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FILED
SID J. WHITE
OCT 7 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA
Case No. 78,636

78,636

JUNE MILLER,

Petitioner,

Third District Case No. 91-1025

vs. :

MICHAEL J. SCHOU,

Respondent.

PETITIONER, JUNE MILLER'S JURISDICTIONAL BRIEF

On Discretionary Review From The
Third District Court of Appeal of Florida

By: Barry S. Franklin, Esq.
Fla. Bar No. 279633
Andrew S. Berman, Esq.
Fla. Bar No. 370932

YOUNG, FRANKLIN & BERMAN, P.A.
17071 West Dixie Highway
North Miami Beach, Florida 33160
(305) 945-1851

Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

In March, 1990 Petitioner/Former Wife, JUNE MILLER ("MILLER"), filed a Petition for an upward modification of child support against her Former Husband/Respondent, MICHAEL J. SCHOU ("SCHOU"). MILLER is seeking to increase the Five Hundred Dollars ($500.00) per month child support that SCHOU pays for the parties' now eleven **(11)** year old daughter in accordance with a 1983 final judgment of dissolution of marriage. MILLER did not request a specific sum in her Petition, but alleged that SCHOU is an anesthesiologist who is earning substantially more than when the final judgment was entered.

Shortly after filing the Petition, MILLER propounded a Request For Production of Documents to SCHOU, which generally sought information to establish his current standard of living and financial condition. In response, **SCHOU** filed a Motion For Protective Order from any and all discovery wherein he admitted that he has the financial ability to pay what "appeared" to be the needs of the minor child **as** reflected in MILLER's financial affidavit. (A.5)[1]. He vigorously "disagreed", however, that the child needed that sum and reserved the right to appeal the modification order.

At the hearing on SCHOU's Motion for Protective Order and MILLER's Cross-Motion to Compel (A.7), MILLER argued that she was entitled to the financial discovery not only on the issue of "need" but also because the parties' daughter was entitled to

[1] **The symbol ("A.__") denotes reference to the Appendix filed with this brief.**

enjoy in the **good** fortune of her father, which could not be determined without the discovery'. The trial court agreed and ordered SCHOU to provide "a current and complete financial affidavit in the form and content approved by the Florida Supreme Court", but deferred ruling on MILLER's Motion to Compel "other financial document production."

SCHOU filed a Petition For Common Law Writ of Certiorari in the Third District Court of Appeal of Florida seeking to quash the order compelling production of his financial affidavit **solely** because of his financial acknowledgement **as** contained in his motion for protective order. MILLER responded in opposition. The Florida Chapter of the American Academy of Matrimonial Lawyers was permitted to file an Amicus Curiae Brief in the Third District, where it argued that a parent should not be permitted to avoid financial disclosure by confession of ability to pay, where an increase in child support is based, at least in part, on that parent's post dissolution "good fortune".

The Third District nevertheless granted SCHOU's Petition For Writ of Certiorari finding that the trial court's requirement that SCHOU file a current and complete financial affidavit was "a departure from the essential requirements of law." (A.1).

The sole basis for the Third District's Opinion was SCHOU's confession of ability to pay, which it held obviated the clear requirements of Section 61.30(12), Florida Statutes **(1989).** That statute requires that in connection with *every petition* for modification *of* child support:

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[2] **In an abundance** of **caution, MILLER has since amended her petition** *to* **include a specific prayer** for an **upward modification of** child **support based solely upon the good** fortune of **SCHOU.**

> The respondent shall make an affidavit which shows the party's income, allowable deductions, and net income computed in accordance with this section. The respondent shall include his affidavit with the answer to the petition.

SUMMARY OF THE ARGUMENT

MILLER filed a Petition in the trial court for an upward modification of child support for the parties' eleven (11) year old daughter. The trial court ordered SCHOU to produce a current and complete financial affidavit in response to MILLER's Request For Production. The Third District quashed that Order holding that the trial court departed from essential requirements of law by requiring SCHOU to produce a financial affidavit in view of his admission that he could pay the additional child support which he "assumed" MILLER was requesting in her Petition, while reserving the right to appeal any award. This Opinion directly and expressly conflicts with the following cases from this Court and other District Courts of Appeal which uniformly hold it to be an abuse of discretion to deny all financial discovery on these same facts: *Orlowitz v. Orlowitz*, 199 So.2d 97 (Fla. 1967); *Walton v. Walton*, 537 So.2d 658 (Fla. 1st DCA 1989); *Eyster v. Eyster*, 503 So.2d 340 (Fla. 1st DCA), *rev. denied,* 513 So.2d 1061 (1987); and *Parker v. Parker,* 182 So.2d 498 (Fla. 4th DCA 1966). Language in this Court's recent opinion in *Bedell v. Bedell,* 16 FLW 5401, n.2 (Fla. May 30, 1991) also suggests that this Court is ready to make a strong statement on this important issue.

