Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk/Administrator
Electronically RECEIVED on 2/10/2016 by Workflow Service, Deputy Clerk

Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk/Administrator
Electronically FILED on 2/10/2016 by K. Wojnarowski, Deputy Clerk

C079615

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PHILIP KURTIS CHAPMAN

Appellant

vs.

JUDY KAY CHAPMAN

Respondent

Appeal from an Order of the Superior Court of Sacramento
Hon. Steven M. Gevercer
Case No. 01FL06530

APPELLANT'S OPENING BRIEF

WALZER MELCHER LLP
*Steven K. Yoda (237739)
Christopher C. Melcher (170547)
5941 Variel Avenue
Woodland Hills, California 91367
Tel: (818) 591-3700
Fax: (818) 591-3774

Attorneys for Appellant,
PHILIP KURTIS CHAPMAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

I. ISSUES PRESENTED 7

II. INTRODUCTION 7

III. STATEMENT OF APPEALABILITY 9

IV. STATEMENT OF FACTS 9

A. Philip Is A Retiree Of The United States Navy 9

B. Philip Suffers From Post-Traumatic Stress Disorder, Is 100% Disabled, And Is Entitled To CRSC 10

C. The Parties Divided Philip's Retired Pay But Confirmed Philip's Disability Compensation As Philip's Separate Property 10

D. In Order To Receive CRSC, Philip Waived His Retired Pay 11

E. Judy Claims That She Is Entitled To Philip's CRSC To Compensate Her For Lost Retired Pay; The Trial Court Agrees 11

V. STANDARD OF REVIEW 11

VI. DISCUSSION 12

A. The Trial Court's Order Contravenes Federal Law ... 12

1. The Trial Court Relied Upon *Krempin* And *Smith*, Both Of Which Misapprehend Federal Law By Treating Military Disability Compensation As Community Property 12

2. Under Federal Law, Neither Disability Compensation Nor CRSC May Be Treated As Community Property 13

a. In 1981, The United States Supreme Court Held (In *McCarty*) That State Courts Could Not Treat Military Retired Pay As Community Property……….. . 14

b. In 1982, Congress Passed USFSPA, Permitting State Courts To Treat "Disposable Retired Pay" As Community Property…..……………..15

c. "Disposable Retired Pay" Does Not Include Disability Compensation or CRSC…...……………………………15

d. In 1989, The United States Supreme Court Held (In *Mansell*) That USFSPA Preempts State Community Property Law………………………..……...17

3. By Imposing A Constructive Trust Over Philip's CRSC, The Trial Court Violated Federal Law By Treating CRSC As Community Property 20

4. The United States Supreme Court Has Rejected The Imposition Of Constructive Trusts Over Similar Military Benefits 21

B. Even If The Trial Court Did Not Contravene Federal Law, Its Ruling Was Erroneous 23

1. The Constructive Trust Imposed Against Philip Was Improper Because Philip Committed No Wrongful Act 23

2. Equitable Relief Is Improper Because Judy Has No Legal Right To Enforce 25

C. The Trial Court's Error Was Prejudicial 27

VII. CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

PROOF OF SERVICE 30

TABLE OF AUTHORITIES

CASES

ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.
(1993) 17 Cal.App.4th 1773 26

Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.
(1999) 72 Cal.App.4th 1175 11

City of Oakland v. Oakland Police and Fire Retirement System
(2014) 224 Cal.App.4th 210 26

Comm'r of Internal Revenue v. Glenshaw Glass Co.
(1955) 348 U.S. 426.. 17

Douglas v. Independent Living Center of Southern California, Inc.
(2012) 132 S.Ct. 1204... 20

Halstead v. Halstead
(N.C.Ct.App. 2004) 596 S.E.2d 353 21

Hannan v. McNickle
(1889) 82 Cal. 122 20

Harustak v. Wilkins
(2000) 84 Cal.App.4th 208 11

Hawkins v. United States
(9th Cir. 1994) 30 F.3d 1077 17

Hedges v. Dixon County
(1893) 150 U.S. 182... 20

In re Marriage of Krempin
(1999) 70 Cal.App.4th 1008 .... 12, 20, 24

In re Marriage of Pierce
(Kan.Ct.App. 1999) 982 P.2d 995 21

CASES (cont'd)

In re Marriage of Smith
(2007) 148 Cal.App.4th 1115 .... 12, 13, 20

INS v. Cardoza-Fonseca
(1986) 480 U.S. 421 17

INS v. Pangilinan
(1988) 486 U.S. 875 20

King v. King
(Ga.Ct.App. 1997) 483 S.E.2d 379 23

Mansell v. Mansell
(1989) 490 U.S. 581 .... 17, 18, 19, 20

McCarty v. McCarty
(1981) 453 U.S. 210 .... 14, 15

Raphael v. Bloomfield
(2003) 113 Cal.App.4th 617 .... 8, 16

Rees v. Watertown
(1874) 86 U.S. 107 20

Ridgway v. Ridgway
(1981) 454 U.S. 46 .... 21, 22, 23

Silva v. Silva
(S.C.Ct.App. 1998) 509 S.E.2d 483 23

Spielholz v. Superior Court
(2001) 86 Cal.App.4th 1366 11

Starrels v. Comm'r of Internal Revenue
(9th Cir. 1962) 304 F.2d 574 17

STATUTES

10 U.S.C. § 1408 .... 7, 13, 14, 15, 16, 18, 20, 21
10 U.S.C. § 1413a 7, 11, 14, 16, 20
26 U.S.C. § 63(a) 17
26 U.S.C. § 104 17
38 U.S.C. § 1110 16
38 U.S.C. § 1131 16
38 U.S.C. § 5305 .... 11, 16
Civ. Code §1641 26
Code Civ. Proc. § 475 27
Code Civ. Proc. § 904.1 9

