

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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RICHARD L. ABERNETHY,

Appellant,

vs.

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

Appellee.

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CASE NO.:

**FILED**

SID J. WHITE

MAY 10 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. 95-3 10)

JURISDICTIONAL BRIEF OF APPELLANT

Submitted by:

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**PRELIMINARY STATEMENT**

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

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

In 1990 the parties entered into a marital settlement agreement which granted to the wife “25 % of [the husband’s] AF [Air Force] retirement, effective upon retirement.” (R 70, 73) The agreement contained no other provisions defining the wife’s entitlement. In 1992 the parties were divorced and in the final judgment the wife was awarded twenty-five percent of the husband’s military retirement pay pursuant to the Uniformed Services Former Spouse’s Protection Act, 10U.S.C., Sec. 1408. (R 141)

Subsequently, because the husband separated from the military before retirement, the trial court ordered him to pay twenty-five percent of his Voluntary Separation Incentive (VSI) payments to the wife (R 208-209) The Fifth District Court of Appeal affirmed that order when it determined that VSI, an annuity payable to the husband after his honorable discharge from the Air Force, pursuant to 10 U.S.C., Sec.1175, was the functional equivalent of a military pension. *Abernethy vs. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994) (hereafter *Abernethy I*). This court approved the *Abernethy I* decision in *Kelson vs. Kelson*, 21 Fla.L.Weekly S134 (Fla. March 21, 1996).

Because of arthritis throughout most of his body in August of 1992, the husband had applied for VA disability benefits. (T 31, 32) When he was awarded the VA disability benefits, they were deducted from his VSI payments, so that VSI was reduced by an amount equal to the VA disability payments. (T 19, 37, R 271) In 1994 upon the wife’s motion, the husband was ordered by the trial court to pay twenty five-percent of

**the military payments he was receiving, whether VSI or VA disability, to the wife.**

**(R 272-273) The husband appealed this order to the Fifth District Court of Appeal. The district court affirmed the order. *Abernethy vs. Fishkin*, No. 95-310 (Fla. 5th DCA March 1, 1996) (hereafter *Abernethy II*). After appellant's motion for rehearing was denied by the district court, he appealed to this court asserting conflict jurisdiction.**

## SUMMARY OF THE ARGUMENT

The supreme court has discretionary jurisdiction to review the decision in *Abernethy II* because it expressly and directly conflicts with a decision in another district court of appeal. Fla.R.App.P. 9.030(a)(2)(A)(iv). The decision in *Abernethy II* conflicts with the decision of the district court in *McMann vs. McMann*, **567** So.2d 976 (Fla. 1st DCA 1990), on the question of a Florida trial court's authority to award a portion of a retired military service member's disability benefits to his spouse in a dissolution of marriage proceeding. Based on its interpretation of *Mansell vs. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989), the first district held that there is an absolute bar to awarding such benefits. *Abernethy II* disagreed, holding under its interpretation of *Mansell*, that the court could do so if it was enforcing a predivorce marital settlement agreement of the parties even if the court could not, under *Mansell*, do so on its own. The first district **court** expressly disagrees with *Abernethy II* in this regard, since McMahan took the position that under *Mansell*, even with such an agreement, the court is precluded from distributing the service member's disability benefits.

## ARGUMENT

### THE SUPREME COURT HAS DISCRETIONARY CONFLICT JURISDICTION TO REVIEW ABERNETHY II

The Supreme Court of Florida has discretionary jurisdiction to review the *Abernethy II* decision because it expressly and directly conflicts with the decision of another district court of appeal. Fla.R.App. P. 9.030(a)(2)(A)(iv). The decision of the Fifth District Court of Appeal in *Abernethy II* expressly and directly conflicts with the decision of the First District Court of Appeal in *McMahan vs. McMahan*, 567 So.2d 976 (Fla. 1st DCA 1990). In both cases the trial court included a portion of the husband's disability benefits in the military retirement division which **was** awarded to the wife, but in each case the appellate court reached a different result and a different interpretation of *Mansell vs. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L.Ed. 2nd 675 (1989).

In *McMahan* the husband asserted that the trial court had erred because, in approving the terms of the parties' separation agreement, it had awarded to the wife a portion of the husband's military retirement pay which constituted disability benefits. The First District **Court** of Appeal reversed the trial court, holding that it was "convincingly established that no portion of a military pension which is attributable to disability is subject to distribution for the benefit of the other spouse." 567 So2d. at 978.

