IN THE SUPREME COURT OF FLORIDA

PAUL SHIMEK, JR.,	: CASE NO. 73,282
Petitioner,	: 1st District-No. 87-486
v.	:
MONA L. SHIMEK,	:
Respondent.	:

APPELLANT'S BRIEF

APPEAL FROM FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

Circuit Court Case Number 86-477
First District Court of Appeal Number 87-486

PAUL SHIMEK, JR.
For the Corporation
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STATEMENT OF THE CASE AND OF THE FACTS

References to the record herein are referred to as (R:). Reference to the transcript of hearing of June 27, 1986, is referred to as (H). The trial transcript at final hearing is referred to herein as (T).

Wife filed a Petition for Dissolution of Marriage on February 19, 1986, and amended the petition on March 12, 1986 (R:1,R:3) with her March 11, 1986, financial affidavit attached (R:5). Husband filed his response on August 7, 1986 (R:60). On May 15, 1987, the trial Court entered final judgment dissolving the marriage, awarded Wife permanent, periodic alimony, rehabilitative alimony, and ordered Husband to be financially responsible for the payment of Wife's attorney's fees and costs. The Court required Husband to secure the payment of periodic, permanent alimony with an unemcumbered life insurance policy on his life, with the Wife named as beneficiary thereon (R:185).

On June 1, 1987, Husband filed a motion to clarify the insurance question raised herein (R:188-190) but abandoned same (R:192) and instead appealed to the First District Court of Appeals. (R:191). On September 8, 1987, Husband filed Motion for Relief for financial inability to comply with the Court Order then being appealed (R:198-200). Husband subsequently did totally

comply with the lower Court's Order as relates to alimony payments.

On August 24, 1988, the First District Court of Appeal affirmed the trial Court. On October 7, 1988, the Appellate Court granted Appellant's Motion to Certify and certified the question sub judice. On November 9, 1988, the Florida Supreme Court established a briefing schedule. This brief is timely filed pursuant to that Order.

On January 31, 1986, Wife, having vacated the marital home, possessed in her exclusive control $21,116.33 in a savings account (R:8,12), (H 17,30,32), (R:34,48,50) (T 28,29); $33,000.00 in jewelry, including a diamond ring worth $25,000.00 to $30,000.00 (R:16,45,86) (H 27); a 1979 Datsun 280ZX valued by Wife between $3,000.00 and $6,000.00 (R:5,49) (H 31) (R:16,86); $50,000.00 cash (R:8,11,16,5,86); which subsequently was placed into T-bills, drawing interest of $330.00 per month (H 25A.26.28); (R:43,44,46); (T 6,9,57,160,168), (T 6,9,157,160,168); $30,000.00 in expected proceeds from the sale of the marital home (R:82-83,131-134), which did materialize in December, 1986, in the amount to her of $30,102.00 (T 150,180); realty in Hernando County, Florida, valued at $15,000.00 to $19,000.00 net (R:5,67) for which she had an offer to

sell at $15,000.00 (T 6), this property having been procured by Husband from Husband's brother (T 156-157), but awarded to Wife (R:185), and a salary whereby she was earning $270.00 per week. (T 161).

Wife continued working but was subsequently terminated, and obtained another job with a department store (Gayfers) (H 6) (R:23), and except for her own admission of deliberately violating her employer's policy (T 166) could have retained that latter employment. Wife's request for temporary alimony was denied on 6/27/86 (H:37)(R:55).

At trial on January 29, 1987, Wife testified that her only debt was a $2,634.69 loan she recently took out on her 1979 Datsun 280ZX so that she could pay her 1985 income tax bill (T 170).

All other debts, i.e., Gayfers, Mary's Corner Shop, McRaes, were ordered to be paid by the Husband (T 170), (R:168). All realty promissory note debts were eliminated by foreclosure or sale.

Wife had already paid her attorneys $10,000.00 from time to time prior to final hearing (T 180).

Wife was capable of dealing in real estate investment and testified as to her success in real estate and in business (T 141,143,146,157-159,182-186) (H 33);(R:51).

Husband, on the other hand, had debts of $312,022.71, (R:143-173) all of which was documented, detailed, and uncontested (R:150) (T 7,27,102-105). A previous financial statement (R:87-92) had reflected a debt of $291,278.20. From October, 1985, through January, 1987, Husband earned a salary of only $16,900.00, i.e., $8,000.00 in 1985 and $8,900.00 in 1986 (R:89,142). Husband had no other income except from the joint rental proceeds the parties jointly received on an annual basis from the law firm tenant (R:90,141) which, in turn, was used to pay the first mortgage on that realty but which realty was lost to foreclosure (R:102-104; R:153-163). Husband had, but has no longer, an additional $1,000.00 per year rental on heavily mortgaged family farm lands in Arkansas (R:100-101; R:97-99) which were subsequently conveyed to the parties' sons (R:150).

