IN THE SUPREME COURT OF FLORIDA

MICHELLE M. KELSON,

Petitioner,

vs.

RUSSELL M. KELSON,

Respondent.

_____/

CASE NO. 85,246
District Court of Appeal
First District - No. 93-03003

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the District Court
of Appeal, First District,
State of Florida

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INTRODUCTION

Throughout this brief, the Respondent, Russell M. Kelson, will be referred to as "Maj. Kelson" or "Respondent". The Petitioner, Michelle M. Kelson, will be referred to as "Ms. Kelson" or "Petitioner. Citations to the Record on Appeal will be denoted as [R:___].

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Statement of the Case and Facts contained in the Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The First District Court correctly upheld the trial court's determination that the property settlement agreement entered into between Mr. and Ms. Kelson at the time of their divorce could not be modified by the court to provide for division of Maj. Kelson's Voluntary Separation Incentive ["VSI"] benefits. The Agreement specifically provided only for an equitable division of Maj. Kelson's military retirement pay; as the First District concluded, VSI benefits are not the same as military retirement pay and could not be divided by the court in any event under controlling federal law.

While the Petitioner characterizes the instant case as presenting primarily the question of whether the state court has jurisdiction to divide VSI benefits in connection with a dissolution of marriage action, this Court need not even reach that issue. In this case, the parties entered into a property settlement agreement which was ratified by order of the court. That agreement is silent concerning divisibility of VSI benefits, and speaks only to "military retired pay". As the First District pointed out, there are significant differences between military retirement pay and VSI benefits. In order to grant the relief Petitioner requests, this Court would have to essentially re-write the Agreement previously entered into between Mr. and Ms. Kelson, in contravention of the long-established principle that property settlement agreements entered into between the parties to a dissolution of marriage proceeding may only be subsequently

modified or amended by mutual agreement of the parties, not by the court upon the request of one party alone. Any conflict between the First District's opinion and that of the Fifth District in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994) can be resolved without disturbing the outcome of either case. This Court should enforce the specific terms of the Agreement, recognizing the many distinctions between VSI benefits and military retirement pay, and uphold the decision of the First District Court of Appeal.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE PARTIES' PROPERTY SETTLEMENT AGREEMENT COULD NOT BE MODIFIED TO INCLUDE RESPONDENT'S VSI BENEFITS AS PROPERTY SUBJECT TO DIVISION BY STATE COURTS

I. INTRODUCTION

The issues before this Court include significant and complex questions regarding federal preemption and statutory interpretation. However, the primary issue that must be resolved is relatively simple: whether a valid property settlement agreement, freely entered into by the parties to a dissolution of marriage proceeding, may subsequently be modified upon motion of one party, to include property which was not only unmentioned in the agreement, but which did not even exist at the time the agreement was entered into. The Petitioner vehemently asserts that the property in question -- Maj. Kelson's annual payments received pursuant to the Voluntary Separation Incentive Program ["VSI"], 10 U.S.C. 1175 -- are the "equivalent" of the military retirement pay the parties had expressly agreed to divide. Under this argument, the court would not actually "modify" the agreement, as property settlement agreements are considered final under Florida law absent fraud, overreaching, concealment or other misconduct, but merely "enforce" the agreement to implicitly include VSI benefits. As will be discussed in greater detail below, however, the agreement (drafted by Ms. Kelson's attorney) expressly provides only for division of Maj. Kelson's "U.S. Marine Corp Retired/Retainer Pay". The VSI benefits Maj.

