045 w/app

IN THE SUPREME COURT OF FLORIDA

Case No. 78,636

JUNE MILLER,
Petitioner,
vs.
MICHAEL J. SCHOU,
Respondent.

RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW

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STATEMENT OF THE CASE AND FACTS

June Miller (June) petitioned for an increase in the $500 per month child support paid by Michael Schou (Michael) for the 11 year old daughter of the parties. At the end of May 1990, June filed a financial affidavit showing projected average monthly expenses for Dana to be $2,915.33.[2]

Michael filed a motion for protective order after June served an extensive set of interrogatories and a request for production of documents (RA 5-23). Michael set forth his understanding of June's contention that she needed $3,000 per month for child support. He disagreed with that statement of need, but admitted "that he has the financial ability to pay that amount of child support if such is the award of this Court. Therefore, the Respondent's financial condition is not an issue in this case" (PA 5).

At the hearing, the trial judge questioned the appropriateness of financial discovery (RA 25-26):

> There are generally two sides to that. One is, I need more money; the other is, and the other side can afford to pay it. And generally that's done by discovery. You see what the other side

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[1]The following abbreviations will be used:
PA Appendix to the Jurisdictional Brief of Petitioner;
RA Appendix to the Jurisdictional Brief of Respondent;
All emphasis is ours unless otherwise indicated.

[2]This figure does not appear on the financial affidavit. June's household consists of herself, 11 year old Dana, and a 14 year old son by a different marriage. The affidavit shows general living expenses such as household, automobile, entertainment, vacations, and miscellaneous expenses and attributes one-third of all of these expenses to Dana. That total is $1,774.33. There is also a separate category of children's expanses specifically for Dana, including babysittera, clothing, medical, tutoring, etc. totaling $1,141. The total of the two numbers is $2,915.33 (RA 3).

has to present those facts to the court.

> In this case the other side is saying, "Judge, he doesn't need that discovery because I am admitting that I can pay whatever you order to pay."
>
> Now, what purpose then is served in going through his financial records and discovery since he has apparently remarried? He's married to a lawyer I think he said. Their financial statements are probably intermingled. Their income tax returns are intermingled, that kind of thing. Why am I subjecting, why am I subjecting this person and his new wife to this kind of discovery?

Ultimately he decided that a financial affidavit should be filed because of the provisions of Fla. Stat. § 61.30(12) (RA 27).

> THE COURT: Fellows, my impression is that I should require a financial affidavit under the statute. I am not going to require him to go any further than that because the truth of the matter is, are you saying to me, "Wait a second, Judge, what we want to know is does he have a million dollars a year in income" and so what if he does, what are you going to ask for, a Rolls' Royce for the child; obviously I am not going to give you a Rolls-Royce for the child. So, you know, I am not sure that there is a real need to go into his finances.

Michael petitianed for certiorari to the District Court of Appeal. The Florida Chapter of the American Academy of Matrimonial Lawyers was permitted to file a brief amicus curiae and agreed with Michael's position (RA 29):

> Where a child support increase is sought in a specific amount, in a past-dissolution modification proceeding, the

> defending party should be permitted to limit the expense of the litigation and to insulate himself or herself from intrusive discovery by the filing of a sworn statement, or an offer to stipulate to the ability to pay the amount sought, if necessity can be established.

The Third District Court of Appeal quashed the order requiring a financial affidavit finding that the order represents a departure from the essential requirements of law as established by, among others, Braverman v. Braverman, 549 So.2d 750 (Fla. 3d DCA 1989) and Young v. Young, 456 So.2d 1282 (Fla. 3d DCA 1984). The Court pointed out in its opinion that Fla.R.Civ.P. 1.611(a) already provides for financial affidavits and that the rule established by this Court would control over the statute. The Court indicated that the civil procedure rule has been interpreted not to require a financial affidavit under the circumstances of this case.

SUMMARY OF ARGUMENT

The instant case is distinguishable from all of those cited in June's brief. Two of the cases June relies on are initial dissolution of marriage cases in which full discovery is always permitted. The other two are First District decisions, a court which has an internal four to four conflict on the question of the extent to which discovery should be permitted in a modification case. That is a conflict better resolved by an en banc rehearing, rather than taking the time of this Court.

ARGUMENT

WHEN A MOTHER REQUESTS MODIFICATION OF CHILD SUPPORT FROM $500 TO $2,915.33 *AND* THE FATHER ADMITS ABILITY TO PAY $3,000 PER MONTH IF "HAT IS THE ORDER OF THE COURT, THERE IS NO EXPRESS *AND* DIRECT CONFLICT BETWEEN A LIMITATION ON DISCOVERY INTO THE FATHER'S FINANCIAL ABILITY AND THE CITED MODIFICATION CASES OF THE FIRST DISTRICT WHICH HAVE CONSIDERED THE SAME POINT.

June cites four cases for the purported express and direct conflict. Two must be eliminated immediately and should not even have been in June's brief. Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967) and Parker v. Parker, 182 So.2d 498 (Fla. 4th DCA 1966) are both decisions concerned with the wife's ability to obtain financial discovery from her husband during the course of an initial proceeding to dissolve the marriage of the parties, rather than a modification of alimony or child support case. It has long been the law that complete discovery should be accorded a spouse at the initial dissolution stage.

