IN THE SUPREME COURT OF FLORIDA

MICHELLE M. KELSON,

Petitioner,

v. Case No. 85,246

RUSSELL M. KELSON,

Respondent.

* * * *

PETITIONER'S JURISDICTIONAL BRIEF

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

* * * *

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STATEMENT OF THE CASE AND THE FACTS

The respondent, the former husband, was the prevailing party in an action by the petitioner, the former wife, to modify or amend the final judgment dissolving their marriage. The parties, who were divorced in 1986, had entered into a marital settlement agreement which was incorporated in the final judgment dissolving their marriage and which provided, among other things, that the petitioner would receive a share of the respondent's military retired pay upon his retirement according to a formula agreed upon by the parties. (References to the decision of the First District Court of Appeal in Kelson v. Kelson, 19 Fla. L. Weekly D.2587 (Fla. 1st DCA December 7, 1994) shall be denoted as "Slp. Op."). (Slp. Op. 2). Following the parties' divorce, Congress enacted the Voluntary Separation Incentive Program, 10 U.S.C.A. §1175 (West 1994), hereinafter referred to as "VSI," and the respondent elected to retire under that program before reaching twenty years of active duty at which time he would have been entitled to retired pay. (Slp. Op. 2). The petitioner filed an action to modify or amend the final judgment to provide that she receive a share of the VSI benefits commensurate to the share of the respondent's retired pay to which she was entitled under the marital settlement agreement and final judgment. (Slp. Op. 1).

The trial court found that VSI benefits were not the same as or the equivalent of retired pay and that it had no jurisdiction under McCarty v. McCarty, 453 U.S. 210, 2101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), or the Uniformed Services Former Spouses Protection

Act, 10 U.S.C.A § 1408 (West 1983 & Supp. 1994), hereinafter referred to as "USFSPA," to divide VSI benefits between the parties. (Slp. Op. 3). The trial court further found it had no jurisdiction to modify the settlement agreement to go beyond the agreed upon division of retired pay. (Slp. Op. 3).

An appeal was taken to the First District Court of Appeal to review the trial court order denying the petition. On December 7, 1994, the First District affirmed the trial court. Kelson v. Kelson, No. 93-3003 (Fla. 1st DCA December 7, 1994). The district court held that, under McCarty, federal law preempts state law with regard to the divisibility of military benefits. The district court went on to hold that as the subsequently enacted USFSPA only expressly authorizes state courts to divide military retired pay, McCarty applies to VSI benefits and state courts do not have the authority to divide such benefits between spouses. (Slp. Op. 5). The court further found 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." (Slp. Op. 7).

Petitioner's motion for rehearing, motion for rehearing en banc, and suggestion of direct conflict or, in the alternative, a question of great public importance, were denied on January 26, 1995. (App. A-2). The petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on February 24, 1995.

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal held that VSI benefits are not the same as or equivalent to military retired pay. (Slp. Op. 7). It held that, under McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728. 69 L.Ed.2d 589 (1981), federal law precludes state courts from dividing VSI benefits and, further, that the USFSPA does not authorize state courts to divide VSI benefits because VSI benefits do not constitute retired or retainer pay. (Slp. Op. 5). The district court, while correctly recognizing that the Fifth District Court of Appeal had reached a contrary conclusion on these same issues in Abernethy v. Fishkin, 638 So. 2d 160 (Fla. 5th DCA 1994), incorrectly found that conclusion to be in dictum. (Slp. Op. 4). Because the former husband in Abernethy contended that VSI benefits did not constitute retired pay and that trial court was precluded from dividing such benefits under McCarthy and the USFSPA, it was necessary for the Abernethy court to decide those issues and, consequently, its decision on those issues is not dicta. Abernethy v. Fishkin, 638 So. 2d 160, 162 (Fla. 5th DCA 1994). Accordingly, petitioner contends that the decision of the First District expressly and directly conflicts with a decision of another district court of appeal of this state.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN Abernethy v. Fishkin, 638 So. 2d 160 (Fla. 5th DCA 1994).

