IN THE SUPREME COURT OF FLORIDA

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

REPLY TO APPELLEE'S ARGUMENT

APPEAL FROM FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

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

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STATEMENT OF THE CASE AND OF THE FACTS

Several clarifications and additions need be made to the parties' Statement of the Case and of the Facts to bring the statement into proper focus. As to Appellant's statement, in addition to the already mentioned cash, i.e., $21,163.33 savings account, $50,000.00 cash (T-bills), $30,102.00 (sale of home), various employment salaries, Wife has received $25,000.00 alimony under the Final Judgment, and $3,000.00 under the Temporary Order for a total of $28,000.00. This is also in addition to personalty, i.e., the $33,000.00 jewelry, $4,500.00 Datsun 280 ZX (approximate) and $15,000.00 profit from the sale of Hernando County land awarded her.

Concerning Appellee's Statement of the Case and of the Facts it is noted that Appellee does not contest a single sentence of Appellant's statement, but what is recited are facts in addition to that already stated by Appellant. Certain statements, however conclusive in nature, that are stated as facts, need be commented upon to bring the matter into focus. A statement on Page 2 that Wife was forced to pay for a portion of her attorney's fees with proceeds from the sale of the parties' marital home is not, in fact, reflected in the record. Nowhere does the record even suggest such

pressure or forcing and such use of terminology is misleading. On Page 3, the statement concerning $50,000.00 income, $410,000.00 law practice value, and anticipation of a $65,000.00 attorney's fee are such gross exaggerations, taken out of context, that the undersigned must address in clarification. The Court, at (T-125), brought quickly into focus that borrowed funds were the reason for the suggested average income which was used as the basis for the true evaluation and personal income. Appellant only earned $8,000.00 in 1985 and $8,900.00 in 1986 (R-89,142). Concerning the law practice value of $410,000.00, the testimony of the expert, Ted G. Gund, (T-192) recites that the law practice had a negative net worth of (-)$20,000.00 (T-194). Ted Gund was the parties' and the law firms' accountant for the last fifteen years. Concerning the $65,000.00 attorney's fee, the undersigned announces that the firm received those funds on October 20, 1987, and from that amount the undersigned received $12,600.00 gross, $9,311.10 net. That is the sum total of Appellant's 1987 earnings and is consistent with the 1985 and 1986 wages from the law firm. Since alimony payments exceed wages, it is obvious that more borrowing is involved.

Appellee makes mention, on Pages 3 and 4, that the

foreclosure occurred because Husband refused to communicate the need to rollover a $43,000.00 note. That statement probably is irrelevant, but since it is so in conflict with the record it must be noted. At (T-88) the testimony is directly contrary to counsel's representation to the Court. Concerning rollover (renewal) of the note, the undersigned, at Line 9, recited, "I've asked Mona. I have not asked her counsel, but counsel is your partner." At Line 16 that the Wife refused to permit rollover. At Line 20 Husband talked to bank counsel, who talked to Wife's counsel without any resolution of rollover in the face of impending summary judgment. At (T-89), concerning letting the property go into foreclosure, the testimony recites that rollover is not available unless Wife executed the Promissory Note also. Therefore, the characterization of the testimony demonstrates a distortion that cannot be permitted to go unnoticed.

At Page 4 another irrelevant mention of Husband paying on a $43,000.00 first mortgage on the foreclosed law firm property now must be clarified. The law firm property is now owned by a second owner since foreclosure, to whom the law firm pays rent. Both Husband and Wife were signatories to the first mortgage and the Husband continues to make payments on the first

mortgage via law firm checks for the landlord as part of the rent. The underlying suggestion that Husband still somehow controls the property, and therefore pays personally the $43,000.00 first mortgage payment is an unfair characterization of the truth. The firm makes monthly payments as rent on that debt.

