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SUPREME COURT OF FLORIDA

JAMES H. COX, JR.,

Petitioner,

v.

CASE NUMBER: 84,004

District Court of Appeal

1st District - No. 91-4159

KIMI LEA COX,

Respondent.

PETITIONER'S INITIAL BRIEF

APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

✓
**MCCAULEY & PETERS
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PRELIMINARY STATEMENT

In this brief petitioner-former husband, JAMES H. COX, JR., will be referred to as "husband." Respondent-former wife, KIMI LEA COX, will be referred to as "wife."

References to the Record on Appeal will be designated "R" followed by the page number. References to the transcript will be designated "T" followed by the page number. References to the Appendix will be designated "A" followed by the page number.

STATEMENT OF THE CASE

On December 31, 1990, husband, James H. Cox, Jr., filed a petition for dissolution of marriage in Bay County, Florida. (R 1). Wife filed an answer and counter-petition for dissolution of marriage. (R 11). This was the second marriage of the parties to one another. Their first marriage was dissolved by a final judgment of divorce obtained by agreement in the Territory of Guam on March 2, 1988. (A 1).

Prior to trial the parties entered into a written stipulation that addressed and resolved the issues of custody, child support, and rehabilitative alimony. The stipulation was adopted by the trial court in the final judgment of dissolution of marriage. (R 103-112).

The case was tried on the issues of wife's entitlement to a portion of husband's military retirement benefits or in the alternative permanent periodic alimony, and wife's claim for payment of attorney's fees by husband. After trial of the case and submission of written arguments and memoranda by counsel, the court entered its final judgment. The final judgment denied wife's claim for a portion of husband's future military retirement benefits, denied wife's

claim for permanent periodic alimony, and awarded wife three-fourths of her attorney's fees and costs.

The final judgment contained specific findings upholding the validity of the marital settlement agreement made in the parties' first divorce in Guam. The trial court found that:

1. The Guam agreement was free from duress, coercion, misrepresentation or overreaching.

2. The agreement did not make unfair or unreasonable provisions for wife under the circumstances of the parties at that time. The court noted that the agreement included provisions requiring husband to pay approximately \$35,360 in marital debt; rehabilitative alimony for four years; child support equal to 35% of husband's gross income less taxes; and medical, dental, eye care, and college tuition for the children.

3. The agreement was not procured under circumstances involving any concealment by husband or real lack of knowledge by wife. (A 24).

In its denial of permanent alimony the trial court noted in its final judgment the short duration of the marriage and the rehabilitative alimony agreed to by the parties.

On June 30, 1994, the First District Court of Appeal filed its opinion. The district court rule that the trial court abused its discretion in failing to void the Guam agreement and in failing to award wife any portion of

husband's military retirement. The court further ruled that the remarriage of the parties did not itself void the marital settlement agreement as a matter of law. It was, however, an abuse of discretion for the trial court to fail to void the agreement in this particular case. The court also certified the following question to the Florida Supreme Court as one of great public importance:

Does reconciliation or remarriage void a property settlement agreement or separation agreement as a matter of law?

(A 39).

Husband filed a timely notice of appeal of the order of the district court.

STATEMENT OF THE FACTS

Husband, James H. Cox, Jr., and wife, Kimi Lea Cox, were first married to one another on August 11, 1978, in Fulton, Arkansas. There were four children, Renda Joy Cox, born July 25, 1977, who was legally adopted by husband; Carrie Elaine Cox, born April 5, 1979; Joel Ryan Cox, born May 11, 1981; and Craig Michael Cox, born December 16, 1985. (R 1). Prior to the marriage husband was in the United State Air Force reserves with a brief period of active duty. Husband was recalled to active duty as a first lieutenant in May 1979. (T 23). Husband has been on active duty since that date and held the rank of major on the date of final hearing. (T 16, 22).

In 1988 the parties and the children were living in Guam. Husband was stationed on the western Pacific island at that time. (T 41). Martial difficulties occurred and the parties agreed that they would obtain an uncontested divorce in Guam. (T 54). Husband located a divorce lawyer through the newspaper and the parties contacted the lawyer together. The lawyer advised that he could only represent one party, but each had the option of obtaining a separate attorney. (T 25).

The parties were given forms to fill out and return. (T 26).

