

Case Materials 2003 Update

McNABB v. McNABB, 65 P.3d 1068; 2003 Kan. App. LEXIS 237

Appellee mother filed a petition for an order of child support against appellant father and moved for determination of jurisdiction. The Sedgwick District Court (Kansas) found that it had subject matter jurisdiction to determine child custody and visitation, and personal jurisdiction to determine child support, despite the existence of an earlier proceeding on those subjects in the State of Virginia. The father appealed.

The parties and their child resided together in Virginia until December 1999, when the mother and the child moved to Kansas. In April 2000, the father filed a petition for determination of custody and visitation in Virginia. In July 2000, the mother filed a petition in Kansas. The appellate court reversed and remanded the district court's decision because: (1) Virginia had initial child-custody jurisdiction as the child's home state under *Va. Code Ann. § 20-146.12* and *Kan. Stat. Ann. § 38-1348(a)*; (2) Virginia's exclusive jurisdiction continued after the Kansas proceeding was filed; (3) the Kansas judge failed to assume jurisdiction under *Kan. Stat. Ann. §§ 38-1348(2), 38-1353(a)*, before the Virginia judge vacated his deferral; thus, Kansas had no jurisdiction over the father under the Uniform Child Custody Jurisdiction and Enforcement Act, *Kan. Stat. Ann. § 38-1336 et seq.*; and (4) Kansas had no personal jurisdiction over the father under the Uniform Interstate Family Support Act, *Kan. Stat. Ann. § 23-9,101 et seq.*, because there was insufficient evidence to support the exercise of personal jurisdiction over the father under *Kan. Stat. Ann. § 23-9,201(e)*.

The district court's order was reversed and remanded for entry of an order of dismissal

ATCHISON v. ATCHISON, 256 Mich. App. 531; 2003 Mich. App. LEXIS 1100

The parties resided in Michigan. The mother moved to Canada to care for a sick family member. Thereafter, the father filed for a divorce. However, a custody proceeding was already pending in Canada. After the Canadian court awarded joint custody, the father filed a motion for a change of custody in Michigan. After the trial court determined that it did not have jurisdiction over the case under the Michigan Uniform Child Custody Jurisdiction and Enforcement Act, *Mich. Comp. Laws § 722.1101 et seq.*, the father sought review. In affirming, the court determined that Michigan courts were only allowed to modify custody orders of other states/foreign countries under certain circumstances. The father failed to meet either of the mandatory criteria set forth in *Mich. Comp. Laws § 722.1203*. Exclusive jurisdiction of the case remained with the Canadian court. Further, the trial court was not required to communicate with the Canadian court before declining to exercise jurisdiction. Pursuant to *Mich. Comp. Laws § 722.1206*, such communication was not required.

The judgment of the trial court was affirmed.

Schroeder v. Schroeder, Respondent, 658 N.W.2d 909; 2003 Minn. App. LEXIS 393

The Cook County District Court, Minnesota, granted judgment in favor of appellee mother by asserting subject matter jurisdiction over a California child custody and support order and modifying the order. Appellant father appealed.

The father argued that California retained jurisdiction over a child custody and support order, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), *Minn. Stat. § 518D (2002)*, the Uniform Interstate Family Support Act (UIFSA), *Minn. Stat. § 518C (2002)*, and the Full Faith and Credit for Child Support Orders Act, *28 U.S.C.S. § 1738B (2000)*. The appellate court determined that, under *Minn. Stat. § 518D.202* and *Cal. Fam. Code § 3422* of the UCCJEA, California retained exclusive jurisdiction over the decree, as the father was still a California resident. The father's failure to timely challenge the mother's registration of the California order did not bar his

challenge to subject matter jurisdiction. Under UIFSA, the mother had no support or arrearage-related issue as to the California support order that she could enforce against the father, and the mother was not entitled to register it for enforcement in Minnesota. Because the father resided in California and the mother resided in Minnesota, the mother could not satisfy the requirements for modification of the California support order under *Minn. Stat. § 518.C.611(a)(1)(i)-(ii)*.

The judgment was reversed and vacated, where California had jurisdiction over the custody of the child.

SHELLEY SACKETT v. HAL ROSEMAN, 2003 Tenn. App. LEXIS 480

Appellant mother brought an interlocutory appeal from the decision of the Circuit Court for Davidson County (Tennessee), which found in favor of appellee father and granted his motion for summary judgment finding that it had jurisdiction pursuant to the Uniform Child Custody Joint Enforcement Act (UCCJEA).

The interlocutory appeal was brought to determine whether the trial court properly exercised subject matter jurisdiction pursuant to the UCCJEA. The circuit court granted the father's motion for summary judgment, finding that it had jurisdiction over the matter and granting the mother permission to seek an interlocutory appeal of the grant of summary judgment. The question that the mother's application placed before the court was whether at the time of the petition a trial court in Tennessee had proper subject matter jurisdiction to consider issues of custody and visitation. The court stated that it did, pursuant to *Tenn. Code Ann. § 36-6-216*, and that neither Wyoming nor Colorado had jurisdiction under § 36-6-216(a)(1). In addition, the children and the father had a significant connection with the State. The father was a resident and the children repeatedly visited that resident in the State. As a result, there was substantial evidence available in Tennessee concerning the children's care and protection by virtue of their continued visitation with the father.

The court held that the circuit court had subject matter jurisdiction at the time the father's petition was filed and remanded to the trial court for further proceedings.

FOLEY, v. FOLEY, 576 S.E.2d 383; 2003 N.C. App. LEXIS 110

Appellant father challenged an order concluding the Wilkes County District Court (North Carolina) had subject matter jurisdiction over a child custody dispute with appellee mother, who filed a complaint seeking temporary and permanent custody of the parties' minor child.

Where the record had no evidence to show a trial court had subject matter jurisdiction over a custody dispute, the appellate court vacated the order and remanded the case to the trial court to determine whether it had subject matter jurisdiction under any one of the four bases outlined in the Uniform Child-Custody Jurisdiction and Enforcement Act, specifically *N.C. Gen. Stat. § 50A-201* (2001), and to make the appropriate findings of fact to support the conclusions of law. The trial court erred in ruling the signing of a consent order by the father waived any challenge to the subject matter jurisdiction of the trial court. Subject matter jurisdiction could not be waived. There was no direct evidence of the minor's place of birth, the length of time the minor resided in West Virginia or North Carolina, or whether the minor resided in North Carolina during the six months prior to the commencement of this proceeding. There was no evidence the West Virginia court had subject matter jurisdiction but declined to exercise it. There were no court records from West Virginia. The orders had no home state determination to show trial court had subject matter jurisdiction.

The lower court decision was vacated and remanded.

PEREGOY v. PEREGOY, 358 N.J. Super. 179; 817 A.2d 381; 2003 N.J. Super. LEXIS 87

Plaintiff mother appealed from a judgment of the Superior Court, Chancery Division, Family Part, Ocean County (New Jersey), that granted defendant father's application for an injunction barring the return of the parties' child to the mother, who lived in Oklahoma, and ordering her to pay child support. She argued that the trial court had ignored New Jersey's Uniform Child Custody Jurisdiction Act, *N.J. Stat. Ann. § § 2A:34-28 to -52* (UCCJA).

The parents' settlement agreement, incorporated in their divorce, specified New Jersey as the child's home state for purposes of the UCCJA, but also seemed to refer to the possibility of some other home state in the future. The mother moved to Oklahoma with the child, and made sure that he returned for all agreed visitation with the father, but at the end of the summer visit the father brought an ex parte proceeding seeking custody. He supported his petition with conclusory statements, and at later proceedings the mother was not allowed to present a full home study that Oklahoma authorities had completed. The appellate court noted that if it had reviewed the case earlier, it would have ordered the child returned immediately, because the parties' long ago agreement could not be enforced in such a matter as to avoid the trial court's obligation under the UCCJA to consult with an Oklahoma court. Since a year and a half had passed, however, New Jersey had become the child's home state under the laws of both jurisdictions, so further proceedings, including consultation with Oklahoma authorities, were required before a decision could be made.

