both signed a marital dissolution agreement ("MDA") on October 11, 2018. As relevant to the issues on appeal, the MDA provides:

> A. MILITARY RETIREMENT.
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> i. *Award of Retirement*. The Wife (the "Former Spouse") is awarded a percentage of the Husband's (the "Service Member") gross disposable military retired pay, including the same percentage of the gross amount of any future cost of living adjustments (the "award" as used in this Paragraph). The award is computed by multiplying 50% times a fraction, the numerator of which is 183 months of marriage during the Service Member's creditable military service, divided by the Service Member's 240 months of total creditable military service. The award is computed as if the Service-Member Spouse were to retire upon the date of divorce with a retired pay base at the rank of E-7 and over eighteen (18) years of credi[table] service.
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> ii. *Definition of Military Retired Pay*. Under this Agreement and any court order incorporating it, "military retirement," "disposable military retired pay," or "military retired pay" is defined as "disposable military retired pay" under 18 U.S.C. 1408(a)(1) (2018).
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> iii. These parties were married on 07/04/2003 and were married to each other for at least fifteen (15) years during which the Service Member performed at least fifteen (15) years of creditable military service. The Service Member's name is William George Hammond, Social Security Number: XXX-XX-[XXXX], and is a member of the United States Army. The Former Spouse's name is Katy Elizabeth Hammond, Social Security Number: XXX-XX-[XXXX]. The Service-Member's High-3 at the time of the parties' divorce is $4,436.80.
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> iv. *Continuing Exclusive Jurisdiction to Enforce*. The Court shall retain jurisdiction to enforce this Paragraph and the military retirement benefits awarded herein, including but not limited to: the re-characterization thereof as a designation of civil service or other retirement benefits; to make an award of alimony in the sum of benefits payable—including any future cost of living adjustments—if the Service-Member Spouse fails to comply with this Paragraph by, *inter alia*, applying for a disability award, filing for

Bankruptcy, applying for military or civilian regulations or restrictions that interfere with payments to the Receiving Spouse under this Paragraph.

Husband also agreed to alimony in the MDA:

A. SPOUSAL SUPPORT. The Husband will pay to the Wife transitional alimony in the amount of $1,578.00. Each payment shall be due and payable to the Wife on the first day of each month, beginning on November 1, 2018. The Husband shall continue paying such transitional alimony until he is discharged from the United States Army. The Husband may set off any payments made by him towards the Wife's car note and insurance on the parties' 2014 Jeep Cherokee Latitude against his spousal support obligation under this Paragraph.

B. ALIMONY *IN FUTURO*. Beginning upon the Husband's retirement from the U.S. Army, he will pay to the Wife alimony *in futuro* in an amount equal to the Wife's portion of the Husband's military retired pay as calculated under this Agreement. This award shall not be affected by either party's remarriage or cohabitation with a member of the opposite sex, nor is this award modifiable based upon a material change of circumstances, except as necessary to account for the Husband's conversion of military retired pay to disability payments. Both parties acknowledge that this Paragraph is intended solely to protect the Wife's portion of the Husband's military retired pay in light of the Supreme Court's holding in *Howell v. Howell*. Therefore, the Husband's spousal support obligation under this Paragraph shall be set off, dollar-for-dollar, by any amounts the Wife actually receives of her portion of the Husband's military retired pay, as calculated under this Agreement, either from the Defense Finance and Accounting Service (DFAS) or from the Husband directly. Furthermore, the Husband's spousal support obligation under this Paragraph is expressly conditioned upon the Husband's willfully and voluntarily taking any action or making any election that reduces or eliminates the Wife's portion of military retired pay he would have received but for such willful and voluntary actions.

A final hearing was held on June 10, 2019, at which time the trial court entered the final decree of divorce incorporating the MDA. Husband retired from the Army effective May 31, 2020. A statement from October of 2020 shows that during this time, Husband's gross retired pay was $2,332 per month. According to Husband, he began the process "of getting examined by the VA[1] to determine eligibility for disability" soon after he retired.

