OA 8-30-95

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 REPLY BRIEF ON THE MERITS

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

* * * *

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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 SELECTED TO RETIRE EARLY AND RECEIVE VSI BENEFITS RATHER THAN REMAIN ON ACTIVE DUTY AND RECEIVE RETIRED PAY.

A. INTRODUCTION.

Although he acknowledges in his Answer Brief that this case presents significant and complex questions regarding federal preemption and statutory interpretation, Major Kelson argues that this Court does not need to address such questions, including the question whether Florida courts have jurisdiction to divide Voluntary Separation Incentive Benefits (VSI) pursuant to 10 U.S.C. 1475 as marital property as held by the Fifth District Court of Appeals in Abernethy v. Fishkin, 638 So.2d 160 (Fla. 5th DCA 1994). In essence, he argues that the parties' marital settlement agreement provided only that Mrs. Kelson receive a share of any military retired pay earned by him, that the VSI benefits he elected to receive are substantially different from and do not constitute retired pay, and, therefore, any award to Mrs. Kelson of an interest in his VSI benefits would constitute an impermissible modification of a property settlement agreement. Having made this argument, Major Kelson further argues that federal law preempts state court from dividing VSI benefits. Finally, Major Kelson contends that any conflict between Abernethy and the decision of the First District in this case can be resolved without disturbing the outcome of either case.

It is Mrs. Kelson's position that VSI benefits are essentially the same as or equivalent to retired pay, or they were voluntarily elected by Major Kelson in lieu of retired pay. In any case, she maintains she is entitled to receive a share of such VSI benefits commensurate to the share the parties agreed she would have in his retired pay.

Although there are differences between VSI and retired pay in terms of ancillary or secondary benefits such as medical care, the monetary compensation afforded Major Kelson is equivalent to retired pay because it is based upon the same factors as retired pay, that is, his years of past service and his pay at time of his separation. The unavoidable facts are that Major Kelson will receive, over thirty-two years, in excess of half a million dollars in VSI benefits and such benefits are guaranteed even in the event of his death. (T-41,42).

Even if VSI benefits and retired pay are not equivalent, Mrs. Kelson contends that, because Major Kelson voluntarily elected to receive such benefits in lieu of remaining on active duty and earning retired pay, she is entitled to enforce her right to receive a share of his retired pay against his VSI benefits. To deny Mrs. Kelson an interest in Major Kelson's VSI benefits would effectively permit him to unilaterally divest his former wife of the interest he agreed she would have in his retired pay simply by electing to receive benefits under a program which did not even exist at the time of the parties' agreement. To permit such a result is manifestly unjust and inequitable.

Major Kelson also argues that the First District correctly held that federal law preempts state court from dividing VSI benefits as marital property in dissolution proceedings, and, therefore, contrary to the decision of the Fifth District in Abernethy, Florida courts have no jurisdiction to divide VSI benefits in dissolution actions. Because the VSI statute prohibits the service

member from transferring his interest in VSI benefits except by testamentary devise, he concludes that it is clear Congress intended that VSI benefits not be divided by state courts. Simply put, Mrs. Kelson contends that such a prohibition is expressly limited to the service member and does not evidence any clear intention on the part of Congress that state courts not divide VSI benefits as marital property.

Major Kelson asserts that the First District correctly held that only those specific benefits identified in the Uniformed Services Former Spouse's Protection Act (USFSPA), Title 10 U.S.C. 1408 **et seq**, can be divided by state courts in dissolution actions. As VSI benefits were not included in the USFSPA, he concludes they are not subject to division by state courts. This argument overlooks the fact that the VSI program was enacted several years after the USFSPA. It also ignores the fact that, as required by the Supreme Court in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), federal preemption of state law as to the division of VSI benefits is not positively required by direct enactment in either the USFSPA or the VSI statute.

It is for these reasons and the reasons addressed in the Initial Brief that Mrs. Kelson requests, not that the parties' agreement be modified, but rather than she be permitted to enforce the agreement that she receive a proportionate share of Major Kelson's retired pay against his VSI benefits. While it may be necessary for the trial court to address certain contingencies, including reimbursement by the parties of their respective shares of VSI benefits in the event Major Kelson subsequently becomes entitled to retired pay, these contingencies do not justify denying Mrs. Kelson her equitable share of such benefits.

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.

Contrary to the decision of the Fifth District Court in Abernethy, Major Kelson argues that the First District Court correctly held that state courts do not have jurisdiction to divide VSI benefits because neither the USFSPA nor the VSI statute specifically authorize the division of such benefits. He argues that, under Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 589 (1989), and McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), if state court jurisdiction over a specific military benefit is not expressly granted in the USFSPA, then state courts have no jurisdiction to divide that benefit in a dissolution proceeding. This argument is faulty for several reasons.

