

NOTICE: NOT FOR PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE  
LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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DIANE MERRILL, *Petitioner/Appellee*,

*v.*

ROBERT KENNETH MERRILL, *Respondent/Appellant*.

No. 1 CA-CV 13-0649  
FILED 12-18-14  
AMENDED PER ORDER FILED 1-7-15

Appeal from the Superior Court in Maricopa County  
No. DR1991-092542  
The Honorable Paul J. McMurdie, Judge

**VACATED**

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COUNSEL

Popp Law Firm, P.L.C., Tempe  
By James S. Osborn Popp  
*Counsel for Petitioner/Appellee*

Berkshire Law Office, PLLC, Phoenix  
By Keith Berkshire, Maxwell Mahoney  
*Counsel for Respondent/Appellant*

**MEMORANDUM DECISION**

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Andrew W. Gould joined.

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**T H U M M A**, Judge:

¶1 Robert Kenneth Merrill (Husband) appeals from an August 2013 judgment in favor of Diane Merrill (Wife). Husband claims the superior court failed to comply with this court’s mandate in *Merrill v. Merrill*, 230 Ariz. 369, 284 P.3d 880 (2012) (*Merrill I*). Relying on amendments to Arizona Revised Statutes (A.R.S.) section 25-318.01 (2014),<sup>1</sup> expressly made retroactive to July 28, 2010, Husband also moves to dismiss the action, vacate the 2013 Judgment and overrule *Merrill I*. For the reasons that follow, recognizing the 1993 Decree remains in full force and effect, the 2013 Judgment is vacated, the Petition is deemed denied and Husband’s motion is granted in part and denied in part as indicated below.

**FACTS AND PROCEDURAL HISTORY**

¶2 Husband and Wife married in 1963 and divorced by a decree entered in 1993 (Decree). *Merrill I*, 230 Ariz. at 371 ¶ 2-3, 284 P.3d at 882.<sup>2</sup> “Husband is a West Point graduate who was injured during a mortar attack in Vietnam.” *Id.* at 371 ¶ 2, 284 P.3d at 882. Because Husband received both military disability and military retirement benefits, the Decree

acknowledged Husband’s ongoing receipt of monthly military disability payments but did not treat those payments as community property subject to division. The [D]ecree,

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<sup>1</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

<sup>2</sup> The court adopts where indicated the facts as stated in *Merrill I*, noting the parties take issue with certain factual recitations in that decision.

MERRILL v. MERRILL  
Decision of the Court

however, equally divided Husband's military retirement benefits by providing for a qualified domestic relations order awarding 50 percent of his "military retirement pay" [MRP] to Wife as her sole and separate property.

*Id.* at 371 ¶ 3, 284 P.3d at 882. Under the Decree, Wife is entitled to approximately \$1,116 in MRP monthly payments. *Id.* at 371 ¶ 5, 284 P.3d at 882.

¶3 "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 benefits. This program, referred to as CRSC, allows veterans injured in combat to choose to receive tax-free benefits in exchange for a dollar-for-dollar reduction in their retirement pay." *Id.* at 371 ¶ 4, 284 P.3d at 882. "Federal law precludes division of [CRSC] benefits as community property." *Id.* at 372 ¶ 8, 284 P.3d at 883 (citing 10 United States Code (U.S.C.) section 1408(a)(4)(C) and *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989)). As a result, going forward from 2004, "Wife's share of [Husband's] retirement pay was all but eliminated," and her MRP interest was reduced to \$133 per month. *Merrill I*, 230 Ariz. at 371 ¶¶ 4-5, 284 P.3d at 882.

¶4 In 2010, Wife filed a Petition for Post-Decree Relief, Order to Appear, Request for Arrearage Judgment and Modified Retirement Award (Petition). Among other things, the Petition sought (1) an arrearages judgment for the difference between the monthly MRP required by the Decree and the reduced amount Husband had been paying since 2004 (alleged to be \$63,796 plus interest) and (2) a modified retirement award for MRP going forward. *Merrill I*, 230 Ariz. at 371 ¶5, 284 P.3d at 882. After the superior court denied the Petition in its entirety, Wife's appeal was resolved in *Merrill I*.