[1] The "VA" is how the parties and the trial court refer to the U.S. Department of Veterans Affairs.

On March 15, 2021, Wife filed a petition for civil contempt, citing the MDA and noting that Husband was supposed to begin paying Wife alimony in futuro upon his retirement from the military and had not done so. The VA assessed Husband at one-hundred percent disability and notified him that effective December 31, 2021, he would begin receiving "service-connected disability compensation." Husband answered the petition for contempt on May 10, 2022,[2] arguing that

> Wife has failed to state a claim upon which relief may be granted. Because federal law preempts any state court's division of veteran's disability benefits, the Final Decree is unenforceable to the extent it imposes an obligation upon the Husband to indemnify the Wife against a reduction of his military retired pay caused by his obtaining VA disability benefits.

A hearing was held on May 17, 2022, at which both Husband and Wife testified. On July 8, 2022, the trial court entered an order concluding that Husband was in violation of the MDA and owed Wife an arrearage of $8,478.65 in unpaid alimony in futuro. The trial court did not hold Husband in contempt, concluding that his failure was not willful, and crediting Husband's "testimony regarding his confusion and difficulty in determining the exact amount owed in light of the offsets he was entitled to" under the MDA. The trial court also awarded Wife her attorney's fees as the prevailing party and ordered Wife's counsel to submit an affidavit within thirty days. Wife's counsel submitted her affidavit, and the trial court entered a final order on August 12, 2022, finding Wife's requested fees of $6,507.20 reasonable. Husband timely appealed to this Court.

ISSUES

Husband raises a single issue on appeal:

Whether the alimony in futuro provision in the parties' MDA violates federal law by specifically circumventing the ruling in *Howell v. Howell*.

In her posture as appellee, Wife also posits that she is entitled to attorney's fees incurred on appeal.

DISCUSSION

The central issue in this appeal is whether the alimony in futuro provision in the parties' MDA is unenforceable under federal law. "MDAs are essentially contracts, and we construe them as such." *Vlach v. Vlach*, 556 S.W.3d 219, 222 (Tenn. Ct. App. 2017)

[2] At first, Husband proceeded pro se in the contempt action, and the parties engaged in a discovery dispute not relevant to the issues on appeal. Eventually, however, Husband hired counsel who answered the petition on Husband's behalf.

(citing *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001)); *see also Long v. McAllister-Long*, 221 S.W.3d 1, 8 (Tenn. Ct. App. 2006) ("These agreements are contractual in the sense that they are the product of the parties' negotiation and agreement.").

Some background regarding military retirement pay and service-connected disability pay is necessary to understand the issue raised. "Members of the United States Army may retire after a specified period of service and receive 'retired pay.' 10 U.S.C. §§ 3911–3929 (Supp. 2016). The monthly amount of retired pay is based upon years of service and rank. *Id.* §§ 3926, 3991." *Vlach*, 556 S.W.3d at 223. While military pay is an area generally pre-empted by federal law, a state court "may treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1); *see also Vlach*, 556 S.W.3d at 223–24 ("The Former Spouses' Protection Act is only a limited grant of authority to the states in an area that is otherwise preempted by federal law."); *Mansell v. Mansell*, 490 U.S. 581, 584 (1989) ("Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat 'disposable retired or retainer pay' as community property." (footnote omitted) (quoting 10 U.S.C. § 1408(c)(1))). Consequently, disposable retired pay is commonly treated as marital property and divided between spouses in divorce actions, as it was in the present case. *See* Tenn. Code Ann. § 36-4-121(b)(2)(B)(ii) (providing that marital property includes, *inter alia*, "the value of . . . retirement[] and other fringe benefit rights accrued as a result of employment during the marriage").

Disposable retired pay, however, is not the same as service-connected disability benefits.

