Docket Number:

SUPREME COURT OF THE UNITED STATES

Ron Waterman, ex-husband,

Petitioner pro se,

vs.

Robyn Waterman, ex-wife,

Respondent pro se,

ON PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT and COURT OF APPEALS

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI

Ron Waterman, petitioner pro se
RR 2 Box 7169
Manati, PR 00674
email: ronwaterman3@yahoo.com
cell: 781-975-2889

CONTENTS OF APPENDIX

(20)
DOCKETED
AUG 12 1999

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
The Probate and Family Court Department

Norfolk Division **Docket No. 98D0300-DX2**

Judgment of Divorce Nisi

Robyn B. Waterman ,Plaintiff

of Holbrook in the County of Norfolk

v.

Ronald J. Waterman ,Defendant

of Braintree in the County of Norfolk

All persons interested having been notified in accordance with the law, and after hearing, it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of an irretrievable breakdown of the marriage as provided by Chapter 208, Sec. 1-B ; and that upon and after the expiration of ninety days from the entry of this judgment, it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order.

It is further ordered that the Agreement of the parties dated June 16, 1999 is approved and incorporated into and made part of this Judgment, and MERGED into this Judgment.

It is further ordered that the issue of visitation shall be left open for subsequent determination. Pending said determination, all prior temporary orders relating to visitation shall remain in full force and effect.

June 16, 1999
Date
9/15/99

Justice of Probate and Family Court

c.g.f

A/1

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Norfolk Division **Docket No. 99D0300**

Robyn B. Waterman, Plaintiff

v.

Ron J. Waterman, Defendant

JUDGMENT
(On Complaint for Contempt filed 3/28/22)

This matter came before the Court on July 28, 2022 for hearing on Plaintiff's Complaint for Civil Contempt filed on March 28, 2022. The Plaintiff appeared and was represented by Attorney Wayne Gilbert. The Defendant appeared as a self-represented litigant. Neither party requested an evidentiary hearing.

The Plaintiff contends that the Defendant is in contempt of Court of the Judgment of Divorce dated June 16, 1999 which incorporated the parties' Separation Agreement. Specifically, the Plaintiff alleges that the Defendant is violation of Exhibit A, Paragraph V which provides:

> "V. Additional Pension Rights – To the extent that the Husband is entitled to any military or other pension up to the date of the Agreement, the Wife shall be entitled to receive 50% thereof via appropriate QDRO or other order. The Husband shall have an affirmative obligation to immediately report the existence and status of any such pension rights to the Wife as soon as he becomes aware of same".

The Plaintiff alleges that the Defendant has failed to provide documentation regarding his pension with the United States Air Force. Further, that the Plaintiff has made numerous attempts to communicate the need for cooperation in applying for payments for the Plaintiff, as the Defendant is currently receiving retirement benefits. The Defendant has refused to cooperate and communicate with the Plaintiff.

The parties were married on August 11, 1984 and Judgment of Divorce entered on June 16, 1999. The Defendant served in the United States Air Force from December of 1985 through September 29, 1993. The Plaintiff stated that the Defendant may have served in the reserves, however neither party provided any evidence as Defendant's dates of service in the reserves or if he in fact served at all. As the result of his service between December of 1985 and September of 1993, the Defendant receives military retired pay. At the request of the Plaintiff, Attorney Lisa Ehrmann prepared a Military Qualifying Court Order (MQCO) on January 4, 2022. Attorney Ehrmann's

A/2

cover letter enclosing the MQCO states, "I understand that his [Defendant] benefits accrued from 12/17/85-9/29/93, therefore his pension falls entirely within the marital period". The MQCO itself defines the duration of the marriage as from August 11, 1984 (Date of Marriage) to June 16, 1999 (Date of Divorce). In Paragraph 6 of the MQCO, it states "The Former Spouse is awarded 50% per month from the Member's disposable military retired pay". To date, the Defendant has refused to sign the MQCO.

The Defendant initially stated that he has refused the sign the MQCO because it gave the Plaintiff the ability to receive a portion of any benefits that accrued after the date of divorce. The Defendant acknowledged that the Plaintiff was entitled to one-half of the benefits accrued during the marriage. The Defendant later changed his position stating that any right of the Plaintiff to receive a portion of his military retirement was extinguished as of the date of divorce. The Defendant then became argumentative with the Court asking where he could file his appeal.

To prove a civil contempt a plaintiff must show a clear disobedience of a clear and unequivocal command. In re: Birchall, 454 Mass. 837, 852 (2009). The contempt must be proved by clear and convincing evidence, and the court is to consider the "totality of the circumstances" Wooters v.Wooters, 74 Mass. App. Ct., 839, 844 (2009).

The Order that the Defendant shall have an affirmative obligation to immediately report the existence and status of any such pension right to the Wife as soon as he became aware of same is clear and unequivocal. The Plaintiff failed to prove by clear and convincing evidence that the Defendant has violated this order. However, there is no language contained within the Separation Agreement which requires the Defendant to execute a MQCO within a certain time. While cooperation within a reasonable time is certainly inferred, this is insufficient to sustain a finding of contempt. Accordingly, the Court finds the Defendant NOT GUILTY of contempt of Court.

Notwithstanding the Court's finding that Defendant is not guilty of contempt of Court, the Court finds it only equitable to award Plaintiff her reasonable attorney fees and costs in the interests of justice. The Plaintiff made several attempts to resolve this matter prior to filing a Complaint for Contempt and the Defendant ignored same. The Defendant refused to engage in any meaningful conversation with counsel or Attorney Ehrmann regarding his issues with the language of the MQCO. In fact, the Defendant changed his position during the hearing as to whether the Plaintiff was even entitled to the benefit which is the subject of the MQCO. It is clear from the Defendant's conduct that this matter would have not been resolved but for Court intervention.

Accordingly, Plaintiff's counsel shall have fourteen (14) days from the date of this Judgment to file an Affidavit of Attorney Fees and Costs with the Court. The Defendant shall have fourteen (14) days thereafter to file a Financial Statement as well as an Opposition to the Affidavit for Attorney Fees and Costs, if any. Once all submissions are received, the Court will rule on the issue of attorney fees and costs administratively. All submissions should be filed with the Court with a copy by email to AJCM Jennifer Maggiacomo (jennifer.maggiacomo@jud.state.ma.us).

A/3

Lastly, the Court has amended the MQCO to state as follows "the Former Spouse is awarded 50% per month *of any benefits which the member accrued during the marriage (i.e. between 8/11/94 to 6/16/99)* from the Member's disposable military retired pay" in order to exclude benefits the Defendant may have accrued subsequent to the date of divorce, if any exist.

Date: 7/29/22

Kimberly Moses, Justice
Norfolk Probate and Family Court

A/4

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
NORFOLK DIVISION DOCKET NO. 98D-0300-DX2

ROBYN B. WATERMAN,
Plaintiff,

RONALD J. WATERMAN,
Defendant.

MILITARY QUALIFYING COURT ORDER

1. **Acknowledgment:** The parties acknowledge that Ronald J. Waterman ("Member"), is currently receiving a military retirement benefit based on his service in the United States Air Force. The parties further agree that Robyn B. Waterman ("Former Spouse"), has a property interest in a portion of such military retirement benefits, and shall receive from Member's disposable military retired pay an amount as set forth below.

2. **Member Information:**
The "Member" as referred to herein is Ronald J. Waterman, whose address is: 9 Apollo 11 Road, Plymouth, MA 02360. The Member's social security number and date of birth are provided in a separate addendum.

3. **Former Spouse Information:**
The "Former Spouse" as referred to herein is Robyn B. Waterman, whose address is: 19 Teed Road, Holbrook, MA 02343. The Former Spouse's social security number and date of birth are provided in a separate addendum.

4. **Duration of Marriage Acknowledgment (Compliance with 10/10 Rule):** The Member and the Former Spouse acknowledge that they had been married for a period of more than ten years during which time the Member performed more than ten years of creditable military service. The parties were married from August 11, 1984 ("Date of Marriage") to June 16, 1999 ("Date of Divorce").

5. **Assignment of Benefits:** The Court assigns to the Former Spouse an interest in the Member's disposable military retired pay. The Former Spouse is entitled to a direct payment in

the amount specified below and shall receive payments concurrent with the Member.

6. **Amount of Payments:** The Former Spouse is awarded **50%** per month (*) from the Member's disposable military retired pay. In addition to the above, the Former Spouse shall receive a proportionate share of any post-retirement cost of living adjustments ("COLA") made to the Member's benefits on or after the date of his retirement.

(*) of any benefits which the member accrued during the marriage (i.e., between 8/11/94 to 6/16/99)

7. **Duration of Payments:** The monthly payments set forth under Section 6 shall commence to the Former Spouse as soon as administratively feasible and shall continue during the joint lives of the parties, and, to the extent permitted under law, irrespective of the future marital status of either of them.

8. **Continued Cooperation of the Parties:** The Member agrees to cooperate with the Former Spouse to prepare an application for direct payment to the Former Spouse from the Member's retired or retainer pay pursuant to 10 U.S.C. Section 1408. The Member agrees to execute any and all documents that the United States Military may require to certify that the disposable military retired pay can be provided to the Former Spouse. The Former Spouse agrees to notify DFAS about any changes in the Qualifying Court Order or the order affecting these provisions of it, or in the eligibility of any recipient receiving benefits pursuant to it.

9. **Overpayments:** The Former Spouse agrees that any future overpayments to her are recoverable and subject to involuntary collection from her estate.

10. **Merger of Benefits and Indemnification:** The Member agrees not to take any action by merger of the military retirement pension with another pension so as to cause a limitation in the amount of the total retired pay in which the Member has a vested interest and thereby causing a limitation of the Former Spouse's monthly payments as set forth above. Notwithstanding the above, if the Member becomes employed outside of the military and has his military pension merged, or such employment or condition causes a merger of any portion of the Member's disposable military retired pay with another retirement system, the Former Spouse shall remain entitled to the assigned share of the Member's retirement benefits as set forth above, regardless of which retirement system actually pays the retirement benefits.

Further, should any portion of the Member's retirement benefits earned under this Plan become payable under another retirement system, the provisions of this Order shall be deemed modified to the extent necessary to provide the Former Spouse with a portion of the benefits under such other retirement system along with all of the rights and entitlements afforded to the

A/6

16. Discovery: The Member hereby waives any privacy or other rights as may be required for Former Spouse to obtain information relating to Member's date and time of retirement, last unit assignment, final rank, grade and pay, present or past retired pay, or other such information as may be required to enforce the award made herein, or required to revise this Order so as to make it enforceable.

17. Additional Awards: For the purposes of interpreting this Court's intention in making the division set out in this Order, "military retired pay" includes retired pay paid or to which Member would be entitled for longevity of active duty and/or reserve component military service and all payments paid or payable under the provisions of Title 38 or Chapter 61 of Title 10 of the United States Code, before any statutory, regulatory, or elective deductions are applied. For purposes of calculating the Former Spouse's percentage share of the military retired pay awarded by the Court, the marital property interests of the Former Spouse shall also include a pro-rata share of any sum taken by Member in addition to disposable retirement pay including exit bonuses, voluntary separation incentive pay (VSI), special separation benefit (SSB), or any other form of retirement benefits attributable to and based in party on any or all of the marital years of the Member's service in the military. Such pro rata share shall be based on the same percentage specified in Section 6 above, as applicable. In the event that the DFAS will not pay the Former Spouse directly all or a portion of the benefits awarded to her herein, then Member shall be required to pay her directly in accordance with the terms and provisions set forth in Section 11 above.

SO ORDERED.

(Moses, J.)

Justice, Probate and Family Court
Department, Norfolk Division

Dated: 7/28/22

A/7

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

Norfolk Division

Docket No. 98D0300

Robyn B. Waterman

Ron J. Waterman

ORDER

This Court Ordered on April 11, 2023 that each party was to submit a 1 page pleading identifying the matters before the Court. Only Mr. Waterman has done so. After review of Mr. Waterman's submission, it is hereby ORDERED:

1) Defendant's Motion to Amend Judgment/ Defendant's Motion to Amend Findings/ Defendant's Motion to Certify Questions of Federal Law (Docket #106) is: Denied *

2) Defendant's Renewed Motion to Take Judicial Notice does not appear on the docket; accordingly, there is no action to be taken on same.

3) Defendant's Supplemental Motion to Alter or Amend Judgment/ Defendant's Supplemental Motion to Amend Findings (Docket #116) is: Denied

Any other Motions filed prior to April 14, 2023 are stricken.

Dated: 6/6/23

Kimberly Moses, Justice

* The Court notes that there was no finding of Contempt in the Judgment of 7/29/22 (Moses, J.). All Judgments shall remain in full force and effect.

A/8

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-905

ROBYN B. WATERMAN

vs.

RONALD J. WATERMAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Ronald J. Waterman (husband), the former spouse of Robyn B. Waterman (wife), principally appeals from a July 2022 judgment, issued by a Probate and Family Court judge, that adjudicated the wife's complaint for contempt alleging that the husband violated the judgment of divorce nisi (divorce judgment) by failing to satisfy his obligations related to certain military benefits. Though the judge ultimately found the husband not guilty of contempt, the judge entered a military qualifying court order (MQCO) requiring the husband to pay to the wife fifty percent of his disposable military retired pay that accrued during the marriage. The husband appeals from the July 2022 judgment, and from the judge's orders allowing the wife's motion for

attorney's fees and denying the husband's postjudgment motions to amend the July 2022 judgment. We vacate so much of the judgment as amended the MQCO to include an incorrect marital coverture period for the husband's military pension, and remand the case for the limited purpose of entering a modified judgment and MQCO setting forth the correct marital coverture period. We affirm the judgment as so modified, and we also affirm the orders allowing the wife's motion for attorney's fees and denying the husband's postjudgment motions.

Background. The parties were married for nearly fifteen years, from August 1984 until June 1999, during which time the husband served in the military for almost eight years. The parties executed a separation agreement in 1999, which was incorporated into and merged with the divorce judgment. In the agreement, both parties waived alimony "at the present time," without waiving the "right to seek alimony in the future."[1] The agreement provided that military separation pay, which the husband was then receiving under a voluntary separation incentive (VSI) program, would be divided between the parties, with one-third being paid to the wife as lump sum child support

A/10

[1] The parties signed the separation agreement more than a decade before the Alimony Reform Act, St. 2011, c. 124 (eff. March 1, 2012).

until the children's emancipation. As to the husband's pension, the agreement provided as follows (pension clause):

> "To the extent that the [h]usband is entitled to any military or other pension up to the date of this agreement, the [w]ife shall be entitled to receive 50% thereof via appropriate Q[ualified] D[omestic] R[elations] O[rder] or other order. The [h]usband shall have an affirmative obligation to immediately report the existence and status of any such pension rights to the [w]ife as soon as he becomes aware of same."

In 2022, in furtherance of the pension clause, the wife arranged for an attorney to draft the MQCO, which provided that the wife would receive "50% per month from the [husband]'s disposable military retired pay." The husband refused to sign the MQCO. The wife filed a complaint for contempt alleging that the husband had violated the pension clause by refusing to cooperate in the preparation of the MQCO. The husband moved to dismiss the complaint, arguing that because he did not receive his military pension until 2021 it was not governed by the pension clause.

After a nonevidentiary hearing on the complaint for contempt, the judge concluded that the pension clause was a clear and unequivocal order requiring the husband to report his receipt of the military pension to the wife. However, the judge concluded that the wife had not proven by clear and convincing evidence that the husband had violated that order by refusing to execute the MQCO, because the pension clause did not specify a

A/11

judge divided the husband's disposable retired pay as permitted by the USFSPA.[3]

The husband argues that the judge erred in interpreting the language of the pension clause that states, "[t]o the extent that the [h]usband is entitled to any military or other pension up to the date of this agreement the [w]ife shall be entitled to receive 50% thereof" (emphases added). He contends that the verb "is entitled," in the present tense, and the phrase "up to the date of" collectively mean that the pension clause applied to benefits which he was entitled to receive as of the date of the separation agreement, June 16, 1999, and not, as the judge interpreted it, pension benefits that he had accrued as of that date. We are not persuaded. See McMahon v. McMahon, 31 Mass. App. Ct. 504, 508-509 (1991) (at time of divorce, husband was in Air Force; judge properly awarded wife percentage of retirement pay which husband began receiving after divorce).

