No. _____

IN THE
Supreme Court of the United States

ROBERT MERRILL,
Petitioner,

v.

DIANE MERRILL,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Mansell v. Mansell*, 490 U.S. 581 (1989), this Court held that, according to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408 (1982 ed. and Supp. V), a state court does not have jurisdiction to indemnify a former spouse if a retiree waives military retired pay in order to receive veterans' disability benefits, prior to a divorce. Despite *Mansell*, the Arizona Supreme Court found that a military retiree must indemnify his ex-spouse for a post-divorce waiver of military retired pay to receive disability benefits. Did the Arizona Supreme Court err in circumventing *Mansell* under the guise that post-divorce waivers of retired pay are different than pre-divorce waivers?

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Robert Merrill petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 362 P.3d 1034. The decision of the Arizona Court of Appeals (Pet. App. 10a) is unreported but is available at 2014 WL 7237678. The decision of the Arizona Superior Court (Pet. App. 25a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 15, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982), is codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--
>
> . . .
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> . . .

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except . . . to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made concurrently to any person based on such person's own service . . . .

38 U.S.C. § 3505 provides, in pertinent part:

> . . . [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, . . . and who would be eligible to receive pension or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person

> with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.
>
> . . .

10 U.S.C. § 1413a provides, in pertinent part:

> (g) Status of Payments
>
> Payments made under this section are not retired pay.

STATEMENT OF THE CASE

This case revolves around the jurisdiction of state courts' to compensate former spouses for post-divorce waivers of military retired pay waived in favor of military disability benefits. If available to them, due to a service related disability, many veterans elect to take military disability benefits rather than military retired pay, resulting in a dollar-for dollar waiver of military retired pay for military disability benefits. This creates issues if a former spouse was awarded a portion of the veteran's military retired pay in a divorce. In *Mansell v. Mansell*, 490 U.S. 581 (1989), this Court held that the Uniformed Services Former Spouses' Protection Act (USFSPA) and 10 U.S.C. § 1408, permits the division of military retired pay by state courts, in divorce proceedings, but prohibits the division of military disability benefits. Because this Court has not addressed a post-divorce waiver of military retired pay in favor of military disability benefits, state courts and legislatures have been left to their own devices in interpreting federal law. This has created variable outcomes across the nation, which can only be rectified by this Court.

In the decision below, after the VA increased Petitioner's disability rating, Petitioner elected to receive disability benefits, and was therefore required to waive military retired pay. Additionally, Petitioner received an additional benefit, as his injuries were incurred in combat, thus allowing him to qualify for a benefit established by Congress in 2002, of Combat Related Special Compensation ("CRSC"). *See* 10 U.S.C. § 1413a (2006 & Supp.

2008). Due to receipts of disability benefits, Petitioner was required to waive a dollar-for-dollar portion of his retired pay, 50% of which was awarded to Respondent. This resulted in a decrease of value of Respondent's portion of Petitioner's retired pay awarded to her in the parties' Decree. Respondent filed an action seeking modification of the Decree, arguing that Petitioner must indemnify Respondent for any decrease in her portion of retired pay. The Arizona Supreme Court agreed with the trial court, finding that Respondent is entitled to indemnification against Petitioner's election to waive a portion of retired pay in favor of disability benefits, under a theory she had a vested right in the retired pay. The Arizona Supreme Court also specifically found that USFSPA and *Mansell* did not preclude indemnification for post-divorce waivers of retired pay in favor of disability benefits.

A. Statutory Framework

Under Federal law, military members who retire after serving for a minimum period (generally twenty years) receive a lifetime pension award. *E.g.*, *Mansell*, 490 U.S. at 583. This pension is referred to as Military Retired Pay ("MRP"). Secondarily, for veterans who suffer from service-connected disabilities, those members are entitled to receive disability benefits. *See* 38 U.S.C. §§ 1110, 1131; 10 U.S.C. § 1413a. The Veteran's Administration ("VA") calculates the amount of disability benefits on a scale reflecting "the average impairments of earning capacity resulting from such injuries in civil occupations." 38 U.S.C. § 1155.

To receive disability benefits, retired veterans entitled to MRP must waive an equivalent portion of his or her MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305. Most eligible veterans elect to receive disability benefits because disability benefits are exempt from federal, state, and local taxation, unlike MRP. *See Mansell*, 490 U.S. at 583-84.

This Court first addressed MRP, in *McCarty v. McCarty*, 453 U.S. 210 (1981), when this Court held that federal law did not give state court jurisdiction to divide MRP in divorce proceedings. This Court held that under the specific language of the then existing federal law, Congress conferred MRP to veterans as a "personal entitlement" of service. *Id.* at 232. This Court specifically stated that only Congress could change the law to allow state courts to have jurisdiction to divide MRP. *Id.* at 235-36.

Due to public sentiment, Congress acted quickly in response to *McCarty,* and passed the Uniformed Services Former Spouses' Protection Act ("USFSPA"), Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA specifically granted state court the ability to treat MRP as divisible property, but also specifically excluded the ability to divide any portion of MRP that is waived in order to obtain disability benefits. The Act states that "a court may treat *disposable retired pay* payable to a member . . . either as property solely of the member or as property of the member and his spouse . . . ." 10 U.S.C. § 1408(c)(1) (emphasis added). The Act defines "disposable retired pay" to exclude "amounts which . . . are

deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive [disability] compensation." *Id.* § 1408(a)(4).

Seven years later, in *Mansell v. Mansell*, this Court addressed the issue of a pre-divorce waiver of MRP in favor of receipt of disability benefits. This Court confirmed 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." 490 U.S. 581, 594-95 (1989). The *Mansell* court explained that the USFSPA specifically granted to the states the authority to divided "disposable retired pay," which did not include disability benefits. *Id.* at 592-94.

Subsequently, in 2002, Congress enacted CRSC under Title 10 of the United States Code. CRSC allows veterans injured in combat to receive an additional benefit. S*ee* 10 U.S.C. § 1413a (2006 & Supp. 2008). A veteran can only qualify for CRSC if they: (1) sustained injuries in combat; (2) have a VA disability rating of at least 10%; and (3) waived MRP in favor of disability pay.

B. Proceedings Below

Petitioner Robert Merrill and Respondent Diane Merrill divorced in 1993. The dissolution decree issued by the Arizona Superior Court specifically awarded Respondent 50% of Petitioner's military retirement pay. Pet. App. 32a – 33a.

In 2004, the Veterans Administration (VA) reclassified Petitioner at a 100 percent disabled rating and found him eligible to receive disability benefits and CRSC. In order to obtain these benefits, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). After the waiver, the MRP payments to both Petitioner and Respondent declined.

In 2010, Respondent filed to modify the Decree seeking indemnification from Petitioner due to the reduction of her portion of the MRP. The case was litigated and appealed once under Arizona's newly created statute, A.R.S. § 25-318.01, and remanded to the trial court for further proceedings. After a judgment was entered at the trial court, Petitioner appealed again. Pet. App. 25a. The case was eventually appealed to the Arizona Supreme Court. Pet. App. 1a. In the Arizona Supreme Court, Petitioner argued that the USFSPA, as construed in *Mansell*, denies state courts the authority to award a former spouse an interest in the waived portion of a veteran's MRP.

The Supreme Court relying on an earlier case, summarily dismissed the notion on federal preemption, stating: "*We recently held that neither federal law nor § 25-318.01 precludes the family court from ordering a retired veteran to indemnify an ex-spouse for a reduction in the latter's share of MRP caused by a post-decree waiver of MRP made to obtain Department of Veterans Affairs ("VA") disability benefits pursuant to 38 U.S.C. chapter 11." Id.* at 2a. (Emphasis Added.)

REASONS FOR GRANTING THE WRIT

I. 37 Separate State Courts Have Addressed The Issue Presented And They Are Split As To The Outcome.

70% of the states have ruled on the issue presented. And the one item that every state agrees on for this issue, is that this Court has never addressed *Mansell's* application to post-divorce waivers of MRP. Of the 37 states that have addressed the issue, the leading precedent in 12 states is that *Mansell* applies to both pre and post-divorce waivers of MRP, thus precluding indemnification. The precedent in the other 25 states is state courts can force retirees to indemnify a former spouse for post-divorce waivers of MRP. These state interpretations are in direct conflict with each other regarding the meaning of the USFSPA and *Mansell*. This Court should grant review to resolve this established conflict on an unquestionable issue of federal law.

A. 12 States, Including The Supreme Courts Of Vermont, Mississippi, Alabama, Alaska, and Nebraska, Interpret *Mansell* and USFSPA To Preclude Indemnification Due To Federal Preemption.

Of the 12 states that have found *Mansell* applies to pre and post-divorce waivers of MRP, five of those decisions come from state supreme courts.