> [T]o 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. § 3105.[3] Because disability benefits are exempt from federal, state, and local taxation, § 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

Mansell, 490 U.S. at 583–84 (footnote in original).[4] *Mansell* addressed the interplay of disability benefits and marital property division, explaining that "state courts lack the authority to divide as marital property 'total retired pay.'" *Vlach*, 556 S.W.3d at 223–24

[3] For example, if a military retiree is eligible for $1500 a month in retirement pay and $500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any disability benefits.

[4] Several years after the *Mansell* decision, Congress changed federal law to provide that some members of the Armed Forces may receive disability compensation without a corresponding waiver of retirement pay. *See* 10 U.S.C. § 1414. Only certain members of the Armed Forces meet the qualifications for this change, however, and neither party argues that section 1414 affects the present case.

(quoting *Mansell*, 490 U.S. at 588). In *Mansell*, the husband and wife divorced after a twenty-three-year marriage and "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." 490 U.S. at 586. A few years later, Major Mansell moved the court to modify the provision about his disability pay, which the court denied. The California appeals court agreed with the lower court, and the California Supreme Court denied review.

The United States Supreme Court disagreed, however, explaining that Congress could have included disability benefits in the Former Spouses' Protection Act but declined to do so. Rather, the Act provides that

> "a court may treat disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." § 1408(c)(1). The Act's definitional section specifically defines the term "disposable retired or retainer pay" to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. § 1408(a)(4)(B). Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property.

Id. at 588–89 (footnote omitted). The majority acknowledged that its holding "may inflict economic harm on many former spouses[,]" a point that the dissenting justices also noted:

> The harsh reality of this holding is that former spouses like Gaye Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits.

490 U.S. at 595 (O'Connor, J., dissenting).

Consequently, disability benefits may not be treated as marital property subject to division by state courts, and "[s]ince *Mansell*, both courts and practitioners have struggled with how to ameliorate the harm" to former spouses. *Vlach*, 556 S.W.3d at 224. This issue arose again in 2017, when the Supreme Court decided *Howell v. Howell*, 581 U.S. 214. In that case, the parties divorced in 1991 while the husband was a member of the United States Air Force. The trial court awarded the wife fifty percent of the husband's future retired pay to begin upon his retirement. The husband retired the following year, and the wife received her portion of the retired pay without issue for many years. In approximately 2005, however, the VA assigned the husband a twenty-percent disability, and he elected to waive the corresponding amount of his retired pay to receive the non-taxable disability benefits. The waiver reduced the wife's portion of the retired pay. The wife asked the

divorce court to order the husband to pay her the difference, which the divorce court did. It found that the wife had "a vested interest in the prewaiver amount of that pay, and ordered [the husband] to ensure that [the wife] receive her full 50% of the military retirement without regard for the disability." 581 U.S. at 219 (quotations omitted).

The Arizona appeals courts ruled in favor of the wife and upheld the lower court's decision. However, relying on *Mansell* and preemption principles, the Supreme Court reversed. The Court explained that ordering the husband to repay the wife, dollar for dollar, the amount lost due to the waiver was a distinction without a difference:

> We see nothing in this circumstance that makes the reimbursement award to [the wife] any the less an award of the portion of military retirement pay that [the husband] waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse. *Mansell, supra*, at 589, 109 S.Ct. 2023. That the Arizona courts referred to [the wife's] interest in the waivable portion as having "vested" does not help. State courts cannot "vest" that which (under governing federal law) they lack the authority to give.

Id. at 221. The Court also held that following a waiver of retirement pay in favor of disability benefits, a state court may not order the former service member to "indemnify" or "reimburse" the non-service member, as "[t]he difference is semantic and nothing more." *Id.* at 222. Indeed, "[r]egardless 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." *Id.* Nonetheless, the *Howell* Court, like the *Mansell* Court, acknowledged the hardship these rulings inflict on former military spouses, explaining that

> a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.

Id.

Thus, *Mansell* and *Howell* unequivocally provide that state courts may not 1) treat disability benefits as divisible marital property, or 2) order a former service member to provide dollar for dollar indemnity or reimbursement of the lost amount once a former spouse's share of retirement is reduced due to a retirement pay waiver.