First, it fails to acknowledge that, with the enactment of the USFSPA, the Congress directly overruled the decision of the Supreme Court decision in McCarty, and made clear its intention that state courts have the authority to divide non-disability military retirement benefits.

Second, it ignores the fact that neither the USFSPA nor VSI act contain plain and precise language prohibiting the division of VSI benefits by state courts. Even if McCarty was not completely overruled by the USFSPA, Hisquierdo still requires a showing that pre-emption of state law is "positively required by direct enactment." Hisquierdo, 439 U.S. 572, 581. As the Supreme Court found in Mansell, the USFSPA contains plain and precise language excluding disability benefits from retired pay and, therefore, federal law preempted state law as to the division of such disability benefits. However, both the USFSPA and the VSI statute are silent as to the divisibility of VSI benefits. Therefore, as preemption of state law as to the divisibility

of such benefits is not positively required by the USFSPA or the VSI statute, neither McCarty nor Mansell prohibit the division of VSI benefits by state courts.

Third, Major Kelson fails to show, as required by the Supreme Court in Hisquierdo, that, absent federal preemption of state law, there are clear and substantial federal interests which would be harmed if state courts divide VSI benefits. In fact, Major Kelson fails to assert any federal interest which would be threatened by the division of VSI benefits by state courts.

Fourth, the fact that the VSI statute prohibits the military member from transferring VSI benefits does not clearly evidence, as contended by Major Kelson, an intent by Congress to prohibit state courts from dividing such benefits. If Congress intended to prohibit state courts from dividing VSI benefits, it could have said so in plain and specific language, but it did not.

For these reasons, Mrs. Kelson submits that, as held by the Fifth District in Abernethy, the courts of Florida do have jurisdiction to divide VSI benefits.

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

Major Kelson argues there are significant differences between VSI benefits and retired pay and, because of these differences, the First District correctly held that the parties' agreement that Mrs. Kelson receive of share of Major Kelson's retired pay did not encompass his VSI benefits.

Citing the California appellate court holding in In Re Marriage of Kuzmiak, 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644 (Cal.Dist.Ct.App. 1986), cert. den. 479 U.S.885, 107 S.Ct. 276, 93 L.Ed. 2d 252 (1986), that involuntary separation pay is the separate property of the service member, argues there is no logical reason why voluntary separation pay, such as VSI benefits,

should be treated differently than involuntary separation benefits. As argued in the Initial Brief, voluntary and involuntary separation benefits should be treated differently because they serve very different purposes. Involuntary separation pay is intended to assist the military member make the transition to private employment because he or she has been compelled to leave the military and denied the right to pursue a military career and obtain retired pay. Voluntary separation benefits, such as VSI benefits, are intended to induce a military member to choose to leave the military before earning retired pay and to compensate him for his years of military service. Additionally, involuntary and voluntary separation benefits should be treated differently because they provide very different compensation. At the time of the parties' agreement, the maximum involuntary separation pay which Major Kelson could have received if he was involuntarily separated was $30,000. 10 U.S.C. §1174(d)(1). Under the VSI program, Major Kelson is guaranteed to receive over $580,000. (T-41,41).

Stating that VSI benefits, like involuntary separation benefits, are intended to replace future lost earnings while retired pay represents payments for past services, Major Kelson fails to cite any portion of the legislative history of the VSI program to support that claim. Further, while arguing that VSI benefits and involuntary separation benefits are essentially the same, he never acknowledges or explains the tremendous difference in the amount of compensation he will receive under the VSI program as compared to involuntary separation pay.

Major Kelson also argues that, because he had not served on active duty for twenty years and become entitled to retired pay, Mrs. Kelson's receipt of a share of his retired pay was only an expectation at the time of the parties' agreement, and that his death or involuntary separation would have defeated that expectation and Mrs. Kelson would have received nothing. This

argument sidesteps the simple fact that, after agreeing his wife receive a share of his retired pay upon his retirement, he subsequently elected VSI benefits and thereby unilaterally defeated Mrs. Kelson's expectation that she share in his retired pay.

While Major Kelson is correct in noting VSI benefits are paid on an annual basis and retired pay is paid on a monthly basis, this is hardly a significant or material difference. Also, contrary to his argument, the formula agreed upon by the parties to divide his retired pay can readily be applied to the division his VSI benefits, to wit: one-half times the ratio of the total number of years the parties were married while he served on active duty, or 13.2 years, to his total years of active duty when he left the service, or 16 years, or 41%.