OTHER AUTHORITIES

Black's Law Dictionary (7th ed. 1999) 25

Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub.L. 107-314, §§ 1, 636 (Dec. 2, 2002), 116 Stat. 2574 14

H.R.Rep. No. 97-749, 2d Sess. (1982) 15

Hogoboom & King, Cal. Prac. Guide: Family Law (The Rutter Group 2015) 27

S.Rep. No. 97-502, 2d Sess. (1982) 15

Uniformed Services Former Spouses' Act, Pub.L. 97-252, §§ 1001-02 (Sept. 8, 1982), 96 Stat. 730 13

TREATISES

1 J. Pomeroy, Treatise on Equity Jurisprudence (3d ed. 1905) 20

I.

ISSUES PRESENTED

Does federal law prohibit Combat Related Special Compensation ("CRSC") from being treated as community property divisible in divorce? Did the trial court err in imposing a constructive trust over husband's CRSC, when wife had waived all interest in husband's disability and other work-related benefits?

II.

INTRODUCTION

This is a family law appeal from a post-judgment order imposing a constructive trust over the Combat Related Special Compensation ("CRSC") of Appellant Philip Kurtis Chapman ("Philip") in favor of Philip's ex-wife, Appellee Judy Kay Chapman ("Judy").[1] CRSC is a special form of federal compensation available to retired military personnel, like Philip (a retiree of the United States Navy), who suffer from combat-related disabilities. Congress has expressly declared that state courts may not treat CRSC as divisible community property. That, however, is precisely what occurred in this case.

When it comes to military retirement benefits, Congress has made clear that state courts may only treat "disposable retired pay" as divisible community property under state law. (10 U.S.C. § 1408(c).) Congress also has made clear that CRSC is not "retired pay" (*id.* § 1413a(g)). Therefore, state courts may not treat CRSC as divisible community property under state law. This, incidentally, is consistent with the well-established family law principle that disability compensation, insofar as it compensates an

[1] As is customary in family law appeals, the parties are referred to by their first names.

injured party for diminished earning capacity, is the separate property of the injured party. (*See*, *e.g.*, *Raphael v. Bloomfield* (2003) 113 Cal. App. 4th 617, 623.)

In this case, the parties stipulated to a judgment of dissolution while Philip was receiving military *retired* pay, which is divisible in a divorce. Philip was not receiving CRSC at that time. The judgment awarded Judy "[her] community portion of [Philip's] military retirement pay in the amount of $475.00 per month." (CT 6.) Philip was awarded, and Judy waived, all rights to Philip's disability compensation and "any and all [of his] work related benefits." (CT 4-5.) Philip also was awarded his "separate property and community property interest in military retire[d] pay." (CT 6.) The court did not reserve jurisdiction to modify the judgment.

After judgment was entered, the United States Department of Veterans Affairs ("VA") deemed Philip to be 100% disabled and thus eligible for disability compensation. Philip also became eligible for CRSC. In order to receive these benefits, Philip was required to waive all retired pay he otherwise would have received. The trial court concluded, despite federal law to the contrary, that Philip must "continue to [pay Judy] her original share of [Philip's] retirement pay even if he waived all or a portion of that pay to obtain CRSC benefits." (CT 185.) To accomplish that result, the trial court imposed a constructive trust over Philip's CRSC in Judy's favor. This was error. Congress precludes state courts from dividing CRSC as community property. Thus, when the trial court imposed a constructive trust over Philip's CRSC, it violated federal law. Accordingly, this Court should reverse the trial court's order.

III.

STATEMENT OF APPEALABILITY

The trial court imposed a constructive trust on Philip's CRSC in a post-judgment order. (*See* CT 178-188.) That order is appealable under section 904.1(a)(2) of the Code of Civil Procedure. (*See* Code Civ. Proc., § 904.1, subd. (a)(2) ["An appeal . . . may be taken . . . from an order made after a judgment"].)

IV.

STATEMENT OF FACTS

A. Philip Is A Retiree Of The United States Navy

Philip served in the United States Navy for over twenty years, from July 14, 1971 to July 31, 1991. (CT 80.) During that time, Philip served in active combat roles during our nation's highest-profile military operations of the period, including the Vietnam War and the Persian Gulf War. (CT 58.) In Vietnam, Philip served as a corpsman aboard the aircraft carrier USS Midway ("Midway"). (CT 166.) Philip still recalls, to this day, an incident in 1972, when an aircraft carrying ordnance crash-landed on the Midway's flight deck. (RT 60:1-6.) Philip was one of the first people to respond, and the first person he treated had no neck. (RT 60:1-6.) During the Persian Gulf War, Philip served as Chief Petty Officer in the battalion aid station for the First Marine Division of the United States Marine Corps. (CT 166.) Philip described his service during the Persian Gulf War as "more difficult than my service in Vietnam." (RT 60:13-14.) During both engagements, Philip treated gruesome injuries, placed himself in physical danger, and observed the horrors of war. (CT 167.)

