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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**KRISTINA BROMUND,**  
**Petitioner/Respondent,**

**No. 47602-2019**

**vs.**

**Ada County Case No.**  
**CV-DR-2008-16162**

**KURT BROMUND,**  
**Respondent/Appellant.**

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE GERALD SCHROEDER**  
**District Judge**

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**STATEMENT OF THE CASE**

Kurt Bromund (hereafter “Appellant”) appeals from the District Court ruling affirming the magistrate court’s Order Clarifying Division of Military Retirement entered March 12, 2019.

The parties were married on October 26, 1990. (R., pp. 7.) After marriage, Appellant entered military service on March 18, 1991. (R., pp. 39.) The parties divorced on November 17, 2008. (R., pp. 19.) The Appellant continued his active duty service after divorce, and retired from active duty on April 30, 2018. (R., pp. 39.)

The JUDGMENT AND DECREE OF DIVORCE entered on November 17, 2008 was entered by default. (R., pp. 18.) At the time of the entry of the decree, Appellant’s military retirement had not fully vested since he had not yet completed the requisite 20 years of active duty service. The decree was ultimately entered had been drafted by the Petitioner *pro se* and contains the following paragraph regarding Appellant’s military retirement:

9. **RETIREMENT ASSET.** Plaintiff is awarded her community interest share of the Defendant’s eventual military retirement benefits. Her share of said benefit shall be determined by the following formula:

$$\frac{\text{Number of days of marriage}}{\text{Number of the days of Defendant’s active duty}} \times \frac{1}{2} \times \text{Net disposable retirement benefit}$$

(R., pp. 21.)

After entry of the decree, Appellant filed the current action to identify the retirement benefit more precisely and to clarify the division of the asset. In his motion before the Magistrate Court, Appellant argued that the retirement benefit subject to division is a federal entitlement which is defined by the federal statute and rule. Appellant further argued that the

2017 National Defense Authorization Act (“2017 NDAA”) defined the military retirement subject to division in this case and defined the formula for division of the retirement in a divorce.

The Appellant brought the issue before the magistrate court by way of a motion to clarify the division of military retirement. The parties each filed memorandums regarding the division of the military retirement, and the magistrate court issued its ORDER CLARIFYING DIVISION OF MILITARY RETIREMENT. In that decision, the magistrate ordered that the retirement be divided using the “time rule.” (R., pp. 31-32.) Appellant appealed, the District Court affirmed, and Appellant appealed to this court. (R., pp. 41-46; 48-50.)

### **ISSUES**

The issues on appeal are:

- (1) Did the Magistrate err in concluding that military retirement benefits earned after the date of divorce are a divisible community property asset?
- (2) Did the Magistrate’s err in concluding that the amendment to 10 U.S.C. § 1408, which became effective after entry of the decree but before the appellant’s retirement from the military, did not define the portion of the military retirement that constitutes community property?
- (3) Did the District Court err in concluding that the amendment to 10 U.S.C. § 1408 do not apply to a decree of divorce entered prior to the date of the statute’s amendment when the military member was still on active duty after the amendment?
- (4) Did the the Magistrate’s error in holding the decree of divorce reflected the parties’ mutual intent regarding division of Appellant’s military retirement was harmless error?

## STANDARD OF REVIEW

When the court reviews issues decided in the magistrate court that are then presented to a district court on appeal, the Court reviews the magistrate court's decision independently of, but with due regard for, the district court's appellate decision. *Balderson v. Balderson*, 127 Idaho 48, 51 (1994) (citing *Ireland v. Ireland*, 123 Idaho 955, 957-58 (1993)). The Court will uphold the findings of the magistrate court if the findings are supported by substantial and competent evidence but shall freely review issues of law. *McNelis v. McNelis*, 119 Idaho 349, 351 (1991); *In re Mundell*, 124 Idaho 152, 153 (1993).

The magistrate court has discretion regarding the disposition of community property and unless there is evidence to show an abuse of that discretion, the award of the magistrate court will not be disturbed. *Chandler v. Chandler*, 136 Idaho 246, 249 (2001) (citing *Maslen v. Maslen*, 121 Idaho 85, 88 (1990)).

The question of preemption of Idaho Law through the Supremacy Clause of the federal Constitution is a question of law over which the Court exercises free review. *In re Estate of Mundell*, 124 Idaho 152, 153 (1993).

## ARGUMENT

- I. The Magistrate erred in concluding that military retirement benefits earned after the date of divorce were a divisible community property asset.

The issue before the Magistrate was whether or not the amendment to 10 U.S.C. 1408 in the 2017 NDAA applied to the division of the Appellant's military retirement. The formula that

would be used to divide the retirement if 10 U.S.C 1408 applies was not at issue. The trial court did not articulate its reasoning in declining to apply the Federal statute to Appellant's retirement. Instead, the Magistrate relied upon its conclusion that the parties agreed to use a time rule to divide the retirement. The Magistrate then saw the issue as one of intent of the parties.

The District Court then affirmed the Magistrate, but did so on different grounds by finding the 2017 NDAA did not apply that the Magistrate's reliance upon the parties' intent was harmless error. (R. p. 44).

