ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

DIANE MERRILL v. ROBERT KENNETH MERRILL
CV-15-0028-PR

PARTIES:

Petitioner/Appellee: Diane Merrill ("Wife")

Respondent/Appellant: Robert Kenneth Merrill ("Husband")

FACTUAL AND PROCEDURAL HISTORY:

The parties married in 1963. Husband is a West Point graduate who was injured during a mortar attack in Vietnam. He retired in 1983, after 20 years of service, and went to work as a test pilot for a defense contractor. When the couple divorced in 1993, Husband had a disability rating of 18.62 percent from the Veterans Administration.

The dissolution decree acknowledged Husband's ongoing receipt of monthly military disability payments but did not treat those payments as community property subject to division. The decree, however, equally divided Husband's military retirement benefits and provided for a qualified domestic relations order ("QDRO") awarding 50 percent of his "military retirement pay" to Wife as her sole and separate property.

At the time of the 1993 dissolution, Husband was 52 years old and Wife, 50. 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 ("CRSC") benefits. This program, which was created by Congress in 2002, allows veterans injured in combat to choose to receive tax-free benefits in exchange for a dollar-for-dollar reduction in their retirement pay. *See* 10 U.S.C. § 1413a (2006 & Supp. 2008); *see also* 26 U.S.C. § 104(a)(4), (b)(2)(C) (2002). The result of Husband's decision to elect to receive CRSC was that Wife's share of his retirement pay was all but eliminated.

In 2010, Wife filed a petition seeking $63,796 plus interest in arrearages and a "modified retirement award," arguing Husband had improperly reduced her sole-and-separate share of his military retirement benefits by waiving those benefits in favor of CRSC. At trial, the superior court heard evidence that Husband was entitled to receive gross military retirement pay of $3,262 a month, but that he had waived all but about $400 of that to receive monthly tax-free CRSC benefits of $2,823. Accounting for various disbursements, the result of Husband's waiver was that Wife's share of his monthly retirement was reduced to $133 from $1,116.

In a signed, the superior court denied Wife's petition on the basis that it was barred by A.R.S. § 25-318.01. Wife timely appealed.

In a published opinion, the court of appeals reversed, stating as follows:

> In this case we revisit the post-decree right of a former spouse to a share of the other spouse's military retirement benefits when the retiree has waived retirement pay in favor of a tax benefit afforded to him as a disabled veteran. 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.

Merrill v. Merrill, 230 Ariz. 369, 371 ¶ 1, 284 P.3d 880, 882 (2012) (*Merrill I*). *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. In doing so, *Merrill I* concluded that A.R.S. § 25-318.01 (2010)—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 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 Wife's 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." *Id.* at 377 ¶ 30, 284 P.3d at 888. The court summarily denied Husband's motion for reconsideration. In 2014, this Court denied Husband's petition for review in CV-12-0396-PR.

On remand, in August 2013, the superior court granted Wife's petition, entering judgment in her favor "for amounts due to [Wife for] her interest in [MRP] through July, 2013, in the total amount of $128,574.35" plus interest, to be paid "from any and all nonexempt income and assets" belonging to Husband. The court also ordered Husband to pay Wife's "interest in [MRP] pay for August, 2013, and each month thereafter, until the earlier of the death of either party . . . $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." Finally, the court ordered Husband to pay Wife's attorneys' fees and costs, "to be paid and or collected from non-exempt income and assets." Husband timely appealed from this 2013 judgment, arguing the superior court failed to follow the *Merrill I* mandate.

While Husband's appeal was pending, the Legislature amended A.R.S. § 25-318.01 (2014) (retroactive to July 28, 2010, the date of the original effective date of A.R.S. § 25-318.01) 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 these amendments, 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. The court of appeals heard oral argument on both the appeal and the motion.

In a 2014 memorandum decision, the court of appeals recognized that the 1993 dissolution decree remains in full force and effect, vacated the 2013 judgment, and deemed Wife's petition denied. The court also granted Husband's motion in part and denied his motion in part.

The court began by finding that A.R.S. § 25-318.01 (2014) applies to Wife's 2010 petition, rejecting her argument that the statute does not apply because (1) the petition does not seek to modify the decree, (2) the 2014 amendments cannot retroactively impair her vested rights in the decree, and (3) the 2014 amendments are contrary to federal law and, therefore, violate the Supremacy Clause.

First, the court held that, contrary to Wife's contention, her petition *does* seek to modify the decree because it sought a "modified retirement award," thereby implicating A.R.S. § 25-327 and making A.R.S. § 25-318.01 (2014) applicable. Second, the court held that the latter statute, as amended in 2014, does not retroactively impair Wife's vested property rights because her rights under the decree have not been changed and remain in full force and effect. However, the court acknowledged that:

> . . . 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 [citations omitted]. . . .

Mem. Dec. ¶ 12. The court further noted that "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)." (Citations omitted.) *Id*. n. 3. Nor has she "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." *Id*. Moreover, according to the court, "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 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." *Id*. Third, the court held that A.R.S. § 25-318.01 (2014) does not violate the Supremacy Clause by conflicting with 10 U.S.C. § 1408(e)(6),[1] as alleged by Wife, because CRSC benefits "are not retired pay" under federal law. 10 U.S.C. § 1413a(g).

Finally, the court of appeals turned to the issue of how to apply A.R.S. § 25-318.01 (2014) to the 2013 superior court judgment and *Merrill I.* The court first vacated the judgment, finding that the judgment was contrary to the statute because the judgment was based upon a consideration of Husband's CSRS benefits. With respect to the effect of the amended statute on *Merrill I*, the court concluded A.R.S. § 25-318.01 (2014) superseded the holding in *Merrill I* that "the military

[1] "*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).

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," and "that he must indemnify Wife for the consequences of doing so." The court found Husband had not shown that the statute superseded the remaining portions of *Merrill I*.

The court emphasized that 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 the court. Thus, the court did 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 the appeal and the decision, the court denied Husband's request that it overrule *Merrill I*.

Wife filed a petition in this Court seeking review of the court of appeals' decision.

ISSUES FOR WHICH REVIEW WAS GRANTED:

1. Whether the Court of Appeals erred in concluding that A.R.S. § 25-318.01 (2014) applies because Wife sought to modify the decree; and

2. If so, does the statute retroactively impair Wife's vested rights.