B. Philip Suffers From Post-Traumatic Stress Disorder, Is 100% Disabled, And Is Entitled To CRSC

Philip, though, like many others, has paid a steep personal price for his service to our country. Philip suffers from post-traumatic stress disorder ("PTSD"). (CT 67; RT 59:25-28.) He takes medications to treat it. (CT 67; RT 59:25-28.) The VA determined that, as of July 1, 2005, Philip is totally and permanently disabled by PTSD. (CT 61, 80.) Philip eventually became eligible for CRSC, a special form of compensation available to military retirees suffering from combat-related disabilities. (CT 58, 77, 80-81; RT 68-69.)

C. The Parties Divided Philip's Retired Pay But Confirmed Philip's Disability Compensation As Philip's Separate Property

In 2003, however, before Philip became eligible for CRSC, the parties stipulated to a judgment of dissolution. (*See* CT 3-18.) The parties agreed to divide the community property portion of Philip's retired pay. (*See* CT 6 ["[Judy] shall take . . . [her] community portion of [Philip's] military retirement pay in the amount of $475.00 per month"]; *see also id.* ["[Philip] shall take . . . [his] separate property and community property interest in military retire[d] pay"].) This division was "intend[ed] to effect an equal division of [the parties'] community and co-owned property." (CT 7.) To the extent the division was not equal, the parties "waive[d] the inequality." (CT 9; *see also* CT 9 [although "Wife understands that she has the right to . . . a precisely equal division, . . . Wife hereby waives the right to insist upon such an equal division"].) Judy also expressly confirmed Philip's right to disability as his separate property and waived any interest therein. (*See* CT 4-5.) Moreover, Judy knew, before the divorce was finalized, that the VA had declared Philip at least partially disabled. (RT 34-35.)

D. In Order To Receive CRSC, Philip Waived His Retired Pay

In 2005, after Philip became eligible for CRSC, Philip was required to waive his military retired pay in order to receive CRSC. (*See* 10 U.S.C. § 1413a(b)(2); *see also* 38 U.S.C. § 5305.) Philip, in fact, waived 100% of his military retired pay. (*See* CT 77 [disclosing that Philip's income comes entirely from disability compensation and CRSC, not from retirement pay].) The issue here relates to the *effect* of this waiver.

E. Judy Claims That She Is Entitled To Philip's CRSC To Compensate Her For Lost Retired Pay; The Trial Court Agrees

Judy argues that Philip must pay for her lost share of his now-waived retired pay, even if the funds come from CRSC. (CT 22, 70-72, 156-63; RT 88-92, 99-100.) The trial court agreed with Judy on equitable grounds because it was Philip's post-judgment election to receive CRSC that caused Philip's retired pay to disappear. (CT 178-88.)

V.

STANDARD OF REVIEW

Questions of law and mixed questions of law and fact are reviewed *de novo*. (*See Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212 ["The de novo standard of review . . . applies to mixed questions of law and fact when legal issues predominate"]; *Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) ["We review issues of law de novo"].) Federal preemption, as a question of law, is reviewed *de novo*. (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371.)

VI.

DISCUSSION

A. The Trial Court's Order Contravenes Federal Law

The trial court's order should be reversed because it contravenes federal law.

1. The Trial Court Relied Upon *Krempin* And *Smith*, Both Of Which Misapprehend Federal Law By Treating Military Disability Compensation As Community Property

Noting that, "There are no published cases in California specifically addressing how to treat the post-judgment election of CRSC benefits in lieu of military pension payments" (CT 181), the trial court looked to two military disability-related cases for guidance: *In re Marriage of Krempin* (1999) 70 Cal.App.4th 1008, and *In re Marriage of Smith* (2007) 148 Cal.App.4th 1115. (CT 181-85.) After reviewing these cases, the trial court concluded that equitable relief to Judy was proper. (CT 181-86.) Accordingly, it imposed a constructive trust on Philip's CRSC "to remedy the . . . financial impact on [Judy] of [Philip's] post-judgment election to receive [CRSC]" (CT 185). This was error.

In *Krempin*, as part of the parties' stipulated judgment, wife was awarded 25% of husband's Air Force retired pay. (*Krempin*, 70 Cal.App.4th at pp. 1010-11.) After judgment was entered, the VA determined that husband was 40% disabled. (*Id.* at p. 1011.) As a result, husband began receiving approximately $400 in disability compensation per month, and his retired pay was commensurately reduced. (*Id.*) This, of course, meant that the amount wife received from husband's retired pay was also reduced. (*Id.*) The court in *Krempin* concluded that a resulting trust could, as a matter of equity, be imposed on husband's disability compensation. (*Id.* at p. 1021; *see also id.* at p. 1015 [noting that a majority

of state courts "'take equitable action to compensate the former spouse' when that spouse's share of retirement pay is reduced by the other's post[-]judgment waiver"].)

