

State of Minnesota
In Supreme Court

In Re the Marriage of:

LORETTA MARIE ANGELL,

Respondent,

and

GORDON WILLIAM ANGELL, Jr.,

Appellant.

BRIEF AND APPENDIX OF AMICUS CURIAE
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STATEMENT OF LEGAL ISSUE

DO FEDERAL ANTI-ATTACHMENT STATUTES BAR A STATE DISTRICT COURT FROM EXERCISING ITS EQUITABLE POWERS IN A MARITAL DISSOLUTION PROCEEDING TO PREVENT UNFAIR HARDSHIP BY AWARDING AN INDIGENT PARTY A PORTION OF NON-MARITAL MILITARY LIFE INSURANCE AND FEDERAL DEATH GRATUITY BENEFITS RECEIVED BY THE SOLE-NAMED BENEFICIARY OF THOSE BENEFITS?

The Minnesota Court of Appeals answered in the affirmative

INTRODUCTION

This *amicus* brief is filed by the Family Law Section of the Minnesota State Bar Association, an organization of more than eight hundred (800) attorneys practicing in the area of family law throughout the State of Minnesota. Our members represent clients who are seeking equitable divisions of marital property and, occasionally, a distribution of their spouses' non-marital property based on a claim of unfair hardship.

The Family Law Section of the Minnesota State Bar Association reluctantly concurs with the decision of the Minnesota Court of Appeals in Angell v. Angell, 777 N.W.2d 32, 40 (Minn. App. 2009), which holds that the trial court's award to Appellant of a portion of Respondent's Servicemembers' Group Life Insurance and federal death-gratuity benefits, based on a determination of unfair hardship, is barred by the anti-attachment provisions of 38 U.S.C. §§ 1970(g) and 5301(a)(1). *Amicus* believes that the express language of these statutes and United States Supreme Court and other precedent permit no other result.

STATEMENT OF THE CASE AND FACTS

The parties were married on February 14, 1981. Appellant was 65 years old and Respondent was 53 years old at the time of their divorce on September 11, 2008. The parties had one remaining minor child, Adam, born on March 18, 1991, at the time of the dissolution of marriage. The parties separated in July of 2006. (App. App. 2) At the time of the filing of Respondent's petition for dissolution, Respondent was earning gross employment income of approximately \$1,100 per month from her job as a substitute rural postal carrier. Appellant was unemployed and disabled and receiving monthly general

assistance payments of \$203 and monthly Supplemental Security Income benefits of \$424 due to disability. At the time of the divorce, Respondent was on disability leave benefits. The parties agreed that no spousal maintenance should be awarded to either party. (App. App. 3)

On April 8, 2004, the parties' adult son, Levi Tuddy Angell, was killed while serving as a member of the armed forces of the United States. Following Levi's death, Respondent received in April 2004 federal death gratuity benefits totaling \$100,000 pursuant to 10 U.S.C. § 1478, which provides payment to certain designated survivors of service members who are killed in action. Respondent was named as sole beneficiary of the \$100,000 benefit. In May 2004, Respondent received a payment of \$250,352.66 as sole beneficiary of Levi's insurance under the Servicemembers' Group Life Insurance program. In August 2005, Respondent received an additional \$150,000 from the United States government under a program which provides an additional payment to previously paid beneficiaries. By the time of the divorce, Respondent had spent approximately \$133,000 of the insurance and death benefit proceeds, with the remainder of the monies held in an account managed for Respondent by an adult daughter of the parties. (App. App. 4-5)

The parties' September 11, 2008 divorce decree reflects that the parties agreed to a mutual waiver of spousal maintenance and the sale of the marital homestead, with an equal division of the anticipated modest sale proceeds. The issue of child support and medical support for the remaining minor child was referred to the expedited process. Respondent was awarded three motor vehicles and some non-marital land in Mille Lacs

County. Appellant was awarded a 1992 Dodge Caravan. The district court found that the \$400,352.66 of the death benefits received by Respondent in May of 2004 and August of 2005 were her non-marital property as the result of her being named as exclusive beneficiary of Levi's Servicemembers' Group Life Insurance policy. The district court awarded Appellant \$100,000 of those benefits, concluding that unfair hardship was present as the result of Appellant's inadequate resources. However, the district court found that the \$100,000 in death gratuity benefits received by Respondent in April of 2004 was marital property because they "were paid under a program that provides payments to the survivors of service members who were killed in action, the parents in this case." The district court provided that the \$100,000 in gratuity benefits would be equally divided between the parties, with each receiving \$50,000. Thus, Appellant was to receive death benefits totaling \$150,000. (Judgment and Decree of September 11, 2008, App. App. 1 – 8)

Respondent thereupon brought a motion for amended findings, challenging: (1) the \$100,000 award to Appellant from her \$400,352.66 in non-marital death benefit proceeds; (2) the trial court's characterization of the additional \$100,000 in death gratuity benefits as marital; and (3) the award of \$50,000 of the additional death benefits to Appellant. Respondent also argued that the district court lacked authority to direct the distribution of federal death benefits to Appellant based on federal anti-attachment provisions. (App. App. 9-11)

On January 21, 2009, the district court issued an Order Amending Findings of Fact in which it characterized the entire \$500,352.66 in death benefits received by Respondent

as her non-marital property, concurring with Respondent's argument that she had been designated as sole beneficiary by Levi of the \$100,000 in death gratuity benefits received by her in April of 2004. However, the amount of the total death benefits awarded by the district court to Appellant remained at \$150,000, because the court increased the amount of non-marital death benefits awarded to Appellant from \$100,000 to \$150,000. The district court did not address Respondent's argument regarding the anti-attachment provisions of federal law. (App. App. 19-21)

On appeal, Respondent argued that federal law prevented the award to Appellant of any of the military death benefits received by her. Appellant, on the other hand, contested the trial court's determination that the death benefits received by Respondent were her non-marital property, and further argued that the trial court had the authority to apportion the benefits, even if they were deemed non-marital, to prevent an unfair hardship.