The first state supreme court to deal with the issue after *Mansell* was decided in 1989, was the

Alaska Supreme Court, three years later, in *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). In *Clauson*, the parties were divorced in 1984 and Husband was a retiree receiving MRP. *Id.* at 1259. The parties' divorce decree awarded Wife "13/40 of [Husband's] current military pension and increases therein." *Id.* Four years later, in 1990, Husband waived MRP in favor of disability benefits. *Id.* Wife filed a motion to modify the divorce decree, and the family court entered an order requiring Husband to pay to Wife the monthly sum she was previously receiving in MRP prior to his waiver. *Id.*

The Alaska Supreme Court vacated the order, holding that *Mansell* barred state courts from compensating former spouses for waivers of MRP to receive disability benefits. *Id.* at 1261. It noted specifically that under *Mansell*, "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Id.*

The *Clauson* court concluded that was "precisely what happened in the case" at hand, because the court imposed a new obligation on Husband to replace the amount of MRP he waived. Accordingly, the order sought to "regain the status quo as if the *Mansell* decision did not exist," and its "effect . . . was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.*

A few years after the Alaska Supreme Court decision, the Nebraska Supreme Court in *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997) dealt with the

same issue. In *Kramer*, the parties were divorced in 1993, and Husband had already retired from the Air Force and was receiving MRP. The final divorce decree awarded Wife 49% of Husband's military retirement. *Id.* at 105. Approximately a year later the VA determined that Husband was eligible for disability compensation retroactive to his application in 1992. Husband therefore waived a portion of his MRP in favor of disability benefits, retroactive to 1992. *Id.*

The Nebraska court embraced both the rule and the reasoning of the Alaska Supreme Court in *Clauson,* stating that the "holding does not permit the district court to treat service-connected disability benefits as divisible marital property in form or substance." *Id.* at 113 (citing *Clauson*, 831 P.2d 1257). The court insisted that lower courts heed this "significant limitation" on their power to order "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

Similarly, the Vermont Supreme Court, in *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010), held that *Mansell* applies to both pre and post-divorce waivers of MRP. In that case the parties were divorced in 2005, shortly after Husband retired from the Marine Corps. The parties divorce decree awarded Wife "19.81% of [Husband's] monthly retirement benefits." *Id.* at 679. Soon after the divorce, Husband's disability rating was increased by the VA, resulting in a waiver of MRP in favor of disability benefits. The MRP payments both parties

received were reduced, causing Wife to file to modify the decree in family court.

On review, the Vermont Supreme Court held that that USFSPA barred the family court from increasing Wife's share of the MRP to compensate for Husband's disability-based waiver. In doing so, the Vermont Supreme Court also noted the division in the states on the issue. *Id.* at 684, 687. The Vermont Supreme Court further commented that other states, who ruled contrary, were specifically trying to find ways around this Court's decision in *Mansell*. *Id.*

The Mississippi Supreme Court was the most recent state supreme court to address the issue prior to the case at hand, in *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012). In that case the parties were divorced in 2001, while Husband was active duty Air Force. Wife was awarded 40% of Husband's "disposable military retired pay" in their divorce decree. *Id.* at 1267. Two years later, the VA determined that Husband was entitled to disability benefits, thus reducing his MRP, and the payment received by Wife. *Id.* Wife then filed to modify the decree alleging that Husband interfered with her right to receive her percentage on MRP. *Id.*

The Mississippi Supreme Court denied indemnification and noted the split of authority across the country, similarly to Vermont Supreme Court. *Id.* at 1271. The court concluded that the date of the waiver of MRP, in favor of disability benefits, was irrelevant, as state courts lacked jurisdiction under the USFSPA, and *Mansell,* to

compensate a former spouse in any way for MRP waivers. *Id.* at 1273.

In addition to the five state supreme courts that have held *Mansell* and USFSPA preclude indemnification, another seven states' appellate courts have ruled similarly. As these states have discretionary review to their highest court, the sheer number of appellate decisions shows the breadth of the divide among the states.

Specifically, the following cases have agreed with the above cited cases, in that *Mansell* and USFSPA preclude pre and post-divorce indemnification due to waiver of MRP. *See Copas v. Copas,* 359 S.W.3d 471 (Ky. Ct. App. 2012) ("We are cognizant of the potential inequities which may result when a retiree elects to receive disability payments, thereby reducing the net amount of retired pay the retiree's former spouse receives.[8] Nonetheless, the current state of the law, both federal and in this Commonwealth, clearly prohibits a court from treating a retiree's disability payments as marital property." (internal citation omitted)); *Gillin v. Gillin*, 307 S.W.3d 395 (Tex. Ct. App. 2009) (USFSPA restricts the trial court from ordering veteran to waive retirement pay for disability benefits; former spouse will receive nothing if retirement pay reduced to zero); *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008) (trial court precluded from modifying decree to award more MRP due to waiver.); *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004) *(Mansell* prohibits increase in percentage of former spouse's share of retirement pay, and order requiring

veteran to reimburse former spouse for waived retirement pay violates 38 U.S.C. § 5301); *Tirado v. Tirado*, 530 S.E.2d 128 (S.C. Ct. App. 2000) (Former spouse barred from reimbursement for retirement pay waived for disability.); *In re Marriage of Pierce,* 982 P.2d 995 (Kan. Ct. App. 1999) ("*Mansell* makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order [husband] to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to [wife]. We conclude the court may not do indirectly what it cannot do directly."); *Wright v. Wright*, 594 So.2d 1139 (La. Ct. App. 1992) (court cannot order division or indemnification of disability received due to waiver of MRP after divorce.).

Presently, almost 30 years later, the divide among the states on this issue is fully entrenched. And there is nothing more to be gained by any more lower court rulings. It is now up to this Court to finally resolve the issue of whether *Mansell* and the USFSPA federally preempt post-divorce waivers of MRP for disability benefits.

The order issued by the Arizona Supreme Court is specifically contrary to the orders in the cases above, and therefore violates federal law, requiring review.

B. 25 states, including the Supreme Courts of Arizona, Maine, Massachusetts, Rhode Island and Tennessee Hold That the USFSPA Does Not Apply to Post Divorce Waivers.

The Arizona Supreme Court decision below is the most recent in a line of cases that hold directly contrary to the cases above. In the Opinion issued below the Arizona Supreme Court held that the USFSPA and *Mansell* do not apply to post-divorce waivers of MRP. The rationale to get around *Mansell*, which is similar in all 25 states, is that the divorce allocation of MRP creates a vested right in the amount of the payment. Five of the 25 decisions, are from those states' supreme courts.

The first state supreme court to rule on the issues was the Supreme Court of Tennessee in *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). There, the parties were divorced in 1996, while Husband was an active-duty member of the Marine Corps. *Id.* at 894. The divorce decree awarded Wife 50% of Husband's retirement benefits. *Id.* Both parties began to receive MRP when Husband retired, up until Husband waived a portion of his MRP in order to receive disability benefits, thereby reducing the MRP payments to both parties. *Id.* Wife petitioned to modify the divorce decree to increase her payments, which the Supreme Court construed as a motion to enforce the original decree. *Id.* at 895-96.

The Tennessee Supreme Court agreed with Wife and reasoned that she had a "vested right" in the

expected value of the MRP at the time of the divorce, which could not be "unilaterally diminished by an act of the military spouse." *Id.* at 897-88. The court also held that *Mansell* did not prevent indemnification claims. *Id.* at 898. The court reasoned that the divorce decree would not require Husband to pay part of his disability payment, but rather indemnify Wife for the loss. *Id.*

Next, the Supreme Judicial Court of Massachusetts dealt with the same issue in *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003). The parties divorce judgment awarded 50% of Husband's Army pension to Wife. *Id* at 319. After the decree was entered, the VA determined that Husband suffered from post-traumatic stress disorder, awarded him disability pay, for which he waived MRP. *Id.* at 320-21. Wife sued Husband and the Supreme Judicial Court sided with Wife, finding that Husband breached the agreement "by converting his and Wife's military retirement benefits to VA disability benefits for his own benefit." *Id.* at 324. The court also concluded that *Mansell* and the USFSPA did not preclude an indemnification order, for post-divorce waivers. *Id.* at 326. In doing so, the court acknowledged that *Mansell* "does not permit State courts 'to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits.'" *Id.* (quoting *Mansell*, 490 U.S. at 595). But in an attempt to circumvent *Mansell*, found that the judgment simply awarded Wife her vested interest in the decree. *Id.*

Similarly, in *Black v. Black*, 842 A.2d 1280 (Me. 2004), the Supreme Judicial Court of Maine agreed with the other states finding that vested rights can supersede federal law. The parties' divorce judgment Wife was awarded 50% of the retired pay. *Id.* at 1282. Seven years later, after the VA increased disability percentage, Husband waived MRP in favor of disability benefits. *Id.* Wife sued, and the Supreme Judicial Court noted that "[s]ince *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay allocated to a former spouse in an earlier divorce judgment." *Id.* at 1284. The court used specific language from *Mansell* that stated the bar to an award was only "*upon* divorce" and not post-divorce. *Id.* at 1284-85 (emphasis in original). The court concluded that indemnification of post-divorce waivers are not barred by *Mansell*. *Id.*

The Rhode Island Supreme Court concurred with the above in *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006). In yet another remarkably similar fact pattern, Wife was awarded 35% of Husband's retired pay. *Id.* at 1007-08 & n.2. Years after the divorce, upon Husband's conversion of MRP to disability benefits, Wife sued and eventually the Rhode Island Supreme Court agreed with Wife's argument. The Court found that Wife was entitled to 35% of the MRP irrespective of Husband's waiver, finding that pre and post-divorce waivers are different. *Id.* at 1009-10.