In *Smith*, the parties' stipulated judgment required an equal division of the community property portion of husband's Army retired pay. (*Smith*, 148 Cal.App.4th at pp. 1119, 122-23.) Although there was no evidence that husband was eligible to receive disability compensation, the trial court entered a post-judgment order requiring husband, in the event he later received disability compensation in lieu of retired pay, to pay wife her share of any lost retired pay. (*Id.* at p. 1120.) Husband appealed, arguing that the post-judgment order violated federal law. (*Id.* at p. 1119.) Citing *Krempin*, the court in *Smith* noted that a majority of state courts "take equitable action on one theory or another, to compensate a former spouse when his or her share of retirement pay is reduced by the other's post[-]judgment waiver." (*Id.* at p. 1121.) The court in *Smith* upheld the trial court's order by implying an indemnification provision (favoring wife) into the parties' judgment. (*Id.* at p. 1124 ["[I]f [husband] does elect to receive disability in lieu of retirement in the future, he will indemnify [wife] for his unilateral reduction of the retirement asset"].)

Both *Krempin* and *Smith* misapprehend federal law as set forth below.

2. Under Federal Law, Neither Disability Compensation Nor CRSC May Be Treated As Community Property

Congress, through the Uniformed Services Former Spouses' Protection Act ("USFSPA") and the Bob Stump National Defense Authorization Act for Fiscal Year 2003 ("Bob Stump NDAA"), prohibits state courts from treating disability compensation and CRSC as community property. (*See* Uniformed Services Former Spouses' Act, Pub.L. 97-252, §§ 1001-02 (Sept. 8, 1982), 96 Stat. 730 [codified at 10 U.S.C.

§ 1408(a)(4)(B), (c)]; *see also* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub.L. 107-314, §§ 1, 636 (Dec. 2, 2002), 116 Stat. 2574 [codified at 10 U.S.C. § 1413a(g)].) To fully appreciate this, some historical context is in order.

a. In 1981, The United States Supreme Court Held (In *McCarty*) That State Courts Could Not Treat Military Retired Pay As Community Property

In 1981, the United States Supreme Court decided *McCarty v. McCarty* (1981) 453 U.S. 210, which held that, under federal law, state courts could not treat military retired pay as community property. Justice Blackmun, writing for the majority, concluded that state community property laws conflicted with federal laws governing military retirement. (*See id.* at p. 223 ["[W]e agree . . . that . . . [state] community property law conflicts with the federal military retirement scheme"]; *id.* at p. 232 ["[I]t is manifest that the application of [state] community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests"]; *id.* at 233 ["The community property division of [military] retired pay has the potential to frustrate . . . [Congress'] objectives [regarding the military retirement system]"].) Since "it is not for the States to interfere with the . . . military retirement system [created by Congress]," the Court reversed a California judgment, which had divided a husband's Army pension in accordance with California community property law. (*Id.* at pp. 235, 236.)

The Court acknowledged that "the plight of an ex-spouse of a retired service member is often a serious one." (*See id.* at p. 235.) Nevertheless, it had no choice but to defer to Congress' authority to control military affairs. (*Id.* at p. 236 ["[I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs"].) The Court concluded that: "Congress has weighed the matter, and '[i]t is not the

province of state courts to strike a balance different from the one Congress has struck.'" (*Id.*; *see also id.* at p. 233 ["State courts are not free to reduce the amounts [of military retired pay] that Congress has determined are necessary for the retired member"].) Congress was free to change the law, if it so desired. (*Id.* at p. 236 ["This decision, however, is for Congress alone"].)

b. In 1982, Congress Passed USFSPA, Permitting State Courts To Treat "Disposable Retired Pay" As Community Property

In 1982, Congress responded to *McCarty* by passing USFSPA. As the Senate Report accompanying USFSPA notes, "The primary purpose of this bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*." (S.Rep. No. 97-502, 2d Sess., p. 1 (1982); *see also* H.R.Rep. No. 97-749, 2d Sess., p. 165 (1982) [noting that the bill "would have the effect of reversing the decision of the United States Supreme Court in the case of *McCarty v. McCarty*"].) USFSPA expressly permits state courts to treat military retired pay as community property divisible under state law. USFSPA states: "Subject to the limitations of this section, a [state] court may treat disposable retired pay . . . as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408(c).) One of the "limitations" of the section, however, is set forth in the definition of "disposable retired pay."

c. "Disposable Retired Pay" Does Not Include Disability Compensation or CRSC

To be clear, "disposable retired pay" is the only type of military retired pay that Congress allows state courts to treat as community property. (*See* 10 U.S.C. § 1408(c).) "Disposable retired pay" is defined as "total monthly retired pay . . . *less* amounts which . . . are deducted from . . . retired pay . . . as a result of a waiver . . . to receive compensation under . .

. title 38.” (10 U.S.C. § 1408(a)(4)(B) [emphasis added].) Disability is a form of compensation deducted from retired pay as a result of a waiver under title 38. (*See*, *e.g.*, 38 U.S.C. § 1110 [wartime disability]; 38 U.S.C. § 1131 [peacetime disability]; *see also* 38 U.S.C. § 5305 [“[A]ny person who is receiving . . . retired . . . pay . . . [from] the Armed Forces . . . and who would be eligible to receive . . . [VA disability] compensation . . . shall be entitled to receive such . . . compensation upon . . . a waiver of . . . such person’s . . . retirement pay”].) Disability compensation, therefore, is not “disposable retired pay” under USFSPA. Thus, state courts may not treat disability compensation as community property (as the courts in *Krempin* and *Smith* did).

