B-5

IN THE SUPREME COURT OF FLORIDA

JEAN L. ABBE,

Petitioner,

v. CASE NO. 64,794

MARNON F. ABBE,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS*

Jean Abbe filed her petition in the Circuit Court for Charlotte County seeking dissolution of the parties' twenty-four year marriage. She asked for child custody and support, and alimony. She prayed alternatively for relief with respect to entireties properties, seeking award of Marnon Abbe's interest as lump sum alimony, or partition. (1-6)

Marnon admitted entireties ownership of all property including a business called Abbe's Donut Nook and the real property upon which the business was situated. His counterclaim asserted a special equity in Jean's interest in three unimproved lots, and he asked for "equitable distribution" of all other real property "in accordance with the parties' respective interests therein." No interest other than entireties was alleged. (11-14)

On September 3, 1982, Jean and Marnon went to the courthouse with their lawyers for a trial of their case. The transcript of the proceedings that day reveals that Jean Abbe was not in the hearing room.**

No testimony was taken and no documents were offered in evidence. Attorneys Rankin and Hathaway discussed the case with Judge Adams. The court reporter's notes (32-44, A 1 to 13) omit any preliminaries that ordinarily might explain the purpose for the conference. The transcript commences abruptly

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*Record on appeal in the District Court referred to by page number. Appendix = page number prefixed by "A".

**At Page 42, A 11, Mr. Rankin: "You want her to come in and testify as to residence or something?"

with Rankin (representing Jean) saying: "Your Honor, I think they can cut everything up pretty well." He goes on to comment in sketchy terms about real property, the business, and support. Hathaway then presented Marnon's views, including that he "doesn't want to be in partnership with her running the business." (33-35)

Judge Adams asked such questions as: "How come he couldn't sell the business?" "What's the business worth?" What's the real property worth, the business?" "What do you think its worth, John?" "What kind of education does she have?"

The lawyers attempted to answer these questions, often differently, and they casually debated various points. Finally, Judge Adams said: "Looks to me like you got a divorce," and he proceeded to announce his decision on the property and support.

During the conference, neither lawyer suggested that he had authority to stipulate to the terms of a final judgment, or to enter into a compromise settlement, or to submit the case for decision without a trial. The only reference to a stipulation came after Judge Adams finished dividing up the property.

> "MR. RANKIN: Okay. Just for the record, I would take exception to the award of the business outright to the Respondent.
>
> THE COURT: They won't run it, both of them.
>
> MR. RANKIN: What do we need, proof of prima facie case?

MR. HATHAWAY: We can stipulate to it, I think, if you agree to it.

MR. RANKIN: You want her to come in and testify as to residency or anything? We can stipulate on the record that we can prove a prima facie case.

MR. HATHAWAY: Oh, yeah, there is no question, these people been here a long time. Why don't you stipulate we waive all the technical requirements and there would be no problem there.

MR. RANKIN: Okay.

MR. HATAHWAY: Entry of a Final Judgment as per the Court's ruling?

MR. RANKIN: Okay."

(Hearing concluded.) (42-43, A 11-12)

There being no evidence in the record upon which to base a statement of the facts, Petitioner must resort to the pleadings and to the financial affidavits filed by the parties. (1-9, 11-14, 18-25)

These papers indicated that the Abbes owned a house in Port Charlotte, lots in Englewood improved with a mobile home, a business called Abbe's Donut Nook and its premises, and the three unimproved lots in which Marnon claimed a special equity. The financial statements lump properties and mortgages together so that it is impossible to determine all values or equities. Separate values for the two residences cannot be determined. According to Jean's statement, the combined value of the business and its premises was $135,000. Marnon's shows a $30,400 mortgage on the business property. A $75,000 annual gross was mentioned during the conference with Judge Adams.

The final judgment incorrectly recites that the trial judge "heard the testimony of the parties and...reviewed the evidence presented." It does not pretend to be based upon a stipulation for proffer of facts by counsel. It gave custody and child support to Jean; gave her rehabilitative alimony for four years, but no permanent alimony; Jean received Marnon's interest in the Port Charlotte house as lump sum alimony and Marnon was ordered to make the house payments; Marnon got Jean's interest in the business, the business property, and the mobile home property; the three unimproved lots were left in joint names, and no attorney's fee was awarded. (26-29, A 14-17)

Jean filed an appeal. She asserted that she was denied her right to a trial of the issues presented by her petition. She specifically took issue with the denial of permanent installment alimony and the award of her interest in the business and its property to Marnon. (Page 8 of Appellant's brief) She pointed out that Marnon claimed a special equity only in her interest in the unimproved lots, and beyond that, only asked for equitable distribution "in accordance with the parties respective interests," never suggesting that he had any claim on Jean's interest in any other property. (Page 9) She mentioned that there having been no trial, subject matter jurisdiction had not been proved. (Page 9) She suggested that the District Court should reverse and remand for a trial to establish jurisdiction, deal with the challenged points, and proceed with partition. (Page 10)