The clarity ends there, however. In the wake of *Howell*, state courts have reached a vast array of conclusions regarding its application. For example, many states have determined that although *Howell* prohibits a court from *ordering* post-divorce indemnification or reimbursement as a result of retirement waiver, it does not prohibit a service member from *agreeing* to future indemnification in a negotiated settlement. *See, e.g.*, *Yourko v. Yourko*, 884 S.E.2d 799, 804 (Va. 2023) ("[N]either Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit . . ."); *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022) ("*Howell* does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement."); *Martin v. Martin*, 520 P.3d 813, 818 (Nev. 2022) ("By its plain language, nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in a negotiated property settlement incident to divorce. Rather, the statute in this regard limits what divisions a state court may impose based on community property laws."); *In re Marriage of Weiser*, 475 P.3d 237, 246–47 (Wash. Ct. App. 2020) (applying res judicata to negotiated property settlement requiring indemnification and holding that "the superior court did not err when it concluded that [the husband] had agreed to reimburse [the wife] for any amount she lost due to the disability waiver").

In contrast, some courts apply *Mansell* and *Howell* more expansively, holding that federal law pre-empts even negotiated settlements in which the military spouse agrees to indemnify the non-military spouse in the event of a future retirement waiver. *See, e.g.*, *Foster v. Foster*, 949 N.W.2d 102, 111–112 (Mich. 2020) ("*Howell* and *Mansell* preclude any provision of a divorce judgment requiring that a nonveteran former spouse receive payments in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay . . . This analysis is not undone by plaintiff's insistence that this case is distinguishable from *Howell* because the parties *consented* to plaintiff's continued receipt of funds equal to those she would have received had defendant not elected to receive [disability]."); *Matter of Marriage of Babin*, 437 P.3d 985, 991 (Kan. Ct. App. 2019) ("We are convinced that the division of [a veteran's] disability compensation—even through a mediated settlement agreement—is simply not permitted by federal law.").

Likewise, there is no clear consensus amongst state courts regarding *Howell*'s effect on alimony. The *Howell* Court did not directly address how its holding might affect alimony awards, but mentioned in dicta that state courts may consider the possibility of future retirement waivers "when [they] calculate[] or recalculate[] the need for spousal support." 581 U.S. at 222 (citing *Rose v. Rose*, 481 U.S. 619, 630–634 (1987); 10 U.S.C. § 1408(e)(6)). The result of this language is, again, an array of approaches across the states.

For example, some courts have held that alimony may not be a dollar for dollar match of the amount lost due to the waiver. *See Marriage of Cassinelli*, 229 Cal. Rptr. 3d

801, 807 (Cal. Ct. App. 2018) (quotation omitted) ("We cannot help but conclude that this was, in substance, reimbursement or indemnification. *Howell* was particularly critical of an award that mirrors the waived retirement pay, dollar for dollar."); *Byrd v. Byrd*, 501 P.3d 458, 465 (Nev. Ct. App. 2021) ("[T]he district court specifically ordered [the former service member] to reimburse [his ex-wife] 'from his military pension disability,' which patently violates *Mansell* and *Howell*. And the district court cannot avoid this problem by referring to the allocation as alimony rather than community property . . ."). Moreover, Alabama courts "lack[] the authority to consider any portion of [the retired service member's disability] benefits in determining [an] alimony award."). *Colafrancesco v. Colafrancesco*, 359 So. 3d 1137, 1143 (Ala. Civ. App. 2022).

But at least one court has concluded that *Mansell* and *Howell* are distinguishable from and thus inapposite in an alimony case, as those opinions dealt exclusively with division of community property. *Allen v. Allen*, No. 03-18-00287-CV, 2019 WL 1576086, at *5 (Tex. Ct. App. Apr. 12, 2019) ("This distinction is important because the USFSPA limits the community property available for division to 'disposable retired pay' but imposes no such limitation on alimony.").

