IN THE SUPREME COURT OF FLORIDA

PAUL SHIMEK, JR.,

Petitioner,

vs.

Case No.: 73,282
1st District - No. 87-486

MONA L. SHIMEK,

Respondent.

APPEAL FROM THE FIRST DISTRICT COURT
OF APPEAL OF FLORIDA, CASE NO. 87-486

APPELLEE'S ANSWER BRIEF

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PREFACE

This is an Appeal taken from a Final Order of the Circuit Court of Okaloosa County, Florida, the Honorable Erwin Fleet presiding. The Appellee was the Petitioner below in an action seeking a dissolution of marriage of the parties hereto against the Respondent below, Appellant. This is an appeal invoking the discretionary jurisdiction of the Supreme Court of Florida pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) to review a decision of the First District Court of Appeal. The decision passes upon a question certified to be of great public importance.

This Answer Brief of Appellee is presented subject to Appellee's Motion to Strike and Dismiss Appellant's Argument II and other portions of Appellant's brief which Appellee asserts are not properly before this Court.

The following symbols will be used in this brief: (R) = Record on Appeal and (T) = Transcript.

The parties shall be referred to by Appellee in this brief as follows:

APPELLANT:	Mr. Shimek Husband Respondent Paul Shimek, Jr. Appellant
APPELLEE:	Mrs. Shimek Wife Petitioner Mona L. Shimek Appellee

STATEMENT OF THE CASE AND THE FACTS

In addition to the Statement of Case and Facts submitted by Appellant, Appellee would respectfully submit the following additional facts which are relevant to this Court's decision regarding the issues on appeal.

The parties were married thirty-one (31) years (T-137). The Wife, at the time of the dissolution of marriage, was forty-nine (49) years old (T-138). She is now fifty (50) years old. She is the mother of the parties' two adult children (T-138). Her primary job during the marriage was homemaker, wife and mother (T-137-139, 160). During the marriage, the wife accompanied her husband and assisted him wherever he was stationed during his military career, during his legal education in Gainesville, Florida, and throughout the marriage (T-138-140). She remained at her husband's side as his faithful wife during the lean years, as well as the prosperous years of this marriage; she devoted herself to her husband's needs as well as those of her two children (T-137-150, 161, 174). Mona Shimek leaves this marriage without a college degree, the specialized skill or training necessary to maintain herself in a competitive labor market (T-160-161). She was employed by her husband in his law office from 1984 until he fired her in March of 1986 shortly after their separation (T-161-163, 174). She was forced to pay for a portion of her attorney's fees with the proceeds from the sale of the parties' marital home which were divided equally between the parties (T-149-150, 180).

In contrast, at the time of the dissolution of marriage, Mr. Shimek had been a practicing attorney for almost twenty-three (23) years (T-92). He furthered his Naval career as an officer and received his legal education during the marriage (T-18-21). Mr. Shimek admits that his wife of thirty-one (31) years was primarily a housekeeper, a mother, and an excellent cook who remained unemployed during the marriage except for a short period of time when she worked for his law office because ". . . I thought it was best to keep her under my umbrella because she hadn't worked before . . . " and " . . . I felt I should give her the best opportunity" (T-22, 25-26, 30).

Mr. Shimek admitted he and his wife maintained a comfortable life style which was sustained entirely by his income. The parties enjoyed a nice home, a maid, membership in private clubs, and annual vacations (T-46-49). Furthermore, he admitted his wife took pride in her cooking, baking, their appearances, and was a good hostess for the family (T-47-48).

The husband provided income averaging $50,000.00 a year (T-110-111). He maintained a law practice having a value of $410,000.00 (T-123) which does not include the value of the furniture and equipment or the $40,000.00 law library (T-114). Furthermore, at the time of the final hearing in this cause, he anticipated receiving $65,000.00 as an attorney's fee (R-199).

The jointly titled property which had an equity value of $100,000.00 and which remains the location of the husband's law practice was lost due to foreclosure (T-88, and Appellant's Brief page 4). The foreclosure occurred primarily because the husband refused

to communicate the need to roll over a $45,000.00 note on that property which had been rolled over on three prior occasions (T-88). Although the husband states this property was purchased at foreclosure sale by a third party, he admits that he is still paying on a $43,000.00 first mortgage on that property (Appellant's Brief page 6).