In the case of CRSC, this proposition is even clearer. Congress has explicitly stated that CRSC is “not retired pay.” (*See* 10 U.S.C. § 1413a(g); *see also* 10 U.S.C. § 1413a(b)(2) [CRSC pay “may not exceed the amount of the reduction in retired pay . . . [waived] under [38 U.S.C. § 5305 to receive disability compensation]”].) Since CRSC is not “retired pay,” it cannot be “disposable retired pay” under USFSPA. Therefore, state courts may not treat CRSC as community property.

Congress did not expressly state why disability compensation and CRSC were excluded from the definition of “disposable retired pay,” but it is reasonable to assume that Congress wanted to ensure that military retirees received all of their disability compensation. This policy judgment is consistent with the well-established family law principle that disability compensation, insofar as it compensates the injured party for diminished earning capacity, is the separate property of the injured party. (*See*, *e.g.*, *Raphael v. Bloomfield*, *supra*, 113 Cal.App.4th at p. 623 [“[A] . . . permanent disability award . . . is the injured spouse’s separate property to the extent it is meant to compensate for the inured spouse’s diminished earning capacity . . . after separation”] [italics omitted].) It also is

consistent with Congress' own recognition, in the context of tax law, that military disability compensation is not taxable. (*See* 26 U.S.C. § 104(a)(4) [payments for personal injuries resulting from active service in the armed forces are not part of a person's "gross income"]; 26 U.S.C. § 104(b)(2)(C) [payments for combat-related injuries are not part of a person's gross income]; *see also* 26 U.S.C. § 63(a) ["taxable income" is "gross income minus [allowable] deductions"].) Military disability compensation, like payments for personal injury, is not taxable because it makes recipients whole by compensating them for injuries they have suffered. (*See Comm'r of Internal Revenue v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 432 fn. 8 [noting that personal injury recoveries, which are compensatory in nature, are nontaxable because they "roughly correspond to a return of capital"]; *Hawkins v. United States* (9th Cir. 1994) 30 F.3d 1077, 1083 [personal injury damages are not taxable "because they make the taxpayer whole from a previous loss of personal rights—because, in effect, they restore a loss to capital"] [quoting *Starrels v. Comm'r of Internal Revenue* (9th Cir. 1962) 304 F.2d 574, 576].) Therefore, it is reasonable to presume that Congress intentionally excluded disability compensation and CRSC from community property division. (*See*, *e.g.*, *INS v. Cardoza-Fonseca* (1986) 480 U.S. 421, 432 fn. 12 [acknowledging the "strong presumption" that "Congress expresses its intent through the language it chooses"].)

d. In 1989, The United States Supreme Court Held (In *Mansell*) That USFSPA Preempts State Community Property Law

In 1989, the United States Supreme Court interpreted USFSPA vis-à-vis California community property law in *Mansell v. Mansell* (1989) 490 U.S. 581. In that case, husband, an Air Force retiree, received both Air Force retired pay and, pursuant to a partial waiver of that pay, disability compensation. (*Id.* at p. 585.) The parties' stipulated divorce decree

required husband to pay 50% of total retired pay (including waived retired pay) to wife. (*Id.* at p. 586.) Husband sought to remove the requirement that his total retired pay be shared with wife. (*Id.*) The trial court denied husband's request, and this Court affirmed. (*Id.* at pp. 586-87.) The United States Supreme Court, however, reversed. (*Id.* at p. 587.)

Writing for the majority, Justice Marshall observed that, although Congress rarely displaces state law in the area of domestic relations, this was "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." (*Id.*) The language of USFSPA is "precise and limited." (*Id.* at p. 588.) It affirmatively grants state courts the power to divide "disposable retired pay" as community property. (*Id.* at pp. 588-89.) "Disposable retired pay" excludes retired pay that is waived to receive disability compensation. (*Id.* at pp. 588-89 [citing 10 U.S.C. § 1408(a)(4)(B)].)

> Thus, under [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.

(*Id.* at p. 589.)

In other words, USFSPA preempts state law (*id.* at pp. 591-92), USFSPA authorizes state courts to treat only "disposable retired pay" as community property (*id.* at p. 589), and USFPSA's definition of "disposable retired pay" limits what may be treated as community property (*id.* at p. 591). Since retired pay waived to receive disability compensation is not "disposable retired pay," California could not treat it as divisible community property. (*Id.* at pp. 594-95.)

Justice O'Connor dissented, criticizing the harsh implication of *McCarty*'s holding.

> The harsh reality of this holding is that former spouses like [Mrs.] Mansell 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 p. 595.) She went on to state:

> To read [USFSPA] as permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid his obligations under state community property law . . . is to distort beyond recognition and to thwart the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. Women generally suffer a decline in their standard of living following a divorce.

(*Id.* at pp. 601-02.)

The majority acknowledged the potential harm of its holding, but it declined to misread USFSPA's plain text.

> We realize that reading [USFSPA] 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 p. 595; *see also id.* at p. 594 ["Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice"].) On this last point, Justice O'Connor agreed: "It is now once again up to Congress to address the inequity created by the Court in

situations such as this one." (*Id.* at p. 604.) Congress has not amended USFSPA in light of *Mansell*.