The only case dealing with modification of child support cited by June is Walton v. Walton, 537 So.2d 658 (Fla. 1st DCA 1989). Eyster v. Eyster, 503 So.2d 340 (Fla. 1st DCA 1987) deals only with an alimony modification. Both cases are factually distinguishable because in neither is it apparent from the opinion that the wife was seeking a specific sum of money as alimony or child support with the father admitting the ability to pay that sum. Further, it is apparent from examination from these two cases and Granville v. Granville,

445 So.2d 362 (Fla. 1st DCA 1984) that there is an even split among the judges on the First District Court of Appeal as to whether there should be financial disclosure in a support modification case when the paying former spouse admits the ability to pay reasonable amounts of alimony or child support. Judges Ervin, Thompson, Nimons and Zehmer would not permit financial discovery in this circumstance. Judges Smith, Shivers, Wentworth and Mills would permit financial discovery.

In Evster, a rehearing en banc was requested, but denied. Florida Rule of Appellate Procedure 9.331(c) specifically provides for rehearings en banc to maintain uniformity in a court's decision. If the judges of the First District Court of Appeal are evenly split on an issue, that court should utilize the en banc procedure to resolve the disagreement among its members. It is not appropriate for that intra-district conflict to be resolved by use of conflict certiorari by this Court in a case which is factually distinguishable from all of the First District cases.

In Evster, Judge Zehmer's dissent cogently states (503 So.2d at 344):

> The lower court has erroneously treated the issues raised by the former wife's motion for modification of alimony as requiring consideration of the same facts and circumstances as the initial determination of alimony in the original dissolution hearing, in which inquiry into the respective financial circumstances of each party is usually relevant to issues placed in dispute by the pleadings, such as the respective financial ability of each party and the standard of living enjoyed during the marriage. The trial court's confusion of these funda-

> mentally different issues is plainly evident from the portion of the lower court order quoted in the majority opinion, which refers to provisions in section 61.08, Florida Statutes (1985), as requiring consideration of all relevant economic factors, including the financial resources of each party, in setting alimony, and which further states that the court must have before it knowledge of the husband's ability to pay in order to determine what amount of alimony is reasonable. Both the statute and common law rule cited by the trial court are applicable in deciding an award of alimony in the original dissolution proceeding wherein issues of the parties' standard of living and other collateral issues may be in dispute; but the former husband's financial circumstances are not relevant in alimony modification proceedings to address the former wife's claim of increased financial need if the former husband stipulates to his financial ability to pay a reasonable increase in alimony. See Calvo v. Calvo, 489 So.2d 833 (Fla. 3d DCA 1986); Alterman v. Alterman, 361 So.2d 773 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1361 (Fla. 1979).

The judges of the Third District Court of Appeal are uniform in not permitting financialdiscoverywhenthe ability to pay of the spouse against whom a modification is sought is not an issue in the case. Miller v. Schou, (PA 1-3); Braverman v. Brayerman, supra; Bedell v. Bedell, 561 So.2d 1179 (Fla. 3d DCA 1989) quashed in part on other grounds, 16 F.L.W. S401 (Fla., May 30, 1991); Calvo v. Calvo, 489 So.2d 833 (Fla. 3d DCA 1986); Shuffelbarser v. Shuffelbarser, 460 So.2d 982 (Fla. 3d DCA 1984); Schottenstein v. Schottenstein, 384 So.2d 933 (Fla. 3d DCA 1980); Powell v. Powell, 386 So.2d 1214 (Fla. 3d DCA 1980); Alterman v. Alterman, 361 So.2d 773 (Fla. 3d DCA

1978), cert.denied, 368 So.2d 1361 (Fla. 1979); Young v. Young, supra.

The instant case also factually is more similar to Granville than the other two First District cases. The trial judge specifically noted that Michael had remarried a lawyer and that his financial affairs were intertwined with those of his new wife. One of the important factors in the Granville decision was also the need to protect the paying party's financial status.

June also argues that a number of other cases conflict with this decision based upon the "fair implication" of the holdings in those cases, under Hardy v. State, 534 So.2d 706 (Fla. 1988). June grossly distorts the "fair implication" of the opinion below and there simply is no conflict between this opinion and any of the cases cited in that section of June's brief.

Rule 1.010 of the Florida Rules of Civil Procedure provides that the rule shall be construed to secure the just, speedy and inexpensive determination of every action." This Court surely has noted the trend to make child support modification proceedings as burdensome and expensive as initial dissolution of marriage actions. An example is the extensive discovery June sought to have Michael respond to at pages 5-23 in the appendix to this brief. This case does not present an issue which requires the attention of this Court.

CONCLUSION

There is no express and direct conflict between the

instant decision of the Third District Court of Appeal and any other appellate decision. Certiorari should be denied.

Respectfully submitted,

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BY _____
PAUL SIEGEL

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Andrew S. Berman, Esq., Young, Franklin, Merlin & Berman, P.A., Attorneys for Petitioner, 17071 W. Dixie Highway, North Miami Beach, Florida 33160, on November 13, 1991.

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APPENDIX

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