Page 4 of the statement discusses insurance policies. The only policy existing at final hearing was the $25,000.00 policy encumbered in the amount of $3,600.00. Preceding discovery established that precisely. To claim that Husband admitted ownership of a $30,000.00 policy, taken from a statement at (T-32), Line 5, when Husband believed it was $30,000.00 but no record to check it, again suggests distortions that cannot be ignored. As to a $100,000.00 encumbered policy to two banks, (T-32), Husband testified at Line 20 that he wasn't sure, but that if there were a policy then the banks were the beneficiaries. Both banks now have reduced the debts to judgments and those policies expired. On the day of testimony (January 29, 1987) it is possible the policies might have existed but were expired before Final Judgment was entered. For the Court's information, the only policy that exists with the knowledge of the undersigned, is a $25,000.00 policy encumbered with a $3,600.00 loan. Recently the

undersigned took out a $50,000.00 policy, first beneficiary being Wife herein, but limited only to arrearages at death. The Court Order has been complied with in that respect.

At Page 4 the comment is made that no attorney's fees for representation have been incurred. The Court can judicially notice that same or similar time and costs are required on each side of the case to research, investigate, appear in Court, write briefs, etc. and that time is money. Time spent by Husband on the case is time away from other cases and constitutes great amounts of time which translates to fees. The statement is true if costs of representation must be paid only to another, as compared to the loss endured by loss of time for self-representation. The fact simply is that Husband couldn't afford counsel.

SUMMARY OF THE ARGUMENT

The law of Florida is that permanent periodic alimony terminates upon death of the payor. Specific amounts can be protected by insurance where the Court clearly speaks to that specific amount and meets the criteria. To order the purchase of a life insurance policy to secure permanent periodic alimony open ended is an invalid post mortem award. It is not an investment to spend during life but is post mortem payment of alimony not contracted for by the parties. Safety nets to one are hangman nooses to others and would be an unfair burden to impose.

The Court erred in this case in ordering life insurance to pay for open ended post mortem permanent, periodic alimony.

ARGUMENT

Appellee states in her first paragraph that the statute is clear, non-limiting, and non-restrictive. As stated in Appellant's previous argument the amended statute clearly contains the limitation "to the extent necessary to protect an award". Appellant agrees that 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) et.seq. A strict and precise reading of the statute clearly illuminates the above-referred limitation. The legislature clearly intended to limit the Court's discretion in awarding life insurance when it set forth the limiting language "to the extent necessary to protect an award."

Next the Appellee urges this Court to look beyond the plain wording of the amended statute in contradiction to her earlier argument of strict construction through submission of public policy arguments. The Appellee does not refer to any legislative history in setting forth her public policy argument and merely speculates as to what she believes is the supposed benefits of carte blanc award of life insurance. Such an argument abrogates the fundamental

rule of separation of powers and duties contained within our separate branches of government. The legislature makes the law and the judiciary is called upon to interpret the law. Although Appellee's public policy arguments may appear worthwhile it is not the role of the judiciary to expand upon a right which the judiciary has long ago expressly limited. If the legislature intended that the trial Court should have unlimited discretion to award life insurance it would not have explicitly included the limitations set forth in the amended statute. It could also have provided for post mortem alimony being charged to a paying decedent's estate, thus changing the law of Florida. It didn't do that and alimony still terminates at death.

Appellee's argument regarding life insurance being analogous to retirement benefits or a pension plan should be rejected. Retirement benefits presume enjoyment during life while life insurance does not contemplate that. Appellant does not dispute that a life insurance policy may be properly subject to equitable distribution. However, the requirement to maintain a life insurance policy into the future following the dissolution as contemplated by the amended statute does not involve marital property. It is a security requirement wherein the trial Court determines that an

ascertainable alimony amount ordered must be protected. The lower Court's ability to treat equity in a life insurance policy as marital property subject to equitable distribution is not questioned. The Court could have addressed existing encumbered insurance policies but it did not. The Court clearly contemplated new insurance to protect post mortem alimony.

The trial Court must follow the strict limitations of the amended statute and may require the maintenance of a life insurance policy to provide only for the sum total of any existing alimony arrearages.

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 U.S. Mail to Kathleen Gainsley, Esquire, LEVIN, MIDDLEBROOKS--, Seville Tower, 226 South Palafox Street, Pensacola, FL 32501, this 23rd day of December, 1988.

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