Beyond the highest courts in these states, another 20 states intermediate appellate court have ruled similarly. *See Bandini v. Bandini*, 935 N.E.2d 253 (Ind. Ct. App. 2010); *McGee v. Carmine*, 802 N.W.2d 669 (Mich. Ct. App. 2010); *In re Marriage of Hayes*, 208 P.3d 1046 (Ore. Ct. App. 2009); *Hodge v. Hodge*, 197 P.3d 511 (Okla. Civ. App. 2008); *Blann v. Blann*, 971 So.2d 135 (Fla. Dist. Ct. App. 2007); *In re Marrigae of Warkocz*, 141 P.3d 926 (Colo. App. 2006); *Perez v. Perez*, 110 P.3d 409 (Haw. Ct. App. 2005); *In re Marriage of Gahagen*, 690 N.W.2d 695 (Iowa Ct. App. 2004); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004); *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004); *Whitfield v. Whitfield*, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); *In re Marriage of Neilsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003); *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000; *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

The highest courts of Maine, Massachusetts, Rhode Island, and Tennessee, as well as Arizona all hold that while a state court does not have jurisdiction to divide MRP waived for disability benefits pre-divorce, somehow there is jurisdiction to do the exact same action, post-divorce.

II. Due to Persisting Ambiguity on This Issue, State Legislatures Have Begun To Secondarily Codify Existing Federal Law Preventing Indemnification of MRP Waivers.

Without a decision from the Court, state legislatures have gone to the extreme step of writing state laws that mirror the holding of *Mansell*. The statute at issue in *Merrill* was Arizona's attempt to do exactly that under Arizona Revised Statute ("A.R.S.") § 25-318.01 (2014). Section 25-318.01's language mirrors this Court's holding from *Mansell*:

> The Arizona legislature's intent behind enacting A.R.S. § 25-318.01 (2014) was to prohibit the division of military disability payments obtained through a waiver of military retirement pay.

Other states have pursued similar statutes to A.R.S § 25-318.01. For example,

> Cal. Civ. Proc. Code § 483.031 (West 2010)
>
> Nev. Rev. Stat. § 125.210(3) (West 2015)
>
> Okla. Stat. tit. 43, § 121(C) – (G) (2015)
>
> Wyo. Stat. Ann. § 20-2-114 (1977)

On the other hand, other states are creating statutes specifically contrary to *Mansell*. For example, Pennsylvania's 23 Pa. Con. Stat. Ann. § 3501(a)(6) (West 2005) provides that:

> Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229)1, as amended, except for those benefits

> received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans' compensation.

This discrepancy in both case law and statutes is concerning and a ground why this Court should accept this Petition. This Court needs to act to stop any further split between the states.

III. This Case Presents A Recurring Issue Of National Importance.

This Court's review is appropriate and necessary because the issue presented has already been dealt with by 37 states. And given the amount of recent litigation on the issue, as shown by the dates of those opinions, it will undoubtedly continue to occur in the future. The issue is also of crucial importance to the more than one million current and over two million retired service members in the United States military and their spouses. U.S. Dep't of Defense, Office of the Actuary, *Statistical Report on the Military Retirement System: Fiscal Year 2014*, at 18 (2015) ("DOD Report"). An opinion by this Court on this issue will fill in the national divide on the apparent ambiguity regarding *Mansell*'s post-divorce application, and will provide guidance to the states on how to properly divide MRP and disability benefits. This will further grant the nearly three million current or retired service members—and their spouses—some nationwide consistency in application because, as *McCarty* noted, service members are not free to choose their place of residence. *See McCarty*, 453 U.S. at 234.

As noted above, this issue is frequently and solely raised in state courts. Importantly, and absent from the cases detailed above, it is unknown how many trial court cases address this issue but simply are not appealed. The importance of resolving this issue and providing clarity, therefore, is paramount.

IV. This Case Offers Clear Facts To Apply Federal Preemption.

This case presents an ideal opportunity for this Court to provide state courts with clarity regarding the division of military disability benefits. First, the issue before this Court is one of interpreting federal law. The Arizona Supreme Court decided that federal law specifically did not apply to post-divorce waivers of MRP, allowing a direct and concise application of federal law, citing to a prior decision in *In re Marriage of Howell*, which states: *"Under these circumstances, the family court did not violate the USFSPA or Mansell because it did not treat the MRP subject to the VA waiver as divisible property." In Re Marriage of Howell*, 361 P.3d 936, 939 (Ariz. 2015).

Thus, the Arizona Supreme Court's decision in *Merrill* is a direct challenge to *Mansell*'s application to post-divorce waivers of MRP in favor of disability benefits—a federal issue. As such, this case presents the optimum opportunity for this Court to provide finality to the question of whether *Merrill* applies to post-divorce waivers of MRP for military disability benefits.

Second, the Decree at question only addresses an award of 50% of the MRP, and does not contain many

of the additional provisions that may be dealt with under state law. For example, the Supreme Court of South Dakota upheld a provision in a decree requiring indemnification, as the divorce decree in that situation specifically required indemnification if MRP was waived to receive disability benefits. *See Hisgen v. Hisgen,* 554 N.W.2d 494 (S.D. 1996). Here, the decree only deals with awarding MRP, which allows for clarity of ruling.

The simple facts of this case are also the model situation for other cases longing for guidance on the issue presented here. The similarities this case shares with those other cases and the fact that the issue remains open to interpretation of federal law, provides this Court with an optimum opportunity to both efficiently clarify this issue and provide guidance on a nationwide scale.

As this case contains the central question that defines the split of authority in its clearest form, stripped of any extraneous factual complications, it offers an unusually good vehicle and warrants this Court's review.

V. The Arizona Supreme Court's Decision below is an Incorrect Application of *Mansell*.

This Court in *Mansell* was direct in its analysis of USFSPA. Specifically, *Mansell* precluded state courts from dividing military disability benefits finding that according to USFSPA'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*, 490 U.S. at 589 (emphasis added). Further, *Mansell* held that USFSPA "impose[s] new substantive limits on state courts' power to divide military retirement pay." *Id.* at 590. Most importantly, however, was the *Mansell* court's strong desire to read USFSPA strictly, regardless of the outcome:

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Id. at 594. This statement anticipated the post-divorce waiver of MRP, holding that regardless of the fact scenario, the USFSPA must be read literally. This is bolstered by Justice O'Conner's dissent, wherein she expressed concern for a post-divorce waiver of MRP:

> former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits.

Id. at 595 (O'Connor, J., dissenting).

Despite *Mansell*'s clarity and the foresight that the decision would apply to post-divorce waivers of MRP, the Arizona Supreme Court declined to read *Mansell* as instructed by this Court. Rather, the Arizona Supreme Court—and many other state courts—sought an end-run around *Mansell* through the use of equities and legal fiction. Specifically, the Arizona Supreme Court found it inequitable to follow the strict reading of USFSPA suggested by *Mansell* and created an indemnification fiction that vested rights supersede *Mansell*. Essentially, the Arizona Supreme Court—and numerous other state courts—reasoned that it is authorized to require the veteran to "indemnify" the ex-spouse in the exact difference of the waived MRP, so long as the court does not require that the veteran pay the indemnification amount from their disability benefits. This is a thinly veiled award of the veteran's disability benefits, which violates *Mansell* and the USFSPA.

It is also exactly what the Alaska Supreme Court discussed in *Clausen*, finding that, "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Clauson*, 831 P.2d at 1261. While an indemnification theory is not the exact form, it is the exact substance barred by *Mansell*.

This was reversible error.

NOTICE OF OTHER SIMILAR PETITION

Petitioner provides notice that another similar Petition for Writ of Certiorari was filed with this Court on February 16, 2016 under docket number 15-1031. That case was also the result of an Arizona Supreme Court decision in *In Re Marriage of Howell,* 361 P.3d 936 (Ariz. 2015). Should the Court desire to accept that Petition, then Petitioner requests that the Court stay this matter until resolution of that matter.

CONCLUSION

Due to the significant division of the states, on an issue of federal jurisdiction and preemption, Robert Merrill respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,

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March 14th, 2016

APPENDIX

Appendix A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

IN RE THE MARRIAGE OF:

DIANE MERRILL,
Petitioner/Appellee,
v.
ROBERT KENNETH MERRILL,
Respondent/Appellant.

No. CV-15-0028-PR
Filed December 15, 2015

Appeal from the Superior Court in Maricopa County
The Honorable Paul J. McMurdie, Judge
No. DR1991-092542
Memorandum Decision of the Court of Appeals,
Division One
1 CA-CV 13-0649
Filed Dec. 18, 2014
Amended Per Order Filed Jan. 7, 2015
VACATED AND REMANDED

COUNSEL:

James S. Osborn Popp (argued), Popp Law Firm, PLC, Tempe, for Diane Merrill

Keith Berkshire (argued), Maxwell Mahoney, Berkshire Law Office PLLC, Phoenix, for Robert Kenneth Merrill

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JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER and JUSTICES BRUTINEL and BERCH (RETIRED) joined.

JUSTICE TIMMER, opinion of the Court:

¶1 Federal law prohibits courts in marital dissolution proceedings from dividing any portion of military retirement pay ("MRP") waived by a retired veteran to receive Combat-Related Special Compensation ("CRSC") benefits pursuant to 10 U.S.C. § 1413a. Arizona law prohibits courts from "making up" for the resulting reduction in MRP by awarding additional assets to the non-military ex-spouse. A.R.S. § 25-318.01. We recently held that neither federal law nor § 25-318.01 precludes the family court from ordering a retired veteran to indemnify an ex-spouse for a reduction in the latter's share of MRP caused by a post-decree waiver of MRP made to obtain Department of Veterans Affairs ("VA") disability benefits pursuant to 38 U.S.C. chapter 11. In re Marriage of Howell, No. CV-15-0030-PR, slip op. at *9 ¶ 25 (Ariz. Dec. 2, 2015). For the reasons set forth in Howell, we hold that § 25-318.01 likewise cannot apply to preclude indemnification when a retired veteran makes a post-decree waiver of MRP to obtain CRSC benefits and the decree was entered before § 25-318.01's effective date.