Following their visit to the lawyer, wife consulted at least twice with her brother, an Arkansas attorney. Wife discussed with her brother various issues in the case, including husband's military retirement and the amount of child support. (T 27-30).

In their settlement negotiations husband would not agree to assign to wife any portion of his future military retirement benefits. (T 28). The parties completed their negotiations and reached an agreement. Wife returned to the Guamanian lawyer and filed a petition for divorce. Wife obtained an uncontested final judgment of divorce that included a fully executed and detailed marital settlement agreement. The marital settlement agreement included provisions for payment by husband of child support in an amount equal to 35% of husband's monthly income; payment of college tuition for the children; medical and dental insurance for the children until age 24; rehabilitative alimony to wife for a period of four years; distribution of the personal property; and payment by husband of approximately \$35,000 in marital liabilities. (A 2).

Following their divorce in Guam, wife and the

children returned to the United States. Both parties dated other people. Each disposed of an IRA from their marriage. (T 34, 50). In May 1989 husband returned to the states and was assigned to Tyndall Air Force Base in Bay County, Florida. (T 32). In August 1989 wife and the children joined husband in Florida, and in November 1989 the parties remarried. Shortly after their remarriage marital problems again occurred, and in December 1990 husband filed for dissolution of the marriage.

SUMMARY OF THE ARGUMENT

There was no abuse of discretion by the trial court in its denial of wife's claim for permanent alimony, or in the alternative, a portion of husband's military retirement benefits. In the exercise of its discretion the trial court was called upon to determine the validity of the parties' Guam divorce agreement. After receiving and weighing the testimony of the parties and other evidence, the court determined that the agreement was valid. The court made specific findings concerning the circumstances and effect of the agreement. The findings were based upon competent substantial evidence in the record. The district court, in reversing the trial court, impermissibly re-weighed and re-evaluated the evidence and improperly substituted its judgment for that of the trial court.

The opinion of the district court contains no mention or discussion of the inter-related provisions of the Guam agreement and the inter-related provisions of the judgment of the trial court. It must be inferred that the district court made an improper piecemeal review of the agreement and final judgment.

The question certified by the district court to the Supreme Court should be answered in the negative. Reconciliation or remarriage should not as a matter of law operate to void a prior separation or property settlement agreement. The better approach to determination of the effect of reconciliation or remarriage on separation or property settlement agreements involves the use of the trial court's broad discretion to determine the circumstances surrounding execution of the agreement, its fairness or lack of fairness, and the intention of the parties following reconciliation or remarriage.

ARGUMENT

I.

THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT IN DENYING WIFE A PORTION OF HUSBAND'S MILITARY RETIREMENT BENEFITS; THE TRIAL COURT'S DECISION CONTAINS APPROPRIATE FINDINGS OF FACT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, THUS THE DISTRICT COURT IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE TRIAL COURT.

The First District Court of Appeal has certified to the Supreme Court a question of great public importance. The scope of the Supreme Court's review of the decision of the district court, however, is not limited to the certified question. Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961); Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976). Husband respectfully asks the Court to review and consider the correctness of the decision of the district court in its entirety.

The trial court's decision to uphold the validity of the Guam agreement and to deny wife's claim to an interest in husband's military retirement benefits were discretionary decisions. Thomas v. Thomas, 571 So. 2d 499 (Fla. 1st DCA 1989); Mills v. Mills, 460 So. 2d 545 (Fla. 1st DCA 1984).

These were decisions that required the application of the trial court's broad discretionary authority rather than the application of a legal principle to the facts of the case. Therefore, the standard of review by the district court of the trial court's decision is the "abuse of discretion" standard. Mercer v. Raine, 443 So. 2d 944 (Fla. 1983).

In dissolution of marriage proceedings the trial judge possesses broad discretionary authority to do equity and justice between the parties. Absent an abuse of discretion a ruling should not be reversed on appeal. An alleged abuse of discretion is determined by a general standard of reasonableness. In Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), the Supreme Court stated the following:

In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the act is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy the test of reasonableness.

In reviewing the ruling of the trial judge the question for the appellate court is whether reasonable persons informed by

the experience of a trial judge with full knowledge of all relevant and material facts could differ as to the action taken.

