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MAR 21 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MICHELLE M. KELSON,

Petitioner,

vs. Case No. 85,246

RUSSELL M. KELSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

Respondent adopts and incorporates the Statement of the Case and Facts contained in the Petitioner's Jurisdictional Brief.

SUMMARY OF THE ARGUMENT

The instant case is not in direct and express conflict with the decision of the Fifth District Court of Appeal in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994). The language in Abernethy upon which Petitioner relies, wherein the Fifth District opined that benefits payable under the Voluntary Separation Incentive Program were the same as military retirement pay, was not necessary to the ultimate holding of the Fifth District in that case. Accordingly, that language is mere dicta and is insufficient to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3), Fla. Const.

ARGUMENT

NO EXPRESS AND DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE AND THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994).

Pursuant to Article V, Section 3(b)(3), Florida Constitution, this Court has the discretion to accept jurisdiction to resolve an "express and direct conflict" between decisions of the district courts of this state. Petitioner Michelle Kelson ["Petitioner"] urges this Court to invoke its jurisdiction under Article V, Section 3(b)(3), arguing that the decision of the First District Court of Appeal in the instant case is in direct and express conflict with an earlier decision of the Fifth District Court of Appeals in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994). Both the instant case and Abernethy address the apportionment of military Voluntary Separation Incentive Program[1] ["VSI"] benefits under a marital settlement agreement. However, the portion of the Fifth District's opinion in Abernethy which is alleged to conflict with the decision in the instant case was mere dicta. Accordingly, there is no express and direct conflict between Abernethy and the instant case,`and therefore no grounds upon which to invoke the discretionary jurisdiction of this Court.

The Petitioner argues that the crux of the Fifth District's decision in Abernethy, was that VSI benefits are the same as, or

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[1]10 U.S.C.A. 1175 (West 1994)

equivalent to, military retirement pay for purposes of enforcing a marital settlement agreement, and thus that there can be no federal preemption which would preclude a state court from apportioning such VSI benefits. Petitioner's argument fails to recognize that the facts in the instant case present a different issue: whether a state court may modify a marital settlement agreement after the fact to require apportionment of VSI benefits, where the agreement does not otherwise speak to such benefits, or require such an apportionment. The First District in the instant case correctly held that state courts have no such authority, while the Fifth District in Abernethy, confronted with an entirely different factual situation, held that the agreement at issue in that case could be construed to require a division of VSI benefits. Because the facts before the Fifth District in Abernethy are materially distinguishable from those before the court in this case, and because the language in Abernethy on which Petitioner relies to show a conflict is mere dicta, this Court has no jurisdiction over the instant case pursuant to Article V, Section 3(b)(3), Fla. Const. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983); Niemann v. Niemann, 312 So.2d 733 (Fla. 1975).

As Petitioner states in her brief, in 1986 the parties to this appeal entered into a marital settlement agreement, subsequently incorporated in a final judgment of dissolution of marriage. That agreement provided, in pertinent part, that the Petitioner would receive a monthly percentage of the Respondent's

anticipated military retired pay upon his retirement from the U.S. Marine Corps. The Respondent would have become eligible for military retired pay after twenty years of active military service. Prior to the Respondent's achieving eligibility for military retired pay, the United States Congress enacted the VSI Program, which provided for an annual payment for a specific term of years upon early separation from the armed services. The Respondent elected to receive VSI benefits after completing sixteen years of active service. The trial court determined, and the First District Court of Appeals agreed, that the agreement between the parties did not require apportionment of the VSI benefits as "military retired pay", and that the court lacked jurisdiction to modify that agreement to require any such apportionment.

The property settlement agreement at issue in Abernethy also provided that the former wife would receive a percentage of the former husband's military retired pay upon his retirement from active duty in the armed services. Unlike the instant case, however, the parties in Abernethy had also incorporated a provision in the agreement under which the former husband specifically agreed to take no action which might defeat the former wife's right to the stated percentage of retirement pay. That provision further required the former husband to self-implement the agreement's payment requirements, if necessary. Abernethy, 638 So.2d at 163. Notwithstanding his specific agreement not to defeat the former wife's entitlement to a

