IN THE SUPREME COURT OF FLORIDA

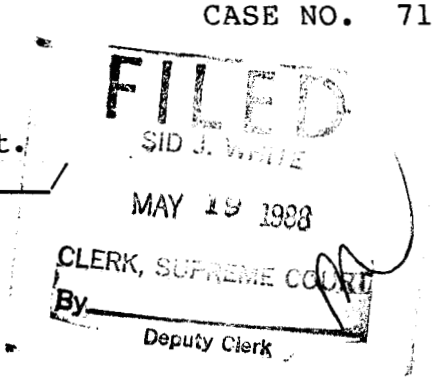
GOLDIE SOBELMAN,

Petitioner,

v. CASE NO. 71,683

ALAN SOBELMAN,

Respondent.



PETITIONER'S INITIAL BRIEF ON THE MERITS

APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

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PRELIMINARY STATEMENT

The Petitioner is Goldie Sobelman, who shall be referred to throughout this brief as Wife. The Respondent is Alan Sobelman, who shall be referred to throughout this brief as Husband. "A" means reference to the Appendix accompanying this brief.

POINT ON APPEAL

WHETHER A PARTY OBLIGATED TO PAY ALIMONY MAY BE ORDERED TO MAINTAIN LIFE INSURANCE AS SECURITY FOR ALIMONY PURSUANT TO SECTION 61.08(3), FLORIDA STATUTES, WITHOUT LIMITING THE INSURANCE OBLIGATION AND THE PAYMENT OF INSURANCE PROCEEDS TO ONLY ACCRUED ALIMONY ARREARAGES.

STATEMENT OF THE CASE

The Wife initiated this action by a Petition for Dissolution of Marriage. The Husband countered by serving a Counterpetition for Dissolution of Marriage. A final hearing was held January 18, 1985. On March 4, 1985, a Final Judgment of Dissolution of Marriage was entered by the Honorable Paul E. Logan.

On or about November 25, 1986, the Husband filed a Notice of Appeal, and the Wife cross-appealed certain provisions contained in the Final Judgment. The Second District Court of Appeal rendered a decision on the merits of both the appeal and the cross-appeal in Sobelman v. Sobelman, 490 So. 2d 225 (Fla. 2d DCA 1986). Among other issues, none of which are relevant to the issue before this Court, the Second District Court of Appeal remanded the issue of maintaining life insurance to the trial court as follows:

> Our only recourse, therefore, is to remand this matter with direction to strike the life insurance aspect of the final judgment so that the life insurance award is proper under either the statutory provision or the pertinent decisional law. Sobelman v. Sobelman, 490 So. 2d, 225, 226 (Fla. 2d DCA 1986)

On remand, the trial court entered an Amendment to Final Judgment, which provided in part as follows:

> 1. That paragraph 12 of the Final Judgment shall be amended 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.

The Husband appealed the Amendment to Final Judgment, and in Sobelman v. Sobelman, 516 So. 2d 7 (Fla. 2d DCA 1987), the District Court of Appeal remanded the case with directions to strike the insurance as security for alimony. Sobelman, 516 So. 2d 7, 9.

The Wife moved for a rehearing before the Court of Appeal, and same was denied by order entered December 1, 1987. On December 30, 1987, the Wife filed her Notice to Invoke Discretionary Jurisdiction in this Court. The Wife has also filed a Motion for Attorney's Fees with this Court.

On or about January 8, 1988, the Florida Chapter of the American Academy of Matrimonial Lawyers moved for leave to file an Amicus Curiae pursuant to Florida Rules of Appellate Procedure, Rule 9.370, and same was granted on January 11, 1988, allowing the Chapter to file a brief only, provided, jurisdiction was accepted by this Court. This Court accepted jurisdiction by order dated April 8, 1988.

STATEMENT OF THE FACTS

The parties were married over twenty-two years at the time of dissolution. (A-1) There were three children born of the marriage, one of whom is presently a minor. (A-16) The Wife was nineteen years old when she married the Husband and is not a high school graduate. (A-16) The Wife, who was 41 years old at the time of dissolution, has only worked full-time for one year prior to the final judgment. (A-15.b, 18) The Wife is employed at a ladies' apparel store. (A-17.a) The Husband is a licensed stockbroker and employed at the time of final hearing as vice-president of Prudential-Bache. (A-14, 15)

At the time of final hearing, the Wife had a gross employment income of $15,000.00 to $20,000.00 per year. (A-9) The Husband's gross income the year prior to the divorce was over $101,000.00. (A-15.a)

The Husband had a life insurance policy on his life in effect at the time of final hearing. (A-12) The Husband's amended financial affidavit, filed in this action, reveals insurance loans of $20,000.00. (A-8)

The final judgment of dissolution of marriage awarded to the Wife permanent periodic alimony of $1,250.00 per month, and child support for the minor child in the amount of $500.00 per month. (A-20) In addition, the Husband was ordered to pay the reasonable and necessary medical, den-

tal and orthodontic expenses of the minor child until his obligation for child support terminated. (A-20)

The single major asset of the parties, the former marital home, was awarded to both parties, as tenants in common, with the Wife having exclusive possession during the minority of the youngest child. (A-20) The Wife was obligated to maintain all payments on the note and mortgage. (A-20) The mortgage payments are $453.26 per month. (A-10) The outstanding principle mortgage balance at final hearing was over $52,000.00. (A-11)

During the marriage, the parties maintained an upper middle class standard of living. (A-17) The parties traveled frequently, (A-17) and employed a full-time housekeeper at one time. (A-17) The former marital home of the parties is located on Siesta Key, Florida and valued by the Wife on her financial affidavit at $225,000.00. (A-11)

SUMMARY OF ARGUMENT

The District Court of Appeal for the Second District has restricted the reasonable effectiveness of section 61.08(3) Florida Statutes in its decision Sobelman v. Sobelman, 516 So. 2d 7 (Fla. 2d DCA 1987). The statute contains no restriction on the applicable use of life insurance or other means to secure an award of alimony. By limiting the use of life insurance as security for periodic alimony to only securing arrearages, the Second District has eliminated any practical usefulness of section 61.08(3) as the provision relates to periodic alimony.

The states of Nebraska and New Jersey have enacted comparable statutes to that of section 61.08(3), Florida Statutes. The decisional law in both jurisdictions provide for interpreting the statutes to provide security for periodic alimony in the form of life insurance with the spouse receiving alimony as the designated beneficiary. The Wife suggests a similar interpretation be afforded to our own statute, section 61.08(3). As shown by the recent decision of the Court of Appeal for the First District in Fiveash v. Fiveash, 13 F.L.W. 952 (Fla. 1st DCA April 15, 1988), a clearly unrestrictive viewpoint has been adopted by at least one District Court of Appeal.

The Wife in this action has demonstrated a need for security. The Husband has the ability to provide the

security. The State has provided the means for security by enactment of section 61.08(3), Florida Statutes. The Wife's need should not be ignored.

ARGUMENT

POINT ON APPEAL

WHETHER A PARTY OBLIGATED TO PAY ALIMONY MAY BE ORDERED TO MAINTAIN LIFE INSURANCE AS SECURITY FOR ALIMONY PURSUANT TO SECTION 61.08(3), FLORIDA STATUTES, WITHOUT LIMITING THE INSURANCE OBLIGATION AND THE PAYMENT OF INSURANCE PROCEEDS TO ONLY ACCRUED ALIMONY ARREARAGES.

The case at bar presents this Honorable Court with the opportunity to clarify conflicting decisional law interpreting section 61.08(3), Florida Statutes. In addition, the Petitioner-Wife seeks reinstatement of the trial court's determination that the Husband maintain life insurance as security for his obligation to pay alimony.

The Wife herein, Goldie Sobelman, has a need for security of her alimony award. The facts presented shall demonstrate this need.

Section 61.08(3), Florida Statutes contains no limitations on its application. The statutory provision should be available for the trial court to use without unreasonable limitation and available to assist the court to do equity in matrimonial actions.

I. Current Caselaw in Conflict

In Florida, the obligation to pay permanent

periodic alimony ceases upon death. O'Malley v. Pan American Bank, 384 So. 2d 1258 (Fla. 1980). Prior to the enactment of Florida Statutes, Section 61.08(3), the District Court of Appeal for the Second District had limited the use of life insurance as security for alimony by disallowing the obligation to maintain insurance if viewed as post-mortem alimony. Mahan v. Mahan, 415 So. 2d 146 (Fla. 2d DCA), review denied, 424 So. 2d 762 (Fla. 1982).

Effective January 1, 1985, section 61.08(3), Florida Statutes, provided the following:

> To the extent necessary to protect an award of alimony, 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.

The statute contains no restrictions in the type of alimony to which it pertains, nor any limitation to securing only arrearages in alimony.

As discussed in the Appellant's jurisdictional brief, the interpretations afforded this statute are not consistent throughout this State. The Second District, most recently in Sobelman v. Sobelman, 516 So. 2d 7 (Fla. 2d DCA 1987), and Dwyer v. Dwyer, 513 So. 2d 1325 (Fla. 2d DCA 1987), has limited the application of the statute, as it applies to periodic alimony, to providing only security for arrearages in alimony.

The Fourth District Court of Appeal in two separate decisions, Clark v. Clark, 509 So. 2d 364 (Fla. 4th DCA 1987), and Gepfrich v. Gepfrich, 510 So. 2d 369 (Fla. 4th DCA 1987), supported the interpretation and application of section 61.081(3) to allow the trial court to require the payor spouse to maintain life insurance as security for periodic alimony without limitation to arrearages.

The Third District in Benson v. Benson, 503 So. 2d 384 (Fla. 3d DCA 1987) has upheld a trial court decision which required the Husband maintain life insurance with his spouse as irrevocable beneficiary. The per curiam opinion in Benson noted that since the obligation to pay alimony ceases on death, insurance proceeds would not be acquired by the Wife as post-mortem alimony. Benson, 503 So. 2d 384, 385.

The District Court of Appeal for the First District in Kooser v. Kooser, 506 So. 2d 81 (Fla. 1st DCA 1987) affirmed the trial court's denial of Wife's request that Husband be obligated to obtain life insurance to secure the alimony award. Kooser, 506 So. 2d 81, 82. However, in a recent opinion, Fiveash v. Fiveash, 13 F.L.W. 952 (Fla. 1st DCA April 15, 1988) the First District affirmed a provision in a final judgment of dissolution of marriage requiring the alimony paying spouse maintain an insurance policy to cover alimony payments. Fiveash, 13 F.L.W. 952. The Fiveash opinion clearly takes issue with the Second District decision

in Sobelman and the position that section 61.08(3) should be used to secure only arrearages existing at a spouse's death. Fiveash, 13 F.L.W. 952, 953. As stated in Fiveash:

> By requiring appellant to maintain a life insurance policy that will pay appellee alimony upon appellant's death, appellant's estate is not forced to pay postmortem 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 deceased's estate. Fiveash, 13 F.L.W. 952, 953.

The decisional law interpeting section 61.08(3), Florida Statutes, is clearly in conflict. The Wife herein requests this Court provide conformity by providing the trial court be allowed to require maintenance of life insurance or other means of security where a need for security exists, without limitation to arrearages arising at payor spouse's death.

II. Mrs. Sobelman and the Need for Security

The Wife in this action was awarded permanent periodic alimony of $1,250.00 per month. (A-20) The Wife is not a high school graduate nor has she worked full-time until 1984 after the parties separated from one another. The Husband is also Mrs. Sobelman's major source of income.

By it's final judgment, the trial court made the parties tenants in common of the marital home. (A-20) The Wife was awarded exclusive use until the youngest child

attained age 18. (A-20) In the event, Mr. Sobelman dies prior to the sale of the residence, the Wife would be without not only alimony and child support, but also in a position of paying the mortgage on jointly owned property which could be subject to partition by the Husband's heirs.

