**INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

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BRADLEY L. BOWE

Petitioner Below, Petitioner,

v. No.: 23-ICA-370

MELISSA A. BOWE

Respondent Below, Respondent.

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# PETITIONER'S BRIEF

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## TABLE OF CONTENTS


Table of Authorities. . . . . ii

Assignment of Error. . . . . 1

Statement of the Case. . . . . 1

Summary of Argument. . . . . 3

Statement Regarding Oral Argument and Decision. . . . . 3

Standard of Review. . . . . 3

Argument. . . . . 4

A. The Family Court Erred by Failing to Consider and Employ Applicable Federal Law Which Governs Veteran's Administration Disability Benefits. . . . . 4

B A State Court Created Concept and/or a State Statute Identifying Property in a Divorce Cannot be Employed to Recharacterize the Nature of a Federal Benefits. . . . . 7

C. Under the Facts and Issues Raised Below the Family Court Overlooked an Important Step Which Appears Applicable. . . . . 8

D. Court Decisions in This and Other Jurisdictions Support Petitioner's Arguments. . . . . 9

Conclusion. . . . . 10

Certificate of Service. . . . . 12

## TABLE OF AUTHORITIES


Burnside v. Burnside, 194 W.Va. 263, 267, 460 S.E. 2d 264, 266 (1995). . . . . 2,8

Butcher v. Butcher, 178 W.Va. 33, 357 S.E. 2d 226, 229-231 (1987). . . . . 5

Halstead v. Halstead, 596 S.E. 2d 353 (NC Ct. App. 2004). . . . . 10

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). . . . . 4,5

Howell v. Howell, 581 U.S. ___, 137 S. Ct. 1400 (2017). . . . . 6,7,9

Mallard v. Burkhart, 95 So. 3d 1264 (MS, 2012). . . . . 10

Mansell v. Mansell, 490 U.S. 581 (1989). . . . . 6,7

McCarty v. McCarty, 453, U.S. 210 (1981).. . . . . 5

Stephen L.H. v. Sherry L.H., 195 W.Va. 384, 465 S.E. 2d 841 (1995).. . . . . 4

Whiting v. Whiting, 183, W.Va. 451, 396 S.E. 2d 413 (1990) .. . . . . 7

Youngbluth v. Youngbluth, 6 A 3d 677 (VT. 2010). . . . . 9,10

Zickefoose v. Zickefoose, ___WV___, 724 S.E. 2d 312 (2012) . . . . . 3,10

**Constitution**

U.S. Constitution, Article VI cl. 2. . . . . 3,5,8

**Statutes**

10 U.S.C. §1408.. . . . . 3,7

38 U.S.C. §5301(a)(1). . . . . 3,6,7,10

45 U.S.C. §231m. . . . . 5

West Virginia Code Code §48-1-33. . . . . 7

West Virginia Code §48-7-103 (1)(B). . . . . 8,9,11

West Virginia Code §48-1-237 (1). . . . . 4

**Text**

Turner, Equitable Distribution of Property (2d ed. 1994) p. 292.. . . . . 5

## I.
## Assignments of Error

The Family Court failed to consider the applicable federal law when determining the treatment of military disability benefits which had been awarded to Petitioner Bradley L. Bowe. The West Virginia law that the Court interpreted and employed contravenes the federal law in violation of the Supremacy Clause of the U.S. Constitution

## II.
## Statement of The Case

At issue in this appeal is the award of ninety percent of the $103,000 in equitable distribution which Mr. Bowe was ordered to pay his former wife. More specifically, the Family Court ordered Mr. Bowe to pay $10,500 representing one-half of the reduction of principal portion of the mortgage which had occurred during their brief marriage and $92,625.45 representing one-half of the increase shown in a bank account in Mr. Bowe's name during their time together, JA 13 paragraphs 11 and 13. The $10,500 as well as another $10,000 ordered for attorney fees has been paid by Mr. Bowe to the former Mrs. Bowe. The contested $92,625.45 at issue is one half of the account into which Mr. Bowe's VA service-related disability benefits were direct deposited just as they had been since 2010, some seven (7) years before these parties married.

The parties were married on May 23, 2017. They separated on July 26, 2021. Their Final Divorce Order was entered on July 20, 2023 in the Family Court of Fayette County, JA 100 (Dkt entry 103). Mr. Bowe who is now age 57 is self-employed as a construction contractor. The former Mrs. Bowe, now age 49, operated a maid service, JA 17. The single issue which dominated their divorce proceedings is the characterization and claims concerning Mr. Bowe's

VA disability payments, see Mediation Statement, JA 60; and see Final Divorce Order, JA 1-14 paragraphs 14-16, 31-32, 35-37, 45 and conclusions reached by the Family Court contained in paragraphs 10, 11 and 12.