The judge interpreted the pension clause to mean that the husband's future interest in any military pension he accrued during the marriage would be shared with the wife. The language

A/12

[3] To the extent that the husband argues that the judge should have allowed his motion for judicial notice of the USFSPA, rather than taking no action on the motion, we conclude, assuming without deciding, that even if the husband is correct, he was not prejudiced. As we explained, the judge's interpretation of the pension clause and entry of the MQCO comported with the USFSPA.

of husband's pension depended on "variables that could not be determined in advance"; he "could retire in a day, a year, or a decade"). In those circumstances, the wife is entitled to the benefit of her bargain as incorporated into the divorce judgment.

2. VSI benefit as equivalent to pension. The husband argues that his VSI benefit was the functional equivalent of a pension, and therefore it was the "military or other pension" referred to in the pension clause. He contends that because he already paid a portion of the VSI benefit to the wife, he should not also be required to pay the wife a portion of his military pension. The argument is unavailing. It would make no sense for the separation agreement to have both the military separation pay clause and the pension clause if both clauses allocated the VSI benefit. See Duval, 101 Mass. App. Ct. at 760. Moreover, the agreement expressly required the husband to pay the wife thirty-three percent of his VSI benefit as lump sum child support (in addition to his weekly child support payments), with the obligation terminating on the emancipation of the parties' children. Thus, unlike the husband's military pension (which was part of the property division), the husband's VSI benefit was, in essence, treated as income for purposes of child support.

A/13

dated September 9, 2022, allowing the wife's motion for attorney's fees is affirmed. The order dated June 6, 2023, denying the husband's postjudgment motions is affirmed.

So ordered.

By the Court (Desmond, Hand & Grant, JJ.[4]),

Assistant Clerk

Entered: June 17, 2024.

A/14

[4] The panelists are listed in order of seniority.

FAR-29897 - Notice: FAR denied

From: SJC Full Court Clerk (sjccommclerk@sjc.state.ma.us)

To: ronwaterman3@yahoo.com

Date: Friday, September 6, 2024 at 07:42 AM GMT-4

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-29897

ROBYN B. WATERMAN
vs.
RON J. WATERMAN

Norfolk Probate & Family No. NO98D0300DX2
A.C. No. 2023-P-0905

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on September 5, 2024, the application for further appellate review was denied.

Very truly yours,
The Clerk's Office

Dated: September 5, 2024

To: Robyn B. Waterman
Ron J. Waterman

A/15

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

ROBYN B. WATERMAN vs. RON J. WATERMAN
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
FAR-29897

CASE HEADER	
Case Status	FAR denied; recon denied
Status Date	10/17/2024
Nature	Family Law
Entry Date	07/08/2024
Appeals Ct Number	2023-P-0905
Response Date	07/22/2024
Appellant	Defendant
Applicant	Defendant
Citation	494 Mass. 1107
Case Type	Civil
Full Ct Number	
TC Number	NO98D0300DX2
Lower Court	Norfolk Probate & Family
Lower Ct Judge	Kimberly Moses-Smith, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
Robyn B. Waterman Pro Se Plaintiff/Appellee	
Ron J. Waterman Pro Se Defendant/Appellant	

DOCKET ENTRIES

Entry Date	Paper	Entry Text
07/08/2024		Docket opened.
07/08/2024	#1	FAR APPLICATION filed by Ron J. Waterman. (Note: Application filed with a copy of judgment of lower court only.)
07/08/2024	#2	LETTER from Ron J. Waterman regarding the filing of the $270 filing fee.
07/08/2024	#3	FAR APPLICATION filed by Ron J. Waterman. (Note: Second copy of Application filed with a copy of decision of Appeals Court only.)
07/08/2024	#4	LETTER from Ron J. Waterman regarding the filing of the second copy of FAR application (paper #3). He asks the clerk's office to add the appendix from the first copy of FAR application (paper #2) be added to the second copy.
09/05/2024	#5	DENIAL of FAR application.
09/18/2024	#6	Motion to reconsider denial of FAR application filed by Ron J. Waterman.
10/17/2024	#7	DENIAL of petition to reconsider denial of FAR application.
10/24/2024	#8	Notice of appeal to the United States Supreme Court filed by Ron Waterman.

As of 10/24/2024 12:20pm

A/15A

FAR-29897 - Notice of docket entry

From: SJC Full Court Clerk (sjccommclerk@sjc.state.ma.us)

To: ronwaterman3@yahoo.com

Date: Friday, October 18, 2024 at 10:01 AM GMT-4

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: No. FAR-29897

ROBYN B. WATERMAN
vs.
RON J. WATERMAN

NOTICE OF DOCKET ENTRY

Please take note that on October 17, 2024, the following entry was made on the docket.

DENIAL of petition to reconsider denial of FAR application.

Very truly yours,
The Clerk's Office

Dated: October 17, 2024

To:
Robyn B. Waterman
Ron J. Waterman

A/16

6/16/99

(19)
DOCKETED
AUG 12 1999

COMMONWEALTH OF MASSACHUSETTS

NORFOLK DIVISION

PROBATE AND FAMILY COURT
DOCKET NO. 98D0300 DX2

RONALD J. WATERMAN,

Plaintiff

v.

ROBYN B. WATERMAN,

Defendant

NORFOLK COUNTY
TRUE COPY-ATTEST
FEB 04 2008
REGISTER

SEPARATION AGREEMENT

AGREEMENT made this 16 day of June, 1999, between ROBYN B. WATERMAN of Holbrook, Norfolk County, Massachusetts (hereinafter referred to as the "Wife") and RONALD J. WATERMAN of Braintree, Norfolk County, Massachusetts (herein referred to as the "Husband"). All references to "Party" or the "Parties" shall mean the above referenced Husband and Wife.

STATEMENT OF FACTS

The Husband and Wife were married at Nashua, New Hampshire on August 11, 1984. The Husband and Wife last lived together at Holbrook, Massachusetts on or about January 22, 1998. Three children were born during the marriage, namely: Ry[redacted]. W[redacted], born [redacted], 1990; A[redacted]. W[redacted], born [redacted], 1994; and S[redacted]. W[redacted], born [redacted], 1996.

EXHIBIT C

A/17

RW

R.W

9. The failure of the Husband or the Wife to insist in any instance upon the strict performance of any of the terms hereof shall not be construed as a waiver of such term or terms for the future and the same shall nevertheless continue in full force and effect.

10. In the event any provision(s) of this Agreement shall be held invalid, such invalidity shall not invalidate the whole Agreement, but the remaining provisions of this Agreement shall continue to be valid and binding to the extent that such provisions continue to reflect fairly the intent and understanding of the parties.

11. This Agreement shall be construed and governed according to the laws of the Commonwealth of Massachusetts.

12. This Agreement shall not be altered or modified except by an instrument signed and acknowledged by the Husband and Wife or by subsequent order or judgment of a Court of competent jurisdiction.

IN WITNESS WHEREOF, the Husband and Wife have set their hands and seals to five (5) counterparts, each of which shall be considered an original.

DATED: ~~March~~ June 16, 1999

Robyn B. Waterman
ROBYN B. WATERMAN

DATED: ~~March~~ June 16, 1999

RONALD J. WATERMAN

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss. ~~March~~ June 16, 1999

Then personally appeared the above-named ROBYN B. WATERMAN and acknowledged the execution of the foregoing instrument to be her free act and deed before me.

MCG : 4.21.02 Notary Public

A/18

R.W.

IV Liabilities

1. The Husband shall be solely responsible for the following liabilities and shall hold the wife free, harmless and indemnified therefrom:

A. VALIC (Loan against account)
B. Sallie Mae (listed on Rule 401 Financial Statement Dated 6.16.99
C. Visa (listed on Rule 401 Financial Statement Dated June 16, 1999)
D. Pentagon Credit Union (as listed on Rule 401 Financial Statement Dated June 16, 1999)

2. The wife shall be responsible for the liabilities listed on her Rule 401 Financial Statement Dated June 16, 1999

3. The wife shall be Responsible for the excise tax and insurance associated with the Ford Windstar Van.

V Additional Pension Rights

A/19

To the extent that the Husband is entitled to any military or other pension up to the date of this ~~[illegible]~~ agreement the wife shall be entitled to receive 50% of

THEREOF VIA appropriate QDRO OR OTHER ORDER.
THE HUSBAND SHALL HAVE AN AFFIRMATIVE OBLIGATION
TO IMMEDIATELY REPORT THE EXISTENCE AND STATUS
OF ANY SUCH PENSION RIGHTS TO THE WIFE AS SOON
AS HE BECOMES AWARE OF SAME

COMPLAINT FOR ☒ CIVIL ☐ CRIMINAL CONTEMPT	Docket No. NO98D0300D1	Commonwealth of Massachusetts The Trial Court Probate and Family Court

Robyn (First Name) B (M.I) Waterman (Last Name), Plaintiff

v.

Ron (First Name) J (M.I) Waterman (Last Name), Defendant

Norfolk Division

1. Plaintiff resides at 19 Teed Road (Address) (Apt, Unit, No. etc.) Holbrook (City/Town) MA (State) 02343 (Zip)
2. Defendant resides at (Address) (Apt, Unit, No. etc.) Manati (City/Town) Puerto R (State) 00693 (Zip)
3. By ◉ judgment ○ order of the Court, dated 6/16/1999 defendant was ordered
   - ☐ to pay ○ alimony and/or ○ support for minor or dependent child(ren) in the sum of $ _____ ○ weekly ○ monthly
   - ☐ to comply with the Court ordered parenting time.
   - ☐ not to impose any restraint on the personal liberty of plaintiff
   - ☐ to pay health insurance premiums for ○ plaintiff and/or ○ child(ren)
   - ☐ to pay reasonable medical and dental expenses for ○ plaintiff and/or ○ child(ren)
   - ☒ other

     by Separation Agreement and Judgment of Divorce Nisi (dated 6/16/1999) with regard to a QDRO, the Agreement states: To the extent that the Husband is entitled to any military or other pension up to the date of this Agreement the Wife shall be entitled to receive 50% thereof via appropriate QDRO or other order. The Husband shall have an affirmative obligation to immediately report the existence and status of any such pension rights to the Wife as soon as he becomes aware of same.

   and said ◉ judgment ○ order is still in force.
4. Defendant has not obeyed that ◉ judgment ○ order and
   - ☐ is in arrears of court-ordered support payments.
   - ☐ there now remains due and unpaid to plaintiff the sum of $ _____ plus such further amounts as may accrue to the date of hearing.
   - ☐ plaintiff has been denied parenting time on _____
   - ☒ has violated the order on 1/13/2022 by:

     By refusing to cooperate in providing documentation regarding his pensions with the United States Air Force and Lockheed Martin for the preparation of a QDRO. Numerous attempts have been made to communicate the need for cooperation in applying for payments to his former spouse, as Defendant is currently receiving retirement benefits. The attempts have been met with refusal

FILED: 03-28-2022
SUMMONS ISS'D: 05-06-2022
SUMMONS RET'D: 07-28-2022 08:32 AM

A/21

103

COMMONWEALTH OF MASSACHUSETTS

NORFOLK DIVISION **PROBATE AND FAMILY COURT**
DOCKET NO. 98D-0300

ROBYN B. WATERMAN,
Plaintiff,
vs.
RON J. WATERMAN,
Defendant.

DEFENDANT'S ANSWER TO COMPLAINT FOR CIVIL CONTEMPT

AND RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant pro se Ron Waterman ("ex-husband") respectfully submits this Answer to the Complaint filed by counsel for Plaintiff Robyn Waterman ("ex-wife").

1. Plaintiff's address: Admitted.

2. Defendant's address: Denied.

3. Quoting Separation Agreement dated June 16, 1999: Admitted.

4. Complaint this Agreement was violated: Denied.

5. Plaintiff requests Defendant be required...: Admitted as to Plaintiff making this request.

THERE IS NO LEGAL OR FACTUAL BASIS FOR PLAINTIFF'S COMPLAINT FOR CONTEMPT

The Judgment of Divorce for this case was final in 1999. No appeal was filed against that judgment. The statute of limits to complain about failing to comply with a civil judgment is six (6) years. M.G.L. Ch. 260 § 2. That six years expired in 2005, seventeen (17) years ago. By law, this Complaint must be dismissed with prejudice as time barred.

The Complaint accurately quotes the June 16, 1999 Separation Agreement for this case (adopted in full by the June 1999 Judgment de Nisi, and Sept. 1999 Final Judgment): "To the extent that the Husband is entitled to any military or other pension UP TO THE DATE OF THIS AGREEMENT..." (emphasis added). To reprise: UP TO, not past, June 1999.

Does Plaintiff mistakenly believe the ex-husband was "entitled to ... (a) pension" in June 1999 that he concealed, in violation/contempt of the June 1999 Order? If so, the statute of limitations for a complaint of fraud is three (3) years. Mass. G.L. Ch. 260 § 2A.

Does Plaintiff believe the ex-husband became entitled to a pension at some time after June 1999? If so, the Agreement, signed by both parties, adopted into Judgment, now the "law of the case," explicitly excludes any such pensions from division. If this theory is the basis of Complaint, the Complaint has no factual basis, so must be dismissed.

The Complaint never specifies which alternative it relies on, but both fail by law.

DEFENDANT'S Mass. R. Civ. P. 12(b)(6) MOTION TO DISMISS ACTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

For the reasons above, the ex-husband respectfully moves this Court to dismiss the Plaintiff's Complaint for Civil Contempt, with prejudice.

CONCLUSION

The Court should dismiss with prejudice, as the Statute of Limitations for this claim expired over a decade ago.

Done this 22nd day of May, 2022 in Plymouth, Bristol County, Massachusetts.

Ron Waterman, Defendant *pro se*
c/o New England Propeller, Inc.
9 Apollo 11 Road
Plymouth, MA 02360
cell: 781-975-2889
email: ronwaterman3@yahoo.com

A/23

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK DIVISION

PROBATE AND FAMILY COURT DEPT.
DOCKET NO. 98D 0300 (DX1, DX2)

ROBYN B. WATERMAN,
Plaintiff,

vs.

RON J. WATERMAN,
Defendant.

TRANSCRIPT OF THE JULY 28, 2022 HEARING

ON PLAINTIFF'S MARCH 28, 2022 COMPLAINT FOR CIVIL CONTEMPT,

HEARD BEFORE THE HONORABLE JUSTICE KIMBERLY MOSES

AUDIO ONLY PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF, Mr. Wayne Gilbert, Esq.

FOR THE DEFENDANT, Ron Waterman, Defendant pro se

A/24

JULY 28, 2022, 9:04 a.m., Norfolk Family Court, Courtroom 4

COURT: Can you state your name for the record, please.

PLAINTIFF: Um, sure, Robyn Waterman.

COURT: Counsel?

MR. GILBERT: Uh, Wayne Gilbert for Robyn Waterman.

COURT: And sir?

DEFENDANT: Ron Waterman, Defendant.

COURT: Will the parties raise their right hands? Do you both solemnly swear in the matter now in hearing to tell the truth, the whole truth, and nothing but the truth?

DEFENDANT: I do.

PLAINTIFF: I do.

BAILIFF: This gentleman's [of the Defendant] hard of hearing, so

COURT: Oh, alright, I'll be my usual loud self [laughs]. Alright, so, um, counsel, this is your client's Complaint for Contempt,

MR. GILBERT: Yes.

COURT: So I'll hear from you first.

MR. GILBERT: Yes, thank-you Your Honor. Aah Your Honor aahm, this is a matter, aah, involving, um, involving the parties, aah, they have a, I guess a long history with this Court, ahm, when, um, the parties were divorced, back in, uh, June of aah, 1999, ahm, the parties agreed, in their Separation Agreement, aah, under page 10, aah, to the extent, aah, either party, uh, has a, pension, and so forth, a QDRO [pronounces herein as "Quatro"] would be, aah, I'm just, ih, just paraphrasing, um, would be, ah, um, instituted and eh, the husband, or former husband, has a, uh, military pension, aah my client aah, obtained a, uh, aah, had a QDRO, uh, drafted by, aah, Lisa Ehrmann, aah, put together the, thee, uh, aah, plan, and so forth, and, aah, she presented it numerous times to the ex-husband and he refused to, um, cooperate

and sign the, uh, aam, my office got on board and was retained and, uh, subject was at least sent out a letter, to see if we can't get this resolved, back, aah, in, uh, earlier this year, and, uh, Mister Waterman does not want to, uh, aah, participate in that, uh, in, uh, signing the QDRO. He was in the in the uh the Air Force, aaah, we have the discharge papers from '85 to uh '93, um, it's my understanding he was in the Reserves as well, um, and, aaah, 'torney Ehrmann who drafted the QDRO said he said that's within the marital time, um, and it did qualify and she did all the research, ah, on the matter. Um, THAT is [phone rings] what brings us forth today, um, we are looking for, aah, the, uh, cooperation of [phone rings] the uh Mr. Waterman, if not, we ask this Court to, uh, aah, issue an Order, aahum, to uh to sign off on it and Attorney Ehrlmann also drafted a QDRO just, aah, with the Judge's signature, ahm, in case some, something of this case came to be, be with this latter

COURT: So you'd like for me to sign it without

MR. GILBERT: Just sign, Yes.