The court reversed the judgment in all respects and remanded the matter for further proceedings in accordance with the UCCJA and other child custody laws.

Harris v. Harris, 2003 Tex. App. LEXIS 1913

The District Court of Travis County, 261st Judicial District, Texas, granted judgment in favor of appellee father by determining that the Mississippi child support award governed the action, but Texas controlled child custody issues over foreign jurisdictions. Appellant mother appealed.

The mother alleged that the trial court erred by failing to confirm the registration of the Mississippi child support orders and in failing to designate which Mississippi custody order it was purporting to modify. By asking the Texas court to determine which Mississippi child support order was controlling, the appellate court found that the mother was attempting to collaterally attack the Louisiana order concerning child support, which she could not do in Texas. The Louisiana court had taken jurisdiction and had recognized the Mississippi judgment as controlling. This observation indicated that Louisiana was the proper forum to adjudicate the child support issue. Any error in the Louisiana court's recognition of an invalid Mississippi order had to be raised in Louisiana pursuant to *Tex. Fam. Code Ann. § 159.611*. The Texas trial court had jurisdiction to address issues of custody because Texas was the child's home state for six months prior to the commencement of the child custody proceeding, and no parent or child continued to reside in Mississippi. The Texas order superseded and controlled over all prior foreign child custody determinations.

The judgment of the trial court was affirmed.

IN THE INTEREST OF Y.M.A. AND Y.M.A. , 2003 Tex. App. LEXIS 57

Appellant husband sought review of an order of the 324th District Court of Tarrant County (Texas), which granted appellee wife's motion for expedited enforcement of a foreign child custody determination.

The husband argued that: (1) the trial court erred in granting the motion, as the determination was based on an irrebuttable presumption under Egyptian law that a mother shall have custody of a male child until the child was 10 years old; and (2) the trial court erred in granting the motion, as the wife had previously sought general, affirmative relief from Texas courts and therefore was estopped from relying upon a temporary order from an Egyptian court. As to the first argument, the husband claimed that his rights to due process under the United States Constitution and Texas Constitution were violated, as he failed to receive notice of the lawsuit. The argument, however, was overruled, as he failed to preserve error for review of the instant court. As to the second argument, the husband claimed Texas had jurisdiction over the entire case, not Egypt. However, Egypt was the child's home state and had jurisdiction to make the initial child custody order; the family had lived in Egypt within the six months before commencement of the wife's proceeding, and the wife continued to live there, despite the child's absence one month before the Egyptian proceeding was filed.

The order was affirmed.

In re the Termination of Parental Rights to Thomas J.R., a Person Under the Age of 18: Tammie J.C., Petitioner-Respondent-Petitioner, v. Robert T.R., Respondent-Appellant, 2003 WI 61; 663 N.W.2d 734; 2003 Wisc. LEXIS 431

Petitioner mother sought to terminate the parental rights of respondent father, who was in prison in Arizona, was served with notice there, and participated in the trial by telephone. The circuit court denied the father's motion to dismiss and ultimately terminated his parental rights. The court of appeals (Wisconsin) reversed on the basis that Wisconsin did not have personal jurisdiction over the father. The mother appealed.

In reversing, the court noted that the child was left without a forum because when the circuit court gave the parties an opportunity to seek resolution of the jurisdictional question in an Arizona court, that court concluded that it could not exercise jurisdiction. Although the father did not have minimum contacts with Wisconsin, the court found that under the Uniform Child Custody Jurisdiction Act (UCCJA), *Wis. Stat. § 822*, traditional personal jurisdiction was not required in child custody proceedings. The status exception to general personal jurisdiction requirements provided a basis for the exercise of jurisdiction. Examining the five Asahi factors, the court found that such an exercise of jurisdiction was consistent with notions of fair play and substantial justice. *Wis. Stat. § 801.05(11)* provided sufficient due process protection to out-of-state parents based on notice and an opportunity to be heard. Further, the father was afforded notice, an opportunity to be heard either in person or telephonically, and an opportunity to petition the Arizona court. Thus, Wisconsin's exercise of jurisdiction did not violate the father's due process rights.

The court reversed the decision of the court of appeals and remanded the cause to the court of appeals for a determination on the remaining issues previously raised in that court, but not briefed or argued on review.

Though you might be interested in these cases:

**Gayliene Marie Longo, appellee and cross-appellant, v. Dean Jay Longo, appellant
and cross-appellee.**

No. S-02-394.

SUPREME COURT OF NEBRASKA

266 Neb. 171; 663 N.W.2d 604; 2003 Neb. LEXIS 99

June 20, 2003, Filed

PRIOR HISTORY:

[**1] Appeal from the District Court for Sarpy County: William B. Zastera, Judge.

DISPOSITION:

Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former husband appealed an order of the Sarpy County District Court, Nebraska, dissolving his marriage to appellee former wife, who cross-appealed.

OVERVIEW: The husband, a commissioned officer on active duty in the United States Air Force, argued that the trial court erred in awarding the wife: (1) an interest in his future military pension benefits; and (2) alimony of \$ 1 per year modifiable only upon a potential reduction to his future military pension by a potential future disability offset. The wife argued that the award of alimony was inadequate and that the property division was inequitable. The instant court concluded that the trial court did not err in awarding the wife a share of the husband's future nondisability military pension entitlement, payable only if and when such benefits became payable to the husband. Federal law did not prohibit and state law permitted the trial court's decision. While there was a disparity in the earning power of the parties, in the absence of evidence that the wife chose to forgo a career or education because of the marriage, the award of nominal alimony was not an abuse of discretion. Because there was a significant disparity in the division of marital debt, the trial court did not abuse its discretion in awarding the husband slightly more marital assets to account for some of this disparity.

OUTCOME: The judgment was affirmed.

HEADNOTES:

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

3. **Divorce: Property Division: Armed Forces: Pensions.** Federal law does not preempt the power of a state court to treat the future nondisability pension entitlement of a spouse currently on active military duty as a marital asset in a dissolution proceeding.

4. **Divorce: Property Division: Armed Forces: Pensions.** *Neb. Rev. Stat. § 42-366(8)* (Reissue 1998) requires that a nonvested military pension be treated as marital property in a dissolution proceeding.

5. **Divorce: Property Division: Armed Forces: Pensions: Alimony.** While a Nebraska court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate, it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether there has been a material change in circumstances which would justify modification of an alimony award.

COUNSEL:

Carl J. Kretsinger, P.C., for appellant.

Eileen Reilly Buzzello and Brandie M. Fowler, of Holthaus Law Offices, for appellee.

JUDGES:

Hendry, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

OPINIONBY:

Stephan

OPINION:

Stephan, J. [*172]

Dean Jay Longo appeals from an order of the district court for Sarpy County dissolving his marriage to Gayliene Marie Longo. He contends that the court erred in awarding Gayliene (1) an interest in his future military pension benefits and (2) alimony of \$ 1 per year modifiable only upon a potential reduction to his future military pension by a potential future disability offset. Gayliene cross-appeals, arguing that the award of alimony was inadequate and that the property division was inequitable.

I. FACTS

The parties married on August 15, 1991. At all times during the marriage, Dean was a commissioned officer on active duty in the U.S. Air Force. At the time of trial, he held the rank of lieutenant colonel and had served on active duty for 18 years. Dean testified that he could remain at his present rank until retirement. However, he had no guarantee [*2] of being permitted to continue his service as a commissioned officer, as his service was at the pleasure of the President of the United States.

