045 w/app

IN THE SUPREME COURT
STATE OF FLORIDA

STACY FRANK,

Petitioner,

v.

MARK K. STRALEY,

Respondent.

CASE NO. 78,556

DCA CASE NO. 90-1546

PETITIONER'S BRIEF ON JURISDICTION

GEORGE A. VAKA, ESQUIRE
Florida Bar No. 374016
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

STEPHEN W. SESSUMS, ESQUIRE
Florida Bar No. 072463
SESSUMS AND MASON
Post Office Box 2409
Tampa, Florida 33601
(813) 251-9200
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

---

[1] Table of Authorities prepared by Lexis.

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

Pursuant to the limitations imposed upon a party when seeking to invoke this Court's discretionary jurisdiction, as her Statement of the Case and Facts, Petitioner, Stacy Frank,[2] adopts by reference the en banc majority decision of the Second District Court of Appeal[3] in this matter. (A. 1-10)[4]

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER DISTRICTS ON THE SAME QUESTIONS OF LAW?

SUMMARY OF THE ARGUMENT

The decision of the Second District conflicts with decisions from this Court and the other district courts of appeal in several respects. First, the court reversed an award of attorneys' fees to the wife and applied a rule that examines only the financial ability of the spouse claiming attorneys' fees, even where the other spouse may have a financial ability far superior to the one claiming fees. The court applied this rule despite the fact that it results in an inequitable diminution of the fiscal sums granted to the wife.

Likewise, the decision rejected the trial court's determination of what percentage of increased value of a premarital asset was the result of the

---

2 The Petitioner, Stacy Frank, the former wife, will be referred to by name or as wife. The Respondent, Mark Straley, former husband, will be referred to by name or as husband.

3 By virtue of orders dated January 16, 1990 and December 13, 1990, this Court appointed the judges of the Fifth District Court of Appeal to sit as temporary judges of the Second District.

4 All references to the Appendix attached hereto, pursuant to Fla.R.App.P. 9.120(d), will be referred to as (A) followed by the appropriate page number of the Appendix. Pursuant to Reaves v. State, 485 So.2d 829 (Fla. 1986), the Petitioner relies only on the facts stated by the majority to invoke this Court's jurisdiction.

expenditure of marital funds and earnings so as to be considered a marital asset. The decision, which required the court to reweigh the evidence, found the wife to be entitled to an amount which represented one-half of the reduction of the principle during he marriage.

Finally, the district court's interpretation of Fla. Stat. § 61.075(3)(a)5 conflicts with cases which address proper statutory construction. The Second District interpreted this statute as a codification of this Court's decision in Ball v. Ball, 335 So.2d 5 (Fla. 1976). The court relied upon extrinsic evidence and the absence of legislative history to reach its conclusion. The statute cannot be a codification of Ball because Ball has two presumptions (real property presumed to be a marital asset, and upon a proper showing, a subsequent no-gift presumption), while the statute has only one. Since the decision of the Second District conflicts with numerous other decisions, this Court should invoke its discretionary jurisdiction and review the case on the merits.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTIONS OF LAW.

Pursuant to Article V, Section 3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction where an appellate decision expressly and directly conflicts with the decision from another Florida appellate court. That conflict must be express and contained within the written rule announced by the majority decision. Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980).

Jurisdiction requirements are satisfied when the decision announces a rule of law which conflicts with a rule previously announced by another appellate court or when there has been an application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). The jurisdictional requirements have been satisfied where there has been a misapplication of law. See, Wale v. Barnes, 278 So.2d 601 (Fla. 1973). Conflict is also present where there has been a failure to follow rules of statutory construction. See, Rinker Materials Corp. v. City of North Miami, 286 So.2d 552 (Fla. 1973).

In dissolution proceedings, the various equitable remedies available to a trial judge are considered interrelated parts of an overall scheme. They are to be reviewed by appellate courts as a whole, rather than independently. Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980). The Second District did exactly the opposite when it dismantled the equitable scheme developed by the trial judge.

A. ATTORNEYS' FEES.

The Second District reversed, in toto, the award of attorneys' fees to the wife. The court ordered that no party should be awarded attorneys' fees and refused to consider or ignored whether the financial ability of the husband was superior to the wife's. The rule announced by the court requires only an examination of the financial ability of the spouse who claims fees, even though the financial ability of the other spouse may be substantially greater. Applying the rule here, the court stated that there was no showing that the wife lacked the present ability to pay substantial attorneys' fees. To reach its decision, the court relied solely upon Stacy's earnings, in excess of $50,000.00

per year, and her one-half interest in the parties' two boats which had a value in excess of $50,000.00.[5] (A. 9) The court stated that the purpose of attorneys' fees pursuant to Fla. Stat. § 61.16 was to compel the trial court to mitigate the harm an impecunious spouse might suffer where the other spouse's financial advantage accords him or her unfair ability to obtain legal assistance. Citing, Nichols v. Nichols, 519 So.2d 620, 621-622 (Fla. 1988); see also, Cummings v. Cummings, 330 So.2d 134 (Fla. 1976).