COURT: without his signature?

MR. GILBERT: Yeah.

COURT: Alright, have you submitted it counsel?

MR. GILBERT: Aah uh aah I have it here, I can [clears throat]

COURT: Sorry, did you give him, uh, Mr. uh

MR. GILBERT: No, I had it just was given that this morning by my my my client

COURT: Yes.

MR. GILBERT: It's just the same thing as he's been presented. Aah, um Your Honor, we, aah, we're also, I reserve the right to ask for uh, attorney's fees and costs on this matter, aahm, 'cause I really think, you know, this matter is pretty straightforward, um, the parties agreed to this, aaand, uh, um, Mister Waterman, re-re-refuses to, uh, cooperate on this.

COURT: It defines the period of the marriage, but then, paragraph six does say, she is awarded 50% per month from his pay. Period.

MR. GILBERT: In the QDRO. Okay. But, the aah, ahm, no, we have, I have Attorney Erhl, which is a cover letter in here, attorney only's QDRO. What I'm trying to, to, to, aah, to get clear is, that we have his cooperation, if in fact this Court, we have the, uh, the, thee, the plan, um,

COURT: Where's the one for my signature?

MR. GILBERT: Right here, Your Honor. Uh, he has that right, sorry.

MR. WATERMAN: So pause for a minute

[multiple voices overlap] [mumbling]

COURT: So counsel, what I would, what I'm going to do,

MR. GILBERT: Yes?

COURT: is I'm gonna sign the one that doesn't require the parties' signatures, but I'm gonna say, add in the language, "The former spouse is awarded 50% per month from the member's disposable military retired pay which accrued during the course the marriage."

MR. GILBERT: Correct! That's

MR. WATERMAN: No, that's not at all what the Agreement says, that she signed in 1999. "To the extent that the husband is entitled up to the date of the Agreement."

MR. GILBERT: Right.

MR. WATERMAN: Up to the date of the agreement

COURT: That's the point with your marriage, sir.

MR. WATERMAN: No, "IS ELIGIBLE." I wasn't entitled to that in 1999.

COURT: Alright, I'm going to go sign the QDRO, and amend it accordingly.

MR. WATERMAN: No, I wasn't entitled to that in 1999.

COURT: Alright, the matter is under advisement.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK DIVISION

PROBATE AND FAMILY COURT
DOCKET NO. 98D-0300 DX2 (AND DX1)

ROBYN B. WATERMAN,

Plaintiff,

vs.

RON J. WATERMAN,

Defendant.

) DEFENDANT'S MOTION TO
) ALTER OR AMEND JUDGMENT
) Mass. R. Civ. P. 59(e)
)
) DEFENDANT'S MOTION TO
) AMEND FINDINGS
) Mass. R. Dom.Rel. P. 52(b)
)
) DEFENDANT'S MOTION TO
) CERTIFY QUESTIONS OF FEDERAL LAW
) 28 U.S.C. 1331, U.S. Const. Art. III

RELIEF SOUGHT

For the reasons presented hereinafter, Defendant pro se moves this Court to:

1. vacate any July 2022 Orders or Judgment of this Court holding me in Civil Contempt, and vacate any subsequent orders resulting in a QDRO and costs or fees awarded to counsel,

2. Certify and transfer questions of first impression involving federal laws and regs. to U.S. Federal District Court, and consider federal court's responses before ordering a QDRO, or alternatively, issue this Court's findings, explicitly addressing the federal law questions of first impression, and how this Court applied principles of equity to the relevant federal law,

3. take Judicial Notice pursuant to ER 201 for the facts in my previously filed Motion to Take Judicial Notice, and all facts and laws below eligible for Judicial Notice under ER 201,

4. vacate any July 2022 Orders directing Defendant to pay Plaintiff any part of the military

Complaint that are false and disproven, and then grant a Contempt order on anything that remains; it succeeds or fails as a whole. Plaintiff asserted Contempt; Defendant proved the claim was false, Judgment must enter for Defendant.

I am not in contempt of court; the rest of this Affidavit/Memorandum explains how & why.

Most plainly and fundamentally: the June 1999 Agreement never promised Robyn I would give her half of all pensions I ever received decades into the future, for the rest of my life.

The Agreement divided the pension I was eligible to receive in 1999, and was receiving, and foreclosed any claim to potential other, later pensions that did not yet exist; for which the ex-husband was not then "eligible." Id., at 10-11.

In 1984 Robyn and I married, In 1985 I was commissioned in the U.S. Air Force, In 1993 the Department of Defense (DoD) implemented a major Reduction in Force (RIF), and I was separated from the military. Form DD 214 (my 1993 Honorable Discharge, Exhibit 6).

Veterans with 8 years of service or more, people the DoD considered "vested," were paid a pension, a Variable Separation Incentive (VSI) in lieu of the possibility of future retirement, based on rank and number of years of service. See DoD Financial Management Regulation (FMR) vol. 7B, Chap. 4 (Exhibit 7), 10 U.S.C. § 1175 (Exhibit 8) . DoD considered me "vested" and paid me a VSI military pension of $6,855.12 annually for 16 years. DD 214, Exhibit 6.

From 1993 to 1998, Robyn and I spent that VSI military pension on household expenses.

Appellate courts have found that VSI payments are a pension, a retirement pay. E.g., *In the Matter of the Marriage of Menard*, 180 Or.Ct.App 181, 183, 42 P.3d 359 (2002) (affirming the trial court when it "found that VSI payments were the 'functional equivalent' of retirement benefits and therefore marital property").[3]

It was this 1993 pension the parties divided 50% and 50% in June 1999, a pension "Husband is entitled to" receive in June 1999. The Agreement did not purport to divide a potential future retirement that was not yet earned and probably would never be; the ex-wife waived interest in any future, potential retirement pay, and instead elected to receive 50% of the existing 1993 pension, which had the potential to create a post-divorce, $100,000

3 And further noting, "Congress, reacting to a surplus of senior military personnel, created the "voluntary separation incentive" program to encourage early separation from active duty." U.S.C. § 1175. That program allowed members to separate from active duty, transfer to the Ready Reserves, and receive a stipend in an amount determined by current level of pay and years of service, distributed in annual installments until depleted." Ibid. see sec. 1175 (Exhibit 8)

pay for all of Robyn's 3-year old minivan (id., at 8-9, adjusted value is $27,393) and yet another 30% (tax free), folded into my income and relied on to calculate child support due.

Because I later became eligible for a second military pension in Sept. 2021, the $100,000 dispensed to me and Robyn, 50% / 50%, must now be paid back. The Defense Finance and Accounting Service (DFAS) takes $953 out of my retirement check every month, and my Feb. 2022 pay statement reflects the over $99,000 I must pay back. Ex. 3 (DFAS, Feb. 2022).

So does Robyn keep that $50,000 (her half of the VSI received beginning 1993 and on) as a "bonus" and start collecting 50% of my 2021 pension, or is Robyn obligated in any way for the $50,000 she received out of the $100,000 that I now owe the U.S. Government? [6] This case presents unique issues (of over one million VSI recipients DoD wide, only 47,000 later retired. Hopefully, the other 46,999 stayed married).

2. MOTION TO CERTIFY QUESTIONS OF FIRST IMPRESSION OF FEDERAL LAW TO THE APPROPRIATE FEDERAL COURT

Defense moves for an interlocutory query to be certified to Federal district court for their answer to questions of federal law of first impression. These questions, and authorities, will be provided in a separate motion, before the hearing on this Rule 59(e), 52(b) motion.

3. JUDICIAL NOTICE

Defendant's Second **OBJECTION**: I made a timely motion for judicial notice of facts and laws relevant to Plaintiff's Complaint. At the hearing the Judge indicated she had not read that motion and refused to consider it. The language in ER 201 is mandatory. ER 201(d), ER 201(e), and laws that define their application. This refusal to take Notice of federal law is a U.S. Const. Amend. 14, Due Process violation.

4. COMPLAINT FOR CONTEMPT FAILS BECAUSE PLAINTIFF IS NOT ENTITLED TO ANY OF MY 2021 RETIREMENT PAY

Nothing in the 1999 joint Agreement contemplated division of military pensions that then-Husband was NOT entitled to on or before June 1999. The June 1999 Agreement explicitly employs a present tense verb: "is eligible," to restrict the Agreement to marital property or assets that existed at the time of the divorce.

Defendant's Third **OBJECTION**. In 1999 ex-wife agreed to take 50% of the 1993 VSI pension that existed, and waived potential future interests in a vestment-depleted and unlikely-to-

6 Please refer to my July 2022 Motion to Take Judicial Notice's Exhibit 3 (DFAS Retiree Account Statement for February 2022, "Debt Balance" of over $99,000); that same DFAS doc. is also this Motion's Exhibit 3

Defendant's Fourth **OBJECTION**: Courts have a duty to review, consider, adjudge (i.e. make a ruling on), and explain their Judgments on timely and properly filed motions pending before the court directly related to the issues being examined, discussed, and decided. Court's refusal violates US Const. Amend. 14 Due Process,[7] and Mass. R. Civ. P. The Court of Appeals is hampered in assessing abuse of discretion claims when it has no lower court reasoning to evaluate, so an unexplained denial to consider such motions adversely impacts any party's right to an appeal, which carries Due Process implications.

At about that point in time (in July 28 hearing), the judge interrupted me to have Plaintiff's counsel speak more. Counsel told the judge again I had failed to comply with the terms of the 1999 Agreement by refusing to disclose the existence of my military retirement.

Then how did he know I had a military retirement? Or did he mean the Lockheed pension? No, he said military retirement. He knew because I told Robyn about it, satisfying even Plaintiff's interpretation of the Agreement. So how is that contempt of court? It's not. Exhibit 3 to my July 2022 motions to dismiss is my DFAS retired pay for Feb. 2022. How am I refusing to divulge the existence of a 2021 retirement when I sent Plaintiff my pay stub?

Counsel told the judge I was sent "this exact DQRO" several times, but had refused to sign it, and presented the judge a copy. Bailiff handed a copy to the Judge (now it's "filed"), and I asked to see a copy, since none was offered me. I glanced at it and testified, "I've never seen this before." See Exhibit 10, page 1. That violates Mass. R. Civ. P. 5 (service).

Defendant's Fifth **OBJECTION**: Plaintiff's counsel was deliberately untruthful to the Family Court and I object to his untruths (which are not evidence) being assumed true when I disputed them testifying under oath (which is evidence). Before the July 28 hearing I was never given the document he handed the judge. This dissonance affects my credibility, which is a factor any reasonable Judge would consider in adjudging whether or not to grant Plaintiff's Complaint for an order of contempt.

I asked for time to review the Plaintiff's QDRO, was given 30 seconds, then testified, "I've never seen this document before." All I absorbed in my 30 second speed perusal was a line on page 2 of 4 that ordered me to give 50% of my military retirement to Robyn. I reiterated that the 1999 agreement did not award Robyn any pension that I had not yet earned, it gave her half of what I had already earned during our marriage, "up to the date" of the Agreement; it did not obligate money that I might never get, and if I ever became eligible, would not get for another 25 years.[8] Then the judge nodded to the Bailiff to collect the copy of the QDRO I'd perused for 30 seconds and that copy was taken away.

---

7 any mention of "Due Process" herein means U.S. Constitution Fourteenth Amendment Due Process

8 in the surreality of the moment, I rounded up from 22+ years to 25, calculating from when our marriage actually ended, in 1996, and not when a court finally got around to issuing its death certificate, in 1999

The judge then announced that we would adjourn in a moment so she could return to her chambers and sign the Plaintiff's QDRO.

Aghast, I re-read the relevant clip from the 1999 Agreement into the record, again, "To the extent that the Husband IS ENTITLED, present tense, already existing in 1999, to any military or other pension UP TO THE DATE of this Agreement, the Wife shall be entitled to receive 50% of such pension." I stressed, again, the Agreement committed only money that I earned while we were married, pensions that existed as of the day the Agreement was signed, and did not encompass money I may or may not be first entitled to until over 20 years in the future. "It says, 'IS entitled,' not 'will someday be entitled to'."

Then Judge Moses told Plaintiff's counsel, "it does say 'up to the date of the agreement,' so I'll add a paragraph to your QDRO to specify that the percent of his pension to be awarded to the Plaintiff is only for those years of service before the Agreement was signed," which entirely missed my point.

Then counsel said he'd like to receive lawyers fees, then I began to voice objections to being ambushed by a QDRO I'd never seen before, when the Judge interrupted me to announce "Court is adjourned," and walked away from the bench while I was speaking.

As I was not permitted to make objections during the "hearing," I make them now.

Defendant's Sixth **OBJECTION**: For any paper that is filed, i.e. by being given to the court clerk or handed to a judge, the opposing party is entitled to a copy of the same. Defendant objects to having a document he's never seen before being taken out of his hands after it was filed in court, and no copy provided as per the Mass. R. Civ. P. 5(a), 5(b), 5(d) and 5(e).

Defendant's Seventh **OBJECTION**: Defendant objects to litigation by ambush, where Plaintiff's counsel seeks an order of contempt for for Defendant "failing to cooperate" in providing information about his Air Force and Lockheed Martin pensions, when the lawyer and Plaintiff clearly had that information, then Plaintiff pops out a QDRO I've never seen before, and the Judge almost instantly agrees to sign it. The proper remedy for "he refuses to disclose information about his Air Force and Lockheed Martin pensions" is to find contempt (somehow, for failing to disclose a Lockheed pension I never received?), then issue an order directing me to "disclose the information." Not to grant everything on Plaintiff's Christmas wish list when Defendant is absolutely unaware what that list entails and the Plaintiff is demanding 50% of the entire pension.

Defendant's Eighth **OBJECTION**: To alter the terms of a signed Agreement and Absolute Judgment 23 years after Judgment is final violates U.S. Const. Due Process, Mass. R. Civ. P. 54, and offends established precedent and all court rules promising to promote equity and

COMMONWEALTH OF MASSACHUSETTS
The Trial Court
Probate and Family Court Department

Norfolk Division, ss. Docket No. 98D 0300

Robyn Waterman,
Plaintiff
vs.

Ron Waterman,
Defendant *pro se*

DEFENDANT'S MOTION TO REQUEST JUSTICE KIMBERLY MOSES TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE AND LEGISLATIVE FACTS, AND TO PERMIT WITHDRAWAL OF OBSOLETE MOTIONS

per MGE Art. II, § 201, § 202

REQUEST FOR RELIEF

1. Defendant moves for permission to withdraw obsolete, pending motions, and permission to correct the title of his 9/12/2022 motion to amend Judgment/Findings.

2. Defendant moves to consolidate all of his Motions to Take Judicial Notice; made July 13, 2022, August 6, 2022, and April 19, 2023; into this present motion.

REASONS TO GRANT RELIEF

1. Today (4/19/23), the parties appeared before Justice Moses and clarified what motions are pending before the Court. Defendant filed his "List of Open Matters" on 4/14/23 to comply with the Court's 4/11/23 Order to produce this List. But later, in preparing to present his motions to take Judicial Notice, Defendant realized motions on his List are now obsolete. He moves the Court for permission to withdraw these motions from consideration, and remove them from his List of Open Matters:

Motion:	Filed:
Defendant's Mass. R. Civ. P. 12(b)(6) Motion to Dismiss for Lack of Jurisdiction	May 22, 2022
Defendant's Special Motion to Dismiss per G.L. 231 § 59H	July 13, 2022
Defendant's ER 201 (Mass. R. Civ. P. 44.1) Motion to Take Judicial Notice	July 13, 2022*

*if this Court permits that July 13, 2022 Motion to be consolidated into this motion

A/33

coversheet, as it explains the purpose of each request for Judicial Notice, which I'd planned to do at today's hearing. And this motion extracts all the detritus (Exhibit first filed date, original Exhibit number, etc.), and places that info in Attachment 1.

DEFENDANT'S CONSOLIDATED MOTION TO TAKE JUDICIAL NOTICE MGE Art. II

Defendant requests this Court to take Judicial Notice of the following federal laws, various authorities, and adjudicative facts:

In my 1993 DD Form 214 Honorable Discharge from active duty: After 8 years of active duty I was separated from the military and then was entitled to a temporary pension, called VSI (Variable Separation Incentive), so was paid $6,855.12 annually for 16 years. Payments began in 1993 and ended in 2008. The Judgment on Complaint for Contempt (7/29/2023) correctly notes I was in the US Air Force from 1985 to 1993, but incorrectly concludes I am now, still, receiving a pension from that service.