Mr. Shimek admits ownership of a Navy Mutual Life Insurance Policy having a value of $30,000.00. The wife was the beneficiary on that policy until the parties separated (T-32). He subsequently stated the policy was ". . . now worth $25,000.00 but is encumbered by an approximate $3,600.00 loan . . . " and further that "the encumbrances can be gradually eliminated and that policy assigned. However, a new policy might also be procured." (R-188-189). The husband admitted having another policy on his life having a face of over $100,000.00 with potential liens against said policy of $60,000.00. The wife was designated as the beneficiary on that policy (T-32-33). Lastly, the husband admitted ownership of a $110,000.00 life insurance policy on his wife's life and that the policy names himself as the beneficiary (T-34).

Mr. Shimek has represented himself throughout the proceedings below and before this Court. Thus, he has incurred no attorney's fees for his representation.

The trial court ordered in parts relevant to this appeal as follows:

> "10. . . . He shall likewise secure the payment of alimony by an unencumbered life insurance policy on his life with the wife as beneficiary thereon. The Husband shall furnish to the wife written evidence of the establishment

and continuing maintenance of these insurance policies."

"12. The husband shall be financially responsible for the payment of a reasonable fee for the services of the wife's attorneys incident to these proceedings, together with the allowable court costs. This matter may be scheduled by either party before this Court for an evidentiary hearing to resolve these questions."

SUMMARY OF ARGUMENT

Section 61.08(3) and Section 61.16, Florida Statutes (1985), provide for a discretionary choice by the trial court. Unless this Court can find a clear abuse of that discretion, the trial court's order requiring Appellant to secure the payment of alimony by an unencumbered life insurance policy on his life with Appellee as beneficiary and to pay reasonable attorney's fees and costs for Appellee's representation in this cause must be affirmed. Appellee asserts both awards meet the "reasonableness" test as set forth in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Furthermore, the language of Section 61.08(3) Florida Statutes (1985) is neither restrictive nor limiting such that the Court is authorized only to require life insurance sufficient to secure lump sum alimony awards and arrearage situations.

Appellant retains ownership of life insurance policies on his life having values of $30,000.00 and $100,000.00, as well as life insurance policy on Appellee's life having a value of $110,000.00. All policies were acquired during the parties' marriage; and until shortly after their separation, Appellee was the beneficiary on all of Appellant's policies.

Appellee asserts that as a matter of public policy the question certified to this Court must be answered in the negative. First, to order an alimony paying spouse to maintain or purchase a life insurance policy to secure such alimony awards are not an invalid post-mortem award. Second, such an award is merely an order to maintain an investment for the future which was contracted for during

the marriage and should be treated in a similar fashion as this Court has treated pension and retirements. Third, an order to maintain life insurance policies with the alimony receiving spouse named as beneficiary provides a support "safety net" for the former wife who was unable to support herself. Without this security and given the presumption of a need for alimony, a need which does not cease upon the former husband's death, the former spouse might well become a ward of the state.

Appellant has been practicing law for twenty-three (23) years. He represented himself in the trial court, in his Appeal taken before the First District Court of Appeal and before this Court; and thus, he has incurred no attorney's fees for his representation. On the other hand, Appellee has been forced to significantly deplete assets, proceeds from the sale of the marital home which were divided equally between the parties, in order to pay a portion of her attorney's fees and costs. Finally, consideration must be given to the parties' disparate incomes and future earning capacities. Appellant is a seasoned attorney whereas Appellee was primarily a homemaker throughout this thirty-one (31) year marriage.

Clearly, the trial court did not err in granting its awards to Appellee of life insurance on Appellant's life to secure the alimony awards and in ordering Appellant to pay Appellee's reasonable attorney's fees and costs.

ARGUMENT

DOES SECTION 61.08(3), FLORIDA STATUTES (1985) 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 ALIMONY PAYING SPOUSE THE RECEIVING SPOUSE IS ONLY ENTITLED TO RECEIVE FROM THE INSURANCE THE SUM TOTAL OF ANY EXISTING ALIMONY ARREARAGES?

