IN THE SUPREME COURT OF FLORIDA

9-24

NADINE G. NICHOLS,

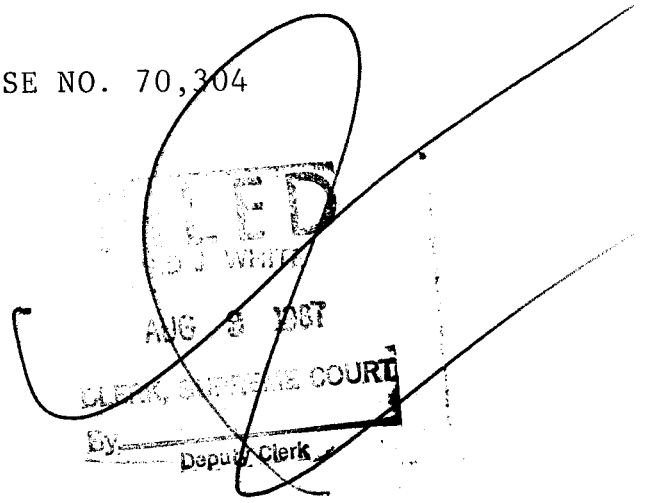
Petitioner,

vs.

LOUIS ALLEN NICHOLS,

Respondent.

CASE NO. 70,304



PETITIONER'S BRIEF ON THE MERITS

ERNEST M. JONES, JR., ESQ.
Post Office Box 8816
Lakeland, FL 33806-8816
(813) 680-1019
Attorney for Petitioner

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

This Court has accepted jurisdiction to review the decision of the Second District Court of Appeal in Nichols v. Nichols, 12 F.L.W. 649 (Fla. 2d DCA Feb. 27, 1987), which decision affirmed the trial court's denial of Petitioner's Motion For Attorney's Fees Pendente Lite.

The Petitioner will be referred to herein as the "Wife", and the Respondent as the "Husband".

Attached hereto and made a part hereof is an Appendix, which will be referred to by the symbol "A", and a copy of the original transcript of the temporary hearing in the trial court, which will be cited by the symbol "T".

STATEMENT OF THE CASE

On August 18, 1986, the Wife filed a Petition For Dissolution of Marriage in the Circuit Court in and for the Tenth Judicial Circuit of Florida. Attached to that Petition was her financial affidavit (A. 1-6). Contemporaneously therewith, the Wife also filed a Motion For Award of Attorney's Fees Pendente Lite (A. 7-9).

On or about September 5, 1986, the Husband responded to the Petition and filed a Counter-petition, to which was attached his financial affidavit (A. 10-14; 15-16).

The Wife's Motion for Award of Attorney's Fees Pendente Lite came on for a temporary hearing before the trial court on September 19, 1986 (T. 1-29).

On September 23, 1986, the trial court entered its Temporary Order and denied the Wife's request for temporary attorney's fees, suit money and costs (A. 17-18).

A timely Notice of Appeal was filed on October 16, 1986 (A. 19).

On February 27, 1987, the Second District Court of Appeal affirmed the trial court with a brief opinion (A. 20-21).

On April 2, 1987, the Wife timely filed her Notice to Invoke Discretionary Jurisdiction, and on April 9, 1987, filed her Brief on Jurisdiction. This Court accepted jurisdiction on July 8, 1987.

STATEMENT OF THE FACTS

INTRODUCTION

The facts recited herein are as they existed on the date of the temporary hearing before the trial court on September 19, 1986.

GENERAL BACKGROUND

The parties were married to one another on July 7, 1969. It was the second marriage for both parties. They separated over sixteen and a half years later, on February 15, 1986. On the date of the temporary hearing, the Wife was fifty-three and the Husband fifty-eight years of age (A. 1; T. 11, 20, 21, 24).

WIFE'S FINANCIAL CIRCUMSTANCES

The Wife had worked a total of seven and a half years throughout the duration of the parties' marriage. This was so because the Husband had desired that she stay at home and be a Wife and homemaker (T. 12). At the time of the temporary hearing, the Wife was employed as a bank teller, and had been so employed for the previous four years (T. 11-12). The Wife had no

special training or skills (T. 12).

The Wife's net monthly income was $727.00 (A. 5-6). Although the Husband, who was living in Orlando, had been paying the mortgage and utilities for the marital home, of which the Wife had exclusive use and occupancy, the Wife's monthly expenses exceeded her income by more than $100.00 (A. 5-6; T. 13, 14-15, 18-19).

The Wife had virtually no assets in her own name, and those which she did have barely exceeded her liabilities (A. 6).