In this case, the final judgment of dissolution incorporated an agreement which provided that the wife would receive, as a equitable division of property, a percentage of the husband's military retired pay upon his retirement from the Marine Corps, that percentage being based upon a formula agreed upon by the parties. (Slp. Op. 2). After the dissolution, but before the husband had achieved twenty years of service and eligibility for retired pay, Congress enacted and the husband elected to receive benefits under the VSI program. (Slp. Op. 2). The wife petitioned to modify or amend the final judgment to include specific language allowing her an interest in the VSI benefits on the ground that VSI benefits were the functional equivalent of the retired pay to which she was entitled under the agreement, that the husband elected such benefits in lieu of retired pay, and that the parties could not have anticipated the husband's receipt of VSI benefits in lieu of retired pay because no such benefits were available at the time of the agreement. (Slp. Op. 2). The husband argued that VSI benefits are not the same as or equivalent to retired pay and that the court had no jurisdiction to modify the property settlement agreement. (Slp. Op. 2). The trial court agreed with the husband and denied the wife's petition. (Slp. Op. 3).

In this case, the First District Court of Appeal affirmed the trial court decision, rejected the wife's arguments, and 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.

(Slp. Op. 4).

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.

(Slp. Op. 4).

In Abernethy v. Fishkin, 638 So. 2d 160 (Fla. 5th DCA 1994), the Fifth District Court of Appeal decided the appeal of a case strikingly similar to this case. In Abernethy the judgment dissolving the marriage incorporated an agreement which provided the wife would receive twenty-five percent of the husband's military retired pay when he retired. 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 dissolution but before he had served twenty years and became eligible for retired pay, the husband voluntarily left the service and received VSI benefits. The wife moved for enforcement of the divorce decree, arguing that 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 trial court agreed and ordered the husband to pay twenty-five percent of every VSI payment to the wife and the husband appealed.

After summarizing the facts, the Fifth District stated:

> In attacking the trial court's order of enforcement, the husband's principal contention is that, under the doctrine of federal preemption, the trial court lacked authority to order him to pay 25% of his VSI payments to the wife regardless of the provisions contained in the parties' property settlement agreement and the final judgment...The husband argues that, under the reasoning in McCarty, federal law precludes state courts from distributing VSI benefits in dissolution proceedings because such distribution frustrates Congress' intent in enacting the VSI program. The husband further argues that the USFSPA does not authorize state courts to distribute VSI because VSI does not constitute retired or retainer pay.

Id. at 161-162.

The court then expressly rejected these arguments and, after analyzing the legislative history of the VSI program, concluded VSI benefits were the same as retired pay and that the trial court had jurisdiction to order the husband to pay a portion of the VSI benefits to the wife. Id. at 162-163.

Only after reaching this conclusion did the Abernethy 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...

Id. at 163.

It is clear that the decision of the Abernethy court that VSI benefits constitute retired pay is not dictum as determined by the First District below. It was necessary for the Abernethy court to address this issue as it was specifically raised by the husband on appeal and went to the jurisdiction of the trial court to enter the order appealed. Where a statement is necessary to the disposition of a case, it is not mere dicta. Therrell v. Reilly, 111 Fla. 805, 151 So. 305 (Fla. 1933). Further, it is clear that the court below specifically decided that VSI benefits do not constitute retired pay and, therefore, its decision is in direct conflict with Abernethy.

In addition, even assuming that the Fifth Circuit Court of Appeal could have decided Abernethy without addressing the questions raised by the husband and without deciding whether VSI benefits constitute retired pay, it did address those issues and expressly reached a conclusion of law with which the decision of the First District Court of Appeal is in direct conflict.

This Court has discretionary jurisdiction in this case and should exercise such jurisdiction. The resolution of this conflict will determine the manner in which the courts of this state distribute VSI benefits in pending and future dissolution actions as well as the enforcement of existing dissolution judgments in which the parties agreed to or the court ordered the division of military retired pay.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

Respectfully submitted,

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Attorney for Petitioner

* * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished to **KATHRYN RUNCO, ESQUIRE**, Attorney for Respondent, 304 E. Government Street, P. O. Box 848, Pensacola, Florida, 32501, by hand delivery on this the 3rd day of March, 1995.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHELLE M. KELSON, FORMER WIFE,

Appellant,

v.

RUSSELL M. KELSON, FORMER HUSBAND,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 93-3003

Opinion filed December 7, 1994.

An appeal from the Circuit Court for Santa Rosa County. Paul Rasmussen, Judge.

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, J.

