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SUPREME COURT OF FLORIDA

CHERYL MORTENSON,

Petitioner,

v. Case No. 76,750
Second District - No. 89-02119

B. EDWIN JOHNSON,

Respondent.
_____/

DISCRETIONARY REVIEW OF A CERTIFIED QUESTION
FROM THE SECOND DISTRICT COURT OF APPEAL

BRIEF OF B. EDWIN JOHNSON, RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The Respondent was retained by the School Board of Pinellas County as their attorney for 14 years. He was retained by the Board from July 1, 1986 on an annual contract ($70,000.00 per year) until June, 1987.

In July, 1987 the School Board entered into a hourly contract with the Respondent with a guaranteed payment of $96,000 a year. That contract was renewable for an additional year at the end of June, 1988.

In October, 1987 this paternity case became highly publicized by the media. After the public disclosure of the case, the School Board "cancelled" its contract with the Respondent. As a result, the Respondent suffered a significant reduction in income. He was unable to obtain any public employment because of the publicity. After 24 years in public service, he opened a private law practice.

In July, 1988, the Respondent determined that his income fell below the level of $2,637.00 per month established for the payment of child support of $455.00 per month. In August, 1988 the Respondent filed a Motion for Modification of the Final Judgement of Paternity. Thereafter, the Respondent filed a Financial Affidavit indicating that he was "drawing" the sum of $300.00 per week from his business account. This "draw" was made from funds paid to him by the school system for work completed in 1987 and $25,000 which he borrowed from his pension fund and brother. The Respondent's

income from the law practice for the 8 months prior to filing the Motion for Modification was less than office expenses. In other words, the Respondent was "living on borrowed money".

On November, 28, 1988, a three-hour hearing was scheduled before the Honorable Judge Steinberg to hear the Respondent's Motion for Modification. The Petitoner's attorney then began a series of "delaying" tactics that extended the hearings so that it was almost a year later that the modification proceeding was concluded.

Judge Steinberg indicated on several occasions that the Respondent had suffered a significant change in circumstances, however, he was unable to determine from the Respondent's records whether his 1987 net income fell below that specified in the Final Order of Paternity which established the level of child support payable to the Petitioner.

On October 21, 1988, Appellant's counsel filed a Motion for Attorney's Fees. In her Motion, the Petitioner requested the Court to interpret Section 742.031 Florida Statutes to provide attorney's fees to her. The hearing on the motion was not scheduled until March, 1989.

During the year the Motion for Modification was pending, the Petitoner's attorney filed approximately 30 documents including motions, notices of hearings, interrogatories, subpoena duces tecum and other papers. During this process,

he filed many useless motions; i.e., he served a notice of Final Hearing for September 27, 1988 (reserving 15 minutes) although he received a notice of Final Hearing dated September 20, 1988 which reserved several hours to hear the Motion for Modification.

On March 30, 1989 Judge Steinberg forwarded his research concerning the question of attorney's fees upon modifiction. He enclosed an article from the April issue of the Florida Bar Journal, which discussed the subject of "Attorney's Fees in Paternity Modification Proceedings".

On June 6, 1989 the question of attorney's fees was heard before Judge Vernon W. Evans, Jr., who rejected the Petitioner's request for attorney's fees in connection with an appeal taken by the defendant from an order of contempt which had been litigated in 1987. The Petitoner failed to request the award of fees at the Appellate Court level.

Subsequent to the Motion for Attorney's Fees, the Petitoner's attorney filed an affidavit demanding attorney's fees in the amount of $5,625.00 plus $1,115.00 in costs. (Costs included law clerk and paralegal time) The amount of fees requested by the Petitioner's attorney was was more than double that collected for his services in the initial litigation between the Petitoner and Respondent concerning the level of child support to be paid. The question of paternity was never contested, only money.

On July 7, 1989, Judge Vernon W. Evans, Jr. carefuly

reviewed the Florida Paternity Statute and found that the legislature failed to include a provision which would allow the recovery of attorney's fees on a petition for modification in a paternity case. The Court, relied on Fink vs. Roller, 448 N.E.2d. 204 (Ill. 5th DCA 1983), and Stump v. Foresi, 486 So.2d 62 (4th DCA 1986), which reversed an award of attorney's fees and costs to a mother in a paternity case after a modification proceeding. The Court also determined that it was without jurisdiction to grant attorney's fees under any other statute pursuant to section 742.10 Florida Statute.

On July 14, 1989, Petitioner herein filed a Notice of Appeal to the Second District Court of Appeal. That Court affirmed the trial court decision but certified the question to this Court.