In such a situation, the Wife would swiftly move from a reasonably stable financial position to the status of complete chaos. The life insurance required in this cause is the security contemplated by section 61.08(3), Florida Statutes to prevent such an occurrence as this.

The periodic alimony awarded in the case at bar ceases upon Husband's death. The life insurance maintained by Husband to secure such alimony is paid by the insurance company. Neither the Husband nor his estate is obligated to make any payments after Husband's death.

On the facts presented, the trial court did not abuse its discretion in requiring the Husband to maintain life insurance as security for Husband's obligation to pay alimony. The Wife has demonstrated a need for security sufficient to warrant Husband maintaining life insurance in the face amount of $200,000.00.

III. Similar Statutes and Foreign Caselaw

Two sister states, New Jersey and Nebraska have statutes which provide to the trial court discretionary

authority to order security for alimony. The statutes are similar to Florida Statutes, section 61.08(3). The Nebraska law, section 42-365, Revised Statutes of Nebraska provides (in part) as follows:

> Reasonable security for payment may be required by the court. (A-29)
> NEB. REV. STAT. § 42-365 (1984)

The New Jersey statute is New Jersey Revised Statutes § 2A:34-23, which states, in part:

> [T]he court may make such order as to the alimony or maintenance of the parties, . . . and require reasonable security for the due observance of such orders. (A-30)
> N.J. STAT. ANN. (West 1987)

Both states provide for the termination of alimony upon the death of the payor spouse, in usual circumstances and unless indication is otherwise made in the final judgment. In Masters v. Masters, 155 Neb. 569, 52 N.W. 2d 802 (1952), the Supreme Court of Nebraska held that an award of alimony without specifications as to duration terminates upon death of the payor Husband. Masters, 52 N.W. 2d 802. Termination is presently provided for by statute in Nebraska. NEB. REV. STAT. § 42-365. Unless provided otherwise, in New Jersey, the death of either party terminates the obligation for alimony. Modell v. Modell, 23 N.J. Super. 60, 92 A. 2d 505 (Super. Ct. App. Div. 1952).

Nebraska Statute, section 42-365 has been interpreted to allow a trial court to order insurance be

maintained with the recipient spouse as beneficiary for the purpose of providing security for alimony. In Trimble v. Trimble, 218 Neb. 118, 352 N.W. 2d 599 (1984), the husband was obligated to pay alimony of $200.00 per month for two years and $400.00 per month for three years, with a review of same in January, 1988. In addition, the Husband was obligated to maintain two life insurance policies with a face value of $150,000.00 as security for the alimony and child support awards. The requirement of maintaining insurance was upheld, and the amount of coverage was upheld in Trimble.

The New Jersey Supreme Court has not overruled the Modell opinion, but it has circumvented the decision, insofar as N.J.S.A. section 2A:34-23 grants the trial court authority to secure alimony and child support. In the decisions of Grotsky v. Grotsky, 58 N.J. 354, 277 A. 2d 535 (1971) and Meerwarth v. Meerwarth, 71 N.J. 541, 366 A. 2d 979 (1976), the Supreme Court of New Jersey indicated that under the statutory authority of N.J.S.A. § 2A:34-23, the trial court could require the ex-spouse be maintained as a beneficiary on insurance policies if the policies were security for child support (Grotsky) or alimony (Meerwarth). In Meerwarth, the denial of insurance was upheld, but the Court stated:

> We conclude that a trial court in appropriate circumstances and for good cause shown, could order a divorced husband to cooperate in obtaining insurance

> on his life for the financial protection of his former wife, and his children, if there be any. This authority stems from the statutory provision N.J.S.A. 2A:34-23 . . . . Meerwarth, 366 A. 2d 979, 980.

