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IN THE SUPREME COURT OF FLORIDA

DEC 12 1990

CLERK, SUPREME COURT

By [Signature]  
Deputy Clerk

MARY JO KELLY,  
Wife/Petitioner,

-vs-

WILLIAM KELLY,  
Husband/Respondent.

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DCA-2 CASE NO. 89-02755  
SUPREME COURT CASE NO.  
76,946

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RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The case at bar does not expressly and directly conflict with Iodice v. Scoville, because both the case at bar wherein the court made its decision based upon the "totality of the circumstances" and in Iodice v. Scoville, wherein the court based its decision on the entire record, the issue whether a party would be entitled to reimbursement for interest payments made is based upon the discretion of the court. Reimbursement for interest expenses is a discretionary matter and therefore the decisions of the two district courts of appeal are not expressly and directly in conflict with each other. Furthermore, this case is not of such significance to cause this court to exercise its discretionary jurisdiction for this minor issue.

### JURISDICTIONAL ISSUES

WHETHER THE PRESENT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH Iodice v. Scoville, 460 So.2d 576 (Fla. 4th DCA 1984) and WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THIS MATTER.

Petitioner seeks the discretionary jurisdiction of this court pursuant to Rule 9.030(a)(2)(A)(iv). That subsection of the rule allows this court to review decisions which expressly and directly conflict with the decision of other district court of appeals if this court wishes to exercise its discretion to do so.

The case at bar does not expressly and directly conflict with Iodice v. Scoville. In the case at bar, the court stated, "We think that under the totality of the circumstances the wife should be responsible for the interest payments." (Emphasis added.) The Second District Court of Appeal considered the entire record, allowed the wife contribution for the principal payments that she had made on the mortgage, but felt under the totality of the circumstances she should be denied reimbursement for the interest payments because these payments did not increase the husband's equity. The Second District also noted that the husband had received no compensation for his court ordered loss of enjoyment of the jointly owned property.

The Second District did not state that its decision conflicted with Iodice v. Scoville. (The Petitioner also filed a Motion with the Second District under Rule 9.030(a)(2)(A)(vi) requesting certification to this court that the Second District's decision was in direct conflict with Iodice. The Second District entered an Order on November 20, 1990 denying certification of any conflict.

In Iodice, the trial court and the appellate court found the husband entitled to reimbursement for one-half the principal payments he had made on the mortgage and then stated, "We find nothing in the record to justify denying him reimbursement of the interest payments." (Emphasis added.) The court in Iodice did not state that it was a black letter rule of law that the party in possession was automatically entitled to reimbursement of interest payments. It merely found nothing in the record in that case to justify denying the interest reimbursement. Both the Second District in considering the "totality of the circumstances" and the Fourth District in Iodice in considering "the record" indicate that reimbursement of interest payments in these cases is a discretionary item to be allocated in a matrimonial case by the trial court based upon the totality of the circumstances. It may be awarded in some cases and denied in others. Accordingly, the decision in the case at bar does not conflict with Iodice v. Scoville.

Treatment of interest differently depending upon the totality of the circumstances is consistent with Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) in which this court stated the appellate court should avoid establishing inflexible rules that make achievement of equity between the parties difficult and that the remedies used by the trial court be reviewed by the appellate courts as a whole, rather than independently. That is the way the Second District reviewed the interest issue in this matter. In considering the totality of the circumstances, the Second District

Court felt that the wife should not receive reimbursement for the interest payments when the husband had received no compensation for his court ordered loss of enjoyment of the jointly owned home.

Even assuming arguendo there were express and direct conflict between the case at bar and Iodice v. Scoville, undersigned counsel respectfully submits that this single conflict is not of such significance to cause this court to exercise discretionary jurisdiction for this minor issue.




CONCLUSION

Respondent requests that discretionary jurisdiction be denied.

CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished by mail to Philip S. Prosch, this 14 day of December, 1990.

  
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JAMES E. AKER  
Attorney for Husband/Respondent

cc: William Kelly