

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERICH M. MARTIN,
Appellant,
vs.
RAINA L. MARTIN,
Respondent.

No. 81810-COA

FILED

NOV 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ERICH M. MARTIN,
Appellant,
vs.
RAINA L. MARTIN,
Respondent.

No. 82517-COA

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING*

Erich M. Martin appeals from a district court order regarding enforcement of military retirement benefits, Docket No. 81810-COA, and from a district court order awarding attorney fees pendente lite, Docket No. 82517-COA. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge; Bryce C. Duckworth, Judge.¹

Erich and Raina L. Martin were married in 2002.² In 2015, Erich filed a complaint for divorce in Las Vegas. The district court referred the parties to mediation to see if they could reach an agreement on the terms of divorce. At a hearing, Erich represented to the court that the parties had reached an agreement on the provisions of the divorce. The decree of divorce was signed by both parties, their attorneys, and the district court, and filed

¹Shortly after the Honorable Judge Rebecca Burton issued the orders on appeal, the case was reassigned to the Honorable Judge Bryce C. Duckworth.

²We do not recount the facts except as necessary to our disposition.

in November 2015. There was not a separate unmerged marital settlement agreement.

As pertinent to this appeal, the decree stated, “[s]hould Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status.” In November 2016, an order incident to decree of divorce was filed and submitted to the military to effectuate the parties’ decree of divorce. This order specifically provided that Raina’s share of Erich’s military retired pay

also includes all amounts of retired pay Erich actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any post-divorce waiver made in order to qualify for Veterans Administration benefits [It] is intended to qualify under the *Uniformed Services Former Spouses Protection Act*, 10 U.S.C. §1408 et seq.

The order incident to divorce also stated that if Erich obtained a disability waiver, “he shall make payments to Raina directly in an amount sufficient to neutralize, as to Raina, the effects of the action taken by Erich” and that the court would retain jurisdiction to enforce the award to Raina of military retirement benefits by making an award of alimony.

Erich retired from the military in July 2019. Raina received several monthly payments from Erich’s retirement pension. The Department of Veterans Affairs (DVA) eventually determined that Erich was eligible for disability retirement benefits, and Erich ultimately waived his retirement pay in order to receive disability benefits. As a result of his waiver, the DVA determined Raina was no longer entitled to her share of Erich’s retirement pay, as Erich exclusively receives disability benefits, and

the Defense Finance and Accounting Service stopped sending payments to Raina.

In May 2020, Raina filed in district court a motion to enforce the decree and order incident to divorce, requesting compensation for the loss of Erich's monthly retirement pay as a division of property, and arguing that Erich was obligated to indemnify or reimburse her for the loss. Erich opposed the motion, arguing that federal preemption prohibited the district court from ordering any division of his veteran's disability benefits, citing to *Howell v. Howell*, 581 U.S. ___, 137 S. Ct. 1400 (2017). After the district court conducted a hearing, the court issued an order enforcing the decree and order incident to divorce, finding that Erich "voluntarily" agreed to the indemnification provisions in the decree, and that the *Howell* decision had no impact on the parties' ability "to freely contract." The court ordered Erich to pay Raina the amount of his former retirement pension in monthly installments that she would have been entitled to had he not waived his retirement pay to receive disability benefits. The district court also awarded Raina \$5,000 in pendente lite attorney fees to cover costs associated with defending against Erich's appeal.

On appeal, Erich primarily argues that the district court erred when it ordered Erich to reimburse for his waived military retirement pay as a result of accepting military disability benefits because federal law preempts such an order. *See Howell*, 581 U.S. ___, 137 S. Ct. 1400. Erich also argues that the district court ignored public policy that explicitly seeks to protect disabled veterans by ordering him to reimburse Raina for his waived military retirement pay. He also argues that the support exception contained in *Howell*, 581 U.S. ___, 137 S. Ct. 1400, does not apply. Erich also argues that the indemnification provision is unenforceable on contractual grounds and

on the alternative basis of preclusion. Lastly, he argues that the district court abused its discretion in awarding attorney fees pendente lite to Raina.³ *The district court erred when it ordered Erich to reimburse Raina for his waived military retirement pay as a result of accepting military disability benefits.*

