IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,514

JACK C. VANDERGRIFF,

Petitioner,

v.

WALLYCE V. VANDERGRIFF,

Respondent.

On Petition for Review from the First District Court of Appeal

DCA DOCKET NO. AQ-277

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent, Wallyce V. Vandergriff, agrees with the statement of the case as set forth in the petitioner's brief.

STATEMENT OF THE FACTS

The parties were married on June 23, 1951, in Pensacola, Florida. Mrs. Vandergriff bore and raised three daughters, Lisa, age twenty-five, Laka, age twenty-four and Lee, age fifteen. All three children continue to reside with their mother in the marital home and but for Lisa, who attended and graduated from Florida State University before returning home, have always lived in the home (T-28).

Dottie Bonifay, Mrs. Vandergriff's mother, has resided with the family unit since moving into the marital home at Mr. Vandergriff's request in 1961 (T-29 and 130). Mr. Vandergriff is fifty-two years of age and has worked for Southern Bell, presently as an associate manager, public services for a period of thirty-four years. Mr. Vandergriff's gross monthly income from his employment was $3,133.34 per month (R-288).

In addition to a substantial retirement plan with Southern Bell and a savings plan, the employer also provides Mr. Vandergriff health, hospitalization and dental insurance(T-6).

Mrs. Vandergriff is fifty-two years of age and suffers from high blood pressure, allergies and a back condition (T-27). The marital home in which she resides with her seventy-four year old mother and three daughters is

unencumbered and has been occuppied by the parties continuoulsy since 1961 (T-28 and 29).

Mrs. Vandergriff, at the age of twenty-one, had received a degree in elementary education from F.S.U.; she worked as a teacher until 1956; since then, she has not worked outside of the home (T-39-41). Her elementary education certification had longed since lapsed (T-42). Mr. Vandergriff had always maintained, after lengthy discussions, that no wife of his would work outside of the home (T-42). Mrs. Vandergriff was a full time mother and wife. She worked extensively in the home and the yard before she hurt her back, sewed, did needle point, helped with Southern Bell functions, taught Sunday School, taught Vacation Church School, was a Brownie leader, Girl Scout leader, room mother, teacher's helper, unpaid volunteer teacher and lunchroom helper (T-43 - 45).

She had no health, hospitalization or dental insurance apart from that afforded to her through her husband's employment. She had no disability or retirement plan other than the security of her husband's plan (T-46 and 47). Mr. Vandergriff <u>always</u> handled the family's financial affairs. Apart from painting and sewing, Mrs. Vandergriff really has no other skills (T-71 and 72).

Mrs. Vandergriff sincerely believed that her husband was having an affair with his secretary and after the separation, wrote a series of spiteful notes to both. The

notes were all written within a period of about two weeks after the parties' separation.

Mr. Vandergriff unfortunately was an alcoholic (T-97 and 98).

Lisa Allison Vandergriff testified that her father used to drink only on weekends though over the last couple of years drinks heavily every night; he was an alcoholic who, when drunk, was rude and used nasty language (T-102 - 104). She was of the opinion that her mother had been a good wife (T-103).

Laka Elizabeth Vandergriff testified that her father, when drinking, was mean, unthoughtful and careless; his drinking periods definitely outweighed his times of sobriety. On one occasion, Laka recalled that her father had tied up her sister Lisa when drunk and had tried to cut off Lisa's hair (T-109). Laka likewise was of the opinion that her mother was a very good wife (T-110).

Mrs. Bonifay testified that Mr. Vandergriff acted quite unkindly to his wife and children when drinking (T-120).

Mr. Vandergriff testified that his wife had called him a drunk, attempted to stab him with a pair of scissors and had pointed a rifle at him and was therefore unhappy during his thirty-one year marriage. Mrs. Vandergriff testified that she had used a three and one-half inch pair of scissors to protect herself from being raped by a drunk and that the gun incident involved an unloaded gun and incurred some twenty-six years ago (T-76).

Judge Shivers summarized this case as follows:

> "The parties were married over thirty-two years. Although the wife received a degree in elementary education, her teaching certificate long ago lapsed. The wife has stayed home to raise the parties' three daughters and has not been gainfully employed for twenty-six years. Her activities outside the home have included teaching at Church School, helping with Southern Bell functions and family/community service as a leader in Brownie and Girl Scouts, a room mother, a teacher's helper, an unpaid volunteer teacher and lunchroom helper.
>
> The husband has been employed thirty-four years with Southern Bell, is now an associate manager earning an annual gross salary of $36,000.00 - $37,000.00 ($3,133.34 per month). The marital home is unencumbered. The husband owes $6,500.00 to his credit union."

The First District Court of Appeal upon those facts, reversed the trial court's award of rehabilitative alimony and further the trial court's failure to divide the parties' savings plan account and provide Mrs. Vandergriff with health insurance. The decision furthermore mandated an increase in the monthly alimony allowance.

