

IN THE SUPREME COURT OF
THE STATE OF FLORIDA.

CASE NO. 67,106

FOURTH DISTRICT COURT
OF APPEAL NO. 84-1219

ELIZABETH ANNE NOAH,

Petitioner,

vs.

RICHARD ALAN NOAH,

Respondent.

FILED

SID J. WHITE

JUN 25 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON MERITS

HAINES & D'ANGIO

Martin L. Haines, III
636 U.S. Highway One
Penthouse 301
North Palm Beach, Florida 33408
(305) 863-5400
Attorneys for Petitioner

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INTRODUCTION

Petitioner, ELIZABETH ANNE NOAH, was the petitioner in the trial court and the Appellee in the Fourth District Court of Appeal. She will be referred to as Wife.

Respondent, RICHARD ALAN NOAH, was the respondent in the trial court and the Appellant in the Fourth District Court of Appeal. He will be referred to as Husband.

A means Appendix

R means Record on appeal

T means Trial transcript

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

This involves an action for dissolution of a ten (10) year marriage. The trial court awarded the Wife the bulk of the assets acquired during the marriage because

"Because the wife was a good wife, in view of her contributions to the marriage, the disparity in the parties' income, the husband's ability to pay alimony, the wife's inability to earn a sum sufficient to support herself, the parties' ages, the length of the marriage and the wife's ill health, and because of the husband's gross marital misconduct, the court will award the wife a combination of permanent periodic alimony and lump sum alimony."

(A- Final Judgment, pg. 3)

The appellate court reversed and returned a condominium to the Husband (A-Final Judgment pgs.1-6). In doing so, it expressed confusion with this court's decision in Williamson v. Williamson, 367 So.2d 1016 (Fla. Sup.Ct. 1979). After citing the circumstances

wherein marital infidelity can be considered the appellate court on page 3 goes on to say that "Williamson, infra, does not appear to go so far as to say that such fault would in effect cause the spouse without fault to receive distribution of virtually all the assets. To us, to do that smacks only of punishment which Williamson concludes to be improper." (A-4th DCA pg. 3)

From that point this question was certified to the Florida Supreme Court as one of great public importance.

"DOES THE WILLIAMSON DECISION PERMIT A TRIAL JUDGE TO MAKE A DISTRIBUTION OF VIRTUALLY ALL THE ASSETS TO A FAITHFUL WIFE, IN PART BECAUSE HER HUSBAND HAS BEEN UNFAITHFUL?"

(A-4th DCA pg. 3)

ISSUE

WHETHER THE TRIAL COURT ERRED BY DISTRIBUTING TO A FAITHFUL WIFE VIRTUALLY ALL OF THE MARITAL ASSETS IN PART BECAUSE THE HUSBAND WAS UNFAITHFUL.

As the appellate road lengthens, it is easy to forget the evening long ago when the Husband came home and told his unprepared Wife that he was in love with another woman. (T-25,64). This Wife had been a good Wife who worked throughout the marriage despite suffering from poor health. She was devastated by her Husband's news and had difficulty recovering (A-Final Judgment, pg.2).

The question presented by these facts and certified to this court is overly broad. The issue in this case should be whether the adultery of a spouse not claiming alimony is one of the factors which may be considered by the trial court in the absence of any adultery on the part of the spouse claiming alimony?

It must be remembered throughout this argument that adultery was but one of the factors which predicated the award to the Wife. The Final Judgment states quite clearly the factors which governed its distribution of assets:

"Because the wife was a good wife, in view of her contributions to the marriage, the disparity in the parties' income, the husband's ability to pay alimony, the wife's inability to earn a sum sufficient to support herself, the parties' ages, the length of the marriage and the wife's ill health, and because of the husband's gross marital misconduct, the court will award the wife a combination of permanent periodic alimony and lump sum alimony."

(A-Final Judgment, pg.3).

If adultery is deleted from the trial court's considerations, would the award to the Wife be unfair? Would not the Wife's ill health (T-45), her advancing age, 42, and her contributions to the marriage be sufficient to uphold the unequal distribution of assets? The complaint of the appellate court is with the wording of Williamson v. Williamson, 367 So.2d 1016 (Fla. Sup. Ct. 1979). In that decision, the Supreme Court discussed three fact patterns which would allow the trier of fact to consider marital misconduct:

1. To reduce or disallow alimony to the adulterous spouse who requests it.
2. To mitigate the impact of adulterous behavior by the spouse seeking alimony.
3. To determine if the adultery worked an economic hardship on the marriage.

In addition to those the court concedes at page 1019, that consideration of adultery will "depend on the circumstances of each case."

The lower court chose to consider the Husband's adultery in using as predicate the demands of Florida Statute 61.08(1) and (2). The question begged by the Fourth District Court of Appeal concerns the weight that was given the misconduct by the trial court in making its award. That issue should not be reached by this court.

Marital misconduct is not restricted to infidelity. It necessarily includes alcoholism, drug addiction, chronic or convenient headaches, joggers syndrome, lifelong construction of an airplane in a garage, voluntary obesity, self-indulgence, and laziness. In Williamson, infra, the court at page 1019 refers to the no fault concept of divorce and states that its purpose is "to promote the amicable settlement of marital disputes..." It warns against taking "a step backward to the days of threats or insinuations which plagued our courts before no-fault was enacted." While no-fault may be touted as an ideal long overdue, it should not mute or outmuscle the sensitivity that is ingrained in our courts of equity.