All realty awarded the parties jointly or to Husband were foreclosed upon before final order of the Court. This included the $100,000.00 equity foreclosure on the law office realty in February, 1987, with Florida National Bank (T 88,152,155).

A Writ of Garnishment had been issued (R:168-170) against the law firm employing husband to attach his salary in order to satisfy a $58,463.44 judgment

(R:160-161) against him by First State Bank (R:110-118). Wife's counsel microscopically examined the law firm checking account, trust account, the parties' joint checking account and Husband's personal checking account over several years and there was no discrepancy in the figures recited in those records. (T 27,102,103).

Husband is in economic distress for several reasons reflected at (T 33,62,65,70,87,99). Husband owes more than $60,000.00 on the First State Bank judgment and more than an additional $17,000.00 to Barnett Bank (since reduced to judgment) (R:119-128) because he signed promissory notes totalling $165,000.00 so that an attorney, Joe Hosner, could receive and did receive the money to help him in a financial crisis.

Husband owes approximately $60,000.00 ($57,715.88 plus interest to date) (R:96) to the law firm pension and profit sharing plan for an original loan by the plan to him of $40,000.00 (R:95, R:78-184). The $40,000.00 was spent to release Tom Davis of a $41,000.00 mortgage debt (R:179,182) owed to Husband as trustee for others. Davis then conveyed to Wife realty worth $40,000.00, (R:177) for which she paid nothing, which realty Wife then sold for $80,000.00, which $80,000.00 Wife retained in her own name, and which proceeds are the root source of the $50,000.00 held by her in T-bills. The Court

awarded Wife this money and refused Husband's request for one half of same (R:171-deeds-exhibits-Respondent's Exhibit "B"), (T 81,157-159,183,186,189) (H 33).

Husband also owes Florida National Bank $15,000.00 on a note co-signed with a client, Mr. Corbin, to cover Mr. Corbin's bounced checks to the law firm (T 59,60). Husband owes additional amounts to Florida National Bank totalling $38,000.00, (R:143) which sums are in addition to the amounts owed but foreclosed upon (T 51,168).

Husband is still paying on a $43,000.00 promissory note owed to Bisbee-Baldwin (R:105-106, R:165-166) which is the first mortgagee on the law firm realty, realty subsequently owned by the party who purchased at the foreclosure sale.

Husband paid, by Court Order, temporary alimony of $1,000.00 per month to Wife for November, December, 1986, and January, 1987, but was unable to pay thereafter and was released at trial in January, 1987. (R:174-176) (T 4,202).

Husband had even been required to borrow funds to pay salaries at the law firm, FICA and Withholding and paid back those loans with the proceeds he received from the sale of the marital home. (T 38).

Husband sold all of his law corporation stock for $2,500.00, which sale was approved by Court Order. (T

89-90).

Over the years Husband has been required to lend funds to the law firm which owed him, at various times, $10,000.00-$20,000.00, since 1983 (T 131-132). The law firm is also in financial distress, it having a negative net worth of $20,000.00. (T 194).

Additionally, Husband recited his necessary expenses to pay for rental, food, clothes, etc. (R:91.40) (T 17).

SUMMARY OF THE ARGUMENT

I

The amended statute §61.08(3), Fla.Stat. (1985) provides the means to allow the trial Court to protect an award of alimony through life insurance to the extent necessary. Therefore, the trial Court must make specific findings of fact which indicate the necessity for requiring the protection and narrowly limit the protection to the vested alimony right. In the case of permanent, periodic alimony, the security, in this case life insurance, must be limited only to prospective arrearages at the time of the death of the alimony payor. Therefore, the trial Court must make specific findings as to need and then sufficiently and narrowly tailor the life insurance requirement to meet the security need. The trial Court failed to perform this dual requirement and must therefore be reversed.

II

The trial Court abused its discretion in requiring the Husband to pay the Wife's attorney's fees. The purpose of §61.16, Florida Statutes (1985) is to insure both parties will have a similar ability to secure competent legal counsel. Where, as in the case at bar, the spouse requesting attorney's fees is placed in a better financial position than the other spouse through

equitable distribution and alimony awards she is not entitled to an award of attorney's fees. Further, where the party requesting the payment of attorney's fees fails to demonstrate on the record her inability to pay it is an abuse of discretion to order the payment of her attorney's fee.

I
ARGUMENT

WHETHER §61.08(3) FLORIDA STATUTES (1985) AUTHORIZES THE TRIAL COURT TO REQUIRE APPELLANT AS AN ALIMONY PAYING SPOUSE TO MAINTAIN A LIFE INSURANCE POLICY SECURING SAID ALIMONY AWARD, SUCH THAT UPON THE DEATH OF APPELLANT THE RECEIVING SPOUSE IS ONLY ENTITLED TO RECEIVE FROM THE INSURANCE THE SUM TOTAL OF ANY EXISTING ALIMONY ARREARAGES

§61.08(3), Fla.Stat. (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."