Title 10 United States Code (USC) § 1175: This law authorizes VSI, a pension paid to vested members being separated from the military in lieu of a longevity (20 years of service) retirement. VSI is paid for twice the number of years of service, § 1175(2)(A). But should the service member later become eligible for a second, longevity retirement, all monies paid to that member in a VSI pension are then recouped from the retired pay the service member becomes eligible for in the future. Id, § 1175(3)(A)

Separation Agreement, June 16, 1999, page 10, § Additional Pension Rights: "To the extent that the Husband is entitled to any military or other pension up to the date of this Agreement the Wife shall be entitled to receive 50%...", Ibid. Notice present tense, "is entitled." In June 1999, the Husband "is entitled" to a military pension of $6,855 per year for 10 more years, including the Sept. 1999 VSI annual payment. Per the June 1999 Separation Agreement, Husband agreed to give 100% of this Sept. 1999 pension payment to the Wife to help pay off her 3-year old minivan. Id, at 14, § II(b). That section also reiterates that the parties "agree that the Husband is entitled to receive military separation pay" (VSI), a pension, and significantly, using the present tense verb, "is entitled". Id., 13 § II(A).

Several states' appellate courts have determined that VSI is a pension or a retirement benefit and thus divisible marital property. See *In re Marriage of Menard*, 180 Or.App 181, 42 P.3d 359, 364 (2002). Appellate courts in Arizona, Montana, Oklahoma, and Florida have all found VSI is a retirement benefit divisible during

COMMONWEALTH OF MASSACHUSETTS

The Trial Court
Probate and Family Court Department

NORFOLK DIVISION Docket No. 98D0300 DX2

Robyn Waterman,
Plaintiff,

vs.

Ron Waterman,
Defendant pro se

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO AMEND THIS COURT'S JULY 2022 MILITARY QUALIFYING COURT ORDER (MQCO)

Defendant pro se makes these substantive and procedural objections to Plaintiff's Motion to Amend MQCO (Docket File Reference "Ref." 140).

SUBSTANTIVE OBJECTIONS

FIRST OBJECTION: This Court's July 2022 Judgment correctly observed that I served on active duty in the US Air Force from 1985 to 1993. Ref. 113 (Judgment). In 1993 I was unwillingly separated due to a post Gulf War Reduction in Force (RIF); but as I was "vested," and prevented from earning a longevity retirement, the Dept. of Defense (DoD) paid me a "VSI" pension of "$6,855 annually for 16 years." [1] This VSI pension was paid from 1993 to 2008, and is the only military pension divided by the parties' 1999 Separation Agreement. Ref. 11, 1999 Separation Agreement, at 10; quoted in Plaintiff's Complaint, Ref. 103 ("To the extent that the Husband is entitled

1 Atch. 1 (DD 214, Honorable Discharge, previously filed as Ref. 106 Exhibit 6).

A/35

to any military or other pension up to the date of this Agreement the Wife shall...")

After being out of the military for about a year and a half, I found a post in the National Guard. Just before the parties met in June 1999 to forge an Agreement, the National Guard announced it was closing my base and separating everyone on that base in a new wave of RIF closures; soon after I was out of the military again.[2]

So the only pension that existed, and to which I was "entitled to" as of the date of the 1999 Agreement, was my VSI pension; $6,855 paid annually 1993 to 2008. Ex-wife Robyn agreed to collect 50% of this VSI pension; in fact, she got 100% of the VSI pension payout in 1999. Atch. 2 (1999 Separation Agreement, at 14; Ref. 11).

After the Judgment of Divorce for this case was final, I found a third position, in the US Air Force Reserves, and retired in 2009. Ref. 129 Ex. 12 (Retirement Order). Because I retired from the Reserves, and not from active duty, I was not "entitled to" my second military pension (for longevity) until I turned age 60 in Sept. 2021.[3]

My first, fundamental objection continues to be that I never agreed to divide a FUTURE military pension with my ex-wife; one that I was not "entitled to" receive in 1999, and which would never have existed had I known I was going to be Ordered to give half of it away 25 years after my divorce was final. There should be no MQCO.

Plaintiff's counsel's only objection to the fact that the VSI pension was the one divided by the parties' 1999 Agreement was "Plaintiff contends that the Defendant is confusing the VSI with that of a pension." Ref. 130, at 3 (Plaintiff's Response ...).

Plaintiff's refusal to consider VSI pensions a retirement benefit is contradicted

2 See File Ref. 106 Exhibit 9 (NGB Form 22 Honorable Discharge, Air National Guard)
3 10 U.S.C. § 12731(a), filed Ref. 129 Exhibit 13 (statute); *cf.* Ref. 129 Exhibit 12 (Order)

by every State Appellate Court that has addressed that question. Atch. 3.[4]

Plaintiff's argument that VSI is not a retirement benefit is also contradicted by the MQCO this court signed in July 2022. Ref. 112, at 5 para. 17 (Ordering that "VSI" is a "form of retirement benefits.") Plaintiff also self-contradicts; Plaintiff's proposed, amended MQCO defines "VSI" as a "form of retirement benefits." [5]

SECOND OBJECTION: Because I qualified in 2009 to become "entitled to" a longevity pension beginning in Sept. 2021, I must repay $100,000 of my VSI pension paid from 1993 to 2008; including the $50,000 of that VSI given to ex-wife Robyn. See 10 U.S.C. § 1175(e)(3)(A) filed with Ref. 106 as Exhibit 8; see Atch. 4, my Feb. 2022 eRas retirement pay stub, showing my $99,999.99 debt incurred from VSI pension being garnished from my 2021 longevity pension (I've rounded up by one penny).

Plaintiff's MQCO orders me to pay Plaintiff a SECOND $50,000 for my service from 1985 to 1993 (with no provision to repay the $50,000 Plaintiff already received).

Then, Plaintiff's proposed MQCO orders me to pay Plaintiff a THIRD $50,000, for that same active duty service from 1985 to 1993, ordering, "the marital property interests of the Former Spouse shall also include a pro-rata share of any sum taken by Member in addition to disposable retirement pay including ... VSI ... or any other form of retirement benefits ..." Ref. 140, proposed MQCO, at 5 para. 17.

Honestly, paying Robyn half of my VSI pension for my 1985 to 1993 active duty

---

4 *e.g.*, *In re Marriage of Menard*, 180 Or.App 181, 42 P.2d 359, 364 (2002), holding VSI is a retirement benefit, thus divisible as marital property during divorce, and citing accord to Appellate Court cases in Florida, Arizona, Montana, and Oklahoma. This opinion was previously filed as Ref. 129 Exhibit 11

5 Ref. 140, at 5 n.17 (presuming amended MQCO was filed with motion to modify)

STATEMENT OF ISSUES

ISSUE ONE. In July 2022 the Norfolk Family Court altered a 1999 Judgment of that court which had been final for 23 years. My 2021 military pension, seized by the lower court's July 2022 Order, was deliberately excluded from division by the parties' June 1999 Separation Agreement. Court's July 2022 Judgment and Order violate US Const. Amend. XIV Due Process, Mass. Const. First Part Art. X, Art. of Amend. Art. CVI, and civil rules protecting finality of Judgments. A/195.

ISSUE TWO. Lower court's award of attorney's fees for ex-wife's Complaint for Civil Contempt is not authorized by statute; ergo is a violation of Due Process.

ISSUE THREE. Lower court's award of 50% of my military retirement to ex-wife after rejecting ex-wife's Complaint for Civil Contempt violates Due Process.

ISSUE FOUR. Norfolk Family Court's Justice Moses violated Due Process by refusing to take Judicial Notice of relevant Federal statutes and regulations.

ISSUE FIVE. Lower court's July 2022 Judgment fabricates evidence to support an adverse credibility determination, misapprehends extent of ex-husband's military service, and is deliberately oblivious that ex-wife had already received 50% of ex-husband's 1993 to 2008 pension for his 1985 to 1993 military service, constituting a "clearly erroneous" denial of XIV Amend. Due Process. A/195.

That MQCO directs that I must pay ex-wife a SECOND time for the years we were married, from my 2021 longevity pension. Then under ¶ 17, "Additional Awards," lower court's MQCO directs I must pay ex-wife a THIRD time; $50K of the same $100K she received from my 1993-2008 VSI pension:

> ... the marital property interests of the Former Spouse [ex-wife] shall also include a pro-rata share of any sum taken by Member in addition to disposable retirement pay, including exit bonuses, voluntary separation incentive pay (VSI), special separation benefit (SSB), or any other form of retirement benefits attributable to and based in part on any or all of the marital years of the Member's service in the military." A/70 (MQCO).

Under this July 2022 MQCO, ex-wife Robyn will collect her SECOND and THIRD 50%'s of the same $100,000 VSI pension that we divided in 1999, that I am currently paying back to the United States by myself. A/62. That is not fair.

This vitiation of a 1999 Judgment violates Due Process (A/195), violates well-established principles of finality of judgments, violates Rule 60(b) (A/197), and is an abuse of the lower court's discretion. "Procedural due process requires that ... governmental action ... be implemented in a fair manner." *Aime v. Commonwealth*, 414 Mass. 667, 674 (2000).

The lower court's July 2022 Judgment and Order (MQCO) are "contrary to the principle of fundamental fairness that underlies the concept of due process of law." *Doe v. Attorney General*, 426 Mass. 136, 146 (1997).

A/39

Absent commas, "up to the date of this Agreement" modifies, limits, and conditions the phrase, "the extent that the Husband is entitled to any military or other pension." For any pension the husband is entitled to AS OF the date of the Agreement, the ex-wife gets 50%. That "pension" was the then active, 1993-2008 VSI pension that this section divided as a marital asset. Any *future* pension husband may later become entitled to post-divorce was excluded from division.

Compare my 1999 Agreement's language to divorce Agreements in other appellate cases that involve VSI pensions:

In Matter of Marriage of Menard, 42 P.3d 359 (Or.App. 2002), judgment of divorce provided: "The Husband's ***future*** military retired pay constitutes marital property to the extent that [it] is based upon military service while the parties were married." Id., at 363 (emphasis added). A/148.

Kelson v. Kelson, 675 So.2d 1370 (Fla. 1996) noted, "judgment incorporated a marital settlement agreement that ... [wife] shall be awarded a monthly percentage share of [husband's] 'retired/retainer pay' upon [his] retirement from the U.S. Marine Corps." Id., at 1370 ([paraphrases] added). A/185.

In Blair v. Blair, 271 Mont. 196 (1995), the divorce decree provided, "wife to share in husband's ***future*** net disposable military retirement pay." Quoted in Kelson, 675 So.2d at 1371 fn.1 (emphasis added). A/189.

The Agreement in this case doesn't *read* "future" since it doesn't *mean* "future." A/26. It divided my *existing* VSI pension, earned 1985-1993. A/85.

An etiology of the 1999 Agreement's clause at issue is instructive.

Second, there was no existing order or judgment for monetary payment.

Third, the statute applies to a "failure to obey any order or judgment of the probate court relative to support of a wife or children." G.L. c. 215, § 34A(a).

Such a failure is not at issue in ex-wife's Complaint; the section of our 1999 Separation Agreement at issue appears under "Exhibit A – Asset Division," A/24, below "I. Personal Property," *ibid.*, then under "V. Additional Pension Rights." A/26.

"Child Support" is the subject of the 1999 Agreement's "Exhibit B." A/28.

Judgment operating contrary to law does not comport with Due Process.

ISSUE THREE

STANDARD OF REVIEW

A judge's legal conclusions are reviewed de novo. Anastos v. Sable, 443 Mass. 146, 149 (2004) (citation omitted).

An abuse of discretion exists where the reviewing court concludes that a judge made a "clear error of judgment ... such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). "The exercise of discretion ... involves the absence of arbitrary determination, capricious disposition, or whimsical thinking." Berube et al. v. McKesson Wine Co., 7 Mass.App. 426, 433 (1979) (citation omitted).

ARGUMENT

After a *brief* hearing on ex-wife's Complaint, A/166-173, the lower court

My Rule 52(b) and 59(e) motions to amend, that relied on these same U.S. laws, were given no hearing, earning just one word rejections: "Denied." A/162.

My April 19, 2023 motion, condensed: I earned a VSI pension in 1993, A/85 (DD 214), and equitably divided it with ex-wife in 1999 as a marital asset. A/26 (Agreement). States have ruled a VSI pension is a retirement benefit and is thus divisible property. A/149 (*Menard*). The 1999 Agreement deliberately excluded potential, future pensions for which I was not yet eligible. A/26. In 1999 ex-wife knew if ever I became eligible for a future military pension, every penny of the 1993-2008 VSI pension must be repaid to the U.S. by recoup from the second pension. A/129, A/138; A/89 (10 USC § 1175). As ex-wife admits, A/128, A/138, her lawyer hand-wrote the contested section of our 1999 Agreement (A/26); thus *Merrimack Valley Natl. Bank*, 372 Mass. at 724 applies; so 1999 our Agreement's exclusion of future pensions, not yet "entitled to," as relied on by me, controls. A/153 (*Merrimack*). Federal law states, "a person is entitled ... to retired pay ... if the person ... has performed at least 20 years of service." A/151 (10 U.S.C. § 12731). I wasn't "entitled" to "20 years of service" retirement pay until 2021 AD, *i.e.* 22 years after my divorce. A/150. Consequently, my 2021 pension is excluded from 1999's Agreement, *and* I must repay to U.S. all $100,000 of my VSI pension, A/89, half of which was paid ex-wife pursuant to our 1999 Agreement (A/24-30).

For the lower court to deliberately, repeatedly refuse to take mandatory Judicial Notice is a denial of U.S. Const. Amend. XIV Due Process. A/195, XIV Am.

MGE Article II, § 202(a) makes a court taking Judicial Notice of federal law

"mandatory." A/196. Due process is "all the process that is due." Cleveland Bd. Of Ed. v. Loudermilk, 470 U.S. 532, 547 (1985). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (citations omitted). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Id., 424 U.S., at 334.

ISSUE FIVE

STANDARD OF REVIEW

Questions of law are "reviewed *de novo*." Twin Fires, 445 Mass. at 424. "Mixed questions of law and fact ... generally receive *de novo* review." Commissioner of Revenue v. Comcast, 453 Mass., at 303 (citation omitted).

ARGUMENT

A. Judgment fabricated evidence to make an adverse credibility ruling.

The "due process touchstone of an accurate and reliable determination still remains." Commonwealth vs. Durling, 407 Mass. 108, 117 (1990). On review, an appeals court accepts a trial court's "findings of fact unless they are clearly erroneous." Anastos, 443 Mass. at 149.

Preliminary, context errors in court's July 29, 2022 Judgment (A/71-A/73):

I did not refuse to sign the MQCO because it gave my ex-wife money after the divorce, *cf.* A/72 – an error disproved by 1999 Agreement that divided my VSI pension for 9 years after the divorce. A/26. During the 7-28-2022 hearing, I tried

the Agreement says, that she signed in 1999. 'To the extent that the husband is entitled to, up to the date of the Agreement'." A/171. "No, IS ELIGIBLE. I wasn't entitled to that (2021 pension) in 1999. COURT: Alright, I'm going to go sign the QDRO..." *Ibid.* As the judge stood to walk out of the courtroom, I protested,

> "When we sat in the Dedham Court together, her lawyer said, 'You have to give her half of your (future) retirement,' and I said, 'Absolutely not'
> COURT: Doesn't matter sir because you signed the agreement
> Mr. WATERMAN: 'and if you insist on that we'll go to trial.' So she signed it away." A/172 (referring to then potential, future, 2021 military pension).

My "position" never "changed." A/72 (Judgment). An inattentive and obstructive judge fabricating credibility damaging contradictions to justify ruling against a party is a violation of U.S. Const. XIV Amend. Due Process (A/195); an abuse of discretion, *i.e.*, a "clear error of judgment ... such that the decision falls outside the range of reasonable alternatives." L.L., 470 Mass. at 185 n.27.

This was not a Due Process-compliant, "full and fair hearing." Castillo-Villagra v. INS, 972 F.2d 1017, 1029 (9th Cir. 1992). "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'." Mathews, 424 U.S. at 348.[9]

My amended Rule 59(b) and 52(b) motions to amend Judgment brought these errors to the lower court's attention, A/111, but no hearing was allowed on those motions, A/131, A/176, so this Court is free to draw its own conclusions. Packaging Indust., 380 Mass. at 616. My position never "changed" at any time:

9 Quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-172 (Frankfurter, J., concurring, brackets in original) (1951).

