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IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICHARD L. ABERNETHY,

**Petitioner,**

vs.

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

**Respondent.**

\_\_\_\_\_ /

CASE NO.: 87,957

**FILED**

SID J. WHITE

SEP 30 1996

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

ON APPEAL FROM THE **DISTRICT COURT OF APPEAL  
OF THE STATE OF FLORIDA, FIFTH DISTRICT**  
(CASE NO. 95-310)

**PETITIONER'S INITIAL BRIEF ON THE MERITS**

**Submitted by:**

✓  
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## PRELIMINARY STATEMENT

In this brief, the petitioner, Richard L. Abernethy, will be referred to as the “husband.” The respondent, Monica R. Fishkin, f/k/a Monica R. Abernethy, will be referred to as the “We.”

Citations to the record on appeal will be made by the letter “R” and the appropriate page number, except for citations to the transcript of proceedings, which will be made by the letter “T” and the appropriate page number.

## STATEMENT OF THE CASE AND FACTS

On May 30, 1990, the husband and wife entered into a ~~marital~~ settlement agreement. (R 68-73, App. 1-6) The agreement contained the following paragraph regarding personal property;

6. **Personal Property:** The HUSBAND shall have the property stated in attached schedule A, which is incorporated by reference into this Agreement. The WIFE shall have the **property stated** in attached **Schedule B**, which is incorporated by reference into this Agreement. (R 70, App. 3)

Schedule B of the marital settlement agreement contained the following item: "10. 25% of AF Retirement, effective upon retirement." (R 73, App. 6) Nothing else was stated in the parties' agreement regarding the husband's military pension, his retainer pay or his retired pay and no other agreement was ever made by the parties regarding his retirement, his pension, his retainer pay or his retired pay. In fact, the marital settlement agreement contained a disclaimer that issues pertaining to pension benefits and retirement were not covered. (R 69, App. 2)

In 1992 the parties were divorced and in the final judgment the wife was awarded 25% of the husband's "military retirement pay pursuant to the Uniformed Services, Farmer Spouses Protection Act, 10 U.S.C. Sec. 1408." (R 141, App. 12) Specifically, the court ordered that from each payment of the husband's net disposable retired or retainer pay "the... [wife] shall receive twenty-five (25%) percent of the ... [husband's] net disposable retired or retainer pay." (R 141, App. 12) After the divorce the husband separated from military service before retirement and began receiving Voluntary Separation Incentive

(VSI) payments. In February of 1993, at the **wife's** request, the trial court **entered an order** awarding to the **wife 25%** of the former husband's VSI payments **as her** share of his retirement. (R **208-209**, App. **17-18**) That order **was** appealed by the husband to the Fifth District Court of Appeal which, in affirming the order, determined that the former **wife** did have the right to receive 25% of the former husband's **VSI** payments, which it described **as an annuity payable to him**, after his honorable discharge from the Air Force, pursuant to **10 U.S.C. Sec. 1175** (West Supp. **1994**). *Abernethy v. Fishkin*, **638 So. 2d 160** (Fla. 5th DCA **1994**) (hereafter *Abernethy I*).

Upon remand to the trial court on October **21, 1994**, the former **wife** filed her motion entitled Motion to Determine the **Amount of VSI to be Paid** by Former Husband to Former Wife. (R **269-271**) On December **28, 1994**, the trial court pursuant to **that** motion ordered **that** the former **wife** shall receive 25% of **the former** husband's **annual** payment of \$8,850.52 each year; **that** the former husband shall pay **25% of** each payment he receives whether in **the form of disability or** VSI payments to the **wife**; and that while the court **was** not **assigning** any of the husband's **VA (Veterans Administration)** disability **benefits** to the **wife**, it **was** ordering him to pay 25% of any payment he received to **the wife as her share of the VSI**. (R **272-273**, App. **19-20**) Pursuant to this order the division of property which had begun **as** a division of "25% of AF retirement" had now evolved into 25% of any payment including VA disability payments,

At the December 6, **1994**, hearing on the **wife's** motion, only the former husband testified. He stated **that** he had **applied** for both **VSI** and **VA** disability benefits when he

left the **service** in August of 1992, and that he was currently receiving VA disability benefits. (T 31) He applied **for** VA benefits because of his poor health, **an** arthritic condition throughout 90% of his body. (T 32) At the time of the application, the former husband did not know how much VA disability or VSI he would be receiving, but he did know **that** if he only received VSI, he would not receive **any** medical benefits. (T 33, 36, 37) Therefore, he sought the VA benefits because he needed and desired the medical services which are included in VA disability benefits. (T **33-34**)

