NO. 2010-CA-02069

IN THE SUPREME COURT OF MISSISSIPPI

JAMES MALLARD,

Appellant

v.

TONYA MALLARD BURKART,

Appellee

ON APPEAL FROM THE CHANCERY COURT OF LAMAR COUNTY, MISSISSIPPI
CAUSE NO. 01-0023-GN-W
HON. JOHNNY L. WILLIAMS, CHANCELLOR

BRIEF OF APPELLANT, JAMES MALLARD

SUBMITTED BY:

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IN THE SUPREME COURT OF MISSISSIPPI

JAMES MALLARD, APPELLANT

V. NO. 2010-CA-02069

TONYA MALLARD BURKART, APPELLEE

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument.

IN THE SUPREME COURT OF MISSISSIPPI

JAMES MALLARD, **APPELLANT**

V. **NO. 2010-CA-02069**

TONYA MALLARD BURKART, **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. James Mallard, Appellant
2. Rob Curtis, Esquire, Attorney for Appellant
3. Tonya Mallard Burkart, Appellee
4. Cheryl D. Johnson, Esquire, Attorney for Appellee

Respectfully submitted this the 5th Day of December, 2011.

ROB CURTIS
ATTORNEY OF RECORD FOR
JAMES MALLARD, APPELLANT

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STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

On April 25, 2001, James and Tonya Mallard (now Tonya Mallard Burkart) the Final Judgment of Divorce (Judgment) was entered in the instant case granting the parties a divorce on the statutory grounds of irreconcilable differences by the Lamar County Chancery Court (R 21). The parties' Child Custody and Support and Property Settlement Agreement (Agreement) was incorporated into the Judgment. (R 22). Pursuant to the Judgment, Tonya was awarded custody of the four minor children with James having visitation as outlined in the Agreement. (R 22, 27). James was ordered to provide medical and dental insurance for the minor children, with Tonya to pay the co-payments. (R 28). All expenses not covered by insurance were ordered to be divided with James to pay 70% and Tonya to pay 30%. Graduation expenses, including rings, invitations, and pictures, were to be divided equally between the parties. College expenses, including as books, tuition, room and board, were to be divided between the parties with James paying 70% and Tonya paying 30%. (R 28). Husband was to claim two of the four minor children as dependents on his taxes for deductions and child tax credit for the year 20000, and Tonya was to claim all three of the minor children as her dependents for tax deductions and child tax credit every year thereafter. (R 28).

Pursuant to the Judgement (Paragraph 12 of the Agreement), Tonya was awarded 40% of James' "disposable military retired pay" for ten (10) years unconditional, with certain restrictions on Tonya's receipt of these payments coming into play after the initial ten-year period, her receipt

of these payments to cease if she remarried or lived with someone for a cumulative of sixty (60) days. (R 20).

In addition, the Judgment required James to pay $550.00 on the attorney fees and Tonya to be responsible for any and all of the balance. (R 29). James was also ordered to pay child support in the amount of $650.00 per month and to maintain a policy of insurance on his life of at least $50,000.00 with Tonya as beneficiary until the youngest child was emancipated.

Following the divorce, James moved to Florida, while Tonya remained a resident of Mississippi. (R 35).

On October 4, 2006, James filed a Petition for Modification of Judgment of Divorce (Petition). By this time, two of the four children of the marriage had reached their majority, leaving two minor children, who were twin boys. In his Petition, James asserted, among other things, that the two remaining minor children had moved into a college dormitory at Pearl River Community College, thereby decreasing Tonya's expenses for their support and maintenance, that James' monthly child support payments were not in substantial part being applied to meet the actual financial needs of the minor children, and that it would be in the childrens' best interests that the Judgment be modified to provide that the child support payments be redirected from Tonya and made directly to the minor children. (R 37). The Petition further asserted that Tonya had consistently refused to use network medical providers for the minor children under James' insurance plan resulting in higher out-of-network rates incurred for the minor childrens' doctor and dentist bills and that Tonya had also consistently failed to timely submit medical bills to James for payment, and instead held onto the bills and submitted numerous bills to James all at the same time. Consequently, James requested that the Judgment be modified to address these concerns. (R 38).

A Temporary Order was entered on December 22, 2006 directing that Tonya file her responsive pleading and, after all pleading were filed, and that the parties conduct such discovery as deemed necessary and to set the matter for expedited trial. Pursuant to the Temporary Order, by

agreement of the parties, Tonya was ordered to submit proof of uninsured medical/dental expenses for the minor children to James within thirty (30) days of her receipt of an invoice for same, with James to do the same for any such receipts that he might first receive. (R 54).

On January 18, 2007, James filed an Amended Petition for Modification of Judgment of Divorce (Amended Petition) asserting, among other things, that the twins desired to transfer to a college in Florida, and that to facilitate this plan, they desired that their custody be changed from Tonya to James. Accordingly, James requested that the Judgment be modified to award custody to him and to require Tonya to pay child support to James. (R 57). The Amended Petition also requested appropriate adjustments regarding payment of child support and the claiming of the twins as dependents for tax purposes depending on how the custody issue was resolved. (R 57, 61).

On March 9, 2007, an Order Setting Case for Hearing was filed scheduling the case to be heard on April 3, 2007. (R 65).

On April 3, 2007, Tonya filed an Answer and Counter-Petition to James' Amended Petition, denying, in her Answer, most of James' allegations (R 66–69). In her Counter-Petition for Contempt & Modification (Counter-Petition) (R 69), Tonya asserted, among other thing, that James structured his retirement form the U.S. military in such a fashion to try to defeat her forty-percent (40%) interest in that retirement and that as a result James was indebted to her for a substantial sum of money. (R 70). Tonya also asserted that James' child supports to her should be increased. (R 71).

On May 9, 2007, a Notice of Court Setting was filed setting the case for trial on July 24, 2007. (R 74). On June 4, 2007, Tonya's attorney filed a Motion to Withdraw as Counsel (R 75) and and Notice of Motion Hearing setting the motion for hearing. (R 77). On June 12, 2007, Tonya's attorney filed a Voluntary Dismissal of Motion to Withdraw as Counsel. (R 78). On July 24, 2007, James' filed a Reply to Counter-Petition for Contempt and Modification and Affirmative Matters denying most of the Tonya's allegations in her Counter-Petition. (R 79).

A Notice of Status Conference was filed on December 6, 2007 setting the case for a status conference to be held on January 7, 2008. (R 80). A Motion for Trial Setting (R 85) and Notice of Motion Hearing (R 84) were filed by Tonya on November 24, 2008, with Amended Notice of Motion Hearing filed by Tonya on November 26, 2008. (R 86). A Notice of Court Setting was filed on January 29, 2009 setting the trial for April 15, 2009. (R 87).

On March 9, 2009, James attorney filed a Letter Brief addressed to the chancellor addressing certain issues raised in Tonya's Counter-Petition. Specifically, it set forth legal authorities to support James' position regarding Tonya's contention that at the time of the divorce, James had, in the Agreement incorporated into the Judgment, structured his retirement form the U.S. military to defeat her forty-percent (40%) interest in his retirement and that he was indebted to her for a substantial sum of money as a result of this alleged action. (R 88–99).

On April 13, 2009, James filed a Motion for Continuance to reset the trial from April 15 2009 to a later date due to an unavoidable scheduling conflict with James' business trip (R 96) and a Notice of Motion (R 99). On October 2, 2009, a Notice of Court Setting was filed setting the trial in this matter on November 12, 2009.

The trial was held on November 12, 2009 on James' Amended Petition for Modification of Judgment of Divorce and Tonya's Counter-Petition for Contempt and Modification. (TT 1). On November 19, 2009, the chancellor's Findings of Facts, Conclusions of Law, and Final Judgment was entered. (R 101). The chancellor ruled in favor of Tonya regarding her attempt to be compensated for the money she was denied as a result of the reduction in the retirement benefits package. In so finding, the chancellor rejected the view the Mississippi Supreme Court has taken on the finality of property settlement agreements, and found that Tonya's property interest in the percentage of military retirement income that she was to receive vested at the time of the divorce, and, as such, this percentage could not be thereafter unilaterally altered by the actions of James. (R 107).

Reasoning that because Tonya had suffered a loss as a result of James' decision to waive part of his military retirement, the Court held that James was liable to Tonya in the amount of $21,213.57. (R 107). This amount represented the total amount Tonya would have received over a seven year period if she had continued to receive the amount she was receiving in 2003, prior to James' election to change to veterans' disability benefits, which was $47,964.00, less the total of the reduced amount that Tonya did receive ($27,951.19) (to give James credit for the reduced amount she was paid), with an interest rate of six percent (6%) factored in, bringing the total amount owed to Tonya the amount of $21,212.57. (R 107–108) . The Court concluded that Tonya's award of forty percent (40%) of James' military retirement was part of her property settlement which vested at the time of the divorce in 2001, and that it could not be unilaterally altered by James' actions post divorce. (R108–109).

However, the court determined that James was not in contempt of court on this issue in the traditional meaning because he was using military rules and regulations available to all military retirees. (R 109). The court further found that the twins were emancipated as of July, 2007 due their active status with the U.S. military, and therefore James owed no back child support. (R 108, 109). However, James did owe Tonya reimbursement for his share of the childrens' medical and dental bills and senior portraits and miscellaneous school expenses. (R 108, 109).

On November 30, 2009, James filed a Motion to Alter or Amend Judgment to correct a calculation error in figuring James share of dental an medical expenses. (R 111-112). On May 3, 2010, Tonya filed a Response to Motion to Alter or Amend Judgment denying any mathematical or other error in the Judgment recited by James (R 115). On November 19, 2000, an Order Amending Final Judgment was entered upon agreement of the parties ordering that the Judgment be amended to correct the amount that James owed to Tonya for dental and medical expenses from $897.00 to $537.00. (R 117).

On December 17, 2010, James filed a Notice of Appeal appealing the Judgment of the trial court o the Mississippi Supreme Court. (R 130).

B. STATEMENT OF FACTS

James Mallard and Tonya Mallard Burkart were married on May 24, 1980. (R 8). James was on active service in the United States Air Force up until the time the parties divorce on April 25, 2001 (TT 5, 45) (R 28). Four children were born to the marriage, namely James Mallard, Jr., born on June 7, 1981; Ashley Mallard, born on November 10, 1983, age 17; Kyle Mallard, born August 15, 1988; and Beau Mallard, born on August 15, 1988. (R 9). On April 25, 2001, the Lamar County Chancery Court granted James and Tonya divorce on the ground of irreconcilable differences. (R 21, 22). The parties' Child Custody and Support and Property Settlement Agreement (CCSPSA) was incorporated was incorporated into the Final Judgment of Divorce (Judgment) (R 22). The CCSPSA addressed several issues including child custody, child support, marital debt, child custody and visitation, child support, and division of marital property, including assigning wife a share of husband's military retirement benefits. (R 24–29).

Paragraph 12 of the *Child Custody and Support and Property Settlement Agreement* (*Agreement*) incorporated in the Judgment provides in pertinent part as follows:

Pursuant to the Uniform Services Former Spouses Protection Act ("USFSPA"), 10 U.S.C. section 1408, the Court makes the following findings of fact:

(A) That the Husband is currently an active duty service member in the United States Air Force.

(B) That Husband's rights under the Soldiers and Sailors Civil Relief Act have been observed in these proceedings.

(C) The Wife and Husband were married for at least ten (10) years during which Husband performed at least ten (10) years creditable service, making Wife eligible for involuntary military deduction under The USFSPA at such time s Husband becomes entitled to retired pay.

