ORIGINAL

Supreme Court of Florida

BEN WILSON BANE,

Petitioner,

vs.

CONSUELLA KATHLEEN BANE,

Respondent.

CASE NO.: 1999-93

District Court of Appeal,
2d District - No. 98-02291

ON CERTIFICATION OF CONFLICT
BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner Ben Wilson Bane was the Petitioner/Former Husband and Respondent, Consuella Kathleen Bane was the Respondent/Former Wife in the Civil Division of the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, the Honorable Judge Robert L. Doyel presiding.

The following symbols will be used:

"PA" Appendix to Petitioner's Initial Brief In the Court of Appeal, Second District, the contents of which are included in the Appendix hereto with the same item numbers. The Second District Court granted the parties' joint motion and stipulation that the appeal be decided based on the appendices to the parties' briefs (PA.15).

"RA" Appendix to Respondent's Answer Brief in this Court.

STATEMENT OF FONT SIZE AND STYLE

This Brief was prepared using 12 pt. Courier.

ARGUMENT

THE TRIAL COURT AND SECOND DISTRICT COURT OF APPEAL ERRED IN ENTITLEMENT OF THE FORMER WIFE TO ATTORNEY FEES INCIDENT TO HER PROCEEDING UNDER RULE 1.540(b) FLA.R.CIV.P. TO VACATE AN AGREED FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE.

Respondent's Answer Brief boils down to bare and naked assertions on the ultimate issue that "A motion pursuant to Rule 1.540, on the other hand, is a continuation of the original dissolution proceeding under Chapter 61" (Ans.Brief, p.23) and that, based upon the Second District's opinion, "...Section 61.16 does apply to all attacks on dissolution judgments, whether successful or not." (Ans.Brief, p.25). The Answer Brief continues to rely upon ***Rosen v. Rosen***, 696 So.2d 697 (Fla.1997). Petitioner again points out that ***Rosen*** only applies if F.S. 61.16 provides for attorneys' fees in a Rule 1.540(b)(3) proceeding.

Respondent points out that the trial court felt the award of attorneys' fees under F.S. 61 was appropriate because the wrong - doing that necessitated the proceedings was perpetrated under Chapter 61 (Ans.Brief, p.14). The latter seems to be a public policy type consideration, though in this particular case Petitioner must point out the trial court finding that, but for the former wife's failure to heed the advice of counsel, the Rule 1.540 proceedings would not have been necessary (PA.4). But

again, these are ***Rosen*** type considerations which are specific - fact - driven and not usable to determine the policy of the law concerning attorneys' fees in Rule 1.540 proceedings. What about Rule 1.540 proceedings in other areas of the law wherein some other statutory proceeding has resulted in a judgment? See re attorney fee statutes ***Bell v. U.S.B. Acquisition Co. Inc.***, 734 So.2d 403 (Fla. 1999), footnote 9; ***Florida Patient's Compensation Fund v. Rowe***, 472 So.2d 1145, 1148 (Fla. 1985). The "wrongdoing" or ground for relief which necessitates a Rule 1.540 motion will always occur under whatever cause(s) of action gave rise to the initial complaint in the litigation. Respondent would have Rule 1.540 take on or partake of the nature of every underlying statutory cause of action that results in a judgment subject to attack. Respondent argues that Rule 1.540 is a mere procedure, only a step in the cause (Ans.Brief, p. 15). And Respondent argues that the order vacating the final judgment herein was a "non-final order" (Ans.Brief, p. 17).

Petitioner is belittled for having mentioned, "...as though it is significant that the Order vacating the Final Judgment did not include a reservation of jurisdiction to award attorney's fees..." (Ans. Brief, p. 17). While it is true that Petitioner did not develop the point of lack of reservation in the vacation order to award attorneys' fees as fully as he could, it is now appropriate and important so to do in view of Respondent's position concerning

the non-finality of the vacation order. To begin with, as will be further shown, the order on a motion to vacate a final judgment is in fact a final order on the issues relative to vacation, in this case the issue of fraud. If attorneys' fees are awardable in the Rule 1.540 action, the motion for attorneys' fees would have been untimely filed by the Respondent. The order vacating the final judgment below was entered July 24, 1996, with no reservation for any later award of fees. The order vacating was appealed to the Second District and was affirmed per curiam, ***Bane v. Bane***, 701 So.2d 872 (Fla. 2d DCA 1997- opinion of October 22, 1997). The motion for attorney fees was not filed until December 24, 1997.