The requirement of maintaining insurance as security for alimony pursuant to New Jersey statutory authority was affirmed in Davis v. Davis, 184 N.J. Super. 430, 446 A. 2d 540 (Super. Ct. App. Div. 1952). In Davis, the payor-spouse was obligated by initial agreement of the parties to pay $580.00 per month as periodic alimony in 1973. The payee-spouse moved for modification in 1979, and as a part of his order, the trial judge increased the alimony to $990.00 per month and required payor-Husband to designate his former spouse as beneficiary on $100,000.00 worth of insurance, or create a $100,000.00 trust fund with Wife to receive monies in the event of husband's death. The New Jersey Appellate Court upheld the insurance requirement finding the facts of the case warranted providing the Wife with security for her alimony award. Davis, 446 A. 2d 540, 545. The Wife had poor health and the Husband had sufficient funds to maintain the insurance.

The Davis opinion remanded the case to the trial court so that conditions might be placed on the insurance policy obtained (emphasis added by writer) or the trust fund created. Davis, 446 A. 2d 540, 545. The restrictions cited by the Appellate Court in Davis are the same conditions

outlined in the Florida opinion of the Second District Court of Appeal in Stith v. Stith, 384 So. 2d 317, 319 (Fla. 2d DCA 1980). As applied in Stith, the restrictions pertained to ownership of the policies, but as suggested in the Davis opinion may be utilized for security purposes as well. The suggested restrictions included a prohibition against assignment, reversion of ownership upon recipient's death or remarriage, determination of responsibility for premiums and insurance loan payments, and finally, copies of all conditions provided to the insuror. Davis at 540, quoting, Stith v. Stith, 384 So. 2d 317, 321 (Fla. 2d DCA 1980).

IV. Why not limit the scope of section 61.08(3)?

In the case at bar, restricting the application of section 61.08(3) to arrearages would provide Mrs. Sobelman no real security. If the Husband died prior to termination of his child support obligation, the Wife would lose over 50% of her current income, she would be obligated to maintain a mortgage, she would be forced to support herself and son, and she would only own a one-half interest in the former marital home. Public policy should seek to avoid placing a former spouse in such dire circumstances, when insurance is available and affordable.

What real security does limitation of insurance to only arrearages provide to a spouse receiving periodic alimo-

ny? To a spouse threatened with the loss of a major or sole source of income, the answer is very little. To require a spouse to maintain life insurance with the other spouse as a designated beneficiary contains no post-mortem obligation of either the payor-spouse or said spouse's estate. The obligation to maintain insurance as security is not a post-mortem commitment. The premiums are paid during the life of the payor-spouse. It is the insurance carrier not the payor-spouse who is required to make payment.

The purpose of section 61.08(3) is to provide security for an award of alimony. To limit this provision to providing security for only arrearages in alimony would be an unreasonable restriction without doing equity to a needy spouse.

CONCLUSION

The decision of the District Court of Appeal for the Second District in Sobelman v. Sobelman, 516 So. 2d 7 (Fla. 2d DCA 1987) should be reversed, and the Amendment to the Final Judgment entered by the trial court should be upheld and affirmed.

The provisions of section 61.08(3), Florida Statutes allows the trial court to require security for payment of alimony. No restrictions are contained within the statute limiting security to arrearages in alimony. By limiting the use of section 61.08(3), Florida Statutes, to securing arrearages, the Second District opinion in Sobelman unreasonably restricts the effectiveness of this statute.

Mrs. Sobelman has a limited educational background, a limited employment income, and would have desparate circumstances should Mr. Sobelman die and the parties' sole major marital asset then be owned by the Husband's heirs jointly with the Wife.

The State of Florida has provided the means to secure an award of alimony. The means should not be limited in this case or in other fact situations where a need is demonstrated. As stated by the Superior Court of New Jersey in Davis v. Davis, "In these circumstances, equity cries out for some relief." Davis, 446 A. 2d 540, 545.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail to Daniel Joy, Esq., 900 First Florida Bank Plaza, 1800 Second Street, Sarasota, Florida 34236 and A. Matthew Miller, Esq., Post Office Box 7259, Hollywood, Florida 33081-1259, this 18th day of May, 1988.

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