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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 78,018
DCA-3 90-02157

EDWARD C. TIETIG

Defendant, Petitioner,

-vs-

COLLEEN H. TIETIG,
k/n/a Colleen H. Boggs

Plaintiff, Respondent.

_____/

THIRD AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CITATIONS

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STATEMENT OF CASE AND FACTS

Introduction

This is an appeal from an Amended Order on Report of General Master. The Appellant, Edward C. Tietig, was the Petitioner in the trial court and will be referred to herein as "TIETIG" or "HUSBAND". The Appellee, Colleen H. Tietig (Boggs), was the Respondent below and will be referred to herein as "BOGGS" or WIFE".

The following symbol will be utilized:

"A" - - - - Appendix to this Brief

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

By motion filed September 20, 1988, Appellant/Husband moved to modify the child support obligations as set forth in agreement made a part of Final Judgment of Dissolution of Marriage A Vinculo filed March 17, 1982.

In that motion, Husband alleged that he had made payments of $200 per week for each of the three children, (a total of $600.00 per week) since the effective date of that agreement, January, 1982, until shortly before the filing of this petition. However, Husband had been forced to seek Chapter 11 bankruptcy protection to protect his assets from a $2,345,000 judgment. It further alleged he was in default as to numerous mortgages encumbering substantially all of his assets and was no longer able to fulfil this obligation. Appellant, thereafter, voluntarily continued support of the children at the rate of $75.00 per week, for a total of $225,000 per week.

A financial affidavit was filed by Petitioner on October 17, 1988, in support of said motion.

On December 5, 1988, a Suggestion of the Pendency of said bankruptcy proceeding was filed in this case.

More than one year after this motion was filed, October 18, 1989, Respondent/Wife, cross-petitioned by Motion to Enforce Final Judgment of Dissolution of Marriage A Vinculo.

Respondent/Wife then moved for a lifting of the automatic stay provisions in the bankruptcy proceeding which was granted by stipulation on October 15, 1989. This order allowed her to proceed for the limited purpose of determining the amount of the claim for child support and related medical expenses.

After said order was entered Respondent/Wife then filed a Motion for Reasonable Attorney's Fees on December 8, 1989. This was filed in the Circuit Court but not in the Bankruptcy Court.

Various discovery and production was made thereafter by both parties. Trial before the General Master, Carol R. Gersten, was held on February 23, February 26, and March 7, 1990, on Appellant's original Petition for Modification, Appellee's Motion to Enforce Child Support Agreement, Appellee's Motion for Award of Attorney's Fees and Appellant's Petition to Strike Appellee's Motion for Award of Attorney's Fees.

During the trial it was proven that at the time the settlement agreement was executed in January, 1982, Husband had very substantial income from the law and real estate practice, a tree nursery and the sale and operation of two large apartment complexes and with mortgage debt in good standing of approximately $4,500,000,. However, at the time of the petition, to modify he had a $2,345,000 judgment involuntarily recorded against him, had over $8,000,000 in defaulted mortgage debt, some of which was in foreclosure, had little or no assets which were not frozen by these liens and had little or no income. Sworn reports given to the U.S. Trustee's Office in the bankruptcy action introduced into evidence showed average gross monthly income since filing date through trial date, about 17 months, to average $1,768 with a net useable income in negative figure when compared to the monthly support obligation of $2,580 provided in the agreement. Even at Husband's proposed figure of $75.00 per week per child ($225.00 total) the monthly amount of $967.50 was almost 56% of his gross income.

Respondent's/Wife's Affidavit admitted gross income in excess of $3,500 per month. However, this figure, not counting any child support was increased to over $4,300 per month by admissions during trial so that combined with the voluntary payments reached over $5,300 per month. She further testified that the children were healthy, happy and were doing very well in school and in athletics and were not harmed by the change in support income. Appellant's objections as to the authority given by the bankruptcy court excluding any consideration of attorney's fees were denied, despite the fact the Petition to Award Attorney's Fees was filed after order granting a limited lift of stay was entered.

The Report and Recommendations of the General Master was entered on June 20, 1990.

Exceptions to the Findings Report and Recommendations of the General Master were filed by Appellant. However, the Report of the General Master was ratified by Order on Report of General Master dated February 20, 1990. This was then amended by Amended Order on Report of General Master dated August 22, 1990. This was appealed to the Third District Court of Appeal which affirmed on April 30, 1991 (A-1). This appeal followed.

POINT INVOLVED ON JURISDICTION

Point I

WHETHER THE GENERAL MASTER, THE CIRCUIT COURT AND THE THIRD DISTRICT COURT OF APPEALS ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN ON PETITIONER TO MODIFY A WRITTEN AGREEMENT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE COURT IN A DISSOLUTION PROCEEDING, THIS MUCH "HEAVIER BURDEN" RULE BEING IN DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEALS SET FORTH IN BERNSTEIN V BERNSTEIN 498 So 2d 1270 (1986 Fla App 4 Dist).

SUMMARY OF ARGUMENT

There is no legal basis for an application of "Much Heavier Burden of Proof".

The proper rule of law of a Preponderance of Evidence in considering petitions to modify written child support agreements is well stated in Bernstein v Bernstein 498 So 2d 1270 (1986 Fla App 4 Dist).