Kelson currently receives were not contemplated by the parties at the time the agreement was entered into; in fact, the VSI Program itself did not come into existence until after the Kelsons' divorce became final. Further, VSI benefits are qualitatively different than military retirement benefits, and including Maj. Kelson's VSI benefits within the property settlement agreement would require a wholesale revision of that agreement by the courts. Finally, this is not an instance in which Maj. Kelson personally guaranteed that Ms. Kelson would receive the agreed-to portion of his retirement benefits, in which case the nature of the VSI benefits vis-a-vis military retirement pay would not be relevant. As the First District appropriately noted, both parties to the property settlement agreement had only an expectation that Maj. Kelson would ever receive any retirement pay (death or involuntary separation would have defeated both parties entitlement thereto), and if he did not, there would have been no divisible assets under that agreement. Kelson v. Kelson, 647 So.2d 959, 960 (Fla. 1st DCA 1994)

It is apparent that Ms. Kelson is requesting modification, not enforcement, of the property settlement agreement based merely on changed circumstances. Under Florida law, such modification is improper, and Ms. Kelson's request should be rejected.

As previously indicated, this appeal also presents complex issues of federal preemption. In addition to affirming the sanctity of the property settlement agreement, the First District

Court of Appeal correctly held that federal law preempts state courts from dividing VSI benefits as marital property in a dissolution of marriage proceeding. Kelson, supra at 961. Accordingly, even if the Kelson's property settlement agreement were not so explicit, the Florida courts have no jurisdiction to include VSI benefits as marital property subject to equitable distribution. In fact, the federal statutes governing the VSI program make clear that VSI benefits are not transferrable by the recipient, except by testamentary devise.[1] Clearly, Congress did not intend that separation benefits received under the VSI program be subject to division by state courts in dissolution proceedings.

The First District correctly determined that under federal law only those benefits specifically identified in the Uniformed Services Former Spouses Protection Act ["USFSPA"], Title 10 U.S.C. 1408 et seq., could be divided by state courts in dissolution actions. Finding that VSI benefits were not included within those specifically identified in USFSPA, the court then concluded that VSI benefits were not subject to division by state courts. This Court should affirm the opinion of the First District Court of Appeal.

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[1]Since the prohibition against transferability of VSI benefits allows testamentary devise of those benefits, additional questions are presented if Petitioner is granted an interest therein. For instance, may Ms. Kelson will her interest in Maj. Kelson's VSI benefits? If she predeceases him, does her interest then revert to Maj. Kelson or may her heirs then share in VSI payments which are otherwise non-transferrable?

II. VSI BENEFITS ARE NOT THE "EQUIVALENT" OF MILITARY RETIREMENT PAY UNDER THE PROPERTY SETTLEMENT AGREEMENT BETWEEN THE PARTIES

The disposition of this case should be governed by the express terms of the property settlement agreement entered into between Mr. and Ms. Kelson and ratified by court order in 1990. It is undisputed that the agreement speaks specifically to retirement pay and makes no mention of VSI benefits; the VSI program under 10 U.S.C. Sec. 1175 was not in existence at the time, and therefore could not have been contemplated by the parties. Nevertheless, Petitioner argues that VSI benefits should be considered the equivalent of retirement pay, or "in lieu of" retirement pay, and that the agreement should be construed to include the VSI payments within its scope. As both the trial court and the First District correctly concluded, there are significant differences between VSI benefits and retirement pay; the terms cannot be rendered synonymous for purposes of construing the property settlement agreement between the parties.

First, as the District Court explained, separation benefits and retirement pay are fundamentally different in that the former is intended to constitute replacement of future lost earnings, while the latter represents payment for past services. Kelson, supra at 961-962. In addition to this philosophical distinction, there are other more specific and practical differences between VSI benefits and military retirement pay that render it impractical and inappropriate to construe them as synonymous for purposes of enforcing the parties' property settlement agreement.

Indeed, under the facts of this case it would be inequitable to require a division of VSI benefits under the agreement, where that agreement specifically and expressly contemplated only a division of Maj. Kelson's retirement pay.

