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IN THE SUPREME COURT OF FLORIDA

MICHELLE M. KELSON,

Petitioner,

v.

Case No.: 85,246
District Court of Appeal
First District - No.: 93-03003

RUSSELL M. KELSON,

Respondent.

* * * *

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

* * * *

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PREFACE

In this brief, the Petitioner, Michelle M. Kelson, will be referred to as Mrs. Kelson, the Former Wife, or Petitioner, and the Respondent, Russell M. Kelson, will be referred to as Major Kelson, the Former Husband, or Respondent.

References to the record will be made by the letter "R" and the appropriate page number. References to the trial transcript will be made by the letter "T" and the appropriate page number. References to the Appendix to this brief will be made by the letter "A" and the appropriate page number.

STATEMENT OF THE FACTS AND THE CASE

The parties were married in July, 1976 and were divorced in June, 1990 in Milton, Florida. (R-7). The final judgment of dissolution incorporated a marital settlement agreement made by the parties on April 11, 1990 which provided that Mrs. Kelson would receive, as an equitable division of marital property pursuant to the Uniform Services Former Spouses Protection Act (USFSPA), Title 10 U.S.C. 1408 et seq., a share of Major Kelson's disposable military retired or retainer pay upon his retirement from the U. S. Marine Corps. (R-9, 10). The parties agreed that Mrs. Kelson's monthly share of the retired pay would be calculated as follows: one-half times the fraction created by the number of years the parties were married until their separation while the husband was on active duty (13.21 years), as the numerator, and the total number of years accrued "when the plan vests at time of spouse's retirement," as the denominator. (R-9,10). The agreement defined "disposable military retired/retainer pay" as "the Husband's gross military retired/retainer pay less only those amounts properly withheld for federal, state, and local income taxes." (R-11). The agreement also provided that "the sharing of the disposable military retired/retainer pay shall continue until the death of either party," that Major Kelson began "service creditable in determining his eligibility for retired/retainer pay with the United States Marine Corps on September 7, 1975," and that he was on active duty at the time of the agreement. (R-11).

Approximately two years later, on September 30, 1992, Major Kelson elected to leave active duty and receive certain benefits pursuant to the Voluntary Separation Incentive program under 10 U.S.C. §1175 (hereinafter referred to as "VSI"). (T-38). At that time, Major Kelson had served sixteen and a half years on active duty. (T-41). Prior to Major Kelson's resignation

on June 15, 1992, Mrs. Kelson filed a motion entitled "Motion to Amend and/or Modify Final Judgment of Dissolution of Marriage" alleging that, at the time of their agreement, the parties mutually and mistakenly believed Major Kelson would remain on active duty for at least twenty years and receive retired pay but, as a result of a reduction of the size of the military services, he had decided to retire early. (R-23). Mrs. Kelson asked the trial court to amend and/or modify the final judgment to include such information necessary to qualify it as a Qualified Domestic Relations Order as defined by 26 U.S.C §401 so she would receive a share of the VSI benefits elected by Major Kelson. (R-24).

At the final hearing on July 13, 1993, Major Kelson moved to dismiss Mrs. Kelson's motion, arguing as Florida courts do not have jurisdiction to modify property settlement agreements, and as the parties' agreement awarding Mrs. Kelson an interest in his military retirement pay was a property settlement agreement, the court did not have jurisdiction to modify the agreement and award her an interest in his VSI benefits. (R-70). The trial court denied the Motion to Dismiss, ruling that Mrs. Kelson's motion stated a cause of action and that "the issue for the court to determine is whether or not what [Major Kelson] is getting is retired and/or retainer pay." (T-14,15).

Mrs. Kelson testified that at the time of the divorce, neither party was aware of any VSI program and they understood that Major Kelson could not retire with less than twenty years of active duty and receive retirement pay. (T-27). She testified that sometime after the dissolution, Major Kelson told her he was going to volunteer to retire early and that she would receive no share of his retirement benefits. (T-27). Mrs. Kelson testified that if he had remained on active duty for twenty years and retired at his rank of major, he would have received annual military

retirement pay of $22,435 for life and which, less her 33% share under the agreement, would have left him gross annual pay of $15,031. (T-34). She further testified he would receive $18,509 a year for approximately thirty-four years under the VSI program. (T-34).

Major Kelson testified that when he elected to leave the service under the VSI program in September, 1992, he had served sixteen and a half years on active duty. (T-41). He said that he had already received one lump sum payment of $18,193.59 and would receive a annual payment in that same amount for thirty-two years. (T-41,42). He testified that the formula used in computing his benefits under VSI was:

> 2.5% of the separating member's final monthly basic pay multiplied by 12, and then multiplied again by the member's years of active duty service. These payments are made each year for two times the number of years of service. (T-43).

Major Kelson testified he volunteered to leave the military because he believed he might be passed over for promotion a second time because of the kind of plane he was flying and then be required by the military to separate from the service. (T-50). He weighed that consideration against taking orders to Japan for three years and being separated from his children. (T-51). He also said that because he was currently qualified as a DC9 pilot, he believed that was "a pretty good ticket to get out with to try to earn civilian money." (T-51). He admitted he had not been told he would be discharged if he did not take VSI. (T-51).

Major Kelson testified that under the VSI program, he was entitled to medical military benefits for only 120 days following discharge, commissary and exchange privileges for only two years, that he would not get cost-of-living increases and would have to remain on inactive reserves throughout the period he received VSI benefits. (T-51,52). He acknowledged he could be invited to return to active duty and complete twenty years and receive regular retirement

benefits although he would have to reimburse whatever VSI payments he had received. (T-54). Finally, his Certificate of Release From Active Duty, Form #DD214, states that he "residgned [sic] to accept V.S.I." (R-105).

Chief Daniel Thomas O'Connor, an enlisted man responsible for the administration of personnel and pay related matters at Major Kelson's command, testified that Major Kelson would receive no further VSI payments after thirty-two years. (T-64). He also testified that if Major Kelson had retired after twenty years, he would have had no reserve obligation or be subject to recall, unlike the VSI program where he is obligated to remain on either active or inactive reserves and be subject to recall. (T-66,67).

Major Kelson offered the telephone deposition of John Early Hairston, II, the Head of the Separation Section, Headquarters, United States Marine Corps, Arlington, Virginia. (R-104, p. 5). Mr. Hairston testified it was his section's policy not to treat VSI as retirement pay. (R-104, p. 7). He acknowledged that VSI statute does not contain any language indicating VSI benefits are not subject to equitable division by state courts. (R-104, p. 12). He further acknowledged that military retired and retainer pay is "based on ... pretty much the same formula as the VSI program" (R-104, p. 13) and that VSI pay and retired pay are based upon the same premise, that is, the number of years the member has served on active duty. (R-104, p. 14).

Major Kelson introduced the telephone deposition of Chuck M. Stinger, Assistant General Counsel of the Defense Finance and Accounting Center. (R-103, p. 6). Mr. Stinger testified the VSI program is:

> ...a voluntary separation incentive program that Congress enacted in 1991 along with another program to try to reduce the number of military members on active duty. It's an incentive program to draw down the total population of the military service...

(R-103, p. 8). He further testified that VSI benefits are paid from a separate fund (R-103, p. 9) and that the formula used in computing benefits under VSI is two and a half percent of the member's monthly base pay times twelve times the number of years of active service, which amount is paid for twice the number of years of service. (R-103, p. 17). He testified that the formula used for computing monthly retired pay is two and a half percent of the member's monthly base pay times the number of years of active duty not to exceed thirty years (R-103, p. 16) and a member must serve a minimum of twenty years to receive retired pay. (R-103, p. 14). He stated that both retired pay and VSI pay are taxable (R-103, p. 14), that any receipt of disability pay is offset against both VSI and retired pay (R-15, p. 15), and that the same board of actuaries administer the funds for retired pay and VSI pay. (R-103, p. 18). He testified it is the position of the legal staff of the Defense Finance Accounting Service that VSI is not considered to be a retirement or an asset that is divisible by a court and the authority for such position is:

> ...basically along the same line of cases that the Supreme Court has entered in the McCarty decision and its predecessors...And to summarize, it is basically that unless-if it's a federal benefit - that unless Congress has authorized it to be treated by the state in a particular manner, than [sic] the states are precluded by the Supremacy Clause in treating it as an asset of the military union [sic] or what have you."

(R-103, p. 19).

Finally, contained in the record is a Department of Defense pamphlet entitled "Voluntary Separation Incentive, VSI/SSB" which states that "the treatment of VSI or SSB is not dictated

by federal law. It will be up to the state courts to rule on the divisibility of these incentives." (R-60).

At the conclusion of the hearing, the trial court stated:

> Certainly from [Mrs. Kelson's] side of the table...it's an equitable argument; and [Major Kelson's] side of the table is more of a legal argument on the jurisdictional grounds. What--the real issue is whether or not the VSI is in effect retired and/or retainer pay. (T-87).

The trial found that the VSI program differed from the retired pay program as follows: VSI payments end after 32 years whereas retired pay is for life; VSI installments unpaid at the member's death are payable to the member's beneficiaries whereas retired pay ends at the time death unless the member has elected survivor benefit coverage; the right to receive VSI payments are not transferrable; medical care privileges and commissary privileges are limited to 120 days and two years respectively under the VSI program whereas they are for life in the retired pay program; there are no cost of living adjustments to VSI pay but there are to retired pay; there is a reserve requirement in the VSI program but not in the retired pay program; the member is subject to recall to active duty in the VSI program but not the retired pay program. (A-1-2,3,4). Noting also that VSI statute does not state that VSI pay be treated in the same manner as retired pay, the trial court concluded that VSI pay is not encompassed within the definition of retired pay in the USFSPA. (A-1-4).

Based upon these differences, the trial court denied Mrs. Kelson's motion and said:

> The Court therefore reluctantly finds that VSI is not retired/retainer pay as defined under Federal law. Furthermore, the Court lacks jurisdiction to modify the Agreement to provide for a division of the former husband's VSI as opposed to Retired/Retainer Pay.

(A-1-4).

Mrs. Kelson timely filed a Motion for Rehearing in which she argued that the parties had clearly intended she share in any funds paid to Major Kelson upon his separation from the military, that he had effectively elected to retire early and receive VSI benefits in lieu of regular retired pay, that the retired pay and VSI programs were substantially similar and that it would inequitable to deny her a share of the VSI payments in light of the parties' agreement. (R-85,86,87). The trial court denied the motion, finding it did not raise any issues not previously considered by it. (R-89).

Mrs. Kelson timely appealed to the First District Court of Appeal on September 16, 1993. (R-90). After considering the briefs of the parties, the First District Court affirmed the trial court and denied Mrs. Kelson's appeal on December 7, 1994. The First District held that federal law preempts state law with regard to the divisibility of military benefits and that as the USFSPA only expressly authorizes state courts to divide military retired pay, state courts do not have the authority to divide VSI benefits. Kelson v. Kelson, 647 So.2d 959, 961 (A-2-3). The First District further held that VSI benefits are not the same as or equivalent to retired pay and, therefore, the marital settlement agreement could not be interpreted as encompassing the VSI benefits under the term "retired/retainer pay." Id. at 962 (A-2-4).

Mrs. Kelson timely filed in the First District Court a Motion for Rehearing, a Motion for Rehearing En Banc, and a Suggestion of Direct Conflict or, in the Alternative, a Question of Great Public Importance, all of which were denied on January 26, 1995. (A-3). Mrs. Kelson's Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on February 24, 1995. (A-4). In her jurisdiction brief, Mrs. Kelson argued that the First District decision expressly and directly conflicts with Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994),

wherein the Fifth District Court of Appeals decided that a former wife was entitled to share in VSI benefits elected by her former husband after the parties' divorce but before he attained twenty years of military service pursuant to the parties' marital settlement agreement that she receive a share of his military retired pay upon retirement. Accordingly, Mrs. Kelson requested this Court grant discretionary review pursuant to Art. V § 3(b)(3) Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv). This Court granted discretionary review on May 12, 1995.

SUMMARY OF THE ARGUMENT

Mrs. Kelson is entitled to and should receive a share of the VSI pay received by Major Kelson because the parties had agreed in their marital settlement agreement she would receive a share of his retired pay upon his retirement from the military. Major Kelson did not receive such retired pay **only** because he subsequently voluntarily resigned from the military before he was entitled to receive retired pay, and received VSI pay in exchange for such early retirement.