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.

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.

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[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 (1981), the United States Supreme Court reversed a California decision dividing military

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[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.

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 (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 retired pay was explicitly limited to the plain and precise language of USFSPA, and state courts may not go beyond what the statute specifies).

"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 (Cal. Dist. Ct. App.), cert. denied mem., 479 U.S. 885 (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. 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, § 1204 (retirement)

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[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.

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 (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."

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); Bockhoven v. Bockhoven, 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., DISSENTING WITH WRITTEN OPINION.

BOOTH, J., 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.

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 SAT CITO SI RECTE

Copies:

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

Richard L. ABERNETHY,
Appellant/Cross-Appellee,

v.

Monica R. FISHKIN a/k/a Monica R. Abernethy, Appellee/Cross-Appellant.

No. 93-661.

District Court of Appeal of Florida, Fifth District.

June 10, 1994.

Following dissolution of parties' marriage, order was entered enforcing property settlement scheme by requiring former husband to pay portion of benefits received upon his voluntary separation from the United States Air Force by the Circuit Court, Brevard County, Tonya Rainwater, J., and both sides appealed. The District Court of Appeal, Diamantis, J., held that: (1) payments to which former service member became entitled under the Voluntary Separation Incentive Program (VSI) qualified as "retire or retainer pay," which was subject to equitable distribution; (2) dissolution court had authority to require payments, even assuming that VSI benefits did not qualify as "retire or retainer pay"; but (3) attorney fees should not have been awarded absent some evidence of wife's need for fees.

Affirmed in part, reversed in part and remanded.

1. Divorce ⇐252.3(4)

Payments to which service member became entitled, upon his voluntary separation from the armed services, pursuant to the Voluntary Separation Incentive Program (VSI) qualified as "retire or retainer pay," which was subject to equitable distribution upon service member's divorce under the Uniform Services Former Spouse's Protection Act (USFSPA). 10 U.S.C.A. § 1408.

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

2. Divorce ⇐252.3(4)

Dissolution court order requiring former service member to pay to his ex-spouse a portion of any benefits that he received, following his voluntary separation from the armed services, pursuant to the Voluntary Separation Incentive Program (VSI) did not improperly assign or award VSI benefits to wife, even assuming that VSI benefits did not qualify as "retire or retainer pay" subject to equitable distribution under the Uniformed Services Former Spouses Protection Act (USFSPA); dissolution court had authority to enforce former service member's promise that his ex-wife would receive 25% of his retirement pay, and to require service member to make agreed payments from his personal funds regardless of their source. 10 U.S.C.A. § 1408.

3. Divorce ⇐226

Prior to awarding attorney fees pursuant to statute specifically authorizing such awards to opposing party in dissolution proceedings, dissolution court should have allowed evidence of wife's need for attorney fees and should have made specific findings as to reasonable number of hours expended and reasonable hourly rate. West's F.S.A. § 61.16.

4. Divorce ⇐224

Award of attorney fees in dissolution action, pursuant to statute specifically authorizing such awards to ensure that each party has similar ability to secure competent counsel, must be based on need of party seeking fees and ability of other party to pay fees; attorney fees awarded pursuant to statute are not based upon prevailing party standard. West's F.S.A. § 61.16.

5. Divorce ⇐226

Prior to awarding attorney fees in dissolution action, pursuant to statute specifically authorizing such awards to ensure that each party has similar ability to secure competent counsel, trial court should make specific findings as to reasonable number of hours expended and reasonable hourly rate. West's F.S.A. § 61.16.

Daniel D. Mazar of Mead and Mazar, Winter Park, for appellant/cross-appellee.

Judith E. Atkin, Melbourne, for appellee/cross-appellant.

DIAMANTIS, Judge.

Richard L. Abernethy (the husband) appeals the trial court's order enforcing the parties' final judgment of dissolution and awarding attorney's fees to Monica R. Fishkin (the wife). The wife cross-appeals the trial court's order because it fails to award all of her attorney's fees. We affirm the trial court's order to the extent that it enforces the parties' final judgment of dissolution but reverse the award of attorney's fees and remand this cause for further proceedings consistent with this opinion.

In January 1992, the trial court entered a final judgment dissolving the parties' 16–year marriage and incorporating the provisions of their property settlement agreement. At the time of dissolution, the husband was a member of the United States Air Force. The agreement provided that the wife would receive twenty-five percent (25%) of the husband's military retirement pay pursuant to the Uniformed Services Former Spouses Protection Act (hereinafter the "USFSPA").[1] Relative to this provision, the husband agreed not to merge his retired or retainer pay with any other pension and, further, not to pursue any course of action that would defeat the wife's right to receive a portion of the husband's full net disposable retired or retainer pay. The husband also agreed to self-implement the provisions of the parties' property settlement agreement either by making direct payments to the wife or by taking other action as required to effectuate the intent and spirit of the parties' agreement if, for any reason, the military became unable to implement the trial court's final judgment with regard to the husband's military retirement.

In March 1992, faced with the government's planned reduction in force, the husband chose voluntary separation from the United States Air Force. According to his affidavit, the husband's voluntary separation options included the Special Separation Bonus (SSB) (a lump-sum payment)[2] and the Voluntary Separation Incentive Program (VSI) (an annuity).[3] The husband selected the VSI option and was honorably discharged from the Air Force. Pursuant to the provisions of the VSI program, the husband will receive annual payments for 32 years (twice the number of years of service).[4]

The wife thereafter filed enforcement proceedings in the circuit court in which she contended that, by voluntarily separating from the Air Force under the VSI program, the husband had pursued a course of action that defeated her right to receive a portion of the husband's military retirement pay and, thereby, had violated the provisions of the parties' property settlement agreement and the final judgment of dissolution. The trial court granted the wife's request for enforcement by ordering the husband to pay to the wife 25% of every VSI payment immediately upon its receipt.

[1] In attacking the trial court's order of enforcement, the husband's principal contention[5] is that, under the doctrine of federal

1. The USFSPA is currently codified at 10 U.S.C.A. § 1408 (West 1983 & Supp.1994).

2. *See* 10 U.S.C.A. § 1174a (West Supp.1994).

3. *See* 10 U.S.C.A. § 1175 (West Supp.1994).

4. The husband's annual VSI payments are calculated as follows: 2.5% × final monthly basic pay × 12 months × 16 years of service. *See* 10 U.S.C.A. § 1175(e)(1) (West Supp.1994).

5. The husband argues that the trial court employed an improper procedure when it granted the wife's motion for summary judgment in these enforcement proceedings. The record reflects that, although the trial court orally granted summary judgment, the court's subsequent written order granted the wife's motion for enforcement. More importantly, the issue before the trial court was one of law because the parties' pleadings and the husband's affidavit and deposition presented no factual dispute for the court's resolution.

We further reject the husband's contention that the trial court lacked subject matter jurisdiction to grant the wife's motion for enforcement. *See Work v. Provine*, 632 So.2d 1119, 1121 (Fla. 1st DCA 1994); *Seng v. Seng*, 590 So.2d 1120, 1121 (Fla. 5th DCA 1991). *See also Clauson v. Clauson*, 831 P.2d 1257, 1261 (Alaska 1992). The trial court's order enforced the final judgment's provisions prohibiting the husband from pursu-

preemption, the trial court lacked authority to order him to pay 25% of his VSI payments to the wife regardless of the provisions contained in the parties' property settlement agreement and the final judgment. In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the United States Supreme Court held that federal law precluded state courts from distributing military retirement benefits in marital dissolution proceedings because such distribution frustrated the objectives of the federal military retirement scheme. Congress responded to the *McCarty* decision by enacting the USFSPA, which allows state courts to treat a service member's disposable retired or retainer pay as property subject to equitable distribution.[6] The husband argues that, under the reasoning of *McCarty*, federal law precludes state courts from distributing VSI benefits in dissolution proceedings because such distribution frustrates Congress's intent in enacting the VSI program. The husband further argues that the USFSPA does not authorize state courts to distribute VSI because VSI does not constitute retired or retainer pay.

We reject these arguments based upon the reasoning set forth by the court in *In re Marriage of Crawford*, No. 2 CA-CV 93-0203, 1994 WL 155101 (Ariz.Ct.App. Apr. 29, 1994). In that case, a 1989 dissolution decree awarded the wife 32.5% of the husband's military retirement benefits. In 1992, the husband voluntarily separated from the Air Force under the SSB option, and the wife filed an enforcement petition seeking 32.5% of the husband's lump-sum SSB payment. In discussing Congress's intent in enacting the SSB and VSI programs, the Arizona court stated:

> ing any course of action which would defeat the wife's right to receive a portion of the husband's full net disposable retired or retainer pay. The order did not modify the parties' agreement and judgment because the "order did not alter the extent of the benefits due to the wife under the agreement, but only the method of payment." *Work v. Provine*, 632 So.2d at 1122. *See also McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113, 115 (Ct.App.1993).

6. *See* 10 U.S.C.A. § 1408(c) (West Supp.1994).

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.[FN5]

FN5. We note that literature distributed by the Department of Defense explaining the Voluntary Separation Incentives and Special Separation Benefits programs states, "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."

1994 WL 155101, at *1, *3. The court affirmed the trial court's order awarding the wife a portion of the husband's SSB payment.

The purpose of the VSI program is 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 selection for involuntary separation or denial of reenlistment." H.R.Conf.Rep. No. 311, 102d Cong. 1st Sess. (1991). As with military retirement, VSI payments primarily are based on the recipient's ending salary and years of service.[7] While some commentators are of the view that VSI payments do not constitute retired or retainer pay,[8] one court has referred to VSI and SSB benefits as "inducements to elect early retirement." *Elzie v. Aspin*, 841 F.Supp. 439, 440 (D.D.C.1993). Further indicating Congress's 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

7. *See* 10 U.S.C.A. § 1175(e)(1) (West Supp.1994).

8. *See* Major Michael H. Gilbert, *A Family Law Practitioner's Road Map to the Uniformed Services Former Spouses Protection Act*, 32 Santa Clara L.Rev. 61 (1992); Captain Allison A. Polchek, *Department of the Army Pamphlet 27-50-241, Recent Property Settlement Issues for Legal Assistance Attorneys*, Army Law., Dec. 1992, at 4.

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of any disability payments the member receives[9] and that the Retirement Board of Actuaries administers both the VSI Fund and the Military Retirement Fund.[10]

Our conclusion that the trial court has authority to order the husband to pay a portion of his VSI benefits to the wife also is supported by the Supreme Court's decision in *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). In *Rose*, the Court held that federal laws preventing the attachment of veterans' disability benefits do not preclude state courts from enforcing, by contempt, child-support orders even where such disability benefits represent the veteran's only source of income and would necessarily be used to pay child support. *Rose*, 481 U.S. at 635–36, 107 S.Ct. at 2038–39. The Court noted that "these benefits are intended to support not only the veteran, but the veteran's family as well." *Id.* at 634, 107 S.Ct. at 2038.[11]

[2] 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 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.[12] 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. By unilaterally electing VSI benefits and refusing to make payments to the wife, the husband has breached these 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.[13] *See Clauson v. Clauson*, 831 P.2d 1257, 1262–64 (Alaska 1992); *Hapney v. Hapney*, 824 S.W.2d 408, 409–10 (Ark.Ct.App.1992); *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113, 115–16 (Ct.App.1993); *Owen v. Owen*, 14 Va.App.

9. *See* 10 U.S.C.A. § 1175(e)(4) (West Supp.1994).

10. *See* 10 U.S.C.A. § 1175(h)(4) (West Supp. 1994).

11. Under the USFSPA, the term "disposable retired pay" is defined as the total monthly retired or retainer pay *less* any amount received on account of disability. 10 U.S.C.A. § 1408(a)(4)(C), (a)(7) (West Supp.1994). Consequently, a state court lacks the authority, apparently even when presented with a property settlement agreement, to directly award that portion of the member's retirement which constitutes disability benefits. *See Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989); *McMahan v. McMahan*, 567 So.2d 976 (Fla. 1st DCA 1990); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Owen v. Owen*, 14 Va.App. 623, 419 S.E.2d 267 (Ct.App.1992). Notwithstanding *Mansell*, state courts may consider the impact of a veteran's disability payments in determining the "entire equitable distribution scheme contemplated by the parties in an effort to do equity and justice to both." *McMahan*, 567 So.2d at 980. *See also Clauson*, 831 P.2d at 1263.