(D) Wife is awarded 40% of Husband's disposable military retired pay for ten (10) years unconditional. Wife shall continue to receive 40% of Husband's disposable military retired pay after ten (10) years

if she does not remarry or has not lived with someone for a cumulative of sixty (60) days. Payment shall continue until Wife remarries or lives with someone for a cumulative of sixty (60) days upon which time payments shall cease. It is Wife's responsibility to notify the Defense Finance and Accounting Service and Husband of any change of eligibility for payment.

(E) The Husband voluntarily consents to the exercise of jurisdiction to the State of Mississippi, County of Forrest for division or military retired pay.

(R 28–29).

Following the parties divorce on April 25, 2001, James retired from the military in October, 2002 (TT 45). Prior to James' retirement, he had sustained a back injury from lifting heavy equipment and a herniated disk. At the time, James was at the nineteen-year point in his military career and would have lost all of his retirement and would have been discharged on disability. James' doctor did not believe such an outcome would be right. Therefore, to allow James to complete his twenty years and retire with full retirement, the doctor kept James under medical observation and put him through a series of treatment, physical therapy, steroid injections, and ultimately surgery. (TT 51). This approach permitted James to retire on what was classified as standard military retirement prior to the processing of his paperwork, which took about six months–until June, 2003–due to a VA backlog in processing. At that time, the final decision on the classification of James discharge was reached, and he received a partial disability rating, which was backdated to October 2003. (TT 52).

When the final disability rating came through, James was required to waive a portion of his retirement pay in order to receive military disability benefits. (TT 61). Since the percentage of disability rating is deducted from retirement benefits dollar for dollar, the reclassification of retirement benefits to disability benefits decreased James' military retirement pay by the amount of his VA disability benefits, which effectively reduced Tonya's payments because her award of forty percent of disposable retired pay was correspondingly reduced and she was not entitled any portion

of the disability benefits. (TT 11– 14) Mr. Mallard's disability rating is currently sixty percent (60%). (TT 61). Due to this delay, Tonya received her forty percent of full retirement Tonya's received her first payment from the miliary for her forty-percent share of James' disposable retired pay in 2003 in the amount of $571.00. (TT 14). Due to the initial delay in processing James' discharge paperwork as a result of the VA backlog, Tonya received higher payments based on full retirement for a couple of months because the issue of James' disability rating remained unresolved. (TT 52). The payments subsequently decreased after James' disability rating took effect, and her payments decreased to between $80.00 and $120.00 per month. (TT 14).

However, due to changes in federal law designed to compensate an a former military spouse in Tonya's situation for losses incurred by the military's spouses waiver of retirement benefits in order to receive disability benefits, (TT 38–40, 74–75), Tonya's payments actually increased from an annual total of $2,044.40 in 2003 to $7,241.00 in 2009. (TT 34–37). Thus, Tonya's current monthly payment for her share of James retirement pay is currently $603.00 per month, representing an increase of $32.00 from her original monthly payment of $571.00.

Immediately following the divorce, there were three minor children living with Tonya–Ashley, and the younger twins, Beau and Kyle. (TT 5). Tonya remarried (to Thomas Burkart) (TT 7). After Beau and Kyle started attending college and had moved into the dormitory at Pearl River Community College, a dispute arose as to whether the boys were sufficiently benefitting from James' child support payments to Tonya. James filed his initial petition for modification believing that his monthly child support payments were not being properly applied to meet the boys' actual financial needs. He sought modification to have the child support payments redirected from Tonya and made payable directly to the boys. (R 37) (TT 23). Later, after Beau and Kyle desired to transfer to a college in Florida, James amend his petition to request that they be

placed into his custody. (R 57). These issues became moot by the time of the trial as Beau and Kyle had become emancipated upon entering the military in 2007 (TT 72, 83–84).

Tonya responded to James amended petition by asserting, among other thing, that James had structured his retirement form the U.S. military in such a fashion to try to defeat her forty-percent (40%) interest in that retirement and that as a result James was indebted to her for a substantial sum of money. (R 70). Even though Tonya was represented by counsel at the time the Child Custody and Support and Property Settlement Agreement (CCSPSA) was prepared, James had himself drafted paragraph 12 of the CCSPSA which divided his military retired pay. (TT 11-12). After Tonya had employed a lawyer and provided James with a draft of the CCSPSA, he consulted DFAS to determine what language was required so that the military would accept the document and pay Tonya her share of the retirement benefits. (TT 53-54) If the precise language required by DFAS had not been included, the military would have declined to make any disbursement to Tonya pursuant to the agreement. (TT 54). Therefore, James intent in furnishing the language employed in paragraph 12 was to ensure the language complied with the military's regulations so that DFAS would accept it and pay Tonya. (TT 63). After James researched the retirement issue and supplied the language dividing his military retirement for paragraph 12, Tonya's lawyer approved the language James provided and incorporate it into the CCSPSA). (TT 28–29).

Tonya asked the trial court to compensate her for the reduction in her share of the retirement pay benefits. She also asserted that James' child supports to her should be increased and sought reimbursement for unpaid medical and dental expenses not reimbursed by insurance (R 71) (TT 14, 23).

In his Findings of Facts, Conclusions of Law, and Final Judgment, the chancellor found for Tonya with respect to her attempt to be compensated for the money she was denied as a result of

the reduction in the retirement benefits package. In reaching his decision, the chancellor relied heavily on a 2001 opinion of the Tennessee Supreme Court to address the issue of a post-divorce waiver of military retirement pay to receive disability benefits (R 104).

In *Johnson v. Johnson*, 37 S.W. 3d 892 (Tenn. 2001), the written marital dissolution agreement entered into by the parties awarded wife one-half of all military retirement benefits due her husband as portion of her property settlement. (R 104). Following husband's retirement, wife received her one-half share of husband's military retirement benefits for a year–until husband elected to waive a portion of his military retirement benefits to receive veterans' disability benefits. Husband's waiver of his retirement benefits caused the amount of wife's share of the military retirement pay to be reduced. Wife sought redress via appeal to the Tennessee Surpreme Court. The *Johnson* court held that wife, the non-military spouse, held a vested interest in her portion of those military retirement benefits which divided pursuant to the marital dissolution agreement, and that the military spouse was prohibited from diminishing her vested interest through a unilateral act. (R 105).

The chancellor in the case at bar also relied on a decision rendered by the Tennessee Court of Appeals subsequent to the *Johnson* decision in finding for Tonya (R 106). In *Hillyer v. Hillyer*, 59 S.W. 3d 118 (2001), the court again addressed this issue regarding the effect on the non-military ex-spouse of the military ex-spouses post-divorce waiver of military retirement benefits to receive disability benefits. Again, the court ruled in favor of the non-military ex-spouse (ex-wife) based on the reasoning set forth in *Johnson*, holding that wife had obtained at the entry of the divorce a vested right to the stated percentage of her ex-husband's gross military retirement benefits which she was entitled to enforce. (R 106).

In finding for Tonya, the trial court found that Tonya's forty-percent interest in James' military retirement was a part of her property settlement which vested at the time of the divorce in

2001. The court found that as such, this interest could not be unilaterally altered by James post-divorce. (107–109). Since Tonya had suffered a loss as a result of James' decision to waive part of his military retirement to receive veterans disability benefits, the court held that James was liable to Tonya in the amount of $21,213.57. (R 107), which the court calculated by determining the total amount Tonya would have received over the seven years since the divorce if her payments had remained undiminished, crediting James with the total amounts Tonya actually received, and adjusting the total owed to add interest. (R 107–08).

The chancellor seemed to acknowledge that in adopting the reasoning in *Johnson* and *Hillyer*, and thereby finding for Tonya on the retirement benefits issue, he was inclined to downplay, if not outright reject, the traditional view the Mississippi Supreme Court on the finality of property settlement agreements. (R 107):

> The Court finds persuasive, the reasoning of the Johnson and Hillyer opinions, and feels that *in lieu of* the view the Mississippi Supreme Court has taken on the finality of property settlement agreements, that Tonya's property interest in the percentage of military retirement income that she was to receive vested at the time of the divorce. As such, this percentage could not be thereafter unilaterally altered by the actions of James. (R 107, emphasis added).

The chancellor's language on this point was arguably ambiguous, and his position on the finality issue remain somewhat unclear.

With regard to those findings in favor of James, the chancellor determined that James was not in contempt of court in the traditional meaning regarding Tonya's losses , reasoning that James was merely using military rules and regulations available to all military retirees. (R 109).
The court also found in James' favor that the twins were emancipated as of July, 2007 due their active status with the U.S. military, and therefore James owed no back child support. (R 108, 109). However, James did owe Tonya reimbursement for his share of the childrens' medical and dental bills and senior portraits and miscellaneous school expenses. (R 108, 109).

SUMMARY OF THE ARGUMENT

I. Standard of Review and Applicable Law

The standard of review in this appeal is de novo. The facts are not in dispute. Instead, the Court is called upon to review how the chancellor interpreted and applied the law. The Court's objective will be to determine whether the chancellor employed an erroneous legal standard in concluding that James was financially liable to Tonya for her monetary losses which resulted from James' post-divorce waiver of military retirement benefits in order to receive veterans disability benefits. The issue therefore concerns questions of law rather than disputed questions of fact. "As to matters of law ... a different legal standard applies. In that case, our review is *de novo*, and if we determine that the chancellor applied an incorrect legal standard, we must reverse." *Carter v. Carter*, 725 So.2d 1109, 1114 (¶ 18– ¶ 20), 97-CA-00115 COA (Miss. Ct. App. 1999) (citing *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994)).

II. **The chancellor erred in requiring James to compensate Tonya for the monetary amounts she did not receive as a result of James' post-divorce waiver of his military benefits in exchange for veterans disability benefits because he applied an erroneous legal standard.**

Military retirees may receive military retirement benefits. 10 U.S.C. 3911 *et. seq.* (Army); 10 U.S.C. 6321 *et. seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et. seq.* (Air Force). For partially or totally disabled veterans, retirees my receive veterans disability benefits as well. However, in order to receive veterans disability benefits, the military retiree must waive a corresponding amount of military retirement pay. 38 U.S.C. § 5305.

Under the Uniform Services Former Spouses Protection Act (USFSPA), state courts have the authority to treat military disposable retired pay as marital property and divide it between divorcing spouses according to the laws of the state. 10 U.S.C. § 1408(c)(1). Pursuant to the USFSPA, "disposable retired pay" is defined as "the total retired pay to which a member is

entitled," less the authorized deductions. *Id.* at 1408(a)(4). Amounts waived by military retiree in order to receive veterans disability benefits are included among these authorized deductions. Thus, the USFSPA excludes disability payments from the definition of disposable retired pay.

In *Mansell*, 490 U.S.581, the United States Supreme Court interpreted the USFSPA, 10 U.S.C,§ 1408, holding that state courts "have been granted the authority to treat disposable retired pay as community property," 490 U.S. at 589 (emphasis added). However, because the USFSPA excluded disability benefits from the definition of disposable retired pay, the Court held that state courts are preempted by federal law from treating military retirement pay waived to receive veterans disability benefits as property divisible upon divorce. 490 U.S. at 594-95. Thus, under the Act's plain and precise language, state courts have been granted the authority to treat *disposable retired pay* as community property; they have not been granted the authority to treat *total retired pay* as community property."

Mansell prohibited the trial court from allocating any portion of James disability payments and making them payable to Tonya. However, by ordering James to compensate Tonya for the monies she did not receive as a result of his waive of retirement benefits to receive veterans disability benefits, the chancellor's ruling operated indirectly to what Mansell and the USFSPA prohibited him form doing directly, thus contravening federal law.

One of *Halstead's* holdings is particularly pertinent to the case at bar. Both cases involve instances where the trial court has ordered the military retiree ex-spouse to personally reimburse the civilian ex-spouse for deductions from her payments which resulted from the military retiree's post-divorce waiver of retirement benefits to receive veterans disability benefits. The *Halstead* court held that the trial court's order contravened the anti-attachment provision in 38 U.S.C § 5301. Applying this holding to the case at bar, Tony would not be entitled to any direct monetary reimbursement payable personally by James.

