IN THE SUPREME COURT OF THE STATE OF FLORIDA

**RICHARD L. ABERNETHY,**

**Appellant**

**vs.**

**MONICA R. FISHKIN, f/k/a MONICA R. ABERNETHY,**

**Appellee**

---

**CASE NO.: 87,957**

(Appeal **from District Court** of **Appeal, Fifth District)**
Case No. **95-310**

# APPELLEE'S ANSWER **BRIEF**

**Judith E. Atkin, Esquire**
**Attorney** for **Appellee**

**109 West New Haven Avenue**
**Melbourne, Florida 32901**
(407) 725-5904

## TABLE OF CONTENTS

## TABLE OF CITATIONS

## PRELIMINARY STATEMENT

In this brief, the Appellant, Richard Abernethy, will be referred to as the former husband. The Appellee, Monica R. Fishkin f/k/a Monica R. Abernethy, will be referred to as the former wife. *Abernethy* v. *Fishkin*, 638 So.2d 160 (Fla. App. 5th Dist. 1994) will be referred to as Abernethy I. Abernethy v. *Fishkin*, 670 So.2d 1027 (Fla. 5th DCA 1996) will be referred to as Abernethy *II*. The following symbols are used:

(R) Record on Appeal

(A) Agreement (added by the Appellant's Motion to Supplement Record)

## STATEMENT OF THE CASE AND OF THE FACTS

The parties were divorced on January 15, 1992. (R-145) The divorce decree was based, in part, on an agreement entered into by the parties without separate counsel while the former husband was stationed with the military in Germany. (A-4) The agreement with respect to the retirement merely stated,

> "issues not covered by this agreement such as retirement/pension benefits...and other issues not specifically covered by this Agreement will be resolved after the parties have made a decision about whether to pursue a more permanent type of separation and have had a chance to obtain separate counsel." (A-2)

It later states on page three of that Agreement that,

> "[T]he WIFE shall have the property stated in attached schedule B." (A-3)

Schedule B of that Agreement provides among other items "25% of AF Retirement, effective upon retirement." (A-6) Trial was held in the 18th judicial circuit with the Honorable Tonya Rainwater presiding. (R-136-145) In accordance with the court's ruling a Final Judgment of Dissolution of Marriage was prepared by the former wife's attorney, *i.e.* the undersigned attorney. The Final Judgment was entered without objection by the former husband's attorney who is also the attorney in this appeal.[1] The Final

---

[1]There is no written formal method of citing to the record to indicate the fact that there was no objection to the Final Judgment, but as there was no appeal of the final judgment, the former husband has had the same attorney throughout these proceedings and the appellant is referring to the property

Judgment provided the language necessary to implement the "Former Spouses Protection Act" including the language which provided that

> "[t]he member shall not merge the member's retired or retainer pay with any other pension, and shall not pursue any course of action that would defeat the former Spouse's right to receive a **portion** of the **full** net disposable retired or retainer pay of the Member. The Member shall not take any action by merger of the military retirement pension so as in total net monthly retirement or retainer pay in which the Member has a vested interest and, therefore, the Member will not cause a limitation of the Former Spouses' monthly payments as set forth above. The Member shall indemnify the Former Spouse of any breach of this paragraph of this paragraph as follows. Therefore, if the Member becomes employed, which employment causes a merger of the Member's retired or retainer, the member will pay to the Former Spouse directly the monthly amount provided for in paragraph 22 under the same terms and conditions as if those payments were made under paragraph 22.... In the event the military is unable, for any reason to implement any of the sections of this Order in which they are affected, then the parties shall self-implement the intent of this Order, through direct **payments** by the Respondent **to** the Petitioner, **or** otherwise as required to effecuate (sic) the intent and spirit of this Order. The parties shall sign any document required to fulfill the intent of this Order." (R-143)(Emphasis supplied)

There was no objection to the original Final Judgment, as prepared. ***(see*** Footnote 1) The original divorce action was not appealed.