The Second District Court of Appeal stated that "We agree with the 4th District's opinion in P.A.G. vs. A.F., 15 F.L.W. D1914 (Fla. 4th DCA July 25, 1990). "We hold that section 742.031, Florida Statutes (1989), does not provide for the award of attorney's fees in a post judgement proceeding for modification of child support in a paternity action." (emphasis supplied)

ISSUE PRESENTED

Whether the Florida Paternity Act specifically allows for an award of attorney's fees to either party in a post-judgement proceeding for modification of child support.

SUMMARY OF THE ARGUMENT

The award of attorney's fees is not an obligation imposed upon a party recognized at common law. In Florida, each party is obligated to pay their own attorney's fees, unless a right to assess fees is provided for by statute or agreement between the parties. Young v. Altenjus, 472 So.2d 1152 (Fla. 1985); Israel v. Lee, 470 So.2d 861 (Fla. 2d DCA 1985). The involved paternity statute contains no language which permits the award of attorney's fees to either party upon a motion for modification of a prior support order. To allow such an award, the legislature must provide for it by law, not the Court.

ARGUMENT

The brief filed by the Petitioner in this Court is almost an exact duplicate of the brief filed in the Second District Court of Appeal.

The Petitioner argued before the Second District Court of Appeal and in this Court, that denying her attorney's fees puts her in an "inequitable position". Denying attorney's fees to either party, does not favor fathers over mothers, or visa versa. If a mother should file a petition for modification and fail in her attempt, the father is required to defend and may spend considerable sums of money on attorney's fees. If he requested attorney's fees under the case's cited herein, he would also be denied fees. In summary, both parties are treated equally.

In her brief, the Petitoner argues that there is "no limiting" language in section 742.031 of the Florida Statute which disallows the Court from awarding attorney's fees and costs in conjunction with a modification hearing.

Unfortunately, the Petitoner's argument is out of step with the established law in Florida which provides that the Courts may award attorney's fees only when provided for by contract or by statute or when the attorney's services create or bring a fund or other property into Court. Stump v. Foresi, supra; Israel v. Lee, 486 So.2d 62 (Fla. 4th DCA 1986) The language in the law must specifically provide for attorney's fees and not language which does not prohibit such fee as suggested by the "limitation" argument advanced by the Petitoner.

In P.A.G. v. A.F., 564 S.2d 266 (Fla. 4th DCA 1990) the mother argued that logic and reason indicates that she should be allowed attorney's fees when she has demonstrated a need and the father has the ability to pay. She claims authority for such fee is based upon section 742.031 and section 742.06 Florida Statutes. Section 742.06 Florida Statutes simply provides that the Court, may retain jurisdiction for the purposes of entering such orders as changing circumstances of the parties may in justice and equity require. That generalized language does not specifically provide for attorney's fees.

In P.A.G., supra , the father argued that the taxation

of fees is in derogation of the common law and thus, entitlement thereto, must be strictly provided by statute or by contract and section 742.031 Florida Statute does not provide for attorney's fees beyond the initial hearing to determine paternity and support.

It is important to note in the P.A.G. v. A.F. case, and this case, neither "mother" has cited one case or legal authority which supports their position that attorney's fees are awardable in a case of modification.

On the other hand, the Respondent argues that the taxation of attorney's fees and costs is in derogation of common law and thus entitlement thereto, must be found in statute or in an agreement. The weight of authority in the United States supports the proposition that an award of attorney's fees is beyond the authority of the Court unless specifically provided for in statute. P.A.G. v. A.F., Stump v. Foresi, supra, Fink v. Roller, 448 N.E. 2d 204 (Ill. 5th DCA 1983) and Toledo v. Brackmann, 355 N.W. 2d 521 (Neb. 1984).

Florida follows the "American Rule" which allows an award of attorney's fees only when authorized by statute or agreement of the parties. Florida Patient Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). In 1985, the Second District Court of Appeal held in Israel v. Lee 470 So.2d 861 (Fla. 2d DCA 1985) that:

"The entitlement to attorney's fees is derivative in

> nature. Florida Rule of Appellate Procedure 9.400 contemplates an allowance of attorney's fees to be paid the successful party and then, only if authorized by substantive law." (emphasis supplied)

The Illinois Appellate Court in Fink, supra, specifically held that the trial court erred in allowing attorney's fees incurred by the plaintiff with respect to her petition for modification against the defendant. That Court said:

> "In Illinois, attorney's fees are not allowable absent a statute or contractual agreement providing therefor. (citations omitted) Section 9 of the Paternity Act provided that if the trial court enters judgement to the effect that the defendant is the father of the child in question, the court shall take evidence upon the requirements of the child for its support, the expenses of the mother during pregnancy, confinement and recovery and reasonable attorney's fees, it shall enter an order with respect thereto." Id. p. 207.