I. BACKGROUND

¶2 Robert Merrill and Diane Merrill married in 1963 and divorced in 1993. Robert was injured in combat while serving with the Army in Vietnam. He retired from the Army in 1983 and went to work in the private sector. At the time of the divorce, Robert received MRP and VA disability benefits based on a disability rating of 18.62 percent. The family court did not divide Robert's disability benefits but awarded each party "one-half" of the MRP as their sole and separate property and issued a qualified domestic relations order to implement that award.

¶3 After the parties' divorce, Robert became unemployable due to his disabilities. Thus, in 2004, the VA changed Robert's disability rating to 100 percent and found him eligible to receive CRSC. The CRSC program permits some veterans injured in combat to waive a portion of their "disposable" MRP for an equal amount of tax-free CRSC. See 10 U.S.C. § 1413a. Federal law prohibits courts from treating CRSC as community property. See 10 U.S.C. § 1408(c)(1) (authorizing a state court to treat only "disposable retired pay" as community property); § 1413a(g) ("Payments under this section are not retired pay."). Robert waived a significant portion of MRP to receive CRSC and, as a result, Diane's monthly share of MRP from 2004 onward decreased dramatically. In 2010, for example, Diane's monthly share of MRP was reduced from $1,116 to $133.

¶4 In 2010, Diane petitioned the family court to award her arrearages for her reduced share of MRP and to compensate her for future reduced payments of MRP.

The family court denied Diane's petition, reasoning that § 25-318.01 proscribes the requested relief.

¶5 The court of appeals reversed, holding that § 25-318.01 applies only to VA disability benefits awarded pursuant to 38 U.S.C. chapter 11, not to CRSC awarded pursuant to 10 U.S.C. § 1413a. *Merrill v. Merrill*, 230 Ariz. 369, 375 ¶ 25, 284 P.3d 880, 886 (App. 2012) ("*Merrill I*"). The court applied long-standing case law to conclude that Robert must indemnify Diane against her loss of MRP. *Id.* at 373 ¶ 13, 284 P.3d at 884. It remanded for the family court to determine whether Robert could indemnify Diane from his non-exempt assets. *Id.* at 377 ¶ 30, 284 P.3d at 888.

¶6 On remand, the family court awarded Diane $128,574.35 in MRP arrearages accrued through July 2013 to be paid by Robert "from any and all non-exempt income and assets" (the "2013 Order"). It also ordered Robert to pay Diane $1,486.50, subject to cost of living adjustments, each month starting August 2013 from "non-exempt income and assets."

¶7 Robert appealed, arguing that the family court did not determine whether he could indemnify Diane from his non-exempt assets, as *Merrill I* required. In 2014, while Robert's appeal was pending, the legislature amended § 25-318.01 to make it applicable to CRSC benefits. *See* H.B. 2514, 51st Leg., 2d Reg. Sess. (Ariz. 2014). The legislature expressly made the amendment retroactive to July 28, 2010, one day before the original version's effective date. On Robert's motion, and without addressing the issues raised on appeal, the court of appeals vacated the 2013 Order,

recognized that portions of *Merrill I* had been superseded by the 2014 amendment to § 25-318.01, and deemed Diane's 2010 petition denied. *Merrill v. Merrill*, 1 CA-CV 13-0649 (Ariz. App. Dec. 18, 2014, revised Jan. 7, 2015) (mem. decision).

¶8 We granted review because the application of § 25-318.01 is an issue of statewide importance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II. DISCUSSION

A. Applicability of § 25-318.01

¶9 Section 25-318.01 provides:

> In making a disposition of property pursuant to § 25-318 or § 25-327, a court shall not do any of the following:
> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code section 1413a or 38 United States Code chapter 11.
> 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.
> 3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.

¶10 Diane argues that the court of appeals erred by applying § 25-318.01 because that statute only applies to an original disposition of property made pursuant to § 25-318 and to a modification or revocation made pursuant to § 25-327. Because she sought to enforce the original disposition rather than modify it, Diane contends that § 25-318.01 does not apply to her petition or the resulting 2013 Order. See *Howell*, slip op. at *6–7 ¶ 17 (noting that "§ 25-318.01 applies only to property dispositions made pursuant to §§ 25-318 and -327" and does not "restrict[] the family court's ability to enforce a disposition order").

¶11 We rejected a similar argument in *Howell*. Like the non-military ex-spouse in that case, Diane sought to redress the reduction in her share of MRP caused by Robert's election to receive CRSC benefits. Because the original decree did not require Robert to indemnify Diane for her loss of MRP, the family court necessarily modified the decree's property disposition terms. Consequently, as in *Howell*, the family court modified the original property disposition terms pursuant to § 25-327(A), and therefore § 25-318.01 applies.

B. Application to vested property rights

¶12 Diane argues that she obtained a vested property right in her share of MRP when the family court entered the decree in 1993, and due process considerations prohibit a court from applying § 25-318.01 to impair that right. Robert counters that Diane waived this argument by failing to comply with A.R.S. § 12-1841. He alternately argues that any vested right is in fifty percent of whatever amount of MRP is paid each month. He asserts that because

Diane still receives fifty percent of the MRP paid monthly, albeit greatly reduced in amount, application of § 25-318.01 would not diminish any vested right.

¶13 We reject Robert's waiver argument. Section 12-1841(A) requires a litigant to serve the attorney general, the speaker of the house of representatives, and the president of the senate with any document alleging that a state statute is unconstitutional. A litigant does not waive a challenge, however, by failing to comply with § 12-1841. The consequence for noncompliance is that an unserved official can move to vacate any finding of unconstitutionality, and the court must give the official a reasonable opportunity to be heard. A.R.S. § 12-1841(C). Also, if a court discovers that a party failed to comply with § 12-1841, the court can require compliance before addressing the constitutionality of a statute. *See, e.g.*, *Arrett v. Bower*, 237 Ariz. 74, 79 ¶ 15, 345 P.3d 129, 134 (App. 2015) (permitting the secretary of state to intervene to defend the constitutionality of a statute); *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12 ¶ 5 n.3, 90 P.3d 211, 213 n.3 (App. 2004) (providing the attorney general an opportunity to address constitutional challenge to a statute), *aff'd* 211 Ariz. 67, 117 P.3d 786 (2005).

¶14 Compliance with § 12-1841 is not required in this case. Diane does not assert that § 25-318.01 is facially unconstitutional. Rather, she argues that the provision as applied works an unconstitutional deprivation. No Arizona court has decided whether § 12-1841 addresses "as-applied" constitutional challenges. *See DeVries v. State*, 219 Ariz. 314, 321 ¶

21 n.11, 198 P.3d 580, 587 n.11 (App. 2008) (declining to address the issue). And courts outside Arizona are split on the issue. *Compare, e.g.*, *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298, 1303 n.3 (Pa. 1992) (noting that notice to attorney general is not required when contending statute is unconstitutional as applied), with *Lazo v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 690 P.2d 1029, 1031–32 (N.M. 1984) (taking the opposite view).

¶15 We are persuaded that § 12-1841 applies only when a litigant asserts that a statute is facially unconstitutional. The purpose of § 12-1841's notice requirement is "to protect the state and its citizens should the parties be indifferent to the outcome of the litigation." *Ethington v. Wright*, 66 Ariz. 382, 388, 189 P.2d 209, 213 (1948). With an as-applied challenge, there is no risk that a statute will be declared unconstitutional for all applications, and the party urging application of the statute is motivated to vigorously defend its constitutionality. Because Diane only challenges the application of § 25-318.01 to her circumstances and not for all applications, she was not required to comply with § 12-1841's notice requirement.

¶16 We next consider whether the court of appeals correctly applied § 25-318.01 to dismiss Diane's petition. We resolve this issue as we did in *Howell*. There, we concluded that prior to § 25-381.01's enactment, Mrs. Howell, the non-military ex-spouse, "had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Mr. Howell]." *Howell*, slip op. at *8 ¶ 21. We held that the due process guarantee set forth in

article 2, section 4 of our constitution, prohibits application of § 25-318.01 in that circumstance to preclude the family court from entering an indemnification order. *Id.* at *9 ¶¶ 23–24. Because Diane's rights in her share of MRP vested before the effective date of the amendment to § 25-318.01, that provision cannot apply to prevent the family court from fashioning an order to redress the reduction in MRP caused by Robert's election to receive CRSC benefits. The court of appeals erred by concluding otherwise.

III. CONCLUSION

¶17 Section 25-318.01 cannot be applied to prohibit the family court from entering an indemnification order to compensate a non-military ex-spouse for a reduction in a share of MRP caused by a veteran's election to receive CRSC benefits when that share was awarded in a decree entered before the statute's effective date. We vacate the court of appeals' decision and remand to that court to address the arguments raised by Robert on appeal. Finally, we deny Diane's request for attorneys' fees without prejudice to the court of appeals considering the request after the issues on appeal are decided on remand.