ISSUES PRESENTED

I. WHETHER THE WIFE IN ALL LONG TERM MARRIAGES, WHERE THE WIFE HAS BEEN GUILTY OF SOME MISCONDUCT, IS IN RELATIVELY GOOD HEALTH, IS EDUCATED, AND HAS EXPRESSED A DESIRE TO WORK, IS ALWAYS ENTITLED TO PERMANENT ALIMONY AS A MATTER OF LAW.

II. WHETHER THE TRIAL COURT MUST SET FORTH FACTUAL FINDING IN SUPPORT OF AN OTHERWISE PROPER RULING.

ARGUMENT

I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL HEREIN EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND WITH DECISIONS OF THE SUPREME COURT ON THE SAME QUESTION OF LAW, THAT IS, WHETHER THE TRIAL COURT HAS THE AUTHORITY TO EXERCISE DISCRETION IN DETERMINING ALIMONY MATTERS.

Discretionary appellate jurisdiction in this matter

may be sought only to review a decision of a district court that expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law. Rule 9.030 (a) (2) (A) (iv) Rules of Appellate Procedure. The petitioner does a disservice to the majority opinion when he suggests that the legal effect of that opinion "is to absolutely remove the discretion from the trial court in determining what, if any, alimony should be awarded in cases of that nature". The decisions cited by the petitioner presumably supportive of conflict upon even cursory scrutinization reveal no conflict. Markgraf v. Markgraf, 320 So.2d 27 (Fla. 2nd DCA, 1975) is a brief two paragraph decision devoid of facts and without any precedential value whatsoever.

In Moses v. Moses, 344 So.2d 1322 (Fla. 2nd DCA, 1977), Mrs. Moses was only forty-two years of age with two minor children, had recently performed some part time clerical and bookkeeping work and had enrolled in a two year course at a community college in order to study nursing; under those facts, Mrs. Moses was definitely a candidate for rehabilitation.

Both of the foregoing decisions cite Lash v. Lash, 307 So.2d 241 (Fla. 2nd DCA, 1979). Therein the parties' marriage had endured for twenty-six years, their daughter was grown and at the time of the final hearing the wife was forty-four years old and the husband was forty-seven; the husband's annual salary was approximately $29,000.00 and the

wife was unemployed. The Second District Court noted as follows:

> "It often happens that the wife has given up her career upon marriage in order to manage the home and raise children. Furthermore, in a marriage where the wife has stayed home, the husband has had the opportunity of enhancing his working expertise during the entire period of his married life; whereas, the wife, if anything, may now be less equipped for work than she was when she became married".

The court noted that rehabilitative alimony presupposes the potential for self-support and without that capacity there was nothing to which one can be rehabilitated. The award of rehabilitative alimony was reversed and remanded to the trial court for an award of permanent alimony. In Jassy v. Jassy, 347 So.2d 478 (Fla. 2nd DCA, 1977) the parties' marriage had endured only about six years; the husband was fifty-eight and the wife fifty-five and both in apparent good health. For many years prior to the marriage, the wife was a secretary and real estate salesperson. At the time of the dissolution, she owned substantial assets in her name alone. The parties owned jointly a mortgage with a balance due of approximately $75,000.00, from which they received approximately $14,000.00 per year; the marital home worth from $45,000.00 to $65,000.00 and 32,000 share of stock worth between $32,000.00 - $100,000.00. The District Court obviously affirmed an award of rehabilitative alimony.

Rehabilitative alimony assumes that the recipient is a candidate to return to the job market successfully. Mrs. Vandergriff, with the approval of her husband, abandoned her

career twenty-six years ago to raise a family; Mrs. Vandergriff manifestly has no present ability to support herself and no reasonable prospect that she will be able to do so at any time in the foreseeable future. Even though the trial court retained jurisdiction over the issue of rehabilitative alimony, this does not render the error any less harmful. Colucci v. Colucci, 392 So.2d 577, 579 (Fla. 3rd DCA, 1980). Cases similar in practically every respect to this case holding that permanent alimony is required as a matter of law are legion.[1]

> "When a trial court awards rehabilitative alimony when permanent alimony is due, the error is harmful, it must be reversed. This is so because it places the burden on the wife to come in at the end of the rehabilitative period and to prove significantly changed circumstances before modification will be allowed." Decenzo v. Decenzo, 1983 FLW 1797 (Fla. 3rd DCA, July 5, 1983).

