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 PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Petitioner, Jack C. Vandergriff, was the appellee/ Respondent below in the dissolution of marriage proceeding which resulted in the Final Judgment of Dissolution of Marriage which was entered in this cause on December 13, 1982, and which awarded the wife rehabilitative alimony followed by a reservation of jurisdiction. The appellant, Wallyce V. Vandergriff, was the Petitioner in the case below and she timely filed her Notice of Appeal from the Final Judgment of Dissolution of Marriage.

That appeal resulted in the Opinion which was filed by the First District Court of Appeal on September 19, 1983. In that Opinion, Judge Shivers stated that the alimony should should be permanent, not rehabilitative, and increased. Judge Smith in a concurring/dissenting opinion stated that he cannot say the trial court erred in awarding rehabilitative rather than permanent alimony. Judge Nimmons in a specially concurring opinion stated that had the trial court actually made the kind of factual findings which such view of the evidence assumes, then he would be inclined to uphold the rehabilitative alimony. The opinion reversed and remanded to the Circuit Court for an increased amount of permanent alimony. See appendix, Exhibit "A".

The appellee/husband timely filed a Motion for Rehearing En Banc, which was denied by order of the First District Court of Appeal dated October 21, 1983. See Appendix, Exhibit "B".

The Final Judgment of Dissolution of Marriage is set forth in petitioner/appellee's appendix as Exhibit "C".

The transcript of the appellate record will be referred to by (T-) and the record on appeal will be referenced by (R-).

STATEMENT OF THE FACTS

The parties were married 31 years, had three children, of which one is a minor (T-28). The wife was 52 and the husband was 52 years old (T-27). Although there was some question as to the wife's health, the doctor felt that that situation would improve following the final hearing (T-27, 64,66).

The wife had a degree in elementary education and taught for four years following that (T-39,40,61). Over the years the husband had asked the wife to go back to work (T-135). The wife is an award winning artist, and is trying to become a commercial artist. She is director of an art gallery on a volunteer basis (T-42,43). The wife makes most of her own clothes, as well as clothes for other people, and is able to do such activities as repairing appliances, painting, wallpapering and repairing screen windows (T-43-45).

Residing with the wife are the two adult daughters, and although one of them works and has an income, neither of them contribute to the overhead expenses of the household (T-53-55). The wife's mother, Mrs. Bonifay, has also resided in the marital home since 1961, over the husband's objection (T-51, 130).

The wife's financial affidavit is not based soley upon the monthly needs of the wife and one minor child, but upon the several adults who have resided with her as well (T-84,85). The former marital home is paid for and unencumbered (T-146).

The wife's mother, Mrs. Bonifay, after paying her minimal contributions to the overhead of the household, has a net profit of approximately $940 per month to dispose of as she pleases (T-121-124).

The wife had stabbed the husband with a 3 1/2 inch pair of scissors, pointed a gun at the husband and pulled the trigger, thrown a beer can at him, sent him teeth in the mail, and sent his secretary obscene mail (T-76-81). The wife has also hit the husband, tried to kick him in the groin many times, as well as the stomach, scratched his neck, hit him on the head with a flower pot, hit him on the head with a gun, and bruised his ribs by pushing him into a staircase (T-132,134).

The husband's monthly net take home pay is approximately $1,511 (R-288).

The First District Court of Appeal reversed the trial court's award of rehabilitative alimony which contained a reservation of jurisdiction to revise or extend said alimony. The District Court of Appeal, Judge Shivers, set forth that

> A husband who has been married over three decades to a wife whom he has supported, who has reaised his three children, and who has no present ability to support herself, but whom he can support, should provide permanent alimony.

The First District Court of Appeal further remanded for an award of increased monthly alimony allowance. See Appendix Exhibit "A".

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 FINDINGS 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.

The opinion of Judge Shivers in this cause stands for the proposition that a wife of a long term marriage, who though well educated has not been gainfully employed in the job market for some years, though she has a desire to pursue a profession, and although she may be guilty of misconduct, is always entitled to permanent alimony. The legal effect of that proposition is to absolutely remove the discretion from the trial court in determining what, if any, alimony should be awarded in cases of that nature. Therefore, that proposition directly conflicts with the following cases of other District Courts of Appeal as well as with previous decisions of this Supreme Court.

In the case of Markgraf v. Markgraf, 320 So.2d 27 (Fla. 2nd DCA 1975), the Second District Court of Appeal stated that,

> True it is, that because of the wife's age and certain physical disabilities, there is some indication that she may be incapable of that degree of rehabilitation within the

> prescribed period sufficient to enable her to maintain the standard of living to which she had become accustomed and to which she may be entitled. [Footnote omitted]. If this fear materializes, however, she will still not be precluded from timely seeking within that rehabilitative period a modification of the decree relating to alimony as may be appropriate. At 27-28.