HUSBAND'S FINANCIAL CIRCUMSTANCES

The Husband was employed by the state of Florida (T. 21), from which he had a gross monthly income of $1,591.23. He also had interest and dividend income of $116.16 per month. His expenses, which included his payment of the mortgage and utilities for the marital home, exceeded his net income by $866.72 per month. (A. 18-19).

The Husband had net assets in his sole name worth approximately $100,000.00 (A. 19).

The Wife testified at the temporary hearing that the parties' 1984 income tax return showed that approximately $11,000.00 had been earned in interest, dividends, and capital gains. This amounted to an additional monthly income to the

Husband of $916.67, not the $116.16 shown on his financial affidavit (T. 16). Furthermore, she was surprised to learn from the Husband's financial affidavit that he owned a three acre lot (T. 15). Similarly, she believed he had not disclosed all of his assets, including a lot in the Bahama Islands and a Swiss bank account (T. 15-16). Finally, it was suggested to the trial court that a ten acre lot in the Husband's name was undervalued on his financial affidavit (T. 4).

THE TEMPORARY HEARING

The temporary hearing was held upon the Wife's Motion For Award Of Attorney's Fees Pendente Lite (A. 7-8). At the commencement of that hearing, when the Wife called an attorney as her first witness, 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.

(T. 2). The attorney testified that an initial retainer of $2,500.00 would be appropriate in this case (T. 5). This was based upon the time the Wife's attorney had already spent on the case and the issues presented by the pleadings (T. 3-4, 7).

The trial court denied the request for temporary attorney's fees. However, he did order the Husband to convey to the Wife his interest in a jointly owned automobile value at

approximately $5,300.00. The trial court further ordered the Husband to continue making the mortgage and utility payments for the marital home (A. 17-18).

THE SECOND DISTRICT COURT'S RULING

The Second District Court of Appeal affirmed. Although acknowledging that the Wife did not have "the present ability to pay substantial attorney's fees and that the Husband does not have that ability," 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.

ISSUE PRESENTED

IS A SPOUSE WHO HAS MINIMAL INCOME AND ASSETS AND WHOSE FINANCIAL CIRCUMSTANCES ARE SUBSTANTIALLY INFERIOR TO THE OTHER SPOUSE REQUIRED TO SHOW A COMPLETE INABILITY TO BE REPRESENTED BY COUNSEL IN ORDER TO BE ENTITLED TO TEMPORARY ATTORNEY'S FEES UNDER SECTION 61.16, FLORIDA STATUTES (1985)?

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal has made a distinction between requests for temporary attorney's fees and fees awarded in final judgments of dissolution of marriage. In the latter case, some ability to pay fees will not defeat entitlement to fees, whereas in the former case it will.

This distinction is contrary to the letter and spirit of Section 61.16, Florida Statutes (1985). That provision authorizes awards of attorney's fees at any stage of the proceedings in light of the parties' financial resources.

The overwhelming majority of cases have held that the purpose of Section 61.16 is to prevent a wealthy spouse from gaining an advantage over a less wealthy or impecunious spouse. To achieve that purpose, the courts have been consistent in inquiring into the parties' relative financial abilities to compensate counsel and seeking to ensure that the parties have similar abilities by an award of attorney's fees. Consequently, even if a party has some ability to compensate counsel, that party will nonetheless be entitled to attorney's fees if his or her financial circumstances are substantially inferior to the other party's.

No basis exists in the case law for a different

approach where temporary fees are sought. Indeed, the few cases involving interlocutory appeals from awards of temporary attorney's fees have suggested that the parties' relative financial circumstances is the underlying inquiry. This focus is especially important where temporary fees are requested, for it is at the outset of dissolution proceedings that the need *to* engage and compensate counsel is most acute.

The decision of the Second District Court not only undermines the intent and spirit of Section 61.16, it also inhibits attorneys from agreeing to even temporarily finance a spouse's divorce. This is so because "some ability" to compensate counsel may not only be inadequate in and of itself, but may also be substantially inadequate in light of the other spouse's financial resources. Yet, "some ability", according to the Second District Court, is enough in and of itself to warrant a denial of temporary attorney's fees.

ARGUMENT

The Second District Court has clearly drawn a distinction between temporary attorney's fees and those awarded in the final judgment. In Smith v. Smith, 495 So.2d 229 (Fla. 2d DCA 1986), which was an appeal from a final judgment, the court correctly stated that a spouse need not be "completely unable to pay attorney's fees in order for the other to be required to pay them, . . ." 495 So.2d at 230. Here, however, the basis for the court's decision is its conclusion that where temporary attorney's fees are requested, the only relevant consideration is whether the requesting spouse has some ability to compensate counsel, not whether the other spouse enjoys a substantially superior financial position.

