SUPREME COURT OF FLORIDA

EUGENE F. GAINES, Petitioner/Appellant, vs. LYNN SAYNE, as personal representative of the estate of CHLODEL H. GAINES, deceased. Respondent/Appellee.	)	SUPREME COURT CASE NO: 95,134 DCA CASE NO: 97-00491

~~ON PETITION TO REVIEW THE DECISION OF THE~~
SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS OF PETITIONER EUGENE F. GAINES

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I. THE FINAL JUDGMENT AND SUPPLEMENTAL ORDER TO FINAL JUDGMENT ENTERED BY THE TRIAL COURT IN THIS CAUSE ARE VOID DUE TO THE DEATH OF THE WIFE PRIOR TO THE RENDITION OF A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE BECAUSE THE DEATH OCCURRED PRIOR TO DISPOSITION OF A TIMELY FILED MOTION FOR REHEARING, DEPRIVING THE TRIAL COURT OF JURISDICTION TO MAKE THE DISSOLUTION DECREE FINAL.

In asking this Court to adopt the rule of law espoused in Reopelle v. Reopelle, 587 So.2d 508 (Fla. 5th DCA 1991), and by the Second district below, the Wife's estate argues that these decisions are better reasoned then Johnson v. Feeney, 507 So.2d 722 (Fla. 3d DCA 1987) because they are consistent with prior case law and the Johnson v. Feeney decision is not. To accept this argument, however, one must ignore the factual and procedural context in which each of these prior cases arose and take certain language out of context from these decisions which is arguably favorable to Respondent's position.

The first older case relied on by the Wife's estate is the decision of this Court in Berkenfield v. Jacobs, 83 So.2d 265 (Fla. 1955). In that case, the husband died after the signing of a written judgment of divorce, but prior to the judgment being recorded by the clerk. Apparently, under then applicable statutes, recording of a judgment by the clerk was necessary before any further process or proceedings could be had on the judgment. In

holding the divorce decree effective, this Court noted that the recordation was a mere ministerial act and was only evidence of the judicial action already taken. Id. at 268. Of crucial importance to the Berkenfield court was the fact that there were no further trial level proceedings anticipated and that judicial labor at the trial level had ended. This Court simply held that in such a situation the failure of the clerk to have performed the ministerial act of recording prior to death would not effect the validity of the divorce judgment signed earlier. In the present case, unlike Berkenfield, judicial labor at the trial level had not ended at the time of the death of the Wife. Thus, to argue that the Second District's opinion below is consistent with the Berkenfield decision is clearly wrong. See, also, McKendree v. McKendree, 139 So.2d 173, 174 (Fla. 1st DCA 1962) where the First District stated that the validity of the divorce decree in Berkenfield "was sustained on the premise that all judicial labor had ended."

The contention by the Wife's estate that the position of the Second District below is consistent with Sahler v. Sahler, 17 So.2d 105 (Fla. 1944) and Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d DCA 1982) is similarly misplaced. Both of these cases require that a written decree of divorce be entered prior to death of one of the parties and stand for the proposition that nunc pro tunc divorce

judgments entered after death are not effective. Again, these decisions recognize that judicial labor at the trial level must be ended prior to death of a party in order for the divorce decree to be effective. Since a written decree had not yet been entered at the time of death, the courts in both these cases ruled that no divorce had occurred. These cases do not stand for the proposition, as contended by Respondent, that a written decree of dissolution will always be effective even though judicial labor at the trial level had not ended at the time of death of a party.

The Wife's estate then offers up the decision of the Fourth District in Becker v. King, 307 So.2d 855 (Fla. 4th DCA 1975) as being consistent with the rule announced below. The problem with citing the Becker decision as authority in this case is that to do so one must ignore the facts of Becker. In that case, after final hearing, the parties stipulated to the entry of a partial final judgment dissolving the marriage with the trial court reserving jurisdiction on property issues. The husband then died before the trial court entered a written order on the reserved issues. The issue on appeal in Becker was not whether the parties were divorced at the time of death. Neither party argued on appeal that the marriage had been terminated by death. The stipulated entry of the partial final judgment of divorce by the trial court had occurred prior to death and there was no challenge to its effectiveness.

Accordingly, the Becker court did not face the issue of the validity of the underlying divorce, and only decided whether the trial court had the authority to determine the reserved property issues after death. Thus, the Becker decision is not authority for the issue in the present case. The Becker court did not, contrary to the Wife's mistaken contention, hold that the parties' marriage in that case was dissolved by the operation of the original written partial judgment of dissolution. The Becker court was simply relating the factual context of the case; i.e. a stipulated partial judgment which neither party was challenging on appeal. To rely on Becker here is to ignore the factual context in which that decision arose.

Similarly, the decision of the Second District in Baggett v. Baggett, 309 So.2d 223 (Fla. 2d DCA 1975) is not authority for the issue faced in the present case. Although at first blush, the facts of Baggett appear similar to the present case, there is a crucial difference. In Baggett neither party challenged the efficacy of the divorce decree either at the trial level or on appeal. The only issue was whether the trial court had the authority to reduce its oral ruling on rehearing to writing after one of the parties had died. The Baggett court held that since the rehearing had been held and fully participated in by the decedent, the matter had ripened and matured for judicial determination prior

to his death. Again, to view Baggett as authority is misplaced because the issue of whether the underlying divorce decree was void because of the death was never raised as an issue by any party.

In Fernandez v. Fernandez, 648 So.2d 712 (Fla 1995), this Court pointed out the important distinction between the cases relied on by the Wife's estate and the factual context presented in Johnson v. Feeney, and the present case. Fernandez involved a stipulated bifurcation of the dissolution issue and the trial court entered a partial final judgment of dissolution with a reservation on property issues. On appeal, the husband contended that after the wife's death the trial court was without jurisdiction to enter an order determining property rights. In rejecting this argument, this Court stated:

> Respondent contends that the Becker case is in conflict with Sahler v. Sahler, 154 Fla.206, 17 So.2d 105 (1944), Johnson v. Feeney, 507 So.2d 722 (Fla 3d DCA), review denied, 518 So.2d 1274 (Fla.1987), Jaris v. Tucker, 414 So.2d 1164 (Fla. 3d DCA), review dismissed, 419 So.2d 1198 (Fla.1982), and McKendree v. McKendree, 139 So.2d 173 (Fla. 1st DCA 1962), which hold that the death of a party to a marriage dissolution action before a final judgment is entered terminates the marriage relationship by operation of law and divests the trial court of jurisdiction to issue a final decree. Those cases are not applicable here because in this case the court had dissolved the marriage prior to the wife's death by entry of the final judgment of dissolution. By retaining jurisdiction to deal with the property, the court did not render the final judgment dissolving the marriage any less final.

Id. At 714. The significance of this quoted language from Fernandez is that this Court acknowledged the consistency between Johnson v. Feeney, and the Sahler, Jaris and McKendree decisions and pointed out the fact that Becker and Fernandez which both involve stipulated bifurcation are legally distinct. In addition, by including the Johnson v. Feeney decision within the above quoted statement, this Court acknowledges that under the facts of Johnson v. Feeney, which are identical to the present case, the judgment of dissolution was not final at the time of death.

The husband concedes that the issue presented here is a difficult one with strong policy arguments in support of both sides. However, to adopt the position of the Wife's estate and the Second District below would be tantamount to approving bifurcation in every dissolution case. Further, such a rule would lead to a lack of certainty as to when a divorce was final since it would turn on the particular language chosen in a motion for rehearing. The Husband submits that the better reasoned and more concrete approach would be to require judicial labor to be at an end at the trial level before a divorce decree is considered final. This would add certainty to this area of the law and would be consistent with the prior appellate decisions of this Court.

II. ALTERNATIVELY TO POINT I, THE TRIAL COURT ERRED IN ENTERING ITS SUPPLEMENTAL ORDER TO FINAL JUDGMENT GRANTING THE WIFE ADDITIONAL EQUITABLE DISTRIBUTION OF $5,500.00, AND THE SECOND DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THAT DECISION WHERE THERE WAS INSUFFICIENT EVIDENCE AS TO THE VALUE OF OR WHETHER THE PROCEEDS FROM THE SALE OF THE GEORGIA PROPERTY WERE A MARITAL ASSET SUBJECT TO DIVISION.

In its Answer Brief, the Wife's estate contends that there was sufficient evidence to support the trial court's award on rehearing of an additional $5,500.00 in equitable distribution. However, the Wife's estate can point only to the Husband's testimony that on November 1, 1995, (some three months prior to the filing on the dissolution petition) that there was between $10,000.00 and $11,000.00 remaining in the parties joint checking account from the proceeds of the sale of the Georgia property. This testimony, of course, is evidence that this marital asset existed on November 1, 1995. But, it is certainly not evidence that this marital asset existed on the crucial date, January 25, 1996, the date the dissolution petition was filed. Particularly, in light of the fact that the Husband testified that the joint checking account was closed in January 1996, (T.233-234), and that his financial affidavit filed in evidence showed cash of only $344.00. (R. 270).