In the case of Moses v. Moses, 344 So.2d 1322 (Fla. 2nd DCA 1977), the parties married in 1957, had two minor children, the husband was 41 and the wife 42. The wife had a high school education plus a year of night school, and had been a secretary for a few years after the marriage. For a short period of time before the divorce, she had been performing part time clerical and bookkeeping work for minimal pay. The wife's objective was to become a nurse. The trial court awarded the wife rehabilitative alimony, and the wife appealed asserting that she should have received permanent alimony. The Second District Court of Appeal, in affirming the award of rehabilitative alimony stated that,

> [T]he law vests broad discretion in a trial judge determining amounts required for alimony . . . Absent a clear showing of abuse of discretion, the judgment of a trial court in these matters should be upheld regardless of the merits of the award when considered de novo.
>
> . . . .
>
> From the testimony, it appears the the wife has a potential for self support. Commendably, she has the initiative to create a secure economic future for herself . . . . We cannot say that [the trial judge] abused his discretion in determining that the wife's potential could be realized through rehabilitative alimony and that permanent alimony is not required. At 1323-1324.

In the case of Jassy v. Jassy, 347 So.2d 478 (Fla. 2nd DCA 1977), although the marriage was not of long duration,

the husband was 58 and the wife was 55, and both in apparently good health. The wife had a high school education but had not worked for years. The District Court of Appeal recognized that the wife would have difficulty competing in today's job market. Page 480. The wife wanted to go back to school to pursue a profession. Ibid. The Appellate Court stated that

> We commonly think of rehabilitative alimony in terms of a somewhat younger spouse when it relates to retraining. Yet, the wife is in apparent good health and considering the increased longevity of the female sex, it was within the trial judge's discretion to conclude her goal was an appropriate one and that she has the potential to realize her objective. At 481.

Fault may be considered by the court in deciding alimony. The effect of the Opinion issued by the First District Court of Appeal, Judge Shivers, in the instant case is to totally disregard the trial court's perception of the testimony of misconduct. In Taylor v. Taylor, 378 So.2d 1352,1353 (Fla. 3rd DCA 1980), the Third District Court of Appeal stated that

> Evidence of [physical abuse] may likewise be taken into account in determining which spouse should bear the brunt of the fact that the dissolution renders it economically impossible for the parties to live separately in the lifestyle they maintained when living together . . . Williamson v. Williamson, 367 So.2d 1016,1019 (Fla. 1979); cf. Also Smith v. Smith, 378 So.2d 11 (Fla. 3rd DCA 1979) . . . .

This court has also ruled that the trial courts possess discretion in matters of this nature. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). In the Canakaris

case, this court approved the wording of Section 61.08, Florida Statutes, that the trial court " . . . may consider any factor necessary to do equity and justice between the parties". At 1200. This court further went on to state,

> . . . It is important the appellate courts avoid establishing inflexible rules that make the achievement of equities between the parties difficult, if not impossible. [at 1200].
>
> . . . .
>
> Our trial judges are granted this discretionary power because it is impossible to establish strict rules of law for every conceivable situation which could arise in the course of a domestic relations proceeding. The trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and events of the trial. At 1202.

Therefore, the decision of the District Court of Appeal herein, Judge Shivers, which states that in long term marriages of this nature the trial court has no discretion and must award permanent alimony, and a certain amount thereof, is expressly and directly contrary to the aforecited cases of the other District Courts of Appeal, as well as of this Court.

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.

As this court has stated in State v. Bruno, 104 So.2d 588,591 (Fla. 1958),

> Except in an order granting a motion for new trial the courts of this state are not required to state the grounds of reasoning upon which orders, judgments or decrees are based.

That proposition has even been cited with approval by

the First District Court of Appeal in Heard v. Mathis, 344 So.2d 651,654 (Fla. 1st DCA 1977).

CONCLUSION

It is respectfully submitted that this court should exercise its discretionary review to review the decision issued by the First District Court of Appeal herein inasmuch as the same directly and expressly conflicts with decisions of other District Courts of Appeal and of this court on the question of whether a trial court has any discretion on the alimony question in marriages of long term duration, where the wife has potential for rehabilitation; and with decisions that a proper ruling must be based on factual findings.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to John L. Myrick, attorney for Respondent/Wallyce V. Vandergriff, 438 East Government, Pensacola, Florida, by delivery this 11th day of November, 1983.

Respectfully submitted,

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