On December 29, 2009, the Minnesota Court of Appeals filed its decision. The Court of Appeals concurred with the district court's determination that all of the death benefits received by Respondent were her non-marital property. It also opined that the district court was correct in finding the presence of unfair hardship and in determining that the award of \$150,000 in death benefits to Appellant would further Minnesota's statutory goal of ameliorating the unfair hardship. The Court of Appeals, however, reversed the district court's award of the \$150,000 to Appellant, concluding that federal law prohibited such a result. (Am. App. 1-10)

By Order of March 30, 2010, the Supreme Court granted Mr. Angell's petition for review and invited the participation of the Family Law Section of the Minnesota State Bar Association as *amicus curiae* in this case. In response to the Family Law Section's timely filed Notice of Intent to Appear as *Amicus Curiae*, the Supreme Court granted the Section Amicus status by order of April 20, 2010.

ARGUMENT

FEDERAL ANTI-ATTACHMENT STATUTES BAR A STATE DISTRICT COURT FROM EXERCISING ITS EQUITABLE POWERS IN A MARITAL DISSOLUTION PROCEEDING TO PREVENT UNFAIR HARDSHIP BY AWARDING A PARTY A PORTION OF NON-MARITAL MILITARY LIFE INSURANCE AND FEDERAL DEATH GRATUITY BENEFITS RECEIVED BY THE SOLE-NAMED BENEFICIARY OF THOSE BENEFITS.

Minn. Stat. § 518.58, Subd. 2 provides that a district court in a marital dissolution proceeding may apportion up to one-half of a party's non-marital property to prevent an "unfair hardship" if the opposing party's "resources or property...are so inadequate as to work an unfair hardship." In Rutten v. Rutten, 347 N.W.2d 47, 50-51 (Minn. 1984), this Court affirmed a trial court's award to a wife of 25% of the husband's inherited real estate based on a finding of unfair hardship where the wife had income of \$725 per month with no maintenance or retirement interests, and the husband had net income of \$1,400 per month. The Minnesota Court of Appeals has also upheld findings of unfair hardship in cases with some factual similarities to the Angell marital dissolution proceeding. See e.g., Reynolds v. Reynolds, 498 N.W.2d 266, 271-272 (Minn. App. 1993) (finding of unfair hardship in favor of wife in long-term marriage upheld where wife earned net monthly income of \$360 and husband earned net monthly income of

\$676.74, but had a better future earnings outlook); Roel v. Roel, 406 N.W.2d 619, 622 (Minn. App. 1987) (finding of unfair hardship in favor of wife in long-term marriage upheld where both parties had health problems); Frederiksen v. Frederiksen, 368 N.W.2d 769, 775 (Minn. App. 1985) (finding of unfair hardship in favor of wife in long-term marriage upheld where wife had significant emotional and physical disabilities).

In this case, the Minnesota Court of Appeals approved the trial court's finding of unfair hardship. See Angell, supra.¹ Respondent did not contest the trial court's finding of unfair hardship in her brief to the Court of Appeals. The fact situation in this case provides a paradigm example of unfair hardship: Appellant is past retirement age, is unemployed, is disabled, has no retirement plan, has waived spousal maintenance, subsists on supplemental security income, lives with his elderly mother, and will receive no marital assets of any consequence beyond a 1992 Dodge Caravan and his one-half of the modest proceeds arising from the sale of the parties' homestead. Respondent, although on disability leave, is 12 years younger, and has in excess of \$350,000 in proceeds remaining from the funds she received in 2004 and 2005 as beneficiary of the parties' deceased son's military death benefits. Unfortunately, the district court's award to Appellant of \$150,000 of these proceeds expressly violates federal anti-attachment provisions.

¹ The Court of Appeals also held that the death benefits received by Respondent were her non-marital property. Although Appellant challenged this aspect of the Court of Appeals' decision in his petition for review to this Court, he did not address the characterization of such benefits as non-marital in the brief he recently filed. *Amicus* is not addressing the Court of Appeals' holding that the military death benefits are Respondent's non-marital property because it believes that the issue of federal preemption is dispositive of Appellant's claims.

The \$250,352.66 in life insurance proceeds received by Respondent in May of 2004 is governed by 38 U.S.C. § 1970(g) which provides that “[a]ny payments due or to become due under Servicemembers’ Group Life Insurance...shall be exempt from the creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” (Emphasis added.) The remaining death benefits received by Respondent are governed by 38 U.S.C. § 5301(a)(1), which is broader in scope, and which covers payments of benefits due or to become due under any law administered by the United States Secretary of Defense. This statutory provision provides that such benefits “shall not be assignable except to the extent specifically authorized by law” and “shall be exempt from the claim of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” (Emphasis added.)

United States Supreme Court precedent supports the view that federal statutory anti-attachment provisions preempt state laws permitting apportionment or allocation of military life insurance benefits as part of a property division in a marital dissolution proceeding. In Wissner v. Wissner, 338 U.S. 655, 659-660, 70 S.Ct. 398, 400 (1950), the United States Supreme Court held that federal statutory anti-attachment provisions preempted state community property law and required that the entire amount of a deceased army officer’s military life insurance benefits be paid over to his designated beneficiary mother instead of his wife. In Ridgway v. Ridgway, 454 U.S. 46, 60, 102 S.Ct. 49, 57 (1981), the Supreme Court held that the imposition of a constructive trust on military life insurance benefits by a state court seeking to enforce a divorce decree’s

requirement that a deceased service member name his ex-wife as beneficiary for the benefit of the parties' children instead of his designated beneficiary second wife, also violated the federal anti-attachment provision. In both Wissner and Ridgway, the existence of an anti-attachment provision was an independent basis upon which the Supreme Court found preemption, with the beneficiary designation provision in sufficient conflict with state law to require preemption.

The Angell decision also relied on Lanier v. Traub, 934 F. 2d 287, 289 (11th Cir. 1991) which provides an excellent discussion of the legislative background to the Servicemen's Group Life Insurance Act (hereafter SGLI). The strict interpretation of the beneficiary designation provisions of SGLI is specifically designed to avoid the difficulty involved in reconstructing the donative intent of a deceased serviceman, precisely the situation in the Angell case. In Coomer v. United States, 471 F. 2d 1, 6 (5th Cir. 1973), the Fifth Circuit held that a deceased Naval Petty Officer's designation of his father as his beneficiary precluded the claims of the wife he had married after execution of the beneficiary designation. It held that absent an express revocation of Petty Officer Coomer's beneficiary designation of his father, strict compliance with the statute required a legally effective change of beneficiary in favor of the wife, which never occurred.