Several courts agree, however, that family courts may at least consider, for purposes of adjusting alimony, the loss of income a former spouse suffers when his or her ex-spouse waives retirement pay in favor of disability. *See Marriage of Cassinelli*, 229 Cal. Rptr. 3d at 807 ("*Howell* specifically permitted a state court to take account of a military spouse's waiver of retirement pay in recalculating spousal support."); *see also In re Marriage of Moss*, 978 N.W.2d 251 (Iowa Ct. App. 2022); *Hurt v. Jones-Hurt*, 168 A.3d 992, 1003 (Md. Spec. Ct. App. 2017); *Jennings v. Jennings*, No. 16AP–711, 2017 WL 6343553, at *3 (Ohio Ct. App. Dec. 12, 2017).

Tennessee courts have had few opportunities to consider *Howell* and, unfortunately, those cases do not provide explicit guidance on the precise issue under review. Only two reported Tennessee cases expound on *Howell*. *Sample v. Sample*, 605 S.W.3d 629 (Tenn. Ct. App. 2018), is not illustrative here because it involved a straightforward application of *Howell*. There, the trial court treated the husband's disability pay as divisible marital property following a contested hearing. The husband appealed, and this Court reversed. The second reported case, *Vlach v. Vlach*, 556 S.W.3d 219 (Tenn. Ct. App. 2017), is less straightforward. In that case, the parties were married for twenty years before divorcing in 2002. The final divorce decree incorporated an MDA "grant[ing] [the wife] a percentage of [the husband's] 'disposable retirement pension.'" 556 S.W.3d at 221. A provision therein provided:

> The [w]ife shall receive twenty-six percent (26%) of the [h]usband's disposable retirement pension from the United States Army, with no consideration for disability until the [h]usband is classified as seventy-four percent (74%) disabled. It is the understanding and belief of the Parties that

> the [h]usband's twenty (20) year military retirement will equal to forty percent (40%) of his base pay, meaning that the [w]ife's entitlement would equal twenty-six percent (26%) of the total retirement, but if the percentage of base pay is higher, the controlling figure will be twenty-six percent (26%) of disposable retirement pension. The Parties will be married in excess of ten (10) years at the time of the entry of the Final Decree, during which time the [h]usband served on active duty with the United States Army. For the purpose of this agreement, disposable retirement pension will include, any and all VA, any early-out or separation bonus such as VSI or SSB, or other disability pension to which the [h]usband is entitled. The [h]usband waives any right of privacy, including but not limited to any rights pursuant to the privacy act 10 U.S.C. 1450(f)(3)(A) to the [w]ife in order to obtain information pertaining to the [h]usband's retirement account.
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> It is the Court's intention that if the [w]ife receives a deduction from his military retirement pension, such as for an election of VA disability, then the percentage of the military retirement pension will be adjusted to equal the same dollar sum as if no disability or similar deduction was made, up to 74% as previously stated.

556 S.W.3d at 221. Problems arose quickly over the MDA's meaning as to retirement; however, the trial court determined that the issue was not ripe for review until the husband retired, which he did in September of 2014. The wife renewed a previously filed "Motion to Clarify Final Decree of Divorce" and, following a hearing, the

> trial court found that [the husband] had retired and that, although he had applied for disability, [the husband] was receiving his full retirement without any adjustment for disability. Based on the language of the MDA, the court concluded that "[the wife] should receive twenty six percent (26%) of the [h]usband's retirement and only if he received a VA disability exceeding seventy-four percent (74%) would there be any adjustment in the amount of the retirement benefit to the [w]ife."

Id. at 222. The trial court later amended its order "to provide that [the wife] 'is awarded 26% of [the husband's] total military retired pay.' The order further provided that, 'if [the husband] becomes classified as 74% or more disabled, he may petition this court for appropriate relief.'" *Id.* (brackets omitted). Soon thereafter, the husband filed a motion informing the trial court that he received a one-hundred percent disability rating and arguing that he no longer owed the wife anything. The trial court disagreed, finding that the husband's disability rating "[did] not relieve him of his obligation to pay military retirement." *Id.* Rather, it found that "the language in the MDA concerning the division of the retirement benefit only permitted the court to consider a modification of the percentage awarded if [the husband] was determined to be more than 74% disabled." *Id.*

The husband appealed, arguing that properly understood, "the MDA entitled him to a greater percentage of his retirement in the event of disability and the entire amount in the event of a 100% disability." *Id.* This Court first noted that to the extent the MDA "sought to impermissibly award [the wife] a share of [the husband's] waived retired pay," "the provision runs afoul of the Supreme Court's holding in *Howell* and is unenforceable." *Id.* at 225. We then concluded that the wife was entitled to twenty-six percent of the husband's disposable retired pay; nonetheless, "the practical effect of [the h]usband's receipt of disability benefits might be a complete waiver of retired pay, which would result in [the w]ife receiving no further retired pay. After all, 26% of $0 retired pay is $0." *Id.* at 225. Accordingly, "we modif[ied] the trial court's order to reflect that [the wife was] awarded a percentage interest in [the husband's] 'disposable retired pay' as that term is defined by the Former Spouses' Protection Act." *Id.* at 226.

Vlach suggests, but does not outright hold, that negotiated property settlement agreements should not contain a provision requiring a former military spouse to indemnify his or her ex-spouse in the event of a retirement waiver. What we reviewed on appeal in that case was not enforceability of the MDA or the final decree itself, but rather the trial court's orders, entered many years later, attempting to clarify those documents in light of the parties' competing interpretations. Our ruling in *Vlach* was that the trial court's order should be modified "to reflect that [the wife] is awarded a percentage interest in [the husband's] 'disposable retired pay' as that term is defined by the Former Spouses' Protection Act." *Id.* at 226. Indeed, in a later opinion issued by the same authoring judge, this Court noted that a "potential remedy" for former military spouses

> may be a contractual provision in an MDA or property settlement agreement that requires the military spouse to reimburse or indemnify his or her non-military spouse for any reduction in retirement pay. *But see Vlach v. Vlach*, 556 S.W.3d 219, 224–25 (Tenn. Ct. App. 2017) (suggesting, in dicta, such a remedy may be impermissible).

Harper v. Harper, No. M2020-00412-COA-R3-CV, 2022 WL 1210467, at *5 n.4 (Tenn. Ct. App. Apr. 25, 2022); *Cf. Roberts v. Roberts*, No. M2017-00479-COA-R3-CV, 2018 WL 1792017, at *7 (Tenn. Ct. App. Apr. 16, 2018) (declining to reach the issue of preemption because it was not properly briefed and thus waived, but noting that *Howell* does not "make a distinction between divorce decrees ordered by the court and agreements entered into by the parties," and "casts substantial doubt as to whether state courts may enter divorce decrees of any kind in which the parties seek to divide any service related benefit other than disposable retired pay").

Against this backdrop we must conclude that there is no binding Tennessee case law squarely addressing the question at bar, that is, whether divorcing spouses may negotiate an alimony arrangement requiring the former military spouse to pay alimony in futuro in the same amount as the waived portion of retirement. Having thoroughly reviewed the

record and relevant case law, we conclude that the provision at issue in this particular case is enforceable, and we thus affirm the trial court's decision.

We reach this conclusion for several reasons. First, we are persuaded by the line of cases from other jurisdictions interpreting *Howell* as inapplicable to negotiated agreements as opposed to court orders. *See, e.g.*, *Jones*, 505 P.3d at 230. We agree that nothing in *Howell* suggests that service members cannot determine on their own, without court intervention, how to spend their future disability pay. 581 U.S. at 221 (explaining that *state courts* lack the authority to vest right to disability pay in spouses); *Yourko*, 884 S.E.2d at 804 ("[N]either Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received."). To understand *Howell* as meaning that a service member may not agree to pay alimony out of his or her own disability pay is an overbroad and paternalistic reading of that case. "[P]rovided the money is paid directly to the veteran first[,]" "federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit[.]" *Yourko*, 884 S.E.2d at 804. And, as addressed above, this conclusion does not run afoul of *Vlach* as this question was not squarely addressed by that opinion. *See Harper*, 2022 WL 1210467, at *5 n.4 (noting that *Vlach* only suggests in dicta that such agreements "*may* be impermissible") (emphasis added).

