OA 1-30-88

IN THE SUPREME COURT
STATE OF FLORIDA

GOLDIE SOBELMAN,

Petitioner,

v.

Case No. 71,683
DCA No. 86-3072

ALAN SOBELMAN,

Respondent

_____/

ON APPEAL FROM
THE SECOND DISTRICT COURT OF APPEAL
MIDDLE DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner is GOLDIE SOBLEMAN who shall be referred to throughout this brief as the WIFE. The Respondent is ALAN SOBELMAN, who shall be referred to throughout this brief as the HUSBAND. References to the appendix are to the appendix attached to the Petitioner's Initial Brief on the Merits.

POINT ON APPEAL

DOES §61.08(3) FLORIDA STATUTES AUTHORIZE A TRIAL COURT TO REQUIRE AN ALIMONY PAYING SPOUSE TO MAINTAIN A LIFE INSURANCE POLICY SECURING SAID ALIMONY AWARD, SUCH THAT UPON THE DEATH OF THE PAYING SPOUSE, THE RECEIVING SPOUSE IS ONLY ENTITLED TO RECEIVE FROM THE INSURANCE THE SUM TOTAL OF ANY EXISTING ALIMONY ARREARAGE?[1]

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[1]The framing of the issue is adopted from the certification made by the First District Court of Appeal in the case of Paul Fivevash v. Carman Fivevash, _____ So2d _____ (Fla. 1 DCA 1988) 13 FLW 952

STATEMENT OF THE CASE

The HUSBAND adopts the WIFE's Statement of the Case insofar as it goes. The Second District Court in Sobelman v. Sobelman, 490 So2d 225 (Fla. 2 DCA 1986) (Sobelman I) noted in its opinion that §61.08(3) Florida Statutes, as amended, did not affect the prohibition against ordering a spouse to maintain life insurance as a form of post mortem alimony. The Final Judgment of Dissolution provided for life insurance to be carried by the HUSBAND. The matter was appealed. The Second District Court however, indicated that it could not discern from the record in Sobelman I whether the Trial Court, having characterized the award as additional alimony, intended the life insurance policy as lump-sum alimony as part of an equitable distribution or as security for other alimony awarded to the WIFE. The Second District remanded the matter with directions to strike the life insurance aspect of the Final Judgment if it was not part of the equitable distribution or to amend the Final Judgment so that the life insurance award was brought into compliance with the legal requirements of McClung v. McClung, 465 So2d 367 (Fla. 2 DCA 1985); Noe v. Noe, 431 So2d 657 (Fla. 2 DCA 1983); and Stith v. Stith, 384 So2d 713 (Fla. 2 DCA 1980).

The Trial Court on remand, amended ¶12 of the Final Judgment to read as follows:

> As security for permanent, periodic alimony, the Husband shall maintain

> life insurance in the face amount of Two Hundred Thousand ($200,000.00) Dollars with the Wife as beneficiary. (R, 5)

In the Final Judgment originally rendered by the Trial Court, the HUSBAND was ordered to pay the WIFE as permanent, periodic alimony, the sum of $1,250 per month beginning April 1, 1985 and continue until the death of either party or remarriage of the WIFE, whichever occurs first. Neither the Final Judgment nor the Amended Final Judgment awarded lump-sum alimony to the WIFE.

In Sobelman v. Sobelman, 516 So2d 7 (Fla. 2 DCA 1987), (Sobelman II) the Court considered the amendment to the Final Judgment and thereafter ordered it struck because the Trial Court, having clarified that the life insurance policy was intended as security for the permanent, periodic alimony, noted that no need therefore had been shown and that functionally the insurance was not serving as security.

The WIFE alleged that Sobelman II conflicted with Gepfrich v. Gepfrich, 510 So2d 369 (Fla. 4 DCA 1987) This Court accepted jurisdiction on April 8, 1988 on the basis of the existence of the conflict.

STATEMENT OF THE FACTS

The WIFE's Statement of the Facts is sufficient for the HUSBAND's purposes with the the exception that nowhere in the Record is there any evidence to support the proposition that the WIFE, through life insurance payments, needed to have the permanent, periodic alimony award secured by a $200,000 life insurance policy. The WIFE will receive almost $100,000 when the marital home is sold in the next year or two.