The General Master, Trial Court and Third District Court of Appeals applied this erroneous rule. They compounded the error by looking to frozen assets rather than present ability to liquidate and secure cash to determine ability to make support payments.

The various Districts are in direct conflict as to this "Much Heavier Burden" rule.

This Court should take jurisdiction to restate the correct rule and to bring the various Districts into uniformity.

ARGUMENT

Point I

WHETHER THE GENERAL MASTER, THE CIRCUIT COURT AND THE THIRD DISTRICT COURT OF APPEALS ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN ON PETITIONER TO MODIFY A WRITTEN AGREEMENT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE COURT IN A DISSOLUTION PROCEEDING, THIS MUCH "HEAVIER BURDEN" RULE BEING IN DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEALS SET FORTH IN BERNSTEIN V BERNSTEIN 498 So 2d 1270 (1986 Fla App 4 Dist).

The General Master held,

> "It is the rule of law that I follow, Sir. There is a much heavier burden in trying to modify an agreement that was mutually entered into by the parties than there is to modify a Final Judgment of Dissolution of Marriage resolved by trial. I believe that is black-letter law. There is a substantial burden".

That "black-letter" law had been specifically overruled in Bernstein V Bernstein, 498 So 2d 1270 (Fla App 4 Dist). That Court held that in child support modification cases such as this, there is no different burden then the same preponderance of evidence rule existing in all civil law cases.

Common law jurisprudence pertaining to civil cases has, for hundreds of years, been based upon a rule of proof of "a preponderance of the evidence".

Over these years, Courts have modified this rule with only one exception, which is invoked only where public policy or the seriousness of the subject matter and its consequences require proof to be "clear and convincing".

The Courts over the years have held to this basic jurisprudence allowing only that the burden of proof may be shifted but not the measure thereof.

Now some lower Courts wish to create other exceptions to the basic rule by using such jargon as "greater burden", "substantial preponderance", and "heavier burden" such as pronounced as the rule in the case at hand.

Unless this stable and understandable and workable rule is not reinforced by this Court then the whole system becomes destabilized. Each trial court may embellish upon the rule. For example, "clear and convincing written evidence", "heavier burden by independent witnesses", "preponderance of left-handed, one-eyed witnesses", etc., etc.

This is not jurisprudential speculation. In Florida, today, we have a different rule of justice for prior written and Court ordered settlements in child support cases. In Florida, today, we have a different rule of justice if you live in West Palm Beach or in Miami.

The reason for the conflict jurisdiction of this Court is just for handling the problem of the present case. To control the lower

Courts, to require them to stick to the basic common law rules and to be sure each person who comes into a Court of whatever part of the State is not playing judicial roulette depending upon geography or judicial whim.

We believe that this Court's position is quite clear and that the position of many of the Appellate Courts have drifted away from that position and must be realigned. This Court has never recognized any rule in civil cases other than "preponderance of the evidence" or its one exception, "clear and convincing" evidence. It has never mentioned or ascribed to any burden as being "heavier".

This Court has examined the question in responding to the Certification of In Re Bryan 550 So 2d 447 (Fla 1987) which considered the very well researched Slomowitz v Walker 429 So 2d (Fla App 4 Dist. 1983).

This one exception to the preponderance of the evidence was again reiterated by the First District Court of Appeals in Smith V Department of Health and Rehabilitative Services 522 So 2d 956 (Fla App 1 Dist. 1988). It has most recently been considered by this Court and by the Bar Committees in preparing Standard Jury Instructions as set forth in 575 So Reporter 2d.,on page 194. In those jury instructions, on page 200, Paragraphs 3 and 4 this Court was very particular as to the language pertaining to this burden, saying:

> The Committee assumes "the greater weight" suffices for proof of falsity MI 4.1 and MI 4.2, as it does for proof of truth in MI 4.3. The SJI 3.9 definition is used in MI 4.2, but MI 4.1 omits part of the familiar phrase, "the more persuasive and convincing force and effect," to avoid confusion with the clear and convincing standard also in MI 4.1 and defined there as in Slomowitz v Walker, (Supra)".

In the case at hand the Third District Court of Appeals conflicts directly with the Fourth District Court of Appeals in its decision of Bernstein v Bernstein 498 So2d 1270 (1986 Fla App 4 Dist) and holds to a "heavier burden" standard. We believe the Court is mistaken in its language. We believe the Court really meant there is a "presumption of correctness for a written agreement" which shifts the burden to the Movant. See Graham, Handbook of Florida Evidence, Section 83, Burden of Proof and Presumptions.

The subject matter of suit at hand is related to child support. The basis of the proof is the showing of economic means and disabilities. This is a simple, straightforward, civil issue where neither side is suffering under a disability and upon which there are no other issues of public policy such as the actions of a sheriff's deputy.

CONCLUSION

The District Courts of this State are in conflict as to the rule of evidence to be applied in actions for modification of written child support agreements. Certain Courts of this State are trying to create a new "heavier burden" rule of evidence which is neither found nor substantiated in any previous case or other authority.

It is the function and the duty of this Court to create uniformity and to be sure that the parties of the Court System of this State are treated to the right rule of law on a uniform basis. This present case shows perfectly the necessity for this Court to take jurisdiction.

Respectfully submitted,

Edward C. Tietig, Esq.

Lit:ECTvBoggsSC.1