045

IN THE SUPREME COURT
OF FLORIDA

STACY FRANK,

Petitioner,

v.

MARK K. STRALEY

Respondent.

CASE NO. 78,556

DCA CASE NOS. 89-3505 and 90-1546

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, Mark K. Straley (Straley), accepts the Statement of Case and Facts and the statement of the Jurisdictional Issue contained in the jurisdictional brief filed by Petitioner, Stacy Frank (Frank).

SUMMARY OF THE ARGUMENT

In reversing the fee award, the district court examined the financial resources of both parties and applied the established rule approved by this Court in Cummings v. Cummings, 330 So. 2d 134 (Fla. 1976) and Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). The district court's conclusion that there is no reasonable basis for finding Frank to be at a financial disadvantage was necessarily based on an examination of the financial resources of both parties.

The facts set forth in the majority opinion support the conclusion that Frank was on an equal footing and had a similar ability to obtain competent counsel. Both parties are practicing attorneys, and Frank has an excellent job earning $54,350 per year with no dependents. The facts of this case are indistinguishable from the facts in Cummings.

The trial court's erroneous inclusion of all of the passive appreciation in value of Straley's non-marital assets was an error of law, which did not require any reweighing of the evidence. Consistent with section 61.075(3)(a)2, Florida Statutes (1989) and established case law, the district court concluded that the increased equity resulting from the expenditure of marital funds is a marital asset, although the passive appreciation in value due solely to "fortuitous market forces" (A. 8) remains nonmarital because it is unrelated to the expenditure of marital funds or marital labor.

There is no appellate decision that conflicts with the district court's interpretation of section 61.075(3)(a)5, Florida Statutes (1989). As is apparent from the text of the opinion, the district court engaged in a proper interpretive analysis by examining the language of the statute together with case law decided before and after the enactment of the statute. The

district court did not improperly rely upon legislative history and secondary authority in reaching its conclusion. For the reasons expressed in the court's opinion, there is no practical or functional difference between the special equity principle outlined in Ball v Ball, 335 So. 2d 5 (Fla. 1976) and section 61.075(3)(a)5.

ARGUMENT

Although Frank's jurisdictional brief initially sets forth the proper legal standard for determining if this Court has conflict jurisdiction, Frank fails to identify a single appellate decision that expressly and directly conflicts with the decision below of the district court. In the absence of the requisite decisional conflict, Frank instead identifies a number of cases which, in her view, arguably or impliedly or tacitly conflict with the decision below. Even if true, this is not the type of conflict needed to satisfy the jurisdictional requirements of this Court.

Frank also attempts to persuade this Court that the case was wrongly decided by the district court. In this respect, her brief is partly a "mini-brief" on the merits. Frank's arguments on the merits are irrelevant. Even assuming, arguendo, that this Court disagrees with the decision below, this is not a jurisdictional basis for review. See Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla.1963).

Finally, throughout her brief, Frank intimates that the decision below is somehow of lesser dignity because the court was comprised of a panel of associate judges specially appointed to hear the case. (Pet. Br. n. 6 at 6, n. 7 at 8, and 10.) This argument is equally irrelevant. The associate judges from the Fifth District who were appointed to hear and decide this case rendered an opinion which is the opinion of the Second District. Even if true, any intradistrict conflict that formerly or presently exists is a subject to be addressed by the Second District. The assertion of intradistrict conflict does not provide a jurisdictional basis for review by this Court.

Moreover, in suggesting that this case would have been decided differently by the "real" Second District, Frank fails to recognize that Florida's appellate courts are courts of law and not individuals or personalities. Most appeals are decided by rotating three judge panels and no litigant is entitled to complain about the composition of the panel assigned to decide a particular case.

A. Attorneys' Fees

Frank's first contention is that the district court "announced" a new rule with regard to attorney fee awards pursuant to section 61.16, Florida Statutes (1989). According to this argument, the decision below conflicts with Canakaris because it "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." (Pet. Br. at 4.)

As is apparent from the text of the majority opinion, a new rule was not announced or applied in this case. To the contrary, in reversing the fee award, the district court examined the financial resources of both parties and applied the established rule approved by this Court in Cummings and Canakaris. See also, Nichols v. Nichols, 519 So. 2d 620, 621-622 (Fla. 1988), and Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 835 (Fla. 1990).