In July of 2010 Mr. Bowe began receiving these VA disability benefits for a service-connected medical condition resulting from his prior military service. These benefits were always directly deposited into the bank account on a monthly basis solely in Mr. Bowe's name. A summary exhibit introduced at the final hearing shows that these deposits which total $164,902.34 were made between the dates of marriage up to separation, JA 88-92.

Arguments about these benefits included claims by the Respondent to the additional VA disability funds which a married recipient receives and which Mr. Bowe continued to receive after separation but before the divorce was final ($165.81 per month), JA 89 see line item for February 1, 2018. Most relevant to the arguments in this appeal is the argument and attendant finding by the Family Court that the deposits made by VA had been commingled with other funds and the account used for marital expenditures, therefore they became by transmutation marital property, JA 7-8. In agreeing with the Respondent the Family Court reasoned that under the decision in *Whiting v. Whiting, 183, W.Va. 451, 396 S.E. 2d 413 (1990)* these funds were transferred or converted into a "joint title," JA 7, paragraph 38. The Family Court relied upon the principle of transmutation, citing as controlling the decision in *Burnside v. Burnside, 194 W.Va. 263, 267, 460 S.E. 2d 264, 266 (1995),* Id. paragraph 39. These conclusions are addressed *infra*.

## III.
## Summary of Argument

The service related VA disability benefits at issue in this case are subject to federal law as embodied in 10 U.S.C. §1408 and 38 U.S.C. §5301(a)(1). The Family Court's failure to consider these federal statutes resulted in an erroneous award of $92,625.45 to the Respondent as equitable distribution.

The employment and interpretation of state law when considering the benefits in dispute contravenes the Supremacy Clause, Article VI, Cl. 2.

## IV.
## Statement Regarding Oral Argument and Decision

Petitioner requests oral argument under Rule 20. In the matter of *Zickefoose v. Zickefoose*, ___*WV*___, *724 S.E. 2d 312 (2012)* our Supreme Court of Appeals determined whether VA benefits awarded for disability could be considered by the Court when passing upon an award of spousal support. The Court stated that the issue there presented was one of first impression in West Virginia. In the Bowe case the issue concerns the treatment by the Court of VA disability benefits as marital or separate property when employing concepts that are court-created for determining equitable distribution. This too presents an issue of first impression in West Virginia. The issue involves a consideration of federal law preemption under the Supremacy Clause of the U.S. Constitution, Article VI cl. 2. This issue is likely to reappear in that many divorcing West Virginians have served in the military where they sustained disabling injuries.

## Standard of Review

Challenges here present a three pronged standard of review. Equitable distribution is

reviewed under an abuse of discretion standard; factual findings are reviewed under a clearly erroneous standard; questions of law and statutory interpretations are subject to a *de novo* review Stephen L.H. v. Sherry L.H., *195 W.Va. 384, 465 S.E. 2d 841 (1995)*. Petitioner submits that as presented here this appeal concerns questions of law and statutory interpretation.

## V.
## Argument

### A.
### The Family Court Erred by Failing to Consider and Employ Applicable Federal Law Which Governs Veteran's Administration Disability Benefits.

The following cannot be disputed: Mr. Bowe acquired federal benefits in the form of service-related disability benefits approximately seven (7) years before this marriage, thus these benefits are Mr. Bowe's separate property under federal law see argument *infra*; and also state law, W.Va. Code §48-1-237 (1). In fact, the Family Court below agreed with this point finding that the benefits were separate property, but with a caveat.

> "The Court concurs that VA disability benefits are not subject to equitable distribution. *However, those VA disability payments were deposited in a checking account which was being used to pay for food and other household expenses and bills*, JA 6-7 paragraph 32. (Italics added).

That account had long existed in Mr. Bowe's name only since it was opened and remained so during the time together in that these parties who married in his 50s and her 40s maintained separate accounts. As previously noted each party was self-employed.

The United States Supreme Court has addressed these federal benefits and others including military benefits in the context of divorce in quite a few cases. In *Hisquierdo v. Hisquierdo*, the Court reviewed a decision of the Supreme Court of California in which that Court had found that benefits in a federally-established retirement plan (the Railroad Retirement

Act of 1974) were subject to division as community property, 439 U.S. 572 (1979). Significant to the Court's consideration was a related federal statute which stated that these benefits were not subject to attachment or other legal process, 45 U.S.C. 231m. [1]

The Court granted certification in order to consider whether the California decision impermissibly conflicted with the Railroad Retirement Act in violation of the Supremacy Clause of the United States Constitution, Article VI, Cl. 2. The Court concluded that it did violate federal law which preempted California community property laws and that it caused an "injury to federal rights by state law based on community property concepts," 439 U.S. 582-583. The Court stated that there existed a flat prohibition against any such attachment of the federal benefits which would stand in the way of the federal benefits, Id. 583-584.

