



Administrative Office of the Courts

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Supreme Court rules military disability benefits not subject to division in divorces

SANTA FE – The state Supreme Court ruled today that New Mexico courts cannot order a veteran to reimburse a former spouse for a divorce agreement's share of military retirement pay that ended when the veteran opted to receive disability benefits.

In a unanimous decision, New Mexico's highest court held that federal law precludes state courts from enforcing provisions of a 2006 divorce agreement that called for Angela Russ to receive 50 percent of Jeffery Russ' military retirement earned during their marriage. However, the Supreme Court observed that a trial court could consider other legal options for potentially adjusting the financial support the veteran provides his former spouse.

Eight years after the Russ' divorce, the veteran waived his retirement pay in order to receive combat-related disability compensation. As a result, his former spouse lost her share of the retirement benefits and she asked a district court to order her former husband to reimburse her for the reduced alimony.

The Supreme Court reversed a decision of the state Court of Appeals and an order by the Bernalillo County District Court for payment of \$22,243 to Russ' former wife.

The justices concluded that the U.S. Supreme Court's 2017 decision in an Arizona case, *Howell v. Howell*, applied retroactively to the New Mexico couple's case and prevents states from treating waived military retirement benefits as community property that can be divided in a divorce, regardless of whether the waiver occurred after a divorce decree.

The Court of Appeals had determined that the 2017 decision by the nation's highest court did not apply retroactively to New Mexico divorce cases.

In an opinion written by Justice David K. Thomson, the Supreme Court acknowledged it "may seem inequitable" that a former spouse can lose income from a divorce agreement because the veteran decided to accept disability benefits. "Yet, New Mexico courts are not powerless to seek a just result," the justices stated.

The Court ordered the divorce dispute back to the district court for further proceedings, including consideration of whether the former spouse's financial support should be recalculated because of the loss of retirement pay. Under federal law, the justices noted, military disability benefits can be considered a source of income for family support.

"The district court should not rest its decision on the need to indemnify Spouse or replace her portion of Veteran's retirement benefit," the Court explained. "Instead, the district court should direct its attention toward the 'family support obligations [which] are deeply rooted moral responsibilities' rather than an agreement concerning the division of community property."

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To read the decision in *Russ v. Russ*, No. S-1-SC-37962, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/494977/index.do>