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IN THE SUPREME COURT
STATE OF FLORIDA

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By _____
Deputy Clerk

NADINE G. NICHOLS,)
)
Appellant, Petitioner,)
)
vs.)
)
LOUIS ALLEN NICHOLS,)
)
Appellee, Respondent.)
_____)

CASE NO. 70,304
DCA-2 No. 86-2681

APPLICATION FOR DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE

NADINE G. NICHOLS (referred to as the "Wife" hereinafter) instituted the dissolution of marriage action against LOUIS A. NICHOLS ("Husband") in the Tenth Judicial Circuit Court, In And For Polk County, Florida. The Wife moved the trial court at the outset of the proceedings for an award of temporary attorney's fees pursuant to Section 61.16, Florida Statutes (1985).

The trial court subsequently entered an order denying said request.

The Wife sought review of that denial in the District Court of Appeal, Second District. On February 27, 1987, the Second District Court of Appeal rendered its opinion affirming the trial court's denial of the Wife's Request For Temporary Attorney's Fees. APPENDIX TAB 1.

On March 30, 1987, the Wife timely filed her Notice To Invoke Discretionary Jurisdiction with the District Court of Appeal, Second District.

STATEMENT OF THE FACTS

The Financial Affidavit filed by the Husband showed that his financial circumstances were substantially superior to the Wife's. However, according to the Wife's testimony at the temporary hearing, not only did her Husband's Financial Affidavit contain one asset she had known nothing about (a 3 acre lot) it failed to list other assets which she suspected the Husband owned. Further, the Wife noted that while the Husband's Financial Affidavit showed only \$1,400.00 per year in interest and dividend income, their 1984 tax return showed \$11,000.00 had been earned from those sources. Moreover, according to the testimony of an attorney who testified on the Wife's behalf as an expert, the real estate listed on the Husband's Financial Affidavit appeared to be undervalued. Thus, it appeared at the outset that the proceedings would be protracted.

At the commencement of the temporary hearing, when the Wife sought to introduce the testimony of an attorney as to what would be a reasonable initial attorney's fee, the trial judge stated:

THE COURT: I have never awarded them before, this is brand new for me. But we'll hear what he has to say.

Predictably, the trial court denied the Wife's request.

The Second District Court of Appeal affirmed the denial. Conceding that the Wife did not have "the present ability to pay substantial attorney's fees . . .," 1/ whereas the Husband did, the Court concluded that because she had not shown that she was without "the ability to be represented by counsel," no abuse of the trial court's discretion had been demonstrated.

1/

The Wife did not request "substantial" attorney's fees. The only amount suggested was by her expert, who testified that \$2,000.00 would be a reasonable initial retainer.

QUESTION PRESENTED

DOES THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICT WITH CASES WHICH HOLD THAT IT IS AN ABUSE OF THE TRIAL COURT'S DISCRETION TO DECLINE TO AWARD TEMPORARY ATTORNEY'S FEES TO A WIFE WHO DOES NOT HAVE THE PRESENT ABILITY TO PAY ATTORNEY'S FEES, WHERE THE HUSBAND DOES HAVE THAT ABILITY AS A RESULT OF A SIGNIFICANTLY SUPERIOR FINANCIAL POSITION?

SUMMARY OF ARGUMENT

Attorney fee awards in dissolution of marriage cases, whether at the outset or conclusion of the proceedings, are to assure that each party has similar financial ability to hire and compensate competent legal counsel. If one party's financial circumstances are significantly inferior to the other party's, that party should be awarded temporary fees even though the party is not completely without the ability to compensate counsel.

ARGUMENT

The decision of the District Court of Appeal, Second District, erroneously distinguishes between temporary attorney's fees and those awarded in the final judgment. The decision holds that if a wife is represented by and has some ability to compensate an attorney, she is not entitled to temporary fees even though her financial circumstances, especially her ability to adequately compensate counsel, are substantially inferior to the husband's. That decision expressly and directly conflicts not only with the spirit of §61.16, Florida Statutes (1985), but with decisions of this Court and of other district courts of appeal.

Each party to a dissolution of marriage action should have similar ability to be represented by competent counsel. Deakyne v. Deakyne, 460 So.2d 582 (Fla. 5th DCA 1984); Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Cummings v. Cummings, 330 So.2d 134 (Fla. 1976). This 'similar financial ability' should also exist at the outset of the proceedings. Kirchner v. Kirchner, 479 So.2d 157 (Fla. 3d DCA 1985). The instant decision, however, holds that the parties' relative abilities to compensate counsel are irrelevant where temporary fees are

sought.

To be entitled to attorney's fees, a wife does not have to be completely unable to compensate counsel. That is, even if she has some ability to pay her attorney, she should be awarded temporary fees where her ability to pay fees is not only inadequate in and of itself, but is substantially inferior to her husband's ability. Deakyne v. Deakyne, supra; Clark v. Clark, 20 So.2d 900 (Fla. 1945). The instant decision holds that if a wife is represented by counsel and has some ability to pay him, she is not entitled to temporary attorney's fees.

If this Court determines that it has jurisdiction, it should exercise its discretion and entertain this cause on its merits for the following reason. Although your Petitioner is unaware of a single case which holds that similar financial ability to secure counsel is unnecessary at the outset of dissolution proceedings, trial courts - at least within the Tenth Judicial Circuit - routinely deny requests for temporary attorney's fees. This is undoubtedly because virtually every decision has addressed the propriety of an attorney fee award in the final judgment. No decision of this Court or of any district court of appeal has unequivocally announced that because the dissolution of a marriage is often a bitter and protracted affair, the assurance of similar ability to engage and compensate

counsel is more important at the outset than at the conclusion of the proceedings. Indeed, the decisions in this state imply that all financial matters should be resolved in the final judgment. Therefore, this Court would fill a conspicuous void by issuing an opinion on this issue.

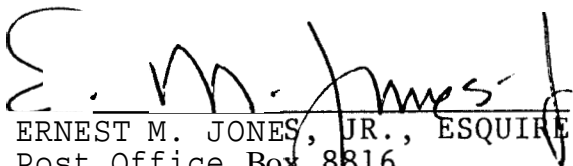
CONCLUSION

For the reasons set forth herein, it is submitted that the decision of the District Court of Appeal, Second District, is erroneous, and that the cited conflicting decisions are correct and should be approved by this Court as the controlling law of this state. More particularly, it would greatly benefit the bench and bar in dissolution of marriage proceedings if this Court would reject the rationale of the instant decision and set forth the circumstances under which temporary attorney's fees and costs should be awarded by the trial courts of this state.

Therefore, the Petitioner requests this Court to extend its discretionary jurisdiction to this cause.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular US Mail this 8th day of April, 1987, to Martin D. Schwebel, Esq., 696 East Altamonte Drive, Altamonte Springs, FL 32701.


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