NO. CAAP-21-0000577

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

VICTOR GEORGE GUSTAFSON, Plaintiff-Appellant, v.
BECKY DAUGHERTY GUSTAFSON, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 07-1-3538)

MEMORANDUM OPINION
(By: Leonard, Acting C.J., and Wadsworth and McCullen, JJ.)

This appeal arises out of post-judgment proceedings in a divorce case between Plaintiff-Appellant Victor George Gustafson (**Victor**) and Defendant-Appellee Becky Daugherty Gustafson (**Becky**). Victor appeals from the October 1, 2021 "Order Regarding [Becky's] Motion for Post-Decree Relief Filed December 17, 2020" (**Post-Decree Relief Order**), entered in the Family Court of the First Circuit (**Family Court**).[1/] He also challenges the Family Court's: (1) July 21, 2021 "Order Denying [Victor's] Motion to Dismiss [Becky's] Motion for Post-Decree Relief Filed on December 17, 2020" (**Order Denying Dismissal**); and (2) November 17, 2021 Findings of Fact and Conclusions of Law (**FOFs/COLs**).

For the reasons discussed below, we affirm.

[1/] The Honorable Bryant G.F.Y. Zane presided.

I. Background

On September 25, 2008, the Family Court entered a Divorce Decree which, among other things, dissolved the marriage between Victor and Becky and incorporated by reference their Agreement Incident to Divorce (**Agreement**), dated September 5, 2008, which included the parties' agreement dividing all of their property. The Agreement provided, among other things, that Becky shall receive 47.5% of Victor's military disposable retirement pay, with monthly payments to be made to her directly by the U.S. Department of Finance and Accounting Service (**DFAS**), as implemented under the terms of a subsequent court order. On November 17, 2008, the Family Court entered a stipulated "Military Qualifying Court Order Regarding [Victor's] United States Navy Retirement" (**MQCO**),[2/] signed by both parties, which restated Becky's share of Victor's retirement pay, and provided, in relevant part:

> **16. Direct Payment by the Member.** If in any month, direct payment is not made to the Former Spouse by the DFAS (or the appropriate military pay center) pursuant to the terms of this Order, the Member shall pay the amounts called for above directly to the Former Spouse by the fifth (5th) day of each month in which the military pay center fails to do so, beginning on the date that the Former Spouse would have otherwise been entitled to commence her payments. This includes any amounts received by the Member in lieu of disposable retired pay, including but not limited to, any amounts waived by the Member in order to receive Veterans Administration (i.e., disability) benefits or any amounts received by the Member as a result of an early-out provision such as VSI or SSB benefits.
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> **17. Actions by Member.** If the Member takes any action that prevents, decreases, or limits the collection by the Former Spouse of the sums to be paid hereunder, he shall make payments to the Former Spouse directly in an amount sufficient to neutralize, as to the Former Spouse, the effects of the actions taken by the Member.

(Emphases added.)

Neither party appealed from the Divorce Decree or the MQCO.

In January 2017, Victor waived a portion of his disposable military retired pay in order to receive Veterans

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[2/] The Honorable R. Mark Browning entered the Divorce Decree and the MQCO.

Administration (**VA**) disability benefits. As a result, Victor's disposable military retired pay was reduced, and Becky's monthly payment from DFAS decreased accordingly. Victor did not pay any portion of the difference to Becky.

On December 17, 2020, Becky filed a Motion and Declaration for Post-Decree Relief (**Post-Decree Motion**) for enforcement of the MQCO. On May 6, 2021, Victor filed a motion to dismiss. On July 21, 2021, the Family Court entered the Order Denying Dismissal, which denied Victor's motion to dismiss.

On October 1, 2021, the Family Court entered the Post-Decree Relief Order, granting Becky's Post-Decree Motion. The Family Court determined that Victor owed Becky 47.5% of the amount of disposable military retired pay that he had waived in order to receive VA compensation from January 1, 2017 through August 31, 2021 – a total principal amount of $18,115.61. The court awarded Becky 10% annual interest on the principal amount and ordered Victor to continue to reimburse Becky 47.5% of the amount of waived disposable military retirement pay. The court also awarded Becky her attorneys' fees and costs in the sum of $14,612.27.

Victor timely appealed, and on November 17, 2021, the Family Court entered the FOFs/COLs. In summary, the Family Court concluded in COLs 2 through 10 that: (1) the MQCO is a judgment that cannot be relitigated under the doctrine of *res judicata*; (2) Victor is barred by *res judicata* from challenging the validity of the MQCO; (3) the MQCO does not violate the Uniform Services Former Spouses Protection Act (**USFSPA**) because it does not divide Victor's VA disability benefits, and is enforceable because Victor agrees he can comply with its terms by using funds and assets other than disability payments, citing Perez v. Perez, 107 Hawaiʻi 85, 92, 110 P.3d 409, 416 (App. 2005); and (4) the United States Supreme Court's decision in Howell v. Howell, 581 U.S. 214 (2017), is distinguishable from and not applicable to this case.

