

IN THE SUPREME COURT
STATE OF FLORIDA

no soA

CASE NO. 71,579

DAVID J. WEISFELD, *
Petitioner, *
and *
PAULINE S. WEISFELD, *
Respondent. *

DEC 20 1981
Clerk
By *M*
Clerk

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The parties will be referred to as they stand in this Court, as they stood in the Appellate Court and as they stood in the trial Court, as "Husband" and "Wife." The Appendix will be 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 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 (\$150,000.00)). 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

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

²The Husband's Cross-Appeal on this point was held to be moot, albeit that the Wife's counsel conceded error in the placing of this restriction on the Husband's exclusive possession award.

finding of the Court that these monies were derived as the result of the injuries the Husband sustained and cannot, by any stretch[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 the findings and Order of the trial Court holding that ". . . this appears to be a case of first impression³ in Florida . . ." (App. 2); and, after reviewing the various approaches to the issue, from jurisdictions around the Country, held that the case would be remanded to the trial Court to establish in accordance with the "analytical approach," what portion of the Husband's personal injury award would be subject to equitable distribution.

The Husband filed his Motion for Rehearing (App. 16-18); a Motion for Rehearing En Banc (App. 19); and, Notice of Reliance on Supplemental Authority (App. 20-21).

The Husband's Motion for Rehearing was denied on November 9, 1987, (App. 22) and the Notice to Invoke Discretion of Jurisdiction was filed on December 8, 1987 (App. 23-32).

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).

POINT I

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER OR NOT PROCEEDS RECOVERED IN CONNECTION WITH PERSONAL INJURIES ARE SUBJECT TO EQUITABLE DISTRIBUTION IN A DISSOLUTION OF MARRIAGE PROCEEDING.

Following a lengthy analysis of the law of numerous sister jurisdictions and after noting that THIS COURT has not addressed the issue, the Court below held that funds received by the Husband for medical payments and other costs, derived from a workman's compensation award are subject to equitable distribution in a dissolution of marriage proceeding (App. 2).

In Freeman v. Freeman, 468 So.2d 326 (Fla. App. 5th District, April 11, 1985). The Fifth District addressed the issue ^For whether the Husband's disability pension was a marital asset subject to equitable distribution. The Freeman Court, Supra noted that no Florida cases were found directly on point and then concluded:

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

A copy of the opinion of the Fifth District Court of Appeals in Freeman, Supra, is attached (App. 33-35).

Clearly, the law of the State of Florida is unclear and the result in the instant case conflicts with the result reached in Freeman, Supra.

Equally as important, this specific question is of great public importance and interest and should be resolved by the Supreme Court⁴.

⁴Matrimonial lawyers are already citing the instant case for the proposition that proceeds recovered in a personal injury case are subject to equitable distribution.

POINT II

THE DECISION OF THE COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEALS AND THE SUPREME COURT ON THE AUTHORITY OF THE TRIAL COURT TO AWARD EXCLUSIVE USE OF THE MARITAL RESIDENCE TO A SPOUSE IN A DISSOLUTION OF MARRIAGE PROCEEDING.

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."

The Court below has erroneously concluded that an award of exclusive use of a former marital residence to a spouse, in a dissolution of marriage proceeding must always be connected to a "support obligation" (App. 13-15). The Duncan case Supra does not set forth an ironclad mandate requiring a support obligation as a predicate to an award for exclusive use. The plain language of the case, the meaning of the case and more important, the general philosophy of inflexible rules have now been abandoned in the State of Florida and in the final analysis, "An award of exclusive use of property must be determined by the equity of the cause and should be for a specific period." (Duncan, Supra, at page 952). A copy of Duncan, Supra is attached (App. 36-40).

Significantly, this Court stated that:

"The critical question is whether the award is equitable and just given the nature of the case⁵" (Duncan, Supra at page 952; App. 36-40).

In Miller v. Miller, 513 So.2d 199 (Fla. App. 1st DCA 1987), the Court stated:

In the present case the record fails to demonstrate that the award of exclusive possession of the marital home served as special purpose or (Miller, Supra at page 99)." (App. 41-42)

The "or" language is significant and in and of itself, creates a conflict. In addition, the decision of the Court below conflicts with the plain meaning and intent of Duncan, Supra.