In any event, the present case is further distinguishable from *Howell* and from *Vlach* because it deals with alimony as opposed to divisible marital property. *Howell* specifically provides that one remedy available to military spouses is that trial courts may consider the possibility of future waivers when calculating or recalculating "the need for spousal support." 581 U.S. at 222. Here, the parties capitalized on this remedy by agreeing to the automatic spousal support modification ahead of time, thus saving both Husband and Wife, as well as the trial court, the time and expense of returning to court once Husband waived his retirement in favor of disability. Indeed, Husband does not contend on appeal that Wife is not in need of alimony, as he agreed to pay both transitional alimony and alimony in futuro. Rather, Husband takes issue with the fact that the MDA provides that a retirement waiver warrants an alimony modification and requires him to pay alimony in futuro in an amount equal to the amount of retirement pay to which Wife was entitled under the MDA. By way of a hypothetical, however, if the parties had not agreed on the automatic modification and amount ahead of time, Wife could have filed a petition asking the trial court to set the amount of alimony in futuro, as the parties agreed that a retirement waiver would be a material change in circumstance. Under Husband's proposed reading of *Howell*, then, former military members and their ex-spouses would have to re-litigate alimony in every event of retirement waiver. Insofar as the spirit of *Howell* is to balance protection of veterans' finances with the financial well-being of their former spouses, we are unconvinced by Husband's proposed interpretation.

Finally, Husband raises his issues with the relevant MDA provision several years after the unappealed divorce decree became a final order. However, the parties were well

aware of *Howell* when negotiating the MDA. Husband testified at the contempt hearing that *Howell* and the possibility of a retirement waiver was thoroughly discussed during settlement negotiations and that the alimony in futuro provision was added, with Husband's agreement, to ensure Wife's security. Emails in the record and the testimony from trial show that Husband only reversed course when he and Wife began having disagreements unrelated to alimony following the divorce. Stated simply, Husband agreed to the provision at issue knowing that, pursuant to *Howell*, there was a question as to whether the trial court would have been able to order such a provision. Husband then waited until it suited him nearly three years later to argue that federal law pre-empts the parties' arrangement.

Under such circumstances, we cannot abide Husband's argument. On a practical note, finding in favor of Husband promotes a public policy encouraging current and former service members to negotiate MDAs in bad faith, only to later waive their retirement pay and renege on an otherwise valid contract years later. Such a policy makes little sense in light of *Howell*'s clear acknowledgement that divorce courts may consider the possibility of retirement waivers when determining spousal support issues. Moreover, this Court has previously held that preemption arguments can, like most other arguments, be waived:

> Statutory preemption arguments are not treated differently than other arguments with regard to waiver. In fact, the United States Supreme Court has previously considered whether a statutory preemption argument was waived by the petitioner's failure to timely raise the argument and failure to properly support its argument with the relevant authority prior to appeal. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487, 128 S. Ct. 2605, 2618, 171 L. Ed. 2d 570 (2008)) (citing *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L. Ed. 2d 826 (1976)) (noting that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below")). In that case, the Supreme Court declined to overturn the Court of Appeals' decision to address the issue notwithstanding the delay in the trial court, as the issue was left to the Court of Appeals' discretion. *Exxon*, 554 U.S. at 487. The Court noted, however, that a litigant should not be permitted to "rely on newly cited statutes anytime it wished, [as] a litigant could add new constitutional claims as he went along, simply because he had 'consistently argued' that a challenged regulation was unconstitutional." *Id.* Thus, the United States Supreme Court has held that courts have discretion to rule that preemption arguments were waived by failure to timely raise and properly support arguments to that effect. *See also Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009) (holding that an express preemption argument was waived where it was not timely and properly presented); *Wells v. Tennesee Homesafe Inspections, LLC*, No. M2008-00224-COA-R3-CV, 2008 WL 5234724, at *3 (Tenn. Ct. App. Dec. 15, 2008) (holding that "any preemption argument has been waived"). Both the *Howell* and *Mansell*

> Courts describe this issue as one of preemption. *See Howell*, 137 S. Ct. at 1406 (describing the circumstances as "congressional pre-emption"); *Mansell*, 490 U.S. at 587 (defining the issue as whether state domestic relations law is preempted by federal law with regard to military retirement benefits).