The chancellor erroneously relied on *Johnson v. Johnson* , 37 S.W. 3d 892 (Tenn. 2001) in determining that Tonya held a property interest in the her share of the military retirement income that could not be unilaterally reduced by the actions of James because that interest that had vested at the time of the divorce. The facts in *Johnson* are distinguishable from those in the case at bar. The parties' property settlement agreement in *Johnson* lacked precise language which limited what benefits the the term "disposable retired pay" was intended to encompass. That term was omitted even though that specific language was required by the military pursuant to the USFSPA, 10 U.S.C. § 1408. Instead the ambiguous language "all military retirement benefits" was employed, thus making the parties' intent difficult to decipher.

By contrast, the property settlement agreement in the instant case followed the § 1498 requirements by including the requisite provisions and terminology. It expressly and unambiguously employed the term "disposable military retirement pay," a term susceptible of only one interpretation under § 1408(a)(4). Unlike the facts in *Johnson*, there is no evidence that the parties at the time of the divorce intended for James' post-employment military compensation to be interpreted to encompass anything more than what it was pursuant to § 1408's definition of "disposable military retired pay." As such, reference to § 1408 made it readily determinable that this compensation was clearly subject to reduction if James waived military benefits to receive veterans disability benefits.

The chancellor's reliance on *Hillyer v. Hillyer* 59 S.W. 3d 118 (2001) to support the "vesting theory" was also misplaced. Like the property settlement in *Johnson*, the term employed in the *Hillyer* trial court's divorce decree to denote what was meant by retirement benefits was not expressly defined or limited. Since "disposable retired pay" is subject to deductions in the event of waiver of retired pay to receive disability benefits under § 1408, the forty-percent payment amount that "vested" upon the execution of Tonya's and James' property settlement agreement was subject to vary over time. This vested claim represented the right to payment of that particular portion

(40%) of whatever "disposable military retired pay" happened to be at any particular point in time. Interpreting Tonya's claim with reference to the definition of the § 1408 definition of "disposable retired pay," her forty-percent interest was itself never unilaterally altered via James' waiver election. The only reduction occurred with respect to the monetary value of Tonya' forty-percent interest. Pursuant to federal statute, this interest was legitimately subject to fluctuations attributable to such factors as the military retiree's election receive veterans disability benefits in lieu of retirement benefits.

In *Youngbluth v. Youngbluth*, 2010 VT 40, 6 A.3d 677 (Vt. 2010), the Vermont Supreme Court rejected the non-military ex-wife's argument that the original property division order intended to grant her a consistent payment of a particular amount per month from husband's retirement benefits regardless of any future actions of husband. According to her reasoning, when he waived a portion of his military retirement benefits to receive veterans disability benefits, he became obligated to provide her with an offset payment so that she would continue to receive the same amount of money. The trial court had agreed with her argument and changed the original property division to increase ex- wife's percentage of ex-husband's disposable retirement benefits, thus restoring her monthly payment to the pre-waiver amount. *Youngbluth,* 2010 VT at 682.

In reversing the trial court's decision, the appellate court held that the plain language of the original property division gave wife an interest only in husband's disposable retirement benefits, not in his disability benefits. *Id.*, 2010 VT at 682. Because under well-settled federal precedent the trial court was prohibited from granting a former spouse an interest in a military retiree's disability benefits, it was prohibited form increasing her percentage of her ex-husband's disposable retirement benefits. *Id.* at 681.

Thus, the *Youngbluth* court, relying on federal premption, rejected the reasoning employed by the *Johnson* court relied upon by the chancellor in the case at bar and other courts which have adopted "creative solutions" around *Mansell* to alleviate the inequity to the non-military ex-spouse in the event of a waiver election by the military retiree. Therefore, federal preemption requires that the Court resolve the case at bar in James' favor by rejecting the "creative solution" reached by the chancellor in attempting to alleviate any unfair hardship and inequity to Tonya, and "*Mansell* must be followed even when it leads to seemingly unfair results. *Id.* at 685.

According the *Youngbluth* court, despite the claims of some courts, there is no clear majority view among the states as to whether a court should take equitable action to compensate a former spouse in an waiver election situation. *Id.* at 687 (quoting *Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W. 3d 761 (2004). *Youngbluth* cited line of cases that it found more persuasive than cases which had taken equitable action toward compensation of the non-military spouse. Those cases generally support the position of the military retiree who has made a waiver election in situations where the original property division order stated an exact percentage and contained no indemnity provision. *Id.* at 687. This line of cases would support reversal in favor of James in the case at bar since James' and Tonya's property settlement agreement stated an exact percentage (" 40% of Husband's disposable military retired pay") (28–29) and it contained no indemnity provision requiring reimbursement to Tonya's in the event of waiver election by James.

In a situation where the pertinent parts of the parties' property settlement agreement contained provisions similar to the James' and Tonya's agreement, the appellant court criticized the absence of specific terms regarding the non-military spouse's receipt of a specific monthly payment amount and the duration of the payments. *In re Marriage of Pierce,* 26 Kan. App. 236, 237–38; 982 P. 2d 995 (Kan. Ct. App. 1999). The court also hinted at the advisability of including an indemnity provision and criticized the non-military ex-spouse for failing to protect her interests.

Tonya should not now be heard to complain about any inequity inherent inequity because her losses could have been prevented had her counsel insisted on adding an indemnity agreement.

The Supreme Court of Alaska also addressed a situation similar to the one at bar. *Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992). Here, the appellate cour reversed the trial judge' order for the military retiree husband to pay this ex-wife an amount equivalent to her share of the waived retirement pension as if the waiver had never occurred. The court reasoned that the effect of the effect of the trial judge's order was to divide retirement benefits waived to receive disability benefits in "direct contravention of the *Mansell* holding. *Clauson*, 831 P. 2d at 1264. Thus, the trial court in the case at bar clearly ran afoul of the *Mansell* prohibition against treating disability benefits as marital property subject to equitable distribution. The chancellor's order for James to reimburse Tonya caused the same practical effect contrary to *Mansell* and federal preemption. Therefore, the chancellor employed an impermissible legal standard in ordering James to reimburse Tonya.

The Mississippi Supreme Court recognizes a compelling policy interest in favoring finality of property settlements, acknowledging a court's obligation to enforce a divorce agreement executed by legally competent parties where the contract terms are clear and unambiguous. *Iverson v. Iverson*, 762 So.2d 329, 335 (Miss. 2000) (citing *Merchants and Farmers Bank v. State ex. rel. Moore*, 651 So.2d 1060, 1061 (Miss. 1995). '[W]hen parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from [other] improvident contracts.' *Palmere v. Curtis*, 789 So. 2d 126, 130, ¶ 10 (Miss. 2001), quoting *East* v. East, 493 So. 2d 927, 931--32 (Miss. 1986).

Even though time has shown James' and Tonya's agreement to have been an improvident one for Tonya, there is not evidence of fraud or overreaching, and she is therefore bound by its terms. Like the ex-spouse in *Pierce* who was awarded an asset which significantly declined in

value, Tonya should not be permitted "to reopen the divorce and demand additional property or demand more payments." *In re Pierce* at 2242. In essence, this is what Tonya, like Ms. Pierce, seeks in this matter.

The concurrent retirement and disability pay (CRDP) legislation found at § 10 U.S.C. 1414 has afforded Tonya significant relief and will continue to do so. By 2014, when the ten-year phase-in period is complete, James will be receiving an additional amount equal to the amount of retired pay waived. 10 U.S.C. § 1414(c), and he will have gained back every dollar of the retired pay that he exchanged for VA disability compensation. *Id.* Forty percent (40%) of the additional amounts received by James will be deducted from his share and shared with Tonya. She has already had a substantial amount of the waived funds restored to her, and her current monthly payment I $603, as compared to her original monthly payment of $571 in 2003. Thus, CRDP has ameliorated much of the inequity to Tonya who is now sharing in the restored funds.

ARGUMENT

I. Standard of Review and Applicable Law

In domestic relations cases, the Mississippi appellate courts will not disturb the chancellor's findings of fact when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Brumfiel v. Brumfiel*, 2008-CA-01944-COA (¶ 9) (Miss. Ct. App. 2010); *Monica R. v. Kendall*, 2002-CA-01859-COA (¶ 4) (Miss. Ct. App. 2004); *Smith v. Smith*, 20 So.3d 670, 674, 2008-CA-00683-SCT (¶ 12) (Miss. 2009); *Sanderson v. Sanderson*, 824 So.2d 623, 625, 1999-CT-00915-SCT (¶ 8) (Miss. 2002); *Hardin v. Hardin*, 2010-CA-00947-COA (¶ 16) (Miss. Ct. of App. 2011).

However, the standard of review in the case at bar is de novo: The standard of review for passing on questions of law in determining whether the chancellor applied an incorrect legal standard in deciphering the provisions in a property settlement agreement which has been incorporated into a divorce decree is de novo. *McLeod v. McLeod*, 2010-CA-00944-COA (¶ 6, ¶

16– 7) (Miss. Ct. App. 2011). "When reviewing a chancellor's interpretation and application of the law, our standard of review is de novo." *Smith v. Smith*, 2009-CA-01661-COA (¶ 8) (Miss. Ct. of App. 2011) (citing *Tucker v. Priscock*, 791 So.2d 190, 192 (¶ 10) (Miss. 2001)). "A chancellor's interpretation that a spouse's conduct rose to the level of habitual cruel and inhuman treatment is a determination of law, which we review de novo." (*Smith* 2009-CA-01661-COA (¶ 8) (citing *Potts v. Potts*, 700 So. 2d 321, 322 (¶ 10) (Miss. 1997) and *Anderson v. Anderson*, 54 So. 3d 850, 851 (¶ 17) (Miss. Ct. App. 2010)). "As to matters of law ... a different legal standard applies [from the standard of review for resolving disputed questions of fact]. In that case, our review is *de novo*, and if we determine that the chancellor applied an incorrect legal standard, we must reverse. *Carter v. Carter*, 725 So.2d 1109, 1114 (¶ 18– ¶ 20), 97-CA-00115 COA (Miss. Ct. App. 1999) (citing *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994)). See also: *Meek v. Warren,* 726 So. 2d 1292, 1293, 97-CA-01444 (¶3) (Miss. Ct. App. 1998); *Webster v. Webster*, 566 So.2d 214, 216, 89-CA-0533 (¶ IV) (Miss. 1990). (See also: *Alpha Insurance Corp. v. Hasselle*, 2010-CA-00609-COA (¶ 9) (Miss. Ct. App. 2011); *In re Estate of Boggan*, 2010-CP-00372-COA (¶ 5) (Miss. 2011); *Dupree v. Dupree*, 2010-CA-00496-COA (¶ 11) (Miss. Ct. App. 2011); *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719,721, 2001-CA-00832-SCT (¶5) (Miss. 2002); Gant *v. Maness*, 786 So. 2d 410, 403, 1999-IA-01172-SCT (¶ 7 & ¶ 8) (Miss. 2001); *Amiker v. Drugs for Less, Inc.*, 796 So. 2d 942, 945, 97-CA-01493-SCT, 97-CA-01535-SCT, (¶ 7) (Miss. 2000); *Res v. Breakers Ass'n, Inc.*, 674 So.2d 496, 499, 94-CA-00192-SCT (Miss. 1996)).

In the case at bar, the issue on appeal concerns whether the chancellor applied an erroneous legal standard. Thus, the Court called upon to review the chancellor's interpretation and application of the law, including his reliance on two Tennessee opinions, the *Johnson* and *Hillyer* cases, as well as his treatment of federal statutory authority and case-law precedent and Mississippi case-law precedent. Were the Court to determine that the chancellor applied an incorrect legal

standard, then reversal of the chancellor's decision would be in order. Therefore the standard of review here is de novo.

In *Carter*, the Mississippi Court of Appeals was presented with resolving both questions of fact and questions of law in determining whether the chancellor failed to apply the correct legal standard to decide if a change in custody was warranted. The legal standard in issue was "that, in order to effect a change of custody, there must be a showing of a material change in circumstances in the situation of the custodial parent that is detrimental to the best interest of the children." *Carter*, 725 So. 2d at ¶ 21 and ¶ 22 (citing *Ash v. Ash*, 622 So.2d 1264, 1265–66 (Miss. 1993)).

In *McLeod*, the ex-wife had filed a motion in the trial court seeking to have her ex-husband held in contempt for failing to pay private school tuition for the parties' minor child. The chancellor denied her motion, finding that the term "tuition" as it was used in the parties property settlement agreement was ambiguous and referred to college tuition and not to private-school tuition. *McLeod*, 2010-CA-00944-COA (¶ 1, ¶6). When the ex-wife appealed, the Mississippi Court of Appeals was called upon to interpret whether the term "tuition" in the property settlement agreement referred to college tuition or private-school tuition. *Id.*, at ¶ 6– ¶ 8).

The ex-wife alleged that pursuant to the pertinent clause of the agreement, her ex-husband owed one-half of their daughter's private school tuition. The ex-husband maintained that the word "tuition" was intended to refer only to college tuition because the parties had never contemplated that their daughter would attend private school. Their daughter had been enrolled in public school at the time of the divorce in 2005 and only after the child was bullied did the ex-wife unilaterally decide to enroll the child in private school in 2009. Therefore, the chancellor concluded that the parties intended the word "tuition" to mean college tuition as they had never contemplated sending their daughter to private school. *Id.* ¶ 7– ¶9.

The chancellor also noted that under case precedent, private school tuition is included in the statutory amount of child support. Since the ex-husband was already paying the statutory amount,

the Chancellor held that the ex-husband could not be required to pay above that amount for the daughter's private school tuition. *Id.* at ¶ 10.

The *McLeod* court set out the applicable de novo standard of review for issues of law:

> Our standard of review ... was set forth in *Meek v. Warren* [citation omitted]:
> ' Because the resolution must be reached via the interpretation of a divorce judgment, our task is to view the terms of the document, find their legal meaning, and adjudge their enforceability.' [citation omitted]. The familiar *manifest error/substantial evidence* rules have no application to such questions of law. *Id.* Consequently, our review is *de novo*, provided only that we read the entire settlement agreement/divorce judgment and in the best light possible, attributing to its provisions the most coherent and reasonable scheme they may yield. *Id.* However, we remain cognizant that our authority is circumscribed in that we may not provide through the pretense of interpretation that not directly or impliedly a part of the text we interpret. *Id.*'

Mcleod , 2010-CA-00944-COA A at (¶ 17) ((quoting *Meek v. Warrren*, 726 So.2d 1292, 1292–94 (¶ 3) (Miss. Ct. App. 1998) (quoting *Webster v. Webster*, 566 So. 2d 214, 216 (Miss. 1990), emphasis added).

In *Webster*, the Mississippi Supreme Court construed the housing and support provisions of a property settlement agreement incorporated into a final judgment of divorce. *Webster*, 566 So. 2d 214. The case involved interpretation and enforcement of provisions in the parties' settlement agreement incorporated into the judgment of divorce respecting whether the ex-husband's obligation topay the mortgage, taxes, and insurance on the former marital residence had extinguished. *Id.* at 215. The *Webster* court explained the applicable standard of review in passing on a question of law is de novo "[w]here the question of before us is essentially one of interpretation of a legal text" in a property settlement agreement incorporated into the final judgment. *Id.* at 216 (citing *Busching v. Griffin*, 542 So.2d 860, 863 (Miss. 1989).

Similarly, in *Meek*, the Mississippi Court of Appeals reviewed de novo the chancellor's interpretation of a provision in the parties' property settlement agreement incorporated into the final judgment of divorce. The provision in issue addressed the extent of the ex-husband's obligation to

pay his daughter's educational expenses. Again, the court, in determining whether the ex-husband was contractually obligated to pay for additional items beyond basic educational expenses, reviewed the terms of the divorce judgment de novo to decipher its legal meaning and adjudge its enforceability. *Meek*, 97-CA-01444 at ¶3--¶4.

II. The chancellor erred in requiring James to compensate Tonya for the monetary amounts she did not receive as a result of James' post-divorce waiver of his military benefits in exchange for veterans disability benefits because he applied an erroneous legal standard.

A. Requirement of Waiver of Military Retired Pay to Receive Veterans Disability Benefits

Members of the military services who have served for the requisite period may retire from active duty and receive retirement pay. 10 U.S.C. § 3911 *et. seq.* (Army); 10 U.S.C.§ 6321 *et. seq.* (Navy and Marine Corps); 10 U.S.C. 8911 *et. seq.* (Air Force). In addition, veterans who become partially or totally disabled as a result of military service may be eligible for veterans disability benefits. 38 U.S.C.§ 1110 *et. seq.* (wartime disability); 38 U.S.C.§ 1131 *et. seq.* (peacetime disability). In general, however, a military retiree may receive disability benefits only to the extend that he or she waives a corresponding amount of military retirement pay. 38 U.S.C.§ 5305. This requirement is intended to prevent double dipping. Mansell v. Mansell, 490 U.S. 581, 584. 109 S.Ct. 2033, 104, 104 L.Ed.2d 675 (1989). Because veterans disability benefits, unlike retirement pay, are exempt from taxation, 38 U.S.C.§ 5301(a), such waivers are common. *Mansell*, 490 U.S. at 583.

B. The Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 under the *Mansell* Decision As Congress' Response to the McCarty Decision

1. Prelude: The *McCarty* Decison

In ,*McCarty v. McCarty,* 453 U.S. 210 (1981), the court held that state courts are preempted by federal law from treating a service member's retirement pay as community property divisible between the service member and former spouse upon divorce.

2 . Uniform Services Former Spouses' Protection Act (USFAPA), 10 U.S.C. § 1408

Congress responded to *McCarthy* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, which authorizes a state court to treat "disposable retired pay" either "as property solely of the [former service] member or as property of the [former service] member and his spouse in accordance with the law of the jurisdiction of such court," 10 U.S.C. § 1408(c)(1). Thus, the Uniform Services Former Spouses Protection Act ("USFSPA") gives state courts the authority to treat military disposable retired pay as marital property and divide it between the spouses according to the laws of that state. *Id.*

3. Definition of Disposable Retired Pay in the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408

"Disposable retired pay" is defined in the statute as "the total monthly retired pay to which a member is entitled," less the authorized deductions. 10 U.S.C. § 1408 (a)(4). Among the amounts to be "deducted from the retired pay" are those waived "to receive compensation under ... title 38"– i.e., amounts waived to receive disability benefits. *Id.* at § 1408(a)(4)(B). A court award can be enforced under the USFSPA up to a maximum of fifty percent (50%) of the member's disposable retired pay. Id. at section 1408(e)(1).

C. The USFSPA under the *Mansell* Decision

1. *Federal Preemption* Prohibiting Military Retired Pay Waived to Receive Veterans Disability Benefits from Treatment as Marital Property Divisible Upon Divorce

a. Federal Preemption

In Mansell v. Mansell, *supra*, the United States Supreme Court interpreted the USFSPA, 10 U.S.C. § 1408 . The Court construed the USFSPA to reject the *McCarty* rule, but only in part. The Court reasoned that, under the statute's "plain and precise language," state courts "have been granted the authority to treat "only *disposable retired pay*, not *total retired pay*, as community property," 490 U.S. at 589 (emphasis added). However, the Court held that ... "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon

divorce military retirement pay that has been waived to receive veterans disability benefits." 490 U.S. at 594-95, 109 S.Ct. 2023. Thus, state courts are preempted by federal law from treating as divisible property retirement pay waived in favor of disability benefits.

The Court based its decision on the fact that § 1408 (a)(4)(B) excluded military retirement pay waived in order to receive veterans' disability payments benefits from the definition of disposable retired pay: "The Act's definitional section specifically defines the term 'disposable retired or retainer' pay to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. § 1408 (a)(4)(B). Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property." 490 U.S. at 589. The Court concluded that "in light of § 1408(a)(4)(B)'s limiting language as to such waived pay, the Act's plain and precise language establishes that §1408(c)(1) grants state courts the authority to treat only disposable retired pay, not total retired pay, as community proptery." *Id.* at 581.

b. Application to the Case at Bar

As noted, under Mansell, state divorce courts may not treat military retirement pay that has been waived to receive veterans disability benefits as distributable property. 490 U.S. at 594-595. Thus, a retiree may receive disability compensation at the same time he is receiving retired pay, including Department of Defense retired pay. The member must then file a waiver of a portion of military retired pay (including Department of Defense disability retired pay) equal to the amount of VA disability compensation. Burda, Joan M., and Majeski, Michael B., "Dividing Military Retired Pay Under the Uniformed Services Former Spouse's Protection Act," ABA General Solo Practice, Small Firm Section, July/August 2000 issue, page 7.

This results in a reduction in disposable retired pay equal to the award of VA disability compensation. "For example, if a military retiree is eligible for $1500 a month retirement pay and

$500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any disability benefits." 490 U.S. at f.n. 1. The reduction automatically reduces the amount available to the former spouse. Therefore, when Mr. Mallard waived a portion of retired pay to receive VA disability compensation, it reduced the payment to the Mrs. Burkart by the same percentage as the VA waiver. This can be done without the consent of either the former spouse or the court.

Applying Mansell, the Court in the instant case lacks the power to allocate any portion of James' disability payments and make them payable to Tonya. In reaching its decision, the trial court in the case at bar noted the appellant's reliance on the *Mansell* decision's interpertation of the USFSPA , in which the United States State Supreme Court held that 'the USFSPA does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits.' [R 103]. Implicit in this holding, which the chancellor appears to recognize, though not explicitly so, is the notion that "the application of Mansell to the case at hand renders the Court powerless to allocate any portion of James' disability payments and make them payable to Tonya; despite the fact that her property settlement agreement has now been significantly reduced." [R 0103]. By ordering James to compensate Tonya in the amount of $21,212.57 for the money she did not receive following his election to waive military retirement benefits to receive veterans disability benefits, the chancellor's approach operates indirectly to do what Mansell and the USFSPA prohibit him from doing directly, thus contravening federal law on the subject.

2. Anti-Attachment Provision, 38 U.S.C. § 5301 (a)(1)

The veteran in *Mansell* argued that he state court's division of his total retired pay violated, not only the USFSPA, but also the anti-attachment provision applicable to veterans' disability benefits found at 38 U.S.C. § 5301(a)(1). Under that provision, "shall not be assignable except to te extent specifically authorized by law, and ... shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or underany legal or equitable process whatever, either

before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1). In light of its holding that the USFSPA precludes the division of retirement pay waived in favor of disability benefits, however, the court found it unnecessary in *Mansell* to address whether the anti-attachment provision would independently afford such protection. See 490 U.S. at 587n.6. This issue was later addressed by the North Carolina Court of Appeals in the *Halstead* opinion, discussed immediately below.

D. The *Halstead* Decision As Supporting Appellant's Position

1. Introduction: Mistakes and unforseen circumstances may lead former spouses to attempt to modify a final decree involving military retirement benefits. This outcome is true particularly in circumstances where the military retiree has waived a portion of military retirement pay to receive disability payments, thus reducing the former spouses payment. Neither the Mississippi Supreme Court nor Mississippi Court of Appeals has addressed this issue.