12. *See Board of Pension Trustees of the City General Employees Pension Plan v. Vizcaino*, 635 So.2d 1012 (Fla. 1st DCA 1994). We recognize that the order provides that, in the event it becomes possible for the military to make payments to the wife, the trial court reserves jurisdiction to sign any additional orders that may be necessary to effect direct payment. The husband does not contend, however, that the trial court's order requires the military to make direct payments.

13. Once a judgment of dissolution becomes final, the parties may be precluded from attacking the property settlement agreement on which the judgment is based. *See In re Marriage of Mansell*, 217 Cal.App.3d 219, 265 Cal.Rptr. 227, 231–32 (1989), *cert. denied, mandamus denied*, 498 U.S. 806, 111 S.Ct. 237, 112 L.Ed.2d 197 (1990); *Tarver v. Tarver*, 557 So.2d 1056, 1062 (La.Ct. App.), *writ denied*, 563 So.2d 877 (La.1990); *Maxwell v. Maxwell*, 796 P.2d 403, 407 (Utah Ct.App.1990). *Cf. McMahan v. McMahan*, 567 So.2d 976 (Fla. 1st DCA 1990) (setting aside property settlement agreement on direct appeal from final judgment and remanding in order for trial court to fashion equitable distribution taking into account husband's disability benefits). We note that the husband has not filed any proceedings to modify or set aside the final judgment and property settlement agreement which govern the parties' rights. Thus, this issue need not be decided in this case.

623, 419 S.E.2d 267, 269–70 (1992).[14]

[3–5] We agree, however, with the husband's contention that the trial court erred in awarding attorney's fees. First, the trial court erred by refusing to allow evidence of the wife's need for attorney's fees. Attorney's fees awarded pursuant to section 61.16, Florida Statutes (1993), must be based on the need of the party seeking the fees and the ability of the other party to pay these fees. *McClish v. Lee*, 633 So.2d 56, 58 (Fla. 5th DCA 1994) (en banc). Statutory fees awarded pursuant to section 61.16 are not based upon a prevailing-party standard. *Thornton v. Thornton*, 433 So.2d 682, 684 (Fla. 5th DCA), *rev. denied*, 443 So.2d 980 (Fla.1983). Additionally, the trial court erred in failing to comply with the requirements of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150–51 (Fla.1985). The trial court did not make specific findings as to the reasonable number of hours expended and the reasonable hourly rate. *Sunday v. Sunday*, 610 So.2d 62, 62 (Fla. 3d DCA 1992).

Accordingly, we affirm the trial court's order enforcing the final judgment of dissolution but reverse the award of attorney's fees and remand this cause to the trial court for further proceedings consistent with this opinion.[15]

AFFIRMED in part; REVERSED in part; REMANDED.

COBB and PETERSON, JJ., concur.

14. The cases of *In re Marriage of Kuzmiak*, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (Ct.App.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 276, 93 L.Ed.2d 252 (1986), and *Perez v. Perez*, 587 S.W.2d 671 (Tex.1979), upon which the husband relies, are inapplicable because these cases involve involuntary separation from military service.

15. Because of our reversal of the trial court's award of attorney's fees and our remand of this matter, the wife's cross-appeal is moot.

Catherine G. FETZER, as Personal Representative of the Estate of Jane O. Cox, Appellant,

v.

BREMER BRACE OF FLORIDA, INC. Appellee.

No. 93–561.

District Court of Appeal of Florida, First District.

June 14, 1994.

Plaintiff in negligence action appealed order of the Circuit Court, Duval County, Frederick Tygart, J., requiring remittitur reducing jury's damage assessment from $150,000 to $18,500 or, in alternative, granting new trial. Plaintiff appealed. The District Court of Appeal held that trial court failed to set forth sufficient reasons supporting its determination.

Reversed and remanded with directions.

1. **Damages** ⇐132(1)
New Trial ⇐162(1)

Trial court erred in requiring remittitur reducing jury's damage assessment in negligence action from $150,000 to $18,500 or, in alternative, granting new trial; court failed to set forth sufficient reasons supporting its determination that jury verdict was excessive or otherwise improper or that jury was influenced by considerations outside record, evidence on issues of whether original plaintiff's wounds had healed and whether she underwent pain and suffering as result of those injuries was in conflict, and it was province of jury to determine those issues.

2. **Jury** ⇐117, 142

Defendant in negligence action could not assert for first time in motion for new trial

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PER CURIAM.

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