The similarity between Florida and Illinois Statute is irrefutable. There is no language in either statute which permits attorney's fees in a post-judgement petition for modification of a support order by either party. Thus, the mother and father of the child are treated equally after a modification proceeding. Neither are entitled to attorney's fees.

The father in the Illinois case argued that Section 9 of the Paternity Act provided for fees at the initial determination of paternity matters, but not for subsequent proceedings for modification. Assume for a moment that the father in that case prevailed in the subseqent petition for modification, would he be entitled to attorney's fees? No.

So the argument that it is inequitible for Petitioner to be denied attorney's fees, fails in light of the fact that the father would not recover attorney's fees if the mother failed to increase benefits upon petitioner for modification.

The mother in P.A.G. supra, and the Petitoner herein, argue that the general language in Section 742.06 Florida Statute allows the Court to retain jurisdiction for the purpose of entering such orders and further orders as changing circumstances of the parties may in justice and equity require. The Illinois Court heard that argument and was not persuaded by it. The Florida Second and Fourth District Courts of Appeal were not pursuaded by that argument either.

In her Brief, the Petitioner argues that the Trial Court had jurisdiction to award attorney's fees under section 742.06 Florida Statute and that without such authority, mothers in paternity actions would "be in an inequitible situation, in violation of due process and equal protection clauses guaranteed by the United States and Florida Constitution". Unfortunately, the Petitioner cites no case on point which would suggest that due process or equal protection has been denied her.

She also argues that the Respondent is an attorney, and as such in a better position to seek modification without cost to her. Such argument bears little on the basic principals of law discussed above. In this case, the

Petitoner is better off financially than the Respondent. She can afford protracted litigation, therefore she is not placed in an "inequitable" position. Equal protection arguments are not applicable, because regardless of who wins or loses in a modification proceeding, be it the mother and/or father, neither party is entitled the award of attorney's fees. If the father should prevail in a modification proceeding to reduce the amount of child support, he likewise, is not entitled to an award of attorney's fees.

The Petitoner argues that pursuant to 742.06 Florida Statute, the legislature intended that mothers of illegitimate children should not be forced to spend their child support in attorney's fees. It is obvious that the principal of law stated above clearly establish that neither party in a modification proceeding is entitled to an award of attorney's fees. There is no case favoring the Patitioner's argument. As a matter of fact, all the cases cited are contrary to the Petitioner's argument. It is the prerogative of the legislature to cure such oversight, if that is the case. It is not the prerogative of the Courts to legislate the award of attorney's fees to a parent in a modification proceeding after the award of a paternity judgement.

The Illinois father also argued that had the legislature wished to provide for attorney's fees during a paternity modification proceeding, they would have done so. The

Illinois Appellate Court agreed with his argument, as does the Fourth District Court of Appeal in P.A.G. v. A.F, supra.

A father's legal duty to support his children is purely statutory and he is under no legal liability under common law to provide support. Clark v. Blackburn, 151 So.2d 505 (Fla. 3d DCA 1963). To require the Respondent to pay attorney's fees where none is provided, clearly places him at a disadvantage in filing his request for modification. He was not put on notice by the paternity statute that he may be required to pay attorney's fees and costs, since there is no language to that effect. Moreover, Chapter 742 Florida Statute is the exclusive method for a mother to establish paternity and to seek a determination as to the father's duty to support the child. The Court is without jurisdiction to determine the duty of support in a proceeding under any other statute, including the Uniform Reciprocal Enforcement of Support Law, because such law is not applicable to illegitimate children. Clark vs. Blackburn, supra.

Section 742.10 Florida Statute provides that the establishment of paternity and support is determined by that chapter and only that chapter in lieu of any other law or statute. Any right to attorney's fees in a modification proceeding must be found in Chapter 742 Florida Statute and not elsewhere. As the Fourth District Court of Appeal pointed out, an argument that section 61.16 Florida Statute provides for attorney's fees in a paternity suit is not apt.

Also see, Stump, supra. Chapter 61 pertains to the dissolution of marriage and certainly not to paternity proceedings.