As discussed below, a large amount of litigation has arisen out of situations where a military service member waives a portion of nondisability retirement benefits in order to receive disability benefits. As discussed above, disabled veterans may receive disability benefits only to the extent that they waive a corresponding amount of military retirement pay. 10 U.S.C. § 1408. These veterans choose this waiver for its tax advantages because VA disability income is exempt from federal, state, and local taxes: The *Mansell* noted that [b]ecause disability benefits are exempt from federal, state, and local taxation ... under U.S.C. § 5301(a), military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common." 490 U.S. at 583. Under the USFSPA, military retirement pay waived to receive disability payments is specifically excluded from the "disposable retired pay" that state courts may treat as property divisible in divorce actions pursuant to 10 U.S.C. section 1408(a)(4)(B). 490 U.S. at 589.

2. The *Halstead* Decision

a. Background

However, the issue has been addressed in a North Carolina case which did not favor the nonmilitary ex-spouse. In Halstead v. Halstead, 164 N.C. App. 543, 596 S.E.2d 353 (N.C.Ct. App. 2004) the North Carolina Court of Appeals found that the trial court erred in an equitable distribution case not only by awarding plaintiff wife a larger percentage of defendant husband's military retirement benefits based on the fact that defendant elected to receive disability pay in lieu of a portion of his retirement pay, but in two other important respects as well. The *Halstead* decision contained three major holdings which are pertinent to the case at bar.

Following defendant's retirement from military service. Defendant had a service-related disability. Since federal law precluded the receipt of military disability benefits and military retirement benefits, defendant elected to waive a portion of his military retirement pay in order to receive military disability pay. *Halstead*, 596 S.W. 2d at 544.

b. Holding Number 1

One portion of the trial court's order required the percentage of retirement pay payable to the non-military ex-spouse increased and the percent payable to defendant decreased to account for the partial disability deduction payment made to defendant. *Id.* at 544.

The appellate court held that this portion of the trial court order "circumvented the mandates of 10 U.S.C. § 1408 by increasing Plaintiff's share of Defendant's military retirement based solely upon Defendant's election to ... waive a portion of his military retirement pay based upon the amount of his disability benefits." *Halstead* at 546: "[T]he trial court's order awarding Plaintiff a greater percentage of Defendant's disposable retirement pay because Defendant elected to receive disability pay in lieu of a portion of his retirement pay contravenes 10 U.S.C. § 1408." *Halstead* at 550.

In finding for the military ex-husband on this issue, the appellate court based its decision on the federal preemption doctrine enunciated in *Mansell*. Federal preemption limits state action regarding military retirement pay and military disability pay to those actions authorized by

Congress. Therefore, state equitable distribution laws may be applied to military retirement and military disability pay only to those areas in which Congress has authorized state action. Thus, the Uniformed Services Former Spouses' Protection Act 'does not grant state court the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits [pursuant to 10 U.S.C. section 1408]' *Halstead*, 546 S.E. 2d at 546 (quoting *Mansell 490 U.S, at 594–595)*. By compensating for the reduction in retirement income by increasing plaintiff's share of disposable retirement income, the trial court's order contravened federal law. *Halstead*, at 547.

The Halstead court noted that "[a]lthough the trial court ... deducted Defendant's veteran's disability benefits from his gross military retirement pay, it then circumvented the mandates of 10 U.S.C. § 1408 by increasing Plaintiff's share of Defendant's military retirement benefits solely upon Defendant's election to ... waive a portion of his military retirement pay based upon the amount of his disability benefits. Indeed, the trial court's order explicitly states that he reason for increasing Plaintiff's share arose from Defendant's election to receive disability benefits in lieu of retirement pay. *Such an attempt to circumvent the mandates of 10 U.S.C. § 1408 cannot be sanctioned by this Court.*" *Halstead* at 546 (emphasis added).

c. Application to the Case at Bar

Applying this portion of the Halstead holding to the the case at bar, the chancellor's awarding Tonya compensation for past losses attributable to James' waiver of his disposable retirement pay is analogous to the *Halstead* trial courts's increasing the percentage of retirement pay payable to the non-military ex-spouse and decreasing the percent payable to the military retiree to account for the partial disability deduction payment made to defendant. Again, the chancellor in the instant case sought to do indirectly what statutory law and case precedent, including *Mansell* and *Halstead* prohibited him from doing directly.

d. Holding Number 2

In another portion of the trial court's order, defendant contended that the trial court erroneously defined military retirement pay without regard to the definition of "disposable retired pay" in 10 U.S.C. § 1408(a)(4)(B). The *Halstead* held that "[t]he trial court could not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by the Congress." *Id.* at 547. Thus, the court again relied on federal preemption, which limits state action regarding military retirement pay and military disability pay to those actions authorized by Congress. Since federal law governs state action regarding those subjects, the trial court was prohibited from substituting its own definition for disposable retirement pay. *Id.* at 550.

e. Application to the Case at Bar

This portion of the court's holding is applicable to the trial court's actions in the instant case as well. The chancellor ignored the plain meaning of the term "disposable military retired pay" in the Paragraph 12 of the parties' property settlement agreement (R 28-29), which was clearly defined in 10 U.S.C. § 1408 and prominently referenced in the agreement. Had he acknowledged the definition assigned by federal statute, then the phrase "40% of Husband's disposable military retired pay" awarded Tonya in the agreement, then he would have applied the proper legal standard and found that percentage to mean 40% of whatever amount James's disposable retired pay happened to be at any given point in time.

f. Holding Number 3

Finally, yet another portion of the trial court's order required of defendant the following, which is even more pertinent than the two provisions just discussed to the case at bar:

> If there is a diminution deduction or cessation of the amounts paid to the Plaintiff pursuant to the *next preceding paragraph* ... , due to an act or omission of the Defendant, the *Defendant shall personally pay to the Plaintiff* ... that amount not paid directly To her by the Defendant Finance and Accounting Service....
>
> [The *next preceding paragraph* referred to immediately above] provided as follows: If the Defendant receives disability pay... and this event causes a reduction of the Defendant's disposable retired pay from the amount set out herein, thus reducing the Plaintiff's share thereof, the *Defendant will pay to the Plaintiff... each month*

> *any amount that is withheld from Plaintiff's share* of the Defendant's military retirement for the above reasons....

Halstead at 549 (emphasis added).

In addressing this portion of the trial court's order, the court held that "... the order requiring defendant to pay his former wife any amount withheld from her share of Defendant's military retirement due to future reductions caused by an act or omission, including future waivers of retirement pay, contravenes 38 U.S.C. § 5301...[which precludes] 'attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" *Halstead* at 549 (quoting 38 U.S.C. § 5301).

The court identified the rationale underlying its holding as being the policy stated by the United States Supreme Court in *Mansell*: 'Veterans who became disabled as a result of military service are eligible for disability benefits ... calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired .... In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. Because disability benefits are exempt form federal, state, and local taxation, military retirees who waive their retirement pay in ... favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.' *Halstead* at 540–550 (quoting *Mansell*, 490 U.S. at 583–84).

g. Application to the Case at Bar

The facts pertinent to this holding are similar to those in the case at bar. Both cases involve instances in which the chancellor orders the military retiree to reimburse the non-military ex-spouse for amounts withheld from her share of the retiree ex-spouse's disposable retirement benefits as the result of future deductions from her share caused by the retiree's future waivers of military retirement pay.

The trial court in the case at bar further noted appellant's correct reliance on North Carolina Court of Appeals' findings in the *Halstead* case, in which the court held that "the order requiring Defendant to pay his former wife any amount withheld from her share of Defendant's military retirement due to future reductions caused by an act or omission, including future waivers of retirement pay, contravenes 38 U.S.C. Section 5301...." *Halstead*, 164 N.C. App. at 549. Even though the chancellor in the case at bar mentioned that "[a]lthough James makes a good argument as to why veterans' disability benefits are not subject to marital property division **at the time of the divorce**, neither case [cited by James] [*Mansell* and *Halstead]* addresses whether a post-divorce waiver of retirement pay in exchange for disability pay could reduce the former spouse's award, as marital property, of a portion of the military retirement pay." (R ,122). Actually the *Halstead* holdings, for the reasons stated above, clearly do have application to a post-divorce waiver of retirement pay to receive veterans disability pay. In particular, the third holding is directly on point regarding the post-divorce waiver issue. Just as in James' situation, the veteran in *Halstead* was ordered to reimburse personally reimburse his ex-wife for all deductions from her payments, both past and future, if the deductions were due to the veteran's election to waive retirement pay to receive disability benefits. The scenario which led to the third holding in *Halstead* actually appeared to have occurred post-divorce, when the reductions took effect, so application of the holding would apply to a waiver of retirement pay in exchange near or at the time of the divorce as well a post-divorce waiver of same. Thus, the chancellor's order for James to personally reimburse Tonya for the uncompensated deductions from her payments contravenes 38 U.S.C. § 5301 and runs afoul of the *Halstead* court's stated rationale. Therefore, she is not entitled to any direct monetary reimburement payable personally by James for the money she feels she has been denied as a result of James' election to receive veterans disability benefits.

E. The Trial Court's Misplaced Reliance on *Johnson* and *Hillyer*

1. The *Johnson* Case

The trial court erroneously relies on *Johnson v. Johnson*, 37 S.W. 3d 892 (Tenn. 2001) in reaching its conclusion "...that Tonya's property interest in the percentage of miliary retirement income that she was to receive vested at the time of the divorce. As such, this percentage could not be thereafter unilaterally altered by the actions of James." [R 0107].

In *Johnson*, *Id.* at 893– 894, the parties' marital dissolution agreement ("MDA") divided Mr. Johnson's "military retirement benefits" to award one half (½) of those benefits to Mrs. Johnson. Following entry of the final decree, which incorporated the MDA, Mr. Johnson retired, and Mrs. Johnson received one half of the amount of Mr. Johnson's retired pay for nearly a year. Later, Mr. Johnson unilaterally waived a portion of his military retired pay to receive an equal amount of non-taxable disability benefits, i.e, by electing, pursuant to federal law, to receive a portion of his retirement pay in the form of tax-free disability benefits. His retirement pay was reduced by the amount of those disability benefits to avoid double payment to Mr. Johnson pursuant to 38 U.S.C. § 5305. Consequently, Mrs. Johnson's payment for her share of the military retired pay was accordingly reduced by the amount of the reduction in Mr. Johnson's retired pay (the amount waived to receive disability benefits). *Id.* at 895.

In the lower courts, Mrs. Johnson had requested a modification of the MDA to award an additional sum as alimony in an amount equal to the reduction in her payment, but the trial court and Court of Appeals denied her request to modify. The Tennessee Supreme Court interpreted the petition to modify as a petition to enforce the divorce decree rather than a request to modify. The court held that when an MDA divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the date of the court's decree. The court went on to point out that "[a]ny act of the military spouse that unilaterally decreases the non-military spouse's vested interest is an impermissible modification of a division of marital property and a violation of the final decree incorporating the MDA." *Id.* at 894. The Tennessee Supreme Court then remanded the case to the trial court for enforcement of the decree.

The Tennessee Supreme Court reasoned that because Mrs. Johnson sought to modify division of Mr. Johnson's retirement benefits, under Tennessee law, his military retired pay is martial property subject to equitable distribution. Therefore, thw court concluded that Mrs. Johnson's payments pursuant to the MDA were periodic distributions of marital property rather then alimony, and consequently, that the divorce decree's apportionment of that marital property was not subject to modification. *Id.* at 895. The court opined that Mrs. Johnson's characterization of her petition as one seeking "modification" was incorrect, reasoning that all of her argument and the remedy she sought indicated that she only desired payment in the amount she originally received, which was one half of the military retired pay Mr. Johnson was entitled to receive at the time of his retirement. *Id.* at 895–896.