When a decision is based on the exercise of discretion it is incumbent upon the trial court to make written findings in support of its decision. 5 Am. Jur. 2d Appeal and Error §840. In the case at bar the trial court fully and precisely set forth its reasons for denying wife's claim to husband's military retirement.

First, the trial court found that the marital settlement agreement of the parties in their first divorce is a valid agreement. As such, it settled all property rights of the parties existing at the time of the agreement, and precludes a later action by either party to determine those rights. Dotter v. Dotter, 147 So. 2d 209 (Fla. 2d DCA 1962); Mason v. Mason, 371 So. 2d 226 (Fla. 2d DCA 1979). The trial court specifically found that wife had access to independent counsel as well as additional legal advice through her brother. The court noted that the evidence did not establish that the agreement was reached by fraud, duress, coercion, misrepresentation, or overreaching. The evidence, as weighed by the trial court, did not establish any concealment by

husband nor any real lack of knowledge by wife at the time the agreement was reached.

The trial court also specifically found that the agreement was not unfair to wife in its provisions. The court noted that husband assumed \$35,360 of marital debts including the debt on wife's vehicle, contributed 35% of his gross pay less taxes to the support of the children, paid wife rehabilitative alimony for four years, and assumed responsibility for payment of medical, dental, eye care, and college tuition expenses for the children.

The trial court's written findings on the validity of the parties' agreement in their first divorce are supported by competent substantial evidence in the record on appeal. Although the evidence is somewhat conflicting, husband testified that negotiations between the parties included husband's retirement benefits. Wife was assisted in the negotiations by her brother, an attorney. As to wife's claim that she did not even know husband's income at the time of the first divorce, the record discloses that the parties filed joint income tax returns and purchased two homes together during the marriage. (T 82). The trial court properly found that wife had no real lack of knowledge of the income and

assets of the parties at the time of the first divorce.

Under Florida law a trial court's findings supported by competent substantial evidence should be upheld on appeal. Clegg v. Chipola Aviation, Inc. 458 So. 2d 1186 (Fla. 1st DCA 1984); Charles R. Perry Const., Inc. v. Barry Gibson & Associates, Inc., 523 So. 2d 1221 (Fla. 1st DCA 1988). Notwithstanding the specific findings of the trial court and the presence in the record of competent substantial evidence to support the findings, the district court decided that the trial court abused its discretion in failing to void the Guam agreement and award wife a portion of husband's military retirement benefits. In its opinion the district court commented on the quality of wife's legal representation in the Guam divorce, the level of education of the parties, the number of moves made during the marriage, the work history of wife, and wife's version only of the extent of her knowledge of husband's income and her entitlement to a portion of husband's military retirement. (A 24). The district court's emphasis of these facts in its opinion strongly suggests that the court impermissibly re-weighed and re-evaluated the evidence and improperly substituted its judgment for that of the trial court through its re-evaluation of the evidence.

In Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976), on remand 336 So. 2d 1282 (1976), this Court explained the function of the appellate court as follows:

It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test . . . is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable testimony or evidence," it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court.

In the case at bar, the trial court in the exercise of its discretionary authority made specific findings to support and explain its denial of wife's claim for a portion of husband's retirement benefits. There is competent substantial evidence in the record to support each of the trial court's findings. On appeal the district court impermissibly re-weighed and re-evaluated the evidence. The district court then improperly substituted its judgment for that of the trial court. Reversal of the order of the district court is therefore required.

II.

**THE DISTRICT COURT OF APPEAL EMPLOYED AN IMPERMISSIBLE
PIECEMEAL APPROACH TO CONSIDERATION OF THE PROVISIONS
OF THE PARTIES' FINAL DECREE OF DIVORCE IN GUAM AND
THE FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE IN
FLORIDA.**

Although the only issue on appeal to the district court was wife's entitlement to a portion of husband's military retirement, the district court was required to examine, consider, and render its decision based upon all provisions of the Guam agreement and the Florida final judgment. Both the Guam agreement and the final judgment of the trial court contain provisions relating to distribution of marital assets and liabilities, child support, rehabilitative alimony, and attorney's fees. These provisions are inter-related. They were fashioned both by stipulation of the parties and by the trial court in the exercise of its broad discretionary authority. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

The opinion of the district court makes no mention whatsoever of the provisions of the Guam agreement which required husband to pay 35% of his gross income after taxes for child support, which distributed to husband all of the

marital liabilities totalling approximately \$35,360, and which required husband to pay rehabilitative alimony for four years. Likewise the opinion of the district court does not even acknowledge the provisions of the Florida final judgment which set forth husband's child support obligation, his obligation to pay rehabilitative alimony, his assumption of approximately \$43,000 in marital liabilities, and his payment of three-fourths of wife's attorney's fees. It must be inferred that the district court failed or declined to examine either the Guam agreement or the Florida judgment as a whole in its determination of whether the trial court abused its discretion.