**The** former husband had no intent of reducing any payments to the former wife by **his** actions. (T 34) In 1992 he did not even know that he would be paying part of **his** VSI to the **wife**. (T**35**) He did, however, know that the VA disability payments would be deducted from **his** VSI. (T 35) The former husband **as** of the hearing date was receiving VSI payments of **\$8,850.52** less **his** VA disability payments. (T 19, **37**, R 271) **His** VA **disability** payments of \$8,123.10 were being deducted from **his** VSI of **\$8,850.52**, (T 37, R 271)

**On** December 6, **1995**, the husband **filed** a notice of appeal from the order which had given the **wife** 25% of **his** VA **disability** payments. (R 275-278) The husband's appeal to the **Fifth** District Court of Appeal resulted in the trial court's order being affirmed. *Abernethy v. Abernethy*, 670 So.2d 1027 (Fla. **5th** DCA 1996) (hereafter *Abernethy II*). The husband then initiated discretionary review in the **Supreme Court** of Florida based on the conflict of *Abernethy II* with the decision of the second district court in *McMahan v. McMahan*, **567** So.2d **976** (Fla. **1st** DCA 1990), and the supreme court accepted jurisdiction.

## SUMMARY OF THE ARGUMENT

The **fifth** district court erred in **affirming the** trial court's order which required the husband to pay **25%** of **his** veterans' **disability** payments to **his** former **wife**. Such an order **is** precluded by *Mansell v. Mansell*, **490 U.S. 581**, 109 S. Ct. 2023, 104 L.Ed. 2nd **675** (1989), even when the parties agree that a spouse **will** receive **a service** member's total disposable retired or retainer pay including **any** portion waived in order that the service member may receive veterans' disability payments.

The husband agreed to divide 25% of **his** AF retirement with the wife, not **25% of his** disability payments. The trial court **had** ordered him in the final judgment not to take **any course of action** which would defeat the **wife's right** to receive **her** portion of **his** net disposable retired or retainer pay. **By** applying for VA disability benefits, the husband did not violate **his** agreement **with** his wife or the trial court's order since he applied for those benefits because he needed the medical care that is included in VA benefits and not because he **was** trying to reduce his wife's portion of **his** retirement. Moreover, retirement pay does not include **disability** payments; it excludes **them**. By legal definition, as recognized in *Mansell*, disposable retired or retainer pay excludes disability payments.

**Thus,** because disability payments are excluded from retirement pay **and an** agreement to include such payments **as a** part of the retirement pay which is shared **with** a **service** member's spouse, is not enforceable, **and** because the Supreme Court of Florida in *Kelson v. Kelson*, 21 Fla.L.Weekly S134 (Fla. March **21, 1996**), **has made VSI** the functional equivalent of retired or retainer pay, it is necessary to determine what retirement



pay the husband is entitled to, in order to determine the wife's share. The retirement pay that the husband is entitled to and receiving, or its functional equivalent, is the VSI he receives after the exclusion of his disability payments. Even the court in *Abernethy I* recognized this exclusion when it decided that VSI and retirement were functionally equivalent because, *inter alia*, both excluded disability payments. Thus, it was error for the trial court to order the husband to pay to his former wife 25% of his disability payments and it was error for the district court to affirm that order, when the wife is only entitled to receive 25% of the husband's VSI payments with the exclusion therefrom of any payment on account of disability.

## ARGUMENT

### THE HUSBAND'S VA DISABILITY PAYMENTS ARE EXEMPT FROM ANY DISTRIBUTION IN DISSOLUTION OF MARRIAGE OR POST-DISSO- LUTION OF MARRIAGE PROCEEDINGS

The order of the trial court requiring the husband to pay **25%** of his VA disability benefits to the **former wife**, is precluded by the decision of the United States Supreme Court in *Mansell v. Mansell*, **490 U.S. 581, 109 S. Ct. 2023, 104 L.Ed.2nd 675** (1989). Pursuant to *Mansell*, *state* courts in both community property and equitable distribution states, lack the authority to treat as property **divisible** upon divorce *military* retirement pay waived by the retiree in order to receive veterans' disability benefits.

The fifth **district** court in *Abernethy II* noted **that**, whether by agreement or by **virtue of the final judgment**, a **duty was imposed** on the husband in *Abernethy I* **not** to pursue **any** course of action **that** would defeat his **wife's** right to receive her portion of the full net disposable retirement pay due him. 370 So.2d at 1029, n1. However, **the husband did give up a substantial portion of his** VSI in order to receive disability **benefits**. The court, therefore, reasoned **in affirming the** trial court's **order** which required him to pay 25% of his VA disability payments to **the** wife, that it **was merely** enforcing a predivorce **property settlement** agreement (or, perhaps, the agreement **as** modified by the **final** judgment). In so doing the court felt that it was not in violation of *Mansell* because, even though *Mansell* precluded state courts **from** dividing, **as** marital **property**, *military*

retirement pay waived by the retiree in order **to** receive disability benefits, *Mansell* did not prohibit **a** state trial court from enforcing **a** marital settlement agreement wherein the veteran himself or herself agreed to divide a portion of his **or her** disability benefits **with his** or her spouse in exchange for other property.