On appeal, Victor contends that COLs 2 through 8 and 10 are wrong.[3/] He does not, however, structure his argument to explain why each of the identified COLs is wrong. See Hawaiʻi Rules of Appellate Procedure Rule 28(b)(7). Rather, he appears to challenge these COLs *en masse* by arguing, primarily, that federal law preempts enforcement of the MQCO to the extent it requires Victor to reimburse Becky for the reduction in her share of his disposable retirement pay. It is this and his related arguments that we address below. See id.

II. Discussion

A. The Family Court's Jurisdiction

Victor argues that the USFSPA preempts state law regarding military retirement pay, and therefore the Family Court that entered the MQCO had "no jurisdiction to divide anything other than what the Act allows it to divide, which is 'disposable retired pay,' defined in 10 U.S.C. § 1408(a)(4)(A)." Victor further argues that the disputed provision of the MQCO – under which he agreed to reimburse Becky for any reduction in her payments due to Victor's decision to receive VA disability benefits in lieu of disposable military retirement pay – is in reality a division of his disability pay and was therefore a "nullity" because "disposable retired pay" excludes disability pay.

It is undisputed that Victor did not appeal from the Divorce Decree or the MQCO. Nor did he bring a motion under HRCP Rule 60(b) for relief from the decree or order. Victor cites no authority allowing him, as a matter of Hawaiʻi law, to challenge the validity of the MQCO in this procedural context twelve years after its entry. Indeed, Hawaiʻi law is to the contrary. As further discussed below, the doctrine of *res judicata* bars Victor's belated challenge to the MQCO.[4/]

[3/] Victor does not contest any of the FOFs. They are binding on appeal. See Okada Trucking Co. v. Bd. of Water Supply, 97 Hawaiʻi 450, 458, 40 P.3d 73, 81 (2002).

[4/] In addition, to the extent Victor argues that the MQCO improperly modified the Divorce Decree, we note that he did not raise this argument in (continued...)

In any event, the Family Court plainly had subject matter jurisdiction to divide Victor and Becky's property pursuant to their divorce. See HRS §§ 580-1, -47 (2018); see also Gross v. Wilson, 424 P.3d 390, 397 n.34 (Alaska 2018) ("A majority of state courts that have addressed the issue treat the USFSPA and Mansell[v. Mansell (Mansell I), 490 U.S. 581 (1989)] as a rule of substantive federal law, and not a jurisdictional matter."); In re Marriage of Mansell (Mansell II), 217 Cal. App. 3d 219, 228-29 (1989) (ruling that the trial court had jurisdiction to provide for the disposition of military benefits as part of a divorce decree).

B. Res Judicata and the Enforcement of the MQCO

Victor argues that in Howell, the Supreme Court "ruled that a state court may not order a veteran to indemnify a divorced spouse for the loss caused by the veteran's waiver of disposable retired pay to receive VA disability compensation." (Formatting altered.) Victor further argues that "[n]othing in the Howell decision restricts its application to future cases or encourages courts to enforce pre-existing indemnification clauses based on *res judicata*."

The Family Court properly concluded that *res judicata* prevents Victor from challenging the MQCO. Under the *res judicata* doctrine:

> [T]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the claims which were actually litigated in the first action, but also of all grounds of claim . . . which might have been properly litigated in the first action but were not litigated or decided.

Kauhane v. Acutron Co., 71 Haw. 458, 463, 795 P.2d 276, 278 (1990) (quoting Morneau v. Stark Enters., Ltd., 56 Haw. 420, 422-23, 539 P.2d 472, 474-75 (1975)) (original brackets and internal quotation marks omitted). *Res judicata* "serves to relieve

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[4/] (...continued)
the Family Court. It is thus deemed waived for this independent reason. See Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawaiʻi 97, 107, 58 P.3d 608, 618 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.").

parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Id. (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)) (internal quotation marks omitted).

Victor contends in part that *res judicata* does not apply because he is not seeking to "reopen" the MQCO, and has merely argued that the Family Court cannot enforce it. We agree with the Family Court, however, that by arguing that the MQCO is invalid in relevant part and cannot be enforced, Victor "is seeking to reopen, relitigate, and challenge the validity of the MQCO, to which the parties had agreed and which the Court had approved and ordered approximately twelve years ago." See In re Marriage of Weiser, 475 P.3d 237, 252 (Wash. Ct. App. 2020) (ruling that "under the doctrine of res judicata [husband] cannot, through a response to a motion to enforce an agreement that he had not followed, reopen the Agreement . . . and challenge the validity of [the dissolution] decree"). It is otherwise undisputed that the MQCO is, or is part of, a final judgment or order from which Victor could have appealed, and that Victor's current challenge to the MCQO's enforcement involves the same subject matter and the same parties as the prior action. *Res judicata* therefore bars relitigation of the MCQO.