The petitioner both at the trial level and now seeks to interject the issue of "fault" as a defense to permanent alimony. Interestingly the "fault" testimony was forthcoming after a marriage of thirty-one years duration and the birth of Mr. Vandergriff's three daughters. This type of testimony has only very limited application; the misconduct ought be limited to gross situations with no mitigating circumstances. McAllister v. McAllister, 345 So.2d 352, 355 (Fla. 4th DCA,

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[1] Golden v. Golden, 395 So.2d 1255 (Fla. 1st DCA, 1981). (A marriage of 23 years duration, wife had only a 10th grade education, poor physical condition and as per the husband's wish, had devoted her married life endeavors to home and children.); Schwartz v. Schwartz, 297 So.2d 117 (Fla. 3rd DCA, 1974) (A 17 year marriage at the time of the dissolution,

the wife was 36 years of age, her schooling was limited, she was ill-equipped by training or experience to support herself but if she later acquired such ability, a modification action was available to the husband); Holland v. Holland, 406 So.2d 496 (Fla. 5th DCA, 1981) (A marriage of 16 years duration, the wife was 43 and had a 10th grade education, she cared for the parties' 11-year old daughter and had some minor health problems); King v. King, 420 So.2d 630 (Fla. 4th DCA, 1982), (At the time of dissolution of this 24 year marriage, the wife was 48 years of age, was working as a school teacher grossing $18,300 per annum but in view of the imbalance between the parties' respective incomes and considering their ages, her limited earning ability and the fact that the wife would be placed on charity if she should become disabled, she had been impermissibly 'short-changed'); McAllister v. McAllister, 345 So.2d 352 (Fla. 4th DCA, 1977) (Considering the husband's financial ability, the needs of the wife, the parties' standard of living during the marriage, the length of the marriage, the number of children, the parties' relative health, the wife's contribution to her husband's successful career, required re-classification of rehabilitative alimony to permanent alimony); Wagner v. Wagner, 383 So.2d 987 (Fla. 4th DCA, 1980) (The wife had obtained a real estate license and some slight modeling experience, she was employed as a teacher with a $12,000/year salary with the expectation of modest pay increases, no "habilitation" to greater financial success anticipated, the wife ought have been awarded permanent alimony); Smith v. Smith, 378 So.2d 11 (Fla. 3rd DCA, 1979), cert. denied, 388 So.2d 1118 (Fla. 1980) (A 17 year marriage, three minor children, a wife with the stated wish to continue rearing them, with no marketable skills, last employed 14 years earlier, and the husband with the ability to pay, rehabilitative alimony award was improper); McNaughton v. McNaughton, 332 So.2d 673 (Fla. 3rd DCA, 1976), cert. denied, 345 So.2d 424 (Fla. 1977) (A 43 year-old wife with no income or training and had not worked outside the home since shortly after the marriage, husband's income was $52,000/annum and the husband had maintined a good home and approved of the wife's role, the wife entitled to permanent alimony, not just rehabilitative alimony.) Colucci v. Colucci, 392 So.2d 577, 579 (Fla. 3rd DCA, 1980) (After a marriage of 24 years, Mrs. Colucci, at age 42, had a high school diploma and some college credits with no significant work experience or marketable skills; her husband was her only source of income. As the District Court noted "even the most sanguine could not believe that she would ever earn an amount which would serve to discharge entirely her ex-husband's obligation to contribute to the support of the person who was his wife and home maker for 24 years and the mother of his five children.") (and others too numerous to mention.)

1977). This court has used the term "extreme misconduct" when characterizing the fault defense and further has suggested that the misconduct ought to have "caused the difficult economic situation in which they (the parties) stand before the court". Williamson v. Williamson, 367 So.2d 1016 (Fla. 1979). No one, not even the petitioner, suggested that his wife's alleged misconduct in some manner caused economic loss; in fact, the petitioner has worked for the same company for some thirty-four years and his wife even assisted at certain Southern Bell functions. The trial judge in the instant case articulated no findings of misconduct in the final judgment. Beville v. Beville, 415 So.2d 151 (Fla. 4th DCA, 1982).

II. JUDGE NIMMONS' OPINION THAT THE FINAL JUDGMENT MUST BE SUPPORTED BY FINDINGS CONFLICTS WITH OTHER DECISIONS, AND THEREFORE JUDGE SMITH'S DISSENTING OPINION ACTUALLY IS THE MAJORITY OPINION WHICH WOULD UPHOLD THE REHABILITATIVE ALIMONY AWARD.

Judge Nimmons' concurring opinion accurately summarizes the applicable law pertaining to gross or extreme marital misconduct as a defense to permanent alimony and as articulated in McAllister, Beville and Williamson, supra.

CONCLUSION

The majority opinion and concurring opinion issued by the First District Court of Appeal conflict with no other decision of another district court of appeal or of the Supreme Court. Therefore, discretionary jurisdiction may not be had pursuant to Rule 9.030 (a) (2) (A) (iv), Rules of Appellate Procedure. The trial judge abused his judicial discretion by denying the respondent permanent alimony; upon the facts the

appellate court was compelled as a matter of law and in order to maintain consistency with other like decisions from all other districts to reverse. The First District has never ruled in this or any other case that a trial court may not exercise its discretion in matters of alimony but only that under the facts of the instant case that discretion was abused. "Judges dealing with cases essentially alike should reach the same result." Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to David H. Levin, attorney for petitioner/Jack C. Vandergriff, Seville Tower, 226 South Palafox, Pensacola, Florida, by delivery, this 28th day of November, 1983.

Respectfully submitted,

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