The district court in *Abernethy II* **was in error**, both factually **and legally**. The unrefuted facts of the case demonstrate that the husband did not do anything **to** defeat the **wife's** entitlement **to** a portion of **his** retirement by applying for VA benefits. The facts show that he applied for VA disability benefits, simultaneously **with** his application for VSI, because VA benefits included medical services which he needed **and** not because he wanted to defeat **his** wife's **entitlement** to a portion of **his** retirement, and, in **any** event, VA **disability** payments **do not constitute any part** of **military retirement** pay. He only agreed to **give** the wife 25% of his retirement, not 25% of **his** disability payments, and the final judgment did not change that fact.

The **trial** court ordered the husband not to 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 husband]." (R 143, App. 14) In applying for VA **disability** benefits the husband did not do **anything** that would have violated that court order because legally anything that the **wife was** entitled to receive, either full net **disposable** retired or retainer pay or VSI, **as its functional equivalent**, would **have** excluded VA disability benefits. Moreover, under *Mansell*, if it were determined **that** the parties' agreement included VA disability benefits, that provision could not **be enforced**.

The **court in *Abernethy II*** recognized the rule that no portion of a **military** retirement pension which is received due to disability can be considered **as marital** property subject to equitable distribution. *McMahan v. McMahan*, **567** So.2d 976 (Fla. 1st DCA **1990**); *Fondren v. Fondren*, **605** So.2d **571** (Fla. 2nd DCA **1992**). It is generally recognized that disability payments do not constitute retirement, that they are separate property, and that they are not subject to division in divorce **proceedings**. *In re the Marriage of Miller*, **524** N.W.2d **442** (Iowa App. **1994**); *Vitko v. Vitko*, **524** N.W.2d **102** (N.D. **1994**); *Johnson v. Johnson*, **450** S.E. 2d 923 (N.C. App. **1994**). However, in the view of the *Abernethy II* court, there is no prohibition against ordering a party to pay disability payments to **his** or her spouse if he **or** she **has** agreed to do so,

In **this** regard *Abernethy II* conflicts sharply with *McMahan* wherein the court held that, even with **an** agreement, a state court is precluded **from** distributing a **military** retiree's retired or retainer pay which **has** been waived in order that the retiree may receive **his** or **her** disability payments. **Although**, in *McMahan* the former wife's claim was based on a marital **settlement** agreement, the first district court found the contractual argument to be without merit because the United States Supreme Court in *Mansell* held that the **wife in** that case, who had **an** agreement with her husband to receive **50%** of **his** retirement including the portion waived in order that he could **receive** disability benefits, was not entitled to any part of the husband's *military* pay which constituted disability benefits.

The **court in *Abernethy II*** holds that such **an** agreement, notwithstanding *Mansell*, is enforceable because *Mansell* did not address its enforceability. **370** So.2d at **1030**. The

Abernethy II court was wrong in this regard because it misconstrued the facts of *Mansell*. It believed that the division of disability benefits was based on **California** community property principles **as** opposed to **an** agreement of **the** parties. 370 So.2d at 103, n2. However, the Supreme Court's recitation of the facts in *Mansell* indicates that the Mansells had entered into a property settlement agreement whereby Mrs. Mansell would receive 50% of her husband's total military retirement pay, **including** the portion of retirement pay he waived so that he could receive disability benefits. 490 U.S. at **585-586**, 109 S. Ct. at 2027. Despite this agreement *Mansell* held that federal law controlled and Mrs. Mansell was not entitled to any portion of her husband's military retirement pay that constituted **disability**. *McMahan* interprets *Mansell* in this **manner** and it, therefore, conflicts with *Abernethy II*.

The trial court relied on the court's language in *Abernethy I*, regarding the agreement between the parties, **as** a basis for ordering the husband to pay 25% **of his** VA disability benefits to the wife without assigning such benefits to the wife. See *Abernethy I* **638 So.2d at 163-164** (T26, **45**, App. 19-20). Although **there never** was **an** agreement of the kind contemplated in *Abernethy I* (See App. 24), and the agreement between the parties in no way speaks to the issue of VA disability payments, *Mansell* renders it a moot point that Mr. Abernethy **and** Mrs. Abernethy entered into a property settlement agreement. Under *Mansell*, **even** if the parties agree **to a distribution** of VA **disability** payments in a property settlement agreement **as they did in Mansell, the state court is**

precluded from distributing a service member's veterans' disability benefits.