"The well established rule is that an obligation to pay alimony ceases upon the death of the obligor, unless that person expressly agrees that the estate shall be bound to continue to pay alimony after his death." Clark v. Clark, 509 So.2d 364, 365 (4th DCA 1987) citing O'Malley v. Pan American Bank of Orlando, N.A., 384 So.2d 1258 (Fla. 1980).

The Florida Legislature, by enactment of the amended §61.08(3), Fla.Stat. (1985) has cast doubt upon the continued blanket prohibition against postmortem alimony. However, strict construction of the amended statute illuminates no new exception to the prohibition,

and correct application of the amended statute will avoid the denigration of a well founded principal and the establishment of new rights which the legislature never intended.

The amended statute states succinctly:

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

Obviously, this language does not establish a new right of postmortem alimony through life insurance but, in the alternative, allows the trial Court, within its discretion, to order the party ordered to pay alimony to maintain a security to protect that award. In the case of lump sum alimony and rehabilitative alimony, wherein the amount to be paid by a party is easily established it is apparent that the trial Court may order a party to purchase and maintain a life insurance policy in the amount of that award until such time as the award is satisfied. Application of the amended statute in order to protect periodic permanent alimony is much more difficult. In order to remain within the strict construction of the amended statute, certain requirements must be met prior to the awarding of such security and that must be combined with strict limitations upon its application.

Strict construction of the amended statute is necessary.

> "Since the law is so clearly established that the obligation to pay alimony dies with the obligated party, such a provision is implicit within the language of the agreement. In order to overcome this implied provision there must be an express indication of an intention to the contrary."

O'Malley v. Pan American Bank of Orlando, 384 So.2d 1258, 1260 (Fla. 1980).

Although the Supreme Court announced this requirement of strict construction in a case involving a separation agreement, the analysis and rationale are equally applicable in the interpretation of the amended statute. §61.08(3) Fla.Stat. (1985). A well founded rule of law such as the prohibition against postmortem alimony should not be cast aside by inference. Where the legislature has failed to explicitly recite such an intention, so should the Court in its interpretation.

Therefore, in order to avoid the creation of a new right and in keeping with the obvious intent of the amended statute, the trial Court must meet two established requirements in the exercise of its discretion when requiring a party to secure alimony, and in particular, permanent periodic alimony through life insurance policy or a bond or some other security.

The first requirement the trial Court must consider is whether there is a factual setting which would necessitate the security of an award. Kooser v. Kooser, 506 So.2d 81, 82 (1 DCA 1987); Clark v. Clark, 509 So.2d

364, 365 (4th DCA 1987); Sobelman v. Sobelman, 490 So.2d 225, 226 (2nd DCA 1986) (Sobelman I). In the case of lump sum or rehabilitative alimony it is readily apparent what is the amount which may be required to be protected. Therefore, the trial Court must limit the security to the amount awarded for the specific time necessary until the award is satisfied and demonstrate specific justification as to the need for such protection.

The more difficult question arises in the application of the amended statute to an award of permanent periodic alimony as in the case at bar.

> "The discretion to impose a requirement for insurance is carefully limited: it may only be exercised 'to the extent necessary to protect an award of alimony . . .'

Longo v. Longo, 13 F.L.W. 2178 (4th DCA September 21, 1988).

Pursuant to the protection provision of the amended statute, it is therefore clear that the factual setting required is that in which it appears reasonably necessary to protect arrearages. Longo v. Longo, supra.

Once the trial Court determines the need to protect arrearages for permanent periodic alimony it is then necessary that the trial Court specifically limit the requirement for a life insurance policy to only that which may be reasonably necessary to protect the

arrearages. Sobelman v. Sobelman, 516 So.2d 7 (2nd DCA 1987) (Sobelman II); Longo, supra, at 2180.

In the case at bar the trial Court ordered the Appellant to procure a life insurance policy in order to protect permanent periodic alimony to be paid to the Appellee. The trial Court failed to establish any factual setting or need for the security it ordered. To the contrary, it is apparent from the record that both individuals are in the prime of their lives and do not suffer from any infirmity or ill health. The record is further barren of any indication that arrearages may arise and, if so, in what anticipated amount. Therefore, it was error for the trial Court to order such security pursuant to §61.08(3).

Further, the trial Court failed to specifically limit the required provisions for the life insurance as to its duration and amount and it is, therefore, impossible to determine whether the required insurance will be sufficiently limited in scope to protect only cumulative arrearage of the awarded alimony.

