DA 11-14-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,641

MARILYN WALTER,

Petitioner,

vs.

DAVID L. WALTER,

Respondent

APPEAL FROM THE DISTRICT COURT OF APPEALS
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF

MICHAEL R. WALSH
326 North Fern Creek Avenue
Orlando, Florida 32803
(305) 896-9431

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS
CASES CITED

STATUTES

PRELIMINARY STATEMENT

As in Petitioner's Initial Brief, the Petitioner will be referred to as MARILYN and the Respondent as DAVID.

PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND FACTS

While it is true that DAVID and MARILYN may not have literally lived together on a day-to-day basis, the record clearly establishes a close and loving relationship between them beginning three (3) months after their divorce and continuing until a short time before MARILYN commenced her modification action (T23, 24, 31, 42, 81 and 82). During this time, DAVID openly acknowledged that he employed his former wife in one of his corporations, beginning August 10, 1975, and until on or about January 2, 1982, when he fired her, to make sure that she and the three minor children were well taken care of (T-33, 47-48, 120, 121, 115 and 116).

DAVID further admitted at the trial that he paid MARILYN more than the ordinary employee in his business and further adjusted her schedule so she could take care of the three minor children (T100 and 101).

MARILYN would point out that her total gross annual income listed on page 3 of DAVID'S Brief for the year 1978, represents $10,400 earned by her in his employ (T38 and R337-339) and for the year 1979, represents $13,100 earned by her in working for him (T38 and R340-342). The remaining earnings of $2,389.49 in 1978 and $6,728.66 in 1979, were from odd jobs on a part-time basis so that MARILYN could supplement her income and support herself and the three minor children.

Until promoted to manager of Mr. Frogg's in approximately April, 1980, MARILYN was required to pursue such part-time

employment (T44-45). As stated in her Initial Brief, she received no child support from DAVID and, consequently, paid all expenses for the three children*, including their dental care, drug and prescription expenses, clothes, food, recreation and attendance at parochial school (T38-42 and A6, of Respondent's Brief).

*In the fall of 1981, or shortly after the modification case was commenced, the eldest child, James Michael, voluntarily went to live with his father (T39 and 40 and R310-315).

PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT

I. THE DISTRICT COURT OPINION IN THIS CASE DOES CONFLICT WITH THIS COURT'S DECISION OF Conner AND Kuvin.

Conner v. Conner, 439 So. 2d 887 (Fla., 1983) preceded by one month the District Court opinion and thus was the law at the time Walter v. Walter, 442 So. 2d 257 (Fla. 5th D.C.A., 1983) was rendered and published. The dissent in Walter clearly acknowledged that the Fifth District opinion conflicted with Conner and suggested that the majority lacked jurisdiction even to write it (260).

Once the Supreme Court has promulgated an established rule of law as it did in Conner, district courts are bound to adhere to such an established precedent even though they might believe that the law should be otherwise, State v. Dwyer, 332 So. 2d 333 (Fla., 1976). The Florida Supreme Court establishes the highest law of this state and, if any of its precedents are to be overruled, only the Supreme Court may do so, Hoffman v. Jones, 280 So. 2d 431 (Fla., 1983).

Kuvin v. Kuvin, 442 So. 2d 203 (Fla., 1983) was decided one month after Walter. If the District Court decision in this case represents the test to be applied to future awards of periodic alimony, then Kuvin's holding:

> "Whether to award permanent or rehabilitative alimony in this cause was a decision within the trial court's discretion," (205).

is effectively overruled and nullified by reason of this District's "self-support" test, Walter, at pages 258-259, which

conceivably can be stretched to include every actual or imaginary factual circumstance possible regardless of the past standard of living of the parties, the wife's actual or expected needs, the ability of the husband to pay or the use of such an award to "do justice and equity between the parties."

By such a holding, the "judicial discretion" of a trial judge as enunciated in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla., 1980) will disappear and become mechanical and the law at the trial level will be thrown into complete and utter chaos and confusion.

II. THE FIFTH DISTRICT COURT OF APPEAL DOES APPLY AN IMPROPER LEGAL TEST IN REVERSING THE TRIAL COURT'S AWARD OF PERMANENT ALIMONY.

As detailed in her Initial Brief (pages 26-30), MARILYN suggests that the legal test approved by the Fifth District expressly conflicts with the standards and rationale adopted by this Court in Canakaris. Further, it fails to take into account the various statutory factors set forth in F.S. 61.08(2).

DAVID seeks to brush aside these important considerations by arguing that the trial judge factually and legally erred in finding that MARILYN had a need for permanent alimony. One has only to read and review the record to establish the falsity of DAVID'S position and to confirm MARILYN'S complete economic dependence upon him (R330-348). Illustrative of the truth of this matter is a partial excerpt from the trial testimony of MARILYN (at T82, lines 14-21):

Q. Is it fair to say up until this incident happened

where you miscarried the last time, Mr. Walter pretty well held you under his thumb?

A. That is correct.

Q. Pretty well controlled you?

A. Yes. He told me that if I didn't do what basically he wanted to do, then he wouldn't pay me or I wouldn't have a job.

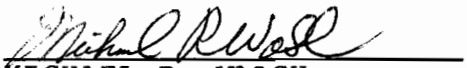
CONCLUSION

DAVID, in his Brief, has recited no evidentiary facts nor matters of record which would warrant the conclusion that Judge Diamantis abused his discretion in awarding permanent alimony to MARILYN.

More importantly, DAVID'S Brief actually supports rather than opposes the conflict which exists between the District Court opinion and this Court's previous decisions in Canakaris, Conner, Kuvin and Shaw v. Shaw, 334 So. 2d 13 (Fla., 1976).

The District Court opinion should, therefore, be reversed and this case remanded to the lower court for an award of permanent alimony retroactive to the date of rendition of the District Court opinion.

Respectfully submitted,



MICHAEL R. WALSH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to JEFF B. CLARK, ESQUIRE, 126 East Jefferson Street, Orlando, Florida 32801, this 28 day of August, 1984.

MICHAEL R. WALSH, ESQUIRE
326 North Fern Creek Avenue
Orlando, Florida 32803
(305) 896-9431

Attorney for Petitioner