First, entitlement to military retirement pay only accrues after the service member has achieved 20 years of active military service. Here, at the time of the Kelson's divorce, Maj. Kelson had served only fourteen and one-half years. Accordingly, neither party had any guarantee of ever receiving any retirement benefits; death or involuntary separation from the armed services would have defeated Maj. Kelson's entitlement to retirement pay.[2] In fact, the record reflects Maj. Kelson's testimony that he decided to participate in the VSI program at least in part because of his fear that he would be involuntarily terminated as a part of ongoing military force reductions [T:50]; it appears to be undisputed that had this event occurred, Ms. Kelson would have been entitled to no portion of any involuntary separation benefits. In addition, the agreement between the parties contained no provision requiring Maj. Kelson to guarantee Ms. Kelson's receipt of the agreed-to percentage of his anticipated retirement pay; accordingly, under that agreement (drafted by Ms. Kelson's attorney), had Maj. Kelson failed to receive retirement pay, Ms. Kelson would have received nothing. Clearly, Ms. Kelson's expectation of receiving a portion of Maj. Kelson's

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[2]Significantly, retirement pay, unlike VSI benefits, terminate upon the death of the service member

military retirement pay was only that -- an expectation.

Further, VSI payments are made annually, for a specific term of years, while retirement payments are made monthly, for the life of the armed services member. This distinction again reflects the inequity of interpreting the parties' property settlement agreement to include VSI payments, since the parties agreed to monthly percentage payments according to a specific formula for dividing Maj. Kelson's retirement pay.[3] [R:9, 10] Further, the agreement calls for the percentage payments to be made for life, since retirement pay continues throughout the life of the recipient [R:11]; however, Maj. Kelson's VSI benefits will terminate after 32 years. Should Maj. Kelson's life span exceed 32 years post-receipt of VSI benefits, will he then be required to continue making payments to Ms. Kelson, or will that portion of the property settlement agreement be revised by the court as well?

Additionally, the benefits under VSI and retirement pay themselves are different. Under VSI, the member is entitled to medical benefits for only 120 days after discharge, while a retired military member receives military medical and dental benefits for life. Similarly, VSI recipients are entitled to only two years (post-discharge) of commissary privileges, while retired members retain those privileges for life. Retirement pay is subject to cost of living allowances; VSI benefits are fixed.

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[3]The formula itself, moreover, is consistent not with the method of calculating VSI benefits but with the statutory method of calculating retirement pay.

These distinctions demonstrate that the VSI recipient enjoys far less financial security than the retired military member, since medical and dental insurance must be obtained, commissary privileges are lost, and the amount of the VSI payments will remain fixed regardless of the effects of inflation. Again, the formula in the parties' property settlement agreement, based on the expectation of receiving retirement pay, is simply inapplicable to these markedly different financial conditions.

Another critical distinction between retirement pay and VSI benefits is that the VSI recipient, unlike the retired service member, remains subject to recall to active duty. This distinction again reflects the fundamental difference between separation and retirement pay; the VSI payments are based in part on the recipient's obligation to remain available to perform future services, an obligation not imposed on the retired service member. If the VSI recipient does return to active duty and becomes entitled to receive military retirement pay, the VSI benefits previously received must be repaid. Here, Ms. Kelson seeks to obtain a percentage (based on a different benefit) of Maj. Kelson's annual VSI payment, notwithstanding the fact that Maj. Kelson could be recalled into active service and subsequently receive the retirement pay for which Ms. Kelson originally bargained. One then wonders whether Ms. Kelson would refund that portion of VSI benefits which she received.

Clearly, the relief Petitioner requests is more complicated than simply substituting the term "VSI benefits" for "retirement

pay" in the property settlement agreement. In fact, it would be impossible to insert VSI benefits within the scope of the agreement without re-writing other portions of the agreement to achieve consistency.