Appendix B

2014 WL 7237678

Court of Appeals of Arizona,
Division 1.
In re the Marriage of Diane MERRILL,
Petitioner/Appellee,
v.
Robert Kenneth MERRILL,
Respondent/Appellant.

No. 1 CA–CV 13–0649.

Dec. 18, 2014.

As Amended Jan. 7, 2015.
Appeal from the Superior Court in Maricopa County; No. DR1991–092542; The Honorable Paul J. McMurdie, Judge. VACATED.

Attorneys and Law Firms
Popp Law Firm, P.L.C. By James S. Osborn Popp, Tempe, Counsel for Petitioner/Appellee.

Berkshire Law Office, PLLC By Keith Berkshire, Maxwell Mahoney, Phoenix, Counsel for Respondent/Appellant.

Judge SAMUEL A. THUMMA delivered the decision of the Court, in which Presiding Judge MARGARET H. DOWNIE and Judge ANDREW W. GOULD joined.

MEMORANDUM DECISION

THUMMA, Judge.

¶ 1 Robert Kenneth Merrill (Husband) appeals from an August 2013 judgment in favor of Diane Merrill (Wife). Husband claims the superior court failed to comply with this court's mandate in *Merrill v. Merrill*, 230 Ariz. 369, 284 P.3d 880 (2012) (*Merrill I*). Relying on amendments to Arizona Revised Statutes (A.R.S.) section 25–318.01 (2014)[1], expressly made retroactive to July 28, 2010, Husband also moves to dismiss the action, vacate the 2013 Judgment and overrule *Merrill I*. For the reasons that follow, recognizing the 1993 Decree remains in full force and effect, the 2013 Judgment is vacated, the Petition is deemed denied and Husband's motion is granted in part and denied in part as indicated below.

FACTS AND PROCEDURAL HISTORY

¶ 2 Husband and Wife married in 1963 and divorced by a decree entered in 1993 (Decree). *Merrill I*, 230 Ariz. at 371 ¶ 2–3, 284 P.3d at 882.[2] "Husband is a West Point graduate who was injured during a mortar attack in Vietnam." *Id.* at 371 ¶ 2, 284 P.3d at 882. Because Husband received both military disability and military retirement benefits, the Decree

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

[2] The court adopts where indicated the facts as stated in *Merrill I*, noting the parties take issue with certain factual recitations in that decision.

> acknowledged Husband's ongoing receipt of monthly military disability payments but did not treat those payments as community property subject to division. The [D]ecree,
>
> > however, equally divided Husband's military retirement benefits by providing for a qualified domestic relations order awarding 50 percent of his "military retirement pay" [MRP] to Wife as her sole and separate property.
>
> *Id.* at 371 ¶ 3, 284 P.3d at 882. Under the Decree, Wife is entitled to approximately $1,116 in MRP monthly payments. *Id.* at 371 ¶ 5, 284 P.3d at 882.

¶ 3 "In 2004, the Veterans Administration approved Husband's application for a 100 percent disability rating and found him eligible to receive Combat–Related Special Compensation benefits. This program, referred to as CRSC, allows veterans injured in combat to choose to receive tax-free benefits in exchange for a dollar-for-dollar reduction in their retirement pay." *Id.* at 371 ¶ 4, 284 P.3d at 882. "Federal law precludes division of [CRSC] benefits as community property." *Id.* at 372 ¶ 8, 284 P.3d at 883 (citing 10 United States Code (U.S.C.) section 1408(a)(4)(C) and *Mansell v. Mansell*, 490 U.S. 581, 594–95, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989)). As a result, going forward from 2004, "Wife's share of

[Husband's] retirement pay was all but eliminated," and her MRP interest was reduced to $133 per month. *Merrill I*, 230 Ariz. at 371 ¶¶ 4–5, 284 P.3d at 882.

¶ 4 In 2010, Wife filed a Petition for Post–Decree Relief, Order to Appear, Request for Arrearage Judgment and Modified Retirement Award (Petition). Among other things, the Petition sought (1) an arrearages judgment for the difference between the monthly MRP required by the Decree and the reduced amount Husband had been paying since 2004 (alleged to be $63,796 plus interest) and (2) a modified retirement award for MRP going forward. *Merrill I*, 230 Ariz. at 371 ¶ 5, 284 P.3d at 882. After the superior court denied the Petition in its entirety, Wife's appeal was resolved in Merrill I.

¶ 5 *Merrill I* did "not hold that Husband must reject the opportunity to receive the tax benefits afforded by CRSC" but, rather, that Husband "must indemnify Wife for the consequences of doing so," and that Husband was "free to indemnify Wife using 'any other available asset'" (i.e., non-CRSC benefits or assets). *Merrill I*, 230 Ariz. at 375–76 ¶¶ 19, 29, 284 P.3d at 886–87 (quoting *Harris v. Harris*, 195 Ariz. 559, 564 ¶ 23, 991 P.2d 262, 267 (App.1999)). In doing so, *Merrill I* concluded that A.R.S. § 25–318.01 (2012)—which precluded a court from considering benefits under Title 38 of the United States Code in making a disposition of property or in modifying a decree—did not apply because (1) it was limited to benefits received under Title 38 of the United States Code and (2) Husband's CRSC benefits were received under Title 10 (not Title 38) of the United States Code. *Id.* at 375–76 ¶¶ 25–27, 284 P.3d at 886–87. *Merrill I* then

remanded for further consideration of the Petition, with directions that "the superior court must determine whether Husband can satisfy his obligation to indemnify Wife from any eligible income or assets and enter an appropriate order consistent with this opinion." *Merrill I*, 230 Ariz. at 377 ¶ 30, 284 P.3d at 888.

¶ 6 On remand, in August 2013, the superior court granted the Petition by:

> 1. Entering judgment in favor of [Wife] ... and against [Husband] ... for amounts due to [Wife for] her interest in [MRP] through July, 2013, in the total amount of $128,574.35. [Husband] shall pay said judgment from any and all nonexempt income and assets. Interest on the judgment shall accrue from the date of judgment at the rate of 4.25%.
> 2. For [Wife's] interest in [MRP] pay for August, 2013, and each month thereafter, until the earlier of the death of either party, [Husband] shall pay [Wife] $1,486.50, subject to increases for costs of living adjustments to [MRP]. [Husband] shall pay to [Wife] 100% of his non-exempt income starting in August, 2013, and he shall remain responsible for any monthly deficit accruing each month starting August, 2013, to be paid and/or collected from non-exempt income and assets.

> 3. Interest shall accrue on all of the above unpaid principal sums at 4.25% from the date each payment became due.
> 4. Entering judgment in favor of [Wife] ... and against [Husband] ... for attorneys' fees in the amount of $10,000.00 and costs in the amount of $1,098.85, to be paid and or collected from non-exempt income and assets.
> 5. Interest shall accrue on all unpaid attorney's fees and costs awarded in paragraph 4, above, at the rate of [ ] 4.25% from the date of this judgment.
> Husband timely appealed from this 2013 Judgment, arguing the superior court failed to follow the Merrill I mandate. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12–2101(A)(1) and –120.21(A)(1).

¶ 7 While Husband's appeal was pending, the Legislature amended A.R.S. § 25–318.01 (2014) (retroactive to July 28, 2010) to include benefits awarded pursuant to "10 United States Code section 1413a" (i.e., CRSC benefits)). See H.B. 2514, 2014 Leg., 2d Reg. Sess. (Ariz.2014). This same legislation made a similar amendment to A.R.S. § 25–530 (2014) ("Spousal maintenance; veterans disability benefits"). *Id.* On July 25, 2014, the effective date of this amendment, Husband moved to dismiss the action, vacate the 2013 Judgment and publish an opinion overruling *Merrill I* (or, alternatively, to remand to superior court with instructions to dismiss the Petition and vacate the 2013 Judgment). Wife opposed

the motion and Husband filed a reply in further support. This court then heard oral argument on both the appeal and the motion.

DISCUSSION

I. A.R.S. § 25–318.01 (2014).

¶ 8 Effective July 25, 2014, the Legislature amended A.R.S. § 25–318.01, retroactive to July 28, 2010. The statute now reads as follows (with the relevant language added in 2014 in bold):

> In making a disposition of property pursuant to [A.R.S.] § 25–318 or 25–327, a court shall not do any of the following:
> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code section 1413a [CRSC] or 38 United States Code chapter 11.
> 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.
> 3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

A.R.S. § 25–318.01 (2014) (emphasis added); *see also* H.B. 2514 (retroactive date). This same legislation made a similar amendment to A.R.S. § 25–350 (2014), which applies "[i]n determining whether to award

spousal maintenance or the amount of any award of spousal maintenance." H.B. 2514. Husband declares "[t]here is no question that the[se] ... changes to A.R.S. §§ 25–318.01 and 25–530 were specifically meant to legislatively supersede this Court's prior decision in *Merrill I*." Husband and his attorney testified in favor of the amendments at a legislative hearing before their passage. *See* H. Comm. on Judiciary, February 20, 2014 Meeting Minutes, 2014 Leg., 2d Reg. Sess. available at http://www.azleg.gov/legtext /511eg/2R/comm_ min/House/022014JUD.PDF. The first issue is whether A.R.S. § 25–318.01 (2014), which includes this amendment, applies to the Petition and the 2013 Judgment.