First, the First District Court wrongly concluded that, under McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed.2d 989 (1981), and Mansell v. Mansell, 490 U.S. 581 (1989), 109 S. Ct. 2023, 104 L.Ed.2d 675, state courts are preempted from dividing VSI benefits. With the enactment of the Uniform Services Former Spouse Protection Act (USFSPA), Title 10 U.S.C. 1408, Congress nullified McCarty and made clear that former spouses are to share in service members' retirement benefits. Contrary to the interpretation of the First District, Mansell shows that since Congress did not positively exclude VSI benefits from division by state courts, VSI benefits are divisible by state courts. Even if McCarty was not entirely nullified by the USFSPA, the division of VSI benefits would not cause grave harm to clear and substantial federal interests and, therefore, state courts are not preempted from dividing such benefits.

Secondly, the First District Court mischaracterized VSI benefits as compensation for future lost wages and the separate property of Major Kelson. A review of VSI pay, retired pay, and involuntary separation pay reveals that VSI pay is the equivalent of retired pay, or at least is paid in lieu of retired pay, and should be divided between the parties in the same fashion as they had agreed to divide retired pay.

Third, the decision of the First District Court conflicts with the decision of the Fifth District Court in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994), and Abernethy directly supports Mrs. Kelson's contention that she should share in the VSI benefits elected by Major Kelson.

Further authority for Mrs. Kelson's position is the recent decision of the Supreme Court of Montana in Blair v. Blair, 1995 WL 30240 (Mont.)(A-5), in which that Court awarded the former wife a share of Special Separation Benefits (SSB) under 10 U.S.C. 1174a, pursuant to the parties' prior agreement that she receive a share of her former husband's retired pay upon his retirement from the military. SSB benefits are essentially the same as VSI benefits except they are paid in one lump sum. This Court should join the Montana Supreme Court in holding that military voluntary separation incentives under the VSI and SSB programs are early retirement benefits and are marital property subject to division by state courts.

Lastly, the decision under consideration at bar is at odds with a fair and reasonable interpretation of the parties' agreement and has resulted in a truly inequitable and unjust outcome. When they divorced, the parties fully expected Major Kelson would remain on active duty and complete twenty years of service and receive retired pay in which they agreed Mrs. Kelson would share. Because the VSI program did not then exist, if Major Kelson had voluntarily left active duty before serving twenty years, he would not have been entitled to any pay, whether retired or otherwise, and, consequently, there would have been nothing in which Mrs. Kelson would be entitled to share. The decision of the First District Court effectively permits Major Kelson to unilaterally divest Mrs. Kelson of her rightful share of the retired pay he would have received had he remained on active duty for twenty years simply by volunteering

to retire early and receive payments under the VSI program which was enacted several years after the parties divorced. Accordingly, this Court should quash the decision of the First District below with directions that on remand the trial court should be ordered to award Mrs. Kelson a share of Major Kelson's VSI benefits according to the formula agreed upon by the parties in their marital settlement agreement.

ARGUMENT

I. WHETHER A FORMER WIFE IS ENTITLED TO RECEIVE A SHARE OF HER FORMER HUSBAND'S MILITARY VSI BENEFITS WHERE THE PARTIES HAD PREVIOUSLY AGREED TO EQUITABLY DIVIDE THE FORMER HUSBAND'S MILITARY RETIRED PAY BUT THE FORMER HUSBAND SUBSEQUENTLY ELECTED TO RETIRE EARLY AND RECEIVE VSI BENEFITS RATHER THAN REMAIN ON ACTIVE DUTY AND RECEIVE RETIRED PAY.

A. INTRODUCTION.

When the parties divorced in June, 1990, they agreed Mrs. Kelson would receive, as an equitable division of marital property, a share of Major Kelson's retired pay after he had completed twenty years of active duty in the Marine Corps and began to receive retired pay. (R-9). The parties agreed to divide the retired pay according to a formula which essentially entitled Mrs. Kelson to a share of the retired pay earned by Major Kelson during the marriage. (R-9,10). After completing over 16 years of service, Major Kelson voluntarily separated from the military in September, 1992, pursuant to the VSI program, and received the first of 32 annual payments of $18,193.59 to which he was entitled under that program. (T-41, 42). Mrs. Kelson filed a "Motion to Amend and/or Modify Final Judgment of Dissolution of Marriage" essentially requesting that the trial court determine whether she was entitled to receive a share of the VSI benefits pursuant to the parties' agreement and, if so, enforce her right to such share. (R-23,24). After hearing, the trial court entered an order finding that VSI benefits are not retired pay under federal law, that it did not have jurisdiction to modify the parties' agreement to divide the VSI benefits between them and thus denied Mrs. Kelson's motion. Mrs. Kelson appealed to the First District Court of Appeals and that Court affirmed the trial court and denied the appeal. Kelson v. Kelson, 647 So.2d 959, 962 (Fla. 1st DCA 1994) (A-2-4).

Voluntary separation incentives are payments offered to military service personnel to induce such personnel to leave the military on a voluntary basis rather than run the risk of being involuntarily separated due to reductions in the size of the military services. H. R. Rep. 665, 101st Cong. 2d Sess, reprinted in 1991 U.S. Code & Cong. & Admin. News at 1112. There were two types of voluntary separation incentive benefits authorized by federal law at the time of Major Kelson's resignation: Special Separation Benefits (SSB) and Voluntary Separation Incentive (VSI) benefits. 10 U.S.C. §1174a, known as the Special Separation Benefits program, enacted by Congress simultaneously with the Voluntary Separation Incentive program, 10 U.S.C. §1175, in December, 1991, provides:

§ 1174a. Special separation benefits programs

(a) **Requirement for programs**. The Secretary of each military department shall carry out a special separation benefits program under this section. An eligible member of the armed forces may request separation under the program. The request shall be subject to approval of the Secretary.

(b) **Benefits**. Upon the approval of the request of an eligible member, the member shall -

(1) be released from active duty...or discharged, as the case may be; and

(2) be entitled to -

(A) separation pay equal to 15 percent of the product of (i) the member's years of active service, and (ii) 12 times the monthly basic pay to which the member is entitled at the time of his discharge or release from active duty; and

(B) the same benefits and services as are provided....for members of the armed forces who are involuntarily separated within the meaning of section 1141 of this title.

(c) **Eligibility**. Subject to subsections (d) and (e), a member of an armed force is eligible for voluntary separation under a program established for that armed force pursuant to this section if the member--

(1) has not been approved for payment of a voluntary separation incentive under section 1175 of this title;

(2) has served on active duty...for more than 6 years before December 5, 1991;

(3) has served on active duty...for not more than 20 years;

(4) has served at least 5 years of continuous active duty...immediately preceding the date of the member's separation from active duty; and

(5) meets such other requirements as the Secretary may prescribe, which may include requirements relating to--

(A) years of service;
(B) skill of rating;
(C) grade or rank; and
(D) remaining period of obligated service.

(d) [omitted]

(e) **Applicability subject to needs of service** -

(1) Subject to paragraphs (2) and (3), the Secretary concerned may limit the applicability of a program under this section to any category of personnel defined by the Secretary in order to meet a need of the armed forces under the Secretary's jurisdiction to reduce the number of members in certain grades, the number of members who have completed a certain number of years of active service, or the number of members who possess certain military skills or are serving in designated competitive categories.

(2) Any category prescribed by the Secretary concerned for regular officers, regular enlisted members, or other members pursuant to paragraph (1) shall be consistent with the categories applicable...under the voluntary separation incentive program under section 1175 of this title or any other program established by law or by that Secretary for the involuntary separation of such members in the administration of a reduction in force.

(3) A member of the armed forces offered a voluntary separation incentive under section 1175 of this title shall also be offered the opportunity to request separation under a program established pursuant to this section...

(f) [Omitted].
(g) [Omitted].
(h) [Omitted].

The payments which Major Kelson receives are voluntary separation benefits authorized by the VSI program, 10 U.S.C. §1175, which provides, in relevant part, as follows:

§1175. Voluntary separation incentive.

(a) Consistent with this section and the availability of appropriations for this purpose, the Secretary of Defense may provide a financial incentive to members of the armed forces described in subsection (b) for voluntary appointment, enlistment, or transfer to a reserve component...

(b) The Secretary of Defense may provide the incentive...if the member--

(1) has served on active duty...for more than 6 but less than 20 years;

(2) has served at least 5 years of continuous active duty...immediately preceding the date of separation;

(3) meets such other requirements as the Secretary may prescribe from time to time, which may include requirements relating to--

(A) years of service;
(B) skill or rating;
(C) grade or rank; and
(D) remaining period of obligated service.

(c) A member of the armed forces offered a voluntary separation incentive under this section shall be offered the opportunity to request separation under a program established pursuant to section 1174a of this title.

(d) [omitted]

(e)(1) The annual payment of the incentive shall equal 2.5 percent of the monthly basic pay the member receives...multiplied by twelve and multiplied

again by the member's years of service. The annual payment will be made for a period equal to the number of years that is equal to twice the number of years of service of the member.

(2) A member entitled to voluntary separation incentive and who qualifies for retired or retainer pay under this title shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received the voluntary separation incentive until the total amount deducted equals the total amount of voluntary separation incentive received.

(3) A member who has received the voluntary separation incentive and who qualifies for retired or retainer pay under this title shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received the voluntary separation incentive until the total amount deducted equals the total amount of the voluntary separation incentive received. If the member elected to have a reduction in the voluntary separation incentive for any period pursuant to paragraph (2), the deduction required under the preceding sentence shall be reduced accordingly.

(4) A member who is receiving voluntary separation incentive payments shall not be deprived of this incentive by reason of entitlement to disability compensation under the laws administered by the Department of Veterans Affairs, but there shall be deducted from voluntary separation incentive payments an amount equal to the amount of any such disability compensation concurrently received. Notwithstanding the preceding sentence, no deduction may be made from voluntary separation incentive payments for any disability compensation received because of an earlier period of active duty if the voluntary separation incentive is received because of discharge or release from a later period of active duty.

(5) [omitted]

(f) The member's right to incentive payments shall not be transferable, except that the member may designate beneficiaries to receive the payments in the event of the member's death.

(g) [omitted]
(h) [omitted]
(i) [omitted]
(j) [omitted]

The SSB and VSI programs are in all respects identical with one exception: the SSB program pays members benefits in the form of a one-time, lump-sum payment, while the VSI program pays members benefits in the form of an annuity for a period of years. The amount payable under both of the voluntary separation programs are calculated based on a percentage of the product of the number of years of active military service -- multiplied by -- the member's base pay at the time of separation. **Compare** Title 10 U.S.C. §1174a(b)(2)(A) **with** Title 10 U.S.C. §1175(e)(1).

B. THE FIRST DISTRICT COURT ERRED IN CONCLUDING THAT STATE COURTS ARE PRECLUDED FROM DIVIDING VSI PAYMENTS UNDER McCARTY V. McCARTY AND MANSELL V. MANSELL.

In its order denying Mrs. Kelson's motion, the trial court cited the U.S. Supreme Court decision in McCarty v. McCarty, 453 U.S. 210 (1981), and appeared to hold that McCarty precludes state courts from dividing VSI as McCarty once precluded the division of nondisability retirement benefits prior to the enactment of the Uniform Services Former Spouse Protection Act of September 8, 1982, at 10 U.S.C. §1408 (hereinafter referred to as the "USFSPA"). On appeal, Mrs. Kelson contended that the USFSPA nullified McCarty and, additionally, even if it did not entirely nullify McCarty, under the analysis adopted by the Supreme Court in Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979), state courts are not precluded from dividing VSI benefits as marital property. In its opinion affirming the trial court, the First District Court stated:

> In light of McCarty, Congress adopted provisions of USFSPA to provide specifically limited authority for state courts to make awards of the expressly described retirement benefits. However, it is clear that, to the extent that a benefit falls outside the specifications of the USFSPA, McCarty is still valid law. The United States Supreme Court said so expressly in Mansell v. Mansell, 490 U.S. 581 (1989) (state court has no authority to treat military retired pay as

> community property except to the extent permitted under the "plain and precise language" of the USFSPA). The USFSPA permits the division in dissolution proceedings of the "disposable retired or retainer pay" of a member of the military services. It does not permit division of retired pay to the extent that the benefits are reduced by non-taxable disability benefits, because that is specifically excluded from the definition of "disposable retired or retainer pay." Id. at 594-95; See also McMahan v. McMahan, 567 So. 2d 976, 979 (Fla. 1st DCA 1990) Congressional grant of authority to the states to equitably divide military retirement pay was explicitly limited to the plain and precise language of the USFSPA and state courts cannot go beyond what the statute specifies.