Section 61.08(3), Florida Statutes (1985), states as follows:

> "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." (Emphasis added)

Appellee asserts the statute clearly provides for a discretionary choice for the trial court to make. The statute contains no restriction such that the trial court is limited in its order to purchase or maintain life insurance for the benefit of a payee spouse to cover only arrearages of alimony at the time of the payor spouse's death. Fiveash v. Fiveash, 523 So.2d 764 (Fla. 1st DCA 1988). The statute is clear, non limiting, and non restrictive.

It is a well established principle that where the language used by the legislature makes clear the legislative intent, it is incumbent upon the courts to give effect to that intent. Barrazza v. Sudath Van Lines, Inc., 474 So.2d 861 (Fla. 1st DCA 1985); Seaboard R.R., Inc. v. Clemente, 467 So.2d 348 (Fla. 3rd DCA 1985); and Citizens of the State v. Public Service Commission, 425 So.2d 534 (Fla. 1982).

Therefore, a court must interpret and construe a statute according to the precise language adopted by the legislature. Florida

Gulf Health Systems Agency, Inc. v. Commission on Ethics, 354 So.2d 932 (Fla. 2nd DCA 1978). There is no reason to read into Section 61.08(3) Florida Statutes (1985) restrictions which did not appear in the language of the statute and which would limit the court to ordering life insurance to protect only lump sum alimony awards or arrearage situations.

The foregoing question has been certified to this court for its consideration as a matter of great public importance. Therefore, certain public policy arguments should be considered by this Court.

First, to order an alimony paying spouse to maintain premium payments on an existing life insurance policy or to order the purchase of insurance policies "to protect an award of alimony" is not an invalid award of post-mortem alimony. The premium payment made by the alimony paying spouse would terminate upon his death; and, therefore, this arrangement does not shift the alimony obligation to the decedent's estate. Fiveash v. Fiveash, 523 So.2d 764 (Fla. 1st DCA 1988). Furthermore, this is not an invalid post-mortem award which would impose a claim by a former spouse against the decedent's estate because life insurance policies which name specific beneficiaries evade the decedent's probate estate.

Second, an order awarding the maintenance of insurance premiums on existing life insurance policies acquired during the marriage as alimony is merely an order to maintain an obligation which was planned for by the parties during the marriage.

Insurance is a contract by which one party, for compensation assumes particular risks of the other party and promises to pay him or his nominee a certain sum of money on a specified contingency.

Its dominent characteristic feature is the granting of indemnity or security against loss, for a stipulated consideration and thus, it is a contract of indemnity against contingent loss. 30 Fla. Jur. 2d Insurance § 2. An insurable interest of some sort must exist in the case of life insurance and said interest may be predicted upon a relationship of dependence upon the life of the insured. 30 Fla. Jur. 2d Insurance § 486.

There is a vested interest in life insurance policies whether a whole life policy which may have a cash value or a term policy having no cash value, where both types of policies were contracted for and invested in by the parties during the marriage. Both types of policies provide for a future contingency, usually the death of the wage earning spouse. Thus, a trial court's order to continue to maintain a life insurance policy for an alimony receiving spouse, which was acquired and paid for during the marriage, is merely a continuation of a contractual obligation and investment which the parties made during the marriage.

The election to purchase life insurance during a marriage involves a choice between available options. Certainly, funds available to pay premiums for life insurance could have been utilized for other investments such as property or utilized to enhance the parties lifestyle. If, in lieu of the election to purchase life insurance, the parties had elected to make a similar monetary investment in property, that property would be subject to equitable distribution by a trial court in a dissolution of marriage action. Similarly, if the parties had elected to utilize these marital funds to enhance their lifestyle in lieu of the payment of premiums for life

insurance, this lifestyle enhancement would be properly considered by the trial court in its award of alimony. Thus, the alimony receiving spouse should not be penalized by the cessation of the marital investment and financial security which the parties contemplated, planned for, and budgeted for during a marriage.