Even if the instant case were as simple as mere substitution, such a modification would be improper under Florida law where the agreement itself expressly contemplated only a division of retirement pay. If Congress, subsequent to the Kelsons' divorce, had chosen to substitute the VSI program for retirement benefits, Ms. Kelson's argument might be given some weight. This is not the case. The military retirement program, the subject of the Kelsons' property settlement agreement, remains in effect. Ms. Kelson now simply wishes to share Maj. Kelson's entitlement to an entirely different benefit. Petitioner claims that the issue of whether VSI benefits are the equivalent of military retirement pay should be controlled by the Fifth District's decision in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994). It is true that in Abernethy, the court opined that VSI benefits should be treated in the same manner as military retirement pay. However, that opinion was not critical to the outcome of the case; in Abernethy, the former husband had personally guaranteed the former wife's receipt of the stated percentage of his retirement pay. Id. at 163. In other words, whether the former husband received retirement pay; failed to receive retirement pay due to involuntary termination or disability; or failed to receive retirement pay due to his

election of VSI benefits, the same amount would have been paid to the former wife out of his own funds. Since the source of the funds from which the former wife was to be paid was irrelevant, the nature of the VSI payments (vis-a-vis retirement pay) was likewise irrelevant: "the trial court was authorized to enforce the agreement and the final judgment by requiring the husband to make the agreed payments from his personal funds regardless of their source".[4] Id. Here, there is no such guarantee by Maj. Kelson. Instead, in the instant case in order for the Petitioner to be entitled to a portion of his VSI benefits, the Court must either interpret the agreement as implicitly encompassing VSI benefits (even though the VSI program was implemented following the parties' divorce) and modify or amend portions of the agreement for consistency, or modify or amend the agreement itself to specifically include VSI payments.

To the extent that there is a conflict between the holding of the First District in the instant case and the dicta contained in the Abernethy opinion, this Court should disapprove of the language in Abernethy regarding the nature of VSI payments and military retirement pay.

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[4]In addition, the Fifth District's dicta concerning the similarity between VSI benefits and military retirement pay appears largely based on the mere facts that both are reduced by the amount of disability payments received, and both are administered by the Retirement Board of Actuaries. The lengthy analysis contained in the First District's opinion in the instant case presents a more compelling argument that the two are fundamentally different. Of course, since the former husband in Abernethy had personally guaranteed the agreed-upon payments, such a lengthy analysis by the Fifth District was unnecessary.

The Petitioner also asserts that this Court should adopt the holding of the Supreme Court of Montana in Blair v. Blair, 1995 WL 302420 (March 2, 1995), where Special Separation Benefits ["SSB"] received pursuant to 10 U.S.C. Sec. 1174a were determined to be subject to division under a property settlement agreement providing for the division of the former spouse's military retirement pay. The Respondent does not dispute that, except for the fact that Blair involved SSB payments and the instant case concerns VSI benefits, the two cases are factually similar. The Respondent does, however, contest the Petitioner's representation that "SSB benefits are essentially the same as VSI benefits except they [SSB payments] are paid in one lump sum." Initial Brief of Respondent at p. 11.[5]

First, the SSB program was created by 10 U.S.C. Sec. 1174a, and the VSI program is administered under 10 U.S.C. Sec. 1175. Although the two sections are somewhat similar, if (as Petitioner suggests) SSB and VSI are identical, why did Congress deem it necessary to enact separate statutes instead of, for instance, enacting a single statute containing alternative payment provisions? Further, unlike VSI benefits, there is no prohibition in Section 1174a against the recipient transferring his or her entitlement to SSB. The two programs are administered through separate funds, and benefits are calculated differently.

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[5]Likewise, Respondent contests the Petitioner's representation that the Blair decision held that "VSI and SSB programs ... are marital property subject to division by state courts." Blair did not address VSI benefits.

For example, SSB benefits are calculated as 15 percent of the product of the member's years of active service plus 12 times the monthly base pay the member received at the time of his discharge, while annual VSI payments represent 2.5 percent of the member's monthly base pay at the time of discharge multiplied by 12, then multiplied by the member's years of active service. Thus, while the benefit calculations do both take into account the member's years of active service, the calculations themselves are quite different.