After filing a Complaint for Civil Contempt in 2022, ex-wife never in the record below denied receiving $50,000 of my $100,000 VSI pension. A/117-120, A/156-158, A/166-173. Nor did ex-wife ever refute that because I first became entitled to a second military pension in 2021, this $100,000 in VSI, divided by the parties' 1999 Agreement, must be repaid in full. A/62, A/89 (10 USC § 1175(e)).

Ex-wife's only argument below was that VSI should not be considered a pension nor a retirement benefit. A/156-157. Thus, ex-wife's counsel reasoned, my 1993-2008 VSI pension could not possibly have been the pension the 1999 Separation Agreement addressed when dividing the pension I was "entitled to" in 1999, A/157, even though per our 1999 Agreement, A/26, ex-wife received *over* 50% of it; *e.g.*, ex-wife received 100% of my VSI annuity in 1999. A/30.

This argument is especially disingenuous, as ex-wife's very own proposed MQCO, signed by the lower court, A/70, seizes yet another $50,000 of VSI paid from 1993 to 2008 by defining "VSI" as a "form of retirement benefits." A/70.

Normally, by which I mean "in every published case in every State that has addressed this question," during divorce proceedings the military member signs a Separation Agreement to transfer part of his *future* retirement pay to ex-wife; later, he's separated in the 1992 Reduction in Force, *cf.* A/147 (*Menard*), then withholds 100% of his VSI, arguing that 10 U.S.C. § 1408, enacted 1982, does not apply to VSI, established by 10 U.S.C. § 1175, enacted in 1992. A/90.[11] *Cf.* A/149.

But every State that has addressed this question affirms that VSI is the

11 And almost always citing *Mansell v. Mansell*, 490 U.S. 581 (1989)

"functional equivalent" of retired pay, is a pension, and thus equitably divisible as a marital asset. A/149 (Marriage of Menard, 42 P.3d 359, 364 (Or.App. 2002) (citing accord to cases in Florida, Arizona, Montana, Colorado and Oklahoma).[12] *Cf.* Accord in appellate court cases in Alaska, Arkansas, Idaho, and Virginia.[13]

Ex-wife won a second 50% of my pension for my 1985-1993 service. A/70.

Her argument that VSI is not a pension nor a retirement benefit, A/156-157, has now prevailed. A/73, A/162 (Order). As has her opposite argument that VSI is, after all, a retirement benefit. A/70.

REQUEST FOR FEES AND COSTS

Pursuant to Mass.R.App.P. 26(a)(3) ("if a judgment is reversed, costs shall be taxed against the appellee"), Appellant *pro se* moves for fees and costs.

Please see G.L. c. 208, § 38 ("In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses"); G.L. c. 215, § 45 (on appeal, costs and expenses in the discretion of the court may be awarded to either party, "as justice and equity may require"); G.L. c. 231, § 6F (any proceedings where court finds that insubstantial, frivolous, or bad faith claims or defenses have been made). A/195-A/196 (statutes).

CONCLUSION

Appellant, ex-husband Ron Waterman, respectfully requests this relief:

ISSUE ONE: Vacate the Norfolk Family Court's July 29, 2022 Judgment and July 28, 2022 Order (MQCO) garnishing 50% of my 2021 military retirement and

12 And quoting at length Kelson v. Kelson, 675 So.2d 1370, 1372 (Fla. 1996), A/185
13 Cited in Abernethy v. Fishkin, 638 So.2d 160, 163 (Fla.App. 5th Dist 1994), A/192

dismiss ex-wife's March 2022 Complaint for Civil Contempt with prejudice.

ISSUE TWO: Strike the lower court's September 2022 award of attorney's fees as unlawful under G.L. c. 215, § 34A.

ISSUE THREE: Publish a decision that Due Process protects people found Not Guilty of Contempt from being punished as if they had been found Guilty.

ISSUE FOUR: Find that Due Process was violated, that Mandatory Judicial Notice of federal laws is, oddly enough, mandatory, and that adjudicative facts and the federal laws the lower court refused to Notice would have, if Noticed, affected the outcome of the proceedings below. Censure, or at least castigate, Norfolk Family Court Justice Moses for refusing to judicially Notice relevant federal statutes when these were properly presented on multiple occasions.

ISSUE FIVE: Find that the lower court's July 2022 Judgment was clearly erroneous on several critical points, undermining confidence in the resulting order, and its MQCO should therefore be vacated with prejudice.

ISSUE SIX: Publish a decision, in accord with several other states, that VSI is a pension, equivalent to military retirement pay, divisible per 10 U.S.C. § 1408.

The above is affirmed to be true. Done on October 13, 2023 at Manati, PR.

Ron Waterman

Ron Waterman, Appellant *pro se*
RR 2 Box 7169
Manati, Puerto Rico 00674
cell: 781-975-2889
email: ronwaterman3@yahoo.com (preferred method of receiving communic.)

A/47

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Case No.:

APPLICATION FOR FURTHER APPELLATE REVIEW
Mass.R.A.P. 27.1

of
104 Mass.App.Ct. 1111 (2024), Court Of Appeals Case No. 2023-P-0905,
An Appeal From The Norfolk Family Court's Judgment Of Not Guilty Of
Civil Contempt, Norfolk Docket No. 98D0300DX2

Ron Waterman, ex-husband,

Appellant pro se,

vs.

Robyn Waterman, ex-wife,

Appellee pro se,

1. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Appellant Ron Waterman requests further appellate review by this Court for substantial reasons affecting public interest, and in the interests of justice.

2. STATEMENT OF PRIOR PROCEEDINGS IN THE CASE

Parties married in 1984; divorced in 1999. Ron served in the U.S. Air Force on active duty from 1985 to 1993. Parties signed an Agreement in 1999 dividing the pension Ron earned, under 10 USC § 1175, for his 8-year, active duty service.

In 2021, Ron first became entitled to military retirement pay, since he'd

5. BRIEF STATEMENT, WITH AUTHORITIES, INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

VSI PENSION: A dozen States' Appeals Courts have decided that VSI is a pension, properly divided under USFSPA limitations. *E.g.* A/149 (*Marriage of Menard*, 42 P.3d 359, 364 (Or.App. 2002) (citing accord to cases in Florida, Arizona, Montana, Colorado and Oklahoma); A/192, *Abernethy v. Fishkin*, 638 So.2d 160, 163 (Fla.App. 5th Dist. 1994) (citing accord to appellate court cases in Alaska, Arkansas, Idaho, and Virginia). Massachusetts has now dissented.

Both parties admit Robyn's lawyer hand-wrote the pension clause in the parties' 1999 Agreement, at A/26-27. This Court has found when contractual language is disputed, "The author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied on by the other party." *Merrimack Valley Natl. Bank v. Baird*, 372 Mass. 721, 724 (1977). Ron relied on the present tense "is entitled" to mean a pension presently entitled to, specifically the VSI pension paid to Robyn from 1999 to 2008 as an effect of this clause of the 1999 Agreement. The lower courts decided that "is entitled to" actually means "will possibly become entitled to in the future," which is a crass revision of the actual 1999 Agreement.

COA's Decision continues to augment its "VSI is not a pension" claim by referring to Ron's two pensions using singular tense: "his military pension," "husband's pension." Id., at 8.

Decision also cites military pension division cases that are inapposite for two reasons: all cited cases explicitly refer to "future pensions" at the time of

his former spouse." A/46. Nothing in the 1999 Agreement's "pension clause" requires my "cooperation in applying for payments" to former spouse. Why should I be forced to subsidize sloppy legal drafting complaining about non-compliance with non-existent, 1999 Agreement conditions?

Each of these three issues violates my Due Process protections. Aime v. Commonwealth, 414 Mass. 667, 674 (2000) ("Procedural due process requires that ... governmental action ... be implemented in a fair manner."); the lower courts' decisions are "contrary to the principle of fundamental fairness that underlies the concept of due process of law." Doe v. Atty. Gen., 426 Mass. 136, 147 (1997); *cf.* Mathews v. Eldridge, 424 U.S. 319, 332-335 (1976).

and full-time National Guard duty" after "active duty".

Subsec. (c)(3). Pub. L. 102–484, §4422(a)(3), as amended by Pub. L. 103–35, §202(a)(17)(A), inserted "or full-time National Guard duty or any combination of active duty and full-time National Guard duty" after "active duty".

Subsec. (c)(4). Pub. L. 102–484, §4422(a)(4), as amended by Pub. L. 103–35, §202(a)(17)(B), inserted "and" after semicolon at end and "or full-time National Guard duty or any combination of active duty and full-time National Guard duty" after "active duty" the first place it appeared.

Subsec. (c)(5), (6). Pub. L. 102–484, §4424(a)(5), redesignated par. (6) as (5) and struck out former par. (5) which read as follows: "if a Reserve, is on an active duty list; and".

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2013 AMENDMENT

Pub. L. 112–239, div. A, title X, §1076(a), Jan. 2, 2013, 126 Stat. 1647, provided that the amendment made by section 1076(a)(9) is effective Dec. 31, 2011, and as if included in Pub. L. 112–81 as enacted.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–337 applicable only to members of the Coast Guard who are separated after Sept. 30, 1994, see section 542(e) of Pub. L. 103–337, set out as a note under section 1141 of this title.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by Pub. L. 103–35 applicable as if included in the enactment of Pub. L. 102–484, see section 202(b) of Pub. L. 103–35, set out as a note under section 155 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Pub. L. 102–484, div. A, title XLIV, §4405(c), Oct. 23, 1992, 106 Stat. 2706, provided that: "The amendments made by subsections (a) and (b) [amending this section and section 1175 of this title] shall apply as if included in sections 1174a and 1175 of title 10, United States Code, as enacted on December 5, 1991, but any benefits or services payable by reason of the applicability of the provisions of those amendments during the period beginning on December 5, 1991, and ending on the date of the enactment of this Act [Oct. 23, 1992] shall be subject to the availability of appropriations."

REMEDY FOR INEFFECTIVE COUNSELING OF OFFICERS DISCHARGED FOLLOWING SELECTION BY EARLY DISCHARGE BOARDS

Pub. L. 103–160, div. A, title V, §507, Nov. 30, 1993, 107 Stat. 1646, as amended by Pub. L. 103–337, div. A, title X, §1070(b)(1), Oct. 5, 1994, 108 Stat. 2856, provided that:

"(a) PROCEDURE FOR REVIEW.—(1) The Secretary of each military department shall establish a procedure for the review of the individual circumstances of an officer described in paragraph (2) who is discharged, or who the Secretary concerned approves for discharge, following the report of a selection board convened by the Secretary to select officers for separation. The procedure established by the Secretary of a military department under this section shall provide that each review under that procedure be carried out by the Board for the Correction of Military Records of that military department.

"(2) This section applies in the case of any officer (including a warrant officer) who, having been offered the opportunity to be discharged or otherwise separated from active duty through the programs provided under section 1174a and 1175 of title 10, United States Code—

"(A) elected not to accept such discharge or separation, and

"(B) submits an application under subsection (b) during the two-year period beginning on the later of the date of the enactment of this Act [Nov. 30, 1993] and the date of such discharge or separation.

"(b) APPLICATION.—A review under this section shall be conducted in any case submitted to the Secretary concerned by application from the officer or former officer under regulations prescribed by the Secretary.

"(c) PURPOSE OF REVIEW.—(1) The review under this section shall be designed to evaluate the effectiveness of the counseling of the officer before the convening of the board to ensure that the officer was properly informed that selection for discharge or other separation from active duty was a potential result of being within the group of officers to be considered by the board and that the officer was not improperly informed that such selection in that officer's personal case was unlikely.

"(2) The Board for the Correction of Military Records of a military department shall render a decision in each case under this section not later than 60 days after receipt by the Secretary concerned of an application under subsection (b).

"(d) REMEDY.—Upon a finding of ineffective counseling under subsection (c), the Secretary shall provide the officer the opportunity to participate, at the officer's option, in any one of the following programs for which the officer meets all eligibility criteria:

"(1) The Special Separation Benefits program under section 1174a of title 10, United States Code.

"(2) The Voluntary Separation Incentive program under section 1175 of such title.

"(3) Retirement under the authority provided by section 4403 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102–484; 106 Stat. 2702; 10 U.S.C. 1293 note).

"(e) EFFECTIVE DATE.—This section shall apply with respect to officers separated after September 30, 1990."

SEPARATION PAYMENTS; REDUCTIONS AND PROHIBITIONS

Pub. L. 103–335, title VIII, §8106A, Sept. 30, 1994, 108 Stat. 2645, as amended by Pub. L. 104–6, title I, §105(a), Apr. 10, 1995, 109 Stat. 79, which provided that members who separated after Sept. 30, 1994, from active duty or full-time National Guard duty in a military department pursuant to a Special Separation Benefits program under section 1174a of this title or a Voluntary Separation Incentive program under section 1175 of this title would have their separation payments reduced by the amount of certain bonus payments and eliminated if they are rehired within 180 days by the Department of Defense in a civilian position and that civilian Department of Defense employees would not receive voluntary separation payments if rehired by a Federal agency within 180 days of separating from the Department of Defense, was from the Department of Defense Appropriations Act, 1995, and was not repeated in subsequent appropriation acts. Similar provisions were contained in the following prior appropriation act:

Pub. L. 103–139, title VIII, §8127, Nov. 11, 1993, 107 Stat. 1469.

COMMENCEMENT OF PROGRAM

Pub. L. 102–190, div. A, title VI, §661(b), Dec. 5, 1991, 105 Stat. 1395, provided that: "The Secretary of each military department shall commence the program required by section 1174a of title 10, United States Code (as added by subsection (a)), not later than 60 days after the date of the enactment of this Act [Dec. 5, 1991]."

REPORT ON PROGRAMS

Pub. L. 102–190, div. A, title VI, §663, Dec. 5, 1991, 105 Stat. 1399, directed Secretary, not later than 180 days after Dec. 5, 1991, to submit to Congress a report containing the Secretary's assessment of effectiveness of programs established under sections 1174a and 1175 of this title.

§ 1175. Voluntary separation incentive

(a)(1) Consistent with this section and the availability of appropriations for this purpose,

the Secretary of Defense and the Secretary of Homeland Security may provide a financial incentive to members of the armed forces described in subsection (b) for voluntary appointment, enlistment, or transfer to a reserve component, requested and approved under subsection (c).

(2)(A) Except as provided in subparagraph (B), a financial incentive provided a member under this section shall be paid for the period equal to twice the number of years of service of the member, computed as provided in subsection (e)(5).

(B) If, before the expiration of the period otherwise applicable under subparagraph (A) to a member receiving a financial incentive under this section, the member is separated from a reserve component or is transferred to the Retired Reserve, the period for payment of a financial incentive to the member under this section shall terminate on the date of the separation or transfer unless—

(i) the separation or transfer is required by reason of the age or number of years of service of the member;

(ii) the separation or transfer is required by reason of the failure of selection for promotion or the medical disqualification of the member, except in a case in which the Secretary of Defense or the Secretary of Homeland Security determines that the basis for the separation or transfer is a result of a deliberate action taken by the member with the intent to avoid retention in the Ready Reserve or Standby Reserve; or

(iii) in the case of a separation, the member is separated from the reserve component for appointment or enlistment in or transfer to another reserve component of an armed force for service in the Ready Reserve or Standby Reserve of that armed force.

(b) The Secretary of Defense and the Secretary of Homeland Security may provide the incentive to a member of the armed forces if the member—

(1) has served on active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty for more than 6 but less than 20 years;

(2) has served at least 5 years of continuous active duty or full-time National Guard duty or any combination of active duty and full-time National Guard duty immediately preceding the date of separation;

(3) meets such other requirements as the Secretary may prescribe from time to time, which may include requirements relating to—

(A) years of service;

(B) skill or rating;

(C) grade or rank; and

(D) remaining period of obligated service.

(c) A member of the armed forces offered a voluntary separation incentive under this section shall be offered the opportunity to request separation under a program established pursuant to section 1174a of this title. If the Secretary concerned approves a request for separation under either such section, the member shall be separated under the authority of the section selected by such member.

(d)(1) A member of the armed forces described in subsection (b) may request voluntary appointment, enlistment, or transfer to a reserve component accompanied by this incentive, provided the member has completed 6 years of active service.

(2) The Secretary, in his discretion, may approve or disapprove a request according to the needs of the armed forces.

(3) After December 31, 2001, the Secretary may not approve a request.