In Hamlet v. Hamlet, 583 So. 2d 654 (Fla. 1991), this Court specifically prohibited the type of piecemeal review conducted by the district court in the case at bar. In Hamlet the Court reviewed a decision of the Fifth District Court of Appeal which reversed the trial court's award of alimony to wife. The district court had adopted the view that where substantial assets were distributed between the parties, the trial court has no authority to award permanent periodic alimony. This was not only the application of an erroneous rule of law, but a piecemeal approach to consideration of a

final judgment. This Court held that the review of a trial court's exercise of discretion must be conducted by examination and consideration of the judgment as a whole.

In Ugarte v. Ugarte, 608 So. 2d 838 (Fla. 3d DCA 1992), husband appealed the amount of alimony and child support awarded to wife by the trial court. Husband did not appeal the distribution of assets or other inter-related provisions of the final judgment. The Third District Court of Appeal affirmed the final judgment. The court stated that the type of piecemeal review requested by husband is prohibited. In the review of a final judgment it is the role and obligation of the district court to consider the overall scheme of distribution to determine if the court reasonably exercised its discretion.

In the case at bar, it appears that the district court made an impermissible piecemeal determination that wife should receive a portion of husband's military retirement. The district court made no mention of any of the other inter-related provisions of either the Guam agreement or the Florida judgment. It was the burden of wife to present a record to the district court that would allow it to determine that the trial court made an unreasonable or unfair disposition of

wife's claims. Neither the record nor the opinion of the district court show mathematically or otherwise that wife was shortchanged in either the Guam divorce or the Florida dissolution of marriage proceeding.

III.

IN ANSWER TO THE QUESTION CERTIFIED TO THE FLORIDA SUPREME COURT, RECONCILIATION OR REMARRIAGE DOES NOT VOID A PROPERTY SETTLEMENT AGREEMENT OR SEPARATION AGREEMENT AS A MATTER OF LAW.

The question certified by the First District Court of Appeal to the Supreme Court should be answered in the negative. That is, reconciliation or remarriage does not as a matter of law void a property settlement agreement or separation agreement.

There is a significant degree of uncertainty in the law of Florida concerning the effect of remarriage or reconciliation upon separation and property settlement agreements. In Weeks v. Weeks, 197 So. 2d 393, 395, (Fla. 1940), a decision that was discussed below by the district court, there is the broad pronouncement that:

It appears to be well settled that the reconciliation of husband and wife and the resumption of marital relations for any period of time will render a previous contract and settlement of property rights void . . .

The use of the term "void" implies that the agreement is a nullity and no rights are acquired under it. Such a contract requires no disaffirmance to avoid it and cannot be validated

by ratification. A voidable contract, on the other hand, is valid and binding until it is avoided by the party intending to avoid it. It is a contract that is capable of being affirmed or rejected at the election of one of the parties. Fla. Jur. 2d Contracts §7. The statement in Weeks has been followed or cited with approval in Delgado v. Cotta de Lopez, 546 So. 2d 1075 (Fla. 3d DCA 1989); Zullo v. Zullo, 317 So. 2d 453 (Fla. 3d DCA 1975); Thomas v. Thomas, 571 So. 2d 499 (Fla. 1st DCA 1991); and Hudson v. Fatolitis, 289 So. 2d 41 (Fla. 2d DCA 1974).

In Miller v. West Palm Beach Atlantic National Bank, 142 Fla. 22, 194 So. 2d 230 (1940), the Supreme Court, in discussing the effect of reconciliation upon a property settlement agreement, stated that abrogation of the agreement will depend on the intention of the parties. In other words, Miller concludes that reconciliation may render a prior property settlement agreement void only if it was the intention of the parties to so treat the agreement. Miller, therefore, treats the property settlement agreement as one that is voidable rather than void.