Marnon filed a "Motion to Confess Error," (A 27)

admitting that there was a failure to prove jurisdiction. The Second District Court entered an order remanding the cause to the trial court "for the purposes specified in the motion," and a hearing was conducted on May 27, 1983, at which Marnon proved residency requirements. (A 29-33)

Marnon's brief did not answer Jean's argument that she was denied a trial. Marnon conceded that there had been no compromise stipulation presented to the trial judge. His position was that "the positions of the parties...were submitted to the judge for his determination...by their respective counsel...." He did not contend that Jean had authorized such a procedure. He contended that the award of Jean's interest in the business and business real property in response to a prayer for equitable distribution in accordance with the parties' interest was authorized by Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), and Severs v. Severs, 426 So. 2d 992 (Fla. 5th DCA 1983).

The Second District Court, without explanation, said: "As to appellant's claim that she was denied her right to trial, we find no merit." That the lack of a trial had necessitated relinquishing jurisdiction for proof of subject matter jurisdiction was not mentioned. (A 21)

Although neither Marnon's counter petition nor the final judgment mentioned lump sum alimony, the District Court said that "the trial court awarded lump sum alimony based on a prayer for 'equitable distribution'". The Court held that this violated the rule it had laid down in Leonard v. Leonard,

414 So. 2d 554 (Fla. 2nd DCA 1982), pet. for reh. denied, 424 So. 2d 762 (Fla. 1983). It adhered to its decisions in Hu v. Hu, 432 So. 2d 1389 (Fla. 2nd DCA 1983), and Powers v. Powers, 409 So. 2d 177 (Fla. 2nd DCA 1982), holding that "Equitable distribution is the end rather than the means." "The award of lump sum alimony to appellee" (Jean's interest in the business and business property) was reversed.

All this was of little benefit to Jean Abbe, as is seen from the following comment by the District Court:

> "The trial judge clearly awarded Appellant's interest in jointly held property to Appellee to balance other awards of jointly held property to Appellant.* We can find no fault with the fairness and equity of the manner of his division of the parties' properties. However, because we must reverse the awards to Appellants for the reasons stated herein, we reverse all property awards to the parties and remand to the lower court for reconsideration in accordance with this opinion. It may be necessary for the parties to plead anew in regard to their property interests, and if so, the trial court may well end up with the same result.** The parties, therefore, might be well advised to amicably settle their differences rather than prolong this litigation."

Acknowledging a conflict with Lynch v. Lynch, 437 So. 2d 234 (Fla. 5th DCA 1983, and Tronconi v. Tronconi, 425 So. 2d 547 (Fla. 4th DCA 1982), on the question whether a prayer for equitable distribution permits an award of lump sum alimony, the Second District certified to this Court these questions:

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*The Court did not explain how it reached these conclusions with no evidence in the record.
**The Court does not say how this will be done without a trial.

"I. WHETHER A PRAYER FOR EQUITABLE DISTRIBUTION ALONE, WITHOUT REFERENCE TO ALIMONY, MAY SUPPORT AN AWARD OF LUMP SUM ALIMONY FOR THE PURPOSE OF EQUITABLE DISTRIBUTION OF THE PROPERTY OF THE PARTIES?

II. IF SO, WHETHER BOTH PARTIES MUST PRAY FOR EQUITABLE DISTRIBUTION OR WHETHER A PRAYER FOR EQUITABLE DISTRIBUTION BY ONE PARTY IS SUFFICIENT TO SUPPORT AN AWARD OF LUMP SUM ALIMONY TO EITHER PARTY FOR THE PURPOSE OF THE EQUITABLE DISTRIBUTION OF THE PROPERTY OF THE PARTIES?"

The District Court denied Jean Abbe's motion for attorney's fees. (A 34)

ARGUMENT

The certified questions present an express and direct conflict between a rule of law announced below and a rule announced by the 4th and 5th District Courts of Appeal, so that this Court has jurisdiction.

Whether a prayer for equitable distribution supports lump sum alimony, however, is a question of little interest to Jean Abbe. Marnon asked for "equitable distribution...in accordance with the parties' respective interests." "The parties' respective interests" were as tenants by the entireties. Marnon could not possibly have been asking for Jean's interest as lump sum alimony or otherwise. He got something he did not ask for, but the real problem is that he got it without a trial.