The first appeal was of Judge Rainwater's Order dated February 17, 1993 and entitled "ORDER OF ENFORCEMENT" **which**

---

settlement agreement it is necessary and non-prejudicial to add these facts.

provided that the former wife receives 25% of the amount of the VSI payments that the former husband receives. (R-208-209)

This court's opinion discusses the enforceability of the Final Judgment which provides for the former wife to receive her share of the military retirement, by ordering the former husband to pay the same percentage of the VSI. *Abernethy I* The Fifth District Court affirmed the trial court's order and stated that the trial court's right to

> "enforc[e] 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. 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, ..." Id. at **163**.

The terms referred to by the court were, in fact, placed in the final judgment without objection, rather than in the property settlement agreement.[2] Appellant did not request a rehearing on this or any other issue before this court.

The former wife was then informed that the former husband

---

[2]See Footnote 1.

was converting as much of his VSI as possible to disability, again attempting to defeat the former wife's right to 25% of the retirement pay. The former husband did know that VA disability payments would be deducted from his VSI, (T-35) The former wife, again, brought an action before the trial court entitled "Motion to Determine the Amount of VSI to be Paid by Former Husband to Former Wife". (R 269-271) The trial court, the Honorable Kerry Evander, ordered the former husband to pay 25% of the amount of his disability but did not assign the husband's disability to the former wife. An appeal to the Fifth District Court of Appeals followed. The Fifth District upheld Judge Evander and the Wife's right to receive 25% of the total amount of the VSI and the retirement. In the meantime this court decided Kelson *v. Kelson*, 675 So.2d 1370 (Fla. 1996) in which *Abernethy* I is the conflict case. The Husband then initiated discretionary review in this court based upon a conflict with *McMahan*, filed an appeal to this court with a jurisdictional brief which utilized *McMahan* as the conflict case. This court found a conflict. This appeal followed.

## SUMMARY OF THE ARGUMENT

POINT I - WHETHER THE FIFTH DISTRICT PROPERLY HELD THAT THE FORMER HUSBAND COULD NOT BE PERMITTED TO DEPRIVE THE FORMER WIFE OF HER SHARE OF THE RETIREMENT BY UNILATERALLY CONVERTING VSI TO DISABILITY, ESPECIALLY WHEN THE FINAL JUDGMENT PROVIDED, WITHOUT OBJECTION AND WHICH WAS NOT APPEALED AND WHICH WAS RELIED UPON IN *ABERNETHY* I, THAT THE FORMER HUSBAND WOULD NOT TAKE ANY COURSE OF ACTION WHICH WOULD DEFEAT THE FORMER WIFE'S RIGHT TO **RECEIVE** A PORTION OF THE FORMER HUSBAND'S RETIREMENT PAY?

The law of the case requires that the 25% share of the retirement, which in Abernethy I the court enforced by finding that the former wife is entitled to receive 25% of the VSI, must now similarly be enforced by requiring the former husband to pay the wife 25% of the amount of the disability pay he receives which is equivalent to the retirement he would have received had it not been for the husband's unilateral conversion. As this court stated in Abernethy I the trial court is merely enforcing its order and is not assigning the disability payments received from the military. The law of the case still controls as Abernethy I was not appealed and any ruling by the Fifth District is binding.

The Final Judgment of Dissolution of Marriage states that the former husband would take no action to defeat the former wife's right to receive a portion of the military retirement. The former husband violated the Final Judgment by converting the VSI

to disability and by refusing to self-implement the payment provisions. The former husband has refused both to effectuate any method of implementing the intent and spirit of the order as required by the Final Judgment and as the Final Judgment requires the Former Husband to.

The U.S. Supreme Court in *Mansell* does not require the state courts to ignore the economic consequences of disability pay, but provides that the court cannot equitably distribute the disability pay itself. The trial court can enforce its orders as long as it does not assign disability pay to the former spouse.