SUMMARY OF ARGUMENT

The positions taken by the First District in Fivevash v. Fiveash, ____ So2d _____ (Fla. 1 DCA 1988) 13 FLW 952; the Fourth District in Gepfrich, supra; and the WIFE ignore the plain meaning of the language contained in §61.08(3) F.S. by construing the statute as to authorize the Court to award life insurance whenever the party receiving alimony demonstrates a need for economic security. The construction placed upon §61.08(3) by the Second District in Sobelman I and II more accurately reflects the plain meaning of the language utilized by the Legislature. The statute was not intended to constitute a repudiation of the long held principle that the Courts will not award post-mortem alimony.

ARGUMENT

ISSUE ON APPEAL

DOES §61.08(3) FLORIDA STATUTES AUTHORIZE A TRIAL COURT TO REQUIRE AN ALIMONY PAYING SPOUSE TO MAINTAIN A LIFE INSURANCE POLICY SECURING SAID ALIMONY AWARD, SUCH THAT UPON THE DEATH OF THE PAYING SPOUSE, THE RECEIVING SPOUSE IS ONLY ENTITLED TO RECEIVE FROM THE INSURANCE THE SUM TOTAL OF ANY EXISTING ALIMONY ARREARAGES?

Neither the WIFE nor the Florida Chapter of the American Academy of Matrimonial Lawyers seem willing to acknowledge that the issue before this Court is purely one involving statutory construction. The WIFE and the Academy argue that the first principle of statutory construction in this case ought to be that which ought to be done, will be done. Neither the WIFE nor the Academy would have this Court look to the language of the statute. To the contrary, each asks this Court to ignore the language and revise the statute so as to satisfy what the WIFE and the Academy argue is sound public policy.

To suggest that the Petitioner and the Academy wishes this to be an activist Court is an understatement. Each argues, the Academy somewhat more passionately, that the specter of a destitute spouse is so compelling that the Court should turn its eyes from the language of the statute and rewrite the section so as to satisfy the felt needs of the Petitioner and the Academy.

There is a long and honorable history, based upon sound public policy, that provides for the Court to interpret statutes by utilizing the various rules of construction to ascertain the intent manifested by the statute. The Courts construe statutes and interpret the laws of the State. It should not assume the prerogative of judicially legislating policies or goals which the litigants and a plurality of the Court considers socially, economically or politically wise. Hancock v. Board of Public Instruction, 158 So2d 519 (Fla., 1963) There is no public policy more well imbedded in the rule of law than the fact that the Legislature's intent as manifested in statutes must be determined primarily from the language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So2d 687 (Fla., 1978) Where the intent is clearly manifest from the language utilized, Courts limit themselves to giving effect to that intent. Englewood Water District v. Tate, 334 So2d 626 (Fla. 2 DCA 1976)

The principle is wise and of crucial importance for many reasons. The rocky road over which the Judiciary has recently traveled is not unrelated to what has been a willingness on the part of some in the Judiciary to see themselves as legislators. This experience has resulted to some significant extent in the polititization of the Court, especially on the federal level. The wisdom of delineating the duties between the two branches as clearly as possible so that legislators stay legislators and judges remain judges is at least as important to the nation's future as the felt needs claimed by the WIFE and the Academy.

Moreover, in the scheme of things, Legislators are better equipped to define public policy. Its procedures contemplate the participation of many at public hearings whereat legislators can digest an almost unlimited number of viewpoints and analyses. The diversity of participation contrasts markedly with the limits inherent in judicial proceedings. The Courts reject the hurly-burly atmosphere of the legislative process where contending interests clash and policy compromises are daily experiences. While the Legislature is far from perfect, the process tends to protect the state from many unintended consequences of a program designed to do good.

The Judiciary is better at settling disputes between litigants, closely analyzing complex documents, construing contracts and statutes and otherwise resolving precise questions of law. The WIFE and the Academy seemingly underestimate the importance of the separation of powers to the wellbeing of the lawmaking process.

What does the statute say? that is the issue.