II. A.R.S. § 25–318.01 (2014) Applies.

¶ 9 Wife argues the 2014 amendments resulting in A.R.S. § 25–318.01 (2014), including the directive that the statute is retroactive to July 28, 2010, do not apply for three reasons: (1) the Petition does not seek to modify the Decree; (2) the 2014 amendments cannot retroactively impair her vested rights in the 1993 Decree and (3) the 2014 amendments are contrary to federal law and, therefore, violate the Supremacy Clause. The court addresses these arguments in turn.

A. The Petition Sought To Modify The Decree.

¶ 10 Wife argues A.R.S. § 25–318.01 (2014) "expressly limits its application to property disposition at dissolution [A.R.S. § 25–318] or on modification of a [decree's] final property division [A.R.S. § 25–327]," and "[n]either form of action is before this Court." Although the Petition does not appear to implicate A.R.S. § 25–318, it does, however, seek to modify the Decree, thereby implicating A.R.S. § 25–327. As noted

in *Merrill I*, the Petition seeks a "'modified retirement award,'" thereby asking the court to modify the Decree. 230 Ariz. at 371 ¶ 5, 284 P.3d at 882. In addition, the primary procedural rule cited in the Petition is Arizona Rule of Family Law Procedure 85, which addresses relief from a judgment or order (here, the Decree). Moreover, consistent with the request in the Petition, the 2013 Judgment modified the Decree, at least prospectively. *See Martin v. Martin*, 182 Ariz. 11, 16, 893 P.2d 11, 16 (App.1994) (noting an arrearage judgment does not modify a decree). Accordingly, contrary to Wife's argument, the Petition does seek to modify the Decree, thereby implicating A.R .S. § 25–327 and making A.R.S. § 25–318.01 (2014) applicable.

B. A.R.S. § 25–318.01 (2014) Does Not Retroactively Impair Wife's Vested Property Rights.

¶ 11 Relying primarily on *S & R Props. v. Maricopa Cnty.*, 178 Ariz. 491, 875 P.2d 150 (App.1993), Wife argues A.R.S. § 25–318.01 (2014) cannot apply retroactively to impair her vested property rights. In doing so, Wife argues her "vested property rights" are her legal rights under the 1993 Decree, an argument *S & R Properties* supports. 178 Ariz. at 498, 875 P.2d at 157 (citing cases defining "vested right"). Wife's legal rights under the 1993 Decree, however, have not changed. Similarly, Husband's legal obligations under the 1993 Decree remain in full force and effect. Because Wife's legal rights in the 1993 Decree have not changed or been impaired by the application of A.R.S. § 25–318.01 (2014), retroactive application of that statute is not prohibited.

¶ 12 The fact that there has been no change in Wife's vested legal rights, and Husband's corresponding legal obligations, under the 1993 Decree is of little practical solace to Wife. *Merrill I* noted that, "in community-property states such as Arizona," "[a]n unfortunate consequence" of the CRSC program was that "former spouses of retirees who elect CRSC see their sole-and-separate shares of military retirement benefits decline or disappear altogether." 230 Ariz. at 372 ¶ 9, 284 P.3d at 883. *Merrill I* added that "'Arizona law does not permit' a former spouse's interest in military retirement pay to be reduced in such a manner." 230 Ariz. at 372–73 ¶¶ 10–11, 284 P.3d at 883–84 (citing *Danielson v. Evans*, 201 Ariz. 401, 36 P.3d 749 (App.2001); *Harris v. Harris*, 195 Ariz. 559, 991 P.2d 262 (App.1999); *In re Marriage of Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (App.1997)). In short, however, the legal rights and obligations of the 1993 Decree remain in full force and effect and A.R.S. § 25–318.01 (2014) does not impair Wife's vested legal rights in what was awarded in the Decree or what the Decree requires.[3]

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[3] Wife has not argued she had property rights to the relief sought in her Petition that vested before the effective date of A.R.S. § 25–318.01 (2014). *See, e.g.*, *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205 ¶ 15, 972 P.2d 179, 189 (1999) ("legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events"); *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139–40, 717 P.2d 434, 443–44 (1986) ("The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right."). In addition, in addressing the retroactivity of A.R.S. § 25–318.01 (2014), the record before this court is limited to Husband's motion to dismiss, Wife's response and Husband's reply; the parties appropriately have not submitted evidence to this court

C. A.R.S. § 25–318.01 (2014) Does Not Violate The Supremacy Clause.

¶ 13 Wife argues that A.R.S. § 25–318.01 (2014) is contrary to federal law, thereby violating the Supremacy Clause. See U.S. Const. art. VI cl. 2. "Federal law preempts state law under the Supremacy Clause when," as applicable here, "state law actually conflicts with federal law." *Hernandez–Gomez v. Volkswagen of America, Inc.*, 201 Ariz. 141, 142 ¶ 3, 32 P.3d 424, 425 (App.2001). Wife argues A.R.S. § 25–318.01 (2014) conflicts with a federal statute providing that, when setting garnishment limits on military retirement income,

> Nothing in this section shall be construed to relieve a member [or former member of the military] of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted

10 U.S.C. § 1408(e)(6) (emphasis added). By statute, however, CRSC benefits "are not retired pay." 10 U.S.C. § 1413a(g). Accordingly, A.R.S. § 25–318.01

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addressing the issue. Accordingly, in finding A.R.S. § 25–318.01 (2014) properly may be applied retroactively to July 28, 2010, this court is not asked to address (and does not decide) retroactivity as a factual matter. Finally, Wife has not claimed or shown that she "so substantially relied upon" the ability to obtain the relief requested in the Petition and the relief directed by *Merrill I* "that retroactive divestiture would be manifestly unjust." *Hall*, 149 Ariz. at 140, 717 P.2d at 444.

(2014) does not conflict with 10 U.S .C. § 1408(e)(6) and, therefore, does not violate the Supremacy Clause.[4]

III. Application of A.R.S. § 25–318.01 (2014) to the 2013 Judgment and *Merrill I*.

¶ 14 Having found A.R.S. § 25–318.01 (2014) properly applies on this record, the remaining task is to apply that statute to the 2013 Judgment and *Merrill I*, issues this court addresses in turn.

¶ 15 As quoted above in paragraph 6, the 2013 Judgment indemnified Wife for the 2004 election resulting in Husband receiving CRSC benefits, awarded Wife other property to account for that election, did so based upon a consideration of Husband's CRSC benefits and awarded interest to be paid on such sums. As a result, the 2013 Judgment is contrary to A.R.S. § 25–318.01 (2014), cannot stand and is vacated and the Petition is deemed denied. This conclusion moots Husband's argument that the superior court failed to properly comply with the mandate in *Merrill I*.

¶ 16 Turning to the impact on *Merrill I*, Husband is correct that A.R.S. § 25–318.01 (2014) supersedes portions of *Merrill I*. More specifically, A.R.S. § 25–318.01 (2014) supersedes those portions of *Merrill I* holding that the prior version of the statute does not apply and that Husband must indemnify Wife for the

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[4] Having rejected Wife's constitutional challenge to A.R.S. § 25–318.01 (2014) on this record, the court need not address Husband's claim that Wife failed to comply with A.R.S. § 12–1841.

consequences of his CRSC election and related discussion. Stated differently, A.R.S. § 25–318.01 (2014) supersedes by statute the following specified portions of *Merrill I*: *Merrill I*, 230 Ariz. at 373, 375–77 ¶¶ 1, 284 P.3d 880 (second sentence, reading "We hold the military retiree must make his former spouse whole to the extent his unilateral decision to receive the tax benefit has reduced her share of his retirement benefits."), heading B preceding 12, 19 (last portion of last sentence, reading "; we only hold that he must indemnify Wife for the consequences of doing so"), 21–30 (including heading C preceding 21), 284 P.3d at 884, 886–88. Husband has not shown that A.R.S. § 25–318.01 (2014) supersedes the remaining portions of *Merrill I*.

¶ 17 Vacating the 2013 Judgment and deeming the Petition denied is not based on any error by the superior court on remand from *Merrill I*. Instead, this court's actions are based on the statutory amendment resulting in A.R.S. § 25–318.01 (2014), which bars the relief sought in the Petition and supersedes by statute specified portions of *Merrill I*. Along with this unique procedural history, the issue resolved in this decision is case-specific and narrow: that by seeking to amend the Decree, the Petition is barred by A.R.S. § 25–318.01 (2014), which can properly apply retroactively on the record presented to this court. This court has no occasion to consider, and does not address, any attempt to enforce the 1993 Decree in a way that does not implicate A.R.S. § 25–318.01 (2014) or A.R.S. § 25–327. Because of the unique and narrow nature of this appeal and this decision, this court denies Husband's request that this court "publish an Opinion overruling *Merrill I*."