The circumstances in the *Johnson* case are distinguishable from the case at bar. In *Johnson*, the parties entered into a written MDA which was incorporated into the final decree of divorce. The MDA provided that Mrs. Johnson would receive one-half of "all military retirement benefits" due the Husband. *Id.* at 894. Unlike the Child Custody and Support and Property Settlement Agreement in the instant case, the MDA in *Johnson* did not contain precise language for limiting just what benefits the term "military retirement benefits" was intended to encompass. Certainly, the term "disposable retired pay" was not even mentioned as it should have been in keeping with the requirements of USFSPA. 10 U.S.C. § 1408. As explained by the court in *Johnson*, "disposable retired pay" is defined by the USFSPA as "the total monthly retired pay to which a member is entitled," minus certain listed deductions. 10 U.S.C. § 1408(a)(4). Included among these deductions is amounts "deducted from the retired pay ... as a result of waiver of retired pay required by law in order to receive [disability benefits pursuant to] title 38. 10 U.S.C. § 1408(a)(4)(B). Mrs. Johnson's main argument was that the parties intended for the term "retirement benefits" as contemplated by the MDA to include both Mr. Johnson's "retired pay" and "disability benefits." Under this interpretation, Mrs. Johnson argued that the parties agreed that she

should receive one half of Mr. Johnson's "post-employment military compensation" in whatever form it might be paid. *Johnson* at 896.

The Child Custody and Support and Property Settlement Agreement in the instant case followed the requirements § 1408 of the USFSPA in clearly setting forth certain provisions and terminology. [R 0016 at ¶ 12. In particular, it expressly and unambiguously employs the term "disposable military retirement pay," a term which is susceptible of only a single interpretation under USFSPA. 10 U.S.C. § 1408(a)(4). The MDA in the *Johnson* case on the other hand employed ambiguous language – " all military retirement benefits" – which Mrs. Johnson called upon the court to interpret I her favor, which it did. In agreeing with Mrs. Johnson, the court accepted her argument that the parties' intent at time of entering into the MDA was to pursue "a course of action," namely that they agreed that Mrs. Johnson was to be paid one half of whatever compensation the military paid to him following his retirement. Thus, the court appeared to have excused the vagueness and ambiguity in the relevant MDA provisions dealing with Mr. Johnson's military retirement benefits.

In the instant case, the court noted that the *Johnson* court analyzed all of the terms of the marital dissolution agreement in finding the phrase 'all military retirement benefits' to be unambiguous and holding that Mrs. Johnson's interest in those benefits vested as of the date of entry of the courts's decree and could not be unilaterally altered (R 0105). However, that finding of unambiguity is specific to the circumstances involved in the drafting of the MDA in the *Johnson* case. There, the parties for whatever reason failed to follow the directives of the USFSPA in crafting the provision dealing with the retirement benefits and chose instead to employ the imprecise language "all military retirement benefits." As a result of this imprecision, the *Johnson* court resorted to a rather circuitous analysis employing the rules governing construction of contracts to ascertain the intention of the parties to resolve the dispute of contract interpretation involved in this case. *Johnson*, at 896. Even after engaging in this labored analysis, the court still

found that the term "all military retirement benefits" to be "unambiguous" as it is used in the MDA.

By contrast, in composing the language of Paragraph 12 of the Child Custody and Support and Property Settlement Agreement in Tonya's and James' document, the language employed was precise, clearly identifying the relevant subject matter as "disposable military retired pay" as directed in by the USFSPA. Thus, there is no evidence that the parties in the instant case intended for Mr. Mallards's post-employment military compensation to be interpreted to be anything other than what it was pursuant to the definition of "disposable military retired pay" in 10 U.S.C. § 1408(a)(4). As such, it would clearly have been subject to reduction in the event of a election by James to waive military retirement benefits to receive veterans disability benefits. This state of affairs was readily determinable by reference to the federal statutory provisions in 10 U.S.C. § 1408 of the USFSPA.

2. The *Hillyer* Case

The chancellor in the instant case further relied on *Hillyer v. Hillyer*, 59 S.W. 3d 118(2001) in finding "that Tonya's property interest in the percentage of military retirement income that she was to receive vested at the time of the divorce....[and] [a]s such, this percentage could not be thereafter unilaterally altered by the actions of James." (R 0107). In *Hillyer*, the Tennessee Court of Appeals addressed the issue of "whether a post-divorce waiver of retirement pay in exchange for a corresponding amount of disability pay could reduce a former spouse's previous award, as marital property, of a portion of the military retirement pay." *Id.*, 59 S.W. 3d at 119. When the trial court granted Mrs. Hillyer a divorce from Mr. Hillyer, it awarded her forty percent (40%) of Mr. Hillyer's "gross military retirement benefits" as part of her share of marital property. *Id.*, 59 S.W. 3d at 119. Unlike the situation in *Johnson*, the Hillyers did not have an MDA. Mrs. Hillyer's right to a share of Mr. Hillyer's retirement pay arose from the divorce decree. *Id.* at 122.

Soon after the divorce, Mr. Hillyer retired from the military, and Mrs. Hillyer began receiving her forty percent of his retirement pay. Shortly thereafter, Mr. Hillyer became one

hundred percent (100%) disabled from heart disease and opted to receive veterans' disability benefits instead of retirement pay. As a result of Mr. Hillier's waiver of retirement benefits, Mrs. Hillyer no longer received payment for any portion of her ex-husband's income based on his military service. *Id.* at 119 – 120.

In deciding whether Mrs. Hillyer was entitled to her previously awarded share of Mr. Hillyer's retirement benefits, the Arkansas Court of Appeals based its reasoning on the *Johnson* court's analysis of this issue in holding that "...at the time of the divorce decree Ms. Hillyer obtained a vested right to forty percent (40%) of Mr. Hillyer's 'gross military retirement benefits' and is entitled to enforce that decree. *Id.* at 123.

Like the situation in *Johnson*, in *Hillyer*, the term employed in the divorce decree to denote what was meant by retirements benefits was not expressly defined or limited, unlike the provisions in the Child Custody and Support and Property Settlement Agreement in the situation of Tonya and James now before this Court, in which the precise meaning of the term "disposable military retired pay" and limitations in connection with that term was clearly determinable by reference to the USFSPA, 10 U.S.C. § 1408.

As mentioned above, "disposable retired pay" is defined by the USFSPA as "the total monthly retired pay to which a member is entitled," minus certain listed deductions. 10 U.S.C. § 1408(a)(4). Included among these deductions is amounts "deducted from the retired pay ... as a result of waiver of retired pay required by law in order to receive [disability benefits pursuant to] title 38. 10 U.S.C. § 1408(a)(4)(B).

Since disposable retired pay is subject to deductions, the payment amount that "vested" upon execution of the Child Custody and Support and Property Settlement Agreement was subject to vary over time, and the fact that Tonya, who was represented by counsel, did not allow for this contingency does not change the reality that the she did not take advantage of the opportunity to do so. At the time the agreement was entered, the Tonya had a vested interest in forty percent of

James' "disposable military retired pay". Her claim to the forty percent share may have been a vested claim. That is, the vested claim was the right to payment of that particular portion (40%) of whatever "disposable military retired pay" happened to be any point in time. As the court in the the case at bar observed, ... "Tonya's property interest in the percentage of military retirement income that she was to receive vested at the time of the divorce. As such, this percentage could not be thereafter unilaterally altered by the actions of James." (R 0107). Interpreting Tony's claim with reference to the definition of "disposable retired pay" in the USSPA, § 10 U.S.C 1408 (a)(4), Tonya's forty-percent vested interest was never itself unilaterally altered via James' actions. The only reduction occurred with respect to the monetary value of Tonya's forty-percent vested interest, which, pursuant to federal statute was legitimately subject to fluctuations attributable to such factors as the military retiree's election to receive veterans disability benefits in lieu of retirement benefits.

F. Other Cases Favoring Appellant Including the *Youngbluth* and *Clauson* Decisions

1. The *Youngbluth* Decision

In *Youngbluth v. Youngbltuh, 2010 VT 40, 6 A.3d* 677 (Vt. 2010), husband retired from the military during the initial divorce proceeding, and the trial court granted wife a percentage of husband's monthly disposable retirement benefits. Subsequently, husband applied for disability benefits from the U.S. Department of Veterans Affairs (V.A.). The V.A. granted husband a thirty percent (30%) disability rating, which meant that a significant portion of husband's taxable retirement benefits were forfeited and replaced dollar-for-dollar by tax-exempt and garnishment-exempt disability benefits. As a result of this waiver of husband's retirement benefits in favor of disability benefits, wife's retirement payment was proportionately reduced. *Youngbluth*, 6 A.3dat 679. Upset by what she viewed as husband's "unilateral modification of the final property division," wife sought a modification of the property division order to increase her percentage of husband's disposable retirement benefits. *Id.* at 679.

The trial court (and later the state's supreme court) treated wife's request for relief as one requesting enforcement, rather than modification, of the original order. Although wife's original motion was entitled a motion for modification, the trial court, and later the state supreme court, believing they were without power to modify the property disposition aspects of a divorce decree absent circumstances such as fraud or coercion, treated wife's motion as requesting enforcement, which addressed "just execution of the judgment already ordered," rather than modification, noting how the state placed great emphasis on the finality of property divisions. *Id.* at 681. With respect to the the appellee's request for relief in the case at bar, the requested relief in the court below may be viewed as essentially an enforcement action with respect to appellant's request to be compensated for her proportionate losses she incurred upon waiver of appellant's disposable retirement benefits.

The position maintained by appellee in the instant case closely resembles wife's argument in *Youngbluth*. In the latter case, wife argued that the original property division order intended to grant wife a consistent payment of roughly $700.00 per month form husband's retirement benefits, regardless of any future actions taken by husband. She maintained that when husband waived a portion of his retirement benefits to receive disability benefits, he "became obligated to provide wife with an offset payment to ensure that wife continued to receive the same amount of money." *Id.* at 682. The trial court agreed and changed the original property division increasing wife's percentage of husband's disposable retirement benefits from 19.81% to 22.4%. This result ensured for the time being that wife would continue to receive roughly $700.00 per month. *Id.* at 682.

In granting wife the requested relief, the court reasoned that the original property division order intended to provide wife with a larger percentage of husband's disposable retirement benefits. Accordingly, it sought to restore wife's monthly payment to roughly the amount that the court had in mind when it decided the initial decision. *Id.* at 680.

The Supreme Court of Vermont disagreed, finding that it was error to increase wife's percentage of husband's disposable retirement benefits in this manner. *Id.* at 682. The court held that "...under the plain language of the original property division order and under well settled law that state courts cannot grant a former spouse an interest in a military servicemember's disability benefits, the original property division order does not allow wife to now receive a greater percentage of husband's disposable retirement benefits." *Id.* at 681. "The original property division order granted wife 19.81% of husband's 'retirement plan," which gave wife an interest only in husband's disposable retirement benefits, not in his disability benefits." *Id.* at 682. Thus, the court rejected the trial court's determination that the original property division order intended to provide wife with a larger percentage of husband's disposable retirement benefits.

The *Youngbluth* court explicitly rejected the result reached in the *Johnson* case relied upon by the chancellor in the case at bar when it noted that "[t]he trial court's decision relied on cases from the Tennessee Supreme Court and from intermediate courts of appeal in... [five other states]..., all of which the trial court found to have held that a service member cannot 'unilaterally' modify a judgment by reclassifying the form in which the servicemember receives payments." *Id.* at 686. The court recognized that *Johnson* directly supported wife in the appeal, but rejected the reasoning employed by the *Johnson* court and other courts which have adopted " 'creative solutions' [around *Mansell*] to prevent a former spouse form losing his or her interest in the military retirement as the result of unilateral action on the part of the military spouse. "[1]

Mansell only permits disposable retired pay to be considered as marital property. Therefore, the *Youngvluth* court hypothesized that even if the original property division order had explicitly granted wife an interest in husband's total retirement benefits, pursuant to *Mansell*, federal law would require the court to interpret the order as applying only to disposable retirement

[1] *Id.* at 684

benefits. '[U]nder *Mansell*, state court do not have the power to treat military retirement pay that has been waived in order to receive V.A. Disability benefits as property divisible upon divorce.' *Id.* citing *Gallegos v. Gallegos*, 788 S.W.2d 158, 160 (Tex. App. 1990) (citing *Mansell*, 490 U.S. 581, 109 S. Ct. 2023).