To restate what is now black letter law, the purpose of a fee award pursuant to section 61.16 is "to ensure that both parties will have similar ability to secure competent legal counsel." Canakaris, 382 So. 2d at 1202. Thus, if one of the parties to a dissolution is at a financial disadvantage and does not have a similar ability to secure competent counsel, a fee award is warranted. Conversely, however, if the claimant spouse is on an "equal footing" and is not at a financial disadvantage, a fee award is error. Cummings, 330 So. 2d at 136.

In this case, the district court expressly states that a fee award is to be made "after consideration of the financial resources of the parties" (A.9); therefore, the decision was

not based solely upon an examination of the resources of the claimant spouse. Based on its review of the record, the district court then concludes that "[t]here is no reasonable basis in this record for finding that Frank was at a financial disadvantage in obtaining legal assistance." (A. 9).

To determine if a party to a dissolution is or is not financially disadvantaged, a court necessarily must compare the financial resources of both parties. This is because the concept of being financially "advantaged" or "disadvantaged" is relative and requires a comparison of the respective financial circumstances of both parties.[1] For example, in the context of another marriage, a well paid lawyer such as Frank could easily be found to have a financial "advantage" which would justify an award of the attorney fees incurred by the other "disadvantaged" spouse. Thus, in concluding that Frank was not at a financial disadvantage, the court is simply stating that she was on an equal footing with her former spouse and had a similar ability to obtain competent counsel.

All of the facts set forth in the district court's opinion support this conclusion. The parties are both practicing attorneys (A. 2). As such, they necessarily have an equivalent income earning ability. Although at the time of the marriage, Straley had six years more experience than Frank, her law practice developed during the marriage and she now has an excellent job earning $54,350 per year with no dependents. (A. 2) Thus, whatever disparity in financial circumstances may have existed at the beginning of the marriage (when Frank had "an embryonic law practice that was not producing income", A. 2) has disappeared.

Nevertheless, Frank argues that the existence of a new rule may be inferred because the majority opinion fails to disclose additional, more specific information about the husband's income, although it does disclose such information about her income. (Pet. Br.

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[1] "Advantage" is defined as "a more favorable position; superiority". Webster's New World Dictionary, College Edition (1966)

at 6) Frank fails to recognize that the district court is not obliged to set forth in its opinion every fact in the record, nor is it required to rebut statements contained in dissenting opinions. Reaves v. State, 485 So. 2d 829 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Furthermore, although a court must consider the financial resources of the parties, the fact that Frank does not need financial assistance is also relevant. See Quanstrom, 555 So. 2d at 835. Thus, the existence of a new rule cannot be inferred from the mere fact that the district court has found that Frank does not need assistance, i.e., she has "the present ability to pay substantial attorney fees". (A. 9)

In claiming that the district court's decision conflicts with Canakaris, Frank is attempting to compare apples and oranges: In Canakaris, the husband was a wealthy physician earning well over $100,000 per year, while the wife was a homemaker earning only $1,000 per year. The parties had been married 33 years, most of the assets were acquired during the marriage, and the husband received substantially more of these assets than the wife. On these facts, this Court held that a fee award to the wife was warranted because "without question" the husband had a superior present ability to pay attorney fees. In marked contrast, the case at hand involves a short term, childless marriage between two working spouses employed in the same profession. The fact pattern is virtually identical to the fact pattern in Cummings.

Finally, Frank claims that the district court's decision will result in "an inequitable diminution of the fiscal sums" granted to her. (Pet. Br. at 6). Because this dissolution has been the subject of very protracted and expensive litigation, it may well be true that both parties will have to dispose of assets in order to pay their respective litigation expenses. This result, although unfortunate, is not inequitable where the parties are similarly situated. Unlike Mrs. Canakaris (who had no present ability to pay her fees without selling the

assets awarded to her), Frank has "the present ability to pay substantial attorney fees" from her own earnings. (A.9)

B.- Marital Assets

When a trial court mischaracterizes an asset of the parties in its equitable distribution, either by erroneously excluding a marital asset or by erroneously including a non-marital asset, it has committed an error of law which "falls within the traditionally limited field of endeavor assigned to appellate courts in the context of equitable distribution judgments . . ." Harper v. Harper, 546 So. 2d 438 (Fla. 2d DCA), review denied, 553 So. 2d 1165 (Fla. 1989), disapproved on other grounds , Thompson v Thompson 576 So. 2d 267 (Fla. 1991). See also Canakaris, 382 So. 2d at 1202. In this case, the trial court erroneously treated all of the speculative appreciation in value of Straley's interests in two non-marital real estate partnerships as a marital asset. To correct this error, the district court did not need to reweigh the evidence, nor did it do so. The district court simply corrected an erroneous application of a rule of law which requires the exclusion of non-marital assets from an equitable distribution of marital assets.