## ARGUMENT

POINT I - WHETHER THE FIFTH DISTRICT PROPERLY HELD THAT THE FORMER HUSBAND COULD NOT BE PERMITTED TO DEPRIVE THE FORMER WIFE OF HER SHARE OF THE RETIREMENT BY UNILATERALLY CONVERTING VSI TO DISABILITY, ESPECIALLY WHEN THE FINAL JUDGMENT PROVIDED, WITHOUT OBJECTION AND WHICH **WAS** NOT APPEALED AND WHICH WAS RELIED UPON IN *ABERNETHY* **I,** THAT THE FORMER HUSBAND WOULD NOT TAKE ANY COURSE OF ACTION WHICH WOULD DEFEAT THE FORMER WIFE'S RIGHT TO RECEIVE A PORTION OF THE FORMER HUSBAND'S RETIREMENT PAY?

The law of the case is controlling in this matter. In the prior appeal in this cause, this court held,

> "[e]ven assuming, *arguendo*, that Congress has not authorized state courts to contribute 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. 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." *Abernethy* **I** at **163.**

The law of the case requires that the court order the

husband to pay the amount due whether he unilaterally converts the source of the funds or not. There is no assignment of funds, whether or not, the funds are VSI or disability. Furthermore, whether the source of the final judgment's ruling is an agreement or a court order which was entered without objection, changes nothing. As there was no request for a rehearing nor an appeal in *Abernethy I*, and it has been determined that the court can enforce the agreement and the final judgment by ordering the former husband to pay the required amount from his own funds pursuant to the agreement and final judgment, there is no basis for overturning the trial court's and Fifth District's decision.

In addition to the law of the case, this order would stand on its own based upon three separate and distinct rules of law and provisions of the final judgment and agreement.

1. The final judgment, which was never objected to or appealed, provided that the husband 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. (R-144) Furthermore, the Final Judgment specifically states that the Husband shall indemnify the Wife for any breach, by the Husband paying the Wife directly the amount she should have received. By now converting the VSI to disability, just as he earlier converted the retirement to VSI, the husband has breached the terms of the final judgment. He

clearly stated that he knew the conversion would reduce the amount of his VSI accordingly. (T-35) Self-implementation is now necessary and the court has enforced that self-implementation, as the husband has refused to do so, by ordering him to pay the amount from his awn funds as he receives it from the military. Appellant cites Owen *v.* Owen, 419 SE 2d 267 (Va.App. 1992). Owen is absolutely correct when it enforces the indemnification requirement even though some of the retirement was converted to disability, just as the Court should, in the instant case. Owen specifically states that federal law was not violated. Id. at 271. See ***also, Stone*** v. Stone, 274 Mont. 331, 908 P.2d *670* (Mont. 1995)

The VSI is reduced dollar for dollar by the amount of disability. The VSI was $8,850.52 before the conversion, the VSI is $728.42 after the conversion and the disability is $8,122.10. The former wife would therefore be entitled to $182.10 per year based upon the former husband's position. (R-13)

2. The final judgment further states that

> "the parties shall self-implement the intent of this order, through direct payments by the husband to the wife, or otherwise as required to effectuate the intent and spirit of this order. The parties shall sign any document required to fulfill the intent of this order." (R-144)(emphasis supplied)

Again, the husband has breached this term as he has refused to use any method to effectuate the intent and spirit of this

order and simply contends that the wife is not entitled to it because it is disability. He will not self-implement its terms.

3. The former husband's argument essentially is, how can this court order the former husband to pay a portion of his disability to the former wife when the U.S. Supreme Court in Mansell held that disability cannot be distributed by state courts and is not community property. Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023,104 L.Ed. 2nd 675 (1989)

In *Abernethy I,* the Court enforced the terms of the Final Judgment of Dissolution of Marriage by ordering payment in the amount of 25% of the VSI as described in points one and two, *infra.* Second it found that the trial court did not assign the benefits to the wife but merely ordered that the appropriate amount be paid to the former wife pursuant to the agreement and final judgment, thus avoiding the issue as described in Mansell.