(e)(1) The annual payment of the incentive shall equal 2.5 percent of the monthly basic pay the member receives on the date appointed, enlisted, or transferred to the reserve component, multiplied by twelve and multiplied again by the member's years of service.

(2) A member entitled to voluntary separation incentive payments who is also entitled to basic pay for active or reserve service, or compensation for inactive duty training, may elect to have a reduction in the voluntary separation incentive payable for the same period in an amount not to exceed the amount of the basic pay or compensation received for that period.

(3)(A) A member who has received the voluntary separation incentive and who later qualifies for retired or retainer pay under this title shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary of Defense shall specify, taking into account the financial ability of the member to pay and avoiding the imposition of undue financial hardship on the member and member's dependents, until the total amount deducted is equal to the total amount of voluntary separation incentive so paid. If the member elected to have a reduction in voluntary separation incentive for any period pursuant to paragraph (2), the deduction required under the preceding sentence shall be reduced as the Secretary of Defense shall specify.

(B) If a member is receiving simultaneous voluntary separation incentive payments and retired or retainer pay, the member may elect to terminate the receipt of voluntary separation incentive payments. Any such election is permanent and irrevocable. The rate of monthly recoupment from retired or retainer pay of voluntary separation incentive payments received after such an election shall be reduced by a percentage that is equal to a fraction with a denominator equal to the number of months that the voluntary separation incentive payments were scheduled to be paid and a numerator equal to the number of months that would not be paid as a result of the member's decision to terminate the voluntary separation incentive.

(4) A member who is receiving voluntary separation incentive payments shall not be deprived of this incentive by reason of entitlement to disability compensation under the laws administered by the Department of Veterans Affairs, but there shall be deducted from voluntary separation incentive payments an amount equal to the amount of any such disability compensation concurrently received. Notwithstanding the preceding sentence, no deduction may be made from voluntary separation incentive payments for any disability compensation received because of an earlier period of active duty if the voluntary separation incentive is received be-

Subsec. (f). Pub. L. 106–398, §1 [[div. A], title VI, §651(2)], added subsec. (f).

1996—Subsec. (c)(1). Pub. L. 104–106, §1501(c)(15)(A), substituted "section 12731" for "section 1331".

Subsec. (d)(1). Pub. L. 104–106 substituted in heading "CHAPTER 1223" for "CHAPTER 67" and in text "section 12731" for "section 1331".

1994—Subsec. (c)(2)(B). Pub. L. 103–337, §1662(j)(5)(A), which directed substitution of "chapter 1223" for "chapter 67", could not be executed because the words "chapter 67" did not appear subsequent to amendment by Pub. L. 101–189, §651(a)(2), (4). See 1989 Amendment note below.

Subsec. (f)(2). Pub. L. 103–337, §1662(j)(5)(B), which directed amendment of subsec. (f)(2) by substituting "Chapter 1223" for "Chapter 67" in heading and "section 12731" for "section 1331" in text, could not be executed because of previous repeal of subsec. (f) by Pub. L. 101–189, §651(a)(2). See 1989 Amendment note below.

1989—Subsec. (b). Pub. L. 101–189, §651(a)(1), (b)(2), substituted "person" for "member", "person's" for "member's", and "subsection (c) or (d)" for "subsection (c)".

Subsec. (c). Pub. L. 101–189, §651(a)(2), (4), added subsec. (c) and struck out former subsec. (c) which related to computation of high-three average.

Subsec. (d). Pub. L. 101–189, §651(a)(4), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 101–189, §651(a)(2), (3), redesignated subsec. (d) as (e) and struck out former subsec. (e) which related to special rules for short-term disability retirees.

Subsecs. (f), (g). Pub. L. 101–189, §651(a)(2), struck out subsec. (f) which related to special rule for members retiring with non-regular service, and subsec. (g) which defined the term "years of creditable service".

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108–375, div. A, title VI, §641(b), Oct. 28, 2004, 118 Stat. 1957, provided that: "Paragraph (3) of section 1407(c) of title 10, United States Code, as added by subsection (a), shall take effect—

"(1) for purposes of determining an annuity under subchapter II or III of chapter 73 of that title, with respect to deaths on active duty on or after September 10, 2001; and

"(2) for purposes of determining the amount of retired pay of a member of a reserve component entitled to retired pay under section 1201 or 1202 of such title, with respect to such entitlement that becomes effective on or after the date of the enactment of this Act [Oct. 28, 2004]."

EFFECTIVE DATE OF 1996 AMENDMENT

Section 1501(c) of Pub. L. 104–106 provided that the amendment made by that section is effective as of Dec. 1, 1994, and as if included as an amendment made by the Reserve Officer Personnel Management Act, title XVI of Pub. L. 103–337, as originally enacted.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–337 effective Dec. 1, 1994, except as otherwise provided, see section 1691 of Pub. L. 103–337, set out as an Effective Date note under section 10001 of this title.

§ 1407a. Retired pay base: officers retired in general or flag officer grades

(a) RATES OF BASIC PAY TO BE USED IN DETERMINATION.—In a case in which the determination under section 1406 or 1407 of this title of the retired pay base applicable to the computation of the retired pay of a covered general or flag officer involves a rate of basic pay payable to that officer for any period that was subject to a reduction under section 203(a)(2) of title 37 for such period, such retired-pay-base determination shall be made using the rate of basic pay for such period provided by law, rather than such rate as so reduced.

(b) COVERED GENERAL AND FLAG OFFICERS.—In this section, the term "covered general or flag officer" means a member or former member who after September 30, 2006, is retired in a general officer grade or flag officer grade.

(Added Pub. L. 109–364, div. A, title VI, §641(a), Oct. 17, 2006, 120 Stat. 2258.)

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) DEFINITIONS.—In this section:

(1) The term "court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) EFFECTIVE SERVICE OF PROCESS.—For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE MEMBER AND SPOUSE.—(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) PAYMENTS BY SECRETARY CONCERNED TO (OR FOR BENEFIT OF) SPOUSE OR FORMER SPOUSE.—(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the

§ 12687. Reserves under confinement by sentence of court-martial: separation after six months confinement

Except as otherwise provided in regulations prescribed by the Secretary of Defense, a Reserve sentenced by a court-martial to a period of confinement for more than six months may be separated from that Reserve's armed force at any time after the sentence to confinement has become final under chapter 47 of this title and the Reserve has served in confinement for a period of six months.

(Added Pub. L. 104–106, div. A, title V, § 563(a)(2)(A), Feb. 10, 1996, 110 Stat. 325.)

CHAPTER 1223—RETIRED PAY FOR NON-REGULAR SERVICE

Editorial Notes

AMENDMENTS

2009—Pub. L. 111–84, div. A, title VI, § 643(e)(2), Oct. 28, 2009, 123 Stat. 2367, substituted "Retirement for service in an active status performed in the Selected Reserve of the Ready Reserve after eligibility for regular retirement" for "Retirement from active reserve service performed after regular retirement" in item 12741.

2000—Pub. L. 106–398, § 1 [[div. A], title VI, § 653(a)(2)], Oct. 30, 2000, 114 Stat. 1654, 1654A–165, added item 12741.

1999—Pub. L. 106–65, div. A, title VI, § 653(b)(2), Oct. 5, 1999, 113 Stat. 667, added item 12731b.

1996—Pub. L. 104–106, div. A, title VI, § 632(a)(2), Feb. 10, 1996, 110 Stat. 365, added item 12740.

1994—Pub. L. 103–337, div. A, title XVI, § 1662(j)(1), Oct. 5, 1994, 108 Stat. 2998, renumbered chapter 67 of this title as this chapter and amended analysis generally, renumbering items 1331 to 1338 as items 12731 to 12738, respectively, substituting "Entitlement to retired pay: computation of years of service" for "Computation of years of service in determining entitlement to retired pay" in item 12732 and "Computation of retired pay: computation of years of service" for "Computation of years of service in computing retired pay" in item 12733, and adding item 12739.

1992—Pub. L. 102–484, div. D, title XLIV, § 4417(b), Oct. 23, 1992, 106 Stat. 2717, added item 1331a.

1986—Pub. L. 99–348, title III, § 304(b)(1), July 1, 1986, 100 Stat. 703, added item 1338.

§ 12731. Age and service requirements

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person—

(1) has attained the eligibility age applicable under subsection (f) to that person;

(2) has performed at least 20 years of service computed under section 12732 of this title;

(3) in the case of a person who completed the service requirements of paragraph (2) before April 25, 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before October 5, 1994, the number of years of such qualifying service under this paragraph shall be eight; and

(4) is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

(b) Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.

(c)(1) A person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 12732(a)(1) of this title except a regular component, is not eligible for retired pay under this chapter unless—

(A) the person performed active duty during World War I or World War II; or

(B) the person performed active duty (other than for training) during the Korean conflict, the Berlin crisis, or the Vietnam era.

(2) In this subsection:

(A) The term "World War I" means the period beginning on April 6, 1917, and ending on November 11, 1918.

(B) The term "World War II" means the period beginning on September 9, 1940, and ending on December 31, 1946.

(C) The term "Korean conflict" means the period beginning on June 27, 1950, and ending on July 27, 1953.

(D) The term "Berlin crisis" means the period beginning on August 14, 1961, and ending on May 30, 1963.

(E) The term "Vietnam era" means the period beginning on August 5, 1964, and ending on March 27, 1973.

(d) The Secretary concerned shall notify each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice shall be sent, in writing, to the person concerned within one year after the person completes that service. The notice shall include notice of the elections available to such person under the Survivor Benefit Plan established under subchapter II of chapter 73 of this title and the Supplemental Survivor Benefit Plan established under subchapter III of that chapter, and the effects of such elections.

(e) Notwithstanding section 8301 of title 5, the date of entitlement to retired pay under this

IDENTIFICATION PURPOSES SAFEGUARD II. AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NO.
WATERMAN RONALD JAMES	US AIR FORCE—USAFR	[redacted] 3352

4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM. DATE
CAPT	O-3	1961 SEP 06	Year 2009 Month SEP Day 28

7.a. PLACE OF ENTRY INTO ACTIVE DUTY	7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)
BOSTON MEPS, MA	11 WAKEFIELD DR NASHUA, NH 03062

8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8.b. STATION WHERE SEPARATED
77 FIGHTER SQUADRON (USAFE)	HANSCOM AFB MA

9. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE
USAFR	None Amount: $ 200,000

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)

4024-AIRCRAFT MAINTENANCE MUNITIONS OFF, 4YRS 9MTHS
4024N-AIRCRAFT MAINTENANCE MUNITIONS OFF, NUCLEAR MUNITIONS, 2YRS 6MTHS (LAST ITEM)

12. RECORD OF SERVICE	Year(s)	Month(s)	Day(s)
a. Date Entered AD This Period	1985	DEC	17
b. Separation Date This Period	1993	SEP	29
c. Net Active Service This Period	07	09	13
d. Total Prior Active Service	00	03	01
e. Total Prior Inactive Service	00	00	00
f. Foreign Service	03	10	25
g. Sea Service	00	00	00
h. Effective Date of Pay Grade	1989	DEC	17

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

AF COMMENDATION MDL//AF OUTSTANDING UNT AWD W/2OLC//NATIONAL DEFENSE SVC MDL//SOUTHWEST ASIA SVC MDL W/2BZ ST//AF OS LG TR RBN//AF LONGEVITY SVC AWD MDL//SM ARMS EXPERT MARKSMANSHIP RBN//AF TRAINING RBN(LAST ITEM)

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

AIRCRAFT MAINTENANCE OFFICER COURSE, JUN 86/OFFICER TRAINING SCHOOL, DEC 85/TOTAL QUALITY MANAGEMENT, JUN 93(LAST ITEM)

15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	Yes	No	15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT	Yes	No	16. DAYS ACCRUED LEAVE PAID
		X		X		13.5

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION X Yes No

18. REMARKS

"MEMBER SERVED IN DESERT SHIELD/STORM IN AREA OF RESPONSIBILITY."
MEMBER SEPARATED UNDER VSI PROGRAM $6,855.12 ANNUALLY FOR 16 YEARS.
NOTHING FOLLOWS

19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)	19.b. NEAREST RELATIVE (Name and address - include Zip Code)
19 TEED RD HOLBROOK, MA 02343	ROBYN B. WATERMAN SM AS ITEM 19A

20. MEMBER REQUESTS COPY 6 BE SENT TO NH DIR. OF VET AFFAIRS X Yes No

22. OFFICIAL AUTHORIZED TO SIGN (Type name, grade, title and signature) DONNA M. PATE, SSGT, USAF
NCOIC, RETIREMENTS/SEPARATIONS

21. SIGNATURE OF MEMBER BEING SEPARATED Ronald L. Waterman

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (Include upgrades)	
RELEASED FROM ACTIVE DUTY	HONORABLE	
25. SEPARATION AUTHORITY	**26. SEPARATION CODE**	**27. REENTRY CODE**
AFR 36-12	MCA	N/A

28. NARRATIVE REASON FOR SEPARATION

VOL TRANSFER TO ANOTHER COMPONENT FOR EARLY RELEASE PROGRAM/VSI

29. DATES OF TIME LOST DURING THIS PERIOD	30. MEMBER REQUESTS COPY 4
NONE	Initials

DD Form 214, NOV 88 *Previous editions are obsolete.* MEMBER-4

A/56

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR RESERVE PERSONNEL CENTER
BUCKLEY SFB, COLORADO 80011-9502

RESERVE ORDER NUMBER
EL-4994

29 JUN 2021

MAJ WATERMAN RON
250 LAKEVIEW AVE
TAUNTON, MA 02780

[redacted]3352

EFFECTIVE ON THE DATE RETIRED, YOU ARE AUTHORIZED RETIRED PAY PER TITLE 10, UNITED STATES CODE, SECTION 12731 AND PLACED ON THE USAF RETIRED LIST, RETIRED RESERVE SECTION ZB, AND ENTITLED TO UNITED STATES UNIFORMED SERVICES IDENTIFICATION CARD, DD FORM 2. (RETIRED) (BLUE).

DATE RETIRED	DATE OF BIRTH	GRADE FOR RETIRED PAY (HIGHEST GRADE SATISFACTORILY HELD)
6 SEP 2021	6 SEP 1961	MAJ

GRADE PLACED ON USAF RETIRED LIST
MAJ

SERVICE PER TITLE 10 USC SECTION 12732

YEARS	MONTHS	DAYS
20	03	01

SERVICE FOR BASIC PAY

YEARS	MONTHS	DAYS
35	11	20

SERVICE PER TITLE 10 USC SECTION 12733
11.56

REMARKS

A. 10 USC 12732 AOD: 16 DEC 2006

B. APPLY TO THE NEAREST MILITARY INSTALLATION WITH ONE COPY OF THIS ORDER TO OBTAIN DD FORM 2 RET, 'UNITED STATES UNIFORMED SERVICE IDENTIFICATION CARD', FOR YOURSELF, AND DD FORM 1173, 'UNIFORMED SERVICES IDENTIFICATION AND PRIVILEGE CARD', FOR YOUR DEPENDENTS.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JENA L. SILVA, COLONEL, USAF
DIRECTOR, PERSONNEL & TOTAL FORCE SERVICES

DISTRIBUTION
EL
RO EL-4994

A/57

42 P.3d 359 (2002)
180 Or. App. 181

In the Matter of the MARRIAGE OF Bernadine Angela MENARD, Respondent, and Raymond Thomas Menard, aka Raymond Thomas Menard, III, Appellant, and Amber Rae Menard, Third-Party Respondent.

C89-1024DR; A113218

Court of Appeals of Oregon.

Argued and Submitted December 13, 2001.
Decided March 13, 2002.

361 *361 Laura Graser, Portland, argued the cause and filed the brief for appellant.

Robert T. Scherzer, Portland, argued the cause and filed the brief for respondent.

Before LANDAU, Presiding Judge, and BREWER and SCHUMAN, Judges.

SCHUMAN, J.

Husband appeals from a trial court judgment that awarded wife a share of his "voluntary separation incentive" (VSI) benefits from the military. The court found that VSI payments were the "functional equivalent" of retirement benefits and therefore marital property under the terms of the dissolution judgment. Husband argues that wife's claim is barred by laches and equitable estoppel and, if not, then it fails on the merits because VSI benefits are not retirement benefits. These arguments did not persuade the trial court, and they do not persuade us either. We therefore affirm.

