

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 71,579

DAVID J. WEISFELD, *

Petitioner, *

and *

PAULINE S. WEISFELD, *

Respondent. *

_____ *

FILED
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PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The parties will be referred to as they stand in this Court; and, as "Husband" and "Wife."

The trial transcript is referred to as "TR" and the appendix is referred to as "App."

Emphasis has been supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The marriage of PAULINE S. WEISFELD and DAVID J. WEISFELD was dissolved by the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida on June 16, 1986 (App. 1-7). The Wife was awarded rehabilitative alimony in the sum of One Hundred Dollars (\$100.00) weekly for a period of two years from the date of the Final Judgment.

The Husband has been paralyzed since May of 1980 (TR. 60-61, 227); had gall bladder surgery and a heart attack in 1982 (TR. 100, 213-345); was under the care of a psychiatrist; and, is incontinent of urine and feces (TR. 211-213, 210, 218).

The trial Court, " . . . In an attempt to balance the equities, the Court recognizes[d] that the Husband has specially adapted this home to fit his needs¹ and maintains same as an office" (App. 5-6), the Husband was awarded exclusive possession of the marital home subject to his " . . . death, remarriage or cohabitation² with a female" (App. 6).

Certificates of deposit titled in the Husband's name and derived as a result of his personal injuries were retained by him (a sum approximating One Hundred Fifty Thousand Dollars

¹The Husband is paralyzed, confined to a wheelchair and has a small private practice in the field of clinical psychology, which he conducts in his home.

²The Husband's Cross-Appeal on this point was held to be moot; and, Wife's counsel conceded error in connection with the inclusion of cohabitation as a basis for termination of the Husband's exclusive possession of the marital home (See footnote three of the opinion of the Court below, App. 14).

(\$150,000.00)). The Husband received "...two lump sum medical payments," (TR 61 and App.16) totalling One Hundred Thousand Dollars (\$100,000.00). An additional Fifty Thousand Dollars (\$50,000.00) "...was paid out..." (ibid). The monies received by the Husband were awarded to him "...By Dade County for medical expenses, current and future (TR 72; App. 17)." The trial Court stated:

"G. The Court awards sole title and entitlement to all bonds and Certificates of Deposit to the Husband. It is the finding of the Court that these monies were derived as the result of the injuries the Husband sustained and cannot, by any sketch[sic] of the imagination, be considered marital assets, but belong to the Husband alone."

The Wife appealed to the District Court of Appeal of Florida, Third District, and on September 8, 1987, the trial Court's decision was reversed (App. 8-15).

The Appellate Court reversed, holding that " . . . this appears to be a case of first impression³ in Florida . . . " (App. 9); and, after reviewing the various approaches to the issue, from jurisdictions around the Country, remanded the case to the trial Court to establish in accordance with the "analytical approach," what portion of the Husband's personal injury

³The Third District also noted "our supreme court has not considered this question and consequently has not adopted either the so called mechanistic or analytical approach" (App. 12).

would be subject to equitable distribution.

While the trial Court permitted the Husband to retain the monies awarded to him as a result of his injuries, the Court below reversed that award and remanded this cause to the trial Court with directions to determine what portion of the award constitutes marital property, subject to equitable distribution (App. 8-15).

This Court granted certiorari on April 28, 1988; and, Oral Argument is scheduled for August 31, 1988.

SUMMARY OF ARGUMENT

The Petitioner was awarded One Hundred Fifty Thousand Dollars (\$150,000.00) as a worker's compensation recovery and strenuously urges the Court to allow him to keep those funds for his personal welfare, medical expenses and health care. Those funds are not subject to equitable distribution.

The Petitioner was also awarded exclusive use of a marital residence which was modified for his special needs. He is entitled to exclusive use subject to his death or remarriage.

ARGUMENT

POINT I

THE HUSBAND'S WORKER'S COMPENSATION AWARD IS NOT SUBJECT TO EQUITABLE DISTRIBUTION; AND, THE FINAL JUDGMENT RENDERED AT THE TRIAL LEVEL SHOULD BE REINSTATED.

The monies⁴ received by the Husband as a worker's compensation award are not a marital asset subject to equitable distribution. In holding that a disability pension is not a marital asset⁵, Judge Upchurch, writing for the Fifth District Court of Appeal, in *Freeman v. Freeman*, 468 So.2d 326 (Fla. App. 5th District April 11, 1985), stated:

"Such a pension is designed to compensate an employee for lost earnings and injuries (including pain and suffering) sustained on the job" (See *Freeman v. Freeman, Supra*, at page 328).

The Petitioner believes it to be significant that no portion of the worker's compensation award received by him was attributable to loss of consortium or in any way allocated to any loss of the Wife.

⁴A relative pittance, based upon the catastrophic nature of his injury and disability.

⁵The Court held that the disability pension could be considered in determining spousal or child support.

While the Court below set forth a lengthy analysis and summary of holdings reached in other jurisdictions, the Husband urges this Court and is of the opinion, that each case must be determined based upon its own peculiar facts as suggested in the *Florida Bar Journal* titled "Distribution of Personal Injury Awards Upon Divorce" by Marsha B. Elser and Jared G. Anton (16 Fla. Bar Journal 6, June, 1982). As set forth in the article, the factors to be considered include:

"(1) Any allocation set forth in the jury verdict making the personal injury award.

(2) The proximity in time of the dissolution action from the accrual of the personal injury cause of action.

(3) The severity of the injury and the permanence of any physical handicap.