Perhaps the most significant distinction between VSI and SSB benefits is the fact that, while both programs require the recipient to remain subject to reserve or active duty status, VSI recipients who receive basic pay/DT pay while serving in the reserves are required to forfeit their VSI payments for that period. [R:60] SSB participants are not required to forfeit any portion of their pay for future active or reserve service. [R:60]. Further, SSB participants must only agree to serve a minimum of three years, while VSI recipients must agree to serve for the duration of the payment period (32 years in Maj. Kelson's case). [R:59] These distinctions reflect that VSI benefits, unlike SSB, are meant to compensate in part for the recipient's agreement to remain available for recall to active or reserve status; not only does the VSI recipient agree to serve for a much longer period, once recalled, the basic pay takes the place of the VSI benefits, which must be forfeited. Clearly, as the First District reasoned, VSI benefits constitute "separation" pay, not

compensation for past services, and there is therefore no justification for awarding a former spouse a portion of those benefits. Kelson, supra at 961.

Finally, the fact that payments under the SSB program are made in one lump sum while VSI payments are made annually is more than a technical distinction. VSI annual benefits, payable for a term equal to twice the number of years served (32 years, in Maj. Kelson's case), and non-transferrable under the statute, evidence the Congressional intent to provide separated members under VSI with a continuing benefit to offset the loss of income from a military career and cushion the return to civilian life. See Kelson, supra at 961-962. Conversely, the lump-sum payments called for under the SSB program, once made, simply constitute cash assets of the beneficiary, and are freely transferrable. Thus, many of the compelling reasons for treating VSI benefits as non-marital property are absent.

Finally, even if this Court deems the SSB and VSI programs similar, it should simply decline to follow the Supreme Court of Montana's holding in Blair. The court in Blair focused primarily on SSB payments as "early retirement benefits", and the opinion does not address the specific terms of the property settlement agreement at issue and how those terms might be affected if the SSB lump sum payment were divided between the parties in lieu of the former spouse's military retirement pay. As noted above, this Court should decline the Petitioner's invitation to re-write the terms of the Kelsons' agreement so as to include VSI

benefits, a revision which would also affect specifically agreed to terms regarding the timing, amount, and duration of payments.

Due to the qualitative and practical differences in implementation, payment, "fringe benefits" and recall provisions, VSI benefits should not be construed as identical to retirement pay for purposes of this appeal. Instead, the parties' property settlement agreement should be enforced as written, and the decision of the First District should be affirmed.

III. STATE COURTS HAVE NO JURISDICTION TO CONSIDER VSI BENEFITS AS PROPERTY SUBJECT TO DIVISION IN A DISSOLUTION OF MARRIAGE PROCEEDING

As discussed above, this Court should recognize the significant and fundamental differences between VSI benefits and retirement pay, and decline to interpret a valid and binding property settlement agreement to include a benefit which not only was not contemplated by the parties, but which did not even exist when that agreement was executed. The remaining question, however, is whether the state court even had the authority to award the Petitioner an interest in Maj. Kelson's VSI benefits. As the First District Court of Appeal correctly held, under McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981); Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989); and the Uniformed Services Former Spouses Protection Act, 10 U.S.C. 1408 et seq., the state court had no such authority.

The United States Supreme Court in McCarty held that military retirement pay could not be considered "community

property" under California law. Noting the apparent Congressional intent that military retirement pay be used for the benefit of the retired member and his or her surviving spouse and dependent children, not former spouses, the Court reasoned that the overriding federal interest in preserving the member's entitlement to retirement pay preempted state courts from dividing that pay in dissolution proceedings. McCarty, supra at 2741.

McCarty was decided in 1981; in 1982, Congress responded to that decision by enacting the Uniformed Services Former Spouses Protection Act ["USFSPA"], codified as 10 U.S.C. 1408 et seq. Under the terms of USFSPA, state courts were granted limited authority to divide military retirement benefits in dissolution proceedings. Specifically, USFSPA speaks only to "Disposable retired or retainer pay", defined as "the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title)..." less certain deductions.