The parties' 12-year marriage was dissolved in 1989. Husband was in the military during the entire marriage. The dissolution judgment awarded wife custody of the parties' two children and imposed a child support obligation on husband. It also incorporated a marital settlement agreement that provided for wife to receive 25 percent of husband's "military retired pay," or of his "disposable compensation" from the military if he chose to "voluntarily separate from the military prior to retirement." At the time of the dissolution, the parties anticipated that husband would remain in the military for seven more years, at which time he could retire with 20 years' service and full benefits. However, shortly after the dissolution, Congress, reacting to a surplus of senior military personnel, created the "voluntary separation incentive" program to encourage early separation from active duty. 10 U.S.C. § 1175. That program allowed members to separate from active duty, transfer to the Ready Reserves, and receive a stipend in an amount determined by current level of pay and years of service, distributed in annual installments until depleted. In December 1992, three years after the dissolution and four years before his anticipated retirement, husband took the incentive, transferred to Ready Reserve, and received a VSI benefit of $523,930.16, payable in annual installments of $16,162.37 until the sum is depleted in the year 2025. Wife learned of this state of affairs almost immediately from the children and wrote to military authorities seeking details.

Husband's business ventures after separation from active duty did not prosper, and, in July 1993, he moved for a modification of his child support obligation. Wife, in turn, moved to show cause "why the judgment should not be modified to award [her] 25% of [husband's] Voluntary Separation Incentive." At the hearing on

> the facts on which he bases his claim of estoppel, that he was influenced by and relied on the conduct of the person sought to be estopped, and that he changed his position in reliance thereon to his injury.' 5 *Thompson on Real Property* (1979 Replacement) § 2525, 552." *Hess*, 55 Or.App. at 762, 641 P.2d 23.

Husband's defense fails for two reasons. First, although wife did receive child support payments from husband on the theory that the VSI was income, the support was not a benefit to her in the legal sense of the term. As this court has pointed out, child support is for the benefit of the dependent child, not the parent. *Christiansen and Christiansen,* 161 Or.App. 528, 535, 984 P.2d 371 (1999). More fundamentally, however, nothing in the record indicates the presence of the key dynamic of an estoppel by acceptance claim—here, a difference between what wife knew about her rights and what husband knew. Indeed, whether wife has rights to husband's VSI is the issue at the core of this case and not a fact that one party could know while another did not. We turn, therefore, to that issue.

III. WIFE'S CLAIM TO A SHARE OF HUSBAND'S VSI

The terms of the dissolution judgment, in context, clearly state that wife is entitled to 25 percent of husband's VSI. In part, that judgment provides:

"The Husband's future military retired pay constitutes marital property to the extent that [it] is based upon military service while the parties were married. The Wife's right to receive her portion of this property interest accrues upon the Husband's retirement, such retirement being solely within the Husband's discretion. At that time, the Wife shall receive an amount of the Husband's disposable retired pay equal to 25 percent of the net retired pay after federal and state taxes, social security and other mandatory
364 deductions. In the event Husband chooses to voluntarily separate from the military prior to retirement, *364 Wife shall be entitled to her portion of Husband's disposable compensation directly from Husband. Husband shall have until six months from the date of payment to provide Wife her portion of the proceeds. Should Husband choose not to provide Wife's portion, Wife shall be entitled to receive and may at her option begin receiving all or a portion thereof by direct payment from the Military Finance Center, payable from Husband's disposable compensation.

"* * * * *

> "For purposes of this agreement, the term net retired pay means the full monthly retirement benefits the Husband is or would be entitled to receive upon retiring * * *. It also includes all amounts of retired pay the Husband in any manner actually or constructively waives or forfeits for any reason or purpose."

By this judgment, wife is entitled to a share of "retirement pay," defined as "monthly retirement benefits." Husband correctly points out that there are differences between VSI and traditional military retirement pay. The plans come from separate funds. VSI is nontransferable and runs for a fixed number of years, while traditional military retirement benefits are an annuity. But the similarities far outnumber the differences. We find the following reasoning from the Florida Supreme Court, and the courts whose cases it cites, persuasive:

> "[Under the] Voluntary Separation Incentive (VSI) and Special Separation Benefit (SSB) programs * * *, qualifying service members who voluntarily leave active duty before their retirement vests receive benefits based on the individual's salary at the time of separation and

A/59

> years of service. 10 USC §§ 1174a(b), 1175(e)(1). * * * Not only are VSI/SSB benefits based on years of service and rate of pay as is retired pay, if a service member who has received a VSI/SSB payment thereafter reenlists in the active force and qualifies for retirement, the incentive payment must be recouped from the retirement benefit to which that individual becomes entitled. 10 USC §§ 1174a(g), 1174(h), 1175(e)(3). We agree with [the wife] as a practical matter, VSI payments are the functional equivalent of the retired pay in which she has an interest under the settlement agreement. *Accord* In re Crawford, 180 Ariz. 324, 884 P.2d 210 (Ct.App.1994) (whether SSB payment represent retirement proceeds or a payment in lieu of retirement benefits, some portion of it is attributable to retirement funds); Blair v. Blair, 271 Mont. 196, 894 P.2d 958, 962 (1995) (election of special separation benefits is an election of early retirement); Kulscar v. Kulscar, 896 P.2d 1206 (Okla.Ct.App.1995) (SSB payment is either retirement proceeds or payment in lieu of retirement benefits). * * * If we were to hold otherwise a service-member spouse would be able to defeat the other spouse's court-awarded interest in military retirement benefits by unilaterally altering the form of those benefits in a manner that was unforeseeable at the time the award was made. *Accord* In re Crawford, 884 P.2d at 213; Kulscar, 896 P.2d at 1208." Kelson v. Kelson, 675 So.2d 1370, 1372 (Fla.1996).

Even if the term "retired pay" were ambiguous, the context within which it appears in this case demonstrates that wife's claim has merit. The parties understood that the date of husband's retirement was "solely within Husband's discretion." To account for the possibility of early retirement, they provided that, "[i]n the event Husband chooses to voluntarily separate from the military prior to retirement, Wife shall be entitled to her portion of Husband's disposable compensation directly from Husband," and "retired pay" was expressly defined so as to include "all amounts of retired pay the Husband in any manner actually or constructively forfeits for any reason or purpose." Thus, even if VSI payments are not "retired pay" *per se,* they are payments in lieu of retired pay that husband in effect forfeited or waived by virtue of his early retirement.

Because the dissolution judgment clearly entitles wife to a 25 percent portion of husband's VSI, husband can prevail only by establishing that the court lacked authority to make that award. To do so, he argues that
365 the court's authority to make the award is preempted by federal law, in particular by *365 the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (USFSPA), as construed in Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

To understand the effect of *Mansell* and USFSPA on this case, we must begin with an earlier Supreme Court case. In McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the Supreme Court held that then-existing federal law preempted state community property law to the extent that state law purported to award a service member's retirement pay to his or her spouse. Congress responded the next year by enacting USFSPA, which specifies that state courts may distribute "disposable retired or retainer pay" in dissolution proceedings under state law. 10 U.S.C. § 1408(c)(1). Husband argues that, because USFSPA used the term "disposable retired or retainer pay," the exemption from federal preemption does not cover VSI. In support, he cites *Mansell,* where the Court held that the exemption did not apply to a military member's disability pay. Husband particularly notes Justice O'Connor's dissenting opinion, where she argues that the majority opinion permits a service member to shield his or her retirement benefits from a former spouse by cleverly transforming it into disability pay. *Id.* at 601, 109 S.Ct. 2023. Husband's point, apparently, is that if *Mansell* allows an unscrupulous serviceperson to shield retirement benefits from an ex-spouse by transmuting it into disability pay, it must also allow an analogous

A/60

675 So.2d 1370 (1996)

Michelle M. KELSON, Petitioner,

v.

Russell M. KELSON, Respondent.

No. 85246.

Supreme Court of Florida.

March 21, 1996.
Rehearing Denied July 1, 1996.

Gordon Edward Welch, Pensacola, for Petitioner.

Kathryn L. Runco of Michael J. Griffith, P.A., Pensacola, for Respondent.

KOGAN, Justice.

We have for review *Kelson v. Kelson*, 647 So.2d 959 (Fla. 1st DCA 1994), because of conflict with *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994), on the issue of whether Voluntary Separation Incentive (VSI) benefits paid to a service member upon voluntary separation from the armed forces qualify as military retirement pay under a property settlement agreement that provides for division of retirement pay. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

After a marriage of approximately fourteen years, Russell and Michelle Kelson were divorced in June 1990. The final judgment incorporated a marital settlement agreement that had been entered into by the Kelsons. A provision of the couple's property settlement agreement is at issue here. That provision provides that Michelle shall be awarded a monthly percentage share of Russell's "retired/retainer pay" upon Russell's
1371 retirement *1371 from the U.S. Marine Corps. The agreement also provided a formula for computing the percentage to be received by Michelle.

Approximately two years after entry of the final judgment of dissolution, but before Russell became eligible for retired pay, Russell elected to leave active duty and receive benefits under the newly enacted Voluntary Separation Incentive Program (VSI), which is codified at 10 U.S.C. § 1175. Under this election, Russell will receive an annual VSI payment of over $18,000 for thirty-two years rather than retired pay in monthly increments for life. Michelle filed a motion to "amend and/or modify" the final judgment, which both the trial court and district court treated as a motion to enforce or modify.[1]

According to Michelle, Russell's VSI benefits are the functional equivalent of the retired pay she is entitled to share under the parties' agreement. She maintains that to deny her an interest in Russell's VSI benefits would permit him to unilaterally divest her of her interest in his retired pay simply by electing to receive benefits under a program that did not exist at the time of the parties' agreement. The trial court denied Michelle's motion, "reluctantly" agreeing with Russell that 1) VSI benefits are not "retired/retainer pay" to be shared under the settlement agreement and 2) the court lacked jurisdiction to modify the agreement to provide for division of the VSI benefits.

A/61

The First District Court of Appeal affirmed. The district court agreed with the trial court that VSI benefits could not be considered retired/retainer pay, as used in the property settlement agreement. 647 So.2d at 961-92. It also agreed that the trial court lacked jurisdiction to modify the parties' agreement to encompass Russell's VSI benefits. *Id.* at 962.

This Court accepted jurisdiction to resolve apparent conflict with the Fifth District Court of Appeal's decision in *Abernethy.* The *Abernethy* court upheld an order enforcing a property settlement agreement that provided for the division of the former husband's military retirement pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA) even though the former husband voluntarily separated from the military under the VSI program. Contrary to the decision under review, the Fifth District concluded that VSI benefits qualify as retired pay that is subject to equitable distribution under the USFSPA. 638 So.2d at 162-63.

After considering the statutes at issue, along with the relevant legislative history and case law, we find that VSI benefits are sufficiently similar to retired pay to allow for enforcement of the settlement agreement at issue here. While we do not agree with the *Abernethy* court that VSI benefits are covered by the USFSPA, we find that federal law does not preclude a state court from enforcing a property settlement agreement that is found to encompass VSI benefits.

In *McCarty v. McCarty,* 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the United States Supreme Court held that federal statutes governing military retirement pay prevented state courts from treating such benefits as marital property subject to division in dissolution proceedings. In response to the *McCarty* decision, Congress enacted the Uniformed Services Former Spouses' Protection Act, which allows state courts to divide "disposable retired or retainer pay"[2] in dissolution proceedings according to state law. 10 U.S.C. § 1408(c)(1). Relying on *McCarty,* Russell Kelson argues that because VSI benefits are not
1372 expressly included within the *1372 USFSPA and Congress enacted no provision authorizing state courts to divide VSI benefits in dissolution proceedings, the trial court was precluded from awarding any portion of his VSI benefits to Michelle. However, before we reach the preemption issue, we must explain our determination that VSI benefits are sufficiently similar to "retired pay," as provided for under the Kelson's property settlement agreement, to allow for enforcement of that agreement.

On December 5, 1991, Congress authorized the Voluntary Separation Incentive (VSI) and Special Separation Benefit (SSB) programs, which took effect in 1992. Pub.L. No. 102-190, §§ 661-664, 105 Stat. 1290, 1394-99 (1991) (codified at 10 U.S.C. §§ 1174a-1175). These early separation incentives were designed to induce members of the armed forces to leave the military voluntarily rather than run the risk of being involuntarily separated due to reductions in the size of the United States military. H.R.Conf.Rep. No. 102-311, 102nd Cong. 1st Sess., *reprinted in* 1991 U.S.Code Cong. & Admin.News at 1111-12. Under both of the early separation incentive programs, qualifying service members who voluntarily leave active duty before their retirement vests receive benefits based on the individual's salary at the time of separation and years of service. 10 U.S.C. §§ 1174a(b), 1175(e)(1). A service member who elects to leave active duty prior to becoming entitled to retired pay may choose a series of annual payments, referred to as a voluntary separation incentive, or a lump-sum special separation benefit. 10 U.S.C. §§ 1174a(b), (e)(3), 1175(c). Not only are VSI/SSB benefits based on years of service and rate of pay as is retired pay, if a service member who has received a VSI/SSB payment thereafter reenlists in the active force and qualifies for retirement, the incentive payment must be recouped from the retirement benefit to which that individual becomes entitled. 10 U.S.C. §§ 1174a(g), 1174(h), 1175(e)(3). We agree with Michelle that, as a practical matter, VSI payments are the functional equivalent of the retired pay in which she has an interest under the settlement

A/62

agreement. *Accord* In re Crawford, 180 Ariz. 324, 884 P.2d 210 (Ct.App.1994) (whether SSB payment represent retirement proceeds or a payment in lieu of retirement benefits, some portion of it is attributable to retirement funds); *Blair v. Blair*, 271 Mont. 196, 894 P.2d 958, 962 (1995) (election of special separation benefits is an election of early retirement); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla.Ct.App.1995) (SSB payment is either retirement proceeds or payment in lieu of retirement benefits). Therefore, the trial court should have enforced the Kelson's settlement agreement by awarding Michelle a percentage of Russell's VSI benefits. If we were to hold otherwise a service-member spouse would be able to defeat the other spouse's court-awarded interest in military retirement benefits by unilaterally altering the form of those benefits in a manner that was unforeseeable at the time the award was made. *Accord* In re Crawford, 884 P.2d at 213; *Kulscar*, 896 P.2d at 1208.

Such enforcement is not precluded by federal law. As noted above, in *McCarty,* the United States Supreme Court held that federal law governing military retirement benefits precluded state courts from distributing such benefits in marital dissolution proceedings. In response to *McCarty,* Congress enacted the Uniformed Services Former Spouses' Protection Act, which returned the retirement pay issue to the states. Pub.L. No. 97-252, § 1002(a), 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA gives state courts express authority to distribute "disposable retired or retainer pay" in dissolution proceedings according to state law. 10 U.S.C. § 1408(c)(1). "Disposable retired or retainer pay" is the total monthly retired or retainer pay to which a service member is entitled less certain specified amounts not relevant here. 10 U.S.C. § 1408(a)(4). The USFSPA, which was enacted prior to the enactment of the VSI/SSB programs, makes no mention of benefits payable under either of the special incentive programs. And there is no indication that Congress intended VSI/SSB payments to be covered by the provisions of the Act. However, the fact that state courts are not expressly authorized to reach VSI/SSB benefits under the USFSPA does not end our inquiry.

1373 In *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S.Ct. 2023, 2028, 104 L.Ed.2d 675 *1373 (1989), the Supreme Court reiterated that because domestic relations are preeminently matters of state law, when Congress passes general legislation, it rarely intends to displace state authority in this area. *See* Rose v. Rose, 481 U.S. 619, 628, 107 S.Ct. 2029, 2035, 95 L.Ed.2d 599 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979). Thus, preemption will be found in domestic relations matters only if it is "`positively required by direct enactment.'" 490 U.S. at 587, 109 S.Ct. at 2028 (quoting *Hisquierdo*, 439 U.S. at 581, 99 S.Ct. at 808). There is no direct enactment requiring preemption here. And we cannot agree with the district court below that the fact that a service member's right to VSI payments is not "transferable" precludes enforcement here. 10 U.S.C. § 1175(f). Even the USFSPA, which allows state courts to equitably divide retirement benefits, contains a similar provision that prohibits the sale, transfer or assignment of retired pay. 10 U.S.C. § 1408(c)(2). Moreover, it appears from a 1990 House Report predating the enactment of the voluntary separation incentives that equitable division of VSI/SSB benefits is not inconsistent with congressional intent. In relation to the congressionally mandated "force drawdown" the House Committee on Armed Services recommended "a comprehensive package of transition benefits to assist separating personnel and their families." H.R.Rep. No. 101-665, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.Code Cong. & Admin.News at 2962. Thus, because there is nothing in the statutes governing VSI/SSB benefits that prohibits a state court from determining the nature of such benefits, we agree with the other courts that have allowed enforcement of a settlement agreement or court decree dividing military retirement pay under circumstances similar to those present here. *In re Marriage of McElroy*, 905 P.2d 1016 (Colo.Ct.App.1995) (marital settlement agreement providing for division of husband's "gross military retirement/pension benefits" and predating enactment of SSB program enforced against husband's special separation benefits); *In re Marriage of Crawford*, 180 Ariz. 324, 884 P.2d 210 (Ct. App.1994) (same);

Kulscar, 896 P.2d 1206 (dissolution decree awarding wife a portion of husband's military retirement benefits and predating enactment of SSB program enforced against husband's special separation benefits). The Department of Defense pamphlet entitled "Voluntary Separation Incentive, VSI/SSB," which is contained in the record, is consistent with our resolution of the preemption issue. The pamphlet states in pertinent part:

> How will state courts treat VSI/SSB in a divorce settlement?
>
> The treatment of VSI or SSB is not dictated by Federal law. It will be up to the state courts to rule on the divisibility of these incentives.