Dean testified that neither he nor the U.S. government contributed on a monthly basis to a pension fund for his benefit. Instead, after 20 years of active duty, Dean will become eligible to apply for retirement status and receive a monetary pension if his application is approved. Dean understood that if he served [*173] 20 years and then retired, his pension would be calculated on the basis of a percentage of his salary at the highest rank achieved. Dean testified that it was his intention to eventually retire from the Air Force.

Gayliene resided in California at the time of trial. She was employed there as an assistant manager of a department store at a base salary of \$ 1,200 per month, plus commissions. Gayliene was employed outside the home at various times during the marriage, but at other times, she stayed home with the parties' two minor children. It was difficult for her to obtain consistent employment due to the frequent moves necessitated by Dean's military career. Following dissolution of the marriage, Gayliene intended to return to school [*3] for 2 years and obtain her teaching credentials. She requested alimony of \$ 1,000 a month for 5 years. She also requested a portion of Dean's future retirement, based on their 10 years of marriage during his military service.

On April 1, 2002, the district court entered a decree of dissolution. The court concluded that it had jurisdiction over the parties and awarded sole custody of the two minor children to Dean, with rights of visitation to Gayliene. Dean was awarded the marital home subject to its mortgages, for a net equity of approximately \$ 10,000, and each party was awarded certain personal property. The marital debts were also divided.

With respect to Dean's military pension, the court found that the parties were married for 10 of the years that Dean had been on active military duty. The court determined that Dean would continue his military career until retirement and that there was a likelihood that Dean would receive his pension. Therefore, "based upon the years of marriage [and] years overlapping in service," the court awarded Gayliene

\$ 690.68 of [Dean's] net disposable non-disability military pension commencing on the first day of the first month during [*4] which [Dean] is entitled to receive and is in receipt of same; and, on the first day of each month thereafter for so long as [Dean] shall be entitled to receive such or until the death of [Gayliene], whichever event should occur first.

The court also awarded Gayliene alimony in the sum of \$ 1 per year for life, "to be modifiable only upon [Gayliene's] portion of [the] military pension being reduced by a portion of said pension [*174] being received as disability." Dean filed this timely appeal, and Gayliene cross-appealed.

II. ASSIGNMENTS OF ERROR

Dean assigns, restated and summarized, that the trial court erred in (1) awarding Gayliene an interest in his future military retirement benefits and (2) awarding Gayliene alimony of \$ 1 per year for life modifiable only upon a future reduction to the military pension by a disability offset.

On cross-appeal, Gayliene assigns, restated, that the trial court erred in (1) awarding only \$ 1 per year in alimony, (2) tying the alimony award to the property division, and (3) making an inequitable property division.

III. STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the **[**5]** record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002); *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003); *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003).

IV. ANALYSIS

1. Division of Future Military Pension Benefits

The primary issue on appeal is whether the district court was legally authorized to award Gayliene a portion of any military pension which Dean may receive in the future. Dean contends that this was impermissible because he was not receiving or eligible to receive such pension at the time of the **[**6]** decree and that thus there was no asset to be divided. He bases this argument on both federal and state law.

(a) Federal Law

[*175] Prior to 1981, division of military pensions in dissolution actions was governed exclusively by state law. In that year, however, the U.S. Supreme Court decided *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), in which it held that federal law precluded a state court from dividing military nondisability retired pay pursuant to state law. The Court reasoned that then-existing federal law clearly intended that all retirement benefits be enjoyed by only the service member. After reaching its conclusion and noting the harsh result such conclusion could impose, the Court noted that "Congress may well decide ... that more protection should be afforded a former spouse of a retired service member." 453 U.S. at 235-36.

Congress responded by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1401 et seq. (2000). Initially, this legislation was viewed as a complete grant of authority to the states to divide military nondisability retirement pay pursuant **[**7]** to state law. See *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) (citing cases). This interpretation, however, was limited by the U.S. Supreme Court in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). In that case, the Court addressed the issue of whether the USFSPA authorized state courts to treat military retirement pay waived by the retiree in order to receive veterans' disability benefits as property divisible upon divorce. Before directly addressing the issue, the Court found:

Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.

Mansell, 490 U.S. at 588. In a footnote, the Court noted that it used the phrase "community property" only because the case at hand involved such law and that both its decision in *Mansell* and the USFSPA were equally applicable to equitable property division states. 490 U.S. at 584 n.2. **[**8]** Thus, according to *Mansell*, the USFSPA must affirmatively grant a state the power to **[*176]** divide a military pension, or the preemptive effects of *McCarty* remain applicable.

Dean's primary argument on appeal is largely based on *Mansell*. He argues that the current form of the USFSPA provides in relevant part:

Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, 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). Section 1408(a)(4) defines "disposable retired pay" to mean "the total monthly retired pay to which a member is *entitled*," less certain identified amounts. (Emphasis supplied.) Dean contends that because he has not yet served on active duty for 20 years, he is not presently "entitled" to a pension benefit, and that therefore the district court lacked the authority to divide his future military pension. He argues that *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), prohibited state courts from dividing any military **[**9]** pensions and that states now possess only that authority to divide pensions that is expressly granted to them by the subsequent enactment of the USFSPA.

In *Mansell*, *supra*, the U.S. Supreme Court acknowledged that "domestic relations are preeminently matters of state law" and that federal legislation is rarely intended "to displace state authority in this area." 490 U.S. at 587. The Court noted its prior cases holding that federal preemption in this area would not be found in the absence of a showing that it is positively required by direct enactment. Based upon the "plain and precise language" of the definitional section of the USFSPA, the Court concluded that Congress precluded the states from treating as marital property retirement pay waived by a service member in order to receive disability benefits. 490 U.S. at 589. Thus, the question presented here is whether use of the word "entitled" in § 1408(a)(4) is a plain and precise prohibition of any division of military pension benefits to which a spouse may become entitled in the future.

Reading this language in the context of other provisions of the USFSPA, we conclude that the language **[**10]** cannot be so construed. For example, § 1408(d)(1) states in relevant part:

[*177] In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. *In the case of a member not entitled to receive retired pay on the date of the effective service of the court order*, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay. (Emphasis supplied.) This statutory language indicates that a court can order division of pension benefits which a service member will receive in the future. In addition, § 1408(c)(3) provides: "This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section." Although Dean argues that this provision supports his interpretation that the USFSPA authorizes disposition only of retirement pay currently being received, it can also be reasonably interpreted as applying to pension benefits which a spouse currently on active military duty will receive upon **[**11]** future retirement. If the USFSPA were construed to permit a court to order division of a military pension only after a service member had retired, this provision would be superfluous.

[3] Neither the parties' briefs nor our research has disclosed any case construing the USFSPA as preempting the power of a state court to treat a future military pension entitlement as a marital asset in a dissolution proceeding. Dean relies upon two cases in which the Supreme Court of Arkansas held that a share of future military pension benefits could not be awarded in a dissolution proceeding, but both of these cases are based upon an interpretation of state law and do not address federal preemption. See, *Christopher v. Christopherd*, 316 Ark. 215, 871 S.W.2d 398 (1994); *Durham v. Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986). Similarly, other state courts considering whether it is permissible to treat a future military pension entitlement as a marital asset have relied upon state law to resolve the issue. See, *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995) (finding under state law future military pension is divisible asset); *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984) **[**12]** (finding under state law future military pension is divisible asset); *Southern v. Glenn*, 677 S.W.2d 576 (Tex. App. 1984) (finding under state law future military pension is divisible). See, also, Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*, 31 Fam. L.Q. 19 (1997). We conclude that federal law does not preempt the power of a state court to treat the future nondisability pension entitlement of a spouse currently on active military duty as a marital asset in a dissolution proceeding. We therefore turn to the issue of whether such treatment is permissible under Nebraska law.

