IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number 61,044

FILED

AUG 27 1981

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

GLORIA DAVIS, :

Appellant :

vs. :

ROSMAN CHARLES DIEUJUSTE, :

Appellee :

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

APPELLANT'S JURISDICTIONAL BRIEF

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CITATIONS OF AUTHORITY

STATEMENT OF THE FACTS AND THE CASE

The parties to this appeal are Gloria Davis, f/k/a Gloria Dieujuste, the Plaintiff in the Court below, the Appellee in the Fourth District Court of Appeal, and the Appellant herein, and Rosman Charles Dieujuste, the Defendant in the Court below, the Appellant in the Fourth District Court of Appeal, and the Appellee herein. The parties will be referred to as they stand before this Court. The page references herein will be to the Record on Appeal (R-page number).

The marriage of the parties was dissolved in Broward County, Florida, in case number 76-19898, in the Circuit Court of the Seventeenth Judicial Circuit, on April 1, 1977 (R-190;191). Appellee was the Petitioner in that case; real estate owned by the parties as tenants by the entireties was not described or even mentioned in the Petition For Dissolution Of Marriage (R-183;184) and final judgment was entered after default. On June 20, 1978, more than one year after the entry of the Final Judgment of Dissolution of Marriage, Appellant filed her Petition for Additional Relief After Dissolution of Marriage. Upon motion of the Appellee, that Court correctly dismissed the Petition for Additional Relief after Dissolution of Marriage noting that the Court's jurisdiction had terminated (R-189). Thereafter on August 29, 1978, Appellee filed her Complaint for Additional Relief After Dissolution of Marriage. That Complaint sought the division of real property formerly owned by the parties as tenants by the entireties and at that time owned by the parties as tenants in common and a determination that the Appellee's share be impressed with a constructive trust in favor of the Appellant (R-93-95). After denying multiple motions to dismiss the Complaint, trial was held and judgment was entered in favor of the Appellant declaring her to be the sole owner of the real estate involved with the Appellee having an equitable lien therein in the amount of $950.00.

The Fourth District Court of Appeal reversed and remanded declaring that "res judicata constitutes a complete defense to the claim of Appellee embodied in the

Complaint on which the judgment on appeal is based". On Motion For Rehearing, Appellant argued that the ruling of the Fourth District Court of Appeal in the case based upon a complaint for dissolution of marriage which did not describe the property or even allege that the parties were property owners was a denial of due process.

The Fourth District Court of Appeal in denying the Motion For Rehearing specifically noted direct conflict between the Supreme Court's holding in Cooper v Cooper, 69 So.2d 881 (Fla 1954) and the decision of the Third District Court of Appeal in Vandervoort v Vandervoort, 277 So.2d 43 (Fla 3d DCA 1973), cert denied 287 So.2d 682 (Fla 1973).

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH OTHER FLORIDA DECISIONS WHICH HOLD THAT PROPERTY RIGHTS NOT LITIGATED AND NOT ADJUDICATED IN A DISSOLUTION OF MARRIAGE ACTION MAY BE LITIGATED IN SEPARATE PROCEEDINGS.

II. WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH OTHER FLORIDA DECISIONS WHICH HOLD THAT IT IS VIOLATIVE OF DUE PROCESS TO ADJUDICATE PROPERTY RIGHTS IN A DIVORCE ACTION BASED WHERE THE LEGAL DESCRIPTION OF THE PROPERTY IS OMITTED FROM THE PETITION IN THE DISSOLUTION OF MARRIAGE ACTION.

ARGUMENT

I. WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH OTHER FLORIDA DECISIONS WHICH HOLD THAT PROPERTY RIGHTS NOT LITIGATED AND NOT ADJUDICATED IN A DISSOLUTION OF MARRIAGE ACTION MAY BE LITIGATED IN SEPARATE PROCEEDINGS.