¶5 *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 (quoting *Harris v. Harris*, 195 Ariz. 559, 564 ¶ 23, 991 P.2d 262, 267 (App. 1999)). In doing so, *Merrill I* concluded that A.R.S. § 25-318.01 (2012) – 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

MERRILL v. MERRILL  
Decision of the Court

limited to benefits received under Title 38 of the United States Code and (2) Husband's CRSC benefits were received under Title 10 (not Title 38) 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 the 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." *Merrill I*, 230 Ariz. at 377 ¶ 30, 284 P.3d at 888.

¶6 On remand, in August 2013, the superior court granted the Petition by:

1. Entering judgment in favor of [Wife] . . . and against [Husband] . . . for amounts due to [Wife for] her interest in [MRP] through July, 2013, in the total amount of \$128,574.35. [Husband] shall pay said judgment from any and all nonexempt income and assets. Interest on the judgment shall accrue from the date of judgment at the rate of 4.25%.
2. For [Wife's] interest in [MRP] pay for August, 2013, and each month thereafter, until the earlier of the death of either party, [Husband] shall pay [Wife] \$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.
3. Interest shall accrue on all of the above unpaid principal sums at 4.25% from the date each payment became due.
4. Entering judgment in favor of [Wife] . . . and against [Husband] . . . for attorneys' fees in the amount of \$10,000.00 and costs in the amount of \$1,098.85, to be paid and or collected from non-exempt income and assets.

MERRILL v. MERRILL  
Decision of the Court

5. Interest shall accrue on all unpaid attorney's fees and costs awarded in paragraph 4, above, at the rate of [] 4.25% from the date of this judgment.

Husband timely appealed from this 2013 Judgment, arguing the superior court failed to follow the *Merrill I* mandate. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-2101(A)(1) and -120.21(A)(1).

¶7 While Husband's appeal was pending, the Legislature amended A.R.S. § 25-318.01 (2014) (retroactive to July 28, 2010) 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 this amendment, 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 and Husband filed a reply in further support. This court then heard oral argument on both the appeal and the motion.

## DISCUSSION

### I. A.R.S. § 25-318.01 (2014).

¶8 Effective July 25, 2014, the Legislature amended A.R.S. § 25-318.01, retroactive to July 28, 2010. The statute now reads as follows (with the relevant language added in 2014 in bold):

In making a disposition of property pursuant to [A.R.S.] § 25-318 or 25-327, a court shall not do any of the following:

1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to **10 United States Code section 1413a** [CRSC] **or** 38 United States Code chapter 11.
2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or

MERRILL v. MERRILL  
Decision of the Court

retainer pay related to receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

A.R.S. § 25-318.01 (2014) (emphasis added); *see also* H.B. 2514 (retroactive date). This same legislation made a similar amendment to A.R.S. § 25-350 (2014), which applies “[i]n determining whether to award spousal maintenance or the amount of any award of spousal maintenance.” H.B. 2514. Husband declares “[t]here is no question that the[se] . . . changes to A.R.S. §§ 25-318.01 and 25-530 were specifically meant to legislatively supersede this Court’s prior decision in *Merrill I.*” Husband and his attorney testified in favor of the amendments at a legislative hearing before their passage. *See* H. Comm. on Judiciary, February 20, 2014 Meeting Minutes, 2014 Leg., 2d Reg. Sess. *available at* [http://www.azleg.gov/legtext/51leg/2R/comm\\_min/House/022014%20JUD.PDF](http://www.azleg.gov/legtext/51leg/2R/comm_min/House/022014%20JUD.PDF). The first issue is whether A.R.S. § 25-318.01 (2014), which includes this amendment, applies to the Petition and the 2013 Judgment.

**II. A.R.S. § 25-318.01 (2014) Applies.**

¶9 Wife argues the 2014 amendments resulting in A.R.S. § 25-318.01 (2014), including the directive that the statute is retroactive to July 28, 2010, do not apply for three reasons: (1) the Petition does not seek to modify the Decree; (2) the 2014 amendments cannot retroactively impair her vested rights in the 1993 Decree and (3) the 2014 amendments are contrary to federal law and, therefore, violate the Supremacy Clause. The court addresses these arguments in turn.

**A. The Petition Sought To Modify The Decree.**

¶10 Wife argues A.R.S. § 25-318.01 (2014) “expressly limits its application to property disposition at dissolution [A.R.S. § 25-318] or on modification of a [decree’s] final property division [A.R.S. § 25-327],” and “[n]either form of action is before this Court.” Although the Petition does not appear to implicate A.R.S. § 25-318, it does, however, seek to modify the Decree, thereby implicating A.R.S. § 25-327. As noted in *Merrill I*, the Petition seeks a “modified retirement award,” thereby asking the court to modify the Decree. 230 Ariz. at 371 ¶ 5, 284 P.3d at 882. In addition, the

MERRILL v. MERRILL  
Decision of the Court

primary procedural rule cited in the Petition is Arizona Rule of Family Law Procedure 85, which addresses relief from a judgment or order (here, the Decree). Moreover, consistent with the request in the Petition, the 2013 Judgment modified the Decree, at least prospectively. *See Martin v. Martin*, 182 Ariz. 11, 16, 893 P.2d 11, 16 (App. 1994) (noting an arrearage judgment does not modify a decree). Accordingly, contrary to Wife’s argument, the Petition does seek to modify the Decree, thereby implicating A.R.S. § 25-327 and making A.R.S. § 25-318.01 (2014) applicable.

**B. A.R.S. § 25-318.01 (2014) Does Not Retroactively Impair Wife’s Vested Property Rights.**

¶11 Relying primarily on *S&R Props. v. Maricopa Cnty.*, 178 Ariz. 491, 875 P.2d 150 (App. 1993), Wife argues A.R.S. § 25-318.01 (2014) cannot apply retroactively to impair her vested property rights. In doing so, Wife argues her “vested property rights” are her legal rights under the 1993 Decree, an argument *S&R Properties* supports. 178 Ariz. at 498, 875 P.2d at 157 (citing cases defining “vested right”). Wife’s legal rights under the 1993 Decree, however, have not changed. Similarly, Husband’s legal obligations under the 1993 Decree remain in full force and effect. Because Wife’s legal rights in the 1993 Decree have not changed or been impaired by the application of A.R.S. § 25-318.01 (2014), retroactive application of that statute is not prohibited.

¶12 The fact that there has been no change in 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 (citing *Danielson v. Evans*, 201 Ariz. 401, 36 P.3d 749 (App. 2001); *Harris v. Harris*, 195 Ariz. 559, 991 P.2d 262 (App. 1999); *In re Marriage of Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (App. 1997)). In short, however, the legal rights and obligations of the 1993 Decree remain in full force and effect and A.R.S. § 25-318.01 (2014) does

MERRILL v. MERRILL  
Decision of the Court

not impair Wife's vested legal rights in what was awarded in the Decree or what the Decree requires.<sup>3</sup>

**C. A.R.S. § 25-318.01 (2014) Does Not Violate The Supremacy Clause.**

¶13 Wife argues that A.R.S. § 25-318.01 (2014) is contrary to federal law, thereby violating the Supremacy Clause. *See* U.S. Const. art. VI cl. 2. "Federal law preempts state law under the Supremacy Clause when," as applicable here, "state law actually conflicts with federal law." *Hernandez-Gomez v. Volkswagen of America, Inc.*, 201 Ariz. 141, 142 ¶ 3, 32 P.3d 424, 425 (App. 2001). Wife argues A.R.S. § 25-318.01 (2014) conflicts with a federal statute providing that, when setting garnishment limits on military retirement income,

*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*

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<sup>3</sup> 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). *See, e.g., San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205 ¶ 15, 972 P.2d 179, 189 (1999) ("legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events"); *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139-40, 717 P.2d 434, 443-44 (1986) ("The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right."). In addition, 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. Finally, Wife has not 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.

MERRILL v. MERRILL  
Decision of the Court

been made in the maximum amount permitted

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10 U.S.C. § 1408(e)(6) (emphasis added). By statute, however, CRSC benefits “are not retired pay.” 10 U.S.C. § 1413a(g). Accordingly, A.R.S. § 25-318.01 (2014) does not conflict with 10 U.S.C. § 1408(e)(6) and, therefore, does not violate the Supremacy Clause.<sup>4</sup>

**III. Application Of A.R.S. § 25-318.01 (2014) To The 2013 Judgment And *Merrill I*.**

¶14 Having found A.R.S. § 25-318.01 (2014) properly applies on this record, the remaining task is to apply that statute to the 2013 Judgment and *Merrill I*, issues this court addresses in turn.

¶15 As quoted above in paragraph 6, the 2013 Judgment indemnified Wife for the 2004 election resulting in Husband receiving CRSC benefits, awarded Wife other property to account for that election, did so based upon a consideration of Husband’s CRSC benefits and awarded interest to be paid on such sums. As a result, the 2013 Judgment is contrary to A.R.S. § 25-318.01 (2014), cannot stand and is vacated and the Petition is deemed denied. This conclusion moots Husband’s argument that the superior court failed to properly comply with the mandate in *Merrill I*.

¶16 Turning to the impact on *Merrill I*, Husband is correct that A.R.S. § 25-318.01 (2014) supersedes portions of *Merrill I*. More specifically, A.R.S. § 25-318.01 (2014) supersedes those portions of *Merrill I* holding that the prior version of the statute does not apply and that Husband must indemnify Wife for the consequences of his CRSC election and related discussion. Stated differently, A.R.S. § 25-318.01 (2014) supersedes by statute the following specified portions of *Merrill I*: *Merrill I*, 230 Ariz. at 373, 375–77 ¶¶ 1 (second sentence, reading “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.”), heading B preceding 12, 19 (last portion of last sentence, reading “; we only hold that he must indemnify Wife for the

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<sup>4</sup> Having rejected Wife’s constitutional challenge to A.R.S. § 25-318.01 (2014) on this record, the court need not address Husband’s claim that Wife failed to comply with A.R.S. § 12-1841.

MERRILL v. MERRILL  
Decision of the Court

consequences of doing so”), 21–30 (including heading C preceding 21), 284 P.3d at 884, 886–88. Husband has not shown that A.R.S. § 25-318.01 (2014) supersedes the remaining portions of *Merrill I.*

¶17 Vacating the 2013 Judgment and deeming the Petition denied is not based on any error by the superior court on remand from *Merrill I.* Instead, this court’s actions are based on the statutory amendment resulting in A.R.S. § 25-318.01 (2014), which bars the relief sought in the Petition and supersedes by statute specified portions of *Merrill I.* Along with this unique procedural history, 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 this court. This court has no occasion to consider, and does 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 this appeal and this decision, this court denies Husband’s request that this court “publish an Opinion overruling *Merrill I.*”

**IV. Attorneys’ Fees And Costs.**

¶18 Wife has requested attorneys’ fees and costs on appeal pursuant to A.R.S. § 25-324. An appellate court “may order a party to pay a reasonable amount to the other party for costs and expenses[, including attorneys’ fees,] of maintaining or defending any proceeding . . . based on consideration of financial resources.” A.R.S. § 25-324(A), (C); *Countryman v. Countryman*, 135 Ariz. 110, 111, 659 P.2d 663, 664 (App. 1983) (the statute “does not require party requesting attorney’s fees to have prevailed on appeal[;]” rather it “is designed to ensure that poorer party has the proper means to litigate the action”). *Merrill I* noted that Wife’s financial resources evidenced by her salary were “far less than” Husband’s, 230 Ariz. at 377 ¶ 31, 284 P.3d at 888, the record does not suggest this has changed and Husband does not argue it has changed. Accordingly, Wife is awarded her reasonable attorneys’ fees and taxable costs on appeal, contingent upon compliance with Arizona Rule of Civil Appellate Procedure 21.

MERRILL v. MERRILL  
Decision of the Court

CONCLUSION

¶19 Recognizing the 1993 Decree remains in full force and effect, the 2013 Judgment is vacated and the Petition is deemed denied. In addition, A.R.S. § 25-318.01 (2014) supersedes by statute the following specified portions of *Merrill I*: *Merrill I*, 230 Ariz. at 373, 375-77 ¶¶ 1 (second sentence, reading “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.”), heading B preceding 12, 19 (last portion of last sentence, reading “; we only hold that he must indemnify Wife for the consequences of doing so”), 21-30 (including heading C preceding 21), 284 P.3d at 884, 886-88. Husband’s motion is granted to the extent that it seeks the relief set forth above and denied to the extent it seeks other relief.



Ruth A. Willingham · Clerk of the Court  
FILED : jt