Kelson at 961. (A-2-3)

The First District Court then proceeded with an examination of VSI benefits and found that neither the USFSPA nor the VSI Act authorize the division of separation benefits or VSI benefits. The court found further that VSI benefits are "voluntary separation benefits" rather than retirement or early retirement benefits. The court then concluded that VSI benefits are not encompassed by the parties' agreement to equitably divide Major Kelson's retired pay and Mrs. Kelson was therefore not entitled to any interest in such benefits. Kelson at 962 (A-2-4).

In regard to the divisibility of VSI benefits by state courts, the reasoning of the First District Court appears to be as follows: that McCarty holds that state courts may divide military benefits only if federal law specifically authorizes them to do so, that neither the USFSPA nor the VSI act specifically authorize state courts to divide separation benefits or VSI benefits and, therefore, unless VSI benefits are retirement benefits which the USFSPA expressly authorizes state courts to divide, the state courts cannot divide such benefits. A careful examination of McCarty and Mansell, however, shows this reasoning to be incorrect and that the First District Court misapprehended the thrust of the Mansell decision and misapplied it and McCarty to the case at bar.

In its 1981 decision in McCarty, the Supreme Court reversed and remanded a California court's division of military retired pay between spouses in a divorce, holding that federal law precluded state courts from dividing nondisability military retired pay pursuant to state community property laws. Id. at 210. Citing its decision in Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, (1979), the Court began its analysis in McCarty by recognizing that the "...whole subject of the domestic relations of husband and wife...belongs to the laws of the States and not to the laws of the United States..." and, thus, "...state family and family-property law must do 'major damage to 'clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." Id. at 220. The Court found that the military retirement pay system was designed to accomplish two major goals: to provide for the retired service member and to meet the personnel management needs of the armed forces. Id. at 232. The Court found that retirement pay was intended for the military member alone for several reasons, including the fact that it was left to the military member whether to provide for his surviving spouse by electing an annuity pursuant to the Survivor Benefit Plan (SBP). Further, only widows, not former spouses, were eligible to receive SBP benefits, which the Court took to indicate that Congress' concern was for widows, not former spouses. Id. at 226, 228. It also found that the military retirement system was intended to serve as an inducement to enlistment and re-enlistment and to ensure 'youthful and vigorous' military forces." Id. at 234. The Court reasoned that the service members would be less likely to reenlist if they knew that retired pay could be divided by a state divorce court. Id. at 234. It further reasoned that the goal of a "youthful military" would be undermined if military retirement pay could be divided between spouses because it would discourage the service member from retiring. Id. at 235. The Court

concluded that the division of military nondisability retirement pay by state courts threatened grave harm to these goals and held that state courts were preempted under the Supremacy Clause from dividing such benefits. Id. at 235.

With the enactment of the USFSPA in September, 1982, Congress emphatically responded to McCarty. The Act made it absolutely clear that one of Congress' paramount concerns was, in fact, the protection of a former spouse's interest in retirement benefits earned during his or her marriage to a military member and ensured that, if permitted under the laws of the state where the parties' marriage was dissolved, such interest would be recognized and enforced under federal law to the maximum extent possible. The USFSPA specifically recognized the propriety of state court division of nondisability retired pay either as property or as alimony. 10 U.S.C. §1408(c)(1). It established a mechanism enabling a former spouse to receive direct payment of his or her share of military retirement pay from the appropriate military finance and accounting center. 10 U.S.C. §1408(d)(2). Finally, it empowered former spouses to enforce state court orders for spousal and child support and the equitable division of property against military retired/retainer pay. 10 U.S.C. §1408 (d)(1).

Following the enactment of the USFSPA, in Mansell v. Mansell, 490 U.S. 581 (1989), the Supreme Court had to decide whether state courts, consistent with the USFSPA, could treat military retirement pay waived by the retiree in order to receive veterans' disability benefits as property divisible upon divorce. The Court first summarized its holding in McCarty:

> [In McCarty] we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. (cite omitted). We reasoned that Congress intended that military retirement pay reach the veteran and no one else. (cite omitted). In reaching this conclusion, we relied on Congress'

> refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. (cites omitted). Finally, noting the distressed plight of many former spouses of military members, we observed that Congress was free to change the statutory framework. (cite omitted).
>
> In direct response to McCarty, Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. (cite omitted).

Mansell at 584.

The Court then noted that the USFSPA defined disposable retired and retainer pay as the "total monthly retired or retainer pay to which a military member is entitled," less certain deductions, including a deduction for any amounts waived in order to receive disability benefits. Id. at 594. The Court then stated:

> Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. See, e.g., Rose v. Rose, 481 U.S. 619, 628, 94 L.Ed.2d 599, 107 S. Ct. 2029 (1987); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 59 L.Ed. 1, 99 S.Ct. 802 (1979). Thus we have held that we will not find pre-emption absent evidence that it is "'positively required by direct enactment.'" Hisquierdo, supra, at 581, 59 L.Ed.2d 1, 99 S.Ct. 802 (quoting Wetmore v. Markow, 196 U.S. 68, 77, 49 L.Ed. 390, 25 S.Ct. 172 (1904). The instant case, however, presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.

Id. at 587.

The Court then held that because the Congress had specifically and expressly excluded veteran's disability benefits from its definition of disposable retired and retainer pay in the USFSPA, the statute did not grant state courts the power to divide such disability benefits in divorce. Id. at 595.

It is respectfully submitted, contrary to the interpretation of the First District Court in the case at bar, that Mansell shows McCarty does not stand for the proposition that state courts are

preempted from dividing military benefits unless federal law specifically authorizes them to divide such benefits. Rather, Mansell makes clear that, under the analysis required by Hisquierdo, state law in domestic relations matters is preempted by federal law only if preemption is positively required by direct enactment. In regard to the disability benefits which were at issue in Mansell, the USFSPA specifically and expressly excluded such benefits in defining disposable retirement pay. Under Hisquierdo, then, the pre-emption of state law as to the division of disability benefits was positively required by the statute. In regard to the VSI benefits which are at issue in this appeal, federal preemption **is not** positively required by either the USFSPA or the VSI act. The USFSPA does not contain any reference to separation pay or VSI pay, not to mention any specific exclusion of separation pay or VSI pay from retired pay. In addition, the VSI statute does not contain any language indicating that Congress intended to prohibit the state courts from dividing such benefits in a divorce. Therefore, under Mansell and Hisquierdo, as pre-emption is not "positively required by direct enactment" in either the USFSPA or the VSI statute, state courts do have the authority to divide VSI benefits in divorce.

Assuming arguendo that the First District Court is correct and McCarty is still "valid law," then this Court must determine, applying the analysis required by Hisquierdo, whether the division of VSI benefits by the courts of this state would cause grave harm to clear and substantial federal interests. The legislative history states that the VSI/SSB program was authorized in order"...to offer a voluntary separation incentive in the form of an annuity to active duty personnel who elect to voluntarily separate in order to avoid the possibility of facing election for involuntary separation or denial of reenlistment." House Conf. Rep. No. 102-311,

reported at 101st Cong. 2d Sess, reprinted in 1991 U.S. Code & Cong. & Admin. News at 1112. It further states:

> The conferees take this action because of their concern over the effect of strength reductions during the next few years on our men and women in uniform **and their families**. The conferees especially recognize that this drawdown in strength is different from previous drawdowns because it affects people who are a product of an all volunteer force. Therefore, the conferees would provide these temporary authorities as tools to assist the military Services in selectively reducing, on a voluntary basis, that portion of career personnel inventory that is not retirement eligible. (emphasis added).

Id. at 1112.

In essence, the VSI and SSB programs offered an early retirement option to certain active duty personnel who might otherwise face involuntary separation before reaching retirement age due to the drawdown in the number of military personnel. As support for this, undersigned counsel cites Elzie v. Aspin, 841 F.Supp. 439 (D.D.C. 1993), in which the federal district court stated:

> In 1991, Congress established the Voluntary Separation Incentive and Special Separation Benefit ("VSI/SSB") program designed to reduce the size of the armed forces in keeping with the perceived diminished threat to United States' interests posed by the "new world order." The VSI/SSB program provides, to those members of the armed forces who qualify, incentive payments and medical and veterans benefits as inducements to elect early retirement.

Id. at 440.

In addition, as indicated by the portion of the legislative history emphasized above, VSI/SSB benefits were clearly intended for the families of military members, not just the military member alone.

In light of the legislative history of the VSI/SSB programs, undersigned counsel is unable to find any clear and substantial federal interest which would be caused grave harm by the

division of VSI or SSB benefits by state courts. In fact, the Department of Defense itself has interpreted payments under the VSI and SSB programs to be subject to state marital property laws in its official brochure concerning the VSI/SSB programs:

> [Q.] How will state courts treat VSI/SSB in a divorce settlement?
>
> [A.] The treatment of VSI or SSB is not dictated by Federal law. It will be up to the state courts to rule on the divisibility of these incentives.

(R-60).

With this Court's decision in Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986) and then the Florida Legislature's enactment of §61.075, Fla. Stat. (Supp. 1988) and §61.076, Fla.Stat. (Supp. 1988), it is the clearly established policy of this state that retirement benefits, including military retirement benefits, whether vested or non-vested, are subject to division as part of any equitable distribution of assets, at least to the extent such benefits are earned during the marriage. Kluessner v. Klusessner, 508 So.2d 775 (Fla. 1st DCA 1987). On the other hand, neither the USFSPA nor the VSI act contain any positive indication of any Congressional intent to preempt or preclude state courts from dividing VSI benefits in divorce. Further, there are no clear and substantial federal interests which would suffer major harm if VSI benefits are divided by state courts. Accordingly, it is submitted that the courts of this state do have the authority to divide VSI and SSB benefits.

C. THE FIRST DISTRICT COURT ERRED IN CONCLUDING THAT VSI PAYMENTS ARE NOT RETIREMENT BENEFITS OR BENEFITS RECEIVED IN LIEU OF RETIREMENT BENEFITS.

In affirming the trial court and denying Mrs. Kelson an interest in Major Kelson's VSI benefits, the First District Court found that VSI benefits, like involuntary separation benefits

under 10 U.S.C. §1174, are not retirement benefits. Citing In re the Marriage of Kuzmiak, 176 Cal. App. 3rd 1152, 222 Cal. Rptr. 644 (2nd Dist. 1986), cert den. 93 L.Ed. 2d 252, 107 S. Ct. 276, it stated:

> ...the purposes of separation and retired pay are different. Separation pay is the personal property of the service member, for its purpose is to ease the transition to civilian life. Retired pay, on the other hand, is a contractual obligation designed to constitute compensation for past services rendered. See also Diffenderfer v. Diffenderfer, 491 So. 2d 265, 267 (Fla. 1986) (pension plan is contractual right of value obtained during marriage). When those services were rendered, and the compensation "earned" during the marriage, there is a rationale for awarding a percentage of a pension to a former spouse which is not present in the distribution of separation pay. Applying this rationale, the Kuzmiak court held that involuntary separation pay was not encompassed by the provisions of the USFSPA. (cite omitted). We believe the same result must apply to voluntary separation pay.

Kelson at 961 (A-2-3).

In Kuzmiak, a 1986 decision, a California appellate court reversed a trial court's award to a former wife of a property interest in $30,000 paid to the former husband as involuntary separation pay under 10 U.S.C. §1174. The wife had filed for divorce in June, 1980, after fourteen years of marriage during which the husband had served on active duty in the Air Force. The parties were divorced in May, 1981 and between that time and the time the trial court decided the property issues almost two and a half years later, the former husband was involuntarily separated from active duty. The trial court divided the separation pay between the parties as a payment in lieu of retirement and the former husband appealed, arguing that it was his separate property under McCarty and the USFSPA, that it was essentially a severance benefit which compensated him for future lost wages, and, therefore, was his separate property. Kuzmiak at 645.

After reviewing the USFSPA and 10 U.S.C. §1174, the appellate court concluded that involuntary separation pay was not encompassed within the meaning of 'disposable retired or retainer pay' under the USFSPA for the following reasons: first, the USFSPA defines disposable retired pay as a monthly payment, whereas involuntary separation pay is a one-time payment; and second, the USFSPA does not mention separation pay or include separation pay in the definition of retired pay whereas the severance benefit under 10 U.S.C §1174 is described as "separation pay." Id. at 646. The appellate court also concluded that involuntary separation pay was not compensation for past services because the right to such pay occurs only when the member is involuntarily discharged and because the legislative history of the statute states it was intended to provide "readjustment pay to ease the member's reentry into civilian life." Id. at 636. The court then cited several California decisions for the proposition that if the purpose of severance or termination benefits is to compensate a spouse for his past services, then they constitute community property to the extent such services were performed during the marriage, whereas if their purpose is to compensate a spouse for future lost wages, then they constitute his separate property if he is not married at the time he receives them. The court then held:

> We are satisfied that Congress did not intend separation pay to be compensation for past services, and that under the reasoning of [the cited California cases], the payment is the separate property of the service member.