Simply under basic principles of statutory construction, the express terms specifically included in USFSPA must be considered to exclude all other benefits not mentioned; here, VSI benefits. The U.S. Supreme Court has also provided further guidance on the scope of McCarty as limited by the USFSPA. In Mansell v. Mansell, supra, the Court held that state courts have no authority over military benefits under USFSPA except as permitted under the "plain and precise language" of that statute. In other

words, if state court jurisdiction over a specific military benefit is not expressly granted under USFSPA, then state courts have no jurisdiction to divide that benefit in a dissolution proceeding. Based on the authority of McCarty, USFSPA, and Mansell, therefore, the First District found that it had no authority to enter an order including VSI benefits as marital property subject to division. Kelson, supra at 961.

Almost ten years after passage of USFSPA, in conjunction with the downsizing of the military, Congress adopted the Voluntary Separation Incentive Program under Section 1175. Congress chose to use precise language in Section 1175, characterizing VSI benefits as "a voluntary separation incentive". Although Congress easily could have done so, it did not state in Section 1175 that VSI benefits were to be considered as "retired or retainer pay" within the scope of the USFSPA; nor did it amend the USFSPA to include VSI benefits as those over which state courts have jurisdiction in dissolution actions. Further, Congress evidenced its intent that VSI benefits accrue to the benefit of the armed services member and not be subject to equitable distribution by specifically providing in Section 1175(f) that the member's "right to incentive payments shall not be transferable..." (emphasis supplied) except by testamentary devise.

As the First District in Kelson pointed out, there is a fundamental difference between "separation" and "retirement" pay. Kelson, supra at 961-962. Retirement pay is given to constitute

compensation for past services; hence the rationale for allowing the former spouse to share in the receipt of retirement payments. Conversely, "separation" pay, the term specifically utilized by Congress in Section 1175, is meant to compensate the service member for future lost earnings, and to ease the transition into civilian life. Thus, there is no rationale for awarding a portion of separation payments to a former spouse. Kelson, supra at 961-962. Based on this analysis, it was held in In Re Marriage of Kuzmiak, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (Cal.Dist.Ct.App.), cert. den. mem., 479 U.S. 885, 107 S.Ct. 276, 93 L.Ed.2d 252 (1986) that involuntary separation pay was not included within the scope of USFSPA and thus could not be subject to division by state courts in a dissolution proceeding. The same reasoning should apply to voluntary separation incentive payments under Section 1175.

The Petitioner claims that the First District erred in applying Kuzmiak to the facts of this case, but does not appear to dispute the holding in Kuzmiak. Thus, if Maj. Kelson had been involuntarily separated from the military prior to reaching retirement, Ms. Kelson would have received no share of any separation benefits. There is no logical reason why benefits payable upon voluntary separation should be treated differently than benefits payable upon involuntary separation. While the Petitioner argues that Congress distinguished VSI from other separation benefits by classifying VSI as "voluntary separation incentives", Initial Brief of Petitioner at p. 28 (emphasis in

original), this is a distinction without a difference. Clearly, there can be no "incentive" for an involuntary separation, but as Petitioner notes, both types of separation are effectuated in order to downsize the military forces.

As the foregoing demonstrates, it is clear that voluntary separation benefits under Section 1175 do not come within the scope of the limited jurisdiction given to state courts under USFSPA. In fact, this same principle was previously endorsed by the First District in McMahan v. McMahan, 567 So.2d 976 (Fla. 1st DCA 1990), where it was held that state courts could not go beyond the express and specific language of USFSPA in equitably dividing military benefits. Since USFSPA speaks only to retirement pay and not to VSI benefits, it follows that the Florida courts have no jurisdiction over VSI benefits when considering equitable distribution of marital property.