Major Kelson also poses the rhetorical question whether, if he should live longer than the 32 years he is to receive VSI payments, he would then be required to continue making payments to Mrs. Kelson. Since he elected to receive VSI benefits which are payable for 32 years, Mrs. Kelson can only receive her commensurate share of such benefits for that period of time and she asks for nothing more.

Major Kelson argues that the differences between the retired pay program and the VSI program as to medical care, commissary privileges, and cost of living adjustments, demonstrate that the VSI recipient enjoys far less financial security than the retired member. This argument ignores the fact that VSI benefits are guaranteed and can be devised by the recipient whereas retired pay is not guaranteed and ceases upon the death of the member. If anything, the core benefit of both VSI and retired pay, that is, compensation for years of service in the military, is more secure in the VSI program than the retired pay program.

The fact, as noted by Major Kelson, that VSI recipients must repay VSI benefits if they subsequently earn regular retired pay simply supports Mrs. Kelson's position that VSI benefits are paid to the member in lieu of retired pay. In this regard, he poses the rhetorical question whether Mrs. Kelson would also be obligated to reimburse her share of VSI benefits in the event he subsequently earns retired pay. As no retired pay would be paid to either party until the VSI benefits are recovered, Mrs. Kelson would have no choice but to reimburse her share of those benefits.

For these reasons and the reasons addressed in the Initial Brief, Mrs. Kelson submits that the Fifth District correctly held in Abernethy that VSI benefits constitute retired pay, and, accordingly, she is entitled to receive a commensurate share of such 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.

Major Kelson argues that the Fifth District Court decision in Abernethy must be distinguished from the instant case because there the husband personally guaranteed the wife's receipt of a specific percentage of his retired pay. He argues that, because there was no such personal guarantee in this case, for Mrs. Kelson to be entitled to a share of his VSI benefits, this Court must either interpret the agreement as implicitly encompassing VSI benefits and modify other portions of the agreement for consistency or, modify or amend the agreement itself to specifically include VSI benefits.

First, this argument ignores the fact that, before turning to the personal guarantee of the husband in Abernethy, the Fifth Circuit specifically addressed and rejected the same arguments which Major Kelson has made in this case and specifically found that VSI benefits do constitute retired pay and that federal law does not preempt state courts from dividing such benefits.

Second, it must also be emphasized that the VSI program was enacted in December, 1991, and, therefore, it did not exist at the time of the Kelsons' divorce in 1990 whereas it already existed at the time of the Abernethys' divorce in January, 1992. Therefore, the Kelsons had no reason to believe that Major Kelson could pursue any course of action by which he could have voluntarily defeated Mrs. Kelson's interest in his retired pay and, consequently, there was no reason for the parties to include a personal guarantee as was included in the Abernethy agreement.

Major Kelson also argues that the Fifth District decision in Abernethy that VSI benefits constitute retired pay and that state courts have jurisdiction to divide such benefits is dicta. However, as the former husband raised those issues on appeal and they went to the jurisdiction of the trial court to enforce the parties' agreement against the VSI benefits received by him, it was necessary for the Fifth District to decide them. As it was necessary for the Fifth District to decide those issues, its holdings in regard to them are not dicta. Therell v. Reilly, 111 Fla. 805, 151 So. 305 (Fla. 1933).

As argued in the Initial Brief, Mrs. Kelson submits that the Fifth District Court examination of the legislative history of the VSI program and its analysis of the VSI and retired pay programs adequately and properly support its decision in Abernethy that VSI benefits constitute retired pay and that the First District 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.

Major Kelson argues that, because of certain differences between VSI benefits and Special Separation Benefits (SSB) paid pursuant to 10 U.S.C. §1174a, this Court should not adopt and apply the same reasoning in this case in regard to VSI benefits as did the Montana Supreme Court in regard to SSB benefits in Blair v. Blair, 1995 WL 30240 (Mont. May 18, 1995).

First, he correctly notes that the service member is prohibited from transferring his benefits under the VSI statute but not the SSB statute. This is hardly surprising, however, because SSB benefits are paid in a single, lump sum. What purpose would be served in prohibiting the transfer of such benefits when the member could do so himself upon his receipt of the single, lump payment of those benefits? Further, what is the purpose of such a provision in regard to VSI benefits? As far as can be determined by undersigned counsel, the legislative history of the VSI program does not contain an explanation for this provision. As it is unclear why this provision was included, it hardly a clear basis for concluding that Congress intended that state courts be precluded from dividing such benefits and that VSI benefits should be treated differently than SSB benefits. This is especially true in light of the clear statement by the Department of Defense in its pamphlet explaining VSI and SSB benefits that the divisibility of such benefits as marital property is a matter left to the state courts. (R-60).