The Supreme Court in Finston v Finston, 160 Fla 935, 37 So.2d 423 (Fla 1948) announced the general rule "that a final decree *** settles all property rights of the parties and bars any action thereafter brought by either party to determine the qustion of property rights.". In that case, the Court had before it the question of property rights and held that the doctrine of res judicata controlled. In an extension of that case, Cooper v Cooper, 69 So.2d 881 (Fla 1954), an action to set aside a deed based on duress which was alleged to have occurred prior to the dissolution, the Court ruled referring to Finston, supra, said "the property rights were not introduced in the litigation but they could and should have been so the same rule applies ...". The Fourth Distrit Court of Appeal relying upon the last quoted statement in Cooper, supra, has ruled that the decision of the dissolution of marriage court is res judicata to the division of the property by the trial court in the instant action. Such decision conflicts with decisions of other District Courts of Appeal which have produced differing results in cases involving substantially the same controlling facts. In Vandervoort v Vandervoort, 277 So.2d 43 (Fla 3 DCA 1973), cert denied 287 So.2d 682 (Fla 1973), the Court held that " ... matters of property rights of the parties which were dealt with before the Master, and reported by the Master and confirmed by judgment of the Court, are res judicata for the parties. As to matters of that nature which were not so dealt with before the Master and not adjudicated by the judgment of August 9, 1972, the parties are at liberty to litigate them in other separate proceedings.".

Accordingly, this Court should take jurisdiction of this appeal in order to resolve the conflicting decisions of the Third and Fourth District Courts of Appeal. The Honorable Judge Anstead's special concurrence in the denial of the Appellant's Motion for Rehearing finds " ... Vandervoort to be 'contrary to the rule' and hence in conflict with our holding.". Further, if the Supreme Court's denial of certiorari in the Vandervoort case is considered as an affirmance of the Third District Court of Appeal's reasoning in that case, then the decision of the Supreme Court in Cooper is an express conflict with its implicit decision in Vandervoort. It is important that the Supreme Court consider the issues presented by this appeal because to follow the reasoning of the Fourth District Court of Appeal in its interpretation of Cooper to its ultimate conclusion would require that all actions for the division of property involved in a dissolution of marriage must be included in the dissolution petition, which is not the law.

II. WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH OTHER FLORIDA DECISIONS WHICH HOLD THAT IT IS VIOLATIVE OF DUE PROCESS TO ADJUDICATE PROPERTY RIGHTS IN A DIVORCE ACTION BASED WHERE THE LEGAL DESCRIPTION OF THE PROPERTY IS OMITTED FROM THE PETITION IN THE DISSOLUTION OF MARRIAGE ACTION.

The Appellant, in her Motion for Rehearing, addressed to the Fourth District Court of Appeal, also pointed out to the Court that in holding that the Final Judgment of Dissolution of Marriage was res judicata as to the determination of property rights that the Fourth District Court of Appeal was violating the Appellant's right to due

process. The Fourth District Court of Appeal, by reversing and remanding with instructions that judgment be entered in favor of the Appellee, is ruling that the Final Judgment of Dissolution of Marriage, based upon a petition for dissolution of marriage in which the property was not described or even mentioned, is res judicata is implying that the Appellant's right to due process has been honored in the dissolution proceeding. Such a decision conflicts with the decisions of the First District Court of Appeal in Nethery v Nethery, 212 So.2d 10 (Fla 1st DCA 1968); with the Second District Court of Appeal in Lahr v Lahr, 337 So.2d 837 (Fla 2nd DCA 1976); and with the Third District Court of Appeal in Hennig v Hennig, 162 So.2d 288 (Fla 3rd DCA 1964), cert denied 166 So.2d 754 (Fla). All of the above cited cases hold that where service on the Defendant is by publication and the Notice of Publication fails to include a legal description of the property, that the Court does not acquire jurisdiction over the property sufficient to adjudicate it in the dissolution action. It is the contention of the Appellant that these cases stand for the rule that a judgment of dissolution of marriage can not affect title to real property when the complaint or petition does not put the Defendant or Respondent on notice that that result is intended or will be implied by law. In other words, by failing to describe the property or even allege that there is property, jurisdiction is not conferred on the trial court to make any adjudication with respect to the property either directly or implicitly.

CONCLUSION

As demonstrated above, the decision of the Fourth District Court of Appeal directly and expressly conflicts with both the prior decisions of this Court and other Florida Appellate Courts and jurisdiction is therefore vested in this Court by virtue of Rule 9.030(2)(A)(iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Jurisdictional Brief was furnished by U.S. Mail to: JOHN D. KRUSE, Esquire, Attorney for Appellee, 1776 East Sunrise Boulevard, Suite 219, Fort Lauderdale, Florida 33304, this 24th day of August, 1981.

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