Roberts, 2018 WL 1792017, at *9 (footnote omitted). We further noted in *Roberts* that neither the *Mansell* nor the *Howell* Court "described the federal law as depriving the state court of subject matter jurisdiction[,]" *Id.* at *9 n.11 (citing *Howell*, 581 U.S. at 216–22; *Mansell*, 490 U.S. at 583–95), which is noteworthy because subject matter jurisdiction cannot be waived and can be raised at any time. Nothing in either our case law or *Mansell* or *Howell* suggests that a valid contract may be invalidated years later based on an argument available to the parties when the contract was executed. Consequently, we are unpersuaded by Husband's argument that preemption is a viable argument years after the MDA was entered into and when Husband knew full well his rights under *Howell* and *Mansell*.[5]

In conclusion, we affirm the trial court's ruling on Wife's motion for contempt in all respects. Husband's preemption argument comes too late. Even entertaining Husband's argument, however, we conclude that the parties were free to negotiate and agree to the MDA provision at issue.

Finally, Wife asserts that as the prevailing party, she is entitled to her attorney's fees incurred on appeal.

> (c) A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter,

[5] This conclusion is not unusual. For example, other jurisdictions have declined to find trial court orders or marital settlement agreements invalid where the divorces were final and not appealed and agree that a mistake in preemption analysis does not deprive a state court of subject matter jurisdiction. *See, e.g.*, *Parish v. Parish*, 991 N.W.2d 1, 7 (Neb. 2023) ("[A] majority of state courts have permitted the previously unchallenged division of military benefits to stand based on application of the state's doctrine of claim preclusion or res judicata. . . . It has been widely held, and we agree, that if the military benefits are initially divided by a state court in violation of federal preemption, but the service member fails to file a proper appeal, the decision is final and the benefits at issue are divided in accordance with the initial award."); *Martin*, 520 P.3d at 818 ("[S]tate courts do not improperly divide disability pay when they enforce the terms of a negotiated property settlement as res judicata, even if the parties agreed on a reimbursement provision that the state court would lack authority to otherwise mandate."); *Foster v. Foster*, 983 N.W.2d 373, 384 (Mich. 2022) (quotation and citation omitted) ("[F]ederal preemption under 10 USC 1408 and 38 USC 5301 does not deprive our state courts of subject-matter jurisdiction over a divorce action involving the division of marital property. Therefore, while the offset provision in the parties' consent judgment of divorce was a mistake in the exercise of undoubted jurisdiction, that judgment is not subject to collateral attack.").

> change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

Tenn. Code Ann. § 36-5-103(c).

> In addition to applying to fees at trial, Tenn. Code Ann. § 36-5-103(c) also applies to attorney fees incurred on appeal. *Paschedag v. Paschedag*, No. M2016-00864-COA-R3-CV, 2017 WL 2365014, at *5 (Tenn. Ct. App. May 31, 2017). We, like the trial court, have discretion to award attorney fees incurred on appeal. *Id.*

Strickland v. Strickland, 644 S.W.3d 620, 635–36 (Tenn. Ct. App. 2021).

Wife prevailed in the trial court and on appeal. Under all of the circumstances, we conclude that she is entitled to an award of reasonable attorney's fees to be determined on remand.

CONCLUSION

The ruling of the Montgomery County Circuit Court is affirmed, and this case is remanded for further proceedings consistent with this opinion. Costs on appeal are assessed to the appellant, William George Hammond, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE