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THE SUPREME COURT OF FLORIDA

CASE NO. 90,071
DCA NO. 95-308

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APR 4 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

GERI FINLEY,

Appellant/Petitioner,

vs.

DENNIS SCOTT,

Appellee/Respondent.

_____/

Respondent's Brief on Jurisdiction

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STATEMENT OF FACTS

Petitioner and Respondent conceived a child out of wedlock. A daughter was born to them on February 20, 1993. The child was twenty-two months at the time of trial (A-2, 7).

Two months after an amendment to F.S. 61.30(6), July 1, 1993, removing any maximum level of support to be paid under the child support guidelines and setting a percentage of combined parental income in excess of $10,000 per month, and with no limitation whatsoever in amount, Petitioner commenced an action in the lower court.

After scientific testing, Respondent was adjudged to be the biological father (A- 1, 15, paragraph 1).

The Petitioner is also the mother of two other children. One of the children resides with her, but she receives only marginal support from the father of $160 per month. The other child resides with either her aunt or mother, and the Petitioner contributes no support whatsoever for that minor (A-l, 6, paragraph 19, A-l, 7, paragraph 21, A-l, 8, paragraph 22, A-2, Goshorn dissent, 3, footnote 2).

The Petitioner neither works nor is a full- or part-time student (A-2, Goshorn dissent, 2). She is, however, employable, and the trial court went so far as to find that she was capable of supporting herself and the two minor children in her care at a reasonable range almost halfway between the amount she is receiving for support under the Final Judgment and the combined living expenses listed on her trial Financial Affidavit (A-l, 5, paragraph 13, and 13, paragraph 36, and A-2, 6 and 7).

Respondent is a professional athlete. He is a national basketball league player with the Orlando Magic. He earns approximately $266,920 a month (A-2, Sharp dissenting opinion,

1, and Griffin dissenting opinion, 2).

The Petitioner's request for guideline child support in the amount of $10,011 per month was rejected by the trial court and, instead, the sum of $2,000 per month was awarded to her. This award, the trial court concluded, was consistent with the lifestyle of the child, met her daily living expenses, and provided a comfortable level of support for her (A-2, 6 and 7).

Additionally, the Respondent was required to pay the full cost of health insurance for the minor child, all unreimbursed or deductible, medical, dental, drug, prescription, optical or orthodontic or other associated expenses for the minor child and maintain life insurance for her benefit (A-l, 3 and 4, paragraphs 8-10 and 17 and 18, paragraphs 5-7).

STATEMENT OF THE CASE

At a temporary hearing in December 1993, the trial court awarded the Petitioner $5,000 per month in temporary child support. For ten months prior to the non-jury trial, such temporary support was paid to her (A-2, Goshorn dissent, 2 and 3, and A-15, paragraph 15).

The Final Judgment noted that the Petitioner had been less than candid with the court and further had failed and refused to properly document or account for the temporary monthly support paid to her and as required by court orders. Also, she had not complied with a financial document production required under a court order, was evasive as to the expenditures made from the temporary child support and misrepresented her income. Specifically, the court found that the Petitioner had used the temporary child support for her own benefit, to pay her own obligations and for her own support (A-l, 4, paragraph 11, and paragraphs 12 and 13, and A-2, 6 and 9, and Goshorn dissenting opinion, 2 and 3, A-l, 5, paragraphs 14 and 15, 6, paragraphs 16-18, 7, paragraph 20, 10, paragraph 29, 11, paragraph 30, 12 and 13, paragraph 34,

and 13, paragraph 30, and A-2, 9 and 10).

In a detailed twenty-page Final Judgment of Paternity, the trial judge devoted numerous fact-finding paragraphs as to why he chose to depart and vary from the amended child support guidelines schedule. After ordering that $2,000 in direct support plus other associated child support obligations be paid by Respondent, he decided, however, to impose an "extra" support requirement of $3,000 per month, and these sums were to be deposited by Respondent with a guardian of the property for the minor child (A-l, 13 and 14, paragraph 37 and 16, paragraph 4 and A-2, 6 and 7).

Dissatisfied with not having received the full amount of child support claimed, Petitioner filed an appeal with the Court of Appeals for the Fifth District. Respondent tiled a Notice of Cross-Appeal as to the Court's requirement that he pay $3,000 per month to the guardian of the property of the minor child and to be used as a savings account and reinvested for her future welfare and well-being without the necessity of a modification review under F.S. 61.13 and 61.14.

The Court of Appeals for the Fifth District affirmed as to the $2,000 per month direct child support obligation and found that this award was fully supported by the record (A-2, 6 and 7).

As to the additional award of $3,000 per month, six members of the Court determined that this excess award had no support in the record to substantiate it as being consistent with the actual and bona fide needs of the child and commensurate with the standard of living of the family in which she resides (A-2, 7 and 8). As to this issue, the District Court reversed.

Further, the District Court let stand the denial of retroactive child support to Petitioner (A-l, 15, paragraph 40, and A-2, 7, 10 and 12).

Three judges joined in Judge Harris' opinion. Judges Dauksch and Antoon concurred in separate opinions. Judges Sharp, Goshorn and Griffin dissented, and each wrote a separate opinion. It is from this *en banc* opinion that the Petitioner has filed a Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

In Boyt, the monthly child support was divided, $1,500 to the custodial parent and $1,154 to a trust. There is implicit in this decision a determination that the total monthly guideline support of $2,654.09 was in keeping with the present and reasonably foreseeable needs of the minor child and was necessary for a comfortable standard of living for that minor. Good cause existed for the use of a trust since the trial court had made a specific finding that if the total of the child support monies were paid to the custodial parent, she may misspend them and, therefore, the trust could be used as an independent entity with a guardian ad litem paying certain support obligations directly,

In Finley, the $2,000 of direct child support paid to Petitioner was found by the trial court, and affirmed by the District Court, as being consistent with all of the present and reasonably foreseeable future needs of the minor child and in keeping with her standard of living. Further, it represented almost 50% of the total living needs listed on a trial financial affidavit and claimed by the Petitioner for her and two children residing in her household, many of which the trial court termed to be "exaggerated, misleading, false, non-existent, or inaccurate" or, alternatively, almost 100% of the monthly expenses for the Petitioner and two children, as

detailed in her initial Financial Affidavit (A-l, 10, paragraph 29, 11, paragraphs 30 and 3 1, 12, paragraphs 32 and 33, and 13, paragraph 13, and A-2, 6 and 7).

Boyt found the use of a trust for "good fortune or excess child support" to be warranted, and Finley did not. The difference is to be found in the fact finding process of each trial court and the applicable principles of law involved.

When one carefully reads the facts in each case, there is no express or direct conflict with either the Finley or Boyt decisions and certainly no conflict with this Court's decision in Miller v. Schou, 616 So. 2d 436 (Fla. 1993) (A-3).

Alternatively, the Respondent submits that even if this Court were to find conflict between the Fifth District and the Second District decision, this Court still, nevertheless, has total discretion to deny jurisdiction.

ARGUMENT

POINT ONE

Finley v. Scott does not expressly and directly conflict with Miller v. Schou or Bovt v. Romanow and, therefore, this Court should decline to exercise discretionary jurisdiction.

In its opinion, the Fifth District did not certify that its decision conflicted with the Second District decision in Bovt v. Romanow, 664 So. 2d 995 (Fla. 2d DCA 1995) (A-4). Judge Harris, for the majority, only noted that: "We acknowledge conflict with Boyt," (A-2, 12). Respondent suggests that this comment only relates to the fact that a trust or guardianship was not employed as a remedy in this action because there was no necessity to award any more in the way of child support than what was being paid directly to Petitioner on a monthly basis.

Petitioner cites the case of Department of Health and Rehabilitative Services v.

Schwass, 622 So. 2d 578 (Fla. 5th DCA 1983), as establishing a "per se" rule of law in the Fifth District requiring a trial court to strictly abide by the mathematical determinations resulting from an application of the child support guidelines, and that the failure to do so is, *ipso facto,* an abuse of discretion. Respondent submits that this decision does not stand for the proposition of law at all, but merely reaffirms the discretion of the trial judge to deviate from the child support guidelines, if fair and equitable reasons exist for doing so, and they are clearly stated in the record or court order being appealed, F.S. 61.30(1 l)(k).

Equally misplaced is Petitioner's reliance upon Miller v. Schou, 616 So. 2d 436 (Fla. 1993) (A-3).

Although this decision concludes that a child is entitled to share in the good fortune of his parents, it does not hold that, in making such awards, the trial court must approve either unnecessary or extravagant monthly expenditures or those inuring to the private financial aggrandizement of the custodial parent. Rather, child support awards should be the result of an analysis of the bona fide or actual needs of the child, and with a comparable view to award an appropriate and comfortable lifestyle for that child.

Boyt v. Romanow, 664 So. 2d 995 (Fla. 2d DCA 1995), approved a novel approach in the way of a trust or guardianship to accept and discretionarily disburse "good fortune child support." It stresses, however, that a determination as to this award must be made on a case-by-case basis (4-A at 999).

In a follow-up decision a year later by the same District but a different panel of judges, a second decision on this point of law relates that there may be a variety of factual instances where the use of such a trust or guardianship may indeed be inappropriate, Irvin v.

Seals, 676 So. 2d 1236 (Fla. 2d DCA 1996) (A-5).

Additionally, it was suggested that this District only embraced the trust concept in the broadest possible terms while, at the same time, urging trial judges to use it only sparingly and resist the temptation to restrict the right of a custodial parent to receive and spend such support for the benefit of the minor child (A-5 at 436).