3. By Imposing A Constructive Trust Over Philip's CRSC, The Trial Court Violated Federal Law By Treating CRSC As Community Property

The Court's reasoning in *Mansell* applies here. Philip waived military retired pay in order to receive disability compensation. (*See* CT 77, 81.) Philip also receives CRSC. (*See* CT 58, 77, 81.) Although either source of funds is sufficient to satisfy Judy's request of $475.00 per month, neither source of funds is divisible under state law. (*See* 10 U.S.C. §§ 1408(a)(4)(B), 1408(c), 1413a(g); *see also Mansell v. Mansell*, *supra*, 490 U.S. at pp. 594-95.) Thus, the trial court's imposition of a constructive trust over Philip's CRSC was error.

Relying upon *Krempin* and *Smith* (*see*, *supra*, Part A.1.), the trial court concluded that it was free to "select[] an equitable remedy" to compensate Judy. (CT 185.) This, however, turned a fundamental legal principle on its head. In our system of jurisprudence, equity follows the law (not vice versa). (*See Douglas v. Independent Living Center of Southern California, Inc.* (2012) 132 S.Ct. 1204, 1213 ["It is a longstanding maxim that '[e]quity follows the law'"] [quoting 1 J. Pomeroy, Treatise on Equity Jurisprudence § 425 (3d ed. 1905)]; *see also Hannan v. McNickle* (1889) 82 Cal. 122, 126-27 ["[E]quity follows the law[] and rules as the law rules"].) Thus, "Courts of equity can no more disregard statutory and constitutional requirements . . . than can courts of law." (*Hedges v. Dixon County* (1893) 150 U.S. 182, 192.) Where, as here, the law requires a clear outcome, "[a] Court of equity cannot create a remedy in violation of law." (*INS v. Pangilinan* (1988) 486 U.S. 875, 884 [quoting *Rees v. Watertown* (1874) 86 U.S. 107].) In this case, the trial court simply lacked the equitable authority to compensate Judy for Philip's waived retired pay

because federal law dictates that CRSC (and disability compensation) may not be treated as community property. (*See Halstead v. Halstead* (N.C.Ct.App. 2004) 596 S.E.2d 353, 356 ["Such an attempt to circumvent the mandates of 10 U.S.C. § 1408 can not [*sic*] be sanctioned by this Court"]; *In re Marriage of Pierce* (Kan.Ct.App. 1999) 982 P.2d 995, 998 ["[T]he court may not do indirectly what it cannot do directly"].) This result may seem harsh, but it is necessitated by law, and it is exactly the result countenanced by the United States Supreme Court. (*See*, *supra*, Part A.2.d.)

4. The United States Supreme Court Has Rejected The Imposition Of Constructive Trusts Over Similar Military Benefits

This result also is supported by the United States Supreme Court's decision in *Ridgway v. Ridgway* (1981) 454 U.S. 46. *Ridgway* addressed a different military benefit—life insurance—but its reasoning applies here. In *Ridgway*, husband was a sergeant in the Army. (*Id.* at p. 48.) His life was insured under a $20,000 life insurance policy issued under the Servicemen's Group Life Insurance Act of 1965 ("SGLIA"), a federal statute. (*Id.* at pp. 47-48.) When husband divorced his first wife, the court ordered him to maintain the SGLIA life insurance policy for the benefit of his and first wife's three children. (*Id.* at 48.) Four months after the divorce, husband married second wife. (*Id.*) He changed the policy's beneficiary from first wife to indicate that the death benefits should be distributed "by law." (*Id.*) Then, husband died. (*Id.* at p. 49.) SGLIA dictated that the benefits should first be paid to the designated beneficiary. (*Id.* at p. 52.) If there is no designated beneficiary, as was the case here, SGLIA required that the benefits be paid to husband's widow. (*Id.*) Since second wife was husband's lawful spouse at the time of his death, she was husband's widow. (*Id.* at p. 49.) First wife filed suit against second wife,

seeking the imposition of a constructive trust over any death benefits paid to her. (*Id.*)

The Superior Court of Maine dismissed first wife's claim, reasoning that the imposition of a constructive trust would interfere with SGLIA and run afoul of the Supremacy Clause of the United States Constitution. (*Id.*) The Supreme Court of Maine reversed, vacated the dismissal of first wife's claim, and remanded with instructions to name second wife as constructive trustee of the policy's benefits. (*Id.* at p. 50.) The United States Supreme Court reversed yet again and upheld the Superior Court's ruling. (*Id.* at p. 63.)

The Court in *Ridgway* acknowledged that, as a general rule, federal law has limited application in the field of domestic relations, but, "even in that area, [this Court] has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law . . . to prevent the frustration and erosion of the congressional policy embodied in the federal rights." (*Id.* at p. 54.) The Court also noted that "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." (*Id.*) SGLIA grants service members, like husband, the absolute freedom to designate anyone they like as beneficiaries of their own life insurance policies. (*Id.* at pp. 56, 59-60.) SGLIA, the Court concluded, "prevail[s] over and displace[s] inconsistent state law." (*Id.* at p. 60.) Thus, the imposition of a constructive trust against second wife was inconsistent with federal law. (*See id.* at p. 56.)