II. The District Court erred In Finding the 2017 NDAA does not apply to final decrees of divorce, verse final property settlement orders.

This District Court's interpretation of the 2017 NDAA is inconsistent with the full language of the statute. The District Court found that 10 U.S.C 1418 includes a note which limits the amendments application. As will be discussed below, Appellant argues that the limitation only applies to the final order dividing military retirements. It does not apply to any to preceding judgments or orders which might be entered prior to the final "property settlement."

The Magistrate and the District Court failed to appreciate that military retirement benefits, along with a few other Federal retirement programs, are not typical community property assets. These Federal entitlements can only be divided as allowed by Federal law. They are divisible only as allowed by Federal law. Congress can always change the rules and regulations that govern the receipt of this benefit. In this case, Congress amended 10 U.S.C. § 1408 to define or clarify the entitlement available to a former spouse. The amendment was enacted after



the divorce was entered but before Appellant's retirement and before entry of the final order dividing or clarifying the division of Appellant's military retirement.

The Magistrate applied a "time rule," and ordered the division of military retirement as if the military retirement were a typical community property asset. In doing so, the Magistrate failed to recognize that the state court does not have authority to apply the time rule to military retirement if doing so is prohibited by Federal law. The Magistrate cited *Hunt v. Hunt* 137 Idaho 18 (2002) as support for finding the time rule was agreed upon by the parties. In *Hunt* case, the trial court had found the parties had intended to use the time rule in dividing the husband's retirement. In addition, the trial court found the time-rule was the most equitable. However, the trial court in *Hunt* acknowledged that the time rule was on always the appropriate calculation and that the time rule is not necessarily the most equitable in all circumstances. *Id* at 782.

In the instant case, the Magistrate recognized that the accrued benefits rule was another method of dividing retirements, and she recognized that the method of dividing military retirement argued for by the Appellant under 10 U.S.C. § 1408 would value the retirement at the time of divorce. Nevertheless, the Magistrate relied upon the Magistrate's mistaken belief that the parties intended to use the time rule to find that the time rule should be used in the final order dividing.

The Magistrate failed to recognize that military retirement is not a typical asset. Military retirement is more like social security than it is a retirement account or pension, and the Federal statutes governing division of that entitlement have changed several times.

In *McCarty v. McCarty*, the United States Supreme Court held that the states did not have authority to divide military retirement. *McCarty v. McCarty*, 453 U.S. 210 (1981). The Court held that military retirement is a federal entitlement program and was, therefore, not subject to division by state courts, unless Congress specifically granted state courts that authority. *Id.* Since *McCarty* it is well-settled that Federal statute defines the retirement available to be divided.

Following the *McCarty* decision, Congress passed the Uniformed Services Former Spouses' Protection Act ("USFSPA") authorizing states to divide military retirement in a divorce action. Since the USFSPA was passed, it has been well established that a state court's authority to divide military retirement flows only from this Federal grant of jurisdiction.

The Court's recognition of Federal preemption was reiterated in *Howell v. Howell*, 137 S.Ct. 1400 (2017). In the *Howell* case, the Court held that the states had no authority to divide military retirement pay that had been waived by the service member for disability payments. *Id.* at 1403. In that case, the trial court ordered the retired military member to pay the ex-spouse indemnify a divorced spouse for the loss of the retirement pay caused by the military member's waiver of retirement to receive disability pay. *Id.*

In 2017, Congress amended 10 U.S.C. § 1408. With this amendment Congress defined more precisely the portion of the military retirement that is available to the state court's to divide. With the amendment Congress specified that the portion of military retirement that could be divided by a state court to only that portion the member would be entitled to if he or she had retired on the date of divorce. The statute now reads:

. . . in the case of a division of property as part of a final decree of divorce, dissolution, annulment, or legal separation that becomes final prior to the date of a member's retirement, the total monthly retired pay to which the member is entitled shall be-- (i) in the case of a member not described in clause (ii), the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation, as computed under section 1406 or 1407 of this title, whichever is applicable, increased by the sum of the cost-of-living adjustment . . .

This case can best be resolved with a careful reading of the Federal statute and noting the differences in meaning of certain words and phrases in the Federal law verses our state community property law.

Under 10 U.S.C. § 1408, a “final decree of divorce” is first entered. The decree is not final as that phrase is used in Idaho family law. Under the Federal statute , the “final decree” can then be modified. The “final decree” or the “modified final decree” may or may not included the “property settlement.” “Property settlement” under the Federal statute does not mean “property settlement agreement.” Rather it means the final order dividing retirement. The property settlement—the final order anticipated by the Federal statute—is entered either at the time of the final decree or subsequent to the final decree. That property settlement is the “court order” defined in 10 U.S.C 1408 (a)(2). The note to 10 U.S.C 1408 which limits application of that section is referring, not to a decree entered before the amendment—but a property settlement. That is, the limitation is to final orders dividing military retirement entered before the amendment. Any other reading of the statute would make a significant portion of the language of the statute superfluous. The statute makes clear that the orders to which it is to apply will include a “previously entered decree.” 10 U.S.C. 1408(a)(2). Then section 1408(B) states that

section (A) applies to a “division of property” in a “final decree” that “becomes final prior to the member’s retirement, shall be . . .”