The Petitioner again argues that the holding of the Supreme Court of Montana in Blair, supra, should be adopted and that this Court should find jurisdiction over VSI benefits pursuant to USFSPA. For the reasons discussed in the preceding section of this brief, the Court should decline to follow Blair, and instead affirm the decision of the First District Court of Appeal.

IV. THE PROPERTY SETTLEMENT AGREEMENT IN THE INSTANT CASE SHOULD NOT BE MODIFIED TO INCLUDE VSI BENEFITS

As the foregoing discussion demonstrates, the Kelsons' property settlement agreement did not, expressly or impliedly, contemplate VSI benefits and should not be so construed.

Moreover, under McCarty, Mansell and USFSPA, the Florida courts are without jurisdiction in any event to consider VSI benefits as divisible marital property. The Petitioner, however, raises an equitable argument: because she would have been entitled to retirement pay, which it now appears that Maj. Kelson will not receive, she should be allowed to share in his VSI benefits. This argument is flawed both in law and in fact.

First, it is well settled that a property settlement agreement between parties to a dissolution of marriage proceeding may not be modified by the court absent fraud, duress, deceit, coercion, or overreaching. Petty v. Petty, 548 So.2d 793 (Fla. 1st DCA 1989); Bockoven v. Bockoven, 444 So.2d 30 (Fla. 5th DCA 1983). Here, there is no showing of any element sufficient to justify modification; instead, Ms. Kelson simply alleges the new circumstance that the VSI program was implemented following her execution of the agreement. Moreover, as the First District aptly noted, the agreement drafted by Ms. Kelson's attorney included no contingencies in the event that Maj. Kelson failed to become eligible for retirement pay. Kelson, supra at 960. Maj. Kelson did not (nor could he have) agree to remain in the military until retirement eligibility; nor is there any indication in the agreement of an intent that the agreed-upon payments would be made by Maj. Kelson whether he received retirement pay or not. Cf. Abernethy v. Fishkin, supra.

Judging the intent of the parties from the express terms of the agreement, as the trial court, the First District, and now

this Court must do, it is clear that the parties anticipated only that if Maj. Kelson received retirement benefits, he would make the agreed upon payments to Ms. Kelson according to the formula set forth in the document. It also must be presumed that the parties understood that other circumstances, including death or involuntary separation, would have defeated his right to such retirement pay, and the failure of Ms. Kelson's attorney to provide a contingency or alternative to retirement pay evidences her agreement that in such event she would receive nothing. That is exactly what happened in the instant case, with the difference that Maj. Kelson remained subject to recall to active duty and could still have become eligible for retirement pay. The property settlement agreement should be enforced according to its specific terms, and the decision of the First District Court of Appeal should be affirmed.

CONCLUSION

The property settlement agreement entered into between Mr. and Ms. Kelson specifically provides for division of Maj. Kelson's military retirement pay. It is clear that the parties did not contemplate VSI benefits as encompassed by that term; the VSI program was not implemented until the following year. Petitioner's argument that the term "retirement pay" as used in the agreement should now be construed to include VSI is belied by the many substantive and fundamental differences between VSI benefits and retirement pay. In fact, if the agreement is construed as Petitioner requests, the timing, amount, and duration of the payments to be made thereunder must be reviewed and modified to be consistent with the VSI program.

Further, state courts have no authority to order a division of VSI benefits in a dissolution proceeding. Congress, in enacting the VSI program, not only failed to include separation benefits within the scope of USFSPA, but went so far as to specifically provide that VSI benefits are non-transferrable except by testamentary devise.

Finally, the Petitioner's claims of equity fail to recognize that the property settlement agreement itself anticipated the very event about which she complains. The sanctity of that agreement should not be abridged.

The decision of the First District should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on Gordon Edward Welch, Esq., 201 E. Government Street, Pensacola, Florida 32501, by regular U.S. Mail, this 5th day of July, 1995.

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