COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP428 **Cir. Ct. No. 2003FA271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE MARRIAGE OF:

ANDREW J. NELSON, III,

PETITIONER-APPELLANT,

V.

RENAE L. ARLT, P/K/A RENAE L. NELSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Andrew Nelson III appeals a postdivorce order, arguing the circuit court erred by treating as divisible property the military retirement benefits he waived to receive disability pay. We reverse and remand for further proceedings.

¶2 Andrew and Renae Arlt were divorced in 2004. Andrew was a recruiter for the Minnesota Air National Guard who anticipated retiring in 2005 after acquiring twenty years of service. The divorce judgment awarded Renae $700 monthly limited term maintenance from October 1, 2004 to March 1, 2007. The property division awarded Andrew his "deferred compensation, subject to [Renae's] interest as determined by the Uniformed Services Former Spouse[s'] Protection Act." (USFSPA). [1]

¶3 Andrew retired from active duty military service in January 2006 and began collecting retirement benefits. In July 2006, he received a military disability rating of 40%. In October 2009, the disability rating was increased to 90%, retroactive to July 16, 2006. In order to receive the disability payments, however, Andrew was required to forfeit an equivalent percentage of his retirement benefits.

¶4 Renae applied for direct payments of her portion of Andrew's retirement benefits from the federal Defense Finance and Accounting Service (DFAS), but apparently did not meet its requirements for direct payments because

[1] Military retirement pay in the context of divorce may be viewed as "deferred compensation" for past services, like public sector employee pensions. *See* ***Barker v. Kansas***, 503 U.S. 594, 603 (1992).

she did not have a court order awarding a percentage or fixed amount.[2] On October 15, 2009, Renae filed a motion with the circuit court seeking "19.11% of all of [Andrew's] retirement pay …."[3] Renae's affidavit supporting the motion averred that she was unable to receive direct payment from DFAS, and therefore, "[Andrew] should be paying me my percentage of his military retirement on a monthly basis." Renae further represented that based upon the formula set forth under the USFSPA, she was entitled to 19.11% of Andrew's total monthly retirement benefits.

¶5 The circuit court granted Renae's motion, concluding Andrew had been ordered to pay only limited term maintenance "based partly on the expectation that [Renae] would receive almost $400 a month as her share of [Andrew's] retirement pay." The court further concluded, "[Andrew] has made the unilateral election to waive 90% of his retirement pay, thereby violating th[e] spirit of the court's decision relating to property division and maintenance." Andrew now appeals.

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[2] The Defense Finance and Accounting Service advised that Renae needed "to provide an order which states a percentage or fixed amount you as the former spouse are awarded." DFAS also indicated, "The USFSPA allows us to issue payments directly to a former spouse by percentage or fixed amount as awarded in a court order."

[3] Renae, pro se, brought a motion in July 2007, seeking to "initiate Petitioner's retirement benefit to respondent by writing a specific order for respondent to receive 25% of Petitioner's retirement from start date of his retirement." She purported her motion was brought due to a request by DFAS indicating, "The USFSPA allows us to issue payments directly to a former spouse by percentage or fixed amounts as awarded in a court order." It appears from the record that this motion was withdrawn without prejudice by an attorney Renae contacted to represent her. A motion for revision of judgment was subsequently filed on May 23, 2008. The circuit court issued correspondence dated May 27, 2008, indicating its preference for a scheduling conference. It is unclear from the record what transpired with regard to this motion. In any event, Renae's present motion seeking 19.11% of Andrew's retirement benefits was filed on October 15, 2009.

¶6 Andrew's main argument on appeal is that the USFSPA preempted the circuit court from treating as divisible property the military retirement benefits he waived to receive disability pay. The doctrine of preemption stems from the Supremacy Clause of the United States Constitution and operates to prevent state law from conflicting with federal law. ***Miezin v. Midwest Express Airlines, Inc.***, 2005 WI App 120, ¶9, 284 Wis. 2d 428, 701 N.W.2d 626.

¶7 Federal law rarely displaces state law concerning spousal property division upon divorce, but under some narrow circumstances the application of state family law cuts into substantial federal interests and must yield. *See* ***Hisquierdo v. Hisquierdo***, 439 U.S. 572, 581-83 (1979). Military retirement pay is one example. Pursuant to the USFSPA, Congress authorizes state courts to treat "disposable retired pay" as divisible property. *See* 10 U.S.C. § 1408(c)(1). However, retirement pay waived to receive disability payments is specifically excluded from the definition of disposable retired pay under 10 U.S.C. § 1408(a)(4)(b). *See* ***Mansell v. Mansell***, 490 U.S. 581, 589 (1989).