The Court in *Ridgway*, as in *Mansell*, recognized the harshness of its holding:

> We recognize that this unpalatable case suggests certain 'equities' in favor of the . . . minor children and their mother. Sergeant Ridgway

> did have specific obligations to the children[,] . . . [but], instead, chose to name his then new wife as beneficiary of his SGLIA policy.

(*Id.* at pp. 62-63.) The Court's holding, however, was required by federal statute, which Congress was free to change.

> A result of this kind . . . may be avoided if Congress chooses to avoid it. It is within Congress' power. Thus far, however, Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured or the one first in line under the statutory order of precedence. That is Congress' choice. It remains effective until legislation providing otherwise is enacted.

(*Id.* at p. 63.)

This logic also applies here, where federal statues exclude CRSC from the ambit of state community property, but the trial court nevertheless imposed a constructive trust over CRSC. Accordingly, the trial court's ruling should be reversed. (*See also Silva v. Silva* (S.C.Ct.App. 1998) 509 S.E.2d 483 [applying similar logic to military survivor benefit annuities]; *King v. King* (Ga.Ct.App. 1997) 483 S.E.2d 379 [same].)

B. Even If The Trial Court Did Not Contravene Federal Law, Its Ruling Was Erroneous

Even assuming *arguendo* that the trial court was authorized under federal law to award equitable relief to Judy, such relief was not appropriate in this case.

1. The Constructive Trust Imposed Against Philip Was Improper Because Philip Committed No Wrongful Act

First, the constructive trust imposed against Philip (CT 185) was improper. As the trial court itself noted, "A constructive trust is a remedy to redress unjust enrichment caused by fraud, accident, mistake, undue influence, violation of trust, or other *wrongful* act." (CT 185 [emphasis

added].) Here, the trial court failed to identify a single wrongful act committed by Philip. (*See generally* CT 185-86.) All Philip did was elect disability benefits to which he was rightfully entitled. This was not a wrongful act. Even *Krempin*, a key case relied upon by the trial court, refused to impose a constructive trust against husband on this basis. The court in *Krempin* aptly observed:

> There is no evidence and no finding of any . . . wrongful conduct in the record. [Husband] was entitled to apply for disability benefits and could not justly be accused of any bad faith in doing so. In this respect we agree with cases . . . which ascribe no fault to the military spouse's pursuit of disability benefits . . . . In our view, [wife's] claim does not hinge on any fault of [husband].

(*Krempin*, *supra*, 70 Cal.App.4th at p. 1018.) This observation applies equally here.

Indeed, the facts of this case only confirm that Philip's election to receive disability compensation and CRSC was anything but wrongful. The VA declared Philip 100% disabled as of July 1, 2005. (CT 61.) Judy, for her part, knew of Philip's disability. (RT 34-35.) For years after that, Philip continued to pay Judy $475.00 per month—and sometimes even more. (*See* CT 38, 40, 53.) If Philip had intended to defraud Judy or wrongfully deprive her of funds, he would have stopped paying her promptly as of July 1, 2005. Instead, he continued paying Judy well into 2014. (*See* CT 40.) Philip's conduct can hardly be characterized as "wrongful."

If anything, the trial court seemed more concerned about Judy's finances than any wrongful conduct by Philip. The trial court, after all, made clear that its priority was to ensure Judy "receive[d] her full community property share of [Philip's] retirement pay." (CT 185.) This,

however, was not a proper basis for imposing a constructive trust against Philip.

2. Equitable Relief Is Improper Because Judy Has No Legal Right To Enforce

It goes without saying that, in order for a court to award equitable relief, there must be some right that is being enforced. That, after all, is the very definition of a remedy. (*See* Black's Law Dict. (7th ed. 1999) p. 1296, col. 2 [defining "remedy" as a "means of enforcing a right or preventing or redressing a wrong; legal or equitable relief"].) In this case, Judy simply has no right to enforce.

The parties agreed to divide Philip's retired pay as community property. (CT 6.) The stipulated judgment clearly states that Judy shall take, as her separate property, her "community portion of [Philip's] *military retirement pay* in the amount of $475.00 per month." (CT 6 [emphasis added].) For his part, Philip took, as his separate property, his community portion of retired pay, plus his separate portion of retired pay. (CT 6.) (Philip served in the military for several years before he married Judy.) (*See* CT 3 [the parties were married on August 31, 1974]; *see also* CT 80 [Philip's service in the Navy began on July 14, 1971].) Philip also was awarded his own "disability account" and "any and all work related benefits," which would have included his right to waive retired pay in favor of disability compensation. (CT 5.) Moreover, at the time the parties entered into their agreement, Judy knew that the VA had declared Philip at least partially disabled. (RT 34-35.) In light of these facts, Judy cannot now claim a right to Philip's CRSC by virtue of his rightful election to receive it.

Judy makes much of the "$475.00 per month" provision in the parties' stipulated judgment. Because it is a "specific dollar amount" (CT 158), Judy argues that she is entitled to that amount regardless of Philip's

election to receive disability compensation and CRSC (CT 158-59). Judy relies upon *Krempin* to support her position. (*See* CT 157-59.) Judy's argument is unavailing for at least two reasons.