In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), this Court stated that it was not necessary that one spouse be completely unable to pay attorneys' fees in order for the trial court to require the other spouse to pay fees. The comparative financial position of the parties was relevant to a determination of who was to pay fees. Likewise, an award of fees is proper to avoid an inequitable diminution of the fiscal sums granted to the wife. Id. at 1205. Florida Statutes § 61.16 also requires the court to examine the relative financial resources of both parties prior to making a decision concerning attorneys' fees.

In effectuating this Court's Canakaris mandate, the other district courts of appeal have held that it is an abuse of discretion for a court to deny an award of attorneys' fees where a husband's financial ability is superior to that of the wife's. See, e.g., Greeley v. Greeley, ____ So.2d ____, 16 FLW D1824 (Fla. 1st DCA, July 12, 1991); Werner v. Werner, ____ So.2d ____, 16 FLW D1447 (Fla. 3d DCA, May 28, 1991); Davis v. Davis, 547 So.2d 309 (Fla. 4th DCA 1989). The earning capacity of each party is a financial resource which the court

---

[5] The court's reference to Stacy's one-half interest in the two boats and their value is confusing given the fact that the court found a special equity in the boat awarded to the wife which presumably would decrease her interest to something less than one-half.

should consider when determining the overall financial circumstances and a party's ability to pay attorneys' fees. See, Nisbeth v. Nisbeth, 568 So.2d 461, (Fla. 3d DCA 1990); Martinez-Cid v. Martinez-Cid, 559 So.2d 1177 (Fla. 3d DCA 1990). Where the parties' past, present and anticipated earnings are not substantially equivalent, it may be inequitable to force the lower-earning party to deplete his or her share of the otherwise equally-divided assets to pay attorneys' fees. Cuse v. Cuse, 533 So.2d 828 (Fla. 3d DCA 1988).[6]

The present decision does not even discuss the financial resources or earning capacity of the husband, much less determine that the parties' positions were substantially equivalent. In fact, the only reference to the husband's financial abilities suggest that they were far superior to the wife's since the husband had a successful law practice for several years prior to the marriage. (A. 2) The reliance by the court on only Stacy's finances clearly conflicts with the precise opposite rules relied upon by Florida's other appellate courts.

The Second District's decision also failed to avoid an inequitable diminution of the fiscal sums granted Stacy in the dissolution. The court noted that under the trial court's distribution, the wife exited the marriage with approximately $150,000.00 in assets. After the court dismantled the trial court's equitable distribution, Stacy's assets would be diminished a minimum of $60,000.00. She was also to be assessed some of the marital debt. (A. 6-9) If Stacy is also required to pay her attorneys' fees, not only will the fiscal sums

---

[6] Remarkably, prior to this case where the judges of the Fifth District sat as the Second District, the Second District applied this very standard. See, e.g., Lochridge v. Lochridge, 526 So.2d 1010 (Fla. 2d DCA 1988); Blackburn v. Blackburn, 513 So.2d 1360 (Fla. 2d DCA 1987). Presumably, the trial judge who is bound by Second District case law based his rulings on these cases.

granted to her be inequitably diminished, she could end up with no assets or even in debt.

B. MARITAL ASSETS.

As part of its piecemeal dismantling of the overall equitable remedy fashioned by the trial judge, the Second District ruled that the appreciation in market value of the husband's interest in two premarriage real estate investment partnerships was not a marital asset. The trial court found that those assets "accumulated a value of $56,825.00 and $40,899.00 respectively during the marriage." (A. 6-7) The trial judge deemed that appreciation to be a marital asset, presumably resulting from the infusion of marital funds into the investment. (A. 7-8) The Second District, however, deemed the appreciation as being passive and resulting from inflation or fortuitous market forces. The court stated that the only appreciation in value of the two partnerships as a result of the infusion of marital funds was the reduction of Mark's share in the mortgage debt on the properties during the marriage. The court, therefore, stated that Mark should have been debited with one-half of that amount, a sum of $4,347.50.

At a minimum, to reach this conclusion, the Second District was required to reweigh the evidence presented to the trial judge in direct violation of this Court's admonition to the contrary in Helman v. Seaboard Coast Line Railroad Co., 349 So.2d 1187 (Fla. 1977). As previously noted by the Second District, the determination of whether an asset is marital or non-marital, for purposes of equitable distribution, is a question of fact. Macaluso v. Macaluso, 523 So.2d 615, 616 (Fla. 2d DCA 1988).