Supreme Court precedent does not require a different result. In Mansell I, the Supreme Court held that under the USFSPA, state courts may not treat military retirement pay waived by the retiree in order to receive veterans' disability benefits as property divisible upon divorce. 490 U.S. at 583. There, the military retiree husband had already waived a portion of his military retirement pay in order to receive veterans' disability payments at the time of the divorce. Id. at 585-86. A California state court, in dividing the parties' property, had ordered husband to pay wife a portion of the military retirement pay he had waived in order to receive disability payments. Id. Four years later, husband moved to modify the divorce decree to remove the provision requiring him to share his total retirement pay with wife. Id. at 586. The California court denied his

request. The Supreme Court reversed the judgment and remanded the matter "for further proceedings not inconsistent with [the Court's] opinion." Id. at 594. In footnote 5 of the opinion, the Supreme Court stated:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-McCarty property settlement from being reopened. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

Id. at 586 n.5 (citations omitted; emphasis added).

On remand, the California Court of Appeal affirmed the trial court's denial of the husband's motion to modify the divorce judgment. Mansell II, 217 Cal. App. 3d at 236. The court clarified that it had not "reopened" the judgment; it "addressed the federal question only to demonstrate there was no basis for reopening the settlement." Id. at 225, 235, 265 Cal. Rptr. at 230, 236. The court further stated that "Husband had shown no justification in law or equity for reopening the 1979 final decree of dissolution," and "under California law, there was, and is, no basis to reopen the settlement and reach the federal question." Id. at 226, 235. The Supreme Court later denied certiorari review. Mansell v. Mansell, 498 U.S. 806 (1990).

In the wake of the Supreme Court's 1989 Mansell I decision, different state courts came to different conclusions as to whether federal law allowed a family court to order a veteran spouse to indemnify the divorced spouse for the loss of the divorced spouse's portion of the veteran's retirement pay caused by the receipt of service-related disability benefits. Howell, 581 U.S. at 219-20. The Supreme Court resolved that issue in Howell, ruling that a state court could not "subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver[.]" Id. at 216. The Court explained that ordering a veteran to

reimburse or indemnify their spouse for such loss was no different than an order that divided disability pay. Id. at 222.

It is important to note that neither Mansell I nor Howell involved a property settlement agreement that contained – or incorporated by reference – an indemnification provision, or a stipulated order that memorialized such an agreed-upon provision. See Yourko v. Yourko, 884 S.E.2d 799, 804 (Va. 2023); see also Jones v. Jones, 505 P.3d 224, 230 (Alaska 2022) ("Howell does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement."). Nor did either case address the enforceability of such a provision. Yourko, 884 S.E.2d at 804. Moreover, Howell did not discuss *res judicata* or mention footnote 5 of the Mansell I decision, leaving the footnote in place for any guidance it may provide on the subject. See Weiser, 475 P.3d at 247-49.

In sum, nothing in Mansell I or Howell precludes application of the *res judicata* doctrine in this context, so as to bar Victor from relitigating the provisions of the MCQO. Accordingly, the indemnity provision of the MCQO was properly enforced. The record shows that Victor and Becky mutually agreed to the MCQO's provisions, including the indemnity provision, while they each were represented by counsel. The Family Court then approved and ordered the parties' agreement. Victor later waived a portion of his disposable military retired pay in order to receive VA benefits, and did not pay Becky the amounts due to her under the parties' agreement. It is also undisputed that Victor "had and currently has sufficient income and assets other than his VA Compensation to enable him to pay to [Becky] equal to forty-seven and a half percent (47.5%) of the amount of his disposable military retired pay that he waived in order to receive VA Compensation." See Perez, 107 Hawaiʻi at 92, 110 P.3d at 416. Becky's Post-Decree Motion merely asked the court to enforce the MQCO according to the parties' agreed terms. The Family Court did not err in doing so.

III. Conclusion

For the reasons discussed above, the October 1, 2021 "Order Regarding Defendant's Motion for Post-Decree Relief Filed December 17, 2020," entered in the Family Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawaiʻi, February 28, 2025.

On the briefs:

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/s/ Katherine G. Leonard
Acting Chief Judge

/s/ Clyde J. Wadsworth
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge