

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

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M/J WHITE
MAY 28 1996

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RICHARD L. ABERNETHY,

Appellant

CASE NO.: 87,957

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

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

Appellee

APPELLEE'S ANSWER BRIEF TO
JURISDICTIONAL BRIEF OF APPELLANT

✓
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TABLE OF CITATIONS

CASES AND OTHER CITATIONS :

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Abernethy v. Fishkin,
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Abernethy v. Fishkin,
670 So.2d 1027 (Fla.App. 5th Dist. 1996)
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McMahan v. McMahan,
567 So. 2nd 976 (Fla 1st DCA 1990) 6, 7, 8

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. App. 5 Dist. 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.' The Final

¹There 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

"the member . . . 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. . . [and] [i]n 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)

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 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 This court affirmed the trial court's order and stated that the trial

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

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 This court makes that distinction in footnote five where it stated,

"[t]he trial court's order enforced the final judgment's provisions prohibiting the husband from pursuing any course of action which would defeat the wife's right to receive a portion of the husband's full net disposable retired or retainer pay. (emphasis supplied) The order did not alter the extent of the benefits due to the wife under the agreement, but only the method of payment."

Id. at 161-162, footnote 5.

Appellant did not request a rehearing on this or any other issue before this court.

²See Footnote 1.

Abernethy I was the conflict case to *Kelson v. Kelson*, 21 F.L.W. 5134 (Fla. S.Ct. 1996) decided by this court on March 21, 1996.

The former wife was then informed that the former husband 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.

The Former Husband then filed an appeal with the Fifth District Court of Appeals. The Fifth District upheld the trial court in Abernethy v. Abernethy, 670 So. 2d 1027 (Fla. App. 5th Dist.. 1996). This appeal followed.

SUMMARY OF THE ARGUMENT

Point One

WHETHER *ABERNETHY 11* EXPRESSLY AND DIRECTLY CONFLICTS WITH *MCMAHAN* CONSIDERING THAT *ABERNETHY 11* DEALS WITH ENFORCEMENT OF A DIVORCE AGREEMENT AND *MCMAHAN* DEALS WITH THE EQUITABLE DISTRIBUTION SCHEME IN A **DIVORCE ACTION**

Abernethy 11 involves the enforcement of an agreement which provided that the Former Wife was entitled to 25% of the Former Husband's retirement, with the Final Judgment of Dissolution of Marriage mandating that the Former Husband take no action to defeat the Wife's right to receive her portion of the retirement.

McMahan is an appeal from a divorce final judgment which equitably divides the disability pension. The First District held that while the disability pension could not be equitably distributed the court could consider the Husband's receipt of those funds in fashioning an equitable distribution scheme.

Abernethy 11 does not disagree or conflict in any way. *Abernethy 11* could not readjust the equitable distribution scheme as it was a post-dissolution action for enforcement. The cases involve different parts of the process and there is no conflict.

ARGUMENT

Point One

WHETHER *ABERNETHY II* EXPRESSLY AND DIRECTLY CONFLICTS WITH *MCMAHAN* CONSIDERING THAT *ABERNETHY II* DEALS WITH ENFORCEMENT OF A DIVORCE AGREEMENT AND *MCMAHAN* DEALS WITH THE EQUITABLE DISTRIBUTION SCHEME IN A DIVORCE ACTION

In *Abernethy II* the parties entered into an agreement which established that the Wife is entitled to 25% of the Husband's military retirement. The final judgment which was never appealed provided that:

"the member ... 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... [and] [i]n 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)

The Fifth District in *Abernethy II* simply enforced the Final Judgment of Dissolution of Marriage.

McMahan, on the other hand deals with the equitable

distribution scheme in the divorce itself. *McMahan* states "[that] no portion of a military pension which is attributable to disability is subject to distribution for the benefit of the other spouse," (Id. at 978) however it later goes on to say that the court on remand should have 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 980. *Abernethy II* agrees. In *Abernethy 11* the Fifth District states,

"While we agree that *Mansell* absolutely prohibits a Florida court from, on its own, treating a veteran's disability benefits as marital property, we do not agree that it prohibits the veteran himself or herself from agreeing as a part of the predivorce settlement, to assign a portion of that award to his or her spouse in exchange for other property. We agree with the wife that although *Mansell* prohibits the state courts from equitably distributing disability pay in the absence of an agreement, courts may nevertheless enforce the agreements of the parties, including veterans, even if the agreement involves disability payments." (emphasis supplied) *Abernethy 11* at

1030.

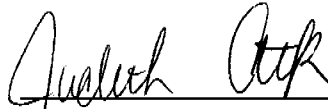
The cases are totally different because they involve a different part of the process. *McMahan* involved the equitable distribution scheme in the divorce itself, at which time the trial court could still consider the economic circumstances of the parties, including the disability pay, in fashioning an equitable distribution scheme. Whereas in *Abernethy 11* enforcement was the issue because the divorce proceeding was complete and the trial court could not revisit the equitable

distribution scheme, but could only enforce the agreement of the parties, and the Final Judgment entered by the trial Court.

CONCLUSION

The Florida Supreme Court may not take jurisdiction because there is no express or direct conflict between the Florida District Courts of Appeal.

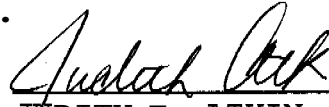
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five copies of the foregoing Appellee's Answer Brief to Jurisdictional Brief of Appellant have been furnished by U. S. Mail to Clerk of Court, 500 South Duval Street, Tallahassee, Florida 32339, and one copy by U.S. mail to Daniel Mazar, 2153 Lee Road, Winter Park, Florida 32789, this day of May, 1996.



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