Increased values of assets owned solely by one spouse prior to the marriage are to be considered marital assets to the extent they are the result

of the spouse's efforts or the expenditure of marital funds or earnings. See, Fla. Stat. § 61.075(3)(a)2; Wright v. Wright, 505 So.2d 699 (Fla. 5th DCA 1987); Crapps v. Crapps, 501 So.2d 661 (Fla. 1st DCA), rev. den., 511 So.2d 297 (Fla. 1987). Applying that rule, the First District has held that a wife was entitled to a portion of the increased equity in a home owned prior to the marriage where mortgage payments on the home and improvements were paid for from a joint checking account. Graff v. Graff, 569 So.2d 811 (Fla. 1st DCA 1990). See also, Massis v. Massis, 551 So.2d 587 (Fla. 1st DCA 1989). To make the determination, the trial court should consider the increased value along with the marital contribution and exclude that portion which is established as exempt because of its character as a non-marital asset. Massis at 589. See also, Hanks v. Hanks, 553 So.2d 340 (Fla. 4th DCA 1989).

The Second District recognized that there was an expenditure of marital funds on the maintenance of Mark's non-marital assets. Nevertheless, the court rejected the trial court's factual determination of what portion of the increase resulted from the infusion of marital funds, and instead, ruled Stacy was only entitled to one-half of the reduction of the principle during the marriage.[7]

C. SPECIAL EQUITY.

In Shelby Mutual Insurance Co. v. Smith, 556 So.2d 393 (Fla. 1990), this Court stated that the plain meaning of the statutory language is the first consideration of statutory construction. Likewise, when a statute contains a definition of a word or phrase, that meaning must be ascribed to the word or

---

[7] This decision also conflicts with other decisions written by the judges of the Second District. For instance, it conflicts with Hickman v. Hickman, 572 So.2d 1021 (Fla. 2d DCA 1991); Kincart v. Kincart, 572 So.2d 530 (Fla. 2d DCA 1990); Pfleger v. Pfleger, 558 So.2d 198, 199 (Fla. 2d DCA 1990).

phrase whenever repeated in the statute unless a contrary intent clearly appears. First National Bank of Miami v. Florida Industrial Commission, 16 So. 636, 154 Fla. 74 (1944); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960); Richard Bertram & Co. v. Green, 132 So.2d 24 (Fla. 3d DCA 1961).

In the present case, Fla. Stat. § 61.075(3)(a) defines "marital assets and liabilities". Included in the concept of marital assets are interspousal gifts. Fla. Stat. § 61.075(3)(a)3. Florida Statutes § 61.075(3)(a)5 states:

> "All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for a special equity." [emphasis added]

In this case, the Second District reversed the trial court's determination that Mark had not proven a special equity in real property held by the parties by the entireties. The court interpreted Fla. Stat. § 61.075(3)(a)5 as a codification of the rule announced by this Court in Ball v. Ball, 335 So.2d 5 (Fla. 1976). To reach its decision, the court relied upon the statute's legislative history and other extrinsic materials as the basis of its interpretation.

This method of statutory interpretation clearly conflicts with the cases cited above. First, the concept of special equity under Ball involves two shifting presumptions. Initially, the property is presumed a marital asset and after a proper showing, a "no-gift" presumption arises. These shifting presumptions also require two different shiftings of the burden of proof. The statute, on the other hand, clearly and unambiguously contains only one presumption and the sole burden of proof lies with the spouse claiming a special

equity. There was no necessity for the court to "interpret" the statute any further and to do so conflicts with this Court's instruction to the contrary.

CONCLUSION

Unquestionably, the present decision is in conflict with the decision of this Court and Florida's other district courts of appeal in several material respects. This Court should exercise its discretion and review the case on the merits. The distribution which resulted from that court's dismantling of the trial court's scheme is anything but equitable. The decision creates uncertainty throughout the state in areas of matrimonial law which have previously been long-settled. Likewise, because of the procedural quirk involved in this case, the Second District is now bound by an en banc decision written by the judges of the Fifth District, which conflicts with the Second District's own decisions. All of these issues are a matter of great public concern and importance and, therefore, require resolution by this Court.

Respectfully submitted,

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411
Attorneys for Petitioner

STEPHEN W. SESSUMS, ESQUIRE
SESSUMS AND MASON
Post Office Box 2409
Tampa, Florida 33601
(813) 251-9200
Attorneys for Petitioner

By: _____
George A. Vaka, Esquire
Florida Bar No. 374016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by HAND DELIVERY to **Raymond A. Alley, Jr., Esquire**, 805 W. Azeele, Tampa, Florida 33606, on September 9, 1991.

_____
George A. Vaka, Esquire