DA 8-30-88

IN THE SUPREME COURT OF FLORIDA

GOLDIE SOBELMAN,

Petitioner,

vs.

ALAN SOBELMAN,

Respondent.
_____/

Case No. 71,683
Second District Court of
Appeal Case No. 86-3072

BRIEF OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, FLORIDA CHAPTER AS AMICUS CURIAE

Appeal from the District Court of Appeal
for the Second District of Florida

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ISSUE

THE UTILIZATION OF SECTION 61.08(3) OF THE FLORIDA STATUTES WHICH PROVIDES THAT TO THE EXTENT NECESSARY TO PROTECT AN ALIMONY AWARD, THE COURT MAY ORDER ANY PARTY WHO IS ORDERED TO PAY ALIMONY TO PURCHASE OR MAINTAIN A LIFE INSURANCE POLICY OR A BOND, OR TO OTHERWISE SECURE SUCH ALIMONY AWARD WITH ANY OTHER ASSETS WHICH MAY BE SUITABLE FOR THAT PURPOSE, SHOULD NOT BE LIMITED TO THE PURPOSE OF SECURING LUMP SUM ALIMONY OR ARREARAGES ACCRUED IN PERIODIC SUPPORT.

ARGUMENT

THE UTILIZATION OF SECTION 61.08(3) OF THE FLORIDA STATUTES WHICH PROVIDES THAT TO THE EXTENT NECESSARY TO PROTECT AN ALIMONY AWARD, THE COURT MAY ORDER ANY PARTY WHO IS ORDERED TO PAY ALIMONY TO PURCHASE OR MAINTAIN A LIFE INSURANCE POLICY OR A BOND, OR TO OTHERWISE SECURE SUCH ALIMONY AWARD WITH ANY OTHER ASSETS WHICH MAY BE SUITABLE FOR THAT PURPOSE, SHOULD NOT BE LIMITED TO THE PURPOSE OF SECURING LUMP SUM ALIMONY OR ARREARAGES ACCRUED IN PERIODIC SUPPORT.

In Audubon v. Shufeldt, 181 U.S. 575 (1901), the United States Supreme Court, in defining the character of alimony stated:

> Alimony does not arise from any business transaction, but from the relationship of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specifically by the decree of the court of appropriate jurisdiction. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings. . . . It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. . . . Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the bankruptcy court.

The obligation of alimony is one of the highest obligations recognized by law and is given corresponding priority with respect to enforcement, i.e., contempt, garnishment, attachment, sequestration, exemption for discharge in bankruptcy, exception from homestead exemption and so forth.

In Killian v. Lawson, 387 So. 2d 960 (Fla. 1980), this Court stated:

> A husband has a common law duty to support his wife. . . . When alimony or child support is awarded, this duty to support survives dissolution of marriage because public policy requires the doing of that which in equity and good conscience should be done. . . . As this Court has noted, the purpose of alimony is to prevent a dependent party from becoming a public charge or an object of charity. (emphasis added)

Section 61.001 of the Florida Statutes provides that Chapter 61 shall be liberally construed and applied to promote its purposes, which are to preserve the integrity of marriage and to safeguard meaningful family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; and to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.

Public policy requires that the courts promote, protect and preserve public health, safety, life, morals, property, and general welfare; inherent is the right to prevent a dependent former spouse from becoming a public charge, or an object of charity upon the death of the obligor former spouse, if there is an alternate source of funds more properly responsive to the needs.

It is a fundamental purpose of the judiciary to guard and enforce the State's public policy. The Court may legitimately interfere with constitutionally protected rights

whenever that conduct materially and substantially impedes operation or effectiveness of the State's public policy. The objective of our legal system is to render justice between litigants upon the merits of a controversy rather than to defeat justice upon the basis of technicalities. The Court should not permit form to override substance or procedural technicalities to defeat fairness and justice.

The interest to be protected in upholding a notion of a common law prohibition of the award of post-mortem alimony must give way to the compelling and overriding interests of the State's public policy in preventing a dependent former spouse from becoming a public charge or an object of charity.

Marriage is not solely between the husband and the wife. The State has an overriding interest and regulates the issuance of marriage licenses, enforces the obligations of the marriage during the marriage, regulates the dissolution of marriage, and any continuing obligations surviving the marriage dissolution.

A lump sum alimony award, as an instance of support, may properly be made where there exists a very legitimate fear that if permanent alimony is ordered and the husband dies shortly thereafter, the wife may be left destitute. Hartley v. Hartley,

399 So. 2d 1126 (Fla. 4th DCA 1981). In other words, a special need for lump sum alimony, as an instance of support, may exist simply because an older husband might die sooner.

QUERY: Could not life insurance, pursuant to Section 61.08(3) of the Florida Statutes, serve as a form of lump sum alimony, as an instance of support, as well as security to protect the overall support award? In many cases, there are no assets or not enough assets to enable a lump sum award. A life insurance policy could thus be utilized as a relatively inexpensive means of providing an alternate source of funds more properly responsive to a dependent former spouse's needs upon the death of the obligor former spouse.