Id. at 647.

Applying this same analysis, the First District Court concluded in the instant case that VSI benefits are not retirement benefits or benefits elected in lieu of retirement benefits. Noting federal statutes governing the armed forces make numerous references to "retirement" as distinguished from "separation" and that Congress used the word "separation" and not

"retirement" in referring to VSI benefits, the First District stated:

> Under traditional rules of statutory construction, we are constrained to assume that Congress deliberately used the word "separation" and not "retirement" when creating VSI benefits, and further that separation benefits were deliberately excluded from the reach of the USFSPA by the limitation of its reach to "disposable retired or retainer" as defined in 10 U.S.C.A. §1408(a)(4). See Russello v. U.S., 464 U.S. 16, 12 (1983). This conclusion is supported by the fact that Congress not only failed to expressly incorporate VSI benefits within the USFSPA, but specifically provided that VSI benefits are not transferrable during the life of the recipient. 10 U.S.C.A. §1175 (f)(West 1994). Accordingly, we conclude that VSI benefits are not "retired pay" and affirm the decision of the trial court that the marital settlement agreement between Major and Mrs. Kelson cannot be interpreted as encompassing the VSI benefits under the term "retired/retainer pay."

Kelson at 962 (A-2-4).

In reaching this conclusion, the First District Court overlooks several important facts. First, in creating the VSI statute, Congress distinguished VSI benefits from all other "separation" benefits by referring to them as "voluntary separation **incentives**." It is clear from the legislative history that VSI benefits were intended to induce or be an incentive for military members to voluntarily separate from the military rather than remain on active duty until retirement. In effect, they are incentives to retire early. Therefore, although the Congress did use the term "separation" rather than "retirement" in describing VSI benefits, the purpose and effect of VSI benefits truly distinguish them from involuntary separation benefits.

Second, the argument that separation benefits were "deliberately excluded from the reach of the USFSPA by the limitation of its reach to 'disposable retired or retainer pay'" overlooks the fact that the USFSPA was created in direct response to the holding in McCarty that state courts were preempted from dividing military retirement benefits. McCarty did not address the divisibility of separation benefits and, therefore, the Congress did not have reason to address that

issue in the USFSPA. Thus, the fact that the USFSPA says nothing about separation benefits does not support the conclusion that Congress, in enacting the USFSPA, intended that separation benefits not be divided between spouses in state divorce actions. The only kind of benefit the Congress deliberately excluded in the USFSPA were disability benefits. The USFSPA is silent as to separation benefits of any kind. If Congress intended to deliberately exclude separation benefits from the reach of the USFSPA and division by state courts, it could have said so in clear and precise language in either the USFSPA or the VSI statute. It did not.

Third, the fact that Congress made VSI benefits non-transferable does not support the conclusion that Congress did not intend VSI benefits to be divisible because even the USFSPA, which clearly makes retirement benefits divisible by state courts, prohibits the sale or assignment of retired pay. 10 U.S.C. §1408(c)(2)). This is akin to the incorrect conclusion that, because the USFSPA does not authorize direct payment of retirement pay to former spouses unless the parties were married during at least ten years of military service, state courts cannot divide retirement pay unless the parties were married during military service for ten years. See Oxelgren v. Oxelgren, 670 SW2d 411 (Tex.App. Ft. Worth 1984).

Put simply, Kuzmiak and the analysis applied in it is inapposite in regard to the VSI and SSB benefits. Kuzmiak involved the division of involuntary separation pay which was payable solely because of the involuntary separation of the service member. VSI benefits are available only upon the voluntary election of the service member.

Additionally, at the time of the parties' agreement, Major Kelson could have received no more than $30,000 in involuntary separation pay under 10 U.S.C. §1174(d)(1) regardless of the number of years he had served on active duty or his rate of pay at the time of his discharge.

On the other hand, his VSI payments were calculated in the same way as retired pay and were based upon his total years of service and his rate of pay at the time he left the service **and** there was no arbitrary cap or ceiling on the amount of VSI benefits he would receive. 10 U.S.C. §1175 (e)(1).

It is clear that the VSI benefits were elected by Major Kelson in lieu of regular retirement pay because he is required to repay those benefits if he subsequently becomes entitled to receive regular retirement pay. 10 U.S.C. 1175 (e)(3). The Department of Defense brochure on the VSI/SSB programs highlights this fact:

> [Q.] What happens to VSI or SSB if I become retirement eligible?
>
> [A.] Essentially, you pay it back from your retirement pay.

(R-60).

Further, although it is clear from the legislative history that involuntary separation pay under 10 U.S.C. §1174 was intended to assist service members in readjusting to civilian life, the legislative history of the VSI and SSB programs makes no mention of such a goal. As argued in the preceding section, the legislative history indicates that the purpose of the VSI and SSB programs was to offer an incentive to military members to voluntarily retire from the armed forces rather than run the risk of being involuntarily separated before they could complete twenty years of service. Prior to the enactment of the VSI program, military members were entitled to no more that $30,000 if they were involuntarily separated before reaching retirement age, regardless of their years of service and rate of pay. With the enactment of the VSI and SSB programs, military members were afforded, for the first time in the history of our armed forces,

the option to voluntarily leave active duty and yet receive full compensation for their years of service and the rank they had attained at the time of their discharge.

For the aforementioned reasons, it is submitted that VSI and SSB benefits compensate service members for past services and constitute early retirement benefits or, at the very least, are benefits paid in lieu of retirement benefits.

D. THE DECISION OF THE FIRST DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT IN ABERNETHY V. FISHKIN AND THE COURT ERRED IN NOT FOLLOWING ABERNETHY V. FISHKIN.

In its opinion, the First District Court stated:

> Mrs. Kelson argues that the fact that the statute creating Voluntary Separation Incentive benefits was not in existence at the time the agreement was drafted, coupled with the similarities between VSI benefits and retired pay (such as the method of calculating the amount) permit an interpretation that the term 'retired/retainer pay' as used in the agreement encompasses the Voluntary Separation Incentive Benefits. The Fifth District Court of Appeal reached a conclusion supporting that result in dictum * in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994). With all due respect to our sister court, we cannot agree that VSI benefits may be considered retired pay for these purposes.

Kelson at 960, 961. (A-2-2,3).

In footnote 1, designated above as *, the court stated:

> The court was not required to reach the question whether VSI benefits are retirement pay because of the specific terms of the agreement between the parties. The former husband had specifically obligated himself to make the agreed payments without limiting the source of funds to anticipated retired pay.

Kelson at 961. (A-2-3)

In Abernethy, the Fifth District Court of Appeal decided the appeal of a case strikingly similar to the instant case. In Abernethy, the divorce decree incorporated an agreement which provided the wife would receive 25% of the husband's military retired pay when he retired.

Abernethy at 161. The agreement also provided that the husband could take no action to defeat the wife's interest in his retired pay. Id. at 161. After the divorce but before he had served twenty years and became eligible for retired pay, the husband voluntarily left the military under the VSI program. The wife moved for enforcement of the dissolution judgment, arguing the husband had defeated her right to receive a portion of his retired pay by selecting VSI benefits and, thereby, violated the agreement. Id. at 161. The husband, as did the husband in this case, argued that, under McCarty and the doctrine of federal preemption, the trial court was precluded from dividing VSI benefits. He further argued that the USFSPA does not authorize state courts to distribute VSI benefits because VSI benefits do not constitute retired or retainer pay. Id. at 161-162.

In rejecting these arguments, the Fifth District Court cited In re Marriage of Crawford, 884 P.2d 210 (Ariz. App. Div.2 1994). In Crawford, the wife was awarded a percentage of the husband's military retirement benefits pursuant to a dissolution decree. After the divorce but before serving twenty years, the husband left the service under the SSB program and the wife pursued a share of his lump sum SSB payment. The Arizona court rejected the husband's argument that, because Congress had not expressly authorized state courts to divide SSB benefits, they were preempted from doing so under McCarty. Id. at 212. Discussing Congress' intent in enacting the SSB program, the court said:

> We find more relevant a 1990 House Report predating the enactment of the SSB program which in relation to the congressionally mandated "force drawdown" recommended "a comprehensive package of transition benefits to assist separating personnel **and their families**," H.R. Rep. No 665, 101st Cong., 2d Sess. (1990)(emphasis added), suggesting that equitable division of SSB benefits is not inconsistent with congressional intent. (footnote omitted) (emphasis added)

Id. at 212.

In Abernethy, the Fifth District Court, noting the purpose of the VSI program, like the SSB program, was to offer a voluntary separation incentive to avoid the possibility of involuntary separation, and that VSI payments, like military retirement, "primarily are based on the member's ending salary and years of service," stated:

> Further indicating Congress' intent to "treat VSI benefits in the same manner as retirement benefits are the facts that VSI benefits, like retired pay, are reduced by the amount of any disability payments the member receives (citing 10 U.S.C. 1175(e)(4) and that the Retirement Board of Actuaries administers both the VSI Fund and the Military Retirement Fund (citing 10 U.S.C.A. §1175(h)(4).

Abernethy at 162-163.

In light of such considerations, the Court held that the trial court had the authority to order the husband to pay a portion of his VSI benefits to the wife pursuant to the parties' agreement that she receive a share of his military retirement pay.

Only after reaching this holding did the Fifth District Court address the effect of the provision of the agreement that the husband not take any action to defeat the wife's interest in his military retired pay, stating:

> Even assuming, **arguendo**, that Congress has not authorized state courts to distribute VSI benefits, we still would affirm the trial court's order enforcing the parties' property settlement agreement because the trial court's order enforcing the parties' property settlement agreement does not purport to assign or award VSI benefits to the wife. Instead, the order merely requires the husband to pay to the wife 25% of every VSI payment immediately upon it receipt in order to insure the wife a steady monthly payment pursuant to the parties' property settlement agreement. Further, the husband specifically agreed that he would take no action which would defeat the wife's right to receive 25% of his retirement pay and that, if necessary, he would self-implement the agreement's payment provisions of the parties' property settlement agreement. Under these circumstances, 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 (citations omitted).

Abernethy at 163.

It is clear that the Fifth District Court decision in Abernethy that VSI benefits constitute retired pay is not dictum as it was necessary for the Abernethy court to address this issue because it was specifically raised by the husband on appeal and went to the jurisdiction of the trial court to enter the order appealed. See Therrell v. Reilly, 111 Fla. 805, 151 So. 305 (Fla. 1933). It is equally clear that in the case at bar the First District Court specifically decided that VSI benefits do not constitute retired pay, and, therefore, its decision is in direct conflict with Abernethy. Finally, in light of the reasons set out in Abernethy, the Fifth District Court correctly decided that VSI benefits are equivalent to or paid in lieu of regular retirement pay. The First District Court erred in failing to follow that decision.

E. THE RECENT DECISION OF THE MONTANA SUPREME COURT IN BLAIR V. BLAIR IS CLEAR AND PERSUASIVE AUTHORITY FOR THE POSITION WHICH THE FORMER WIFE URGES THIS COURT TO ADOPT.

As additional support for Mrs. Kelson's position that this Court reverse the First District Court and direct that the trial court award her a share of the VSI benefits elected by Major Kelson, undersigned counsel cites the May, 1995 decision of the Montana Supreme Court in Blair v. Blair, 1995 WL 302420 (Mont. May 18, 1995)(A-5). Except for the fact that Blair involves SSB benefits rather than VSI benefits, which benefits are the same as VSI benefits except they are distributed in a single lump sum payment rather than annual installments, Blair and Kelson are the same in all other material respects. Blair, the first state supreme court decision on the issue, clearly holds that, as argued by Mrs. Kelson here, a former wife is entitled to and should receive a commensurate share of military voluntary separation benefits where the parties had previously agreed to equitably divide the former husband's retired pay and

the former husband subsequently elected to retire early and receive voluntary separation benefits. (A-5-3).