IV. Attorneys' Fees and Costs.

¶ 18 Wife has requested attorneys' fees and costs on appeal pursuant to A.R.S. § 25–324. An appellate court "may order a party to pay a reasonable amount to the other party for costs and expenses[, including attorneys' fees,] of maintaining or defending any proceeding ... based on consideration of financial resources ." A.R.S. § 25–324(A), (C); *Countryman v. Countryman*, 135 Ariz. 110, 111, 659 P.2d 663, 664 (App.1983) (the statute "does not require party requesting attorney's fees to have prevailed on appeal[;]" rather it "is designed to ensure that poorer party has the proper means to litigate the action"). Merrill I noted that Wife's financial resources evidenced by her salary were "far less than" Husband's, 230 Ariz. at 377 ¶ 31, 284 P.3d at 888, the record does not suggest this has changed and Husband does not argue it has changed. Accordingly, Wife is awarded her reasonable attorneys' fees and taxable costs on appeal, contingent upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶ 19 Recognizing the 1993 Decree remains in full force and effect, the 2013 Judgment is vacated and the Petition is deemed denied. In addition, A.R.S. § 25–318.01 (2014) supersedes by statute the following specified portions of *Merrill I*: *Merrill I*, 230 Ariz. at 373, 375–77 ¶¶ 1, 284 P.3d 880 (second sentence, reading "We hold the military retiree must make his former spouse whole to the extent his unilateral decision to receive the tax benefit has reduced her share of his retirement benefits."), heading B preceding 12, 19 (last portion of last sentence, reading "; we only hold that he must indemnify Wife for the

consequences of doing so"), 21–30 (including heading C preceding 21), 284 P.3d at 884, 886–88. Husband's motion is granted to the extent that it seeks the relief set forth above and denied to the extent it seeks other relief.

Appendix C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

IN RE THE MARRIAGE OF
DIANE MERRILL
AND
ROBERT KENNETH MERRILL

No.: DR 91-92542

Ruling Minute Entry

The Court has considered the record on this matter, and the evidence and argument presented at hearing on August 8:2013.

IT IS ORDERED:

1. Entering judgment in favor of Petitioner, Diane Merrill and against Respondent, Robert Kenneth Merrill, for amounts due to Petitioner her interest in military retired pay through July, 2013, in the total amount of $128,574.35. Respondent shall pay said judgment from any and all nonexempt income and assets. Interest on the judgment shall accrue from the date of judgment at the rate of 4.25%.

2. For Petitioner's interest in military retired pay for August, 2013, and each month thereafter, until the earlier of the death of either party, Respondent shall pay Petitioner $1,486.50, subject to increases for costs of living adjustments to military retired pay. Respondent shall pay to Petitioner100% of his non-exempt income starting in August, 2013, and he shall remain responsible for any monthly deficit accruing

each month starting August, 2013, to be paid and/or collected from non-exempt income and assets.

3. Interest shall accrue on all of the above unpaid principal sums at 4.25% from the date each payment became due.

4. Entering judgment in favor of Petitioner, Diane Merrill, and against Respondent, Robert Kenneth Merrill, for attorney's fees in the amount of $10,000.00 and costs in the amount of $1,098.85, to be paid and or collected from non-exempt income and assets.

5. Interest shall accrue on all unpaid attorney's fees and costs awarded in paragraph 4, above, at the rate of $4.25% from the date of this judgment.

IT IS FURTHERED ORDERED denying Petitioner's motion to compel without prejudice to obtaining such information in the appropriate collection action.

IT IS FURTHER ORDERED denying any affirmative relief sought before the date of this Order that is not expressly granted above.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure (ARFLP).

Dated this 9th day of August, 2013.
/s/ Paul J. McMurdie
The Honorable Paul J. McMudie
Judge of the Superior Court

Appendix D

In re the Marriage of:
Diane Merrill, Petitioner,
And
Robert Kenneth Merrill, Respondent.

No.: DR 91-92542

Decree of Dissolution of Marriage
(Without Children)

This matter having come on for trial; the Court having reviewed the evidence presented in this matter; having reviewed the proposed findings of facts and conclusions of law submitted by each of the parties, and good cause appearing, finds as follows:

1. The parties were married on July 27, 1963. This is a marriage of long duration, nearly thirty (30) years.
2. Petitioner/Wife is fifty (50) years of age. Respondent/Husband is fifty-two (52) years of age.
3. The jurisdictional prerequisites for the granting of a dissolution of marriage in the State of Arizona have been met.
4. There are no minor children of the parties and Petitioner/Wife is not now pregnant.
5. The marriage of the parties is irretrievably broken with no reasonable prospect for reconciliation.
6. Petitioner/Wife has not been gainfully employed outside of the home during the marriage; by agreement of the parties, she has been responsible for rearing the children, and making and keeping the family home.

7. Petitioner/Wife has contributed to Respondent/Husband's education by managing the home, the finances and rearing the children, while Respondent/Husband obtained his Master's Degree during the marriage.

8. Until her recent enrollment in the junior college system, Petitioner/Wife has had no formal education or training post high school.

9. Petitioner/Wife is presently attending school at Mesa Community College and intends to eventually transfer to Arizona Statement University from which it is anticipated that she will earn her Bachelor of Science in Nursing Degree on or before June, 1997. The anticipate costs for completion of her education are approximately TEN THOUSAND AND NO/100 DOLLARS ($10,000.00)

10. Respondent/Husband has monthly income from the following resources:

- McDonnell Douglas (*Net) – $5,190.65;
- Husband's share of Military Retirement (Net) – $698.17;
- VA Disability (Net) – $382.00;
- Rental Income (Net) – $375.00;
- Total – $6,645.82

*Based on an average monthly income of $7,308.39 less applicable taxes from the 1992 Federal withholding of tax tables.

11. Respondent/Husband's monthly expenses are ONE THOUSAND FOUR HUNDRED NINETY-TWO AND NO/100 DOLLARS ($1,492.00); house payment EIGHT HUNDRED THIRTY-SEVEN AND NO/100 DOLLARS ($837.00); car payment TWO HUNDRED FORTY-SEVEN AND NO/100 DOLLARS ($247.00); car insurance TWO HUNDRED FORTY AND NO/100

DOLLARS ($240.00); Wachovia MasterCard ONE HUNDRED SIXTY-EIGHT AND 99/100 DOLLARS ($168.99).

12. Petitioner/Wife's only income is her share of Respondent/Husband's military retirement of SIX HUNDRED NINETY-EIGHT AND 17/100 DOLLARS ($698.17) per month.

13. Petitioner/Wife's monthly expenses are THREE THOUSAND TWENTY-TWO AND NO 100/DOLLARS (3,022.00) including taxes and excluding education expenses.

14. A fair and equitable division of assets valued at the time of trial is as follows:

RESPONDENT/HUSBAND	Asset Value
USAA Annuity	$6,115.00
The USAA Tax Exempt Fund	$1,000.00
Husband's USAA Growth Fund IRA	$3,780.00
Husband's Oppenheimer Equity Fund IRA Account	$1,692.00
Philcorp Note	$1,400.00
Cape Coral, Florida Lots	$3,500.00
½ of Husband's McDonell Douglas Helicopter 401K Retirement Plan	$47,272.00

pursuant to QDRO with an additional credit of $4,000.00 based on Husband's payment of $4,000.00 to Wife towards her home as stipulated by the parties and subject to a deduction of $978.00 pursuant to page 9 paragraph 16 of this Decree and of $750.00 pursuant to page 8, paragraph 14 of the Decree.

PETITIONER/WIFE	
Wife's USAA Growth Fund IRA	$2,000.00
Wife's Oppenheimer Equity Fund IRA Account	$1,331.00
Savings Bonds accrued through date of Decree	

	$4,603.00
Philcorp Stock (186 shares)	$4,697.00
½ of Husband's McDonell Douglas Helicopter 401K Retirement Plan	$42,728.00

pursuant to QDRO subject to a $4,000.00 offset because of the $4,000.00 to be paid to Wife by Husband per stipulation and a credit of $978.00 pursuant to paragraph 16, page 9 of the Decree and a credit of $750.00 pursuant to paragraph 14, page 8 of the Decree.

NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The marriage of the parties is hereby dissolved, and each party is restore to the status of single person.

2. This being a marriage of long duration, Petitioner/Wife having insufficient assets to provide for her needs while enrolled as a student and Respondent/Husband having income of approximately SEVEN THOUSAND AND NO/100 DOLLARS ($7,000.00) per month, Petitioner/Wife shall be awarded the sum of TWO THOUSAND AND NO/100 DOLLARS ($2,000.00) per month as and for spousal maintenance, said payments to begin on February 1, 1993, and to terminate on June 30, 1997, or upon Petitioner/Wife earning her Bachelor's Degree, whichever occurs first. Said benefits shall also terminate upon Petitioner/Wife's remarriage or death and shall be paid pursuant to a Wage Assignment through the Clerk of the Court.

3. Pursuant to stipulation of the parties, it is agree that the two (2) weeks ownership of the Scottsdale, Arizona time share shall be divided as to ownership with Petitioner/Wife receiving one-half

(one (1) week) and Respondent/Husband receiving the other one-half a (week).

> Interval Interest No. B4716 Scottsdale/Camelback Resort, as set forth in the Declaration of Dedication recorded in Docket 15090, at page 934, as amended by the Amendment recorded in Docket 16513, at page 456, and on the Plat recorded in Book 240 of the Maps at page 39, office of the County Recorder of Maricopa County, Arizona.

4. The parties' one week time share condominium at the Sedona Vacation Club at Los Abrigados, Arizona, is awarded to the Respondent/Husband as his sole and separate property. Respondent/Husband shall be fully responsible for any encumbrances or debts that are due and owing on said property.

5. Respondent/Husband is awarded the twelve place setting bronzeware that he purchased in Vietnam, the Polaroid camera, AR stereo speakers, the 22-Rifle given to Respondent/Husband by his Father and Respondent/Husband's pictures from Vietnam. Additional, Petitioner/Wife shall make available to Respondent/Husband all family pictures or negatives thereof so that he can make copies of said photographs for himself. Petitioner/Wife shall also give to Respondent/Husband his DD Form 214.