Such a distinction is not required by Section 61.16, Florida Statutes (1971), which provides in pertinent part:

> Attorney's fees. suit money, and costs. - The court may from time to time, after consideration of the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, . . .

(Emphasis supplied.) On its face, therefore, Section 61.16 requires consideration of the parties' relative financial circumstances at any stage of any proceeding under Chapter 61. There is no suggestion whatsoever within the four corners of that

provision that the parties' relative financial positions are unimportant at the commencement of a dissolution of marriage proceeding where temporary attorney's fees are requested.

The underlying intent of Section 61.16 is to prevent a spouse such as the Wife in this case from being disadvantaged by reason of the other spouse's superior financial position. A sense of fair play permeates Section 61.16, the goal of which is to insure that both parties have similar ability to engage and compensate competent legal counsel. Levy v. Levy, 483 So.2d 455 (Fla. 3d DCA 1986); Linn v. Linn, 464 So.2d 614 (Fla. 4th DCA 1985); Bryan v. Bryan, 442 So.2d 362 (Fla. 1st DCA 1983); Patterson v. Patterson, 399 So.2d 73 (Fla. 5th DCA 1981); Fried v. Fried, 390 So.2d 392 (Fla. 2d DCA 1980); Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

The requirement that the parties have similar financial resources with which to hire counsel necessarily requires consideration of their relative financial circumstances. Thus, where the parties are on equal financial footing, temporary fees will obviously be unwarranted. See, e.g., Mandy v. Williams, 492 So.2d 759 (Fla. 4th DCA 1986). Conversely, if the requesting spouse, as here, has little or no income or assets, temporary fees must be awarded, even though the other spouse may not possess substantial means. See, E.g., Henning v. Henning, 507 So.2d 164 (Fla. 3d DCA 1987); Deakyne v. Deakyne, 460 So.2d 582

(Fla. 5th DCA 1984); Hirst v. Hirst, 452 So.2d 1083 (Fla. 4th DCA 1984); Locke v. Locke, 413 So.2d 431 (Fla. 3d DCA 1982). Indeed, it is a clear abuse of discretion to fail to award fees under such circumstances as existed here. Mandy v. Williams, supra; Johns v. Johns, 423 So.2d 443 (Fla. 4th DCA 1982).

The emphasis upon the parties' relative financial circumstances is even more dramatically illustrated, however, where the requesting spouse has income and assets from which to pay an attorney. In Heller v. Kuvin, 490 So.2d 245 (Fla. 3d DCA 1986), for example, the Wife earned $21,000.00 per year and had net assets valued at $135,000.00. The Husband had similar assets. The Wife was nonetheless entitled to fees because the Husband had a significantly higher income. See also, Hudgens v. Hudgens, 411 So.2d 354 (Fla. 2d DCA 1982); Cuevas v. Cuevas, 381 So.2d 731 (Fla. 3d DCA 1980). Thus, contrary to the Court's decision in this case, the requesting spouse does not need to be completely unable to hire an attorney in order to be entitled to attorney's fees from the other spouse. Canakaris v. Canakaris, supra. See also, Smith v. Smith, 495 So.2d 229 (Fla. 2d DCA 1986); Bryan v. Bryan, supra; Patterson v. Patterson, supra. Rather, consistent with the spirit and purpose of Section 61.16, the spouse's entitlement to fees depends upon whether or not his or her financial position is substantially inferior to the other spouse's. Here, as noted by the Second District Court in its

opinion, the Wife's position was substantially inferior.

There is no authority in the case law justifying a different interpretation of Section 61.16 where temporary attorney's fees are sought. In Kirchner v. Kirchner, 479 So.2d 157 (Fla. 3d DCA 1985), for example, an award of $9,000.00 in temporary attorney's fees, suit money and costs was affirmed in light of the parties' relative financial circumstances. Significantly, all the cases cited in support of that affirmance had been appeals from final judgments. Clearly, therefore, the Third District Court of Appeal makes no distinction between fees awarded at the outset and those awarded at the conclusion of dissolution proceedings. Nor, for that matter, has the Second Discrict Court in other cases. In Littlejohn v. Littlejohn, 495 So.2d 271 (Fla. 2d DCA 1986), the Court reversed a trial court's denial of temporary relief, including attorney's fees, because it had failed, inter alia, to consider the parties' financial circumstances. It should have done so in this case in light of the Wife's inability, both in and of itself and relative to the Husband's ability, to pay her attorney.1/

1/ This Court will note the dearth of cases dealing with temporary relief of any sort. This is undoubtedly a consequence of the financial circumstances which compelled a spouse to seek temporary relief to begin, as well as the time-consuming appellate process. A spouse who cannot finance her divorce in the trial court, can hardly finance an interlocutory appeal. Moreover, any attorney who may have agreed to finance the divorce, certainly did not include an interlocutory appeal.