In Blair, the parties divorced in 1993 after a twelve year marriage. Pursuant to their marital property agreement, the wife was to receive, as a property division, a share of the husband's future net disposable military retirement pay based upon the number of years the parties were married while the husband served on active duty in the Air Force (12 years) and the actual number of years the husband had served on active duty at the time of his retirement. (A-5-1). At the time of the agreement, as was the case here, the parties assumed the husband would remain on active duty and retire from the military after twenty years of active duty. (A-5-1). In October, 1994, after completing fifteen years of active duty, the husband voluntarily separated from the service under the SSB program and received a lump sum SSB payment. (A-5-1). The wife filed a motion entitled "Motion for an Order Modifying Decree as to Retirement Benefits" seeking an interest in such benefits pursuant to the agreement and the trial court awarded her a share of the SSB benefits, applying the formula the parties had agreed to use in regard to retired pay, and the husband appealed. (A-5-1). In affirming the trial court, the Montana Supreme Court stated:

> [The husband] relies on McCarty and Mansell for the principle that federal law preempts state law in the treatment of military retirement. In McCarty, the U.S. Supreme Court held that the husband's military retirement pay was not subject to California's community property laws and, therefore, could not be attached to satisfy a property settlement incident to the dissolution of marriage absent congressional authority to do so. (cite omitted) However, in response to McCarty, Congress enacted Titled 10 U.S.C. §1408, known as the Former Spouses' Protection Act. This act provided the congressional authority the Supreme Court found absent.
>
> Further, the Court's reasoning, in Mansell, is contrary to the [husband's] analysis. There, the Court reiterated its prior holding that state law preempts

> federal law in all domestic relations unless Congress positively enacts it. (cite omitted) Congress expressly excluded VA disability benefits received in lieu of military retirement from division by the state dissolution court. (cite omitted) No such expression was enacted for military retirement waived to receive special separation benefits under 10 U.S.C. §1174 (a). **The holding in Mansell clearly sets forth limitations on the holding in McCarty as applied in this case.** (emphasis added)

(A-5-3)

The Montana Supreme Court noted the statements in the Department of Defense brochure, cited earlier in this brief, that the treatment of VSI/SSB benefits would be left to state courts and that VSI/SSB benefits would have to be repaid if the service member later becomes entitled to receive retired pay. (A-5-4). It also noted the federal court's description of VSI/SSB benefits as early retirement benefits in Elzie. (A-5-3). Recognizing that the former husband's eligibility for the SSB program was based on his years of active duty and that SSB pay, like retirement pay, was calculated according to his years of active duty, the Court held:

> [The husband] could have remained on active duty for five more years and received retired pay. Instead, he chose voluntary separation from the military and received his compensation at an earlier date. For the reasons we have stated, **we characterize separation pay received under the Special Separation Benefits program** (10 U.S.C.§1174a) **as an election for early retirement. We hold that payment received by a member of the military under the Special Incentive Benefits program are an item of marital property subject to division by the dissolution court.** (emphasis added).

(A-5-3,4).

The reasoning and conclusions of the Montana Supreme Court in Blair should be adopted and applied by this Court in this appeal. Blair clearly and convincingly supports Mrs. Kelson's position that the courts of this state do have the jurisdiction to divide VSI pay and that VSI pay, like SSB pay, is the same as or equivalent to retired pay, or put differently, is early retirement pay, and therefore, based upon the parties' agreement she would receive a share of her former

husband's retired pay, she should receive a share of his VSI pay.

It is important to also note that Blair supports Mrs. Kelson's position that she should receive a share of Major Kelson's VSI benefits, not as a modification of the parties' property settlement agreement, but, rather, as a clarification and enforcement of that agreement. In Blair, the wife filed a motion entitled "Motion for an Order Modifying Decree as to Retirement Benefits." On appeal, the former husband argued, as does the husband here, that the trial court did not have the authority to modify the terms of their property settlement agreement and, therefore, the trial court could not award the former wife any interest in his SSB pay. (A-5-1) In rejecting this argument, the Blair court, found that the former wife's motion was "...in substance, a motion to clarify the terms of the agreement and to subsequently enforce them," and that, as the trial court retained the inherent power to enforce its decrees, concluded that the trial court was "correct in treating the SSB program as early retirement divisible under its original decree." (A-5-4).

As in Montana, the courts of this State are to look to the substance, not the form, of the parties' pleadings. See Circle Finance Co.v. Peacock, 399 So.2d 81, 84 (Fla. 1st DCA 1980). As in Montana, the courts of this State do not have the jurisdiction to modify property settlement agreements in the absence of fraud, duress, deceit, coercion or over-reaching. See Petty v. Petty, 548 So.2d 793, 795 (Fla. 1st DCA 1989); Bockoven v. Bockoven, 444 So.2d 30, 32 (Fla. 5th DCA 1983). However, the substance of Mrs. Kelson's motion was to determine whether the parties' agreement that she share in Major Kelson's retirement pay encompassed the VSI pay he had elected to receive, and, if so, to enforce the parties' agreement accordingly. In fact, the trial court in this case recognized that fact when it denied Major Kelson's motion to dismiss for

failure to state a cause of action and ruled that "...the real issue is whether or not the VSI is in effect retired and/or retainer pay." (T-87).

Accordingly, it is respectfully submitted that the Fifth District Court decision in Abernethy and the Montana Supreme Court decision in Blair provide clear and well reasoned authority for the relief sought by Mrs. Kelson and should be adopted by this Court and established as the law of this State.

F. THE FIRST DISTRICT COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT BECAUSE SUCH A DECISION PERMITS THE FORMER HUSBAND TO CIRCUMVENT THE PARTIES' AGREEMENT AND UNILATERALLY DIVEST THE FORMER WIFE OF HER EQUITABLE SHARE OF HIS RETIREMENT BENEFITS.

By failing to reverse the trial court and order that Mrs. Kelson receive a share of Major Kelson's VSI benefits, the First District Court has effectively permitted Major Kelson to unilaterally modify the parties' property settlement agreement and divest Mrs. Kelson of her share of the retirement benefits which the parties both expected he would earn by remaining on active duty for just a few years more following the dissolution of their marriage.

When the parties made their agreement, the only benefits which Major Kelson could have received if he did not serve on active duty for twenty years were disability benefits under 38 U.S.C. §310 (wartime disability); §331 (peacetime disability), or involuntary separation benefits of no more than $30,000 under 10 U.S.C. §1174. Mrs. Kelson acknowledges she would not have been entitled to share in such benefits if Major Kelson received them after the divorce. Further, if Major Kelson had simply resigned and voluntarily left the service, he would have received nothing, and Mrs. Kelson acknowledges she would have been entitled to receive nothing. But that is not what happened here. Major Kelson elected to leave the military after

16 years of service, and, due to the enactment of the VSI program after the dissolution of the parties' marriage, elected very substantial, long term payments which recognized and compensated him for his total years of military service, including over thirteen years during which he was married to Mrs. Kelson. In fact, at $18,193.00 a year for thirty-two years, the VSI benefits elected by Major Kelson will total more than $580,000. (T-41,42). By electing to receive VSI benefits and leave the service, Major Kelson gave up the opportunity to remain on active duty and earn the regular retirement pay the parties agreed and expected they would share. By electing to receive VSI payments, Major Kelson circumvented the parties' agreement that Mrs. Kelson receive a fair share of the compensation he earned during the marriage for his military service. Put simply, he chose to retire early and receive early retirement benefits, or, at the very least, benefits in lieu of regular retirement benefits, and he should be required to honor the agreement he had made with his former wife that she share in his retirement benefits.

CONCLUSION

Wherefore, due to the foregoing, the Petitioner, Michelle M. Kelson, respectfully requests that this Court enter an order which quashes the decision of the First District Court of Appeal and directs that Mrs. Kelson receive a share of Major Kelson's VSI benefits according to the formula agreed upon by the parties. This Court should direct that Mrs. Kelson receive her commensurate share of any and all VSI payments already received by Major Kelson, plus the legal rate of interest for same, as well as her commensurate share of any and all VSI payments he receives in the future.

Respectfully submitted

Gordon Edward Welch, Esquire
201 E. Government Street
Pensacola, Florida 32501
(904) 432-7723
Florida Bar No. 405310
Attorney for Petitioner

* * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery to **KATHRYN RUNCO, ESQUIRE**, Attorney for Respondent, 304 E. Government Street, Pensacola, Florida, 32501, on this the 16th day of June, 1995.

Gordon Edward Welch, Esquire

Appendix Part 1

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

IN RE:

The Marriage of MICHELLE M. KELSON,
Petitioner/Wife, and RUSSELL M. KELSON,
Respondent/Husband.

CASE NO. 90-435-CA-01
DIVISION "A"

ORDER DENYING MOTION TO MODIFY
FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter is before the Court on the Petition of Michelle M. Kelson, the former wife, to amend and/or modify the Final Judgment of Dissolution of Marriage entered by the Court on June 6, 1990. The Final Judgment incorporated therein a Marital Settlement Agreement entered into between the parties on April 11, 1990. Paragraph 3 of the Agreement is entitled Property Division and in part awards the former wife a monthly percentage share of the husband's U.S. Marine Corp Retired/Retainer pay upon his retirement from the U.S. Marine Corp. The Agreement further states that the award shall be in accordance with and construed by the Uniform Services Former Spouse Protection Act of September 8, 1982 (Public Law 97-252) and the wife's monthly percentage share was to be determined by the formula set forth in the Agreement. Additionally, there is a table contained in the agreement for the wife's percentage share of the husband's Retired/Retainer pay based upon the number of years that the husband serves in the Marine Corp. That table commences at twenty years and terminates at thirty-three years. The Court finds that the table set forth in the Agreement is nothing more than an illustration of the application of the formula and that the actual share should be determined by the formula. The issue, however, before the Court is not merely a determination of entitlement

based upon the formula but an interpretation of the funds currently being received by the former husband. The former wife's motion alleges that the parties believed that the former husband would remain on active duty for a minimum period of twenty years but as a result of a reduction in armed forces by the United States Government, the former husband was retired early after sixteen years of active duty military service. The former husband takes the position that the funds he is currently receiving from the United States Government are not Retired/Retainer pay but an incentive pay which he is receiving for a voluntary early separation from active duty. The former husband entered active duty on January 1, 1976 and was separated from the United States Marine Corp on September 30, 1992 under a Voluntary Separation Incentives Program (hereinafter referred to as VSI). The VSI program is a special separation benefits program established pursuant to 10 USCA section 1174a. The benefits and eligibility for the VSI program are set forth in 10 USCA Section 1175.

According to the deposition of Chuck Stinger (Respondent's Exhibit 2), the Assistant General Counsel of the Defense Finance and Accounting Service, the VSI program was enacted by Congress in 1991 in an effort to try and reduce the number of military members on active duty and it is an incentive program to draw down the total population of the military service (page 8). Pursuant to the VSI program, members separating from active duty receive an annual payment and in the former husband's case that sum is equal to $18,193.50. Those payments will continue in the former husband's case for 32 years. Members who are separated by retirement receive monthly retirement/retainer pay. The VSI program also differs from retirement in that as a retired member of the Armed Forces said member would be eligible for medical and dental benefits for life, Commissary and Exchange privileges, cost of living allowance adjustments to the retirement pay, there is no reserve requirement and the member would not be subject to

recall. Under the VSI program medical care privileges continue for only 120 days after separation, Commissary and Exchange privileges are available for only two years, there is no provision for cost of living adjustments, there is a reserve requirement and the member is subject to recall. Another significant difference between retirement and the VSI program is that under the retirement program the members benefits terminate upon the members death (unless a survivor benefit plan is elected by the member prior to separation) while under the VSI program payments continue to be made beyond the members death to his or her designated beneficiaries.

Under the case law of McCarty v. McCarty, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981), the U.S. Supreme Court held that upon the dissolution of an active duty military members marriage, Federal Law precluded a State from dividing that military members nondisability retired pay pursuant to State community property laws. Congress, however, responded by adopting the Uniform Former Spouses Protection Act which provided for a division of military Retired/Retainer pay if otherwise allowable by State Law. This Court is not aware nor did counsel provide any authority that would allow VSI to be treated in the same manner as Retired/Retainer pay. Additionally, in the case of In Re Marriage of Kuzmiak, 176 Cal. App. 3rd 1152, 222 Cal. Rptr. 644, (2nd Dist. 1986), cert den 93 L.Ed. 2d 252, 107 Sup. Ct. 276, the California Court held that military separation pay received under section 1174 is not embraced within the meaning of disposable retirement or retainer pay pursuant to Section 1408, which would permit the State to treat as separate property or property of a service man and his spouse, where the separation pay was a one time payment as opposed to compensation for past services and where Section 1408 does not mention separation pay in its definition of retired or retainer pay. Similarly, VSI is not contained within the definition of retired or retainer pay pursuant to Section 1408. Finally, Section 1175(f) specifically states that the

members right to incentive payments shall not be transferrable, except that the member may designate beneficiaries to receive the benefits in the event of the members death.