(4) Whether the injury sustained affected the duration of the marriage.

(5) The effect of the injury on the conduct of the parties.

(6) Any other factors which should be considered to bring about an equitable result.

Equity, we believe, is better served by the discretion of the trial judge than by any hard and fast rule such as those suggested by some of our sister states (ibid, at Page 557)."

Based upon the monumental medical and related health expenses faced by Petitioner for the rest of his life, it is ludicrous and an exercise in judicial futility to remand this cause to the trial Court for a determination as to how the Wife is to share in a fund (probably nonexistent at this point) insufficient to begin to provide for Petitioner's needs.

For all of the reasons stated, the discretion exercised by the trial Court should prevail; and, its Final Judgment reinstated.

Finally, the record in this cause shows unequivocally, that the monies received by the Husband were for "current and future medical expenses" (TR. 72; App. 17).

POINT II

THE TRIAL COURT PROPERLY EXERCISED ITS
DESCRETION IN AWARDING TO THE HUSBAND,
EXCLUSIVE POSSESSION OF THE MARITAL
RESIDENCE.

The marital residence has been customized to accomodate the Husband's catastrophic injury. An addition to the home serves as a waiting room for patients; contains an outside ramp; and has a separate doorway; large bathroom; and, whirlpool tub (TR. 101-102).

It is interesting that while the Court below found error in the award of exclusive use to the Husband, it concluded in footnote four of its opinion (App. 14):

"This opinion is in no way intended to hold or imply that the trial court may not, on remand, fashion the awards so that Mr. Welsfeld may continue to reside in the parties' marital home. On the contrary, we recognize that such an outcome would be equitable under the circumstances of this case."

Again, the trial Court is apparently directed by the Appellate Court to accomplish what appears to be an impossible task (i.e. allow the Husband to remain in the marital residence while finding some ingenious method of compensating the Wife for her equity).

Under the circumstances of this case, both parties are in the unfortunate position of having to deal with the tragedy

which has befallen the Husband. However, it is the Husband who requires the use of a residence which has been altered to accommodate his physical and professional needs. At this stage it appears obvious that this residence is a necessity for his survival.

In *Duncan v. Duncan*, 379 So.2d 949 (Fla. 1980), this Court held:

"Exclusive Possession of Property

[4,5] The award of exclusive possession of property subject to disposition in a dissolution proceeding should either be directly connected to the obligation to pay support or be temporarily necessary to prevent reduction in the value of the subject property. The critical question is whether the award is equitable and just given the nature of the case. A grant of exclusive possession of property to one of the parties in a final judgment must serve a special purpose. See, e.g., *McDonald v. McDonald*, 368 So.2d 1283 (Fla. 1979) (a form of rehabilitative alimony for a spouse demonstrating a need); *George v. George*, 360 So.2d 1107 (Fla. 3d DCA 1978) (aid to a child who had reached majority but who had a debilitating muscular disorder); *Lange v. Lange*, 357 So.2d 1035 (Fla. 4th DCA 1978) (aid to a spouse with mental problems); and *Richardson v. Richardson*, 315 So.2d 513 (Fla. 4th DCA 1975) (aid to a spouse with custody of minors). In each of these instances, the exclusive possession is actually a facet of support and is clearly warranted because of the equity of the cause. We can foresee the need to grant temporary exclusive possession of a family business in order to ensure income for support and to avoid an immediate substantial reduction in value.

[6] We reject the asserted inflexible rule that an award of exclusive possession of property must be limited to the home,

that it benefit only a spouse with minor children, and that it must terminate when all children born of the marriage have attained the age of majority. *McDonald v. McDonald*. In so holding, we disapprove *Church v. Church*, 338 So.2d 544 (Fla. 3d DCA 1976); *Watson v. Watson*, 324 So.2d 126 (Fla. 3d DCA 1975); *Ranes v. Raney*; and *Saviteer v. McAdoo*.

[7] An award of exclusive use of property must be determined by the equity of the cause and should be for a specific period. It is always the subject to modification whenever there is a change of circumstances."

Significantly, the teachings of Duncan are:

1. The prior inflexible rule limiting exclusive use awards to spouses with minor children is rejected;
2. An award of exclusive use of property must be determined by the equity of the cause;
3. The critical question is whether the award is equitable and just or given the nature of the case.

Based upon the mandate of the Court below, the Husband would be required to undertake the mechanics of seeking support from the Wife by amending his pleadings on remand. Such a costly and time consuming procedure is unproductive in the face of the overwhelming need and justification for the exclusive use award, presented by the compelling circumstances involved in this case. The necessity and justification for the exclusive use award does not appear to be in dispute.

CONCLUSION

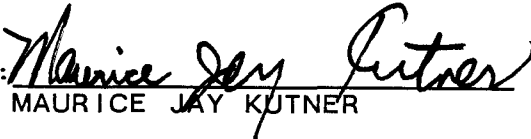
For all the reasons stated, the Court is requested to reinstate the Final Judgment entered by the trial Court; and, to remand this cause with directions to:

1. Amend the Final Judgment of Dissolution of Marriage by striking the award for attorney's fees (conceded as error); and,
2. Striking cohabitation as a contingency resulting in termination of the Husband's exclusive use of the marital home.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief on the Merits was mailed to KENNETH A. FRIEDMAN, ESQUIRE, Law Offices of Baldwin & Friedman, 2020 N.E. 163rd Street - Suite 300, North Miami Beach, Florida 33162, on this 23rd day of May, 1988.

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