If viewed in this manner, the parties' decision to invest in life insurance is analogous to the parties' decision to invest in a retirement or pension plan. Like retirement, death is a future eventuality. In Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986), where during the marriage the husband had deducted funds from his salary and invested in a pension plan, thus receiving a lesser present compensation in exchange for the contractual right to future benefits, this Court held that a spouse's entitlement to pension or retirement benefits must be considered as a marital asset for the purposes of equitably distributing marital property. This Court's holding in Diffenderfer recognized the non employee spouse's entitlement to the other's pension because of the non employee spouse's contribution to the economic success of the marriage. As this Court stated in Diffenderfer, "to the extent acquired during the marriage, the expected benefits are a product of marital team work" Id at 268. (Emphasis added)

In Pastore v. Pastore, 497 So.2d 635 (Fla. 1986), this Court extended its decision in Diffenderfer to include future retirement benefits. In Pastore, the trial court found the husband's future retirement benefits were a marital asset and awarded the wife a property interest in one-half (1/2) of the benefits when received. This Court upheld the trial court's decision stating that the trial

court properly treated the entitlement to the military retirement pension as a marital asset acquired through the labor of both parties over the duration of a lengthy marriage, where as in the instant case, a wife for over twenty (20) years devoted herself to her husband and family and in furthering his career.

Appellee asserts life insurance policies acquired during a marriage with premiums paid for with marital funds should be treated in a similar fashion as this Court has treated pension and retirement benefits. In a lengthy marriage, as in the instant case, a husband may elect to purchase life insurance to provide his wife with adequate protection in the event of his death. Therefore, the solution, and a better view, is to consider a life insurance policy as an asset which can be the subject of a lump sum award to the wife just as any other asset. Furthermore, such an award can be framed in terms which will protect the wife if the husband predeceases her and if she remains unmarried, but at the same time, terminate the husband's obligation in the event of the wife's death or remarriage prior to his death. Stith v. Stith, 384 So.2d 317 (Fla. 2d DCA 1980); McClung v. McClung, 485 So.2d 637 (Fla. 2d DCA 1985).

Third, to order an alimony paying spouse to purchase or maintain life insurance policies with the alimony receiving spouse as the beneficiary provides a support "safety net" for the former wife in the event of the former husband's death. An award of permanent alimony to a former wife presumes there was a finding by the trial court of her need for alimony based upon her inability to support herself. This need does not cease at the death of the former husband. Without some "safety net" for her support, the former wife

of a deceased former husband, no longer dependent upon the former husband's support might well become a ward of the state, dependent upon the state for food, shelter, and welfare programs. Thus, life insurance which is acquired and paid for during a marriage would provide the former wife with some protection against the possibility of having her support payments cut off by the former husband's untimely death.

In the instant case, given the age of the former wife, the former husband's position as an attorney, the former husband's ability to pay court ordered alimony and to maintain life insurance policies acquired during the thirty (30) year marriage, the wife asserts the trial court did not err in its decision to order the former husband to secure the payment of alimony by an unencumbered life insurance policy on his life with the wife named as the beneficiary (R-186). Such an award offsets the complete cessation of permanent alimony in the event that the former husband predeceases the former wife.

In the instant case, the life insurance policies are available, they were paid for over a term of years with marital funds, they were to be investments for the future, they designated the wife as the beneficiary. The policies available on the husband's life at the time of the dissolution of marriage which were maintained by the husband during the marriage have a total face value of over $130,000.00. These policies were marital investments made for the wife's future benefit, investments which were made in lieu of other potential investments or expenditures and which would have been considered by this Court in its equitable distribution scheme and alimony awards. These investments were made to provide security

and to provide protection for the wife in the event of the husband's untimely death. To strip the former wife of these investments, or at the very least a portion of these investments, would fly in the face of the law of equitable distribution as set forth in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

II. THE TRIAL COURT DID NOT ERR IN ORDERING APPELLANT TO PAY APPELLEE'S ATTORNEY'S FEES AND COSTS.

Appellee submits this portion of her Answer Brief subject to the Court's consideration o her Motion to Strike and Dismiss Appellant's Argument II and Other Portions of Appellant's Brief and Motion for Sanctions.

Section 61.16, Florida Statutes (1985), states:

> "The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name."