Any other result would create time-consuming disputes over the actual intent of the serviceman, and that is the very evil Congress sought to avoid by requiring written designations received by the service branch. (Citing Stribling v. United States, 419 F.2d 1350 (8 Cir., 1969).

This is precisely the argument now offered by Appellant as to Levi's knowledge that his mother handled the financial affairs of the family and intended her to take care of all family members, including his father, Appellant herein.

Federal laws governing non-military benefits similarly containing anti-attachment provisions have also been held to preempt state law. In Hisquierdo v. Hisquierdo, 439 U.S. 572, 585, 99 S.Ct. 802, 810 (1979), the Supreme Court held a wife's state community property claim to a portion of her husband's railroad retirement annuity was preempted by then federal law prohibiting attachment of such benefits.

There is a familial support exception to federal anti-attachment provisions. In Rose v. Rose, 481 U.S. 619, 630-631, 107 S.Ct. 2029, 2036 (1987), the Supreme Court held that a Tennessee statute allowing state courts to require veterans to pay child support out of federal veterans' disability benefits was not preempted by a federal anti-attachment provision because the veterans' disability benefits were intended to be used for the support of both the veteran and the veteran's dependents. The Rose court distinguished Wissner, Ridgeway and Hisquierdo by noting that those cases involved property claims. It further noted that Congress had amended federal law to authorize garnishment of certain federal benefits for child support and spousal support, while garnishment was not authorized for property divisions arising out of marital dissolution proceedings. See Rose, 481 U.S. at 632 n. 6, 107 S.Ct. at 2037 n. 6.²

² *Amicus* recognizes that in an unpublished opinion by the Minnesota Court of Appeals, it reached the same conclusion in its reliance upon the Rose decision. See: Schwagel v. Ward, 2007 WL 2600747 (Minn. App. Sept. 11, 2007) (No.

The Court of Appeals was careful to distinguish the support obligation recognized in Rose from the present case. Rose involved a state statute on familial support being deemed free from federal preemption. This case involves a state statute regarding property division provisions. 42 U.S.C. § 659, a federal statute allowing for withholding or garnishment of federal benefits to satisfy child support and alimony obligations, specifically excludes from the definition of alimony “any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable division of property, or other division of property between spouses or former spouses.” 42 U.S.C. § 659 (i)(3)(B)(ii).

In his brief, Appellant asserts that the provision for an award of a portion of one spouse’s non-marital property based on unfair hardship of Minn. Stat. § 518.58, Subd. 2, is tantamount to the creation of a support obligation. Appellant’s need to make such an argument is understandable, but ultimately, that position is disingenuous. *Amicus* notes that Minn. Stat. § 518.58, Subd. 2, is titled “Award of non-marital property.” *Amicus* further notes that the parties expressly waived a maintenance obligation, thus taking the support element out of the property distribution.

It is unfortunate but the Rose holding cannot be argued as applying to Appellant. He is seeking payment of additional property, not spousal support. Although Appellant is Levi’s father and despite his indigency, he was never a dependent of his deceased son.

As such, he cannot take advantage of the familial support exception to the federal anti-attachment law prohibiting apportionment of the military death benefits received by Respondent.

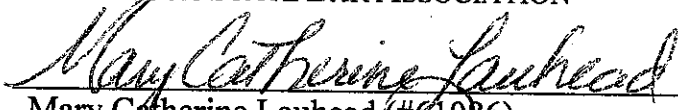
CONCLUSION

Federal anti-attachment provisions prevent the district court from awarding Appellant any portion of the military death benefits received by Respondent notwithstanding the presence of unfair hardship. The Minnesota Supreme Court should affirm the Minnesota Court of Appeals.

Respectfully Submitted:

FAMILY LAW SECTION,
MINNESOTA STATE BAR ASSOCIATION

Dated: May 7, 2010


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DISCLAIMER

Section §14.2 of the Restated Articles and Bylaws of the Minnesota State Bar Association provides that:

No report, recommendation, *amicus* brief or other action of any Section or

Committee shall be considered as the action of the Minnesota State Bar Association unless and until it has been approved by the Assembly, House of Delegates, Board of Governors or Executive Committee

APPENDIX

Angell v. Angell, 777 N.W.2d 32 (Minn. App. 2009)..... 1 – 10

Schwagel v. Ward, 2007 WL 2600747 (Minn. App. Sept. 11, 2007)
(No. A06-1812)..... 11 - 13

777 N.W.2d 32
(Cite as: 777 N.W.2d 32)

▶

Court of Appeals of Minnesota.
In re the Marriage of: Loretta Marie ANGELL, pe-
titioner, Appellant,
v.
Gordon William ANGELL, Jr., Respondent.
No. A09-349.

Dec. 29, 2009.

Background: Parties in dissolution proceeding challenged order of the District Court, Carlton County, Robert E. Macaulay, Jr., J., which classified death benefits paid after parties' son died as wife's exclusive nonmarital property but awarded husband a share to prevent an unfair hardship.

Holdings: The Court of Appeals, Ross, J., held that:
(1) benefits received by wife upon son's death were nonmarital property, but
(2) on matter of first impression, division of non-marital property was preempted by federal anti-attachment provisions.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Divorce 134 ⚡286(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(1) k. Scope and extent in general. Most Cited Cases

Divorce 134 ⚡286(8)

134 Divorce
134V Alimony, Allowances, and Disposition of Property

134k278 Appeal
134k286 Review
134k286(6) Questions of Fact, Verdicts and Findings
134k286(8) k. Disposition of property. Most Cited Cases
Whether property is marital or nonmarital is a legal question, which Court of Appeals reviews de novo, but it defers to a district court's underlying fact findings unless they are clearly erroneous. M.S.A. § 518.003.