Erich argues that federal law, including the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408 (2018), and *Howell*, 581 U.S. ___, 137 S. Ct. 1400, preempted the district court from dividing veteran disability benefits and that any attempt to divide veteran disability benefits via alternatives like indemnification or a settlement agreement is improper. Raina counters by stating that the *Howell* decision is distinguishable from the present facts, as it did not involve an agreement by the parties for the veteran to reimburse the ex-spouse for the retirement amount waived due to claiming disability benefits. The district court concluded that the *Howell* decision did not preempt the indemnification clause contained in the decree of divorce here, as the parties were free to contract, and the terms in the final decree, which was not appealed, specifically provided for Erich to reimburse Raina if he were to claim disability benefits.⁴ We agree with Erich.

³In light of our disposition, we need not address all the arguments Erich raises on appeal.

⁴We note that Raina also argues that *Howell* should not be applied as it is distinguishable and Erich's appeal is barred by the doctrine of res judicata. We are not persuaded by this argument. At the time the district court decided to enforce the indemnification provision, *Howell* was the controlling law regarding division of military retirement benefits upon divorce and therefore should have governed the court's decision. Further, the indemnification provision could not have been fully litigated until Erich waived his disability pay. Therefore, at the time the divorce decree was entered into by the parties, the issue was not yet ripe for adjudication, thus the fact that the decree itself was not appealed does not form a basis for

Questions of federal preemption are reviewed de novo. See *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (“[W]hen a conflict exists between federal and state law, valid federal law overrides, *i.e.*, preempts, an otherwise valid state law.”). The Supremacy Clause establishes that the United States Constitution and all federal laws enacted pursuant to the federal constitution are “the supreme Law of the Land.” U.S. Const. art. VI, § 2.

There are three basic forms of military retirement for members of the military: (1) nondisability retirement, (2) disability retirement, and (3) reserve retirement. *McCarty v. McCarty*, 453 U.S. 210, 213 (1981), *superseded by statute as stated in Howell*, 581 U.S. ___, 137 S. Ct. 1400. To prevent double dipping, disabled military retirees may only receive disability benefits to the extent that they waive a corresponding amount of the military retirement pay. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1402-03; *Mansell v. Mansell*, 490 U.S. 581, 583-84 (1989). Military retired pay is taxable, whereas military disability compensation is not. 38 U.S.C.A. § 5301. Under federal law, “a State may treat veterans’ ‘disposable retired pay’ as divisible property, *i.e.*, community property divisible upon divorce.” *Howell*, 581 U.S. at ___, 137 S. Ct. at 1403 (quoting 10 U.S.C. § 1408(c)(1)). The USFSPA authorizes state courts to divide “disposable retired pay” among spouses in accordance with community property laws. However, this is not the case for disability payments, as discussed more fully below.

applying *res judicata* to bar Erich’s appeal on the indemnification provision. See *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 262, 321 P.3d 912, 918 (2014) (“Whether the issue was necessarily litigated turns on whether the common issue was . . . necessary to the judgment in the earlier suit.” (omission in original) (emphasis and internal quotation marks omitted)).

Based on our review of *Howell*, *Mansell*, and *McCarty*, it is clear that the United States Congress intended to ensure that disability benefits are not community property and cannot be divided by state community property laws during a divorce. The Supreme Court has consistently held that states cannot order a veteran to indemnify or reimburse an ex-spouse for retirement pay waived to receive disability benefits. Nevada has confirmed that such orders are preempted by federal law. *Byrd v. Byrd*, 137 Nev., Adv. Op. 60, ___ P.3d ___ (Ct. App. Sept. 30, 2021).⁵

Raina contends that the indemnification provision, requiring Erich to make up the loss to her because he selected to receive disability benefits, can be enforced on contract grounds. However, the Supreme Court has noted, “[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.” *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406. We have recognized that federal law is clear that an indemnification provision is invalid, due to the order’s effect, regardless of how it is styled. *Byrd*, 137 Nev., Adv. Op. 60, ___ P.3d at ___. The indemnification provision contained in Erich and Raina’s decree, even if agreed to, has the same effect that federal law prohibits by requiring Erich to reimburse Raina compensation for his waived retirement pay, which he no longer receives because he accepted disability benefits in lieu thereof. Thus, the indemnification provision that requires such reimbursement cannot be enforced.