It has been observed that *Hisquierdo* "planted a seed" which "bore fruit two years later," in the Court's decision rendered in *McCarty v. McCarty, 453, U.S. 210 (1981)*, see Brett Turner Equitable Distribution of Property (2d ed. 1994) p. 292. In *McCarty* the Court held that federal law governed military retirement pay thereby barring the State of California from finding that military retirement pay was subject to its laws on community property. This decision and the outcry of military spouses which followed resulted in the 1982 Congressional passage of the Uniform Services Former Spouses Protection Act. That Act made military retirement benefits divisible as martial property, see discussion in *Butcher v. Butcher, 178 W.Va. 33, 357 S.E. 2d 226, 229-231 (1987).*

As stated both in the aforementioned federal act and in *Butcher, 357 S.E. 2d at 229*, the

[1] 45 U.S.C. §231m was later amended to coincide with statutes for other federal plans in order that benefits could be considered for support of children and alimony.

changes made in the federal law however do not render as divisible martial property the *service-related disability payments* as addressed here. These benefits are preempted by federal law and as addressed more fully *infra*, subject to protection by law:

> "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. §5301(a)(1). (Emphasis added).

In following cases the Supreme Court has considered VA disability benefits in the context of divorce cases, see *Mansell v. Mansell*, *490 U.S. 581 (1989)* and *Howell v. Howell, 581 U.S. ___, 137 S. Ct. 1400 (2017)*. The benefits in these cases involved waived benefits of military retirement pay in order to receive VA disability benefits which are not taxable. *Mansell* held that these benefits are not subject to division as martial property just as the Family Court did here. *Mansell* also held that federal preemption generally remains the law when disability benefits are involved. *Mansell* and its significance was not addressed by the Family Court in the Bowe case.

In *Howell* the Arizona courts had ordered the appellant veteran to indemnify his former spouse after he waived military retirement pay benefits in order to get the non-taxable VA disability benefits. The Arizona courts had attempted to order the veteran to reimburse his former spouse, but the Supreme Court ruled that the state courts cannot vest a right which under federal law the States have no authority to change. Pertinent to the Bowe case *Howell* reasons that *disability payments are non-assignable under 38 U.S.C. §5301 (a)(1)*. Federal law preempts a state court's authority to award property rights of these disability benefits directly, therefore state courts should be precluded from doing so indirectly as Arizona tried to do.

Based upon the foregoing authority it is submitted that the decision below which transmutes Mr. Bowe's federal disability benefits awarded for service-related medical conditions contravenes federal law. Specifically, the ruling is contrary to the applicable federal law which both defines and limits that which is subject to division as martial or community property, 10 U.S.C. §1408 and in contrary to the law which identifies the non-assignability and exempt status of these benefits, 38 U.S.C. §5301. The Family Court's ruling below results in a prohibited liability for "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary [Bradley L. Bowe]."

**B.**
**A State Court Created Concept and/or a State Statute Identifying Property in a Divorce Cannot be Employed to Recharacterize the Nature of a Federal Benefits**.

It is beyond dispute in this case that Mr. Bowe's VA disability benefits were his separate assets. These benefits as has been discussed previously herein enjoy a special protected status as belonging to the disabled veteran under our federal laws. Only other federal laws can change that status. In the *Mansell* and *Howell* decisions the Court struck down attempts by the State legislatures and the state courts in California and Arizona to alter or convert the character and status of these benefits into something not intended. How then can a Court decision or an interpretation of a section of a State code as done here achieve such a result? It follows logically that State laws and state court decisions cannot do so. The Family Court decision cites *Whiting v. Whiting, supra* for the authority as being consistent with W.Va. Code §48-1-33 defining marital property by expressing a preference for characterizing divorcing parties' property as being marital property, JA 6 paragraph 30. Moreover, the Family Court in its decision relies

upon the court approved "principle of transmutation" [2] used by West Virginia courts when recharacterizing separate property as martial property, JA 8 paragraph 39.

Under the Supremacy Clause[3] neither the West Virginia Code nor the principle of transmutation as having been approved and employed by our courts can provide a proper basis for rejecting Mr. Bowe's argument which was made but rejected by Mr. Bowe to the Family Court below. Mr. Bowe argued that the "disability payments received during marriage retain classification as separate property and should be *backed out of consideration for equitable distribution,"* JA 8 paragraph 37. It is submitted that the argument of Petitioner Bowe is correct.

**C.**
**Under the Facts and Issues Raised Below the Family Court Overlooked an Important Step Which Appears Applicable**.