[2] Divorce 134 ⚡253(2)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(2) k. Evidence. Most Cited Cases
Presumption that all property, real or personal, is marital if acquired by the parties, or either of them, at any time during the existence of the marriage may be overcome. M.S.A. § 518.003.

[3] Divorce 134 ⚡253(2)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(2) k. Evidence. Most Cited Cases
A party seeking to overcome the marital property presumption must demonstrate by a preponderance of the evidence that the property is nonmarital. M.S.A. § 518.003.

[4] Divorce 134 ⚡252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(4) k. Insurance, retirement, or pension rights. Most Cited Cases
Life insurance and death gratuity benefits received by wife during marriage upon service-related death of parties' adult son, a member of armed forces, were gifts to wife as sole designated beneficiary and, therefore, qualified as nonmarital property, even though delivery was contingent on son's death; son intended to make gift to his mother, having designated her as the sole beneficiary, and funds were transferred without consideration. M.S.A. § 518.003.

[5] Gifts 191 ↪1

191 Gifts

191I Inter Vivos

191k1 k. Nature of gift in general. Most Cited Cases

Essential characteristic of a "gift" is a transfer without consideration.

[6] Gifts 191 ↪4

191 Gifts

191I Inter Vivos

191k4 k. Requisites in general. Most Cited Cases

Required elements of a gift are (1) delivery; (2) intention to make a gift; and (3) absolute disposition by the donor of the thing which the donor intends as a gift.

[7] Armed Services 34 ↪77(18)

34 Armed Services

34II Insurance and Indemnity

34k55 War Risk and Life Insurance

34k77 Right to Proceeds

34k77(18) k. Rights of creditors of beneficiaries. Most Cited Cases

Divorce 134 ↪252.3(4)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k248 Disposition of Property

134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(4) k. Insurance, retirement, or pension rights. Most Cited Cases
District court's \$150,000 award to husband out of wife's nonmarital property, which consisted of life insurance and death gratuity benefits received upon service-related death of parties' adult son, a member of armed forces, while consistent with objectives of Minnesota statute providing for such a division on basis of husband's hardship concerns, effectively constituted a seizure in violation of and preempted by federal anti-attachment provisions of statutes under which death benefits were paid. 38 U.S.C.A. §§ 1970(g), 5301(a)(1); M.S.A. § 518.58.

[8] Appeal and Error 30 ↪241

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k234 Necessity of Motion Presenting Objection

30k241 k. Sufficiency and scope of motion. Most Cited Cases

Arguments presented for the first time in a posttrial motion are usually not considered on appeal.

[9] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In general. Most Cited Cases

Whether federal law preempts state law is primarily an issue of statutory interpretation, which Court of Appeals reviews de novo.

[10] States 360 ↪ 18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in general. Most Cited Cases

States 360 ↪ 18.28

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.27 Domestic Relations
360k18.28 k. In general. Most Cited

Cases
Federal preemption of state law is generally disfavored, and preemption of state family law is especially disfavored.

[11] States 360 ↪ 18.28

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.27 Domestic Relations
360k18.28 k. In general. Most Cited

Cases
State family law cannot be preempted by federal law unless Congress has positively required by direct enactment that state law be pre-empted.

[12] Divorce 134 ↪ 313.1

134 Divorce
134VII Operation and Effect of Divorce, and Rights of Divorced Persons
134k313 Personal Status and Mutual Rights and Liabilities
134k313.1 k. In general. Most Cited Cases

States 360 ↪ 18.28

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.27 Domestic Relations
360k18.28 k. In general. Most Cited

Cases
A state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments.

West Codenotes
Limited on Preemption Grounds M.S.A. § 518.58
**33 Syllabus by the Court*

1. In a dissolution proceeding, life-insurance and death-gratuity benefits received during marriage by only one spouse who is found to be the decedent's sole beneficiary are nonmarital property under Minnesota Statutes section 518.003.

2. Under the Supremacy Clause, federal anti-attachment statutes that protect **34* military death benefits paid to a beneficiary from attachment, levy, or seizure preempt Minnesota Statutes section 518.58, subdivision 2 to the extent that the subdivision authorizes district courts to award the beneficiary's spouse a portion of those benefits as divisible nonmarital property.

Arthur M. Albertson, Duluth, MN, for appellant.

Peter L. Radosevich, Esko, MN, for respondent.

Considered and decided by SCHELLHAS, Presiding Judge; MINGE, Judge; and ROSS, Judge.

OPINION

ROSS, Judge.

The former husband and wife in a marriage dissolution proceeding respectively challenge the district court's classification and division of death benefits paid after their son died during active military duty. The son had named only his mother as the beneficiary of his military life-insurance policy, which,

by federal law, also made her his beneficiary in a federal death-gratuity program available to active-duty service members. The district court classified these funds as Loretta Angell's exclusive nonmarital property but awarded Gordon Angell a share to prevent an unfair hardship. Loretta Angell argues that this award violated federal anti-attachment statutes protecting military death benefits. Gordon Angell filed a notice of review challenging the district court's property classification. He argues that the district court should have classified the life-insurance and death-gratuity benefits as marital property because Loretta Angell did not acquire them as a gift, bequest, devise, or inheritance and because she did not overcome the presumption that property accumulated during marriage is marital property.

Because we conclude that the district court properly classified the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property, we affirm the court's classification. But we hold that federal law prohibits the district court from relying on state law to divide the benefits between the parties. We therefore affirm in part, reverse in part, and remand.

FACTS

Gordon and Loretta Angell's 27-year marriage ended in dissolution in 2008. A life-insurance beneficiary designation by one of their five children, Levi Angell, is the focus of this appeal.