Rule 9.040(a) empowers this Court, its jurisdiction having been properly invoked, "to determine the entire case to the extent permitted by substantive law." (Committee notes to 1977 revision, Rule 9.040)

Jean Abbe has been denied her Florida constitutional right to access to the courts. Section 21, Article 1, Constitution of the State of Florida. She has been deprived of her property without due process in violation of Section 9, Article 1, Constitution of the State of Florida, and the Fifth and Fourteenth Amendments to the Constitution of the United

States.*

The final judgment incorrectly states that the trial judge heard testimony and received evidence. (26, A 14) Respondent's brief below acknowledges that there was no compromise settlement, and suggests only that the two lawyers proffered their client's positions, whereupon the trial judge rendered his decision. The record is devoid of any indication that the parties agreed to this procedure, or that Jean's lawyer had the requisite authority. Her lawyer did not take exception to the procedure, except to object to the award of Jean's interest in the business and business real property to Marnon. Does that mean that Jean has waived her right to litigate her property rights in the proper manner?

Except in certain emergency situations not relevant here, a lawyer engaged to represent his client in litigation cannot compromise or settle his client's cause without express authority. An unratified unauthorized compromise is a nullity.**

The usual terms of employment of an attorney to represent a client in litigation do not authorize the attorney

*Petitioner's brief as Appellant below specifically referred to the denial of her right to a trial, contemplated by all of these constitutional provisions. Her petition for rehearing, (A 24), denied by the District Court (A 26) below specifically cited these provisions.

**Palm Beach Royal Hotel, Inc. v. Breese, 154 So. 2d 698 (Fla. 2nd DCA 1963); Bursten v. Green, 172 So. 2d 472 (Fla. 2nd DCA 1965); Goff v. Indian Lake Estates, Inc., 178 So. 2d 910 (Fla. 2nd DCA 1965); Albert v. Hoffman Electric Construction Company, 438 So. 2d 1015 (Fla. 4th DCA 1983); Nehleber v. Anzalone, 345 So. 2d 822 (Fla. 4th DCA 1977).

to stipulate for entry of a final decree. Kramer v. City of Lakeland, 38 So. 2d 126 (Fla. 1948).

If a lawyer cannot compromise his client's case or stipulate to a final decree without express authority, he certainly cannot leave his client in the courthouse hallway and inexplicably acquiesce in a decision on the merits based upon an informal discussion. Aside from the affront to constitutional guarantees, the lawyers' comments did not provide information sufficient for an informed decision by the trial judge, or for the endorsement of the fairness of that decision by the District Court.

It is not unknown for parties to litigation, by agreement, to present a case to the trial judge on a stipulated statement of fact and legal memoranda. See, e.g., Balboa Insurance Co. v. St. Johns Engineering Co., Inc., 416 So. 2d 1268 (Fla. 5th DCA 1982). There was no stipulated statement of facts here, and there clearly were a number of fact issues.*

This Court held in State ex rel Personal Finance Co. v. Lewis, 140 Fla. 86, 191 So. 295 (1939), that:

> "It is quite true that in matters of procedure or practice which affect solely the conduct of a cause, an attorney may bind his client but

*For example, after Jean's lawyer made a brief opening statement, Marnon's lawyer commenced: "Let me explain -- my view of this is a little different." (34) Debating the implications of a non-conforming use situation for the business property, the two lawyers disagreed what position zoning officials had taken. (35-36) They debated whether Jean was employed. Her lawyer was not sure. (39) Respondent's brief below (Page 4) says that "The positions of the parties as represented by their respective counsel were widely variant."

> this is not the rule as affecting the merits.

The act under consideration in Personal Finance was the plaintiff's attorney's unauthorized filing of a praecipe for dismissal. The client moved to withdraw it and reopen her case. This Court sustained an order granting her relief.

Does the unauthorized acquiescence in a judgment without presentation of evidence go beyond the mere conduct of the cause and affect the merits? It is difficult to conceive of any other act by an attorney which would affect the merits more. For what purpose is a trial lawyer if he waives the trial? There are accepted and proper procedures for the conduct of litigation with considerable latitude for informed discretion. The lawyer frequently must exercise his discretion, his informed judgment, to select the best tactic. But when the lawyer steps substantially beyond the recognized format of trial procedure, depriving his client of the basic right to a trial, he has gone far beyond mere matters of practice and procedure which affect the conduct of the cause.

This concept is recognized in B.F. Goodrich Rubber Co. v. Holland, 131 So. 2d 882 (Miss. 1931). The attorney procured joinder of another party without authority and by means other than ordinary court process. Holding that the client was not charged with liability for this act, the Court said:

> "The authority of an attorney employed to prosecute or defend a litigation embraces all matters of procedure, and his right to act relative thereto is absolute...