For the reasons stated, this Court should grant certiorari and resolve the substantive issues presented by the conflicts of decisions.

⁵The trial Court and the Appellate Court recognized the overwhelming justification, equity and need of this paralyzed Husband to continue to reside in the specially designed and renovated former marital residence.


CONCLUSION

For all the reasons stated, the Court should grant certiorari, and assume jurisdiction of this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Brief on Jurisdiction 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 17th day of December, 1987.

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By: 
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/da

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CASE NO. 71,579

DAVID J. WEISFELD,)
)
 Petitioner,)
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 and)
)
 PAULINE S. WEISFELD,)
)
 Respondent.)
_____)

FILED

SID J. WHITE

JAN 11 1988

CLERK, SUPREME COURT

By _____
Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Petitioner, David Weisfeld, will be referred to herein as "Husband", "Petitioner" or "Mr. Weisfeld"s. The Respondent, Pauline Weisfeld will be referred to herein as "Wife", "Respondent", or "Mrs. Weisfeld". The Appendix to Petitioner's Brief on Jurisdiction will be referred to as "App." followed by appropriate page number citations; and the transcript of the trial proceedings will be referred to as "T." followed by appropriate page number citations. All emphasis herein has been supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent generally accepts the Petitioner's statement of the case and facts subject to the following additions and corrections.

In his statement of the case and facts, the Petitioner refers to his recovery of \$150,000.00 for "...his personal injuries". In fact, the monies received by Mr. Weisfeld represented a lump sum payment from Workers' Compensation. The record below demonstrated that these funds were payable \$100,000.00 in a lump sum followed by five annual installments of \$10,000.00 each, and that the initial lump sum amount was invested in various bank certificates in the joint names of the parties (T. 61-63, 65, 89-90). The initial lump sum amount was paid to Mr. Weisfeld approximately two years prior to Mrs. Weisfeld's filing of her Petition for Dissolution of Marriage.

POINT I

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER A WORKERS' COMPENSATION AWARD IS MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION IN A DISSOLUTION OF MARRIAGE PROCEEDING

The Petitioner contends that this Court has jurisdiction to review the decision of the District Court of Appeal because it expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Freeman v. Freeman, 468 So.2d 326 (Fla. App. 5 DCA, 1985). The Respondent contends that the decision below is not in conflict with the Freeman decision because the two cases involve distinctly different issues and the rule announced by the Third District Court of Appeal in the instant case is in harmony with the Freeman decision.

In the instant case, the District Court of Appeal determined that a Workers' Compensation award received by Mr. Weisfeld during the marriage of the parties was marital property subject to equitable distribution. In Freeman, supra, the Fifth District Court of Appeal determined that a private disability pension received by the husband as a consequence of injuries received in his

employment was not marital property subject to equitable distribution upon dissolution of the marriage.

In Freeman, supra, the trial court awarded the wife an interest in the husband's private disability pension as an equitable distribution of the assets of the parties. In reversing, the Freeman court noted that the disability pension at issue "...is designed to compensate an employee for lost earnings and injuries (including pain and suffering) sustained on the job." 468 So.2d at 328.

In the instant case, the Third District Court of Appeal determined that Workers' Compensation awards may be considered marital property to the extent that they are intended to compensate for lost wages, lost earning capacity, and medical expenses, all of which may properly be considered as marital assets or marital liabilities. Accordingly, the court contemplated that, on new trial, the trial court would determine the specific purposes of Mr. Weisfeld's award and then determine whether any of those elements were marital property.

Workers' Compensation awards pursuant to Florida's Workers' Compensation Act, Fla. Stat. Sec. 440.01, et seq., are intended to compensate an employee for the loss of his wage earning capacity and medical expenses

due to employment-related injuries without regard to fault, and do not include any compensation for pain and suffering. Pursuant to the opinion rendered below, compensation for pain and suffering would not be marital property subject to equitable distribution regardless of whether the award was for personal injuries from a tortfeasor or was from Workers' Compensation.