This is not to say that Frank has no interest in Straley's non-marital assets. To the contrary, the district court specifically holds that the increased equity resulting from the expenditure of marital funds is a marital asset. Consistent with section 61.075(3)(a)2 and established case law, the court also holds that the passive appreciation in value due solely to "fortuitous market forces" (A. 8) remains non-marital because it is unrelated to the expenditure of marital funds or marital labor.

Frank then cites several district court cases (Pet. Br. at 8), which address the enhancement in value of non-marital assets. None of these cases conflicts with the decision below. Indeed, two of the cases supposedly in conflict, Wright v. Wright, 505 So. 2d 699 (Fla. 5th DCA 1987) and Hanks v. Hanks, 553 So. 2d 340 (Fla. 4th DCA 1989), are relied upon in the majority opinion. (A. 7-8) As Frank concedes, the First District has also

held that a non-owning spouse is only entitled to that portion of the increased value of a non-marital asset which is attributable to marital funds or effort. See, e.g., Groff v. Groff, 569 So. 2d 811 (Fla. 1st DCA 1990). Thus, the passive appreciation in value of a non-marital asset which has no nexus to the marriage relationship remains non-marital. Wright. See also, Hanks, 553 So. 2d at 342-343.

Finally, Frank's repeated allegation that the district court engaged in a "piecemeal dismantling of the overall equitable remedy fashioned by the trial judge" (Pet. Br. 4, 7, and 10) is flawed in two respects: First, it is essentially an argument on the merits. Second, it erroneously suggests a shifting of assets, asset by asset, from one spouse to the other. In fact, the district court simply remanded the case so that the trial court could fashion a new plan of equitable distribution that does not include Straley's non-marital assets.

C.-Special Equity

Frank fails to identify an appellate decision that conflicts with the lower court's interpretation of section 61.075(3)(a)5, Florida Statutes (1989). In the absence of conflict, Frank argues instead that the district court misinterpreted the statute. This is basically an argument on the merits. To the extent Frank asserts conflict, it is an implied conflict based on a claim that the district court failed to apply the proper rules of statutory interpretation. This latter argument is premised upon a misreading of the district court's opinion.

Frank correctly states that the beginning point for statutory construction is, of course, the plain meaning of the statute. She overlooks the fact, however, that the district court's analysis begins with a review of the statutory language itself and as it compares with Ball. (A. 3-4.) The district court's comparative analysis of the statute and Ball is appropriate, among other reasons, because the statute references, but does not define, the judicially created term of art "special equity". Therefore, the term must be defined in the context of existing case law, and the elements of a special equity established by case law

are carried over into the interpretation of the statute. See, e.g., Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, 918 (Fla. 1990).

To avoid any possible misconstruction, the district court also examined the legislative history of the statutory enactment, and even consulted secondary authority. (A. 4-5) Finally, the district court reviewed two recent cases from the Second District, as well as six cases from the First, Third and Fourth Districts. (A. 5-6) All of the foregoing authority supports the conclusion that "section 61.075(3)(a)5 is nothing more nor less than a simplified codification of the Ball doctrine itself." (A.4)

Frank argues, however, that the district court's method of statutory interpretation conflicts with other appellate decisions regarding statutory interpretation, because it improperly relied "upon the statute's legislative history and other extrinsic materials as the basis of its interpretation." (Pet.Br. at 9) This is error, first, because the district court, as seen on the face of its opinion, engaged in a proper interpretive analysis. It examined the language of the statute, as well as case law decided before and after the enactment of the statute. The district court's additional examination of legislative history and secondary authority does not taint the first portion of the interpretive process; rather it demonstrates a thorough and deliberate analysis.