The *Youngbluth* court concluded that becaise the trial court's original property division order gave wife as specific portion of husband's monthly retirement benefits, it could not have intended to award wife any percentage of disability benefits that husband might earn in the future. Therefore, the court interpreted the trial court's reference to "retirement pay" to include only husband's "disposable retirement benefits," which under federal law does not include disability benefits received in lieu of retirement benefits. *Id.* 684.

Thus, the *Youngbluth* court, declining to join "those courts which have found 'creative solutions' around *Mansell,* "[2] recognized that federal preemption dictates that "regardless of whether we disagree with it, a decision by the United States Supreme Court on a matter of federal law" is binding upon the state courts."[3] Therefore, "... *Mansell* must be followed even when it leads to seemingly unfair results."[4] The court, pointing out that many other courts have reached this same conclusion even though it sometimes created "an unfair hardship for former spouses,"[5]

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[2] *Id.* at 684

[3] *Id.* at 685

[4] *Id.*

[5] *Id.*

recognized 'the potential for inequity to the former spouse,' [6] but concluded that the wording of [the USFSPA]

evidences an intention on the part of Congress to make these [disability] payments solely for the use of the disabled veteran." [7]

Under the reasoning adopted by the *Youngbluth* court with reference to its explicit rejection of the court's position in *Johnson,* which refused to recognize that a service member could legally modify a judgment by reclassifying the form in which he receives from retirement pay to disability pay, federal preemption requires that the Court resolve the case at bar in James' favor by rejecting the "creative solution" reached by the chancellor to prevent Tonya any losses resulting from unilateral action on the part of James. While the chancellor's creative solution to alleviate any hardship and inequity to Tonya is commendable, it contravened the principles of federal preemption set out in the United States Supreme Court's interpretation of the USFSPA, 10 U.S.C. § 1408 *et. seq.* the Mansell decision. Therefore, as noted in the *Youngbluth* holding, "Mansell must be followed even when it leads to seemingly unfair results." *Youngbluth* at 685.

2. Absence of a Clear Majority View

Other courts have reached results similar to that in *Youngbluth* in concluding that a party cannot generally be required to pay more than the original percentage stated in the final property division order. *Id.* at 686. For example, in *Ex parte Billeck*, 777 So.2d 105 (Ala. 2000), the Alabama Supreme Court reversed the lower court decision which had required the husband to pay additional money to the wife, when as in *Youngbluth*, the wife began receiving less money from the husband's military retirement benefits because the husband applied for and was granted disability

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[6] *Id.* quoting *Davis v. Davis*, 777 S.W. 2d 230, 232 (Ky. 1989)

[7] *Id.*

benefits. *Id.* at 686, citing *Ex parte Billeck*, 777 So. 2d. Indeed, the *Youngbluth* court took exception with the claim made by some courts that the 'majority of state courts, on one theory or another, take equitable action to compensate the former spouse' in these types of situations.' *Id.* at 687 (quoting *Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W. 3d 761 (2004)). The court explained that "[d]espite these claims, there is no clear majority viewpoint here...." *Id* at 687.

3. Significance of Precise Language and an Indemnity Provision to a Favorable Outcome for Military Retiree

The *Youngbluth* court's research also identified some factors which tended to favor the military retiree ex-spouse:

> [T]here are many cases that directly support husband's position that –at least when the original property division order states an *exact percentage* and contains *no indemnity provision* –a former spouse cannot use an enforcement proceeding to receive an increased percentage to offset the military servicemember's subsequent application and receipt of disability benefits. *Id.* At 687 (emphasis added).

In ruling in favor of husband in declining to award wife a mechanism to offset husband's receipt of disability benefits in lieu of retirement benefits, the *Youngbluth* court found a particular line of cases more persuasive than the cases that the trial court relied upon in ruling for wife which had taken equitable action to compensate the non-military spouse. These cases, which supported husband's position, '...at least when the original property division order...[stated] an exact percentage and [...contained] no indemnity provision,' included the following. *Id.* at 687: *Ex parte Billeck*, 777 So.2d 105, 109 (Ala. 2000); *Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992); *Ashley v. Ashley*, 337 Ark. 362, 990 S.W. 2d 507; 508–09 (1999); *In re Marriage of Pierce*, 26 Kan. App.2d 236, 982 P.2d 995, 998 (1999); *Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E.2d 353, 357 (2004); *Hagen v. Hagen*, 282 S.W. 3d 899, 905 (Tex. 2009); *Thomas v. Piorkowshi*, 286 S.W. 3d 662, 669 (Tex. App. 2009); and *Sharp v. Sharp*, 314 S.W. 3d 22, 24–25 (Tex. App. 2009).

It is significant to note that the property settlement agreement in the case at bar stated an exact percentage with respect to the portion of retirement benefits (40%) which Tonya was

awarded. Based on the *Youngbluth* court's observations, this factor should favor James in interpreting ¶ 12 of the Agreement. Moreover, James' and Tonya's property settlement agreement contained no indemnity provision to require reimbursement compensation to Tonya. Again, according to the *Youngbluth's* courts case survey, the absence of an indemnity provision would weigh in James' favor as well.

In *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 982 P.2d 995 (Kan. Ct App. 1999), the Kansas Court of Appeals reviewed the parties' property settlement agreement, which awarded wife an exact percentage (45%) of husband's military retirement benefits. The agreement did not specify any certain monthly guaranteed amount from husband's retirement nor any duration of time that she was to receive the monthly payments. Additionally, there was no provision prohibiting husband from converting his military retirement pay to disability benefits. At some point following the divorce husband's physical condition deteriorated and all of his retirement was converted to disability benefits. *In re Marriage of Pierce*, 982 P.2d at 237–38.

In denying wife any relief, the appellate court, commenting on the ambiguity in the property settlement agreement, recited that husband had not violated the terms of the agreement because there was absolutely nothing in the agreement forbidding him from waiving all fo this retirement pay to receive disability benefits. Further, the agreement specified no set monthly amount which wife was to receive, nor did it contain any guarantee as to the length of time the payments would exist. It simply gave wife the 45% of husband's pay, which presumably wife would receive so long as retirement pay was paid.. *In re Marriage of Pierce* at 240. It is obvious that features in the agreement critically recited by the court were all present in the property settlement agreement executed by James and Tonya as well.

The court, hinting at the advisability of an indemnity provision, criticized wife for failing to protect her interests, noting that "[i]t should have been perfectly obvious ... [at the time of the divorce] that if ...[husband] waived all of his retirement pay for VA disability pension, ...[wife]

would get ... [45%] of nothing. Despite this fact, nothing was put in the agreement to protect ... [wife] from what appears to have been an absolute right and option which ...[husband] could exercise with regard to his retirement pay." *Id.* The court criticism went on to expound on wife's failures: "[Wife]...had every ability at the time of the divorce to protect herself from the situation with which we now deal. She failed to do so. She could have insisted that ...[husband] agree...[not to] convert his retirement funds to disability funds. She did not do so. She could have provided that in the event the retirement funds were converted to disability benefits that...[husband] would be required to continue to pay her from other assets. She did not do so.." *Id.* At 241 to 242. The court, stressing the significant importance of the finality of property divisions in a divorce decree, concluded in the interest of justice and public policy that wife had shown "no valid reason to tinker with" a decree that had been final for over four years. *Id.* at 242.

The inclusion of a mechanism for indemnification would have protected Tonya against any potential inequity in the event of an election by James to receive disability benefits in lieu of retirement pay. Therefore Tonya should not be heard to complain about any inequity inherent in the losses to her due James'election to waiver retirement benefits in favor of disability benefits. As noted in their testimony, James presented the proposed ¶ 12 of the Agreement to Tonya's counsel for review. Had her attorney added an indemnity provision requiring James to indemnify Tonya for any monetary losses suffered as a result of his election to receive veterans disability benefits, those loses would have been prevented in the first place.

4. The *Clauson* Decision

In *Clauson*, 831 P. 2d 1257, the Supreme Court of Alaska addressed a situation similar to the one in the case at bar. At the of the divorce, the parties had stipulated to a marital property settlement agreement awarding wife, the non-military party, a portion of husband's military pension. Four years later, husband elected to waive all (100%) of his military retirement pension

in order to receive veterans disability benefits. As a result of husband's waiver, the amount that wife had been receiving as her share of the pension ceased. *Id.* At 1259.

The trial judge issued a modification order simply ordering husband to pay wife an amount equivalent to her share of the waived retirement pension as if the waiver had never occurred. Wife had been receiving $168 per month from the federal government as her share of the pension pursuant to the stipulated property settlement agreement. The trial judge's modification order required husband to pay wife the sum of $168 per month to compensate wife for six months of past due payments, plus future payments of $168 per month thereafter. *Id.* at 1260.

Thus, the issue before the Alaska Supreme Court became "*[d]oes federal law preclude the modification of a property settlement to compensate for the loss of military retired pay which has been waived to secure veterans disability benefits?*" *Id.* at 1261 (emphasis added). The court found that *Mansell* was dispositive on this issue.

Under the Uniformed Services Former Spouses' Protection Act, state courts may treat 'disposable retired pay' either as property of the armed forces member 'or as property of the member and his spouse in accordance with the law of the jurisdiction.' *Id.* at 1261 (citing 10 U.S.C. § 1408(c)(1) (Supp 1991). Accordingly, the USFSPA clearly provides state courts with the authority to divide military pensions in accordance with applicable state divorce and property laws. *Id.* at 1261 (citing *Chase v. Chase*, 662 P.2d 944, 946 (Alaska, 1983). However, in 1989 the United States Supreme Court held in the *Mansell* case that the USFSPA 'does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits.' *Id.* at 1261 (citing *Mansell*, 490 U.S. at 594-95, 109 S.Ct. At 2031). The majority in *Mansell* reasoned that in passing the USFSPA Congress granted state courts only 'limited' authority to divide military benefits, noting that the statutory language in the Act's definitional section 'specifically defines the term 'disposable retired or retainer pay' to exclude, inter alia, military retirement pay waived in order to receive veterans' disability

payments.' *Id.* at 1261 (quoting *Mansell*, 490 U.S. at 588-89, 109 S.Ct. At 2028 (footnote omitted). 'Thus, under the Act's plain and precise language, state courts...have not been granted the authority to treat total retired pay as community [or marital] property.' *Id.* at 1262 (quoting *Mansell*, 490 U.S. at 588-89, 109 S.Ct. At 2028 (footnote omitted). The *Mansell* Court concluded that Congress intended the statute 'both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees.' *Id.* at 1262 (quoting 594, 109 S. Ct. 2031).

The *Clauson* court found that the trial judge's order for husband to pay wife an amount equivalent to her share of the waived retirement pension, as if the waiver had never occurred, produced the effect of awarding wife a portion of husband's disability benefits, which was contrary to both the holding in *Mansell* as well as the Supremacy Clause of the federal constitution. *Id.* at 1259: "[A]ny adjustment of the parties' marital property settlement would have the effect of dividing [husband's] current veterans' disability benefits in direct contravention of the holding in *Mansell*. *Id.* at 1262.

In reaching this conclusion, the court addressed the issue of whether federal preemption of state domestic relations law precludes our courts from considering the economic impact of a waiver of military retirement pay in lieu of a corresponding receipt of disability pay in making an equitable allocation of property upon divorce. *Id.* at 1262.