The Court therefore reluctantly finds that VSI is not Retired/Retainer pay as defined by Federal Law. Furthermore, the Court lacks jurisdiction to modify the Agreement to provide for a division of the former husband's VSI as opposed to Retired/Retainer pay. Bockoven v. Bockoven, 444 So.2d 30 (Fla. App. 5th DCA 1983). Accordingly, it is

ORDERED AND ADJUDGED that the motion of the Petitioner/Former Wife, Michelle M. Kelson, to amend and/or modify the Final Judgment of Dissolution of Marriage is denied.

DONE AND ORDERED in chambers at the Santa Rosa County Courthouse, Milton, Florida, this 15th day of July, 1993.

CIRCUIT JUDGE

COPIES TO:
J. Jeffrey Slingerland, Esq.
Michael J. Griffith, Esq.

APPENDIX PART 2

1

Carol A. DONNELLY f/k/a Carol A. Prahl, Appellant,

v.

Adel T. FAHMY, M.D. and Adel T. Fahmy, M.D., P.A., Appellees.

No. 93-2953.

District Court of Appeal of Florida, Fifth District.

Dec. 2, 1994.

Rehearing Denied Jan. 4, 1995.

Appeal from the Circuit Court for Brevard County; Frank R. Pound, Jr., Judge.

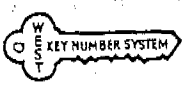
Jocelyn E. Lowther, Johnson and Bussey, P.A., Rockledge, for appellant.

Walter T. Rose, Jr., Rose and Weller, Cocoa Beach, for appellees.

PER CURIAM.

AFFIRMED. *See Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla.1985).

COBB, THOMPSON and DIAMANTIS, JJ., concur.



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Michelle M. KELSON, former wife, Appellant,

v.

Russell M. KELSON, former husband, Appellee.

No. 93-3003.

District Court of Appeal of Florida, First District.

Dec. 7, 1994.

Rehearing Denied Jan. 26, 1995.

Former wife moved to amend final judgment of dissolution to cover benefits former husband received from United States Marine Corps under voluntary separation incentive program. The Circuit Court for Santa Rosa County, Paul Rasmussen, J., denied motion to modify, and former wife appealed. The District Court of Appeal, Davis, J., held that: (1) separation benefits may not be considered retired pay under parties' marital settlement agreement, and (2) trial court lacked jurisdiction to modify agreement to encompass separation benefits.

Affirmed.

Booth, J., filed dissenting opinion.

1. Divorce ⇐252.3(4)

Under Florida law, court in dissolution proceeding may equitably divide nonvested, nonmatured right of spouse to military retired pay.

2. Divorce ⇐252.3(4)

When trial court is making equitable distribution of nonvested pension plan, it must take into account effect on value of those pension rights of possibility that some events as such death or termination of employment would destroy pension rights before they mature.

3. Husband and Wife ⇐279(1)

Marital settlement agreement did not cover military separation pay under term retired pay, which was subject to division under agreement, where separation pay was not compensation for past services rendered.

4. Armed Services ⇐23.1(6), 23.4(1)

"Separation pay" is personal property of service member to ease transition to civilian life, while "retired pay" is contractual obligation designed to be compensation for past services rendered.

See publication Words and Phrases for other judicial constructions and definitions.

5. Husband and Wife ⇐279(2)

Trial court lacked jurisdiction to modify marital settlement agreement to encompass voluntary separation incentive benefits under its provision for military retirement benefits;

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separation pay was clearly property settlement provision, with no intent to provide benefits for support of service member's spouse as form of alimony.

Gordon E. Welch of The Center for Family Law, P.A., Pensacola, for appellant.

Kathryn L. Runco of Michael J. Griffith, P.A., Pensacola, for appellee.

DAVIS, Judge.

Michelle Kelson, former wife, appeals an order denying her motion to modify or amend a final judgment of dissolution. Because we conclude that the trial court did not err in denying appellant's motion to modify the final judgment of dissolution which incorporated the parties' marital settlement agreement, we affirm.

The final judgment incorporated a marital settlement agreement between Michelle and Russell Kelson which was drafted by Mrs. Kelson's attorney. One of the terms of the property settlement portion of the marital settlement agreement was a formula for the division of the former husband's anticipated retired pay from the United States Marine Corp. After the entry of the final judgment of dissolution but before the former husband achieved twenty years of service and eligibility for retired pay, Congress enacted, and the former husband elected, the Voluntary Separation Incentive Program (VSI).

Russell Kelson left the Marine Corps after approximately sixteen years of service, receiving an annual VSI payment for a specific term of years rather than retired pay in monthly increments for life. Michelle Kelson argues that this is the functional equivalent of the retired pay she is entitled to share under the parties' agreement and that the failure of the parties to anticipate the possibility of Voluntary Separation Incentive payments in lieu of retirement benefits was a mutual mistake of fact resulting from the fact that the program simply did not exist when the marital settlement agreement was drafted. Russell Kelson responds that Voluntary Separation Incentive payments are distinctly different from retired benefits and that the trial court lacked jurisdiction to modify the property settlement agreed to between the parties. The trial court held that Voluntary Separation Incentive Benefits were not the same thing as retired/retainer pay as defined by federal law and that the court lacked jurisdiction to modify the property settlement agreement to go beyond the agreed upon division of retired/retainer pay. We affirm.

[1, 2] The starting point for any analysis must be the terms of the marital settlement agreement entered into between the parties. Such an agreement, "entered into voluntarily after full disclosure and then ratified by the trial court, is a contract subject to interpretation like any other contract." *Petty v. Petty*, 548 So.2d 793, 796 (Fla. 1st DCA 1989). This agreement purported to divide Major Kelson's non-vested, non-matured right to military retired pay. Under Florida law, a court in a dissolution proceeding may equitably divide the non-vested, non-matured right of a spouse to military retired pay. *DeLoach v. DeLoach*, 590 So.2d 956, 959 (Fla. 1st DCA 1992). When the trial court is making an equitable distribution of a non-vested pension plan, it must take into account the effect on the value of those pension rights of the possibility that some event such as death or termination of employment would destroy the pension rights before they mature. *Id.* at 962. We must presume that this marital settlement agreement, drafted by Mrs. Kelson's attorney, also accounted for the possibility that some event such as death or termination of employment would destroy the pension rights before they could mature. *Cf. Abernethy v. Fishkin*, 638 So.2d 160, 163 (Fla. 5th DCA 1994) ("husband specifically agreed that he would take no action which would defeat the wife's right to receive 25% of his retirement pay and that, if necessary, he would self-implement the agreement's payment provisions"). The present agreement does not indicate any intent by the parties to provide for any contingencies other than division of vested and matured retired pay upon the event of Major Kelson obtaining the right to such payments.

[3] Mrs. Kelson argues that the fact that the statute creating Voluntary Separation In-

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lating the amount) permit an
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District Court of Appeal reach
supporting that result in dic
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DCA 1994). With all due
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fits may be considered retire
purposes.

In *McCarty v. McCarty*, 45
S.Ct. 2728, 69 L.Ed.2d 589 (19
States Supreme Court revers
decision dividing military n
tired pay as community p
Court held that federal law
law with regard to the divis
military benefits in dissolutio
Congress promptly enacted
Services Former Spouses' Pr
U.S.C. § 1408. In light of
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clear that, to the extent tha
outside the specifications of
McCarty is still valid law
States Supreme Court said
Mansell v. Mansell, 490 U.S
2023, 104 L.Ed.2d 675 (1989)
no authority to treat militar
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funds to anticipated retired p
163.

centive benefits was not in existence at the time the agreement was drafted, coupled with the similarities between VSI benefits and retired pay (such as the method of calculating the amount) permit an interpretation that the term "retired/retainer pay" as used in the agreement encompasses the Voluntary Separation Incentive benefits. The Fifth District Court of Appeal reached a conclusion supporting that result in dictum [1] in *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994). With all due respect to our sister court, we cannot agree that VSI benefits may be considered retired pay for these purposes.

In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the United States Supreme Court reversed a California decision dividing military nondisability retired pay as community property. The Court held that federal law preempts state law with regard to the divisibility of such military benefits in dissolution proceedings. Congress promptly enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. In light of *McCarty*, Congress adopted provisions of USFSPA to provide specifically limited authority for state courts to make awards of the expressly described retirement benefits. However, it is clear that, to the extent that a benefit falls outside the specifications of the USFSPA, *McCarty* is still valid law. The United States Supreme Court said so expressly in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989) (state court has no authority to treat military retired pay as community property except to the extent permitted under the "plain and precise language" of the USFSPA). The USFSPA permits the division in dissolution proceedings of the "disposable retired or retainer pay" of a member of the military services. It does not permit division of retired pay to the extent that the benefits are reduced by non-taxable disability benefits, because that is specifically excluded from the definition of "disposable retired or retainer pay." *Id.* at 594–95, 109 S.Ct. at 2031–32; *see also McMahan v. McMahan*, 567 So.2d 976, 979 (Fla. 1st DCA 1990) (Congressional grant of authority to the states to equitably divide military retired pay was explicitly limited to the plain and precise language of USFSPA, and state courts may not go beyond what the statute specifies).

[4] "Separation pay," as distinct from "retired pay," has been held not to be subject to division as community property.[2] As the court cogently explained in *In Re Marriage of Kuzmiak*, 176 Cal.App.3d 1152, 1157, 222 Cal.Rptr. 644 (Cal.Dist.Ct.App.), *cert. denied mem.*, 479 U.S. 885, 107 S.Ct. 276, 93 L.Ed.2d 252 (1986), the purposes of separation and retired pay are different. Separation pay is the personal property of the service member, for its purpose is to ease the transition to civilian life. Retired pay, on the other hand, is a contractual obligation designed to constitute compensation for past services rendered. *See also Diffenderfer v. Diffenderfer*, 491 So.2d 265, 267 (Fla.1986) (pension plan is contractual right of value obtained in exchange for lower rate of compensation during marriage). When those services were rendered, and the compensation "earned" during the marriage, there is a rationale for awarding a percentage of a pension to a former spouse which is not present in the distribution of separation pay. Applying this rationale, the *Kuzmiak* court held that involuntary separation pay was not encompassed by the provisions of the USFSPA. 176 Cal.App.3d at 1157, 222 Cal.Rptr. 644. We believe that the same result must apply to voluntary separation pay.

The federal statutes governing the armed forces are replete with examples of the distinction between "separation" and "retirement." *Compare, e.g.*, 10 U.S.C. § 1201,

1. The court was not required to reach the question whether VSI benefits are retirement pay because of the specific terms of the agreement between the parties. The former husband had specifically obligated himself to make the agreed payments without limiting the source of the funds to anticipated retired pay. 638 So.2d at 163.

2. The same reasoning applies in states in which marital assets are subject to equitable distribution rather than division under the precepts of community property.

§ 1204 (retirement) *with* 10 U.S.C. § 1203, § 1206 (separation). Chapters 59 and 60 of Title 10 of the United States Code govern separation, Chapter 61 is entitled "Retirement or Separation for Physical Disability," and Chapters 63 through 73 govern various aspects of military retirement, from the age or length of service required to be entitled to retired pay, to the computation of retired pay, to the election to purchase an annuity with a portion of one's retired pay, and so on. Under traditional rules of statutory construction, we are constrained to assume that Congress deliberately used the word "separation" and not "retirement" when creating VSI benefits, and further that separation benefits were deliberately excluded from the reach of the USFSPA by the limitation of its reach to "disposable retired or retainer pay" as defined in 10 U.S.C.A. § 1408(a)(4). *See Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983). This conclusion is supported by the fact that Congress not only failed to expressly incorporate VSI benefits within the USFSPA, but specifically provided that VSI benefits are not transferable during the life of the recipient. 10 U.S.C.A. § 1175(f) (West 1994). Accordingly, we conclude that VSI benefits are not "retired pay" and affirm the decision of the trial court that the marital settlement agreement between Major and Mrs. Kelson cannot be interpreted as encompassing the VSI benefits under the term "retired/retainer pay."

[5] Having concluded that the agreement cannot be interpreted as already providing for the division of these benefits, the next question is whether the trial court had jurisdiction to modify the agreement so as to extend its reach to encompass VSI benefits. This was clearly a property settlement provision, with no intent that these benefits would be provided for the support of Mrs. Kelson as a form of or in lieu of alimony. There has been no allegation that this agreement was procured by fraud, duress, deceit, coercion or over-reaching. Therefore the trial court correctly concluded that it was without jurisdiction to modify this agreement. *See Petty v. Petty*, 548 So.2d 793, 795 (Fla. 1st DCA 1989); *Bockoven v. Bockoven*, 444 So.2d 30, 32 (Fla. 5th DCA 1983).

The order of the trial court denying Mrs. Kelson's motion to amend or modify the final judgment of dissolution is AFFIRMED.

