

**IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

JOSEPH NAPLES,

**CASE NO. SC07-2042
L.T. No. 2D06-3421**

Petitioner,

vs.

CHARLOTTE NAPLES

Respondent.

_____ /

**JURISDICTIONAL ANSWER BRIEF
OF RESPONDENT**

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V. SUMMARY OF ARGUMENT

The instant case does not conflict with any decision of any Florida court. An award of alimony can be entered and enforced even if the payor has income derived from federal veteran's disability benefits. There is no federal law which prevents a state court in dissolution of marriage proceedings from imposing and enforcing an alimony obligation upon a party who receives veteran's disability benefits. While federal law does prohibit treating the benefits as divisible property for equitable distribution, no such prohibition exists as to considering the benefits as income for an award of alimony. The enforcement of alimony under the facts of this case has previously been approved in Allen v. Allen, 650 So. 2d 1019 (Fla. 2DCA 1994) and by the United States Supreme Court in Rose v. Rose, 481 U.S. 619 (1987).

VI. ARGUMENT

The receipt of veteran's disability benefits by the payor of alimony does not remove subject matter jurisdiction or preempt under federal law the enforcement of the alimony judgment by a State Court.

A. Introduction

The case before the Court involves a post-judgment proceeding in a Dissolution of Marriage case. The Wife filed a Motion for Civil Contempt/Enforcement alleging that the Husband had failed to pay alimony as set out in the Final Judgment of Dissolution of Marriage. The alimony sought to be enforced was established in a Mediation Agreement incorporated into the Final Judgment. The Husband answered with, among other things, motions to dismiss claiming that the Trial Court lacked subject matter jurisdiction to enforce the agreement and that enforcement was preempted by federal law. The basis for the motions to dismiss was that the Husband received veteran's benefits. The Wife stipulated that the veteran's benefits received by the Husband at the time of the hearing on the motions to dismiss were veteran's disability benefits. After a hearing on the motions to dismiss the Trial Court denied the Motion for Contempt /Enforcement and dismissed the case for lack of subject matter jurisdiction citing as authority Abernethy v. Fishkin, 699 So. 2d 235 (Fla. 1997). The Second District Court of Appeal reversed.

B. Question Presented

The question before the Second District Court of Appeal was the interpretation of the following paragraph found in the mediation agreement entered into between the parties and incorporated into the final judgment:

2. Alimony. Each party agrees to alimony as follows: The Husband shall pay periodic installment alimony directly the Wife through his VA benefits, effective June 1, 2002, the sum of \$1,000 per month, on the first day of each month until direct deposit by the VA is in effect. Alimony shall be paid by the Husband to the Wife until the remarriage or death of the Wife, whichever shall first occur. Alimony shall be deductible to the payor and income to the payee.

In determining the meaning of the paragraph the Second District opinion made the specific finding that “the alimony provision does not equitably distribute marital property, nor does it grant the Wife a property interest in the disability benefits.” (Petitioner’s Appendix page 2 3) and “Here, the Husband agreed to pay to the Wife \$1000 a month in alimony. He did not assign his disability benefits to her nor did they purport to divide those benefits.”(Petitioner’s Appendix page 5).

Alimony can be awarded and enforced against the recipient of veteran’s disability benefits. Rose v. Rose, 481 U.S. 619 (1987); Allen v. Allen, 650 So. 2d 1019 (Fla. 2DCA 1994). Division of veteran’s disability benefits as property in a dissolution of marriage proceeding is not allowed

under federal law, 10 U.S.C.A. §1408, and those benefits can not be assigned, 38 U.S.C.A. §5301. As shown in the paragraph above the Second District specifically found that neither of those events occurred in this case.

In Allen v. Allen, 650 So. 2d 1019 (Fla. 2DCA 1994), a temporary alimony order was entered in a dissolution of marriage case. The payor under the order appealed arguing that federal law prohibited the award as his income consisted primarily of military disability payments. The Court affirmed the alimony award determining that 10 U.S.C.A. §1408(a) did not preclude an award of alimony against a spouse receiving disability pay.

A Wife's request to have an established support order enforced by contempt in a State Court proceeding even when the monies that enforcement is sought against are veteran's disability benefits has been allowed by the United States Supreme Court. In Rose v. Rose, 481 U.S. 619 (1987) the Supreme Court held that claims of federal supremacy and preemption did not preclude the Courts of Tennessee from enforcement of child support by contempt even if the payor's income was comprised of veteran's disability income.

In Abernethy v. Fishkin, 699 So.2d 235 (Fla. 1997) this court properly pointed out that Florida courts are precluded by Federal law from dividing or assigning veteran's disability benefits. The instant case in no way conflicts

with Abernethy in that the Second District specifically made findings that the Husband did not divide or assign his benefits, but that he agreed to pay alimony. Abernethy does not prohibit the payment of alimony.

VII. CONCLUSION

An agreement to provide support by way of permanent periodic alimony is not prohibited by 38 U.S.C. A. §5301 or 10 U.S.C.A. §1408 even if the funds for the payment of the support will come from veteran's disability benefits. The enforcement of that agreement can be by the use of contempt. Rose.

Since there is no conflict between this case and any other Florida case, this court lacks jurisdiction.

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Brett Alan Geer, Esquire, 3837 Northdale Blvd., #350, Tampa, FL 33624-1841 on December 19, 2007.

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IX. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been printed in Times New Roman 14-point type, as required by Fla. R. App. P. 9.210(a).

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