While Major Kelson correctly notes that the formula used to calculate SSB benefits is different from that used to calculate VSI benefits, it is submitted that this is necessarily the case because SSB benefits are paid in lump sum whereas VSI benefits are paid over a period of years.

The formulas must be different to account for the present value of the lump sum payment of SSB benefits as compared to the payment of VSI benefits over a long period of time.

The final distinction between SSB and VSI benefits made by Major Kelson is that VSI recipients must agree to remain subject to reserve duty for so long as they are entitled to receive VSI benefits and, if they serve in the reserves and elect to receive reserve pay, they must forfeit some or all of their VSI payments for that period. (R: 59, 60). SSB recipients must agree to remain subject to reserve duty for only three years and are not required to forfeit any of their SSB benefits for reserve service. (R: 59, 60). Because of these differences, Major Kelson concludes that VSI benefits, unlike SSB benefits, are, in part at least, compensation for the recipient's agreement to remain available for reserve duty and, therefore, VSI benefits constitute separation pay, not compensation for past services, and there is no justification for awarding a spouse a portion of those benefits.

The Department of Defense pamphlet cited by Major Kelson in support of this argument does not explain what portion of VSI benefits must be forfeited for reserve duty or why this is required. (R:60). Even assuming that some part of VSI benefits are paid for the recipient's agreement to remain available for reserve duty, it is far from clear what portion of those benefits are intended for that purpose. To conclude from these uncertainties, as does Major Kelson, that VSI benefits are not compensation for past services, ignores what is clear: that the entitlement to and amount of VSI benefits under 10 U.S.C. 1175(b)(1) and (e)(1), just like SSB benefits under 10 U.S.C. 1174a(b)(2)(A) and (c), are based upon the total years of active duty which the service member had already served at the time he elected such benefits.

Therefore, while it is true there are some differences between the benefits under the VSI and SSB programs, those differences do not materially distinguish them. As importantly, Major Kelson does not dispute that the VSI and SSB programs were enacted at the same time and the same purpose. Therefore, the decision of the Montana Supreme Court in Blair in regard to SSB benefits is clear and persuasive authority for the position she asks this Court to adopt in regard to VSI benefits.

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.

Major Kelson argues that because the parties' agreement did not address what rights Mrs. Kelson would have in the event he failed to become eligible for retired pay, she should not receive an interest in his VSI benefits. This argument ignores the fact that Major Kelson did not fail to become eligible for retired pay, rather he chose to leave active duty and receive over half a million dollars in VSI benefits rather than remain on active duty and become entitled to retired pay.

Major Kelson contends that Mrs. Kelson has not proven fraud, duress, deceit, coercion, or overreaching, and, thus, has not established a legal basis for modifying the parties' agreement. As abundantly argued in the Initial Brief, Mrs. Kelson does not seek a modification of the agreement, but rather, she seeks to enforce the parties' agreement that she receive a share of his retired pay against VSI benefits which are either equivalent to retired pay or which he elected

in lieu of retired pay.

Major Kelson also argues that it must be presumed that the parties understood that his right to receive retired pay could be defeated by other circumstances, such as death or involuntary separation, and that the failure of Mrs. Kelson's attorney to provide for such contingencies evidences her agreement that in such event she receive nothing. This ignores the context in which the parties made their agreement: the VSI program did not exist and Major Kelson could not voluntarily leave the military and receive benefits in lieu of regular retired pay. If there were such benefits and the parties did not address what right Mrs. Kelson might have to share in such benefits, then it could be fairly inferred from the agreement that she intended to waive any right she might otherwise have in such benefits. This argument also ignores the critical fact that, it was not death or involuntary separation that defeated Mrs. Kelson's right to share in Major Kelson's retired pay, rather it was Major Kelson's voluntary separation for the military and his election of over half a million dollars in VSI benefits that defeated her right to share in his retired pay.

CONCLUSION

For the foregoing reasons and the reasons addressed in her Initial Brief, Mrs. Kelson submits that the First District erred in denying her an interest in the VSI benefits received by Major Kelson. Therefore, this Court should quash the decision below with directions on remand that Mrs. Kelson receive her commensurate share of any and all VSI payments already received by Major Kelson, plus interest, as well her commensurate share of any and all VSI payments he receives in the future.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to **KATHRYN RUNCO, Esquire**, Attorney for Respondent, 304 E. Government Street, Pensacola, Florida, 32501, on this the 25th day of July, 1995.

GORDON EDWARD WELCH, Esquire