That code section would not be needed if it were only to apply to decrees entered after the date of the amendment. That is, the 2017 NDAA would not need differentiate between a final decree and the final property settlement. The only reason for that distinction is to clarify that the amendment applies to final decrees where the member is still on active duty, versus final property settlement orders.

A “property settlement” under the Federal statute is an order issued after a final decree, or modified final decree. The “property settlement” is the last step in the process of dividing a military retirement. The “property settlement” can be in the original final decree, the modified decree, or a separate order incident to either. Under any reading of 10 U.S.C. § 1408(a)(2), the last step in the division of a military retirement is a property settlement that is issued with the decree or incident to the decree. Clearly the settlement is often ordered after the decree has become final. The ultimate division of retirement between parties in the Federal scheme is a “property settlement.” In Idaho we would often identify what the Federal statute calls a “property settlement” as an “Order Dividing Military Retirement.”

In the accompanying recommendations from the committee that proposed the amendment, the committee stated that “[t]his provision is prospective only and would not affect existing “settlements.” S. Rep. 114-225 at 168. This note was relied upon by the District Court in affirming the Magistrate’s decision. However, that note must be read with an understanding of the Federal process. 10 U.S.C. § 1408 has the final property division occurring often after the

entry of a final decree. A “divorce settlement” would be the order or settlement dividing the retirement. This note clearly should not be read to mean final decrees of divorce as use in Idaho. Doing so, would require we ignore the language of the statute that makes the distinction between a member who has divorce and retired, and the member who has divorced by is still serving.

Here, the divorce decree was entered November 17, 2008. However, the Appellant did not retire from the military until April 20, 2018, at which time his military retirement became available. Appellant retired after the 2017 amendment to 10 U.S.C. § 1408. Appellant filed a Motion for Order Clarifying Division of Military Retirement on January 2, 2019 for an order that met the requirements of the Defense Finance and Accounting Service (DFAS) so that the office could pay Respondent directly. DFAS will not make payments to former spouses of service members without an order that complies with its requirements. The Magistrate Court then entered an order Clarifying Division of Military Retirement (hereafter “Order Clarifying”) on March 12, 2019 where the Magistrate court ordered that the time rule be used to divide all of Appellant’s retirement benefits, including those which accrued after the date of divorce. (R. pp. 30-32).

The Order Clarifying is a “court order” as defined under 10 U.S.C. § 1408(a)(2) because it is a “division of property” from a “final decree” or “decree modifying the terms of a previously issued decree of divorce.” 10 U.S.C. § 1408. The amendment is applicable to “any division of property as part of a final decree of divorce” defined by 10 U.S.C. § 1408 that become final *after* the enactment of the amendment. 10 U.S.C. § 1408; PL 114-328 Sec. 641(b).

III. The Magistrate erred in finding that military retirement benefits earned after the date of divorce are a community property asset subject to the court's authority to divide.

A state court has authority to divide military retirement as community property under a grant of authority from Congress but what constitutes military retirement available as community property is governed by federal law.


In *McCarty v. McCarty*, the court concluded that state courts had no ability to divide military retirement because doing so significantly interfered with the federal interests associated with military retirement. *McCarty v. McCarty*, 453 U.S. 210 (1981). Congress has since granted state courts the authority to divide the community portion of military retirements but it remains the province of Congress to define military retirement. *Howell v. Howell*, 137 S. Ct. 1400 (2017). Military retirement benefits are currently defined by 10 U.S.C. § 1408.

Here, the original cause of action was for an order clarifying division of military retirement so that DFAS could pay the Respondent her portion. The Appellant's position regarding the interpretation of 10 U.S.C. § 1408 is consistent with the guidance set out by DFAS. Although that agency's interpretation of the statute is not binding, it is helpful in understanding the integration of the Federal entitlement program and orders flowing from divorces, and an understanding of those relationships aids the interpretation of the statute the agency is enforcing. DFAS has interpreted 10 U.S.C. § 1408 as limiting the available entitlement to that earned as of the date of divorce for any member still on active duty on January 1, 2017.

## CONCLUSION

The Magistrate erred in holding the 2017 amendment to 10 U.S.C. § 1408 did not apply to parties in this case and the relying on an erroneous finding of the parties' intent. The District Court erred in holding the application of the 10 U.S.C. § 1408 did not apply to any decree entered prior to the passage of the amendment. Finally, the Magistrate failed to recognize that the military retirement benefits earned after the date of divorce cannot be divided by a state court. For the foregoing reasons, the Magistrate's decisions, and the District Court's affirmation of that decision, should be overturned and the case remanded with instructions to have an order entered consistent with 10 U.S.C. § 1408.

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John A. Miller

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12<sup>th</sup> day of March, 2020, I caused to be served a true and correct copy of the foregoing document by the method and address indicated below to the following:

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