In reality, the financial needs of an impecunious spouse are more pressing at or shortly after the commencement of dissolution proceedings than at their conclusion, where the trial court's alimony awards and property distribution often place the parties on similar economic footing. Ariko v. Ariko, 475 So.2d 1352 (Fla. 5th DCA 1985); Cortina v. Cortina, 461 So.2d 964 (Fla. 3d DCA 1984). It is at the outset of the proceedings that a spouse must engage an attorney. It goes without saying that the spouse must also pay the attorney, for few attorneys are willing to undertake representation without a retainer and an agreement for regular payments toward fees thereafter, especially where it is apparent that substantial factual and legal issues will be involved. In view of that reality - which Section 61.16 obviously recognizes - it would seem that a trial court must be especially vigilant to insure at the outset of the proceedings that both parties have similar ability to engage the attorney of his or her choice, for only then can the issues be appropriately addressed and resolved in an arena where the combatants are similarly equipped. To permit a spouse to enter the arena without resources comparable to his or her adversary is to give the advantage to the wealthier spouse, which is precisely what Section 61.16 is intended to avoid.

The decision of the the Second District Court of Appeal in this case should be quashed. Because it disregarded the

Husband's superior financial position and found that the clearly impecunious Wife had not shown an inability to be represented by counsel, the court has unmistakably communicated that spouses in the Wife's position must appear pro se in order to be entitled to temporary attorney's fees and costs. This is so because the Wife was represented by counsel when she made her request, and that representation, regardless of whether the Wife had the ability to pay her attorney, was obviously fatal to her request for temporary attorney's fees. The Court's decision will have profound results upon the ability of spouses with minimal income and no assets to engage an attorney. While some attorneys may have been inclined to initially undertake representation of such a spouse without compensation, the decision of the Second District Court in this case will discourage even that minimal generosity. This is so because there is now little hope of a spouse receiving temporary attorney's fees if she cannot show no ability to be represented by counsel. Yet, by being represented by counsel, the spouse cannot show that inability.

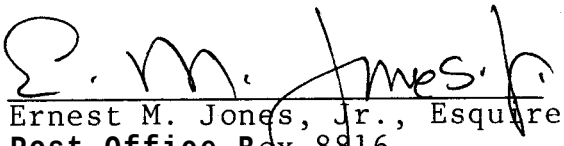
CONCLUDING STATEMENT

After this court accepted jurisdiction on July 8, 1987, the parties amicably resolved this matter and agreed to entry of a Final Judgment incorporating that resolution. On July 16, 1987, the trial court entered a Final Judgment Of Dissolution Of Marriage, although the trial court undoubtedly had no jurisdiction to do so. See, Rule 9.600, Florida Rules of Appellate Procedure. However, although this case might be moot, the issue presented to this Court is not. Consequently, this Court is respectfully urged to continue its jurisdiction and to rule on the merits of the issue presented. It is an issue which your undersigned believes is of great significance to the matrimonial bench and bar. Furthermore, it is not an issue which this Court has ever addressed, undoubtedly because of the time-consuming appeal and review process. Few parties to dissolution proceedings desire to have those proceedings suspended while a temporary order is under appeal. As a result, the overwhelming majority of cases, if not all cases, are resolved and the appeals dismissed before the appellate court has had an opportunity to rule on the merits.

This Court should issue an opinion on the issue presented and conclude that the opinion of the Second District Court Of Appeal is contrary to the spirit and intent of Section

61.16, Florida Statutes (1985), and to the various cases cited herein.

Respectfully submitted,



Ernest M. Jones, Jr., Esquire
Post Office Box 8816
Lakeland, FL 33806-8816
(813) 680-1019

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular US Mail this 30th day of July, 1987, to Martin D. Schwebel, Esquire, 696 E. Altamonte Drive, Altamonte Springs, FL 32701.

ERNEST M. JONES, JR., ESQUIRE
Post Office Box 8816
Lakeland, FL 33806-8816
(813) 680-1019