West Virginia statutory law on equitable distribution provided in West Virginia Code §48-7-103 states:

> "In the absence of a valid agreement, the Court shall presume that all marital property is to be divided equally between the parties, *but may alter this distribution . . . after a consideration of the following*:
>
> . . . . .
>
> *(B) Funds which are separate property.*

The record below demonstrates that Mr. Bowe's VA disability benefits constituted the dominate contested issue. While the Court correctly concluded that these benefits were Mr.

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[2]Transmutation is the conversion of separate property into marital property by express or implied acts. In this case the Court found acts of commingling as the basis. *Burnside*, *supra* ftn. 3.

[3]The Supremacy Clause as embodied in the United States Constitution, Article VI Cl. 2 states that the Constitution and Laws of the United States and all treaties shall be the supreme law of the land. Judges in every State shall be bound thereby.

Bowe's separate asset the Court incorrectly determined that commingling changed that. Certainly it cannot under the federal law and facts here. The Family Court not only overlooked the governing federal law but overlooked W.Va. Code §48-7-103(B) also. This case presents the quintessential fact situation for considering a division of property which is other than equal, even if and when as here the Court here believes that the concept of transmutation applies. The Respondent received the financial benefits of these VA payments during the fifty (50) months they were together. In effect by the award as equitable distribution of $92,625.45 the Respondent has "doubled dipped." Respondent got the benefits from paying bills and other living expenses with these funds which was then followed by a check out of the same pot.

In the event of a remand in this case and if even if this Court were to uphold the Family Court's determination that transmutation was properly employed below, any reconsideration of this matter should require analysis under West Virginia Code §48-1-103 (1)(B), see Conclusion infra.

**D.**

**Court Decisions in This and Other Jurisdictions Support Petitioner's Arguments**

Other Courts have addressed the subject matter herein considered. Similar to the *Howell v. Howell* facts the disabled veteran in *Youngbluth v. Youngbluth, 6 A 3d 677 (VT. 2010)* had waived disposable retirement benefits in order to gain the tax benefits of VA disability payments. The Court addressed the veteran's argument that federal law preempts state courts from granting an interest in the disability benefits, specifically relying upon the Supremacy Clause on grounds that the federal law occupies the entire field of regulation or laws which apply. The Court holds that this includes both disability benefits not obtained by waiver as in Bowe and amounts waived

to receive disability benefits as well. *Youngbluth* represents a reasonably comprehensive treatment of cases on this subject, some of which arrive at a different result when matters of support are involved.

In *Mallard v. Burkhart, 95 So. 3d 1264 (MS, 2012)* the Court determined in no uncertain terms that state courts consistent with the USFSPA may not treat as divisible military pay waived by the retiree in order to receive VA disability benefits. *Mallard* relied on *Youngbluth* in deciding that preemption applies under the Supremacy Clause, see also in accord *Halstead v. Halstead, 596 S.E. 2d 353 (NC Ct. App. 2004)*.

In *Zickefoose v. Zickefoose*, supra our Supreme Court of Appeals took particular notice of 38 U.S.C. §5301 (a)(1), finding that the parties agreed that the husband's military disability benefits are not subject to attachment or allocation for spousal support, considering only whether the benefits can be considered in determining the amount. The Court was careful in distinguishing the consideration as to the financial ability to pay from the right to assign or attach under legal process. It is submitted that to the extent section 5301 (a)(1) is addressed in *Zickefoose* it supports the Petitioner's argument on the subject.

## Conclusion

The Family Court's decree as it pertains to the distribution of an additional $92,625.45 should be reversed as contrary to applicable law. The Family Court lacked authority to redesignate separate property as being marital property and to subject separate funds to assignment, levy and attachment the $164,902.34 or whatever of that amount remained at separation. That bank account was as healthy as it was simply because during coverture nearly $165,000 of federal disability payments, all belonging to Petitioner Bradley L. Bowe, had been

deposited into the account.

Consequently, the relief which Petitioner seeks here is that which is contemplated under West Virginia Code §48-7-103(1)(B). Employing that section to the amounts found as fact in the Final Divorce Order, paragraphs 17-21 and 26 the separate property in the amount of $164,902.34 should be subtracted from the $185,250.89 (the growth during coverture) resulting in a balance of $21,349.00. Half of $21,349 constitutes the remaining equitable distribution when the applicable law is applied.

Respectfully Submitted,

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**Certificate of Service**

The undersigned, counsel for the Petitioner, Bradley L. Bowe, does hereby certify that a true and correct copy of the ***Petitioner's Brief***, was served via e-filing, email to R. Brandon Johnson, Esq., on this the 18th day of September, 2023.

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