

OA 8-21-88

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 71,579

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

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SID J. WHITE

JUL 11 1988

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PETITIONER'S REPLY 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 Petitioner relies on his Statement of the Case and Facts in his Initial Brief on the Merits.

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 Petitioner's argument that no portion of the worker's compensation award in this cause was attributable to any claim of the Wife for loss of consortium or any other possible claim attributable to the Petitioner.

As previously pointed out, the facts of this case warrant all of the proceeds going to the Petitioner-Husband and there is no basis upon which Respondent has any claim to the funds he received.

The Respondent's reliance upon Antonini v. Antonini, 473 So.2d 739 (Fla. App. 1st DCA, 1985), is misplaced. In that case, the funds were commingled with other funds whereas there was no commingling in the instance case. Moreover, the Petitioner always maintained control of the funds in the case at bar.

For all the reasons stated, the Petitioner should received as a result of his recovery in the worker's compensation case.

POINT II

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

This Court has consistently rejected inflexible rules in
dissolution of marriage proceedings; and, the Petitioner is
entitled to exclusive use of the marital residence based upon the
peculiar facts and circumstances of this case Duncan v. Duncan,
379 So.2d 949 (Fla. 1980).

Accordingly, the Petitioner should retain exclusive use
of the former marital residence.

CONCLUSION

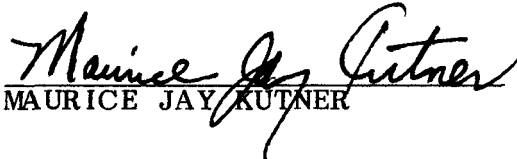
For all the reasons stated, the Court is requested to reinstate the Final Judgment entered by the trial Court; and, to remand this cause with directions to:

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 Reply 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 7th day of July, 1988.

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