In Diffenderfer v. Diffenderfer, 491 so. 2d 265 (Fla. 1986), this Court recognized the usefulness of a hybrid lump sum alimony award based on both the concepts of property distribution, requiring a justification and the traditional alimony, requiring consideration of financial ability. If a husband should die, the former wife's alimony dies with him while, in the event the former wife dies, the former husband would merely experience an increase in income as his alimony obligation terminated. Such potential unfairness, the Court noted, did not treat fairly a wife who wholeheartedly devoted herself to husband and family. The Court stated:

> Finally, we note that an attempt to fairly provide for both spouses through a distribution of property often

results in a superior resolution of a painful situation. By giving the parties economic independence rather than shackling them to the shattered remnants of a marriage which is irretrievably broken, one through dependence and the other through a duty to pay, the individuals stand a better chance of recovering from the often devastating experience of divorce and beginning to heal. . . .

Fully recognizing, however, that often a lack of sufficient offsetting assets or other circumstances may leave the court with little option but to utilize pensions beneifts in calculating permanent periodic or rehabilitative alimony, we have no desire to disapprove those Florida decisions in which the court has done just that. . . . Lest our observations here be misunderstood, we once again reiterate our warning in Walter v. Walter, 464 So. 2d 538, 540 (Fla. 1985), quoting Canakaris, 382 So. 2d at 1197, that we wish to "avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible."

The same philosophy should apply here with respect to the utilization of Section 61.08(3) of the Florida Statutes. The Statute and the legislative intent should be construed to permit a trial court to award life insurance benefits to protect the dependent former spouse from the loss of alimony occasioned by the death of the obligor former spouse in appropriate cases.

Is such an award really post-mortem alimony and if so, should that really matter? See Fiveash v. Fiveash, ___So.2d___(Fla. 1st DCA 1988) (13 FLW 952, Opinion filed April 15, 1988).

Neither the life insurance premiums nor the death benefit are paid from the estate of a deceased

obligor former spouse and periodic spousal support payments still terminate at death. Premiums are paid by or on behalf of the obligor former spouse, during his lifetime, in the same manner as hospitalization and comprehensive medical insurance premiums would be paid if health insurance benefits are awarded. It is clear that health insurance benefits are not considered post-mortem alimony!

In Fiveash the First District stated:

> We believe that the legislature's purpose in enacting 61.08(3), Florida Statutes (1985)was to provide the trial courts with the authority to secure payment of the alimony awarded up to the amount of the insurance policy required where the receiving party's circumstances warranted, i.e., poor health or lack of employability. We do not ascribe to the belief that the legislature only intended such an insurance policy to cover any arrearages existing at the time of the paying spouse's death. The pertinent Statute contains no such restriction, for it makes no mention of arrearages, or outstanding payments, but clearly states on its face that "to the extent necessary to protect and award (not just part of an award) of alimony, the court may order any party...to purchase or maintain a life insurance policy or bond, or to otherwise secure such alimony award..."
>
> By requiring appellant (husband) to maintain a life insurance policy that will pay appellee (wife) alimony upon appellant's death, appellant's estate is not forced to take post-mortem alimony, for it is the insurance company to which appellant has been making payments that will be obligated to pay appellee. The payments made by appellant would terminate upon his death. This arrangement does not shift the alimony obligation to the decedent's estate.

The Fourth District Court has also determined that there is nothing wrong in requiring life insurance benefits to protect a dependent former spouse from the death of the obligor former spouse and the resulting cessation of spousal support. See Gepfrich v. Gepfrich, 510 So.2d 369 (Fla. 4th DCA 1987); and Clark v. Clark, 509 So.2d 364 (Fla. 4th DCA 1987).

The so-called "windfall" death benefit is in the nature of deferred lump sum alimony as an instance of support, vesting at the time of marriage dissolution and maturing at the time of the death of the obligor former spouse.

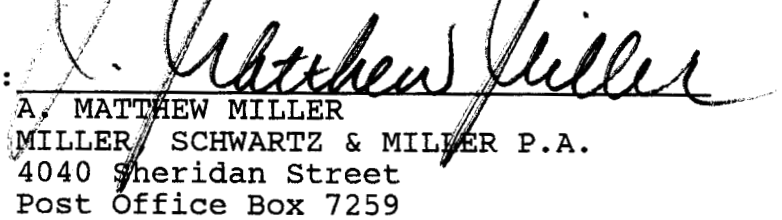
A narrow construction of Section 61.08(3) of the Florida Statutes does not serve the interests of dependent former spouses or the interests of our society. Compelling and overriding public policy mandates that this Court approve and adopt the broader construction applied by the First and Fourth District Courts.

CONCLUSION

Public policy requires the doing of that which in equity and good conscience should be done to prevent a dependent former spouse from becoming a public charge or an object of charity upon the death of the obligor former spouse. The utilization of Section 61.08(3) in appropriate cases to mitigate the potential harm to former spouses resulting from the cessation of spousal support payments should be encouraged by this court in order to avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible. The narrow construction of the Second District in Sobelman II should give way to the broader more liberal construction of the First District in Fiveash and the Fourth District in Gepfrich and Clark.

Respectfully submitted,

FLORIDA CHAPTER, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS,
DAVID H. LEVIN, PRESIDENT,
MELVYN B. FRUMKES, CHAIRMAN AMICUS COMMITTEE and A. MATTHEW MILLER, VICE CHAIRMAN, AMICUS COMMITTEE

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to ARTHUR D. GINSBURG, ESQUIRE, GINSBURG, BYRD, JONES & DAHLGAARD, Attorneys for Petitioner, 1844 Main Street, Sarasota, Florida 34236 and to DANIEL JOY, ESQUIRE, Attorney for Respondent, 900 First Florida Bank Plaza, 1800 Second Street, Sarasota, Florida 34236, this 19th day of May, 1988.

A. Matthew Miller