6. Respondent/Husband shall be awarded the 1991/1992 Mazda RX7 automobile, together with any debts owing thereon.

7. Petitioner/Wife is awarded as her sole and separate property, the Nieman Print, title Red Corrida", the twelve place settings of Noritake China,

one of the parties' 35MM cameras, the oak credenza bar and the Kenwood stereo speakers.

8. The parties are awarded the following real property free and clear of any claim from the other and subject to encumbrances thereon:

a. Petitioner/Wife is awarded the parties' family residence located at 1506 East Fairbrook, Mesa, Arizona, legally described as:
Lot nine (9), TANGERINE TERRACE, according to Book 180 of Marps, page 47, records of Maricopa County, Arizona.
and shall be responsible for the payment of any current of future debt owed thereon.

b. Respondent/Husband is awarded the property located at 1235 North Sunnyvale, #14, Mesa, Arizona, legally described as:
Lot 14 of Subdivision Mission Square, Plan No.: 725 Evaluation B

c. Respondent/Husband is awarded the property located at 2119 East Inca, Mesa, Arizona, legally described as:
Lot 53, HY-DEN PLACE UNIT 1, a subdivision recorded in Book 160 of Maps, page 11, records of Maricopa County, Arizona PARCEL #141-10-149

9. Petitioner/Wife is awarded the 1991 Honda Accord EX, VIN#: JHMCB766OMO44496, together with any debts owing thereon.

10. Each of the parties are awarded as their sole and separate property one-half of the Respondent/Husband's military retirement pay

pursuant to a Qualified Domestic Relations Order entered by the Court. Respondent/Husband shall execute any and all documents necessary to keep the Survivor's Benefit Plan benefit to plan which he is entitled pursuant to this military retirement, in full force and effect, naming Petitioner/Wife as the sole beneficiary thereof. Upon entry of this Decree Petitioner/Wife is to be reinstated into the Survivor Benefit Plan as a former spouse (under the provisions of P.L. 99-661). The premium for this additional coverage is approximately ONE HUNDRED THIRTY-FOUR AND NO/100 DOLLARS ($134.00) per month and is a deduction from the gross monthly military retirement pay to which Respondent/Husband is entitled. As long as Petitioner/Wife shall be entitled to spousal maintenance under the terms of the Decree of Dissolution, the premium costs for the maintenance of this benefits shall be equally borne by the parties. Upon termination of spousal maintenance under the Decree, one hundred per cent (100%) of the premium costs for the maintenance of the survivor's benefits shall be deducted from Petitioner/Wife's share of the military retirement pay. Petitioner/Wife shall receive monthly payments by direct pay (P.L. 97-252) she is entitled to from Respondent/Husband's military retirement plan subject to appropriate tax withholding.

11. Petitioner/Wife shall be responsible for the payment of the First Card debt in the approximate amount of THREE THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($3,300.00).

12. Each party is awarded as his/her sole and separate property fifty percent (50%) of Respondent's ROBERT KENNETH MERRILL's collective benefit plans at McDonnell Douglas Cooperation, including

the Employer Retirement Income Plan for Salaried Employees formerly the McDonnell Douglas Helicopter Company Retirement Plan for Salaried Employees, Employee Payroll Stocker Ownership Plan of McDonnell Douglas Corp. (PAYSOP) and Employee Savings Plan of McDonnell Douglas Corp. – Salaried Plan. Said award shall be by Qualified Domestic Relations Order.

13. Respondent/Husband shall pay Wachovia Credit Card debt in the amount of approximately FOUR THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($4,300.00) and the debt owed to Liz Kinsworthy, the counselor who has been assisting the Petitioner/Wife in her rehabilitative counseling, in the amount of THREE HUNDRED EIGHTY-SIX AND NO/100 DOLLARS ($386.00).

14. During the marriage, and subsequent to the parties separation, Respondent/Husband purchased a ring for Ms. Jeannie Thex for the sum of approximately ONE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($1,500.00). This gift was for a non-community funds. Accordingly, Respondent/Husband shall have deducted from his share of the McDonnell Douglas 401K Retirement Plan, the sum of SEVEN HUNDRED FIFTY AND NO/100 DOLLARS ($750.00).

15. Respondent/Husband shall continue to maintain premium payments on any life insurance policies that he currently owns, naming Petitioner/Wife as the sole beneficiary of such policies:

a. Armed Forces Relief and Benefit Assoc. No.: 147423

b. Army and Air Force Mutual Aid No.: 70917X0L

> c. McDonnell Douglas Helicopter Company (Supplemental policy requiring employee contribution) for so long as it is available to him through his employer. Should Respondent for any reason change or cease his employment with McDonnell Douglas Helicopter Company, he shall notify Petitioner of this fact sixty (60) days before the change or cessation takes place. This change of cessation of work for McDonnell Douglas Helicopter Company shall be deemed a substantial and continuing change of circumstances for purposes of modifying this paragraph.

Respondent shall no encumber these policies.

15. Any life insurance policies in the name of or for the benefits of the parties' children, shall be awarded to Petitioner/Wife. Petitioner/Wife shall be responsible for making any and all future payments thereon.

16. Respondent/Husband shall reimburse Petitioner/Wife as and for her educational expenses which she has incurred since the date of the parties' separation in the amount of NINE HUNDRED SEVENTY-EIGHT AND NO/100 DOLLARS ($978.00). This total of $978.00 shall likewise be deducted from Respondent/Husband's share of the 401K Retirement Plan assets.

17. All debts which have been incurred or paid by either party since their separation, shall be their sole and separate debt, with the exception of those items listed above.

18. No further reimbursement shall be due and owing from one party to the other. Each party shall be awarded all personal belongings and effects now in their possession, with the exception of those items otherwise distributed above, or those items of personal property which the parties have previously agreed to transfer, in accordance with their stipulation on the Court record.

19. Husband shall release, grant, transfer convey and quit-claim any and all interest, estate or other right which he may now or hereafter have or claim in any or all earnings, income and/or property, real, personal or mixed, and wheresoever situated, hereafter acquired by or on behalf of Wife. Wife may convey or otherwise dispose of or deal with the same as through she had never been married.

20. Wife shall release, grant, transfer convey and quit-claim any and all interest, estate or other right which he may now or hereafter have or claim in any or all earnings, income and/or property, real, personal or mixed, and wheresoever situated, hereafter acquired by or on behalf of Husband. Husband may convey or otherwise of or deal with the same as though he had never been married.

21. Neither party shall have any right or interest, whether by law of dower or curtesy, or otherwise, to or in all real or personal property which the other may now own be awarded herein or may hereafter acquire; (ii) that the estate of the other party, real or personal, shall go and belong at the death of the other party to the person or persons who would have become entitled thereto of he or she had predeceased such other party; (iii) he or she shall permit any Will of the other party to be probated and shall allow administration upon the property of the other party to be taken out by the

person or persons who would have been entitled thereto if he or she had predeceased such other party; (iv) neither party has any rights to letters of administration upon the estate of the other party; and (v) has no right of election or any other right granted by the laws of jurisdiction to take against any Will of the other party, whether such Will shall have been executed before or shall be executed after the date of this agreement.

22. Except as otherwise may be provided herein, earnings, income or accumulation of either party, and all property in any manner acquired after entry of this Decree by either, shall be and remain the sole and separate property of the party so earning, receiving, accumulating, or acquiring the same; and each of the parties hereto has no right whatsoever to such earnings income, accumulations and property.

23. The parties shall, at any time, make, execute and deliver all instruments, conveyances, powers of attorney, authorizations and all other documents or assigns reasonably required or desirable to effectuate any conveyance or transfer of any said property each to the other, or for the purpose of giving full effect to this Decree.

24. Each party shall indemnify, save and hold the other harmless from any and all damages, costs, expenses, liabilities and obligations of every kind, character, nature or description which may hereafter arise by reason of or on account of the failure of each party to fully perform each and all of the provision of this Decree required to be performed by said party. The failure of either party to insist, in any one or more instances, upon a strict performance of any of the provisions of this Decree of Dissolution shall not be construed as a waiver or relinquishment for the future

of provision, but the same shall continue and remain in full force and effect.

25. The parties have avowed that total community estate consists of those items delineated in this Decree. If and in the event at any time subsequent to the execution of this Decree additional community, quasi-community or joint tenancy property is discovered, said property having been in evidence prior to the date of the execution hereof by not considered or distributed herein or hereunder, such after-discovered property shall be divided equally between the parties.

26. All distributions of joint and community property under this Decree shall be effective January 31, 1993.

27. Respondent/Husband shall pay two thirds (2/3) of the parties' combined, reasonable attorney's fees; Petitioner/Wife shall pay one-third (1/3) of the parties' total combine reasonable attorney's fees except that each party shall pay their own costs and attorney's fees incurred for the Objection to Form of Decree, the Response thereto and for the hearing held June 8, 1993.

28. Petitioner shall have judgment in the amount of $3,000.00 for sums due her under pendent lite orders as a division of income from November 8, 1992 through January 30, 1993.

29. The parties signature below as to form of this Decree shall be a ban preventing them from pursing further relief for orders entered herein.

Done in open court this date: August 10, 1993
/S/ Paul Katz
The Honorable Paul Katz
Judge of the Superior Court