The policy issue is whether the former spouse who earned and is entitled to a portion of the former spouse's retirement benefits should lose such benefits because the parties divorce before the spouse retires and the member spouse unilaterally alters the nature of the benefits. Essentially, there is not as much of a problem when the member spouse elects the disability or VSI payments before the parties' divorce, as the court can then use other methods to achieve an equitable distribution and can order alimony. ***Allen*** *v. Allen,* 650 So.2d 571 (Fla. 2nd DCA

1995); ***Freeman v. Freeman,*** 468 So.2d ***326*** (Fla. 5th DCA 1985); *Robinson v. Robinson,* 647 So.2d 209 (Fla 1st DCA 1994) McMahan ***v.*** McMahan, 567 So. 2nd 976 (Fla 1st DCA 1990); *Sweeney* ***v.*** *Sweeney,* 583 So.2d 398 (Fla 1st DCA 1991). However, when the divorce is complete before the conversion is accomplished, the court cannot later *go* back and order alimony if none had been ordered previously and the court cannot *go* back and modify the final judgment to achieve an equitable distribution. The only method that is therefore available is enforcement.

It is totally inequitable and unjust for the former spouse to lose her share of the equitable distribution because of the member spouse's unilateral conversion. In the case of McMahan *v.* McMahan, 567 So. 2d 976 (Fla 1st DCA 1990) the court agreed when it stated,

> "[i]n conclusion, because the lower court was without authority to award the wife any portion of the husband's military retirement pay that represented disability benefits, the order, insofar as it approved the payment of such benefits, must be reversed. In reversing, however, we do not remand simply with directions to the lower court to delete from the amount awarded the former wife that portion of appellant's retirement pension obtained from his disabled condition. Rather, because the parties reasonably contemplated at the time they executed the document that their agreements would be judicially honored and because we are now required that a substantial portion of the amount that the parties had agreed upon be reduced to the prejudice of the former wife we are of the view that on remand the trial court should be given the discretion to reconsider the entire equitable distribution scheme contemplated by the parties in an effort to do equity and justice to

both." Id. at 979-980. (Emphasis supplied)

*See also, Sweeney v. Sweeney*, 583 So.2d 398 (Fla 1st DCA 1991)

The first district reversed because the trial court equitably distributed the disability pension, but remanded it for the court "to reconsider the entire equitable distribution scheme, in an effort to do equity and justice to both parties." *McMahan* at 980. In *Mansell* while the U.S. Supreme Court made its ruling with regard to disability, finding that state courts cannot divide disability pay upon divorce, after remand, the California court held that the former spouse was still entitled to the funds. *Mansell* v. Mansell, 490 **U.S.** 581, 109 S. Ct. 2023, 104 L. Ed. 2nd 675 (1989), on *remand,* 265 Cal.Rptr. 227 (Cal.App 5 Dist 1989)

Another consideration for the court of the effect of an equitable distribution of the retirement is the different methods available in making an equitable distribution of the military retirement. *See DeLoach* v. *DeLoach,* 590 So.2d 956 (Fla. 1st DCA 1991) The cases previously discussed utilize a coverture formula and take advantage of the "Uniformed Services Former Spouses Protection Act." However, if the member is still in the service at the time of the divorce the parties can choose or the court can order an equitable distribution of the retirement by utilization of a present value and distribution of other assets in order for an equitable distribution to **be** achieved. 'The

member could later retire with a disability and the former spouse would not be compelled to give back the property that was equitably distributed to the spouse because the distribution was later determined to be based upon the value of the disability pay. The disability funds and the retirement funds are the exact same dollar amount and the amount is based upon the same factors, *i.e.,* length of service, rate of pay, etc. The only advantage, other then deprivation of your former spouse of his/her share, is that the benefits become tax exempt.

Therefore, parties who have sufficient funds to make an equitable distribution of the retirement fund because they have sufficient other assets are not deprived, and those who may rely on those funds for their very existence are deprived.