The fact that the trial court ordered the husband in *Abernethy II* to pay a portion of his benefits upon receipt as opposed to ordering direct payments, does not validate the trial court's order. *Mansell* rejected this approach and reversed the lower California court which had reasoned that it could rely on a remedy other than direct payments from the federal government to distribute disability payments to the service member's spouse.

The parties' marital settlement agreement simply, without stating any definitions or providing any details, grants to the wife 25% of the husband's Air Force retirement. (R 70, 73, App. 3, 6) Based on this agreement, the final judgment awarded to the wife a part of, and the judgment only pertains to, the husband's disposable retired or retainer pay (R 141, App. 12), which by statutory definition excludes any retirement pay he waived in order to receive disability payments. 10 U.S.C. Sec. 1408(a)(4)(B); *Mansell*, 490 U.S. at 588-590, 109 S. Ct. at 2028-2029. VA disability payments are not addressed in the final judgment. Thus, since the supreme court in *Kelson v. Kelson*, 21 Fla.L. Weekly S134 (Fla. March 21, 1996), approved *Abernethy I* and confirmed VSI as the functional equivalent of military retirement pay, to determine the wife's entitlement in *Abernethy II*, the court should have looked to what she would have received if the husband were receiving his net disposable retired or retainer pay.

Based on *Mansell* it is crystal clear that the husband, if he were receiving his net disposable retired or retainer pay would have excluded therefrom his VA disability payments and that the wife, likewise, would have his disability payments excluded from her

portion of **his retirement**. 490 U.S. at 588-590, 594-595, 109 S. Ct. at 2028-2029, 2031-2032. Even the court in *Abernethy I* recognized this application of *Mansell* when it compared retirement and VSI and found them to be functionally equivalent. The court stated, **as follows**:

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 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

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

10 See 10 U.S.C.A., Section 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. Sec.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). 638 So.2d at 162-163 (Emphasis by the court on less, all other emphasis added).

Although the fifth district court in *Abernethy I* recognized the *Mansell* rule of exclusion of disability payments, even in the face of a property settlement agreement, nevertheless it ordered the husband in *Abernethy II* to pay a portion of his disability payments to the wife. This inconsistency accentuates the lack of a legal or factual justification for the decision in *Abernethy II*. By no stretch of the imagination were VA

disability payments contemplated by **the** parties' marital settlement agreement or the final judgment. It is **only** by tortured logic and convoluted reasoning that we can reach the conclusion that these documents require the husband to pay to the **wife** 25% of **his** VA disability payments. There is neither a single word contained in either of these documents that would give any credence to such a conclusion nor **does the** evidence in the record show that the receipt of VA disability payments by the **wife** was **ever** even considered by the parties or the trial court in the settlement of their **marital** rights.

**The** agreement between **the** husband **and** **wife** in this cause provided for no contingency in the event **that** he received disability benefits. Therefore, it cannot be the **basis** for the former wife to receive any portion of **her** former husband's disability benefits. **This is true even if, as** the court in *Abernethy II* reasoned, the law of the case in *Abernethy I* prohibited the husband from doing anything to prevent the wife **from** receiving **her** portion of his full net disposable retirement pay. It is **true** because by **statutory** definition disposable retired or retainer pay excludes disability benefits and the husband did nothing that altered the **wife's** entitlement to **the** disposable retired or retainer pay which the trial court awarded to her in **the** final judgment pursuant to the parties' property settlement agreement. To order the husband to pay **a** portion of **his** disability payments to the wife **under these** circumstances would be to circumvent *Mansell*.



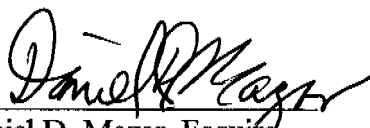
**CONCLUSION**

The decision of the district court should be reversed and the husband's obligation to the wife with respect to his VSI should be limited to only the military pay that is not attributable to disability. This cause should be remanded to the trial court with instructions to fashion an order accordingly.

Respectfully submitted by:

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**CERTIFICATE OF SERVICE**

I certify that a true copy hereof has been furnished by U.S. Mail to  
JUDITH E. ATKIN, Attorney for Respondent, 109 West New Haven Avenue,  
Melbourne, FL 32901, this 27<sup>th</sup> day of September, 1996.

  
DANIEL D. MAZAR, ESQUIRE