Frank's argument is also flawed because the district court's interpretation of the statute does not conflict with any other court's interpretation of section 61.075(3)(a)5. In fact, as noted in the decision below, "no other court has even flirted with the innovative concept" advanced by Frank. (A.6)

Finally, Frank proffers a theory that Ball involves two shifting presumptions, while section 61.075(3)(a)5 contains only one presumption with a "sole burden of proof" lying "with the spouse claiming a special equity." (Pet. Br. 9-10) This theory was specifically rejected by the district court. (A. 3) It is also a theory which merely articulates semantical differences. In fact, there is no practical or functional difference between the Ball "shifting

presumptions" and the initial presumption in section 61.075(3)(a)5 which can be refuted by the claimant spouse carrying his or her burden of proof.

Under both Ball and the statute, record title is the starting point, the presumptive entitlement. Under both formulations, the burden rests with the spouse claiming a special equity to shift the presumptive equal entitlement. In Ball, this Court noted that the other spouse could rebut a special equity claim by convincing the trial court of a gift of the claimant spouse's special equity. Likewise, the statute allows a spouse to rebut the claimant spouse's special equity claim (by showing a gift or otherwise), and if that claim is successfully rebutted, then the claimant spouse will necessarily fail to carry his or her burden of proof. Thus, the processes are functionally equivalent, and the statute merely describes the shifting burdens in a verbally more economical way than the Ball opinion.

In any event, the district court reached the right result because this case does not involve a claim of gift. Twice the district court noted that the record was devoid of any testimony or evidence of a gift of Straley's special equity to Frank. (A. 2, 8) Thus, whether the presumption shifted to Straley and remained there because his evidence was unrebutted under Ball, or whether Straley's uncontroverted showing of a special equity satisfied his burden of proof, sole or otherwise, under the statute, the result reached was correct.

CONCLUSION

Because Frank has failed to demonstrate an express and direct conflict between the decision below and a decision of this Court or another district court, this Court does not have jurisdiction to review the case. Even if there were a jurisdictional basis for review, this Court should exercise its discretion and decline to hear the case on the merits.

From their inception, the district courts were never intended to be intermediate courts or "way stations" on the road to the Supreme Court. Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958). Because the 1980 amendment to article V of the Florida constitution

"substantially strengthened the position of the district courts of appeal as final appellate courts", this court promulgated Florida Rule of Appellate Procedure 9.331 authorizing en banc hearings and rehearings. In re Rule 9.331, 416 So. 2d 1127 (Fla. 1982).

This case illustrates the expanded role of the district courts: the case was initially reviewed by a three judge panel and then re-argued and reviewed a second time by a nine judge en banc panel. The district court did not identify any questions of great public importance in the case, nor did it certify (or even suggest) a conflict of authority. Nevertheless, Frank is asking this Court to conduct a third appellate review of the case. Besides being an injustice to the litigants, a third appellate review would tend to undermine the role of the district courts as courts of final, appellate jurisdiction.

From the standpoint of the litigants, it can certainly be said that they have had their "day" in court. This four year, childless marriage has already resulted in nearly three years of litigation. Given the attorney fees and costs already incurred, it is reasonable to assume that the litigation expenses associated with a third review by this Court will completely dissipate the assets acquired by the parties during their four year marriage. As Justice Thomas stated, "Justice should be done, but not overdone." Lake, 103 So. 2d at 642. This is especially true in contested dissolution cases where the emotion of the litigants can fuel endless litigation. Katz v. Katz, 505 So. 2d 25 (Fla. 4th DCA 1987).

In a larger sense, a decision by this Court to re-review this case would tend to undermine the expanded role of the district courts under the 1980 constitutional amendment. Whenever a case is reheard en banc, differences of opinion are likely, particularly when a panel decision is withdrawn by an en banc majority. If, in the absence of express and direct decisional conflict, this Court then elects to review an en banc decision in an effort to resolve the differing views expressed in the lower court, the efficacy of the en banc procedure itself is undermined. At this point, litigants are confronted with two way stations on an even longer and more expensive road to the Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to George A. Vaka, Esquire at P.O. Box 1438, Tampa, FL 33601 and Stephen W. Sessums, Esquire at P.O. Box 2409, Tampa, FL 33601, on September 26, 1991.

Raymond A. Alley, Jr.