In Appellant's brief he cites three cases from out of state which will now be analyzed. In *Vitko v. Vitko,* 524 N.W. 2d 102 (N.D. 1994), the North Dakota Supreme Court stated

> "[even] those state courts which have recognized that *Mansell* precludes the division of veterans's disability benefits in property distributions have concluded that when making property distributions or awarding alimony the trial court may consider military disability as future income ...relevant to a determination of the parties' ultimate economic circumstances." Id. at 103.

The court in *Vitko* later went on to cite *with approval Clausen* v. *Clausen,* 831 P.2d 1257 (Alaska 1992) which "considered the disability income so as to determine the financial circumstances of each party to the divorce." *Vitko* at 104.

While the court is not per se using the veterans disability in making an equitable distribution, the court is in effect looking at its receipt in determining how it affects the equitable distribution, i.e. the economic circumstances of the parties.

*Johnson v. Johnson*, 450 SE 2d 923 (N.C. App. 1994) does not deal with a military disability pension. *Johnson* adopts an analytic approach for dealing with the state government disability. *Johnson* deals with a disability retirement benefit which "was clearly attributable to his physical disability because it was intended to reimburse plaintiff for his loss of earning capacity due to his disability." Id. at 926. If plaintiff returns to work his disability pay would stop. Clearly, under this analysis a military retirement disability pension would be considered in making an equitable distribution because it only replaces the retirement benefits.

*In re the Marriage of Miller*, 524 N.W. 2d 442 (Iowa App 1994) also does not deal with a military disability.

These cases support a narrow holding of *Mansell* as stated in *Vitko*. How should Mansell be interpreted? Mansell obviously must be followed. Its interpretation is in dispute. Does *Mansell* preempt all of the policy of state law in making an equitable distribution. Must state courts ignore the economic circumstances of the parties when making an equitable distribution in order to give affect to *Mansell*. I don't believe

that is what the U.S. Supreme Court intended *in Mansell. Mansell* went into a discussion of how it is careful not to interpret Congressional acts to preempt state law unless it is clearly necessary. While it is clear that state courts may not assign disability pay which exists because of a waiver of military retirement pay, and that the court cannot affect the disability pay by dividing it, it is nowhere stated that the court may not consider the economic circumstances of the parties as affected by that disability pay in making an equitable distribution.

The disability pay is not property subject to equitable distribution, but its receipt by the member spouse must clearly be considered because it does affect the economic circumstances of the parties. The court may treat the existence of the disability as an economic circumstance which requires the court to order the member spouse to pay the non-member spouse lump sum alimony in periodic payments equivalent to a percentage of the amount of the disability pay in order to affect an equitable distribution considering all of the factors relevant in making such a distribution. The court is not required to act under the fiction that these funds don't exist and don't have value. When a party agrees or the court orders that a spouse receive a percentage of the retirement and the member spouse later waives the retirement in favor of a disability, the member is clearly thwarting the intention of the court and is in affect violating

the court order. There must be a remedy. The court clearly must order the member spouse to implement the courts order by direct payments from his own funds of the amount due or the court's order is a mockery.

## CONCLUSION

The former wife is entitled to her share of the equitable distribution made by the court. In order to enforce the terms of the Final Judgment and the agreement entered into by the parties the court must fashion a method to affect the court's order without violating the U.S. Supreme Court directive. The trial court and the Fifth District did that first in *Abernethy* **I** and again in *Abernethy II* by enforcing the Final Judgment and the terms of the agreement.

The Fifth District and the trial court must be affirmed.

Respectfully submitted,

JUDITH E. ATKIN
Attorney for Appellee
109 West New Haven Avenue
Melbourne, Florida 32901
(407) 725-5904
Fla. Bar No. 304166

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Appellee's Answer Brief have been furnished by U. S. Mail Certified, Return Receipt Requested, to Clerk of Court, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and one copy by U.S. Mail, Certified, Return Receipt Requested, to Daniel Mazar, 2153 Lee Road, Winter Park, Florida 32789, this 29 day of October, 1996.

JUDITH E. ATKIN
Attorney for Appellee
109 West New Haven Avenue
Melbourne, Florida 32901
(407) 725-5904
Fla. Bar No. 304166