⁵We take this opportunity to acknowledge the district court’s comprehensive and well-written order, and recognize that at the time the court prepared its order it did not have the benefit of *Byrd v. Byrd*.

Raina argues that *Shelton v. Shelton* should be controlling, in which the Nevada Supreme Court held that the veteran was contractually obligated by the divorce agreement to pay his former spouse the sum representing his military retirement pay, when he elected to receive veteran's disability benefits. 119 Nev. 492, 497-98, 78 P.3d 507, 510-11 (2003). The *Shelton* decision stated that while federal law preempts the determination that veteran's disability pay is community property, state contract law is not preempted by federal law. *Id.* However, *Shelton* predates *Howell*. This court addressed *Shelton* in *Byrd* and noted that *Howell* is controlling regarding the scope of federal preemption for indemnification provisions concerning military retirement benefits. *Byrd*, 137 Nev., Adv. Op. 60, ___ P.3d at ___.⁶ Additionally, the court in *Shelton* treated the pro se joint petition for divorce as a contract, whereas here we only have a decree and an order incident to divorce that merged all agreements. *See Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964) (an agreement merged into a decree loses its character as an independent contract and the parties' rights are based upon the decree). Therefore, we conclude that the district court erred when it ordered Erich to reimburse Raina based on contract principles.

Award of attorney fees pendente lite

Erich argues that the district court abused its discretion when it awarded Raina \$5,000 in attorney fees pendente lite, given that both parties work and Raina can afford counsel. We disagree.

⁶We acknowledge that an award of alimony to the former spouse may be considered by district courts in light of waived military retirement pay. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406. Here, however, the district court declined to award permanent alimony and the issue is not before us on appeal. We note, however, that the supreme court stated in *Shelton* that courts are not precluded from reconsidering divorce decrees in this situation. 119 Nev. at 496, 78 P.3d at 509.

The award of attorney fees resides within the discretion of the district court and will not be overturned absent a manifest abuse of discretion. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005); *see also County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted). Fees awarded pursuant to NRS 125.040(1)(c) are considered “pendente lite” because they cover the costs of the suit while the divorce action is pending. *See Pendente Lite*, *Black’s Law Dictionary* (11th ed. 2019) (“During the proceeding or litigation; in a manner contingent on the outcome of litigation.”).

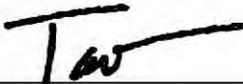
Additionally, “a party need not show necessitous circumstances in order to receive an award of attorney fees under NRS 125.040.” *Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 395, 373 P.3d 86, 89 (2016) (internal quotation marks omitted). Family law district courts must also consider the disparity in income of the parties when awarding fees. *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). When ascertaining the amount to award for the appeal, the supreme court confirmed that a \$15,000 award is appropriate in appeals relating to contentious litigation. *Griffith*, 132 Nev. at 393, 373 P.3d at 87.

At the time the district court granted the attorney fees pendente lite, Erich’s income was three times greater than Raina’s. Accordingly, the district court did not abuse its discretion in awarding Raina \$5,000 in attorney fees pursuant to NRS 125.040. Just as the court held in *Griffith*, the district court here found that it was warranted to award attorney fees pendente lite to Raina because of the disparity in income, the amount was justified, supported by the motion, and reasonable in light of *Griffith*.

Therefore, we conclude that Erich has failed to demonstrate that the district court abused its discretion in awarding fees to Raina pursuant to NRS 125.040.

To the extent that Erich argues that the district court erred in failing to apply the factors of *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), in determining whether to award attorney fees pendente lite, we are not persuaded. Pendente lite fees are prospective and anticipatory, so *Brunzell*, which applies to analyzing attorney fees for work already performed, does not apply here. *Id.* Moreover, Erich fails to support his assertion that *Brunzell* should apply to an award of attorney fees pendente lite. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Accordingly, we

ORDER the judgments of the district court AFFIRMED in part, REVERSED in part, and REMAND for further proceedings consistent with this order.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Rebecca Burton, District Judge, Family Court Division
Hon. Bryce C. Duckworth, District Judge, Family Court Division
Ara Shirinian, Settlement Judge
Marquis Aurbach Coffing
Willick Law Group
Eighth District Court Clerk