(b) Nebraska Law

Neb. Rev. Stat. § 42-366(8) (Reissue 1998) provides in relevant part that the marital estate which is subject to equitable division in a dissolution proceeding includes "any pension plans, retirement plans, annuities, and other deferred compensation benefits *owned by either party*, whether vested or not vested." (Emphasis supplied.) Dean argues that because he has no guarantee of receiving a military pension in the future, he has no ownership interest under this

statutory provision. This argument, however, runs **[**13]** contrary to our decisions involving the treatment of military pension benefits in dissolution proceedings.

For example, in *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985), the husband had served on active duty for 15 years at the time of the divorce decree. We noted that § 42-366(8) requires a court to include any pension and retirement plans in the marital estate, but does not require that each pension be divided between the parties. We therefore concluded that the trial court did not abuse its discretion in awarding the husband his interest in the military pension and the wife the entire value of the marital home in lieu of any interest in the pension. Although this case did not involve the division of a nonvested military pension, it supports the proposition that a military pension which has not vested because the service member is not yet eligible to retire is nevertheless properly considered as a part of the marital estate under § 42-366(8).

Similarly, in *Anderson v. Anderson*, 222 Neb. 212, 382 N.W.2d 620 (1986), the husband had been on active military duty for 16 years prior to the dissolution decree. We concluded that sixteen-twentieths **[**14]** of the amount the husband would receive **[*179]** each month in military retirement pay was acquired during the marriage and that the district court therefore did not abuse its discretion in awarding the husband all interest in his pension, subject to the condition that he pay his wife \$ 500 per month at the time he began to receive such benefits.

The military spouse in *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986), had served on active military duty for 17 years prior to the dissolution. The district court awarded him sole interest in his military pension and awarded the wife \$ 500 a month in alimony "to compensate her for an interest in the Air Force pension." *Id.* at 328, 383 N.W.2d at 754. We noted that under § 42-366(8), "any pension benefits may be considered as marital property, and thus divisible in a dissolution of marriage action, whether or not the pension is vested." *Id.* at 327-28, 383 N.W.2d at 754. We further concluded that the court did not abuse its discretion in considering the pension as the source of the funds for the award of alimony. One concurring judge wrote separately to emphasize that the court was considering a **[**15]** military pension that was not yet vested as part of the marital estate, noting that this approach was "logical" under § 42-366(8). *Ray*, 222 Neb. at 330, 383 N.W.2d at 755 (Brodkey, J., concurring).

[4] We agree with Justice Brodkey's observation that § 42-366(8) logically requires that a nonvested military pension be treated as marital property in a dissolution proceeding. While military personnel do not make monetary investments in a pension plan, they invest time and personal sacrifice in order to qualify for a nondisability military pension. Spouses of such personnel share in this investment to the extent that the duration of the marriage coincides with the period of military service. As one court has noted, the future retirement pay of a career military service member who is not yet eligible to retire "is a contractual right, subject to a contingency, and is a form of property." *Jackson v. Jackson*, 656 So. 2d 875, 877 (Ala. Civ. App. 1995). Because § 42-366(8) specifically requires the inclusion of retirement benefits "whether vested or not vested" in the marital estate, we conclude that the district court did not err in awarding Gayliene **[**16]** a share of Dean's future nondisability military pension entitlement, payable only if and when such benefits become payable to Dean.

[*180] Dean also argues that the trial court erred in its division of his military pension because the trial court contemplated future increases beyond the termination of the marital estate. Dean does not, however, specifically challenge the court's calculation of the future pension benefits. The court noted in the decree that its division of the pension benefits was "based upon the years of marriage [and] years overlapping in service." Although no calculations are included in the record, this language indicates that the trial court considered only the years in which the marriage coincided with Dean's military service in determining Gayliene's share of pension benefits. We find no abuse of discretion in this regard.

2. Alimony

The trial court awarded Gayliene alimony in the sum of \$ 1 per year for life, "to be modifiable only upon [Gayliene's] portion of [the] military pension being reduced by a portion of said pension being received as disability." Both Dean and Gayliene contest this award of alimony.

[5] Dean essentially contends that the award **[**17]** of alimony was an improper attempt to circumvent the limitations of *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989). As noted, *Mansell* held that that portion of military retired pay waived in order for a member to receive disability benefits is not divisible under the USFSPA. Because of this holding, if a former spouse is awarded a certain percentage of military retirement benefits in a divorce decree and the member spouse subsequently voluntarily reduces his or her military retirement pay in order to receive disability benefits, the "pie" from which the former spouse's percentage is taken is reduced, thus reducing the

total monthly payment to the former spouse. See *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997). However, we held in *Kramer*, 252 Neb. at 546, 567 N.W.2d at 113, that

while a Nebraska court may not include service-connected disability benefits awarded to a military retiree as a part of a marital estate under *Mansell* [citation omitted], it may consider such benefits and the corresponding waiver of retirement pension benefits required by federal law in determining whether [**18] there has been a material change in [**181] circumstances which would justify modification of an alimony award

In this case, the award of nominal alimony modifiable only upon a change in the nature of Dean's future pension benefits is consistent with our holding in *Kramer* and does not constitute an abuse of discretion.

In her cross-appeal, Gayliene argues that the award of alimony in the sum of \$ 1 per year was inadequate and that the award was improperly tied to the property division. She contends that alimony is to be considered separate from property division and that the record demonstrates that Dean's earning power has exceeded and will continue to exceed her earning capacity. Specifically, she argues that she chose to forgo additional education in order to assist Dean with his military career and that an award of alimony is necessary to correct the economic imbalance of the parties.

A review of the record indicates a definite economic imbalance between the parties, although it is not as significant as Gayliene contends. Gayliene's earnings of approximately \$ 12,000 in 2001 were derived from approximately 6 months' employment after she moved from Nebraska to California in [**19] June of that year. On an annual basis, therefore, she could anticipate earnings of at least \$ 24,000. Moreover, Gayliene's argument that she chose to forgo additional education in order to further Dean's military career is not supported by the record. In fact, Gayliene testified that she did go to school periodically during the marriage. Although she did not have outside employment during a 2-year period when she chose to stay home with the children, during other times, she was employed and earned approximately \$ 25,000 per year. The record further indicates that Gayliene voluntarily left the marital home and her family on two separate occasions and obtained employment sufficient to support herself.

Dean's 2001 W-2 form indicates that he earned approximately \$ 5,500 per month. The district court calculated Dean's total monthly income for purposes of child support calculations at \$ 7,500. Thus, while there is a disparity in the earning power of the parties, we conclude that in the absence of evidence that Gayliene chose to forgo a career or education because of the [**182] marriage, the award of nominal alimony was not an abuse of discretion.

3. Property Division

On cross-appeal, Gayliene [**20] also argues that the property division was inequitable, as she received only a few items of personal property, while Dean received all items in the family home and the home itself. The trial court valued the home at \$ 135,000, but also assigned Dean all debt on the home, with a resulting equity award of approximately \$ 10,000. Gayliene received her clothing, a table, her automobile, a bedroom set, a television, a DVD player, and some miscellaneous personal property, all of which she had taken with her when she moved to California. She contends that while the marital debts were divided evenly, the assets were not.

Gayliene's argument that the marital debts were divided evenly is not well founded. As noted above, Dean was assigned all of the debt on the marital home, which totaled approximately \$ 125,000. In addition, the decree specifically assigned him debts totaling approximately \$ 19,000. Gayliene was assigned debts totaling approximately \$ 8,000. There is therefore a significant disparity in the division of marital debt, and the district court did not abuse its discretion in awarding Dean slightly more marital assets to account for some of this disparity.

V. CONCLUSION

Federal [**21] law does not prohibit and state law specifically permits the district court's inclusion of Dean's future nondisability military retirement benefits in the marital estate and its award of a portion of such benefits to Gayliene. We find no abuse of discretion in this or any other aspect of the property division or the alimony award in this case. The judgment of the district court is affirmed.

Affirmed.

Constance E. KRAPF vs. Albert H. KRAPF.

SJC-08872

SUPREME JUDICIAL COURT OF MASSACHUSETTS

439 Mass. 97; 786 N.E.2d 318; 2003 Mass. LEXIS 263

February 4, 2003, Argued

April 2, 2003, Decided

PRIOR HISTORY:

[***1]

Civil action commenced in the Middlesex Division of the Probate and Family Court Department on October 6, 2000. The case was heard by Beverly Weinger Boorstein, J., and a motion for reconsideration was heard by Judith Nelson Dilday, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review. *Krapf v. Krapf*, 55 Mass. App. Ct. 485, 771 N.E.2d 819, 2002 Mass. App. LEXIS 978 (2002)

DISPOSITION:

Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: In plaintiff former wife's action for declaratory and monetary relief for defendant former husband's breach of a separation agreement, the court granted the husband's application for further review after the Massachusetts Appeals Court modified and affirmed a trial court order that the husband pay the wife an amount equal to what she would have received as half of the husband's military retirement pay as well as her appellate attorney fees.

OVERVIEW: The husband was an able-bodied military reservist at the time the parties divorced, and their separation agreement directed that pursuant to 10 U.S.C.S. § 1408 the wife would receive half of his military pension. In succeeding years the husband began to suffer from post-traumatic stress disorder and was awarded successive veterans' disability levels, until he was 100 percent disabled. At each level of disability, he waived a commensurate amount of retirement pay to avoid double dipping. Since disability benefits were not divisible under § 1408, the wife was left with almost nothing. The high court held that the issue was not one of federal law, but of contract interpretation. Separation agreements under *Mass. Gen. Laws ch. 208, § 34* made the parties fiduciaries to each other, and the husband had violated his obligation by keeping all his money for himself. The trial court could not order the division of the disability payments themselves, but it could order the husband to satisfy his financial obligation to the wife out of whatever resources he had.

OUTCOME: The court affirmed the judgment as modified.

HEADNOTES:

Divorce and Separation, Separation agreement, Pension benefits, Attorney's fees. Pension. Veterans. Declaratory Relief. Practice, Civil, Declaratory proceeding, Attorney's fees. Res Judicata.

COUNSEL:

Clarence V. LaBonte, Jr. (F. Joseph Gentili with him) for Albert H. Krapf.

Joseph S. Tangusso for Constance E. Krapf.

JUDGES:

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

OPINIONBY:

[**319] Marshall

OPINION:

[*98] MARSHALL, C.J.

Albert H. Krapf (defendant) appealed from a declaratory judgment ordering him to pay to his former spouse, Constance E. Krapf (plaintiff), an amount equal to the military pension income she would have received pursuant to the parties' separation agreement (agreement) had the defendant, after the divorce, not voluntarily and without the plaintiff's

consent waived his military retirement benefits in order to receive Veterans Administration (VA) disability payments. The defendant also appealed from the judge's order that he pay the plaintiff's appellate attorney's fees *pendente lite*. The Appeals [***2] Court affirmed the declaratory judgment with modifications. *Krapf v. Krapf*, 55 Mass.App.Ct. 485, 492, 771 N.E.2d 819 (2002). We granted the defendant's application for further appellate review. We conclude that the judge acted properly in construing and specifically enforcing the agreement and in awarding the plaintiff appellate counsel fees, *pendente lite*. Accordingly, we affirm the declaratory judgment, as modified by the Appeals Court, see *id.*, and the award of attorney's fees.

1. *Facts*. The core facts are undisputed. In 1984, after twenty-seven years of marriage and three children, the defendant filed for divorce from the plaintiff. At the time, the plaintiff was approximately fifty-one years old; the record does not disclose either her health status or her employment status. The defendant was approximately forty-nine years old. He was on inactive or reserve duty in the United States Army. According to his counsel at oral argument, the defendant was "able bodied," in good health, and suffered from no known or suspected disability.

On December 5, 1985, the parties entered into the separation agreement, three provisions of which are germane to this [***3] case. First, the parties agreed that the plaintiff would receive \$ 200 a month in alimony for seven months, and that "thereafter, neither [party] will make any claim against the other for alimony, support or maintenance." Second, the parties agreed that the defendant would "cause to be entered by the Middlesex Probate Court an order allocating half his pension rights with the U.S. Army to the [plaintiff]." Third, the parties provided [*99] that, if the agreement were breached, the breaching party "shall be responsible for all reasonable costs incurred by the non-breaching party to enforce" the agreement. n1 The agreement was incorporated [**320] in the divorce judgment but survived as an independent contract. n2

n1 The agreement also contained general representations that the parties had made full financial disclosure to each other; that they had entered into the agreement freely, voluntarily, and fully apprised of their rights; and that they believed that the agreement was "fair, adequate and reasonable" in light of the factors set out in *G.L. c. 208, § 34*. The parties agreed to submit "any dispute or disagreement concerning the performance, interpretation, meaning or application of" the agreement to the Probate and Family Court. [***4]

n2 In 1989, the parties modified the agreement to reduce the sum the plaintiff was due from the sale of certain real estate and to modify certain child-related provisions. The modification, which survived, also restated the alimony waiver. The terms of the modification agreement are not relevant to this appeal.

On June 2, 1986, a judge in the Probate and Family Court entered a qualified court order, see *10 U.S.C. § 1408(a)(2) (2000)*, n3 directing the Secretary of the Army to apportion to the plaintiff fifty per cent of the defendant's "disposable retire[ment] or retainer pay" accrued as of December 5, 1985, the date of the judgment of divorce nisi. n4 The qualified court order stated that it was "intended to carry out an approved property settlement" entered in connection with the judgment nisi. In May, 1994, the defendant separated from the army after thirty-seven years of service. Both he and the plaintiff began receiving their respective fifty per cent allotment of the defendant's [*100] military retirement benefit, including periodic cost-of-living increases, [***5] directly from the Department of Defense. See *10 U.S.C. § 1408(d) (2000)*.

n3 "The term 'court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree) ... which ... provides for ... division of property...." *10 U.S.C. § 1408(a)(2)(B)(iii) (2000)*.

n4 See *10 U.S.C. § 1408(a)(4) (2000)* (defining "disposable retired pay"). State courts are authorized to treat disposable retired pay as sole property or as marital property in accordance with the law of the court's jurisdiction pursuant to *10 U.S.C. § 1408(c)*. "Disposable retired pay" excludes military retirement pay waived to receive Veterans Administration (VA) disability benefits. See *10 U.S.C. § 1408(a)(4)(B)*. Presently, every State appears to consider military retirement pay to be divisible marital property. See Note, State-by-State Analysis of the Divisibility of Military Retired Pay, *Army Law*. 42 (Aug 2002).

[***6]

In early 1997, without the plaintiff's knowledge, the defendant applied for VA disability benefits on the ground that he suffered from post-traumatic stress disorder stemming from his army service. See 38 U.S.C. § 1110 (2000) (wartime disability). In April, 1997, the VA classified the defendant as ten per cent disabled. In April, 1998, it reclassified him as fifty per cent disabled; and in June, 2000, it reclassified him as one hundred per cent disabled. With each determination of increased disability, the defendant received a commensurate increase in VA disability income. However, because Federal law prohibits a military retiree from "double dipping" into Federal retirement accounts, see *Mansell v. Mansell*, 490 U.S. 581, 583, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989), the defendant executed a waiver that reduced his military retirement payments one dollar for every dollar of VA disability payments he received. See 38 U.S. § 5305 (2000). n5 Because the waiver applied to the defendant's total military retirement pay, his election to forgo his army pension reduced [***321] not only his own military retirement income but also that of the [***7] plaintiff, as follows:

April, 1997, reduced from \$ 1,009.04 to \$ 969.09 a month;

May, 1998, reduced from \$ 969.09 to \$ 797.38 a month;

June, 2000, reduced from \$ 787.38 to \$ 145 a month.

n5 Unlike military retirement pay, VA disability pay is exempt from taxation. See 38 U.S.C. § 5301(a) (2000). "Not surprisingly, waivers of retirement pay [to receive VA disability benefits] are common." *Mansell v. Mansell*, 490 U.S. 581, 584, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989).

As of April 4, 2001, the defendant's total VA disability payment was \$ 2,166, an amount that included a stipend for his current wife. He received an additional \$ 145 each month in military retirement pay. The plaintiff received only \$ 145 each month in military retirement pay. In other words, after he obtained a one hundred per cent disability rating, the defendant's service-related income more than doubled; while his former wife's service-related income fell by approximately eighty-six [***8] per cent.

On July 19, 2000, the plaintiff filed a contempt complaint against the defendant in the Probate and Family Court, alleging [*101] that he violated the qualified court order by "unilaterally" electing to make changes in his disposable military retirement income that resulted in the reduction of her own pension income. On September 18, 2000, a judge in the Probate and Family Court summarily dismissed the complaint with prejudice. n6 On October 6, 2000, the plaintiff filed a complaint for declaratory judgment pursuant to *G.L. c. 231A* in the Probate and Family Court. She alleged that the defendant's actions in seeking and obtaining VA disability pay "defeated the intentions of the parties" under the agreement that the plaintiff would receive one-half of the defendant's military retirement pay. The plaintiff sought a declaration of the rights of the parties concerning the VA and Department of Defense payments, an award of an amount that would "restore [the plaintiff] to the financial position she would have enjoyed from April, 1997 to date," and counsel fees. The defendant answered and filed a motion to dismiss pursuant to Mass. R. Civ. P. 12(b) (5) and Mass. R. Civ. P. 12(b)(6), [***9] 365 Mass. 754 (1994). He claimed that he was in compliance with the agreement that the plaintiff receive fifty per cent of his disposable retired or retainer pay accrued as of December 5, 1985, and thus there was no controversy. He also claimed that the complaint for declaratory judgment was an impermissible attempt to circumvent final and binding determination on the merits occasioned by the dismissal with prejudice of the contempt action. See Mass. R. Civ. P. 41(b)(3), 365 Mass. 803 (1974). Waiving a hearing, the parties submitted the case on the pleadings and on a statement of agreed facts. n7

n6 The dismissal was issued without explanation by way of a notation on the complaint, and the record fails to disclose the reasons for the judge's determination. In a subsequent pleading in the declaratory judgment action, the plaintiff claimed that the defendant argued at the contempt hearing that, because the defendant's actions were not so culpable as to give rise to a contempt judgment, the plaintiff should have filed either a modification complaint or a declaratory judgment action and the contempt action should be dismissed. We do not have the benefit of a transcript of that hearing. [***10]

n7 They also submitted financial statements showing that the plaintiff's adjusted net weekly income from all sources was \$ 389.13 and that the defendant's adjusted net weekly income from all sources was \$ 1,423. The

plaintiff claimed assets valued at approximately \$ 103,000 and liabilities of approximately \$ 9,000. The defendant claimed assets valued at approximately \$ 508,000 and liabilities of approximately \$ 16,000.

On April 4, 2001, the judge issued a memorandum of decision and entered declaratory judgment for the plaintiff. [**322] She concluded that the defendant impermissibly modified the agreement by divesting himself of an asset that he had legally pledged to the plaintiff in which she thus had a vested interest, and from which she had a reasonable expectation of receiving income. See *Nile v. Nile*, 432 Mass. 390, 398-399, 734 N.E.2d 1153 (2000). She further held that, in so acting, the defendant violated his fiduciary obligation to his former spouse, see *Eaton v. Eaton*, 233 Mass. 351, 370, 124 N.E. 37 (1919), the covenant of good faith and fair dealing [***11] inherent in all contracts, see *Kerrigan v. Boston*, 361 Mass. 24, 33, 278 N.E.2d 387 (1972), and the court's authority and obligation to provide equitably for divorcing spouses. See *G.L. c. 208, § 34*. The judge "specifically enforce[d]" the agreement by ordering the defendant to pay to the plaintiff an amount that, when added to the amount the plaintiff currently received, was the equivalent of fifty per cent of his pension "if same was in payout status." The judge also ordered the defendant to pay arrearages accumulated from April, 1997, to the judgment date. She declined to award attorney's fees "as this is a case of first impression...."

The defendant filed a motion for reconsideration pursuant to Mass. R. Civ. P. 52(b), as amended, 423 Mass. 1402 (1996), on the ground that the judgment constituted a division of his military disability pay in violation of 38 U.S.C. § 5301 (2000) (exempting VA disability payments from certain creditors' claims and enforcement mechanisms). The judge denied the motion, and the defendant appealed from both the April 4, 2001, declaratory judgment and the denial of [***12] his reconsideration motion. In May, 2001, the plaintiff filed a motion to restrain the defendant from diminishing his assets and a motion for attorney's fees pendente lite to defend against the appeal. Another Probate and Family Court allowed both motions, and the defendant filed a motion for reconsideration of both orders. When the motion was denied, he timely filed a second notice of appeal. n8 He also filed motions to stay the award of attorney's fees in the Probate and Family Court and in the Appeals Court, respectively. Both motions were denied.

n8 The second notice appealed from the April 4, 2001, judgment, the denial of the motions to reconsider the judgment, the order to restrain dissipation of assets and the order to pay attorney's fees. On appeal, the defendant does not press his argument on the motion to restrain dissipation of assets, and we treat the issue as waived. See *Matter of a Care & Protection Summons*, 437 Mass. 224, 234 n. 19, 770 N.E.2d 456 (2002). See also Mass. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

[***13]

[*103] On the main appeal, the Appeals Court affirmed the order of the trial judge in all respects, except that it modified the judgment to include "a declaration that the plaintiff is entitled to receive from the defendant, pursuant to the agreement, a sum of money per month equivalent to fifty per cent of the monthly military retirement pay that the defendant would receive if his military retirement pay were not reduced by the disability payments minus the monthly military retirement pay the plaintiff receives directly from the Department of Defense." *Krapf v. Krapf*, 55 Mass.App.Ct. 485, 492, 771 N.E.2d 819 (2002). We granted the defendant's application for further appellate review.

2. *Separation agreement.* A policy of long standing in our Commonwealth encourages divorcing couples to resolve their marital disputes by mutual agreement rather than resort to litigation. See *G.L. c. 208, § 1A*; *Knox v. Remick*, 371 Mass. 433, 436, 358 N.E.2d 432 (1976); *Buckley v. Buckley*, 42 Mass.App.Ct. 716, 720 n. 3, 679 N.E.2d 596 (1997). To that end, our [**323] laws permit divorcing parties to enter into written separation [***14] agreements, which they may elect to survive the divorce judgment as independent contracts. See *Moore v. Moore*, 389 Mass. 21, 24, 448 N.E.2d 1255 (1983) (noting Commonwealth's "strong policy ... favoring survival of separation agreements, even when such an intent of the parties is merely implied"). Such surviving separation agreements may secure with finality the parties' respective rights and obligations concerning the division of marital assets, among other things, according to established contract principles. See, e.g., *Larson v. Larson*, 37 Mass.App.Ct. 106, 636 N.E.2d 1365 (1994); *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231, 236-237, 508 N.E.2d 104 (1987).

However, spouses who enter into agreements with each other are held to standards higher than those we tolerate in the arm's-length transactions of the marketplace. Parties to a separation agreement stand as fiduciaries to each other, and will be held to the highest standards of good faith and fair dealing in the performance of their contractual obligations.

See *Eaton v. Eaton*, *supra* at 370. See also *Larson v. Larson*, *supra* at 109. [*104] Moreover, a separation [***15] agreement is a "judicially sanctioned contract" that is valid and enforceable only if and as approved by the judge. *Bell v. Bell*, 393 Mass. 20, 26, 468 N.E.2d 859 (1984), cert. denied, 470 U.S. 1027, 84 L. Ed. 2d 782, 105 S. Ct. 1392 (1985) (Abrams, J., dissenting). In deciding whether to approve a separation agreement, judges have their own independent duty to ensure that the division of the marital estate is fair and reasonable in accordance with the factors set out in *G.L. c. 208, § 34*. See *Knox v. Remick*, *supra* at 436-437. Cf. *Barry v. Barry*, 409 Mass. 727, 732, 569 N.E.2d 393 (1991) (judge's finding agreement fair and reasonable not explicitly stated on record did not warrant reconsideration of issue). Among other things, a judge must ensure that the division of marital property is equitable in the circumstances. The equitable division of marital assets cannot be considered in a vacuum; property division is but one aspect of the finances of the divorcing household that the judge must consider. See *G.L. c. 208, § 34*; *Caccia v. Caccia*, 40 Mass.App.Ct. 376, 382, 663 N.E.2d 1246 (1996). [***16] See also *Andrews v. Andrews*, 27 Mass.App.Ct. 759, 761, 543 N.E.2d 31 (1989) (combination of alimony and equitable division pursuant to *G.L. c. 208, § 34*, "must make sense").

The Legislature has recognized that pensions often constitute valuable marital assets. *General Laws c. 208, § 34*, specifically directs the court to consider the equitable division of "retirement benefits," including "military retirement benefits if qualified under and to the extent provided by federal law," when apportioning the marital estate. n9 See *McMahon v. McMahon*, 31 Mass.App.Ct. 504, 508-509, 579 N.E.2d 1379 (1991) (dividing military retirement benefit as marital asset). The parties in this case do not dispute that, at the time they entered into the agreement, the defendant's "pension [*105] rights with the U.S. Army" constituted divisible marital property to be equitably divided in accordance with *G.L. c. 208, § 34*. Their disagreement centers on whether the defendant in fact breached the agreement by waiving his military retirement benefits in order to receive VA disability benefits. In other [***17] words, their dispute is a matter of contract interpretation, which is a question of State law to be decided by the court. The agreement does not define the term [**324] "pension rights with the U.S. Army," and the judge made no specific findings regarding the parties' intent in using those words. However, we must construe the agreement in a manner that "appears to be in accord with justice and common sense and the probable intention of the parties ... [in order to] accomplish an honest and straightforward end [and to avoid], if possible, any construction of a contract that is unreasonable or inequitable." *Clark v. State St. Trust Co.*, 270 Mass. 140, 153, 169 N.E. 897 (1930).

n9 Military retirement pay may also be considered a "stream of income" for purposes of alimony. *Andrews v. Andrews*, 27 Mass.App.Ct. 759, 759, 543 N.E.2d 31 (1989).

Applying these basic contract principles, we have no difficulty in concluding that the parties intended the term "pension rights with the [***18] U.S. Army" to mean exactly what it says: the totality of benefits due to the defendant on his retirement from the army. We draw our conclusions from the entire agreement itself and from the context of its execution. See *id.*; *DeCristofaro v. DeCristofaro*, *supra* at 237, and cases cited. Although the parties have not furnished us with their financial statements as of the date of the judgment nisi, we infer from the agreement that the defendant's military pension was among their most substantial marital assets. It was, at any rate, valuable enough to the plaintiff in this long-term marriage to induce her to waive any entitlement to alimony, support, or maintenance for an agreement that gave her an enforceable, vested interest in one-half of the defendant's military retirement benefits. It is highly unlikely that she negotiated such an agreement intending to give the defendant carte blanche to reduce the value of her pension to a pittance in order to benefit himself. Nothing in the agreement suggests such authorization. We think it far more likely that the agreement gave her a "reasonable expectation" that she would receive pension income in her later years. See *Schaer v. Brandeis Univ.*, 432 Mass. 474, 478, 735 N.E.2d 373 (2000). [***19] We also credit the representation of the defendant's counsel that, as of the date of the agreement, the defendant was able bodied and no longer on active duty, and that neither party had reason to anticipate a disability claim stemming from his active service. That the defendant waived the joint military retirement rights unilaterally further confirms our conclusion that, at the time they entered into the agreement, each party expected and intended that the plaintiff would receive one-half of the [*106] defendant's full "pension rights with the U.S. Army" when he retired.

The defendant challenges this construction of the contract by claiming now that the plaintiff continues to reap the benefits of her bargain and that he had no control over the evaporation of her pension income. But the defendant's military retirement benefit did not become essentially worthless because of changes in the law or changes in the market. It became worthless because of the defendant's unilateral and voluntary action. We respect the defendant's long years of service and sacrifice in the armed forces, but cannot escape the conclusion that by converting his and the plaintiff's military retirement benefits to [***20] VA disability benefits for his own benefit, see note 5, *supra*, he denied the

plaintiff the fruits of her bargain in breach of his continuing duty to exercise the utmost good faith and fair dealing in performing his obligations under the agreement. See *Nile v. Nile*, 432 Mass. 390, 398-399, 734 N.E.2d 1153 (2000) (breach of implied covenant of good faith and fair dealing does not require showing of bad faith; lack of good faith may be inferred by considering totality of circumstances).

This case bears strong similarities to *Nile v. Nile*, *supra*. There, a party to a postdivorce settlement agreement agreed to bequeath the majority of his estate to **[**325]** the children of his former wife. Subsequently, he poured most of his assets into a revocable inter vivos trust in favor of his new wife, with the result that, when he died, the children of his former wife were left with nothing in the probate estate and very little from the trust. Relying on one hundred years of contract law, we held that, by destroying or injuring the rights of the children of his first marriage to receive the benefit of his agreement with his former wife, the decedent breached his continuing **[***21]** duty of good faith and fair dealing. See *id.* at 398-400, and cases cited. We rejected the trustees' argument that the agreement merely required the decedent to leave the bulk of his "probate" estate to his heirs, while leaving the decedent free to empty the probate estate of all value. *Id.* at 399. A court of equity, we said, will not countenance such "questionable logic," nor permit "an individual to have an estate to live on but not an estate from which his debts could be paid." *Id.* at 400.

[*107] The defendant is correct that he was permitted by Federal law to seek and obtain VA disability payments, and that the characterization of his disability and degree of impairment rested with the VA. But a court in equity will not sanction voluntary action that amounts to an "evasion of the spirit of the bargain." *Larson v. Larson*, 37 Mass.App.Ct. 106, 110, 636 N.E.2d 1365 (1994), quoting *Restatement (Second) of Contracts* § 205 comment d (1981). See *Nile v. Nile*, *supra* at 398-399. To conclude otherwise would negate a divorcing spouse's high obligation of good faith and fair dealing in both the execution and **[***22]** the performance of a surviving: separation agreement.