ZEHMER, C.J., concurs.

BOOTH, J., dissents with written opinion.

BOOTH, Judge, dissenting.

I respectfully dissent. We should reverse and remand for reconsideration in light of the recent decision in *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994), which answered the question posed here. The motion to modify below was, in substance, for enforcement of the former wife's property interest in former husband's voluntary separation incentive (VSI) benefits which, under *Abernethy, supra*, may be treated as retirement, subject to division.

Robert HIGGS, Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, an Agency of the State of Florida; and Manuela F. Decespedes, M.D., in her individual capacity, Appellees.

No. 93–2308.

District Court of Appeal of Florida, First District.

Dec. 7, 1994.

Rehearing Denied Jan. 26, 1995.

Inmate brought civil rights action against Department of Corrections and physician at correctional institution and the Circuit Court, Leon County, L. Ralph Smith, Jr., J., granted motion to dismiss for failure to state cause of action. Inmate appealed. The District Court of Appeal held that inmate stated cognizable claim for deliberate

indifference to inmate's needs.

Reversed and reman

1. Appeal and Error ⇦

When reviewing ord to dismiss for failure to s appellate court assumes a complaint to be true and c inferences in favor of th

2. Civil Rights ⇦235(7)

Inmate stated cogni civil rights statue for deli to inmate's serious medica inmate's allegations might cant, unexplained delay i priate diagnosis and tre merous attempts by inma assistance so that ultim obvious facial deformity w sible and where allegat need for diagnosis and t was obvious to other phys they initially occurred. Amend. 8; 42 U.S.C.A.

Peter M. Siegel and P of Florida Justice Institu appellant.

Craig A. Dennis and Dennis & Bowman, P. appellees.

PER CURIAM.

This is an appeal from motion to dismiss for fai of action. Appellant, an action brought under 42 appellee, a physician at C al Institution, in her ind guilty of deliberate indif medical needs in viol amendment to the U.S *Estelle v. Gamble*, 429 U 50 L.Ed.2d 251 (1976).

In the motion to dism a cause of action, appel pellant's complaint was of a prison doctor to or

Appendix Part 3

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

January 26, 1995

CASE NO: 93-03003

L.T. CASE NO. 90-435-CA-01-DOM

Michelle M. Kelson, Former Wife	v. Russell M. Kelson, Former Husband
Appellant(s),	Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing and motion for rehearing en banc, filed December 22, 1994, is DENIED.

Appellant's suggestion of direct conflict or, in the alternative, suggestion of question of great public importance, filed December 22, 1994, is DENIED.

ZEHMER, CJ., AND DAVIS, J., concur.

BOOTH, J., dissents.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK

By: Karen Roberts
Deputy Clerk

DISTRICT COURT OF APPEAL STATE OF FLORIDA FIRST DISTRICT

Copies:

Gordon E. Welch
Kathryn L. Runco
Michael J. Griffith

Appendix Part 4

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA, FIRST DISTRICT

MICHELLE M. KELSON,

Former Wife/Appellant,

v. Case No.: 93-03003

RUSSELL M. KELSON,

Former Husband/Appellee.
_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that **MICHELLE M. KELSON**, the appellant, invokes the discretionary juridiction of the Florida Supreme Court to review the decision of this court rendered January 26, 1995. The decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

** **

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing was furnished to **KATHRYN L. RUNCO, ESQUIRE**, Attorney for Appellee/Former Husband, 304 E. Government Street, P. O. Box 848, Pensacola, Florida, 32501, by Hand Delivery this 23rd day of February, 1995.

GORDON EDWARD WELCH, ESQUIRE
201 E. Government Street
Pensacola, Florida 32501
(904) 432-7723
Florida Bar No. 405310
Attorney for Appellant/Former Wife

In Re Marriage of Kathy Darlene BLAIR, Petitioner and Respondent,
v.
Stephen J. BLAIR, Respondent and Appellant.

No. 94-521.

Supreme Court of Montana.

Submitted on Briefs: March 2, 1995.

Decided: May 18, 1995.

WEBER.

For Appellant: Marcia Birkenbuel, Great Falls, Montana

For Respondent: James D. Elshoff, Great Falls, Montana

*1 This is an appeal from a decision of the Eighth Judicial District Court, Cascade County, granting Kathy Darlene Blair's motion requesting she be awarded her percentage interest in Stephen J. Blair's military Special Separation Benefits. We affirm.

We restate the issues on appeal:

I. Did the District Court err when it found payments received by a member of the military under the Special Separation Benefits program an item of marital property or retirement benefits subject to division by the dissolution court?

II. Did the District Court lose jurisdiction to change the property settlement provisions of the Decree when it failed to rule on the motion within forty-five days from the time it was filed?

III. Was the District Court's decision barred by res judicata?

IV. Did the District Court err when it did not order Stephen Blair to reimburse Kathy Blair for attorney fees?

The parties were married in 1980, and their marriage was dissolved by the District Court in 1993. The parties agreed to and signed a marital property settlement which the court found not unconscionable. The court divided the marital estate as the parties suggested. Part of the division was that Kathy Blair (Kathy) would receive a share of Stephen Blair's (Stephen) future net disposable military retirement pay. Her share would be based on a percentage using the number of years they were married (twelve) and the actual number of years Stephen served on active duty. At that time, it was assumed Stephen would retire from the military after twenty years of active duty.

In 1994, Stephen was accepted into the Special Separation Benefits program (SSB) pursuant to 10 U.S.C. § 1174a. He voluntarily separated from his military service on October 1, 1994, and agreed to serve in the Ready Reserve for a minimum of three years. He received separation pay based on years of service and current base pay. Stephen completed fifteen years of active service.

On March 24, 1994, Kathy filed a motion entitled Motion for an Order Modifying Decree as to Retirement Benefits. On May 6, 1994, she filed a motion to divide the retirement benefits Stephen received from the SSB program. The District Court held a hearing on the motions on May 6, 1994, and awarded Kathy a percentage interest of Stephen's separation pay.

Stephen appeals from the District Court's September 21, 1994 decision.

I.

Did the District Court err when it found payments received by a member of the military under the Special Separation Benefits

program an item of marital property or retirement benefits subject to division by the dissolution court?

Stephen argues that military retirement and SSB are defined by two different statutes and are two distinct groups of military entitlement. He then argues that 10 U.S.C. § 1408 specifically authorizes the division of military retirement pay as a marital asset in a proceeding for dissolution, but 10 U.S.C. § 1174a does not contain any language authorizing the division of SSB pay in a dissolution proceeding.

*2 Stephen refers to McCarty v. McCarty (1981), 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, in which the U.S. Supreme Court emphasized that the decision as to the availability of retirement pay to a spouse is left to Congress alone. After the McCarty ruling, Congress enacted the Uniformed Services Former Spouses' Protection Act (Spouses' Protection Act), 10 U.S.C. § 1408. This act authorizes a dissolution court's division of "disposable retired or retainer pay."

Stephen argues that his separation pay is not an early retirement benefit. He states that he is no longer eligible for military retirement because he terminated his active duty status prior to the number of years of service required for retirement, and that he received special separation pay in return for serving in the military's Ready Reserve for at least three years following his separation from active duty.

Stephen also refers to Mansell v. Mansell (1989), 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675, in which the U.S. Supreme Court ruled that state courts could not treat the portion of military retirement waived in order to receive Veteran's Administration disability benefits as marital property divisible under the Spouses' Protection Act. Stephen concludes, under McCarty and Mansell, state courts do not have authority to divide SSB pay as a marital asset unless Congress specifically authorizes such a division.

Kathy argues that the benefits provided under 10 U.S.C. § 1174a are clearly for purposes of retirement. She states that the SSB program is known as the "Early Out Program." She points out that SSB benefits are awarded based on years served of active duty the same as other retirement benefits.

Kathy refers to Elzie v. Aspen (D.D.C.1993), 841 F.Supp. 439, 440, which found that SSB benefits provide incentive payments as inducements "to elect early retirement." In addition, Kathy includes a copy of a brochure disseminated by the Department of Defense describing the voluntary separation incentives and what they mean to eligible military members. On page six of the brochure, in a question/answer format, it states:

> What happens to VSI or SSB if I become retirementeligible?
>
> Essentially, you pay it back from your retirement pay.

Kathy stresses the point that if a member voluntarily separates from active duty and then re-enlists, his or her retirement pay, not the current wages, would be tapped for reimbursement. Kathy then refers to the District Court in Cascade County which has twice ruled that SSB benefits are marital property and subject to division upon receipt. In re the Marriage of Daws, BDR 91-626, decided on July 1, 1992; and, In re the Marriage of Plunkett, BDR 90-520, decided on September 8, 1992.

The District Court found that Stephen and Kathy, prior to dissolution, negotiated the terms and freely entered into a Property Settlement Agreement stating "[Kathy] was awarded a share of [Stephen's] future net disposable military retirement pay, to be calculated based upon [Stephen's] actual number of years of service at the time of retirement."

*3 The District Court then likened SSB payments to military pensions because they are both based on longevity of service. The court stated that military pensions have long been declared in Montana to be a marital asset divisible upon dissolution; therefore, SSB payments are also divisible. Stephen and

Kathy were married twelve of the fifteen years of his active service. Since a portion of Stephen's separation benefits accrued during his marriage to Kathy, the court concluded that portion is divisible by the court upon dissolution.

Our standard of review of the District Court's conclusions of law is to determine if the District Court's interpretation of the law is correct. Steer, Inc. v. Department of Revenue (1990), 245 Mont. 470, 474-475, 803 P.2d 601, 603-604.

Stephen relies on McCarty and Mansell for the principle that federal law preempts state law in the treatment of military retirement. In McCarty, the U.S. Supreme Court held that the husband's military retirement pay was not subject to California's community property laws; and, therefore, could not be attached to satisfy a property settlement incident to the dissolution of marriage absent congressional authority to do so. McCarty, 453 U.S. at 228-232, 101 S.Ct. at 2739-2741, 69 L.Ed.2d at 603-605. However, in response to McCarty, Congress enacted Title 10 U.S.C. § 1408, known as the Former Spouses' Protection Act. This act provided the congressional authority the Supreme Court found absent.

Further, the Court's reasoning, in Mansell, is contrary to Stephen's analysis. There, the Court reiterated its prior holding that state law preempts federal law in all domestic relations unless Congress positively enacts it. Mansell, 490 U.S. at 587, 109 S.Ct. at 2028, 104 L.Ed.2d at 684. Congress expressly excluded VA disability benefits received in lieu of military retirement from division by the state dissolution court. 10 U.S.C. § 1048(a)(4)(B). No such expression was enacted for military retirement waived to receive special separation benefits under 10 U.S.C. § 1174(a). The holding in Mansell clearly sets forth limitations on the holding in McCarty as applied to this case.

Further, we note the Department of Defense's statement concerning a dissolution court's ability to divide SSB payments. Page six of the Department's brochure states:

> How will state courts treat VSI/SSB in a divorce settlement?
> The treatment of VSI or SSB is not dictated by Federal law. It will be up to the state courts to rule on the divisibility of these incentives.

We also note that a federal district court has stated:

> The VSI/SSB program provides, to those members who qualify, incentive payments and medical and veterans benefits as inducements to elect early retirement.

Elzie, 841 F.Supp. at 440.

Like retirement, Stephen's eligibility for the SSB program was based on the number of years he served in active duty. 10 U.S.C. § 1174a(c). As with retirement pay, Stephen's separation pay was calculated according to the number of years he was in active service. 10 U.S.C § 1174a(b)(2)(A). Stephen could have remained on active duty for five more years and received retirement pay. Instead, he chose voluntary separation from the military and received his compensation at an earlier date. For the reasons we have stated, we characterize separation pay received under the Special Separation Benefits program (10 U.S.C. § 1174a) as an election for early retirement.

*4 We hold that payments received by a member of the military under the Special Separation Benefits program are an item of marital property subject to division by the dissolution court.

II.

Did the District Court lose jurisdiction to change the property settlement provisions of the Decree when it failed to rule on the motion within forty-five days from the time it was filed?

Stephen states that under Rule 60(c), M.R.Civ.P., a motion for relief must be determined within the forty-five day period set out in Rule 59(d), M.R.Civ.P.; and that if the court fails to rule, the motion shall be deemed denied. He points out that the District Court did not rule upon Kathy's motion to modify

the Decree within the 45 day period and was, therefore, beyond its jurisdiction.