> To the extent necessary <u>to protect an award of alimony</u>, the Court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, <u>or to otherwise secure such alimony award</u> with any other assets which may be suitable for that purpose.[2] [emphasis added]

The Statute is not unclear. The Legislature authorized the Courts to utilize life insurance policies for expressly limited

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[2]Section 61.08(3) Florida Statutes

purposes. The function of life insurance is limited to collateralizing alimony otherwise awarded. Had the Legislature wished to overturn the common law prohibition against ordering a spouse to maintain life insurance as an independent form of alimony, it could have easily done so. It clearly did not do so. Nowhere in the statute can one ascertain an intent to require a party obligated to pay alimony to do so after his or her death. Life insurance was to secure already vested awards.

The First District in Fivevash, supra. and the WIFE in her brief on the merits claim that the result of the position taken by each is other than to award post-mortem alimony. This position cannot be sustained. The First District argued that because the insurance company pays the proceeds to the spouse receiving alimony, by-passing the estate of the spouse paying alimony, no post-mortem alimony is involved. The WIFE asserts the same position. Each disregard the definition of post-mortem alimony. To order a party to pay today so the other will receive support after the death of the person obligated to pay is post-mortem alimony. The alimony or support obligation terminates on the death of either of the former spouses unless the alimony obligation vested prior to the death. O'Malley v. Pan American Bank, 384 So2d 1258 (Fla. 1980) Both the First District and the WIFE would have this Court overlook the substance of post-mortem alimony, dwelling instead on the form. The First District is attempting to overrule O'Malley, on the strength of §61.08(3). Did the Legislature intend for the new

§61.08(3) to overrule O'Malley? The Statute's language indicates no.

The Academy is more candid in its argumentation. It argues that the long held view that the obligation to pay alimony terminates on the death of the party with the alimony obligation should be scrapped as unwise and contrary to the public policy it considers important. Its argumentation is liberally sprinkled with Dickensean descriptions. Motivated by what it considers important objectives, it frankly wants the Court to do good for their clients without those clients being burdened by the traditional processes for amending statutes. Like the WIFE, the Academy makes no effort to justify its argued for construction with the language the Legislature chose to utilize.

What did the Legislature intend? The Legislature stated that 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 the alimony award. The authorization is conditional. The condition is "to the extent necessary to protect an award of alimony." The plain meaning of the language manifests the Legislature's intent to authorize the Courts to guarantee that alimony vested will be collected by the party to whom the alimony was awarded. There is nothing in the statute which justifies the WIFE's or the Academy's argument that the Court can and should use §61.08(3) to project alimony beyond the date of death of the party ordered to pay alimony. The language clearly limits the role life insurance can play to securing vested alimony. Life insurance proceeds can be utilized to

satisfy an unpaid lump-sum alimony award or to pay arrearages on permanent, periodic alimony. Anything more or less should come from the Legislature.

In a monumental distortion of language, the WIFE and the Academy want this Court to define the security condition contained in the statute as securing the wellbeing of the party receiving alimony. While its advocacy may or may not be wise, the Legislature, for what should be considered its own good reasons, chose not to do as the WIFE and the Academy desire.

The issues presented involve more than a consideration of the appropriate roles of the branches of government and the division of powers between the Legislature and the Courts. The HUSBAND's position can be justified on all of those grounds which have led the Courts of Florida to declare post-mortem alimony impermissible. With the codification of the divorce law, the Florida Legislature adopted the traditional view. The Courts should leave it to the Legislature to amend the code.

The Academy strenuously argues that a life insurance policy can be utilized as a relatively inexpensive means of providing an alternative source of funds more properly responsive to a dependant former spouse's needs. That may be true. What is ttue is that the Academy wants the alimony recipient to have a vested interest in the early demise of the party obligated to pay alimony. This is a consquence which may or may not be wise. But, in any event, such a considered change best comes from the Legislature, not the Courts. With its access to social scientists, public policy studies and sister state experiences,

the Legislature is better equipped to analyze the consequences in changes in public policy.

One consequence of the WIFE's and the Academy's argued for construction is that the party ordered to pay alimony would have his or her disposable income deminished further by the amount necessary to satisfy the premium requirements so as to enable the former spouse to be financially accommodated after the death of the person obligated to pay alimony. As attractive as this might be to the matrimonial bar, the possibility may not advance the State's traditional policy of keeping families together whenever possible. Incentives work. A spouse might well conclude this is an easier way to go if his or her spouse refuses to purchase life insurance. While the point should not be considered crucial, one way or the other, the point is that there are reasons why post-mortem alimony may be disadvantageous to the public well-being and that the Legislature is the appropriate forum to consider such a change.