Accordingly, the Court's decision in the absence of any factual setting or specified need and its failure to set sufficient limits as to the security requirement constitutes an abuse of the Court's discretion and normally constitutes reversible error. To the extent,

however, that the trial Court required the maintenance of a life insurance policy to provide only for the sum total of any existing alimony arrearages and nothing more than that, the judgment as clarified on this point wouldn't constitute reversable error. The judgment needs be limited to this interpretation and application.

II
ARGUMENT

WHETHER THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY APPELLEE'S ATTORNEY'S FEES AND COSTS

§61.16, Fla.Stat. (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 of attorney's fees, suit money, and the cost to the other party of maintaining of defending any proceeding under this chapter, including enforcement of modification proceedings. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his name."

It is in the Court's discretion and after consideration of the financial resources of both parties, to require the payment of attorney's fees. The purpose of §61.16, Fla.Stat. (1985) is to insure both parties will have a similar ability to secure competent legal counsel. Canakaris v. Canakaris, 382 So.2d 1197, 1205 (Fla. 1980). The record reflects that at the time of the dissolution of marriage the husband had no assets but had substantial debts. The wife, on the other hand, had substantial cash assets and no debts. The distribution of marital assets was clearly unequal in favor of the wife, who left the marriage with resources from which she is well able to pay her own costs and attorney's fees and, therefore, should be required to do so.

The record indicates that the wife received a Three Thousand ($3,000.00) Dollar Datsun 280ZX (depending upon which financial affidavit is correct, i.e., October 14, 1986; June 6, 1986; or March 11, 1986); Thirty Three Thousand ($33,000.00) Dollars worth of jewelry, including a five (5) carat diamond ring valued at Twenty Five Thousand ($25,000.00) Dollars; realty with Ten Thousand ($10,000.00) to Thirteen Thousand ($13,000.00) equity for which she had a buyer; and Fifty Thousand ($50,000.00) Dollars in T-bills, producing Three Hundred Thirty ($330.00) Dollars per month income, with no debts. The record further reflects that the wife was employed and employable and capable of making approximately Eight Hundred ($800.00) Dollars to One Thousand ($1,000.00) Dollars per month. She was additionally awarded One Thousand ($1,000.00) Dollars permanent, periodic alimony to be paid and which has been paid by the husband, and that secured by an insurance policy to cover any arrearages existing at his death. She also received and was paid Five Thousand ($5,000.00) Dollars rehabilitative alimony. The husband, on the other hand, had debts of at least Three Hundred Thousand ($300,000.00) Dollars and no assets. Considering the Thirty Thousand ($30,000.00) Dollars proceeds of the sale of the marital home, Wife presently

possesses more than One Hundred Thousand ($100,000.00) Dollars cash.

The award of attorney's fees is dependent upon the relative financial circumstances of the parties. The cases are legion that when both parties are in a relatively equal financial position or, as in the case at bar, the spouse requesting attorney's fees is placed in a better financial position, then the requesting party is not entitled to an award of attorney's fees. Blankenship v. Blankenship, 502 So.2d 1002 (5th DCA 1987); Beaver v. Beaver, 500 So.2d 742 (5th DCA 1987); Sizemore v. Sizemore, 487 So.2d 1080 (5th DCA 1986); Zulywitz v. Zulywitz, 473 So.2d 275 (5th DCA 1985); Seitz v. Seitz, 471 So.2d 612 (3d DCA 1985); McIntyre v. McIntyre, 434 So.2d 61, 62 (4th DCA 1983); and Poppe v. Poppe, 412 So.2d 38 (3d DCA 1982).

Beyond that Wife, having secured counsel at least on an equal footing, cannot on the record demonstrate her inability to pay the remainder of her fee. That is one indispensable prerequisite for such an award, and establishing that inability automatically creates the "need" that is met by husband's being required to pay. Cummings v. Cummings, 330 So.2d 134,136 (Fla. 1976); Child v. Child, 474 So.2d 299,302 (3d DCA 1985); Patterson v. Patterson, 348 So.2d 592,596 (1 DCA 1977).

Therefore, the trial Court enormously comprehended the parties' total financial position after the distribution of assets and thereby abused its discretion in making the husband responsible for payment of any of the wife's attorney's fees and costs and should be reversed.

CONCLUSION

The amended statute §61.16, Fla.Stat. (1985) may only protect prospective arrearages in the case of permanent, periodic alimony. Also, the insurance requirement must be narrowly tailored to meet the specific protection required.

The trial Court abused its discretion in requiring the Husband to pay the Wife's attorney's fees wherein she was placed in a better financial position and did not demonstrate a need for the other spouse to pay the attorney's fee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by Delivery to Kathleen Gainsley, Esquire, LEVIN, MIDDLEBROOKS--, Seville Tower, 226 South Palafox Street, Pensacola, FL 32501, this 23rd day of November, 1988.

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