In Freeman, supra, any compensation for pain and suffering was likewise determined to be the separate property of the injured spouse. Thus, there is no conflict between the decision below and the Freeman decision. Since Freeman involved a private disability pension, not a Worker's Compensation award, the issues considered by the two courts are distinct. Accordingly, the decision below does not expressly and directly conflict with Freeman, supra.

While it may be true, as the Petitioner notes in his brief, that the decision below is being cited in other cases involving recovery for personal injuries, the citation of a case is hardly a reason for this court to exercise its discretionary jurisdiction. The decision below does not conflict with Freeman, supra, and the law of this state is not unclear. Accordingly, this Court should refuse to exercise its discretionary jurisdiction.

POINT II

THE DECISION OF THE COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR ANY OTHER DISTRICT COURT OF APPEAL WITH RESPECT TO THE AWARD OF EXCLUSIVE POSSESSION OF THE MARITAL HOME

The Petitioner contends that the decision below expressly and directly conflicts with the decision in Duncan v. Duncan, 379 So.2d 949 (Fla. 1980). The Respondent asserts that the decision below does not conflict with Duncan, or any other decision of any Florida Appellate Court.

In reversing the award of exclusive possession of the marital home to Mr. Weisfeld, the court below specifically considered the Duncan, supra, decision and noted:

"Although the special purpose requirement is obviously satisfied in the instant case, the award of exclusive possession of the parties' marital home to Mr. Weisfeld is not directly connected to any support obligation."

(App. 13)

In urging conflict, the Petitioner has focused on the requirement that an award of exclusive possession of property must serve a special purpose. However, Mr. Weisfeld has ignored the clear language of Duncan, supra, requiring a direct connection to a support

obligation. As the court below noted, the special purpose requirement must be directly connected with the support obligation, and where, as here, there is no support obligation, there can be no valid award of exclusive possession of joint property.

Mr. Weisfeld's citation to Miller v. Miller, 513 So.2d 199 (Fla. App. 1 DCA, 1987) does not demonstrate any conflict of decisions, since the Miller court simply held that the record did not demonstrate that the exclusive possession awarded to the wife in that case served any special purpose or that the award was either equitable or just. Contrary to Mr. Weisfeld's argument in his brief, the "or" language in Miller, does not create any conflict, since it is essentially the same language employed in Duncan, supra, and by the court below.

The opinion of the court below (App. 13-14) makes it quite clear that the trial court's exclusive possession award to Mr. Weisfeld was reversed because of the demonstrated lack of a support obligation, even though the special purpose was obvious. In so ruling, the court below followed the dictates of Duncan, supra, and did not depart from them, or draw an inflexible rule of law in balancing the rights of both parties to the marital home.

Since the decision below does not expressly and directly conflict with Duncan, supra, or Miller, supra, this Court should refuse to exercise its constitutional discretionary jurisdiction.

CONCLUSION

The decision below does not expressly and directly conflict with Freeman, supra, because the instant case involved a Workers' Compensation award which is distinct from the private disability pension considered in Freeman. Both Freeman and the decision below reach the same essential conclusion that compensation for pain and suffering is not marital property subject to equitable distribution, and there is no confusion or disharmony in the decisions which rises to the level required to invoke this Court's constitutional discretionary jurisdiction.

The decision below does not in any way conflict with Duncan, supra, or Miller, supra, since the record below demonstrated without question that the award of exclusive possession of the marital home was not directly connected with any support obligation. The opinion rendered by the court below clearly follows the opinion of this Court in Duncan, supra, and thus, it is not possible to determine that the decision below expressly and directly conflicts with Duncan.

For the foregoing reasons and authorities, this Court should refuse to exercise its discretionary

jurisdiction to review the decision of the Third
District Court of Appeal.

RESPECTFULLY SUBMITTED,

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By *Kenneth A. Friedman*
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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the Respondent's Brief on Jurisdiction has been mailed to Maurice J. Kutner, Esq., of Maurice J. Kutner, P.A. at 28 West Flagler Street, 12th Floor, Roberts Building, Miami, Florida 33130-1801, on this 7 day of January, 1988.

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