If it is appropriate to argue as the Academy has, that its advocacy is based upon preventing a dependant former spouse from becoming a public charge and an object of charity, why does it not take the next logical step? Why should it only be ex-spouses who can be required to carry life insurance? Why not all spouses, so as to insure an alternate source of funds responsive to the needs of the survivor? Should the Courts declare life insurance mandatory? Of course not. But, it is not so far a leap from the Academy's position to such a conclusion. The point

is made only to contrast the appropriate Legislative role against available judicial remedies.

The Academy uses as a weapon broad generalizations which may or may not be accurate. The Academy asks "could not life insurance serve as a form of lump-sum alimony?" Not on the basis of the language of §61.08(3) of the Florida Statutes. The law of this State recognizes a very limited role for life insurance in a dissolution of marriage context. If lump-sum alimony is awarded, the Court may order life insurance to insure that the lump-sum alimony will in fact be paid. The appropriateness of any given lump sum award can be judicially reviewed. If the Court has awarded permanent periodic alimony, it may order life insurance so as to guarantee to the party receiving alimony that if the party paying alimony dies with arrearages outstanding there will be a source of funds from which to satisfy the vested obligation. The statute authorizes nothing more. To hold otherwise is to disregard the Legislature's clearly prescribed link of life insurances to securing other alimony awarded. The WIFE and the Academy want life insurance to be another form of alimony, the nature of which is post-mortem.

Addressing the question certified to this Court by the First District, to-wit: does §61.08(3) F.S. authorize a Trial Court to require an alimony paying spouse to maintain a life insurance policy securing said alimony award, such that upon the death of the paying spouse, the receiving spouse is entitled only to receive from the insurance the sum total of any existing alimony

arrearages? This must be answered in the affirmative, given the plain meaning of the statutory section.

Which brings us to the case of Sobelman. The Second District in Sobelman II ordered the life insurance struck because it determined that the life insurance was not part of an equitable distribution, and that the life insurance was not in fact functioning as security. The Second District concluded that the Trial Court's language to the contrary notwithstanding, the life insurance's function within the Final Judgment was to grant the WIFE support after the demise of the HUSBAND, contrary to O'Malley, supra.

The Trial Court was not asked by the WIFE to attach a security mechanism to insure that only vested alimony would be paid. To the contrary, the life insurance ordered to be maintained was in the amount of $200,000. In order for the entire amount to represent alimony to which the WIFE was entitled by vesting, the HUSBAND would have to be in arrears by 160 months or more than 13 years. If the HUSBAND complies with the Trial Court's order insofar as permanent, periodic alimony is concerned, the WIFE would get $200,000 in addition to the permanent, periodic alimony awarded. What the Wife successfully sought from the Trial Court was post-mortem alimony.

The Second District perceived that the Trial Court in Sobelman did not intend for the insurance to be for security but to be post-mortem alimony. The Second District properly struck that portion of the Amended Final Judgment having determined that the WIFE had made no evidentiary demonstration that she needed

such a large life insurance policy to insure the collectability of a $1,250 monthly alimony award.

CONCLUSION

The question certified to this Court by the First District, to-wit: does §61.08(3) Florida Statutes authorize a Trial Court to require an alimony paying spouse to maintain a life insurance policy securing said alimony award, such that upon the death of the paying spouse, the receiving spouse is only entitled to receive from the insurance the sum total of any existing alimony arrearage?, must be answered in the affirmative based upon the plain meaning of the statute. A further liberalization of the use of life insurance as part of the Court adjudication of marital dissolutions should come through the Legislature, if at all.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to ARTHUR D. GINSBURG, ESQURIE, and KEVIN P. SMITH, ESQUIRE, 1844 Main Street, Sarasota, Florida 34236 and A. MATTHEW MILLER, ESQUIRE, P.O. Box 7259, Hollywood, Florida 33801-1259, this 10th day of June, 1988.

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