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 BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, GOLDIE SOBELMAN, is referred to throughout this response as the WIFE and ALAN SOBLEMAN, the Respondent, is referred to as the HUSBAND.

HUSBAND'S RESPONSE TO WIFE'S STATEMENT OF THE CASE AND FACTS

HUSBAND enters a single major exception to the WIFE's Statement of the Case and Facts. In her statement, she alleges that the Second District Court in Sobelman v. Sobelman, 490 So2d 225 (Fla. 2 DCA 1986) (Sobelman I) remanded the case from the HUSBAND's appeal directing the Trial Court to either eliminate the life insurance requirement or amend the Final Judgment so that the provision conformed with §61.08(3) Florida Statutes or the "pertinent decisional law." Sobelman I, at p. 226. The problem with the WIFE's statement is that it does not make sufficiently clear what the Second District stated was the issue on remand. The Second District observed, citing O'Malley v. Pan American Bank, 384 So2d 1258 (Fla. 1980), that a Husband's obligation to pay alimony terminates with his death. The Court allowed that it had held on previous occasions that if a marriage partner has not agreed to maintain life insurance for a spouse's benefit, a Trial Court cannot impose that requirement in the dissolution judgment, citing Mahan v. Mahan, 415 So2d 456 (Fla. 2 DCA 1982) rev. den. 424 So2d 762 (Fla. 1982) The Second District went on to observe that in the light of those strictures, the

Trial Court's award of life insurance to the Wife was of doubtful validity. Except however, the Second District noted that an exception to the general rule has been carved out. That exception involves the instance where the life insurance is intended as lump-sum alimony with premium payments to be permanent periodic alimony. The Second District cited McClung v. McClung, 465 So2d 637 (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). In McClung and Stith, supra, the life insurance policies were simply considered an asset of the marriage subject to equitable distribution. The Court thereafter went on to observe that as of January 1, 1985 §61.08(3) Florida Statutes was amended to provide

> 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 Second District observed that the amended statute did not affect the prohibition against ordering a spouse to maintain life insurance as a form of post mortem alimony.

Finally, the Court announced 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 or as security for other alimony awarded to the WIFE. It therefore, 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. In other words, the matter was remanded to determine whether it was intended as lump-sum alimony and as part of an equitable distribution or whether it was intended as security.

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 $200,000.00 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 on the first day of each month thereafter until the death or remarriage of the WIFE, whichever occurs first. Neither the Final Judgment nor the Amended Final Judgment awarded lump-sum alimony to the WIFE.

When the case went back to the Second District, the Second District knew that the Trial Court had sought to order the HUSBAND to take out the $200,000 life insurance policy as security for permanent, periodic alimony. The Amended Final Judgment after remand stood to require the HUSBAND to make the WIFE a beneficiary of a $200,000 life insurance policy, which life insurance proceeds would go to the WIFE regardless of any facts relating to the arrearages, or the lack thereof, as to the permanent, periodic alimony previously awarded.

This brought the case back to the Second District in Sobelman II, 12 F. L. W. 2503 (Fla. 2 DCA 1987)

SUMMARY OF ARGUMENT

Sobelman II, and Gepfrich v. Gepfrich, 510 So2d 369 (Fla. 4 DCA 1987) do not in any way conflict. They are two different cases with two different sets of facts, with each Court applying the same legal interpretation to their respective facts and arriving at decisions which were and are entirely consistent.

ARGUMENT

The Second District, in addressing the matter in Sobelman II, concluded, based upon the Trial Court's Amendment on Remand, and the fact that the policy did not exist at the time of the dissolution, that the Trial Court erred in requiring the HUSBAND to obtain and thereafter maintain a $200,000 life insurance policy with the WIFE as beneficiary. The Second District remanded the matter to the Trial Court with instructions to strike the life insurance provision in the Amended Judgment.

The issue is why the Second District Court did that in Sobelman II. The Second District concluded that a Trial Court can order a spouse to maintain a life insurance policy which secures the payment of any arrearage in the payment of permanent, periodic alimony that might be due at the time of the payor's spouse's death, citing Dwyer v. Dwyer, 12 F. L. W. 2355 (Fla. 2 DCA 1987). The Second District, however, held in Dwyer, supra. and reaffirmed in Sobelman II, that the party requesting such

security, must first establish the need for such security. The Court went on to say that furthermore, while a Court can order a spouse to maintain such a policy, the terms and conditions of the policy must be limited in such a manner that the receiving spouse will receive only what may reasonably be necessary to protect arrearages in alimony so that the actual effect of the insurance requirement is not to provide post mortem alimony. It is the WIFE's failure to establish the need for such security and the Trial Court' failure to having conditioned the requirement so as to limit the functional aspect of the life insurance to security that makes up the basis for the Second District's decision in Sobelman II.

Does Sobelman II, supra. conflict with Gepfrich, supra.? The Second District does not think so. In Sobelman II, the Court stated:

> We agree with out sister court that there is no reason to limit the provisions of Section 61.08(3) Florida Statutes 1985 to securing the payment of lump-sum alimony. See Gepfrich v. Gepfrich, 510 So2d 369 (Fla. 4 DCA 1987).

The Gepfrich appeal arose upon the Husband's challenge to the Trial Court's requirement that the Husband maintain life insurance to secure the payment of rehabilitative alimony. Having reviewed the facts pertinent in that case, the Fourth District concluded that the Trial Court was correct in concluding that a need existed for security or protection of the rehabilitative alimony. Concluding that the purpose of the life insurance was to protect the alimony and support provisions of the judgment, the appellate court affirmed the Trial Court.

This is not the case in Sobelman II. Initially, the Second District wanted the Trial Court to clarify just what was the functional purpose of the life insurance. After the Trial Court clarified its position, it declared the entire life insurance policy to be security for a $1,250 per month obligation. Having determined that the insurance award was strictly security, the Appellate Court perused the record and determined that the WIFE, as the party requesting the life insurance policy, failed to establish the need for the security. Undoubtedly, the Second District was moved in this direction, because the WIFE, in her effort to secure what would effectively be post mortem alimony, requested and obtained a $200,000 policy which had no rational relationship to the function for which the WIFE claims the policy was secured. This was apparently cognizant of the fact that for the policy to be actual security, the HUSBAND would have to be 160 months in arrears. No such need was demonstrated. In other words, the Second District concluded in Sobelman II, that post mortem alimony by any other name is still post mortem alimony which is not authorized under §61.08(3) Florida Statutes, as amended.

CONCLUSION

Both the Second and Fourth District's recognize that life insurance may be used to secure lump-sum and periodic alimony obligations. The Trial Court may fashion an order which accomplishes that objective. Both Courts agree that the Trial

Court may not secure an improper objective (post mortem alimony) by simply labeling it as something else. There is no conflict and the WIFE's Petition for Jurisdiction should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to ARTHUR D. GINSBURG, ESQUIRE, 1800 Main Street, Sarasota, Florida 34236 this 19th day of January, 1988.

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