The fair implication of the Opinion below is that MILLER cannot obtain an increase in child support based upon the enhanced good fortune of SCHOU since without the financial information requested she would never be able to establish SCHOU's increased "good fortune". In disarming MILLER of her ability to enforce this inalienable right on behalf of her minor child by denying her the necessary proof, the Opinion below effectively emasculates the right of the child to share in her father's increased good fortune. The fair implication of the Opinion therefore expressly and directly conflicts with the following cases: *Smith v. Smith,* 474 So.2d 1212 (Fla. 2d DCA 1985), *rev. denied,* 486 So.2d 597 (1986); *Alfrey v. Alfrey,* 553 So.2d 393 (Fla. 4th DCA 1989); and *Wanstall v. Wanstall,* 427 So.2d *353* (Fla. 5th DCA 1983). A fair implication of the Opinion is also that SCHOU can stipulate away his child's right to share in his increased good fortune, which holding expressly and directly conflicts with *Bernstein v. Bernstein,* 498 So.2d 1270 (Fla. 4th DCA 1986) and *Thompson v. Korupp,* 440 So.2d 68 (Fla. 1st DCA 1983), which hold that a parent cannot contract away the rights of a child and that the right to child support is the child's.

The issues of the amount of financial disclosure in divorce and related proceedings that a party may prevent by stipulation and whether a parent can effectively emasculate the rights of his child to share in his good fortune by stipulation are of great public importance. This Court should exercise its discretion to exercise jurisdiction and reverse the Opinion of the Third District.

JURISDICTIONAL ARGUMENT

The Opinion of he Third District expressly and directly conflicts with decisions of this Court and other District Courts of Appeal on the same point of law in two important respects[3]. The first conflict involves the basic holding below that SCHOU's limited admission of ability to pay can be used as a shield against ***any*** financial discovery by MILLER in connection with her Petition for an upward modification of child support. The second conflict involves the "fair implication" of the Opinion below that a parent can fend off an upward modification of child support based upon enhanced "good fortune" simply by stipulating to an ability to pay any increase in support, which would then preclude discovery of the very information necessary to establish the increased "good fortune"[4]. In **essence,** a good fortune upward modification **is** no longer available in those **cases** where it would be most appropriate if the payor-parent follows the procedure utilized **by** SCHOU. We proceed to our analysis.

I"

In *Bedell v. Bedell,* **16 FLW 5401** (Fla. May **30 1991),** a recent case involving a petition to increase alimony, this Court made the following observation in footnote 2 in response to the husband's acknowledgement that he had sufficient ability to discharge any reasonable order with respect **to** alimony:

By virtue of the wording of this concession, the

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[3] **Jurisdiction is urged pursuant to Article** V, **§3(b)(3), Fla.Const. and Florida Rules of Appellate Procedure 9.030(2)(A)(iv).**

[4] **Conflict jurisdiction can exist based upon the** *fair implication* **of a holding in** a **case.** *Hardee v. State,* **534 So.2d 706** (Fla. **1988).**

> husband was able to prevent the wife from discovering his current financial status, while at the same time preserving his right to appeal from an order which he deemed unreasonable. However, because this issue was not raised, we do not pass on the propriety of this or any concession which enables a spouse to preclude an inquiry into his or her actual financial circumstances.

The instant case will enable this Court to pass on the propriety of such concessions and offers a clear opportunity to declare such practice offensive and contrary to the proper administration of justice.

The ruling below – – that the trial court departed from essential requirements of law by requiring SCHOU to produce a financial affidavit in view of his admission that he could pay the additional child support which he "assumed" MILLER was requesting, while reserving the right to appeal any award – – expressly and directly conflicts with the following cases from this Court and other District Courts of Appeal: *Orlowitz v. Orlowitz,* 199 So.2d 97 (Fla. 1967)(order immunizing husband from *a// inquiry* concerning his financial worth was an abuse of discretion, even though he stipulated in his motion for protection that he was willing and able to pay any reasonable costs, fees or other allowances); *Walton v. Walton,* 537 So.2d 658 (Fla. 1st DCA), *rev. denied,* 545 So.2d 1370 (1989)(husband already produced affidavit in *modification* proceeding but wife wanted more. The court stated: "Even though a party may concede the ability to pay any reasonable award, ordinarily the court should still insure that the parties are not precluded from presenting 'the whole factual picture' for an independent and complete understanding and evaluation by the court."); *Eyster v. Eyster, 503* So.2d 340 (Fla. 1st