Lastly, this decision reflects upon the fact that trial judges may well be uncomfortable in applying such a remedy because there is no statutory authority, guidelines, or framework within which to establish or maintain these accounts, and that perhaps in the final analysis, this task is best left to the legislature, rather than the courts (A-5 at 437).

In this case, it is important to remember that the Fifth District opinion did not in any way reject the concept of a trust or guardianship account for excess support as advocated by the Second District. Furthermore, the Fifth District noted that it may well be appropriate under certain circumstances but concluded that this case was not one of them (A-2, 12).

In conducting its independent appellate review, the Fifth District, unlike the Second District, did, however, find that there was no justification for an award of this kind. It was in fact unnecessary because the evidence and the findings of the trial court showed that there was no present, special, individual, or financial need of the minor child which was not otherwise subsumed in the $2,000 direct monthly support being paid to Petitioner or, alternatively, which cannot be defrayed by her from her own sources of income. Any future needs or changes in the financial circumstances of the minor child, or the parents, could best be presented to the court by a petition for modification, rather than through a savings of $36,000 per year, not designated for any specific future uses or even earmarked for any particular future needs of the minor child.

The Respondent submits that the critical distinction between Boyt and Finley stems from the factual differences which appear from the record in each case,

In this case, the use of the trust concept resulted in a reversal, **while in Boyt it** resulted in an affirmance. These opposite decisions have their origin in a testing of the trial court's discretion as a fact finder and in its application of correct principles of law to the evidence at hand. By employing this standard of "reasonableness" one district found the actions of the trial judge to be logical and with justification (Boyt), while the other did not (Finley), Walter v. Walter, 464 So. 2d 538 (Fla. 1985), Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), and Marcoux v, Marcoux, 464 So. 2d 542 (Fla. 1985).

These opposite results do not require a reasonable man to conclude that Finlev either expressly or directly conflicts with Boyt or vice versa. Both decisions are reconcilable and distinguishable and, accordingly, this Court should deny jurisdiction.

POINT TWO

ALTERNATIVELY, EVEN IF CONFLICT IS FOUND AS TO THE FIFTH AND SECOND DISTRICT COURTS OF APPEALS DECISIONS, THIS COURT MAY, NEVERTHELESS, REFUSE TO EXERCISE DISCRETIONARY JURISDICTION.

Even if this Court determines that the District Court opinion expressly and directly conflicts with Boyt, it, nevertheless, has discretion to deny jurisdiction.

There are many areas of family law conflict among the Districts which have not yet been resolved by this Court. For example, the Fifth District holds that where there has been an equal and equitable distribution of marital assets and liabilities, then each party should be required to pay their own separate attorneys fees and costs, McIntyre v. McIntyre, 434 So. 2d 61 (Fla. 5th DCA 1983). Other districts hold to the contrary and look to a disparity in earnings or

financial circumstances, even after there has been an equal or equitable distribution, Martinez-Cid v. Martinez-Cid, 559 So. 2d 1177 (Fla. 3d DCA 1990), O'Steen v. O'Steen, 478 So. 2d 489 (Fla. 1 st DCA 1985), Blackburn v. Blackburn, 5 13 So. 2d 1360 (Fla. 2d DCA 1987), and Wiederhold v. Wiederhold, 655 So. 2d 218 (Fla. 4th DCA 1995).

Additionally, the Fifth District requires that an obligation requiring a parent to pay medical expenses must contain a specific dollar amount or maximum total financial limitation as to the child, McDaniel v. McDaniel, 653 So. 2d 1076 (Fla. 5th DCA 1995), the Second District concurs, Edgar v. Edgar, 668 So, 2d 1059 (Fla. 2d DCA 1996), while the First District holds that an obligation to pay uninsured, unreimbursed, or deductible medical expenses incurred by a child may be without limitation as to amount, Imanni v. Imanni, 584 So. 2d 596 (Fla. 1 st DCA 1991).

The Second District, in Irvin, has already suggested that the legislature should well respond to the use of a trust or guardianship as to "good fortune child support" (A-5). Perhaps the legislature will act. In the meantime, this Court has no obligation to accept jurisdiction in matters where other avenues of resolution are possible and especially where there are many other areas of family law which have been left unresolved among the district courts of appeal.

CONCLUSION

This Court should deny jurisdiction because there is no genuine conflict between the Fifth District decision and the Second District decision in Boyt.

Any difference in results is based upon a difference in facts presented to the reviewing court. Both Finley and Boyt conform to existing precedent and do not either expressly or directly conflict with one another.

Alternatively, even if this Court were to find such a conflict, it has discretion to

deny jurisdiction.

Respectfully submitted,

MICHAEL R. WALSH, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to HARRY H. MORALL, II, ESQUIRE, 905 West Colonial Drive, Orlando, Florida 32804, this 3rd day of April, 1997.

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