¶8 Renae concedes that if Andrew had waived his retirement pay prior to divorce, she would not be entitled to any portion of Andrew's disability payments. However, Renae insists that ***Mansell*** involved disability payments the husband was already receiving at the time of the divorce. According to Renae, ***Mansell*** merely held that disability benefits could not be divided "upon divorce"

and never addressed the issue of whether military retirement benefits waived *after* the original divorce judgment were subject to property division.[4]

¶9 We acknowledge that courts are divided as to whether the USFSPA limits the authority of state courts to grant relief when a postjudgment waiver of retirement pay divests a share of a property division allocated to a former spouse in an earlier divorce judgment.[5] *See, e.g.*, cases cited in ***Youngbluth v. Youngbluth***, 6 A.3d 677, 684-88 (Vt. 2010).[6] However, we need not decide which side of the postjudgment fence this court sits because we conclude the circuit court in the present case improperly modified the original property division in any event.

¶10 After Andrew's retirement, the circuit court sought to fashion a new property division by awarding Renae the equivalent of a share of Andrew's disability pay, "a monthly amount equal to what she would have received had [Andrew] not made the unilateral election to waive 90% of his retirement

[4] Renae argues the circuit court decision was not an "abuse of discretion." The Wisconsin Supreme Court changed the terminology from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992). Renae also fails to conform to the requirements of WIS. STAT. RULE 809.19. For example, Renae refers to the parties as "Petitioner-Appellant" and "Respondent-Respondent." Reference to the parties by name, rather than party designation is required. *See* WIS. STAT. RULE 809.19(1)(i).

All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[5] Although Renae cites numerous cases from other jurisdictions, with several exceptions she does not discuss the cases whatsoever. We will not develop arguments. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

[6] We note many of these cases involved a specific monthly amount or percentage of the retirement benefits the spouse was to receive under the original divorce judgment. By contrast, the parties in the present case agreed only to divide Andrew's military pension "subject to [Renae's] interest as determined by the Uniformed Services Former Spouse Protection Act."

benefits." This was based upon the court's conclusion that Andrew "thereby violat[ed] the spirit of this Court's decision relating to property division and maintenance." The court noted that it had ordered only limited term maintenance "based partly on the expectation that [Renae] would receive almost $400 … a month as her share of [Andrew's] retirement pay …." The court stated:

> In awarding [Renae] these payments, this Court is not dividing disability pay received by [Andrew]. Rather, this Court is ordering that [Andrew] pay to [Renae] an amount of money equal to that which she would have received had the expectations of the divorce decree been met.

¶11 By ordering a payment equivalent to the 19.11% of Andrew's disability pay, the court was attempting to offset the effect that Andrew's receipt of disability pay had on the expected retirement benefits due Renae. The effect of the court's order was to reopen and modify the property division in the guise of enforcement of the original divorce judgment.

¶12 However, a final division of property is generally fixed for all time and is not subject to modification. *See* ***Winkler v. Winkler***, 2005 WI App 100, ¶¶15-17, 282 Wis. 2d 746, 699 N.W.2d 652. The rules of civil procedure applicable to divorce cases permit reopening of final judgments only in extraordinary circumstances and within a reasonable time. ***Id.***, ¶16.

¶13 Andrew contends that Renae neither properly moved to reopen and modify the divorce judgment, nor alleged grounds for reopening. Renae fails to reply to this argument on appeal and we therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The circuit court therefore improperly reopened and

modified the property division. Accordingly, we reverse and remand for further proceedings consistent with this opinion.[7]

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] This court held after ***Mansell v. Mansell***, 490 U.S. 581 (1989), that military disability payments may be considered as income in awarding spousal maintenance. *See* ***Weberg v. Weberg***, 158 Wis. 2d 540, 543-45, 463 N.W.2d 382 (Ct. App. 1990). In a footnote in his brief, Andrew argues that if Renae had proceeded in a timely fashion, she could have sought modification of the maintenance award. This argument is underdeveloped and we therefore will not address it further. *See* ***M.C.I.***, 146 Wis. 2d at 244-45.