Twenty-year-old Levi was killed in April 2004 during active military service with the Marine Corps in Iraq. Levi had designated his mother, Loretta Angell, as the sole beneficiary of two funding instruments: his military life-insurance policy and a related federal death-gratuity program. In April 2004, Loretta received \$100,000 from the United States government in death-gratuity benefits payable to the designated survivor of her son, a member of an armed force who died during active duty. *See* 10 U.S.C. §§ 1475-80 (2000 & Supp. IV 2004). In

May 2004, she received \$250,352 from Levi's Servicemembers' Group Life Insurance policy. In August 2005, she received another \$150,000 in death-gratuity benefits under a law that directed an additional payment to previously paid beneficiaries. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1013(b), 119 Stat. 231, 247 (2005) (authorizing retroactive additional payment of death gratuity for deaths incurred in the *35 theater of Operation Enduring Freedom or Operation Iraqi Freedom). These funds were never commingled with marital property. Instead, they were deposited into a separate bank account in Cleveland, Ohio, in Loretta Angell's name. Except for sums spent by Loretta Angell, at dissolution the funds remained in the Cleveland bank account.

The classification and distribution of those funds were the only issues in the dissolution proceeding. The district court originally held that the life-insurance benefits and the second payment of death-gratuity benefits, totaling \$400,352, were Loretta Angell's nonmarital property, and that the first death-gratuity payment of \$100,000 was a marital asset to be divided evenly. It also awarded Gordon Angell a cash settlement of \$100,000 from Loretta Angell's nonmarital property, relying on Minnesota Statutes section 518.58, subdivision 2, which allows the district court to apportion up to one half of a spouse's nonmarital property to the other to prevent an unfair hardship. The district court therefore ordered Loretta Angell to pay Gordon Angell \$150,000: \$100,000 from her nonmarital property and \$50,000 from marital property. The district court later amended its order to find that all of the life-insurance and death-gratuity benefits, totaling \$500,352, were Loretta Angell's nonmarital property. But it still awarded Gordon Angell \$150,000, all to come from Loretta Angell's nonmarital property under section 518.58.

On appeal, Loretta Angell argues that the district court erred by awarding Gordon Angell any cash from her nonmarital property or, alternatively, by

increasing the amount from \$100,000 to \$150,000. Gordon Angell filed a notice of review challenging the district court's finding that the life-insurance and death-gratuity benefits were Loretta Angell's nonmarital property.

ISSUES

I. Did the district court err by classifying life-insurance and death-gratuity benefits as nonmarital property?

II. Do the Supremacy Clause and the federal anti-attachment provisions governing the distribution of Servicemembers' Group Life Insurance and death-gratuity benefits prohibit the district court from apportioning the benefits as divisible nonmarital property under Minnesota Statutes section 518.58, subdivision 2?

ANALYSIS

I

[1][2] Gordon Angell challenges the district court's classification of the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property. Whether property is marital or nonmarital is a legal question, which we review de novo, but we defer to a district court's underlying fact findings unless they are clearly erroneous. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn.1997). All property, real or personal, is presumed to be marital if "acquired by the parties, or either of them ... at any time during the existence of the marriage." Minn.Stat. § 518.003, subd. 3b (2008). This presumption may be overcome. *Id.* The operative statute does not expressly classify life-insurance or death-gratuity benefits as either marital or nonmarital, but it states that property acquired by gift, bequest, devise, or inheritance from a third party to one but not the other spouse is nonmarital property. *Id.*

In determining whether the funds are marital or nonmarital property, we see no material distinction between the death *36 benefits paid from the military life-insurance policy and the death benefits paid as a gratuity by federal statute. The benefits under both instruments result from a servicemember's death, and both are designed to direct payment to the servicemember's designee. The federal government pays a portion of the servicemember's life-insurance premiums and fully funds the statutory death-gratuity benefit program; both are therefore partial compensation for active military service. *See* 38 U.S.C. § 1969(b) (2006) (requiring the federal government to pay part of the costs of Servicemembers' Group Life Insurance).

[3][4] Gordon Angell argues that Loretta Angell offered no evidence proving that the benefits were nonmarital and that she therefore failed to overcome the presumption that the property is marital. A party seeking to overcome the presumption must demonstrate by a preponderance of the evidence that the property is nonmarital. *Pfleiderer v. Pfleiderer*, 591 N.W.2d 729, 732 (Minn.App.1999). Loretta Angell's evidence overcomes the presumption. The evidence established that she was designated as Levi's sole beneficiary. Although the Servicemembers' Group Life Insurance Election and Certificate form that Levi completed offered spaces for up to five beneficiaries, he used only one space, naming Loretta Angell alone as his beneficiary. Levi thereby assured that his mother would receive a 100-percent share of the benefits available from both sources. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1013, 119 Stat. 231, 247 (2005) (providing a death gratuity payable to a beneficiary in proportion to the share of benefits she receives from life-insurance proceeds paid under the SGLI program). Loretta Angell testified correspondingly that all financial documents and correspondence that she received in connection with Levi's life-insurance proceeds and death benefits were addressed to her alone.

Gordon Angell contends that no evidence indicates that Levi intended to exclude him from sharing in the funds. At oral argument, his counsel asserted that it was undisputed that Loretta Angell managed the family's finances and that this requires a finding that the sole designation to his mother meant that Levi intended his parents to share the funds. But the district court made no such finding, and attempting to discern why Levi omitted his father as a designated beneficiary is not our role on appeal. See *Whitaker v. 3M Co.*, 764 N.W.2d 631, 640 n. 1 (Minn.App.2009) (“[O]ur role ... does not extend to making factual findings in the first instance.”), *review denied* (Minn. July 22, 2009). Levi designated his mother as the sole beneficiary, and we therefore accept the district court's implicit finding that Levi intended only his mother to receive the life-insurance and death-gratuity benefits. See also *Lanier v. Traub*, 934 F.2d 287, 289 (11th Cir.1991) (“The beneficiary designation provisions of the [Servicemen's Group Life Insurance] Act are to be interpreted strictly ... to avoid ... disputes concerning the actual donative intent of insured servicemen.”).

Gordon Angell argues that the life-insurance and death-gratuity benefits are marital property because they are not one of the types of instruments that the statute specifies as nonmarital property: gift, bequest, devise, or inheritance. See Minn.Stat. § 518.003, subd. 3b. He relies on the *Black's Law Dictionary* definition of each term and argues that the proceeds were not a gift because they were not a voluntary transfer from Levi; and they were not a devise, bequest, or inheritance because *37 they did not pass through a will or intestacy.

No Minnesota caselaw answers how to classify death benefits from a child's life-insurance policy that names only one parent as the beneficiary. But multiple cases from other states hold that life-insurance benefits received by one spouse as the sole beneficiary are that spouse's nonmarital property. For example, the Iowa Supreme Court so held in a case similar to ours. See *In re Marriage of*

Goodwin, 606 N.W.2d 315 (Iowa 2000). In *Goodwin*, as here, a mother had received life-insurance proceeds as sole designated beneficiary of her son's policy, and the father argued that the singular designation simply reflected the mother's role as manager of the couple's money. *Id.* at 317, 319. The Iowa court rejected the father's claim that the proceeds were marital property. It held that the son's designation of his mother as the only beneficiary supported the conclusion that the proceeds constituted a gift to or inheritance by the mother. *Id.* at 319; see also *Smith v. Smith*, 235 S.W.3d 1, 10-11 (Ky.Ct.App.2006) (holding that life-insurance benefits directed only to the wife upon her parents' death was a gift and therefore nonmarital property); *In re Marriage of Sharp*, 823 P.2d 1387, 1388 (Colo.Ct.App.1991) (holding that life-insurance proceeds directed to only one spouse were a gift and nonmarital property and citing cases from other jurisdictions reaching a similar holding).

[5][6] Consistent with the reasoning of these cases from other jurisdictions, we conclude that the death benefits were a gift. We recognize that the benefits conveyed by the instruments at issue do not resemble the usual “gift” as the term is commonly used. But they have the essential characteristic of a gift, which is a transfer without consideration. See *Roske v. Ilykanyics*, 232 Minn. 383, 392, 45 N.W.2d 769, 775 (1951); see also *Boos v. Reynolds*, 84 F.Supp. 185, 188 (D.Minn.1949) (“Gift[] ... is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear.”). The required elements of a gift are “(1) delivery; (2) intention to make a gift; and (3) absolute disposition by the donor of the thing which the donor intends as a gift.” *Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn.App.2001), *review denied* (Minn. June 27, 2001). Levi's intention to make a gift to his mother is supported by his beneficiary designation, and there was an absolute disbursement of the funds to her alone. That the delivery was contingent on Levi's death does not prevent these funds from being characterized as a gift, especially under a nonmarital property definition

that includes gifts alongside bequests, devises, and inheritances. Like a gift, the funds were transferred without consideration; and like a devise, they were available on the decedent's death based on his specific written designation. Based on the district court's findings, we hold that the life-insurance and death-gratuity benefits were gifts to the sole designated beneficiary in this case and were therefore that beneficiary's nonmarital property.

II

[7] Loretta Angell challenges the district court's division of her nonmarital property. After properly concluding that the life-insurance and death-gratuity benefits were Loretta Angell's nonmarital property, the district court awarded Gordon Angell \$150,000 from that property under Minnesota Statutes section 518.58. That statute allows the district court to apportion up to one half of a spouse's nonmarital property to the other if it finds that the other spouse's resources or property are so inadequate that the division of only the *38 marital property would work an unfair hardship. Minn.Stat. § 518.58, subd. 2 (2008).

The district court's award of nonmarital property accords with the statute's hardship concerns. Gordon Angell is 67 years old and has no bank accounts, retirement savings, or pension. He has no vocational training and never reached high school. He has not held full-time employment since 2002, and his only source of income is monthly Supplemental Security Income payments of approximately \$424. He has employment-restricting health problems and lives with his elderly mother. His only assets are a 17-year-old Ford and an entitlement to half of the proceeds from the sale of the Angell's modest home.

[8] But despite its meeting the state statutory objectives, the apportionment of nonmarital property was subject to federal anti-attachment provisions, and this raises special concerns. Loretta Angell argues that the district court did not have jurisdiction

to direct the distribution of servicemembers' life-insurance or death-gratuity benefits because these benefits fall within the exclusive jurisdiction of the federal government. Gordon Angell claims that this issue arises for the first time on appeal. The record informs us that Loretta Angell raised the argument to the district court in her motion for amended findings and conclusions or for a new trial, and Gordon Angell had an opportunity to respond. Arguments presented for the first time in a posttrial motion are usually not considered on appeal. *See Antonson v. Ekvall*, 289 Minn. 536, 538-39, 186 N.W.2d 187, 189 (1971). However, this court "may review any matter as the interest of justice may require." Minn. R. Civ.App. P. 103.04. We will address the argument's merits.

The Servicemembers' Group Life Insurance and the death-gratuity benefits have anti-attachment provisions imposed by federal law:

Any payments due ... under Servicemembers' Group Life Insurance ... made to ... a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

38 U.S.C. § 1970(g) (2006). The anti-attachment statute for the death-gratuity benefits has identical operative language, except that it adds that the benefits "shall not be assignable except to the extent specifically authorized by law." 38 U.S.C. § 5301(a)(1) (2006). Loretta Angell argues that the district court's division of these benefits was "nothing more than a forced assignment in equity" of a portion of the life-insurance and death-gratuity benefits. She cites Article VI of the United States Constitution and appears to argue that the district court violated the Supremacy Clause by relying on Minnesota Statutes section 518.58 to award Gordon Angell a portion of her nonmarital property.

[9][10][11] Whether federal law preempts state law is primarily an issue of statutory interpretation,

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which this court reviews de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn.2002). The Supremacy Clause defines “the laws of the United States ... [as] the supreme law of the land” prevailing over state laws. U.S. Const. art. VI, cl. 2. The Supreme Court has cautioned, however, that “[c]onsideration of issues arising under the Supremacy Clause ‘start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.’ ” *39*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Federal preemption of state law is therefore generally disfavored. *Martin*, 642 N.W.2d at 11. And preemption of state family law is especially disfavored. State family law cannot be preempted by federal law unless “Congress has ‘positively required by direct enactment’ that state law be pre-empted.” *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176, 49 L.Ed. 390 (1904)). Whether the federal anti-attachment provisions governing the distribution of Servicemembers’ Group Life Insurance and death-gratuity benefits preempt the state law allowing division of nonmarital property is an issue of first impression in Minnesota.

The anti-attachment provision of the Servicemembers’ Group Life Insurance Act (SGLIA) has preempted other states’ family law provisions. In *Ridgway v. Ridgway*, the Supreme Court considered a divorce decree that required an Army sergeant to keep his three children as the beneficiaries of his Servicemembers’ Group Life Insurance policy. 454 U.S. 46, 48, 102 S.Ct. 49, 51, 70 L.Ed.2d 39 (1981). The sergeant remarried and designated his wife as his sole beneficiary. *Id.* at 48-49, 102 S.Ct. at 51-52. After the sergeant’s death, a Maine court placed a constructive trust on the proceeds in favor of the children. *Id.* at 50, 102 S.Ct. at 52. The Su-

preme Court reversed and held that the imposition of the constructive trust was inconsistent with the “strong language” of the anti-attachment provision. *Id.* at 60-61, 102 S.Ct. at 57-58. The Court recognized that it was an “unpalatable” outcome because the divorce decree specifically obligated the servicemember to provide for his children, but it emphasized that “Congress has insulated the proceeds of SGLIA insurance from attack or seizure by any claimant other than the beneficiary designated by the insured.” *Id.* at 62-63, 102 S.Ct. at 59 (emphasis added).

In *Hisquierdo*, the Supreme Court considered a similar statutory prohibition against attachment that protected a federal-entitlement beneficiary. *See* 439 U.S. at 573, 99 S.Ct. at 804. The case involved retirement benefits payable pursuant to the Railroad Retirement Act of 1974. The Act provided that “no annuity [under the Act] shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever.” *Hisquierdo*, 439 U.S. at 576, 99 S.Ct. at 805. The California Supreme Court held that the benefits were community property under state law because they would flow in part from the husband’s employment during the marriage. *Id.* at 580, 99 S.Ct. at 808. The United States Supreme Court reversed, holding that ordering the husband to pay his wife out of his benefits would deprive the husband of a portion of the benefit that Congress protected for him under the anti-attachment provision. *Id.* at 583, 99 S.Ct. at 809. The court further held that the wife could not obtain an offsetting award of other community property, which would indirectly produce the same net result. *Id.* at 588, 99 S.Ct. at 811-12.

Before *Hisquierdo*, the United States Supreme Court also held California community property law to be preempted by an anti-attachment provision in the National Service Life Insurance Act, the predecessor to SGLIA. *See Wissner v. Wissner*, 338 U.S. 655, 659, 70 S.Ct. 398, 400, 94 L.Ed. 424 (1950). In *Wissner*, a deceased Army major’s life-insurance

benefits were claimed by both his widow and his parents. The major had designated only his parents as beneficiaries of the policy, but his widow *40 claimed her community share under state law. The Supreme Court reversed the state court's judgment in favor of the widow, deeming it in "flat conflict" with the anti-attachment provision that protected payments to the named beneficiary "from the claims of creditors," and from "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 659, 70 S.Ct. at 400.

We acknowledge but distinguish *Rose v. Rose*, in which the United States Supreme Court considered a conflict between state family law and 38 U.S.C. § 5301, the same anti-attachment provision that applies to the death-gratuity benefits in our case.^{FN1} 481 U.S. 619, 630-34, 107 S.Ct. 2029, 2036-38, 95 L.Ed.2d 599 (1987). A state court held a disabled Vietnam veteran in contempt for failing to pay child support. His only means of satisfying the child-support obligation were his military disability benefits. He argued that the state court action was preempted by section 5301 (then 3101), which provided that veterans' benefits were not "liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 630, 107 S.Ct. at 2036. The Supreme Court disagreed. It observed that the veterans' disability benefits were intended to provide reasonable compensation for disabled veterans and their families. *Id.* at 634, 107 S.Ct. at 2038. The state contempt proceeding therefore did not frustrate the purpose of the statute because it furthered the federal objective for the benefits to support the veteran and his dependents. *Id.* The court reasoned that, unlike the application of the SGLIA anti-attachment provision at issue in *Ridgway*, "Congress ha[d] not made [Rose] the exclusive beneficiary of the disability benefits." *Id.* Unlike *Rose*, the life-insurance and death-gratuity instruments at issue here have a single beneficiary by operation of federal law and Levi's designation.

FN1. The anti-attachment provision considered in *Rose* was 38 U.S.C. § 3101. This statute was later renumbered to its current designation as 38 U.S.C. § 5301. See Department Of Veterans Affairs Health-Care Personnel Act Of 1991, Pub. L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238-39 (1991).

[12] "[A] state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgway*, 454 U.S. at 55, 102 S.Ct. at 55. The Angells' divorce decree conflicts directly with the applicable anti-attachment provisions because it diverts funds from Levi's sole designated beneficiary. Federal law empowered Levi to freely designate the beneficiary, and "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* (quoting *Wissner*, 338 U.S. at 658, 70 S.Ct. at 399). We hold that the \$150,000 award to Gordon Angell was effectively a seizure of Loretta Angell's non-marital property and that this seizure violates the federal anti-attachment provisions of 38 U.S.C. §§ 1970(g) and 5301(a)(1). Although the district court correctly held that the award meets the objectives of Minnesota law, under the Supremacy Clause, the federal statutes control and prohibit the division.

DECISION

The district court properly classified the life-insurance and death-gratuity benefits as Loretta Angell's nonmarital property because they were intended as a gift to her only, and not to Gordon Angell. But the district court's awarding of a portion of her nonmarital property to Gordon Angell under state law conflicts with the authoritatively*41 superior federal anti-attachment provisions that protect the funds from attachment, levy, or seizure either before or after the beneficiary's receipt. We therefore reverse on that issue only and remand for the district court to make a property distribution consistent with this opinion.

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**Affirmed in part, reversed in part, and re-
manded.**

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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS
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480A.08(3).

Court of Appeals of Minnesota.
In re the Marriage of Michael J. SCHWAGEL, peti-
tioner, Appellant,
v.
Kelly Rylynn WARD, Respondent.
No. A06-1812.

Sept. 11, 2007.

Crow Wing County District Court, File No.
F1-03-2603.
Michael J. Schwagel, Staples, MN, pro se, appel-
lant.

Dennis James Smith, Maple Grove, MN, for re-
spondent.

Considered and decided by ROSS, Presiding Judge;
PETERSON, Judge; and SHUMAKER, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge.

*1 Appellant-father challenges the district court's orders establishing child support and denying his motion to amend his child-support obligation, arguing that the district court overstated his income, improperly included his veterans' disability compensation in his income for child-support purposes, failed to consider respondent's income, and that the child-support award is unfair. Because the district court did not abuse its discretion by establishing child support and did not err by including appel-

lant's veterans' disability payments in his income, and because the award is not unfair, we affirm.

FACTS

Appellant Michael Schwagel and respondent Kelly Ward married in 1991 and had two children together. The marriage was dissolved in December 2003, and the parties shared joint legal and physical custody of the children. The children lived with Ward, and the parties did not follow a set parenting-time schedule. The judgment and decree expressly reserved establishing child support.

Ward moved to establish child support in March 2006. She submitted evidence that Schwagel's monthly income is \$2,762, based on veterans' disability compensation. Schwagel made various representations about his income, including that he receives \$2,762 per month in disability payments.

The district court ordered Schwagel to pay \$826.60 in monthly child support, the guidelines amount for two children based on an obligor's monthly income of \$2,762. Schwagel moved to modify, and Ward brought a motion for contempt because Schwagel had not paid any child support for three months. The district court denied Schwagel's motion and ordered him to pay arrearages.

Judgment was entered against Schwagel in the amount of \$2,485 for back child support after Schwagel filed his notice of appeal. Schwagel also contests that judgment.

DECISION

The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn.1984). A district court abuses its discretion when it sets support in a manner that is against logic and the facts on record or misapplies the law. *Id.* (setting support in a man-

ner that is against logic and facts on record); *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn.App.1998) (improper application of the law).

Schwagel first argues that the district court improperly calculated his income because it "used the married rate" for his disability payments rather than the single rate.

A determination of the amount of an obligor's income for child-support purposes is a finding of fact and will not be altered on appeal unless clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn.App.2002). A finding of fact is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been made." *LaChapelle v. Mitten*, 607 N.W.2d 151, 160 (Minn.App.2000) (quotation omitted), *review denied* (Minn. May 16, 2000).

*2 The record shows that Schwagel presented the district court with several different amounts of his income, including evidence that he receives \$2,762 in monthly disability payments. Ward also presented evidence showing that Schwagel receives \$2,762 in monthly disability payments. Although Schwagel argues that \$2,762 represents "the married rate" and he is no longer married, the evidence shows that, notwithstanding his marital status, he receives \$2,762 in monthly disability payments. The district court's finding that Schwagel's monthly income is \$2,762 is fully supported by the record and is not clearly erroneous.

Next, Schwagel argues that the district court erred by including his veterans' disability payments in his income for child-support purposes. Income for child-support purposes in Minnesota is defined as "any form of periodic payment to an individual, including ... military and naval retirement, pension and disability payments." Minn.Stat. § 518.54, subd. 6 (2004).^{FN1} Whether a source of funds is income for support purposes is a legal question reviewed de novo. *Sherburne County Soc. Servs. v. Riedle*, 481 N.W.2d 111, 112 (Minn.App.1992).

FN1. Schwagel argues that the district court abused its discretion by not considering Ward's income when establishing his child-support obligation, as is required under the current statute. Although the child-support laws changed substantially on January 1, 2007, those amendments do not apply in this case because the district court established the child support, and the parties filed their motions, before the changes became effective. See 2006 Minn. Laws ch. 280, § 44, at 1145; compare Minn.Stat. § 518.551 (2004) with Minn.Stat. §§ 518A.34, .35 (2006). Accordingly, because the 2004 child-support guidelines require the district court to consider only the obligor's income, the district court did not abuse its discretion by not considering Ward's income. Minn.Stat. § 518.551, subd. 5(b) (2004). Also, this opinion will use the 2004 version of the support statute.

Schwagel contends that federal law preempts Minnesota's definition of income and exempts his veterans' disability payments from being used for court-ordered child support. He cites 38 U.S.C. § 5301(a)(1) for the proposition that his veterans' disability payments "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1) (Supp. IV 2004).

The United States Supreme Court directly addressed whether veterans' disability payments can be subject to state-court child-support orders in *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029 (1987). Like Schwagel, the father in *Rose* received only veterans' and social-security benefits as income. *Rose*, 481 U.S. at 622, 107 S.Ct. at 2032. The Tennessee court considered these benefits when establishing child support. *Id.*, 107 S.Ct. at 2032. The father in *Rose* relied on the same statutory language as Schwagel does to argue that federal law pre-

mpts state-court jurisdiction over federal disability compensation. *Id.* at 630, 107 S.Ct. at 2036. The Supreme Court rejected the father's argument because "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Id.* at 631, 107 S.Ct. at 2036. The Court concluded that " § [5301(a)(1)] does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Id.* at 634, 107 S.Ct. at 2038. Therefore, Schwagel's argument is without merit, and the district court properly considered his disability compensation when establishing his child-support obligation.

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(Minn.App.)

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We conclude that the district court did not abuse its discretion by establishing child support, and Schwagel has not shown that the support award is unfair. Consequently, because Schwagel did not show that the support order is unfair under Minn.Stat. § 518.64 subds. 1, 2 (2004), the district court did not abuse its discretion by denying Schwagel's motion to modify the award. *See id.* (stating that a district court may modify child-support payments because of substantial increase or decrease in earnings, substantial increased or decreased need of a party or child(ren), receipt of public assistance, a change in the cost of living, extraordinary medical expense for the child, or additional child-care expenses).

*3 Schwagel also asks this court to strike the judgment against him for his support arrearages that was entered after he filed this appeal. Ignoring the question of whether a judgment entered after this appeal was taken is properly before this court, Schwagel does not provide any authority for reversing the judgment. He relies solely on a statute defining the time period for which retroactive child-support modifications apply, which is not at issue in this case. *See* Minn.Stat. § 518.64, subd. 2(d). Therefore, we decline to disturb the judgment.

Affirmed.

Minn.App.,2007.