The Petitioner further argues that the Court should conclude that the paternity act does provide for attortney's fees in a modification proceeding. Otherwise, attempts to obtain modification will be hampered at the childs expense. In Fink, supra, the Court rejected that argument as follows:

> "We are quite aware that to construe the Paternity Act in this restrictive manner tends to defeat the primary purpose of the Paternity Act at the expense of the welfare of the child. Nevertheless, the award of attorney's fees in a modification proceeding instituted under the Paternity Act is a matter for legislative enactment and not judicial fiat." Id. at. 448 N.E. 3d. 207

ARGUMENT II

The Petitoner argues under this point thaty she is entitled an award of attorney's fees based upon Section 61.16 Florida Statute. Her support for the argument is found in the dissenting opinion written by Judge Gunther in P.A.G. v. A.F., supra. He simply concluded that section 61.16 Florida Statute authorizes the award of attorney's fees to a mother seeking modification of a court order for child support. He does not cite any authority for his conclusion, nor does he take into consideration the language of section 742.10 Florida Statute which provides that paternity act is the exclusive remedy to obtain a determination as to paternity and child support.

It is doubtful that the dissenting Judge considered the

rules of statutory construction cited by the majority opinion. One can not leap from one chapter of the Florida Statutes to another. Chapter 61 Florida Statutes involves provisions pertaining to the dissolution of marriage and has nothing to do with paternity actions. It would also be ridiculous for the Court to conclude that the provisions of Chapter 742 Florida Statute are applicable to a proceeding for dissolution of marriage. To conclude otherwise, would allow the Court to pick and choose from various sections of Florida Statutes totally unrelated to a particular subject matter and apply them arbitrarily.

How did the Judge reconcile that fact that the Petitioner's complaint was instituted under Chapter 742 Florida Statute and not under Chapter 61 Florida Statute? Are there other sections of the Florida Statutes which the Petitoner and Judge would like to apply?

If Judge Gunther had the benefit of further research, he would have discovered that the award of attorney's fees is allowed only when authorized by Statute. For example, in Pippins v. Jankelson, 754 P.2d 105 (Wash. 1988), the Supreme Court of Washington allowed fees in a child support modification proceeding during a paternity case only because of specific provisions were included in the Washington Paternity Statute. See also. State Ex. Rel. V.K.E. v. S.W. 442 N.W.2d 920 (S.D. 1989), and B.G.L. v. C.L.S., 369 N.E.2d 1105 (Ind. App. 1977)

The mother's argument that she should be allowed attorney's fees under Section 61.16 Florida Statute was answered by the Fourth District Court of Appeal. They said that the analogy is not apt. In fact, under rules of statutory construction, it mitigates against the mother's position. Furthermore, that argument was rejected in Stump, because Chapter 61, Florida Statutes involves provisions pertaining to dissolution of marriage proceedings and not paternity. In Stump v. Foresi, supra, the Court considered an appeal by a putative father who brought an action to determine his rights and duties regarding his child. The trial court awarded fees to the mother but the Fourth District Court of Appeal reversed saying:

> "The taxing of attorney's fees and costs is done in derogation of the common law; hence there is no jurisdiction to do so absent an applicable statute or rule, or agreement between the parties. Here, neither specific statute nominated as authority applies. Section 61.16 Florida Statute (1983), is inapplicable because this was not a marriage dissolution. Section 742.031 Florida Statute (1983), does not apply because respondent/appellee was not a prevailing compainant in a paternity case."

Any statute purporting to allow an award of attorney's fees will be strictly construed. Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1980) This principal of law has been strictly applied. For example, in a case where a former wife attempted to prosecute a contempt motion against her former husband who physically assaulted her, she could not recover attorney's fees. Taylor v. Taylor, 491 So.2d 338 (Fla. 3d DCA 1986)

Like the Illinois Court, the Supreme Court of Nebraska in Toledo v. Brackmann, 355 N.W. 2d 521 (Neb. 1984) found no authority in the paternity act to allow an award of fee in a modification proceeding. It reversed the allowance of attorney's fees for the same reason discussed by the Fink Court. The Florida Courts have without exception followed the American Rule and disallowed such fees. P.A.G. v. A.F., and Mortenson v. Johnson, 15 FLW D2238 (Fla. 2d DCA 1990)

If there is a desparity between the dissolution of marriage chapter and paternity chapter, it is the prerogative of the legislature to adopt a remedy. Pursuant to the the Separation of Powers Doctrine, it is the legislature that makes laws and not the Court.

CONCLUSION

Based upon the foregoing, it appears that in post-judgement child support proceedings in a paternity case, attorney's fees are allowed only if there is a specific statute providing for the same. The decision of the Second District Court of Appeal should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 30th day of November, 1990 to: J. Michael Shea, Esquire, 419 West Platt Street, Tampa, Florida 33606.

B. EDWIN JOHNSON, pro se