Accordingly, we hold that a trial court may enforce a settlement agreement or dissolution decree providing for the division of military retirement pay against VSI/SSB benefits. Thus, we approve *Abernethy* to the extent that it is consistent with this opinion. However, we quash the decision under review and remand for further proceedings in accordance with this decision.

It is so ordered.

SHAW and ANSTEAD, JJ., concur.

GRIMES, C.J., concurs in result only with an opinion, in which HARDING, J., concurs.

OVERTON, J., dissents with an opinion, in which WELLS, J., concurs.

WELLS, J., dissents with an opinion, in which OVERTON, J., concurs.

GRIMES, Chief Justice, concurring in result only.

I read *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), to hold that federal law has preempted the subject of military retirement. However, I agree that Veterans Separation Incentive (VSI) payments are the functional equivalent of retired pay. Therefore, I believe that VSI payments are within the scope of the Uniformed Services Former Spouses' Protection Act (USFSPA), as well as the Kelsons' property settlement agreement. *See* *Abernethy* *1374 *v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994).

HARDING, J., concurs.

OVERTON, Justice, dissenting.

I dissent. I agree that the majority reaches an equitable result. I find, however, that the United States Supreme Court's decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), preempts this subject of military retirement. Under *Mansell,* the Court held that disability benefits received in lieu of retirement benefits were not subject to equitable distribution under the Uniformed Services Former Spouses' Protection Act (USFSPA). Likewise, the Veterans Separation Incentive (VSI) payments are received in lieu of retirement benefits and are not subject to equitable distribution absent a specific directive to the contrary in USFSPA. To say that VSI payments are the functional equivalent of retirement benefits is in direct conflict with the rationale of *Mansell.*

Further, at the time the parties entered into their agreement, no congressional authority existed for VSI payments. Given that these payments do not constitute retirement pay, no authority exists to retroactively modify the property settlement agreement to provide for something that was not in existence at the time the parties entered into the agreement.

I would affirm the well-reasoned opinion of the district court. Accordingly, I must dissent.

WELLS, J., concurs.

WELLS, Justice, dissenting.

I would approve the well reasoned opinion of the district court and the conclusion that the trial court was without jurisdiction to modify the agreement.

Furthermore, I believe that the provision in the property settlement in *Abernethy v. Fishkin*, 638 So.2d 160 (Fla. 5th DCA 1994), that the husband would take no action which would defeat the wife's right to receive twenty-five percent of his retirement pay distinguished that case from this one. Thus, I do not believe that there is a direct conflict so as to provide us with jurisdiction. I would discharge this case on the basis that jurisdiction was improvidently accepted.

OVERTON, J., concurs.

[1] Even though the motion Michelle filed in the trial court is entitled "Motion to Amend and/or Modify Final Judgment of Dissolution of Marriage" both the trial court and the district properly treated the motion as if it were a motion to enforce or modify the final judgment. *Accord* *Circle Finance Co. v. Peacock*, 399 So.2d 81, 84 (Fla. 1st DCA 1981) (court should look to substance, not title, of pleading to determine relief sought), *review denied,* 411 So.2d 380 (Fla.1981); *Blair v. Blair*, 271 Mont. 196, 894 P.2d 958 (1995) (decree providing for wife to share in husband's future net disposable military retirement pay could be enforced against husband's special separation benefits where "Motion for an Order Modifying Decree as to Retirement Benefits" was, in substance, a motion to enforce the decree).

[2] The current version of the statute refers only to "disposable retired pay." 10 U.S.C.A. § 1408(c)(1) (West.Supp.1994).

A/65

638 So.2d 160 (1994)

Richard L. ABERNETHY, Appellant/Cross-Appellee,

v.

Monica R. FISHKIN a/k/a Monica R. Abernethy, Appellee/Cross-Appellant.

No. 93-661.

District Court of Appeal of Florida, Fifth District.

June 10, 1994.

161 *161 Daniel D. Mazar of Mead and Mazar, Winter Park, for appellant/cross-appellee.

Judith E. Atkin, Melbourne, for appellee/cross-appellant.

DIAMANTIS, Judge.

Richard L. Abernethy (the husband) appeals the trial court's order enforcing the parties' final judgment of dissolution and awarding attorney's fees to Monica R. Fishkin (the wife). The wife cross-appeals the trial court's order because it fails to award all of her attorney's fees. We affirm the trial court's order to the extent that it enforces the parties' final judgment of dissolution but reverse the award of attorney's fees and remand this cause for further proceedings consistent with this opinion.

In January 1992, the trial court entered a final judgment dissolving the parties' 16-year marriage and incorporating the provisions of their property settlement agreement. At the time of dissolution, the husband was a member of the United States Air Force. The agreement provided that the wife would receive twenty-five percent (25%) of the husband's military retirement pay pursuant to the Uniformed Services Former Spouses Protection Act (hereinafter the "USFSPA").[1] Relative to this provision, the husband agreed not to merge his retired or retainer pay with any other pension and, further, not to pursue any course of action that would defeat the wife's right to receive a portion of the husband's full net disposable retired or retainer pay. The husband also agreed to self-implement the provisions of the parties' property settlement agreement either by making direct payments to the wife or by taking other action as required to effectuate the intent and spirit of the parties' agreement if, for any reason, the military became unable to implement the trial court's final judgment with regard to the husband's military retirement.

In March 1992, faced with the government's planned reduction in force, the husband chose voluntary separation from the United States Air Force. According to his affidavit, the husband's voluntary separation options included the Special Separation Bonus (SSB) (a lump-sum payment)[2] and the Voluntary Separation Incentive Program (VSI) (an annuity).[3] The husband selected the VSI option and was honorably discharged from the Air Force. Pursuant to the provisions of the VSI program, the husband will receive annual payments for 32 years (twice the number of years of service).[4]

The wife thereafter filed enforcement proceedings in the circuit court in which she contended that, by voluntarily separating from the Air Force under the VSI program, the husband had pursued a course of action that defeated her right to receive a portion of the husband's military retirement pay and, thereby, had violated the provisions of the parties' property settlement agreement and the final judgment of dissolution.

A/66

The trial court granted the wife's request for enforcement by ordering the husband to pay to the wife 25% of every VSI payment immediately upon its receipt.

In attacking the trial court's order of enforcement, the husband's principal contention[5] is that, under the
162 doctrine of federal *162 preemption, the trial court lacked authority to order him to pay 25% of his VSI payments to the wife regardless of the provisions contained in the parties' property settlement agreement and the final judgment. In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the United States Supreme Court held that federal law precluded state courts from distributing military retirement benefits in marital dissolution proceedings because such distribution frustrated the objectives of the federal military retirement scheme. Congress responded to the *McCarty* decision by enacting the USFSPA, which allows state courts to treat a service member's disposable retired or retainer pay as property subject to equitable distribution.[6] The husband argues that, under the reasoning of *McCarty*, federal law precludes state courts from distributing VSI benefits in dissolution proceedings because such distribution frustrates Congress's intent in enacting the VSI program. The husband further argues that the USFSPA does not authorize state courts to distribute VSI because VSI does not constitute retired or retainer pay.

We reject these arguments based upon the reasoning set forth by the court in *In re Marriage of Crawford*, No. 2 CA-CV 93-0203, 1994 WL 155101 (Ariz. Ct. App. Apr. 29, 1994). In that case, a 1989 dissolution decree awarded the wife 32.5% of the husband's military retirement benefits. In 1992, the husband voluntarily separated from the Air Force under the SSB option, and the wife filed an enforcement petition seeking 32.5% of the husband's lump-sum SSB payment. In discussing Congress's intent in enacting the SSB and VSI programs, the Arizona court stated:

> We find more relevant a 1990 House Report predating the enactment of the SSB program which in relation to the congressionally mandated "force drawdown" recommended "a comprehensive package of transition benefits to assist separating personnel and their families," H.R.Rep. No. 665, 101st Cong., 2d Sess. (1990) (emphasis added), suggesting that equitable division of SSB benefits is not inconsistent with congressional intent.([FN5])
>
> [FN5] We note that literature distributed by the Department of Defense explaining the Voluntary Separation Incentives and Special Separation Benefits programs states, "The treatment of VSI or SSB is not dictated by Federal law. It will be up to the state courts to rule on the divisibility of these incentives."

1994 WL 155101, at *1, *3. The court affirmed the trial court's order awarding the wife a portion of the husband's SSB payment.

The purpose of the VSI program is to "offer a voluntary separation incentive in the form of an annuity to active duty personnel who elect to voluntarily separate in order to avoid the possibility of facing selection for involuntary separation or denial of reenlistment." H.R.Conf.Rep. No. 311, 102d Cong. 1st Sess. (1991). As with military retirement, VSI payments primarily are based on the recipient's ending salary and years of service.[7] While some commentators are of the view that VSI payments do not constitute retired or retainer pay,[8] one court has referred to VSI and SSB benefits as "inducements to elect early retirement." *Elzie v. Aspin*, 841 F. Supp. 439, 440 (D.D.C. 1993). 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

A/67

163 amount *163 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]

Our conclusion that the trial court has authority to order the husband to pay a portion of his VSI benefits to the wife also is supported by the Supreme Court's decision in *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). In *Rose,* the Court held that federal laws preventing the attachment of veterans' disability benefits do not preclude state courts from enforcing, by contempt, child-support orders even where such disability benefits represent the veteran's only source of income and would necessarily be used to pay child support. *Rose*, 481 U.S. at 635-36, 107 S.Ct. at 2038-39. The Court noted that "these benefits are intended to support not only the veteran, but the veteran's family as well." *Id.* at 634, 107 S.Ct. at 2038. [11]

Even assuming, *arguendo,* that Congress has not authorized state courts to distribute 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.[12] 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.[13] *See Clauson v. Clauson*, 831 P.2d 1257, 1262-64 (Alaska 1992); *Hapney v. Hapney*, 824 S.W.2d 408, 409-10 (Ark. Ct. App. 1992); *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113, 115-16 (Ct.App. 1993); *Owen v.*
164 *Owen*, 14 Va. App. *164 623, 419 S.E.2d 267, 269-70 (1992).[14]

We agree, however, with the husband's contention that the trial court erred in awarding attorney's fees. First, the trial court erred by refusing to allow evidence of the wife's need for attorney's fees. Attorney's fees awarded pursuant to section 61.16, Florida Statutes (1993), must be based on the need of the party seeking the fees and the ability of the other party to pay these fees. *McClish v. Lee*, 633 So.2d 56, 58 (Fla. 5th DCA 1994) (en banc). Statutory fees awarded pursuant to section 61.16 are not based upon a prevailing-party standard. *Thornton v. Thornton*, 433 So.2d 682, 684 (Fla. 5th DCA), *rev. denied,* 443 So.2d 980 (Fla. 1983). Additionally, the trial court erred in failing to comply with the requirements of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150-51 (Fla. 1985). The trial court did not make specific findings as to the reasonable number of hours expended and the reasonable hourly rate. *Sunday v. Sunday*, 610 So.2d 62, 62 (Fla. 3d DCA 1992).

Accordingly, we affirm the trial court's order enforcing the final judgment of dissolution but reverse the award of attorney's fees and remand this cause to the trial court for further proceedings consistent with this opinion.[15]

AFFIRMED in part; REVERSED in part; REMANDED.

COBB and PETERSON, JJ., concur.

[1] The USFSPA is currently codified at 10 U.S.C.A. § 1408 (West 1983 & Supp. 1994).

A/68

[2] *See* 10 U.S.C.A. § 1174a (West Supp. 1994).

[3] *See* 10 U.S.C.A. § 1175 (West Supp. 1994).

[4] The husband's annual VSI payments are calculated as follows: 2.5% x final monthly basic pay x 12 months x 16 years of service. *See* 10 U.S.C.A. § 1175(e)(1) (West Supp. 1994).

[5] The husband argues that the trial court employed an improper procedure when it granted the wife's motion for summary judgment in these enforcement proceedings. The record reflects that, although the trial court orally granted summary judgment, the court's subsequent written order granted the wife's motion for enforcement. More importantly, the issue before the trial court was one of law because the parties' pleadings and the husband's affidavit and deposition presented no factual dispute for the court's resolution.

We further reject the husband's contention that the trial court lacked subject matter jurisdiction to grant the wife's motion for enforcement. *See* *Work v. Provine*, 632 So.2d 1119, 1121 (Fla. 1st DCA 1994); *Seng v. Seng*, 590 So.2d 1120, 1121 (Fla. 5th DCA 1991). *See also* *Clauson v. Clauson*, 831 P.2d 1257, 1261 (Alaska 1992). The 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. The order did not modify the parties' agreement and judgment because the "order did not alter the extent of the benefits due to the wife under the agreement, but only the method of payment." *Work v. Provine*, 632 So.2d at 1122. *See also* *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113, 115 (Ct.App. 1993).

[6] *See* 10 U.S.C.A. § 1408(c) (West Supp. 1994).

[7] *See* 10 U.S.C.A. § 1175(e)(1) (West Supp. 1994).

[8] *See* Major Michael H. Gilbert, *A Family Law Practitioner's Road Map to the Uniformed Services Former Spouses Protection Act,* 32 Santa Clara L.Rev. 61 (1992); Captain Allison A. Polchek, *Department of the Army Pamphlet XX-XX-XXX, Recent Property Settlement Issues for Legal Assistance Attorneys,* Army Law., Dec. 1992, at 4.

[9] *See* 10 U.S.C.A. § 1175(e)(4) (West Supp. 1994).

[10] *See* 10 U.S.C.A. § 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. § 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). Notwithstanding *Mansell,* state courts may consider the impact of a veteran's disability payments in determining the "entire equitable distribution scheme contemplated by the parties in an effort to do equity and justice to both." *McMahan*, 567 So.2d at 980. *See also* *Clauson*, 831 P.2d at 1263.

[12] *See* *Board of Pension Trustees of the City General Employees Pension Plan v. Vizcaino*, 635 So.2d 1012 (Fla. 1st DCA 1994). We recognize that the order provides that, in the event it becomes possible for the military to make payments to the wife, the trial court reserves jurisdiction to sign any additional orders that may be necessary to effect direct payment. The husband does not contend, however, that the trial court's order requires the military to make direct payments.

[13] Once a judgment of dissolution becomes final, the parties may be precluded from attacking the property settlement agreement on which the judgment is based. *See* *In re Marriage of Mansell*, 217 Cal. App.3d 219, 265 Cal. Rptr. 227, 231-32 (1989), *cert. denied, mandamus denied,* 498 U.S. 806, 111 S.Ct. 237, 112 L.Ed.2d 197 (1990); *Tarver v. Tarver*, 557 So.2d 1056, 1062 (La. Ct. App.), *writ denied,* 563 So.2d 877 (La. 1990); *Maxwell v. Maxwell*, 796 P.2d 403, 407 (Utah Ct.App. 1990). *Cf.* *McMahan v. McMahan*, 567 So.2d 976 (Fla. 1st DCA 1990) (setting aside property settlement agreement on direct appeal from final judgment and remanding in order for trial court to fashion equitable distribution taking into account husband's disability benefits). We note that the husband has not filed any proceedings to modify or set aside the final judgment and property settlement agreement which govern the parties' rights. Thus, this issue need not be decided in this case.

[14] The cases of *In re Marriage of Kuzmiak*, 176 Cal. App.3d 1152, 222 Cal. Rptr. 644 (Ct.App.), *cert. denied,* 479 U.S. 885, 107 S.Ct. 276, 93 L.Ed.2d 252 (1986), and *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979), upon which the husband relies, are inapplicable because these cases involve involuntary separation from military service.

[15] Because of our reversal of the trial court's award of attorney's fees and our remand of this matter, the wife's cross-appeal is moot.