portion of his retirement pay and to self-implement the corresponding payment requirements if necessary, the former husband in Abernethy argued that the state court was without jurisdiction to order apportionment of his VSI benefits. Id. at 161. In response to this argument, the Fifth District addressed the significance of the United States Supreme Court decision in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 589 (1981) and the subsequent Congressional enactment of the Uniformed Services Former Spouses Protection Act ["USFSPA"], 10 U.S.C.A. 1408. Abernethy, 638 So.2d at 161-163. In McCarty, the Court had held that under the doctrine of federal preemption state courts could not distribute military retirement benefits in marital dissolution proceedings. In response to the McCarty decision, Congress adopted the USFSPA, which provided limited authority for state courts to apportion military retirement benefits. The Fifth District in Abernethy held that the trial court was not precluded from reaching the former husband's VSI benefits under USFSPA, noting the apparent Congressional intent to treat VSI benefits in a manner similar to military retirement pay. Abernethy 638 So.2d at 162-163. That determination, however, was not the pivotal factor on which the Fifth District's ultimate judgment was contingent. Instead, as the Fifth District Court of Appeal acknowledged, and as the First District in the instant case noted, the Abernethy decision would have been the same absent such a finding; since the former husband in that case specifically agreed to take no action which would defeat the

former wife's entitlement to a portion of his military retired pay, even agreeing to fund the payments from his personal funds if necessary, the source of the funds, whether military retirement pay or VSI, was wholly irrelevant. As the court stated in Abernethy:

> 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.

Id. at 163 (emphasis supplied) (footnote omitted). In the instant case, in contrast, there was no requirement that the Respondent self-implement the provisions of the marital settlement agreement regarding apportionment of his military retirement pay. As the First District correctly noted, the trial court was bound by the specific terms of the agreement[2]; to go further would have amounted to an unauthorized modification of an agreed-to property division.

It is clear on the basis of the Fifth District's own opinion in Abernethy that its determination of the preemption issue under McCarty and the USFSPA was dicta. Crabtree v. Aetna Casualty and Surety Co., 438 So.2d 102, 106 (Fla. 1st DCA 1983) (a statement which is unnecessary to the holding of a case is dicta).[3]

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[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'". Slp. Op. at 3 (citations omitted).

[3]The Petitioner argues that it was "necessary" for the Fifth District to determine whether VSI benefits were the functional equivalent of military retired pay simply because the former

Because the issue of whether VSI benefits constituted "military retirement pay" under the provisions of the USFSPA was irrelevant under the specific terms of the marital settlement agreement in Abernethy, the language in the Abernethy opinion on which the Petitioner in the instant case relies was not necessary in order for the Fifth District enter its ultimate disposition and confers no jurisdiction on this Court under Article V, Section 3(b)(3), Fla. Const. (1980). Crabtree, supra; see also Niemann v. Niemann, supra and Allstate Insurance Co. v. Clendening, 289 So.2d 704, 709 (Fla. 1974).

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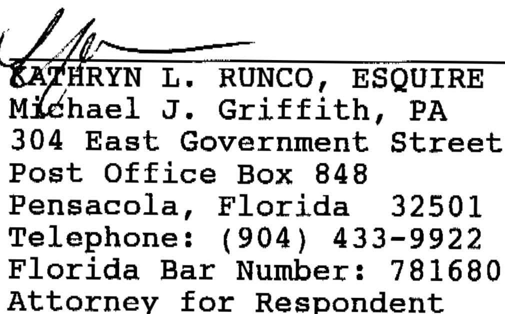
husband in that case raised the issue. (Petitioner's Jurisdictional Brief at 3, 7-8) The test, however, is whether the determination was fundamental to the outcome of the ultimate decision, not whether the issue was presented to the court. Crabtree v. Aetna Casualty and Surety Co., supra.

CONCLUSION

The instant case was correctly decided, and is not in conflict with the decision of the Fifth District Court of Appeal in Abernethy v. Fishkin, supra. Accordingly, this Court is without jurisdiction over this matter pursuant to Article V, Section 3(b)(3), Florida Constitution.

Respectfully submitted,



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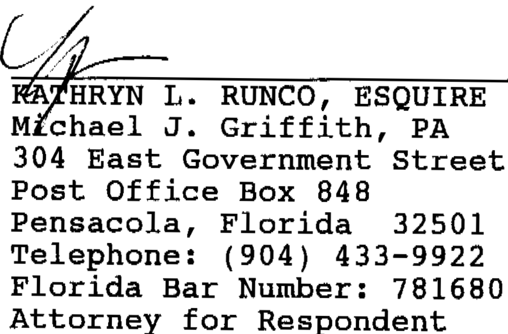
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Gordon E. Welch, Esq., The Center for Family Law, P.A., 201 East Government Street, Pensacola, Florida 32501, by regular U.S. Mail, this 20th day of March, 1995.



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