The two appellate decisions cited by Respondent, Beaty v. Gribble, 652 So.2d 1156 (Fla. 2nd DCA 1995) and Noone v. Noone, 727 So.2d 972 (Fla. 5th DCA 1998), do nothing to support Respondent's

contention. Both of those cases are cited only for the proposition that a party giving opinion testimony as to the value of an asset in which he or she has an ownership interest is competent evidence upon which a trial court may rely. Neither of those cases are applicable to the issue presented here.

The issue in the subject case is whether the Husband's testimony that an amount of cash existed 3 months prior to the date of filing is sufficient evidence that the cash was a marital asset subject to equitable distribution when there was no evidence presented that the cash still existed 3 months later or that the Husband improperly dissipated or transferred this asset. As stated in the Initial Brief, the burden is on the Wife to establish her right to equitable distribution, and, in the absence of the finding of an alternate valuation date by the trial court, the valuation date to be used is the date of filing.

Since there is no evidence that this marital asset existed on the date of filing and since the trial court made no finding that an alternate valuation date should be used, the Wife failed to sustain her burden of proof and the award of the additional $5,500.00 in equitable distribution on rehearing was clearly erroneous. This Court should reverse that award.

III. ALTERNATIVELY TO POINT I, THE TRIAL COURT ABUSED IS DISCRETION WHEN IT AWARDED THE WIFE ALIMONY RETROACTIVE TO THE DATE THE HUSBAND FILED HIS PETITION FOR DISSOLUTION OF MARRIAGE BECAUSE THE TRIAL COURT CANNOT MAKE AN ALIMONY AWARD PRIOR TO THE DATE THE WIFE REQUESTS SUCH RELIEF, AND THE SECOND DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THIS AWARD.

In the Answer Brief, the Wife's estate essentially fails to address the contentions of the Husband under Point III. The argument of the Wife's estate appears to be that somehow the Husband should have been on notice when he filed the initial dissolution petition that the Wife would at some future date seek alimony. Accordingly, the Wife's estate argues, without any legal support, that since the Husband should have known that the Wife would later seek alimony, the trial court had the authority to order alimony retroactively back to the period of time prior to her first requesting such relief. The Husband fails to follow the logic or merit to this contention.

This argument of the Wife's estate is curious in that the Husband did not argue lack of notice in his Initial Brief. The Husband has only contended, and restates here, the fact that there is no case law or statutory support for the award of periodic alimony, whether temporary or permanent, retroactive to a period of time prior to when a party first requests such relief. As the Husband stated in his Initial Brief, research has not disclosed any other Florida appellate decision where such a retroactive award has

been approved. Further, neither the Second District in its opinion below, nor the Wife's estate in the Reply Brief has provided any case law support for this award. Similarly, Section 61.071, Fla. Stat. (1995) by its terms provides no authorization for such a retroactive award.

Perhaps lack of notice is one reason why an award of alimony retroactive to a time prior to when such relief is first requested has never been approved or authorized statutorily. But, to focus on the question of whether the Husband in the present case may have suspected when he initially filed that the Wife would later request alimony relief misses the point. Under Section 61.071, Fla. Stat. (1995), if she had the need, the Wife could have immediately requested temporary spousal support, but she waited more than 3 months to request such relief. Counsel for the Wife's estate in his brief engages in speculation as to what the Husband may have known about alimony ultimately being an issue in this case at the time he filed his petition. It is just as easy to speculate that the Wife waited 3 months to ask for alimony because she did not need such relief at an earlier time. Despite the contention of the Wife's estate that her need for support is "uncontroverted", there is no evidence in the record to establish her need prior to the time of her first request for spousal support.

As the Husband stated in his Initial Brief, there is no reason

for the Court to sanction a rule of law that has no prior case law or statutory support and which encourages a party who has a legitimate need for support to delay assertion of their rights. Accordingly, the Second District's approval of this retroactive award should be reversed.

CONCLUSION

For the foregoing reasons and legal authorities, Petitioner respectfully submits that the trial court erred in allowing this cause to continue after the death of the Wife divested the lower court of subject matter jurisdiction, or in the alternative, erred in its awards of additional equitable distribution on rehearing and retroactive alimony as stated herein, and since reversible error has been demonstrated, the Judgment entered by the trial court and affirmed on appeal should be reversed by this Court with directions to dismiss this cause, or alternatively, remanded for further proceedings consistent with this Court's ruling.

Respectfully submitted,

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John B. Gibbons, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on the Merits of Petitioner, Eugene F. Gaines, has been furnished by U.S. Mail to Theodore J. Rechel, Esquire, 1905 W. Busch Boulevard, Tampa, Florida 33612, this __day of September, 1999.

I ALSO CERTIFY that the font size and style used in this brief is 12 point Courier New.

_____
John B. Gibbons, Esquire