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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.

FILED

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DEC 16 1996

CASE NO.: 87,957

CLERK, SUPREME COURT

Chief Deputy Clerk

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

PETITIONER'S VA DISABILITY PAYMENTS ARE EXEMPT FROM ANY DISTRIBUTION IN DISSOLUTION OF MARRIAGE OR POST-DISSOLUTION OF MARRIAGE PROCEEDINGS

The wife in her answer brief relies on three arguments to support the decision of the fifth district. She relies on the law of the case, the final judgment's prohibition against the husband's defeating the wife's entitlement to a portion of his military retirement, and the economic consequences of the husband's military disability pay. None of these arguments addresses the only issue in this case which arises under the Mansell decision. *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989) (hereafter referred to for convenience as *Mansell I*) That issue involves the right of a state court to characterize military retirement pay.

Fully stated, the issue is: Does a state trial or appellate court have the right to redefine net disposable retired or retainer pay to include disability payments when disability payments are excluded therefrom under federal law, so that the functional equivalent of net disposable retired or retainer pay, *i.e.* VSI, will likewise include disability payments? The answer is that a state court does not have that right.

The state court in California, upon the remand of *Mansell I* from the U.S. Supreme Court, recognized that state courts do not have the right to redefine military retirement pay so as to include disability payments. *In re the Marriage of Mansell*, 265 Cal.Rep. 227, 236 (Cal.App. 5th Dist. 1989). Although the wife in her answer brief implies that the California court decided that it had the right to award a portion of the husband's disability payments to the wife notwithstanding the decision in *Mansell I*

because the wife did upon remand of *Mansell I* prevail and did receive her share of the husband's disability payments, the California court, in fact, recognized that *under Mansell I* it did not have the right to award any portion of the husband's disability payments to the wife. However, it decided **that** procedurally it **was** too late for the husband to avail himself **of the holding** in *Mansell I* because he did not have the grounds under California law to reopen the final judgment **in order** to modify it so **as** to remove his **disability payments from the wife's** award. His attempt, therefore, **at** modification of the final judgment **was** denied for procedural, not substantive, reasons.

Abernethy I, under the law of the case doctrine, does not give any court the right to characterize net disposable retired ~~or~~ **retainer pay as** inclusive of disability payments when federal law defines such pay as being exclusive of disability payments. The law of the case doctrine **only** applies to issues **actually** presented and considered in a previous **appeal**. *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla. 1983). The issue of **disability** payments did not even exist until after *Abernethy I* was decided and remanded. It **was** after the remand that the **trial** court ordered the husband to pay a portion of his disability payments to the **wife**. Therefore, the issue **was neither** presented nor considered in *Abernethy I*. Moreover, to the extent that *Abernethy I* **addressed** disability **payments**, and it did so in *dictu*, it did so to point out how disability payments are **excluded from** both retirement pay **and** VSI by the applicable federal statutes. *Abernethy v. Fishkin*, **638 So.2d 160, 162-163** (Fla. 5th DCA 1994). Thus, **the law of the** case in *Abernethy I* does not support the wife's argument or the **fifth** district's decision.

As for the final judgment, the **wife** in her answer brief correctly points out that it ordered the husband not to take any action that **would** defeat the former spouse's right to receive a portion of the full net disposable retired or retainer pay of the husband. The **wife** focuses her argument on the fact that the husband **was** ordered not to take any action to defeat **her** right to such pay. However, she ignores the fact that the order relates to net disposable retired or retainer pay and she offers no legal basis **which** would **allow** the state **court** to interpret that phrase **as** being inclusive of disability payments in light of the *Mansell* decision.

The gist of the wife's argument **is** to rewrite not only the parties' original property settlement agreement, but also the **final judgment**, so **as** to now include disability payments, when such payments obviously **were** not contemplated by either one of those documents. Moreover, the wife seeks to change the statutory definition of **military** retirement pay notwithstanding a U.S. Supreme Court decision. With respect to VSI, which this court in *Kelson vs. Kelson*, **675 So.2d** 1370 (Fla. 1996), held to be the functional equivalent of **military** retirement pay, the wife seeks to make it the functional superior of military retired pay by including therein disability payments. There **is** nothing in the **final judgment** in this cause or in the parties' original **settlement** agreement which even remotely suggests that VSI should be construed to include disability payments. Neither VSI nor disability payments are addressed by the final judgment **or** the parties' original settlement agreement, but net disposable retired or retainer pay is addressed by the final judgment which awards a portion of the husband's net disposable retired or retainer pay **to the wife**.


The last argument used by the **wife** is the economic consequences of the disability payments argument. She suggests that disability payments may be considered in determining **an** equitable distribution. As to **this** concept, the husband **has** no disagreement. **Certainly**, in considering an equitable distribution **a court** may consider disability income of the husband. However, in the instant case we are not faced with **an** appeal of a final judgment which challenges the equitable distribution made by the court or which seeks **a** modification. This appeal relates **only** to the enforcement of the final judgment. The wife has not suggested **any** ~~grounds~~ that would allow the court to reopen **the final** judgment. Moreover, since the final judgment pertains to the adjudication of property rights without **a** specific reservation of jurisdiction for later adjudication, it **is** quite clear **that** there are no grounds for reopening the final judgment in order to **make** any adjustments in the equitable distribution therein ordered. *Finston v. Finston*, **37 So.2d 423 (Fla. 1948)**; *Davis v. Dieujuste*, **496 So.2d 806 (Fla. 1986)**; *Bockoven v. Bockoven*, **444 So.2d 30 (Fla. 5th DCA 1983)**; *Fahs v. Fahs*, **517 So.2d 136 (Fla. 5th DCA 1987)**; *Brandt v. Brandt*, **525 So.2d 1017 (Fla. 4th DCA 1988)**.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail this 13th day of December, 1996 to Judith E. Atkin, Attorney for Respondent, 109 West New Haven Avenue, Melbourne, FL 32901.


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