DCA), *rev. denied,* 513 So.2d 1061 (1987)(trial court *did not* abuse its discretion in determining that husband's financial condition was relevant to alimony *modification* issue and therefore subject to discovery, notwithstanding his stipulation that he was capable of paying any reasonable amount of alimony): *Parker v. Parker,* 182 So.2d *498* (Fla. 4th DCA 1966)(husband stipulated that his net worth was in excess of Five Million Dollars ($5,000,000.00) and he had the ability to supply the needs of the dependents. The court held: "we do not look with favor upon the husband's position in not wishing to reveal any of the details of his financial position and his efforts to bridle the dependents' discovery rights **by** substituting his secondary non-verifiable conclusion in lieu of primary detailed facts. The adversary and the court are entitled to the whole factual picture...")

This Court should exercise its discretion in favor of accepting jurisdiction because the amount of financial disclosure that a litigant in divorce and related proceedings can avoid by stipulation is *of* great public importance and an issue certain to continue to arise in many **cases** in the future. This issue is obviously the subject of much debate and has a direct and potentially deleterious impact on the administration *of* justice in every case in which it arises.

II.

A fair implication of the Opinion below is that MILLER cannot obtain an increase in child support based upon the enhanced "good fortune" *of* SCHOU, an anesthesiologist. **As** succinctly stated by the trial court at the hearing where it ordered SCHOU to provide a financial statement, only to be reversed by the Third District:

> if a child is entitled to the good fortune of **a** parent and if we never know what that good fortune is, how do we know what the child **is** entitled to. (A.10).

In closing the discovery door to MILLER, the Third District has sent a strong and, in our view, pernicious message that upward modifications of child support based upon "good fortune" can be avoided by simple unilateral stipulation by the very parent who enjoys the increased good fortune. In disarming MILLER of her ability to enforce this inalienable right on behalf of her minor child by denying her the necessary proof, the Opinion below effectively emasculates the right itself. The fair implication of the Opinion below therefore expressly and directly conflicts with the following cases: *Smith **v.** Smith,* **474** So.2d 1212 (Fla. 2d **DCA** 1985), *rev, **denied,*** 486 So.2d 597 (1986)(a substantial increase in the father's earnings, *by **itself,*** justifies an increase in child support); *Alfrey **v.** Alfrey,* 553 So.2d 393 (Fla. 4th **DCA** 1989)(where the change in circumstances **is** no more than a substantial increase in the income of the husband, child support may nevertheless be increased"); *Wanstall v. Wanstall,* **427** So.2d 353 (Fla. 5th **DCA** 1983) (same).[5]

In allowing SCHOU to disarm MILLER (as a *cestui qui* trustee) of her ability to obtain an upward modification *of* child support based upon SCHOU's good fortune, the fair implication of the Opinion below is also that a parent may stipulate away this basic *right* of his child, which holding expressly and directly conflicts with the following cases:

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[5] **The Third District Opinion below relied upon *Young** v. Young,* **456 So.2d 1282 (Fla. 3d DCA 1984) which itself conflicts with the above cited cases by holding that a greater ability of** a **parent to pay is not alone sufficient for an increase in child support.**

Bernstein v. Bernstein, 498 So.2d 1270 (Fla. 4th **DCA** 1986)(en banc, "The authority to modify child support regardless of any contract between the parties, is inherent in a court's authority"); ***Thompson v. Korupp,* 440** So.2d ***68*** (Fla.1st **DCA** 1983)(the right to child support *belongs to the child).*

While SCHOU could divorce his wife (MILLER), he can never divorce his daughter. Unlike a divorced spouse, she ***is*** entitled to share in his enhanced **good** fortune. Since a majority of Florida courts (not now including the Third District) hold that an increase in child support may **be** obtained either because of an increase in need *or* because of the enhanced good fortune of a parent, financial discovery must never be limited or eliminated in this type of proceeding, lest a child be relegated to the status of a divorced spouse, in violation of written and natural law. If the majority view holds firm, the Opinion below violates such laws and in **so** doing touches upon fundamental guarantees of due process and *meaningful* access of children to the courts of this state. This issue **is** of great public importance.

CONCLUSION

For the foregoing reasons, MILLER urges this court to accept conflic jurisdic ion and reverse the Opinion below.

Respectfully submitted,

YOUNG, FRANKLIN & BERMAN, P.A.
Attorneys for Petitioner
17071 West Dixie Highway
North Miami Beach, Florida 33160
(305) 945-1851

By _____
BARRY S. FRANKLIN

By _____
ANDREW S. BERMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 3 day of October, 1991 to Paul Siegel, Esq., 169 E. Flagler Street, Miami, FL 33131.

By _____
ANDREW S. BERMAN