Very recently the Fourth District Court of Appeal in Duggan v. Duggan, 19 Fla. L. Weekly D1513 (July 13, 1994),

certified conflict with the third district's decision in Delgado v. Cotta de Lopez, 546 So. 2d 1075 (Fla. 3d DCA 1989), on the issue of the effect of remarriage or reconciliation upon separation and property settlement agreements. In Duggan, husband and wife entered into a property settlement agreement pursuant to a dissolution of marriage proceeding filed by wife. The judge assigned to the dissolution case entered an order approving the agreement, but the marriage of the parties was never dissolved. Instead the parties reconciled, but they fully complied with the agreement by dividing their assets. Husband later died and wife claimed an elective share of husband's property as a surviving spouse. The trial court ruled that reconciliation of the parties after the property settlement agreement abrogated the agreement based upon Delgado and Weeks and awarded wife an elective share in husband's estate. The fourth district reversed and called into question the uncritical application of the pronouncement in Weeks that reconciliation renders a previous property settlement agreement void. The fourth district cited with approval Miller and emphasized that the intent of the parties controls the determination of whether or not an agreement is abrogated by subsequent reconciliation. The

fourth district certified conflict with the third district's decision in Delgado.¹

In the case below the district court discusses the approaches taken in both Weeks and Miller. The district court declined to follow the pronouncement in Weeks that remarriage voids the parties' prior agreement as a matter of law. The district court held that the best approach to determination of the effect of reconciliation on a marital settlement agreement is an abuse of discretion approach suggested in Thomas.²

Husband generally agrees with the approach adopted by the district court. A literal application of the pronouncement in Weeks would adversely affect the rights of third parties who might attempt to take title or ownership to property given to one spouse incident to a marital settlement agreement. It would also prevent the parties from choosing to continue to recognize and abide by the agreement as was the case in Duggan. Husband suggests that in the event of

¹Counsel for husband is advised that no appeal was taken to the Supreme Court by either party in Duggan.

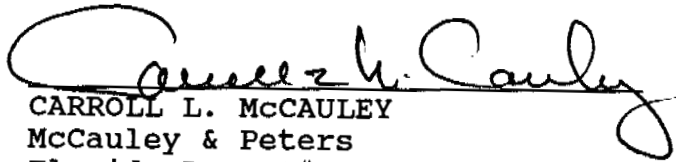
²It is somewhat ironic to note that the trial court in the case at bar seems to have followed Thomas in its determination of the effect of remarriage of husband and wife on their prior settlement agreement.

reconciliation or remarriage a prior marital settlement agreement should be considered valid and enforceable unless the parties by their subsequent actions demonstrate an intent to rescind or abandon the agreement. An agreement should also be subject to the right of either spouse to challenge its validity based upon fraud, duress, mis-representation, undue influence, coercion, concealment, or lack of knowledge, in its procurement. Finally, it should be within the trial court's broad discretion to void or set aside an agreement based upon manifest unfairness to a party in the application of its terms and provisions. Casto v. Casto, 508 So. 2d 330 (Fla. 1987).

In the case below, the trial court found that the Guam agreement was valid. The court's finding is supported by competent substantial evidence. As suggested in Thomas, the court exercised its discretion in its analysis of the circumstances and effect of the agreement. In voiding the agreement, the district court simply impermissibly substituted its judgment for that of the trial court.

CONCLUSION

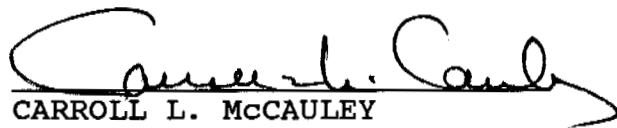
The decision of the district court should be reversed and the judgment of the trial court reinstated. The certified question should be answered in the negative. the decision in Weeks should be clarified so that it is no longer used as authority to void a marital settlement agreement as a matter of law when reconciliation or remarriage occurs.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served, by hand, on Pamela Dru Sutton, attorney for appellant, 116 East Fourth Street, Panama City, Florida 32401, this 5 day of October, 1994.


CARROLL L. McCAULEY

Appendix