

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED

SID J. WHITE

JAN 12 1984

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

MARILYN WALTER,
Petitioner,

vs.

Case No. 64,641

DAVID L. WALTER,
Respondent.

DISCRETIONARY PROCEEDINGS TO REVIEW A
DECISION OF THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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ISSUES INVOLVED

- I. WHETHER THE DECISION OF THE DISTRICT COURT IN THE CASE AT BAR IS IN EXPRESS OR DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL OR OF THIS COURT.

- II. WHETHER THE DISTRICT COURT OF APPEAL IN THE CASE AT BAR SUBSTITUTED ITS OPINION FOR THAT OF THE TRIAL COURT AS TO A FACTUAL MATTER.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT IN THE CASE AT BAR IS NOT IN EXPRESS OR DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL OR OF THIS COURT.

Petitioner contends that the decision of the Fifth District Court of Appeal in the case at bar is in conflict with other decisions of the Fifth District Court of Appeal, i.e. Burke v. Burke, 401 So. 2d 921 (Fla. 5th DCA 1981) and Hinebaugh v. Hinebaugh, 403 So. 2d 451 (Fla. 5th DCA 1981). As stated in Committee Notes to Rule 9.030, Florida Rules of Appellate Procedure:

"The new article [Article V]... terminates Supreme Court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in Rule 9.331."

Rule 9.331, Florida Rules of Appellate Procedure, provides for the resolution of intra-district conflict by rehearings en banc. The Petitioner in this cause failed to utilize the procedure provided by this rule. This Court lacks jurisdiction to consider the Petitioner's allegation of intra-district conflict and the Petition must be dismissed or denied.

Petitioner also infers that the decision in the case at bar is in conflict with this Court's decision in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). However, former Chief Justice England has explained that due to this Court's holding in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), there is no basis for a Petitioner to contend that there is direct

conflict between a decision of a District Court of Appeal and a previous decision of this Court. [See England, Hunter and Williams, "Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform," 32 U. Fla. L. Rev. 147 at 176 (1980)]

In contending that the decision in the case at bar is in conflict with Canakaris, supra, and decisions of other District Courts of Appeal, Petitioner improperly goes beyond the decision of the case at bar and seeks support for her position in the trial court record. Article V clearly limits the discretionary jurisdiction of this Court to a conflict between decisions.

Most importantly, Petitioner fails to establish the existence of any conflict between the decision in the case at bar and any other decision. The Petitioner interprets the decision of the Fifth District Court of Appeal in the case at bar as limiting the factors to be considered in determining whether permanent alimony should be awarded to the sole factor of the financial capacity and ability of the requesting spouse. She then argues that this decision is in conflict with Canakaris, supra, and other decisions which require consideration of the totality of all circumstances.

Petitioner has erred in her interpretation of the decision of the Fifth District Court of Appeal. Judge Dauksch, writing for the Fifth District Court of Appeal in the case at bar, expressly states as follows:

"Here the parties are the same age (he was 42, she 41 at the hearing), both in good health and both have the experience and ability to earn a living...

The children are split between the parties and both parties apparently contribute in raising all the children. Neither party has substantial net worth and both have a spotted history of employment - sometimes working and sometimes not. Under all the circumstances it is apparent rehabilitative alimony should be awarded;..." [Petitioner's Appendix 8, p. 3]

Thus, Petitioner fails to establish an express and direct conflict of decisions and has no basis to request this Court to invoke its discretionary jurisdiction.


II. THE DISTRICT COURT OF APPEAL IN THE CASE AT BAR DID NOT SUBSTITUTE ITS OPINION FOR THAT OF THE TRIAL COURT AS TO A FACTUAL MATTER.

Petitioner is incorrect in contending the the District Court of Appeal in the case at bar substituted its opinion for that of the trial court as to a factual matter. This Court explained in Canakaris, supra, that where a trial judge fails to apply the correct legal rule, he errs as a matter of law. In the case at bar, the Fifth District Court of Appeal found that the trial court applied an incorrect principle of law when he awarded permanent periodic alimony under circumstances where such award has no legal justification. [See Campbell v. Campbell, 432 So. 2d 666, 669 (Fla. 5th DCA 1983); Opinion, Petitioner's Appendix 8] Thus, the Petitioner has failed to establish any basis to invoke this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated herein, Respondent, David L. Walter, respectfully requests this Honorable Court to deny Petitioner's request to invoke this Honorable Court's discretionary jurisdiction.

RESPECTFULLY SUBMITTED this 10th day of January, 1984.

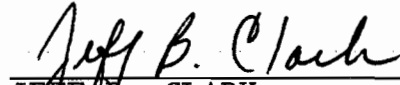


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 10th day of January, 1984 to: MICHAEL R. WALSH, Esquire, 326 North Fern Creek Avenue, Orlando, Florida 32803.



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