Equity demands consideration of all factors. Such a demand is countenanced by Florida Statute 61.08(2) which permits a trial court to consider any factor to do equity and justice between the parties. If it were otherwise then the maxims engrafted in the minds of all aspiring lawyers are no longer alive. Can there be an argument concerning the relevance of adultery? The underlying issue suggesting that the trial court placed too much weight on this conduct is the gravamen of this appeal which can perhaps be artfully addressed.

To determine the relevance of misconduct in a proceeding for dissolution of marriage we must turn to the early decision of Heath v. Heath, 138 So. 796 (Fla. 1932). In that case, the court chose to consider the wife's adultery as the ground for divorce but to deny its impact on the distribution of assets. The court opined on page 797 that "because the Wife contributed her own capital and services to the acquisition and accumulation of assets she should not incur the forfeiture of any of her already vested property rights which were acquired by her while the matrimonial barque was sailing on smoother seas."

Later cases for the Third District Established other criteria for consideration of adultery which gave rise to this court's decision in Williamson, *infra*. In Escobar v. Escobar, 300 So.2d, 702 (Fla. 3rd DCA 1974) the trial court refused to consider adultery of a spouse not seeking alimony where such evidence is offered solely for the purpose of obtaining or increasing alimony for the spouse seeking it. The court used Florida Statute 61.08(1) as the basis for its decision by preferring to adopt a literal translation of the legislature's will. It failed to acknowledge that seeming conflict between 61.08(1) and the duties of a court in an equitable proceeding as described in 61.08(2). That problem was remedied by Cloughton v. Cloughton, 344 So.2d 944 (Fla. 3rd DCA 1977). There the court cited 61.08(2) permitting inquiry into all factors necessary to do equity and justice between the parties and allowed consideration of adultery of both parties in mitigation of the adultery by the spouse seeking alimony.

However, if things seem clear, they are not as the Third District in Langer v. Langer, 463 So.2d 265 (Fla. 3rd DCA 1985) has pronounced that evidence of drug use and adultery if longstanding and extensive is relevant where it impacts on alimony, custody and visitation but it is not relevant to determine whether the marriage is irretrievably broken. Basically, Florida has turned the wheel one full revolution and in doing so it has transferred fault from one which gave reason for divorce to one which gave reason for the distribution of property without regard to whether the divorce was proper or not. Can adultery allow punitive consequences? The Wife asks whether a difference exists in allowing evidence of adultery to lessen her entitlement on one hand and allowing evidence of adultery on the other to increase it? Are not both concepts punitive?

The Wife instantly refers to the dissenting opinion of Judge Barkett in the decision now being appealed wherein she states:

"I suggest that if adultery is to be considered at all in relation to needed alimony then consideration must be applied equally and the answer to the question is in the affirmative. It would seem to be an equal protection violation if a court were limited to considering adultery only when committed by a spouse requesting alimony. If, for example, a court is able to award an adulterous wife less than she needs under a theory that her adultery "caused" the breakup of the marriage and she should therefore bear the economic brunt of the resulting consequences, then a court should likewise be able to leave the adulterous husband with less than he needs under the same theory."

(A-4th DCA pg. 4).

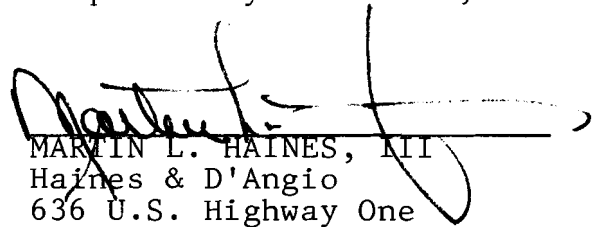
Punishment cannot be deduced from this record. The trial court correctly considered the husband's adultery and combined that

consideration with all other statutory criteria in making its award in this case. There is no evidence or fact in this record that would support the appellate court's contention that adultery was unduly considered and used in punishment of the husband. Simply, it was considered and such consideration is relevant.

SUMMARY OF ARGUMENT

It is proper for the trial court to consider the adultery of either spouse and to mesh that finding with others concerning the needs and abilities of each spouse in reaching a just and equitable resolve of an action for dissolution of marriage.

Respectfully submitted,

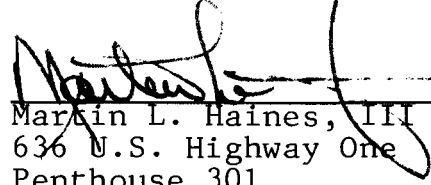


MARTIN L. HAINES, III
Haines & D'Angio
636 U.S. Highway One
Penthouse 301
North Palm Beach, Fl. 33408
(305) 863-5400
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 24th day of June, 1985 to Richard W. Glenn, Esquire, 301 N. Dixie Highway, West Palm Beach, Florida 33401.

HAINES & D'ANGIO



Martin L. Haines, III
636 U.S. Highway One
Penthouse 301
North Palm Beach, Fl. 33408
(305) 863-5400
Attorneys for Petitioner