Appellant's brief appears to complain that the trial court unequally distributed the assets of the marriage; however, Appellant states it is improper to award attorney's fees in favor of the wife when distribution of marital assets was at least equal. Appellant did not elect to challenge on appeal the trial court's distribution of assets, and thus his implication that he was "short changed" should be ignored.

The court in its discretion and after consideration of the financial resources of both parties, ordered the Appellant to pay the Appellee's attorney's fees. The purpose of Section 61.16, Florida Statutes (1985) is to insure both parties will have similar ability to secure competent legal counsel. Canakaris v. Canakaris, 382 So.2d 1197, 1205 (Fla. 1980). In the instant case as in Canakaris, the financial positions of the parties in the proceedings are not the same. The husband, in the instant case, is an attorney who represented

himself throughout the proceedings. He incurred no attorney's fee whatsoever and he has a superior financial ability to pay the fees and costs associated with his wife's representation.

It is not necessary that one spouse be completely unable to pay attorney's fees in order for the court to require a spouse to pay attorney's fees and in this case such an award was proper to avoid an inequitable diminution of the lump sum awards granted to the wife. Canakaris at 1205. After making an equitable distribution of marital assets, it would be inequitable to diminish the assets awarded to the wife. McIntyre v. McIntyre, 434 So.2d 61, 62 (Fla. 5th DCA 1983). In the instant case, the future financial resources of the parties are disproportionate. The husband has the superior earning capacity and education, and therefore, a superior ability to discharge his obligation to pay attorney's fees and costs as ordered by the court. Id. at 62, Smith v. Smith, 495 So.2d 229 (Fla. 2nd DCA 1986), Bowers v. Bowers, 497 So.2d 1357 (Fla. 4th DCA 1986).

A trial court does not abuse its discretion in awarding attorney's fees if it considers the difference between the parties' income. The trial court may award fees after considering the financial resources of both of the parties and finding that one spouse has a greater ability to pay the fees. O'Steen v. O'Steen, 478 So.2d 489 (Fla. 1st DCA 1985). In the instant case, Appellant is a practicing attorney and is well able to make a comfortable living for himself. In contrast, Appellee had primarily been a homemaker during the marriage. In Hartley v. Hartley, 399 So.2d 1126 (Fla. 4th DCA 1981), the court held that the trial court did not abuse its discretion in awarding attorney's fees to the wife where throughout the marriage, as in the

instant case, she was a homemaker and the husband was the bread winner. And, finally, in Kelly v. Kelly, 491 So.2d 330 (Fla. 1st DCA 1986), the court held that the trial court abused its discretion in not awarding attorney's fees to the wife as the wife had a substantially smaller income than the husband.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the First District Court of Appeal's decision to affirm the trial court's order should not be reversed and that the question certified to this Court should be answered in the negative.

Following Section 61.08(3), Florida Statutes (1985), the trial court did not abuse its discretion by ordering Appellant to secure the alimony awarded to Appellee by an unencumbered life insurance policy with Appellee named as beneficiary. This statute clearly allows the trial court to exercise its discretion in making such an award. The language of this statute clearly expresses the legislative intent; and, there is no reason to read restrictions or limitations into the statute such that it limits a trial court to ordering life insurance only to protect alimony arrearage situations.

Additionally, as a matter of public policy the question certified to this Court must be answered in the negative. An award of life insurance to secure alimony is not a post-mortem award, it is merely an order to maintain a contractual investment to secure the future of the alimony receiving spouse and should be treated in a similar fashion as this Court has treated pension and retirement plans.

Following Section 61.16, Florida Statutes (1985), the trial court did not abuse its discretion in ordering Appellant to pay Appellee's reasonable attorney's fees and costs. Although both parties may be equally situated in distribution of assets, Appellee does not have equal earning power nor does she have the same ability as Appellant to obtain competent legal counsel. Furthermore, she has been forced to significantly deplete assets in order to secure competent legal

counsel. Considering the difference in the earning capacities of each of the parties and Appellant's ability to represent himself and incur no attorney's fees, the award of attorney's fees and costs to Appellee was reasonable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Answer Brief of Appellee has been furnished to Paul Shimek, Jr., Esquire, Appellant, at 311 North Spring Street, Pensacola, Florida 32501, by U.S. regular mail on this the 13 day of December, 1988.

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