> But 'the assumption by an attorney at law, even if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings does not create any presumption of actual authority so to act, but as in the case of other agents, his acts must be shown to be within the scope of his authority, else they will not bind his principal.'"

No Florida case in point has been found, but a California divorce case is close, and the observations of the Court are most relevant. Linsk v. Linsk, 70 Cal 2d 272, 74 Cal. Rptr. 544, 449 P.2d 760. Mrs. Linsk sued for divorce. A trial was conducted for eleven days, but the trial judge was incapacitated before rendering a decision, and a mistrial was declared. Mrs. Linsk refused to sign a stipulation to submit the matter to a new judge on the record. The judge then declared to the attorneys in chambers (Mrs. Linsk was not present) that the attorneys could stipulate that the case be heard by another judge solely upon the transcript and evidence introduced at trial unless that judge desired additional testimony. The attorneys so stipulated.

The case then was assigned to another judge who was not advised of the foregoing events. He handled the case pursuant to the stipulation and entered judgment unfavorable to Mrs. Linsk without taking further testimony. Mrs. Linsk challenged the judgment because her attorney had no authority to enter the stipulation presenting the case for adjudication on the transcript and evidence.

The California Supreme Court reversed. The Court

started with this premise:

> "The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself."
>
> * * *
>
> "The extent of an attorney's powers in this regard has been aptly described as follows: 'In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.'"

The Court cited some examples of acts authorized by virtue of the authority inherent in the employment as trial attorney, such as:

- To refuse to call a witness that the client wants called.

- To abandon an unmeritorious defense.

- Stipulate to a view of the premises.

- Stipulate that the testimony of a witness would be the same as that of a prior witness.

- Stipulate that a transcript of testimony given in a prior case may be used in a later action.

- Waive the late filing of a complaint.

The Court observed, however, that the attorney's

general authority did not allow him to:

- Stipulate to a fact that would dispose of the client's sole interest.

- Stipulate to eliminate an essential defense.

- Agree to the entry of a default judgment against the client.

- Agree to a summary judgment against the client.

- Stipulate that only nominal damages be awarded.

- Agree to an increase in the amount of a judgment against his client.

- Waive findings so as to eliminate a right to appeal.

- Stipulate that the other party's violation of a statute would not be a defense.

Commenting on these two categories, the Court said:

> "The dichotomy in the foregoing cases appears to relate to whether the attorney has relinquished a substantial right of his client in entering into a stipulation on his behalf. If counsel merely employs his best discretion in protecting the client's rights and achieving the client's fundamental goals, his authority to proceed in any appropriate manner has been unquestioned. On the other hand, if counsel abdicates a substantial right of the client contrary to express instructions, he exceeds his authority."
>
> "It seems incontrovertible that the right of a party to have the trier of fact observe his demeanor, and that of his adversary and other witnesses, during examination and cross-examination is so crucial to a party's cause of action that an attorney cannot be permitted to waive by stipulation such right as to all the testimony in a trial when the stipulation is contrary to the express wishes of his client. Indeed, it has been held that the very right to trial contemplates the 'right to be present at and to participate

every phase of the trial.'"

The Linsk decision was in part an interpretation of the scope of a California civil procedure rule which provided that an attorney may bind his client "in any of the steps of an action or proceeding." Florida has no corresponding rule, but DR7-101, Code of Professional Responsibility, says, in relevant parts:

> "In his representation of a client, a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right of position of his client."

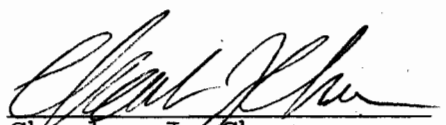
The California decision in Linsk, which holds in essence that giving up the right to a trial is beyond the scope of what is "permissible," should be followed in Florida.

CONCLUSION

Jean Abbe was denied her right to a trial. The remarks by the Second District Court that this contention has no merit, and that the result was fair and equitable, are incomprehensible. There was no trial. The decision below should be quashed with instructions that the cause be remanded for a trial.

As to the certified conflict, it is Petitioner's view that a party to a dissolution action should state with reasonable specificity what relief concerning property is requested. A prayer merely for "equitable distribution" is not sufficiently clear to place the other party on notice as to what relief is sought.

Marnon Abbe, however, asked for equitable distribution "in accordance with the parties' respective interests." His prayer seemed clear enough. It did not indicate that he was after Jean Abbe's interest in their most valuable entireties property. Even after a trial he should not have been awarded something he clearly did not ask for. The Second District's reversal with respect to the prayer for relief was thus correct, but for the wrong reason.



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