

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REBECCA DALTON,
Appellant,
vs.
JONATHAN DALTON,
Respondent.

No. 81599-COA

FILED

JAN 23 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Rebecca Dalton appeals from a district court order after a final judgment in a divorce proceeding. Second Judicial District Court, Family Division, Washoe County; Sandra A. Unsworth, Judge.

Rebecca and respondent Jonathan Dalton, a member of the United States Navy at the time, were married in 2005.¹ At the time of their divorce, the parties reached a marital settlement agreement (MSA) which was incorporated and merged into the parties' decree of divorce. The decree, which was entered in August 2016, contained a provision that Rebecca would receive 50% of Jonathan's retirement benefits accrued during the term of the marriage. Subsequently, in January 2018, the parties agreed to an order incident to divorce (OID) which required Jonathan to provide Rebecca with half of his retirement benefits accrued between the date of the marriage and May 16, 2016, specifying that this included any amount of retirement benefits Jonathan agreed to waive in order to qualify for disability benefits.

Jonathan retired from the Navy in April 2018. Following his retirement, Jonathan applied for and received disability benefits in March

¹We do not recount the facts except as necessary to our disposition.

2019, which required him to waive an equivalent amount of his retirement benefits, resulting in significantly decreased retirement benefits to Rebecca. Jonathan made no arrangements to pay Rebecca the difference between the amount of retirement benefits Rebecca was previously receiving and the reduced amount. Rebecca moved the district court to hold Jonathan in contempt and to enforce Jonathan's obligation to pay her the same portion of his military retirement benefits she was previously receiving before he elected disability. The district court ultimately denied Rebecca's motion on the basis that federal preemption prevented a state court from ordering a veteran to indemnify a former spouse for any portion of retirement benefits that were waived in order to receive disability benefits.

On appeal, Rebecca argues that the district court erred in denying enforcement of the OID based on federal preemption, as federal law does not prevent a veteran from willingly entering into an agreement to make payments to a former spouse in the amount of the veteran's pre-waiver military retirement pay. Conversely, Jonathan argues that the district court correctly concluded that federal preemption prohibited the relief sought by Rebecca.

Federal law does not preempt enforcement of the OID

Appellate courts review the interpretation of caselaw de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014); see also *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) ("Appellate issues involving a purely legal question are reviewed de novo."). Statutory construction is also reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). Additionally, questions of federal preemption are reviewed de novo. *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007).

The Supremacy Clause of the United States Constitution states that federal law is the supreme law of the land. U.S. Const. art. VI, § 2. Federal preemption specifies that federal law shall apply and preempt state law where Congress intends to do so. *Nanopierce*, 123 Nev. at 370, 168 P.3d at 79. Preemption may be express or implied. *Id.* at 371-75, 168 P.3d at 79-82.

The Supreme Court of the United States has held that federal law “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.” *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989). The Court noted that although military retirement pay may be a community asset subject to division by state courts, disability benefits are not. *Id.* at 588-89. The Supreme Court further clarified that a state court may not “subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran’s retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran’s waiver.” *Howell v. Howell*, 581 U.S. 214, 216 137 (2017). The Supreme Court concluded in *Howell* that any reimbursement of waived military retirement benefits was a division of disability benefits by the state court, which federal law prohibits. *Id.* at 222-23.

However, in *Martin*, the Nevada Supreme Court clarified that federal law does not preempt a veteran from agreeing to an indemnification provision for waived military retirement pay. *See Martin v. Martin*, 138 Nev., Adv. Op. 78, 520 P.3d 813, 818 (2022). In *Martin*, the parties reached a written settlement agreement, which merged into the decree, which provided that the veteran would reimburse his former spouse for any reduction in his military retirement benefits if he elected to receive

disability pay instead of retirement pay. *Id.* at 815.² Upon retirement, the veteran received disability pay, which decreased the portion of his retirement benefits his former spouse received. *Id.* at 816. While the veteran argued that federal law preempted him from indemnifying his former spouse, the supreme court affirmed the enforceability of the parties' agreed-to indemnification provision. *Id.* at 821. Specifically, the supreme court held that while *Howell* precludes a state court from ordering a veteran to pay his former spouse the original military retirement amount the spouse was entitled to after he waived military retirement pay for disability benefits, it does not preclude a veteran from agreeing to indemnify as part of a negotiated settlement. *Id.* at 818.

Here, Rebecca and Jonathan agreed to the OID, which provided that Jonathan would reimburse Rebecca for the amount that her portion of his retirement was reduced due to Jonathan receiving disability benefits. As noted above, while the district court was precluded from treating Jonathan's disability benefits as community property and dividing it, the supreme court has confirmed that federal law does not bar parties from entering into such an agreement. *Id.* at 820. Therefore, in this case, the district court erred in concluding that federal jurisprudence preempted enforcement of the indemnification provision set forth in the OID. Thus, the indemnification provision may be enforced consistent with the supreme court's decision in *Martin*. *Id.*


²We note that in *Martin*, the Nevada Supreme Court did not specifically address the continued enforceability of a MSA once it is merged and incorporated into a decree of divorce, at which point the MSA loses its character as an independent agreement. *See Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964). Nevertheless, in *Martin*, the supreme court upheld the indemnification provision based on the agreement of the parties.

On remand, the district court will necessarily need to consider the parties' indemnification provision in the OID and determine the manner of its enforcement pursuant to *Martin*. See *id.*; see also *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

³Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal. To the extent that the district court was inclined to award attorney fees and costs to Jonathan because Rebecca's motion was brought without authority, the district court will need to necessarily take the *Martin* decision into account, on remand, and further consider whether an award of fees and costs is warranted in this matter.

cc: Hon. Sandra A. Unsworth, District Judge, Family Division
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