Before the enactment of the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA), 10U.S.C., Sec. 1408, military retirement pay was not subject



to division in dissolution proceedings based on the decision in *McCarty vs. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2nd 589(1981). However, after the enactment of FUSFSPA, state trial courts were authorized to treat disposable retired or retainer pay payable to a service member as the member's sole property or as the property of the member and his spouse in accordance with the law of the jurisdiction of the state court. 10U.S.C., Sec. 1408(c)(1).

The court in *McMahan* noted that Congress had not granted to the state courts unlimited power to treat military retirement pay as marital property; rather, the congressional grant of authority was expressly limited to disposable retired or retainer pay, which "is defined [in 10 U.S.C., Sec. 1408(a)(4)(B), (E)] as the total monthly retirement pay less any amount received on account of disability." 567 So.2d at 979.

The *McMahan* court relied on *Mansell*, which it stated was a decision of the Supreme Court that interpreted section 1408 as precluding the distribution of any portion of a veteran's retirement pension derived from his disability benefits, on the ground that such disability payments could not be considered as disposable retired or retainer pay under the definition of section 1408. In the *Mansell* case the parties had been married for twenty-three years and before the divorce they entered into an agreement in which the husband agreed to pay to the wife fifty percent of his total military retirement payment, including a portion of the retirement pay which he waived so he could receive disability benefits. After the divorce the husband asked the lower court to modify the divorce

decree so that he would not have to pay to the wife that portion of his retirement pay which was waived in order to receive disability payments. The husband's modification was denied. The court in *McMahan* stated that the Supreme Court had reversed this lower court decision and that "the Court observed that the congressional grant of authority to the state courts explicitly involved **only** 'disposable retired or retainer pay' and that the plain and precise statutory language would be thwarted if state courts were permitted to enter court orders awarding more than such specified amounts." 567 So.2d at 979.

On the other hand, the Fifth District Court of Appeal in *Abernethy II* discounted the decision in *Mansell* based on the logic that even though *Mansell* absolutely prohibits a Florida court from, on its own, treating disability benefits as marital property, it does not prohibit the court from enforcing a marital settlement agreement wherein the veteran agrees to pay a portion of his total military retirement pay, including any portion of retirement pay waived so he can receive disability benefits, to his wife. The district court concedes that the facts in *Mansell* and *Abernethy II* appear to be similar, but it distinguishes *Mansell* by reasoning that:

. . . the issue decided by the *Mansell* court was whether the state court "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veteran's disability benefits." Although the state court was denied this authority, the *Mansell* court did not decide the issue **of** whether a state court may enforce an agreement between the parties even if that agreement includes a payment from disability income. *Abernethy II* at 6 (emphasis by the court).

*McMahan* expressly and directly disagrees with *Abernethy II* in this regard based on *Mansell*. The court addressed the contractual argument as follows:

Finally, appellee's argument that this case is distinguishable from federal and state precedent reaching a contrary result, because it involves a contract between parties, is without merit. *Mansell* also involved a property settlement agreement which required Mr. Mansell to pay his wife 50 percent of his total retirement pay, which necessarily included a portion of disability benefits. Despite the existence of this contract, the United States Supreme Court determined that federal law controlled, and that the wife was not entitled to any portion of the military pay that constituted disability. 567 So.2d at 979.


Although, this court has resolved the conflict between *Abernethy I* and *Kelson*, a conflict of a substantial nature still exists with respect to *Abernethy II* and the decision in *McMahan* and it is of the utmost importance for this court to determine whether disability payments may be distributed by the trial court in the manner suggested by the decision in *Abernethy II*. If the conflict is not resolved, the United States Supreme Court's decision in *Mansell*, will have conflicting application in the State of Florida. A veteran's right to exempt his disability benefits in divorce proceedings should not be subject to such conflicting judicial interpretations.

CONCLUSION

The supreme court has discretionary conflict jurisdiction to review *Abernethy II*, and it should accept this case for review.

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 Appellee, 109 West New Haven Avenue, Melbourne,  
FL 32901, this 9<sup>th</sup> day of May, 1996.

  
DANIEL D. MAZAR, ESQUIRE