First, Judy's interpretation of the judgment wreaks considerable damage to its text. It is a fundamental canon of interpretation that courts should not render terms surplusage. (*See ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1785 ["In California, . . . contracts . . . are construed to avoid rendering terms surplusage"]; *see also* Civ. Code § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"].)

Here, the parties' judgment plainly states that Judy shall receive "[her] community portion of . . . *military retirement pay* in the amount of $475.00 per month." (CT 6 [emphasis added].) This provision appears in a section titled "Division of Community Property." (CT at 5.) Lest there be any doubt, the "community property" being "divided" is Philip's "military retirement pay." In other words, the $475.00 per month claimed by Judy was intended to be $475.00 per month in military retired pay. Judy, however, reads this provision as a guaranteed promise by Philip to pay her $475.00 per month regardless of its source. To Judy, the judgment awards her "~~[her] community portion of . . . military retirement pay in~~ the amount of $475.00 per month." (CT 6.) This cannot be since it renders a critical portion of the judgment's text surplusage.

Second, the parties' judgment lacks a reservation of jurisdiction clause. As such, it is a final judgment between them. (*See City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210, 228-29 [noting that *res judicata*, which preserves the integrity of the judicial system, promotes judicial economy, and protects litigants from harassment by vexatious litigation, precludes parties from relitigating the

same issues in a subsequent suit]; *see also* Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2015) ¶ 15:224, p. 15-53 ["Like a judgment after contested trial, the stipulated judgment is res judicata on all issues raised by the pleadings or which could have been raised, except as to those matters over which the court reserved jurisdiction"].) Indeed, the parties themselves agreed that the judgment is "binding" (CT 16) and that it "resolve[d] all property . . . rights of each party against . . . the other in all aspects" (CT 15).

In this case, the parties' judgment clearly divides Philip's retired pay but awards Philip his own disability compensation and other work-related benefits (including his right to waive retired pay in favor of disability compensation). (*See* CT 4-6.) Perhaps most critically, in 2003, when the parties entered into their agreement (*see* CT 18), the law was in much the same state as it is today. *McCarty* had been decided; USFSPA had been passed; *Mansell* had been decided; and the Bob Stump NDAA had been passed. If Judy and her attorneys wanted to reserve jurisdiction on the issue of retired pay (in the event of Philip's election to receive disability compensation or CRSC), they were perfectly free to do so. They did not, and Philip should not be held to be an insurer against Judy's attorneys' oversight. The parties' judgment is final and there is nothing to enforce.

C. The Trial Court's Error Was Prejudicial

Whether the trial court contravened federal or state law, its error in this case was prejudicial. (*See* Code Civ. Proc. § 475 ["No . . . decision . . . shall be reversed or affected by reason of any error, . . . unless . . . such error . . . was prejudicial"].) Prejudice occurred because a constructive trust was imposed over Philip's CRSC to compensate Judy for sums he was not required to pay (*i.e.*, waived retired pay).

VII.
CONCLUSION

Under both law and equity, the trial court's order is erroneous. Federal law dictates that CRSC is not divisible. When Judy contracted to divide Philip's *retired* pay, she knew of Philip's disability and even confirmed his disability compensation and other work-related benefits to him as his separate property. If Judy was concerned about Philip's right to elect disability compensation or CRSC, she could have contracted around that contingency or reserved jurisdiction on the issue. She did neither. Philip should not now be punished for making a benefit election he was entitled to make. This Court should reverse the trial court's order and remand with instructions to deny Judy's request for military retirement and military retirement arrearages.

Dated: February 10, 2016

Respectfully submitted,
WALZER MELCHER LLP

/s/
*Steven K. Yoda, Esq.
Christopher C. Melcher, Esq.
Attorneys for Appellant,
PHILIP KURTIS CHAPMAN

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Appellant's Opening Brief contains 6,322 words according to the program used to create this document.

Dated: February 10, 2016

WALZER MELCHER LLP

/s/

*Steven K. Yoda, Esq.
Christopher C. Melcher, Esq.
Attorneys for Appellant,
PHILIP KURTIS CHAPMAN

State of California)
County of Los Angeles)
)

Proof of Service by:
☐ US Postal Service
☑ Federal Express

I, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5941 Variel Avenue, Woodland Hills, California 91367.

On February 10, 2016, I served the foregoing document described as **APPELLANT'S OPENING BRIEF** upon the following by placing a true copy thereof in sealed envelopes addressed as follows:

1 Copies ☑ FedEx ☐ USPS

Christie Mitchell, Esq.
Law Office of Christie Mitchell
8863 Greenback Lane, Suite 255
Orangevale, CA 95662
Attorneys for Respondent,
Judy Kay Chapman

1 Copies ☑ FedEx ☐ USPS

Clerk for Honorable Steven M. Gevercer, Dept. 121
Superior Court of California
County of Sacramento
William R. Ridgeway Family Relations Courthouse
3341 Power Inn Road
Sacramento, CA 95826

Copies ☐ FedEx ☐ USPS

Electronically Filed:

CALIFORNIA COURT OF APPEAL
Third Appellate District

Copies ☐ FedEx ☐ USPS

Electronically Served:

SUPREME COURT OF CALIFORNIA

I caused such envelope(s) to be delivered by overnight mail to the offices of the addressee(s).

Executed on **February 10, 2016** at Woodland Hills, California.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

/s/
Annais Alba