The court's review of recent cases involving federal preemption persuaded it that "neither the UFSPA nor prior Supreme Court decisions require our courts to completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." *Id* at 1263. Thus, no federal statutes specifically prohibit a trial court from considering the impact of veterans' disability payments as a factor in addressing spousal maintenance or in making an equitable distribution of marital property. The *Clauson* court held that "federal law does not preclude or courts from considering, when equitably allocating property

upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay." *Id.* at 1264.

Reiterating that "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage," [8] the court cautioned that a party's military disability benefits should only be considered as they affect the financial circumstances of both parties in arriving at an equitable distribution of marital assets. It would be unacceptable, however, for a trial court to "simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouses's side." *Id.*

The *Clauson* court emphasized the import of the trial court's error in issuing its modification order requiring husband to pay wife an amount equivalent to her share of the waived retirement pension, as if the waiver had never occurred. Even though disability benefits should never, either in form or substance, be treated as marital property in dividing property upon divorce, the court observed how that trial court had clearly run afoul of the prohibition against treating disability benefits in this manner:

> This is, however, precisely what happened in the case before us. The trial court's modification order simply replaced direct federal garnishment of ... [husband's] retirement benefits with a state order to pay. The trial judge even ordered that increases in ... [husband's] pay be passed on to ...[wife] without any apparent recognition that ... [husband] no longer has any retirement pay. The court was clearly trying to regain the status quo as if the Mansell decision did not exist. The effect of the order was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in Mansell. This simply cannot be done under the Supremacy Clause of the federal constitution. [9]

The trial court in the case at bar also clearly ran afoul of the prohibition against treating disability benefits as marital property subject to equitable distribution. Just as the trial court in

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[8] *Id.* at 1264

[9] *Id.* at 1264

Clauson simply ordered husband to pay wife an amount equivalent to her share of the waived retirement pension, in contravention of federal preemption, as if the waiver had never occurred, the trial court's order for James to reimburse Tonya produced an identical situation. It also caused the same practical effect of awarding wife a portion of husband's disability benefits contrary to Mansell and the U. S. Constitution's Supremacy Clause. Thus, the chancellor in the case at bar employed an impermissible legal standard in ordering James to financially compensate Tonya.

G. Contract Theory and Preference in the Law for Finality of Property

The law recognizes a compelling policy interest favoring finality in property settlements. To permit otherwise would open a Pandora's Box of uncertainties affecting subsequent marriages and future business interests of both spouses. The Mississippi Supreme Court has recognized that a court is obligated to enforce a contract executed by legally competent parties in the context of a divorce agreement where the terms of the contract are clear and unambiguous. *Ivison v. Ivison*, 762 So.2d 329, 335 (Miss. 2000) citing *Merchants and Farmers Bank v. State ex rel. Moore,* 651 So.2d 1060, 1061 (Miss. 1995), the parties are bound by the language of the contract where a contract is unambiguous. The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law. Id.. When this Court interprets a contract, we look to the contract for its meaning, not to what a party thereto may have thought it meant. The standard is objective, measured by the language of the contract, not by the subjective intent or belief of a party which conflicts with meaning ascertained by the objective standard. *Ivison*, citing *Landry v. Moody Grisham Agency, Inc.*, 181 So. 2d 134, 139 (1965).

"A divorce agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character." *Palmere v. Curtis*, 789 So.2d 126, 130 ¶ 10 (Miss. 2001), quoting *East v. East*, 493 So.2d 927, 931-32 (Miss. 1986). Similarly, the Mississippi Supreme Court held that when parties in a divorce proceeding have reached an agreement that a chancery court has approved, we will

enforce it, absent fraud or overreaching, and we take a dim view of efforts to modify it just as we do when persons seek relief from improvident contracts. *Palmere* citing *Bell v. Bell* at ¶ 10, 572 So.2d 841, 844 (Miss. 1990). The Mississippi Supreme Court has also noted that "property settlement agreements are fixed and final, and may not be modified absent fraud or contractual provision allowing modification." *Weathersby v. Weathersby*, 693 So. 2d 1348, 1352 (Miss. 1997) (citing *Mount v. Mount*, 624 So. 2d 1001, 1005)).

James and Tonya agreed to the terms of the property settlement agreement. Further, Tonya has not alleged any fraud or overreaching regarding the property settlement agreement. Thus, they entered into a valid contract whose terms were clear and unambiguous. Tonya was represented by counsel, while James was not. The language of the contract was clear, providing for Tonya to receive a stated percentage of retirement pay (40%), which was precisely the amount of James' disposable retirement pay which she received even following his election to waive retirement benefits to receive disability benefits.

Even though time may have shown the agreement to be an improvident one for Tonya, there was evidence of fraud or overreaching, and she was therefore bound by its terms. Tonya now finds herself in the same situation as the wife in the *Pierce* case, *supra,* who was awarded an asset under a divorce decree which in the long run has significantly declined in value. In this situation, the party harmed should not be permitted "to reopen the divorce and demand additional property or more payments." *In re Pierce* at 2242. This, in essence, is what Tonya, like Ms. Pierce, seeks in this matter.

While a valid contract may be reformed where a mistake has been made, *Allison v. Allison*, 33 So.2d 289, 291 (1948), the general rule is that reformation is justified only if the mistake is a mutual one, or where one party made a mistake and the other party committed fraud or inequitable conduct. Ivison, 762 So.2d at 335-36. However, "the mistake that will justify a reformation must

be in the drafting of the instrument, not in the making of the contract." Id., quoting *Johnson v. Consolidated Am. Life Ins. Co.*, 244 So.2d 400, 402 (Miss. 1971). In the instant case, there is no evidence of mutual mistake or fraud, and moreover, no evidence of any mistake in the drafting of the instrument, such as a scrivener's error. Therefore, the contract as agreed must stand.

H. Concurrent Retirement and Disability Pay (CRDP): Relief for Non-Military Ex-Spouse

In 2003, Congress passed legislation which became effective January 1, 2004 to allow concurrent receipt of both retired pay and disability benefits known as concurrent retirement and disability pay (CRDP). 10 U.S.C.§ 1414. James testified described this program in his trial testimony (TT 74–75), and Tonya acknowledged how it had benefitted her with substantially increased monthly payments in recent years (TT34–37, 38–40). The following excerpts of James' trial testimony illustrate the program's features:

Q. On your...ex-wife's statement..., Exhibit 5, based on her showing [of] what she has received in her payments from the military...[regarding] her portion of 40 percent of the retired pay, she testified sh has had an increase – [a] substantial increase form '03 through'09.

A. Correct.

Q. Mr. Mallard, do you know what to attribute that – to what to attribute that increase in her portion of her retirement pay?

A. Yes, sir.

Q. What's that?

A. Basically, in 2004 there was legislative action to recoup the dollar for dollar offset for disability pay. That new law basically allowed a ten-year phase in of repayment back to the veteran or the retired individual, [of] their retired pay, and reducing that dollar for dollar offset....[T]hey phased it in over a ten-year period . The first two years was a substantial increases– you know,

higher percentage amounts, and then over the following ten years...that amount matches back up to where it's zero. What that entitles is, in situations that we're in, the ex-spouse then gets to regain that retirement portion that was basically taken away as part of VA disability. I believe, by looking at some documentation, I think that she's probably back up to around 94 percent of the retirement that she [would have received]...if I did not receive any disability.

(TT 74–75).

For military retirees with at least twenty (20) years of qualifying military service and a disability rating of a least fifty percent (50%), CRDP authorizes a ten-year phased elimination of the VA offset. In positive terms, this means that, unless the disability rating is 100%, a ten-year period comes about in which the retiree will gain back every dollar of the waived retired pay that he exchanged for VA disability compensation. 10 U.S.C. § 1414.

Since CRDP is the return of waived pension payments, it has the attributes of those pension payments–it is taxable, and it is also divisible with a former spouse under a military pension division order. Beginning in 2004, the retiree's retirement pay increases each year until the phase-in period is complete in 2014, when the retiree will be receiving an additional amount equal to the amount of retired pay waived.. 10 U.S.C. section 1414(c).

CRDP should ameliorate much unfairness of unilateral changes in military pension division orders by military retirees who, after the fact, obtained VA disability compensation and thus reduced the share of the former spouse, who is can share in the restored retirement funds. Thus, Tonya can be afforded some relief as forty percent (40%) of the additional amounts received by James will be deducted from his share by the military and shared with Tonya pursuant to the terms of the divorce Agreement. To date, Tonya has already had a substantial amount of the waived funds restored to her through the CRDP. (TT 38–40, 74–75). Her payments acctually

increased from an annual total of $2,044.40 in 2003 to $7,241.00 in 2009. (TT 34–37). Tonya's currently monthly payment for her share of James retirement pay is currently $603.00 per month, whereas her original monthly payment was only $571.00, thus representing a increase of $32.00 per month over since her first payment from the military in 2003 for her forty-percent share of James' disposable retired pay.

CONCLUSION

The Chancellor applied an incorrect legal standard in construing the provisions in James' and Tonya's property settlement agreement which was incorporated into their divorce decree. Therefore, this Court should reverse the chancellor's order holding that James is liable to Tonya in the amount of $21,213.57 to compensate her for the monetary losses incurred as a result of James' waiver of part of his military retirement which reduced the retirement benefits package.

The federal preemption enunciated in *Mansell* and its progeny, including *Halstead*, *Youngbluth*, and *Clauson*, makes it perfectly clear that state trial courts have no jurisdiction to require James to reimburse his former wife for monies withheld from her share of his military retirement due to the waiver of his retirement pay to receive veterans disability benefits. The trial court in this case cannot order James to switch the payments back to retirement benefits or to pay his disability benefits to Tonya. It cannot directly reallocate any portion of his disability payments and make them payable to Tonya. The trial court cannot indirectly reallocate these disability benefits either, not without contravening federal law.

Thus, the chancellor cannot do indirectly what he is prohibited from doing directly, which is effectively what happens when *Johnson's* "vesting theory" or some other "creative solution" is applied to circumvent *Mansell* in attempting to alleviate the inequity to the former non-military spouse when the military retiree spouse elects to waive military retirement benefits to receive veterans disability benefits.

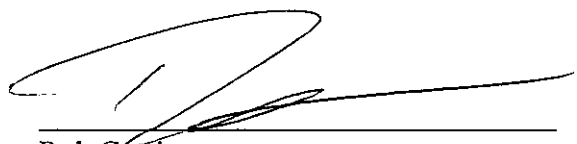
Neither should Tonya be permitted to reopen the divorce years later and demand more

payments because the asset awarded to her in 2001 has subsequently declined in value. Tonya's equitable remedy lies elsewhere–in the concurrent retirement and disability pay (CRDP), which has already afforded her some substantial relief.

For these reasons, James is entitled to relief from this Court.

Based on the foregoing, Appellant James Mallard respectfully prays that the judgment below be revered as to the issue of James liability to Tonya in the amount of $21,213.57 and for such further relief as may be proper under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Rob Curtis, attorney for appellant, James Mallard, certify that I have this day mailed by first class mail, postage prepaid, the original and three copies of the Brief of the Appellant to the Clerk of the Supreme Court of Mississippi for filing and a true and correct copy of the brief to the following person at this address:

Cheryl D. Johnson, Esquire
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This the 5th day of December, 2011.

s/_____
ROB CURTIS
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Rob Curtis, attorney for appellant, James Mallard, certify that I have this day mailed by first class mail, postage prepaid, a true and correct copy of the Brief of the Appellant to the Trial Court Judge, Honorable Johnny L. Williams at the following address:

Honorable Johnny L. Williams
Post Office Box 1664
Hattiesburg, MS 39403-1664

This the 5th day of December, 2011.

s/_____
ROB CURTIS
ATTORNEY FOR APPELLANT

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