We also reject the defendant's argument that the judge improperly transgressed the declaratory judgment statute by effectively converting a declaratory judgment action under *G.L. c. 231A* into a modification proceeding under *G.L. c. 208*, § 37, and then reapportioning the division of marital property contrary to established law. See *Bush v. Bush*, 402 Mass. 406, 409, 523 N.E.2d 259 (1988) ("The parties to a divorce may not relitigate the division of property that already has been the subject of a proceeding under *G.L. c. 208*, § 34"). See also *Taverna v. Pizzi*, 430 Mass. 882, 886, 724 N.E.2d 704 (2000); *Drapek v. Drapek*, 399 Mass. 240, 244, 503 N.E.2d 946 (1987). First, the Legislature has directed courts to construe and administer the declaratory judgment remedy broadly in order "to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." *G.L. c. 231A*, § 9. Second, contrary to the defendant's assertions, a judge may order monetary relief in a **[***23]** declaratory judgment action. See *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 227-228, 118 N.E.2d 89 (1954). Finally, as the trial judge noted, it was the defendant himself, and not the judge, who unilaterally and impermissibly accomplished a de facto modification of the agreement. The judge merely exercised her well-established equitable authority to construe the agreement to effectuate the parties' intent in circumstances where the contracted-for method of paying the plaintiff her equitable share of the marital estate was no longer available because of the defendant's actions.

While not dispositive on this matter of first impression in Massachusetts, we note that many other State appellate courts have ordered similar relief against military retirees who waive **[*108]** the military retirement benefits pledged to a former spouse under a separation agreement in order to obtain VA disability payments. See, e.g., *Dexter v. Dexter*, 105 Md.App. 678, 685-686, **[**326]** 661 A.2d 171 (1995); *In re Marriage of Stone*, 274 Mont. 331, 336, 908 P.2d 670 (1995); *Blissit v. Blissit*, 122 Ohio App.3d 727, 733, 702 N.E.2d 945 (1997); **[***24]** *Johnson v. Johnson*, 37 S.W.3d 892, 897 (Tenn.2001). See also *Clauson v. Clauson*, 831 P.2d 1257, 1263 (Alaska 1992) (court may "consider[] veterans' disability benefits as they affect spousal maintenance or the equitable allocation of the parties' assets." But see *Matter of the Marriage of Pierce*, 26 Kan.App.2d 236, 242, 982 P.2d 995 (1999). n10

n10 Other courts have afforded divorced military spouses similar relief based, at least in part, on indemnity provisions in the separation agreement. See, e.g., *Abernethy v. Fishkin*, 699 So. 2d 235, 240 (Fla.1997); *McHugh v. McHugh*, 124 Idaho 543, 545, 861 P.2d 113 (1993); *Scheidel v. Scheidel*, 2000 NMCA 59, 129 N.M. 223, 226, 4 P.3d 670 (Ct.App.2000); *Hisgen v. Hisgen*, 1996 SD 122, 554 N.W.2d 494, 498 (S.D.1996); *Owen v. Owen*, 14 Va.App. 623, 629, 419 S.E.2d 267, 8 Va. Law Rep. 3441 (1992); *In re Marriage of Choat*, 2000 Wash. App. LEXIS 1288, Nos. 4329 1-5- I, 43791-7-I (Wash.Ct.App. July 3, 2000).

[*25]**

Mansell v. Mansell, 490 U.S. 581, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989), does not compel a different result, but holds that the *Uniformed Services Former Spouses' Protection Act*, 10 U.S.C. § 1408 (2000), which provides for the divisibility of military retirement pensions, does not permit State courts "to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 595. n11 The judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources. n12 Nothing in 10 U.S.C. § 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. In upholding the declaratory [*109] judgment, however, we agree with the Appeals Court that the judgment must be modified to declare the respective obligations of the [***26] parties.

n11 The Federal act does permit courts to order alimony, payments from VA disability benefits. See 10 U.S.C. § 1408(a)(2)(B)(ii).

n12 Similarly, the defendant's argument that the declaratory judgment amounted to a garnishment or assignment forbidden by Federal law, see respectively 42 U.S.C. § 659 (2000) and 38 U.S.C. § 5301 (2000), is unavailing. The judgment did not "turn [the Federal government or any agency of the Federal government] into a collection agency" or require the Federal government to participate in any proceeding or pay money directly to the plaintiff. *Rose v. Rose*, 481 U.S. 619, 630, 635, 95 L. Ed. 2d 599, 107 S. Ct. 2029 (1987).

3. Other Issues.

(a) *Attorney's fees*. The defendant claims that the judge lacked authority in a declaratory judgment action to award the plaintiff appellate counsel fees pendente lite "pursuant to" *G.L. c. 208, § 38* [***27] . He does not claim that the amount of fees awarded was unreasonable. We agree with the Appeals Court that this issue is most properly addressed by resort to the plain language of the contract. The agreement provides that a party in breach of its provisions shall be "responsible for all reasonable costs incurred by the non-breaching party to enforce" the agreement. Although we recognize that the judge denied the plaintiff's request for attorney's fees to prosecute the declaratory judgment action on the ground that the case presented an issue of first impression, n13 it was also reasonable for the judge, in the context of this dispute concerning the interpretation and [**327] enforcement of a separation agreement, to construe the agreement to require the payment of such fees once the defendant was adjudged in breach and the defendant elected to continue with the litigation. See *Judge Rotenberg Educ. Center, Inc. v. Commissioner of the Dep't of Mental Retardation (No.1)*, 424 Mass. 430, 468, 677 N.E.2d 127 (1997) (attorney's fees may be awarded by contract of stipulation, by statute, or by rules concerning damages). Cf. *G.L. c. 208, § 38* (permitting [***28] award of attorney's fees at judge's discretion in original or subsidiary actions under *G.L. c. 208*).

n13 The plaintiff has not appealed from that denial.

(b) *Res judicata*. The defendant claims that the plaintiff was barred from bringing her subsequent action for declaratory judgment because the dismissal with prejudice of her contempt complaint was res judicata on the issue of his liability under the agreement. The Appeals Court rejected this argument on the ground that the record was not sufficiently developed to enable the court to determine the judge's reasons for dismissing the complaint for contempt with prejudice. *Krapf v. Krapf*, 55 Mass.App.Ct. 485, 492, 771 N.E.2d 819 (2002). We agree. It is plausible, as the defendant argues, that the judge intended the dismissal of the [*110] contempt complaint with prejudice as a ruling on the merits of the plaintiff's claim that the defendant violated the agreement when he waived his military retirement benefits for VA disability payments. [***29] It is equally plausible, as the plaintiff argues, that the judge dismissed the contempt complaint with prejudice because she concluded that an action for civil contempt was the wrong vehicle to resolve an issue of contract interpretation. See *Diver v. Diver*, 402 Mass. 599, 603, 524 N.E.2d 378 (1988) (civil contempt cannot be found absent proof of "a clear and unequivocal command" and "ability to comply"). The defendant bears the burden of proving that the plaintiff's declaratory judgment action should have been dismissed. He has not met that burden.

(c) *Due process*. In his supplemental brief to this court, the defendant claims for the first time that the judge denied him due process by failing to afford the defendant the opportunity to be heard on all relevant issues. n14 As the issue is

untimely raised, we do not consider it. See Mass. R.A.P. 16(a)(4), as amended 367 Mass. 921 (1975), and Mass. R.A.P. 16 (c), as amended, 399 Mass. 1217 (1987). n15 See also *Kelley v. Rossi*, 395 Mass. 659, 664, 481 N.E.2d 1340 (1985).

n14 To the extent that the defendant's due process argument also maintains that he was denied due process because the judge sua sponte converted the declaratory judgment action into a de facto modification action, this argument has been previously addressed. [***30]

n15 In any event, we would be hard pressed to find that the lack of a hearing in this case deprived the defendant of due process where he voluntarily waived such a hearing and agreed to submit the case on the pleadings, and where the judgment considered only the issues of contract interpretation and enforcement raised by the parties.

4. *Conclusion.* We affirm the declaratory judgment as modified by the Appeals Court and the order awarding the plaintiff attorney's fees pendente lite. We affirm the denial of the defendant's motions for reconsideration. n16

n16 Our holding today disposes of the need to consider the merits of the defendant's reconsideration motions.

So ordered.