Kathy emphasizes that her intention was not to modify the Decree as was stated in the title of the original petition but rather to enforce the same. Kathy cites § 1-3-219, MCA: "The law respects form less than substance." She argues that the substance of her motion clearly was for the District Court to force Stephen to pay to Kathy her share of his retirement benefits, albeit early, as their original agreement stated. She argues, further, that the property settlement agreement provided for enforcement remedies; therefore, the District Court's jurisdiction continued in order to enforce the Decree.

The District Court found Stephen's actions in denying Kathy part of his separation pay to be unconscionable. Based on that unconscionability, the court reopened the Decree and ordered that Stephen pay to Kathy her percentage interest in his SSB pay.

Although we agree with the result of the District Court's conclusion, we note that the court mischaracterized the motion it had before it when it "reopened the Decree based on unconscionability." The motion was, in substance, a motion to clarify the terms of the agreement and to subsequently enforce them. We have held that the power inherent in every court to enforce its judgments and decrees "is not to be limited by the time limits in Rules 59 and 60, M.R.Civ.P." Smith v. Foss (1978), 177 Mont. 443, 447, 582 P.2d 329, 331. We conclude that the District Court was correct in treating the SSB program as early retirement divisible under its original Decree. We hold that the District Court did not lose its jurisdiction because it failed to rule on Kathy's motion in excess of forty-five days.

III.

Was the District Court's decision barred by res judicata?

On April 28, 1993, the District Court found that the "MARITAL SETTLEMENT AGREEMENT signed by the parties is equitable and not unconscionable, and should be incorporated into the decree of dissolution of marriage." Here, the District Court concluded "[Stephen] has voluntarily and unilaterally upset that division, which has resulted in a substantial detriment to the reasonable future expectations of [Kathy] and which will give [Stephen] an immediate and substantial windfall." (Emphasis added.) The court then found the result of Stephen's actions to be unconscionable.

*5 Stephen points to the Commissioner's Notes to § 40-4-201, MCA, (Separation agreements) which says, "The court's determination, in the decree, that the terms are not unconscionable, under the ordinary rules of res judicata, will prevent a later successful claim of unconscionability." Stephen states further that case law clearly supports the application of the doctrine of res judicata to bar the reopening of a judgment on the grounds of unconscionability after a previous finding of a lack of unconscionability is made, and the agreement merged in the Decree. See Hopper v. Hopper (1979), 183 Mont. 543, 601 P.2d 29.

Stephen then lists the four criteria necessary to establish res judicata as set forth in Hopper.

(1) The parties or their privies must be the same;

(2) The subject matter of the action must be the same;

(3) The issues must be the same, and must relate to the same subject matter; and

(4) The capacities of the persons must be the same in reference to the subject-matter and to the issues before them.

Stephen argues that the four criteria are met, so the doctrine of res judicata barred a finding of unconscionability.

Kathy argues again that the District Court did not modify the Decree and did not reverse any findings. It enforced the division of Stephen's "net disposable military retirement pay." She contends that it was Stephen, through his announcement that he intended to retire early and deprive Kathy of her vested expectation interest in the future marital property, who attempted to modify the Decree/

Property Settlement Agreement; thus, all the law cited by Stephen pertaining to the applicability of the doctrine of res judicata applies equally to him.

We state again that the motion was, in substance, a motion to enforce the Decree, not to modify the same. The District Court looked to unconscionability in order to reopen and then to modify the Decree under Marriage of Laskey (1992), 252 Mont. 369, 829 P.2d 935. In its conclusion, the District Court did not reverse its original finding of the settlement agreement as to unconscionability, but found Stephen's attempt to "voluntarily and unilaterally upset" that agreement was unconscionable.

Stephen is correct in that the parties, the subject matter, and the capacities of the parties are the same as those under the original Decree. However, the most important of the four criteria for res judicata is the identity of issues which is not present here. In re the Marriage of Harris (1980), 189 Mont. 509, 513, 616 P.2d 1099, 1101.

In the first case, the issue was how to divide the marital assets. The District Court incorporated Stephen's and Kathy's Property Settlement Agreement into its order dividing the marital property as they suggested. Here, the issue differs in that the court was asked to determine whether or not payments Stephen received upon voluntarily separating from the military were the equivalent of "net disposable military retirement pay" under the Property Settlement Agreement per its original terms. This issue was not addressed in the Property Settlement Agreement nor in the Decree. On its face, the Decree did not identify whether or not voluntary separation pay was a form of net disposable military retirement pay. We conclude that the doctrine of res judicata does not apply where the issues were not previously addressed.

***6** We hold that the District Court's decision was not barred by res judicata.

IV.

Did the District Court err when it did not order Stephen Blair to reimburse Kathy Blair for attorney fees?

Kathy did not address this issue in her motions nor at the hearing. We will not address issues raised for the first time on appeal. Hislop v. Cady (1993), 261 Mont. 243, 250, 862 P.2d 388, 392. The issue of attorney fees was not raised at the District Court level and, therefore, can not be raised here.

Affirmed.

I concur in issues 2 and 4 of the majority opinion and specially concur in issues 1 and 3. I write separately for two reasons. The first is that I believe there is greater support than that mentioned in the majority opinion for the proposition that Special Separation Benefits (SSB) may be properly included in any marital estate. The second is that another appellate court in a similar case reviewed and upheld a trial court's order to enforce the decree based on the parties' property settlement agreement.

First, an Arizona appellate court has determined that SSB payments may be included in the marital estate. In re Marriage of Crawford (Ariz.Ct.App.1994), 884 P.2d 210. In Marriage of Crawford, the court noted that there is legislative history to support the inclusion of SSB benefits in the marital estate. Specifically, the court stated:

> We find more relevant a 1990 House Report predating the enactment of the SSB program which in relation to the congressionally mandated "force drawdown" recommended "a comprehensive package of transition benefits to assist separating personnel and their families," H.R.Rep. No. 665, 101st Cong., 2d Sess. (1990) (emphasis added), suggesting that equitable division of SSB benefits is not inconsistent with congressional intent.

Marriage of Crawford, 884 P.2d at 212. The Crawford court also recognized, as does the majority opinion, that the Department of Defense pamphlet regarding SSB payments indicated that state courts would determine the divisibility of such payments.

Next, in a case similar to this one, a Florida appellate court determined that a property settlement agreement should be enforced through the payment of early separation benefits. In Abernethy v. Fishkin (Fla. Dist. Ct.App.1994), 638 So.2d 160, the husband and wife had entered into a property settlement agreement which provided that the wife would receive 25% of the husband's military pension. The husband elected to leave the military before his retirement vested and was paid benefits under the Voluntary Separation Incentive Program (VSI). Abernethy, 638 So.2d at 161. The VSI and SSB programs are quite similar in that both provide qualifying military personnel who are voluntarily leaving the service before their retirement vests a payment, or payments, primarily based on the individual's ending salary and years of service.

The Abernethy court first cited Marriage of Crawford in determining that the trial court had correctly concluded that the husband's VSI benefits were subject to division. Abernethy, 638 So.2d at 162. The court went on to state that even assuming Congress had not authorized state courts to distribute these benefits, it would affirm the trial court's order enforcing the parties' property settlement agreement. Specifically, the court stated:

> *7 the trial court's order does not purport to assign or award VSI benefits to the wife. Instead, the order merely requires the husband to pay to the wife 25% of every VSI payment immediately upon its receipt in order to insure the wife a steady monthly payment pursuant to the terms of the parties' property settlement agreement.

Abernethy, 638 So.2d at 163.

In the present case, Kathy and Stephen entered into a property settlement agreement in which the parties agreed to a formula for the division of Stephen's military retirement pay. Similar to the trial court's order discussed in Abernethy, the District Court's order in this case does not purport to assign Stephen's SSB benefits to Kathy, but orders him to pay her 40% (the percentage arrived at through the calculation agreed on in the property settlement agreement) of these monies immediately after he receives them.

As the Arizona court recognized in Marriage of Crawford, federal law does not preclude state courts from dividing SSB benefits in a dissolution proceeding. However, even assuming arguendo, that it does, the fact is that Stephen, in the property settlement agreement, voluntarily agreed to divide his "net disposable military retirement pay." The property settlement agreement did not tie the phrase to any federal statute or program. In my opinion, the phrase "net disposable military retirement pay" is broad enough to encompass Stephen's voluntary early retirement under the SSB program. The District Court merely required Stephen to do that which he agreed to and that which the decree required.

I respectfully dissent from the Court's opinion. The threshold and dispositive question in this case is whether the doctrine of res judicata bars the District Court from determining that the parties' property settlement agreement was unconscionable. Because that question must be answered in the affirmative, I would reverse the District Court.

The marriage of Steve and Kathy Blair was dissolved via findings of fact, conclusions of law and decree of dissolution entered by the District Court on April 28, 1993. The court expressly concluded that Steve and Kathy's Marital Settlement Agreement was not unconscionable and incorporated that Agreement into the decree of dissolution. One of the provisions of the Agreement was that Kathy would receive a share of Steve's future net disposable military retirement pay, calculated as set forth therein.

Approximately seventeen months after the decree of dissolution, the District Court concluded, in essence, that the Agreement was unconscionable. Notwithstanding its determination that Steve's military separation benefits were not "military retirement pay" covered by the Agreement, it reopened the decree to change the terms of the Agreement in order to provide Kathy with a share of

Steve's military separation benefits. I conclude that, because of its earlier conscionability conclusion, the doctrine of res judicata barred the court from making an unconscionability determination.

*8 The criteria necessary to establish res judicata are wellestablished in Montana:

1. The parties or their privies must be the same;

2. The subject matter of the action must be the same;

3. The issues must be the same and relate to the same subject matter; and

4. The capacities of the persons must be the same in reference to the subject matter and issues before them. Hopper v. Hopper (1979), 183 Mont. 543, 557, 601 P.2d 29, 36 (citation omitted).

Here, Kathy does not respond to the res judicata issue and, thereby, does not directly controvert it. Nor, on the basis of the record before us, could she present a persuasive argument that the criteria necessary for the application of the doctrine of res judicata are not met here. There is no question but that the parties to the action are the same and that the subject matter--the conscionability, or lack thereof, of the Agreement--is the same. Likewise, the issues are the same, as are the capacities of Steve and Kathy in relation to the subject matter and the issues.

Hopper addressed the precise issue now before us: whether or not the district court had jurisdiction to determine the conscionability of the property settlement agreement which it had earlier, in the decree of dissolution, found to be not unconscionable. We affirmed the district court's conclusion that a subsequent conscionability determination was prevented by the doctrine of res judicata. Hopper, 601 P.2d at 36. The same result is compelled here.

In its determination to reach the result it seeks in this case, the Court mischaracterizes the nature of Kathy's motion in the District Court in order to recharacterize the District Court's statement that it had "reopened the Decree based on unconscionability." This Court's statement that the motion was one to clarify the terms of the agreement and, thereafter, merely to enforce it, is nonsense. Kathy's motion was a Motion for Order Modifying the Decree as to Retirement Benefits and it is this motion that the District Court granted, based on its unconscionability determination. The Court attempts to buttress its recharacterization of this case by concluding that the District Court "was correct in treating the SSB program as early retirement under its original Decree." The problem with this Court's "conclusion" is that the District Court did not treat the SSB program as early retirement under its original decree; had it done so, it would not have been necessary to "reopen the Decree."

The salient facts are these: The parties' Agreement entitled Kathy to a share of Steve's military retirement pay. No alternative provision was made to deal with Steve's separation from the military prior to retiring, even though Kathy testified that she understood during settlement negotiations that Steve might leave the military prior to completing the full term of military service necessary to be eligible for retirement. The Agreement expressly stated that its purpose was "to provide for the equitable and fair division of the property of the parties," and that it constituted full and final settlement based upon full disclosure of property and income. The Agreement, by its terms, "shall not be modifiable." This was the Agreement the District Court determined to be not unconscionable when it incorporated the Agreement into the decree of dissolution.

*9 I would reverse the District Court's determination that unconscionability permitted it to reopen the decree and modify the terms of the Agreement to give Kathy a share of Steve's military separation benefits. The unconscionability determination is barred by the doctrine of res judicata, as is clear from Hopper and from the Commissioners' Note to § 40-4-201, MCA, which states that "the

court's determination, in the decree, that the terms [of the agreement] are not unconscionable, under the ordinary rules of res adjudicata, will prevent a later successful claim of unconscionability." In remaking this case to reach a particular result, this Court undermines the purpose, importance and legislatively-intended finality of property settlement agreements voluntarily entered into by the parties, found conscionable by the court and incorporated in the decree; the Court also creates both unnecessary and incorrect inconsistency in its own cases. I cannot agree. I dissent.

Justice James C. Nelson and Justice Terry N. Trieweiler join in the foregoing dissent of Justice Karla M. Gray

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