It has long been recognized in Florida law that an order on a motion to vacate a judgment is a final order and will support concepts of res judicata. ***Streater v. Stamper***, 466 So.2d 397(Fla.1st DCA 1985), citing ***Malicoat v. LaChapelle***, 390 So.2d 481 (Fla.4th DCA 1980) and ***Perkins v. Salem***, 249 So.2d 466 (Fla.1st DCA 1971 - there is finality as to the issues raised by the motion to vacate). See also ***State, DOT v. Bailey***, 603 So.2d 1384 (Fla.1st DCA 1992).

The case of ***Bastida v. Vitaver***, 590 So.2d 1092 (Fla. 3d DCA 1991) held that an order disposing of a Rule 1.540 motion to vacate would be appealable as a final order under the method prescribed by Fla.R.App.P. 9.130(a)(5), citing ***Francisco v. Victoria Marine Shipping, Inc.***, 486 So.2d 1386 (Fla. 3d DCA 1986),

rev. den'd, 494 So.2d 1153 (Fla. 1986). The ***Francisco*** case ultimately reversed the trial court, holding that the trial court did not have the authority to entertain a motion for rehearing directed to an order denying a motion for relief under Rule 1.540. This case contains a discussion of the question of finality of orders on motions to vacate. It was stated therein:

> "Florida Rule of Appellate Procedure 9.130(a)(5) merely declares the *method* by which orders on 1.540 motions are to be appealed. This subsection does not change the nature of orders entered on 1.540 motions; nor does it specify that such orders are "non-final" as the second district court states in *Potucek*, 419 So.2d at 1193. The supreme court, apparently, determined that, given the limited nature of the inquiry and the process attendant to 1.540 motions, the abbreviated method of review set forth in appellate rule 9.130 is more appropriate for orders entered on 1.540 motions than the plenary method set forth in appellate rule 9.110. Nothing in the language of rule 9.130 indicates that the supreme court intended anything more. We do not think the answer to this issue lies within the rules of appellate procedure... An order entered on a 1.540 motion, on the other hand, does not adjudicate the merits of the action or determine substantive rights. Rather, it is a ruling on a motion that decides essentially collateral issues."

Petitioner engages in the discussion just presented not because any relief may be granted because of the timing below of the motion for attorney fees, in the absence of a reservation in the Rule 1.540 order vacating, but because the analysis of the nature of Rule 1.540 proceedings, which are final as to the

collateral issue supporting the attack on the judgment, is of such separately litigated magnitude and importance as to contradict Respondent's assertion that such is merely a step in the cause, or a continuation of, the proceeding which gave rise to the judgment. On the issues pertinent to vacation of the final judgment, the order is a final order. As noted, the order on the vacation motion does not provide any decision on the merits of the case which gave rise to the judgment. As previously pointed out, no affirmative relief may be granted incident to the vacation order, other than the fact of vacation of the judgment itself. Certainly an award of attorney fees of almost $250,000.00 is affirmative relief.

According to the last sentence of Rule 1.540:

> Writs of error coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by independent action.

Rule 1.540 took the place of specific common law remedies. As to coram nobis, for example, this Court wrote as follows:

> [2] It is suggested that the Industrial Relations Commission is vested with inherent authority to correct a final order which was based on error of fact or was procured through fraud or the like just as a constitutional court prior to Florida Rules of Civil Procedure 1.540 could do through issuance of a writ of error Coram nobis. The function of a writ of error Coram nobis was to bring the attention of the court to a specific fact or facts then existing but not shown by the record and not known by the court or by the party or

counsel at the trial, and being of such a vital nature that if known to the court in time would have prevented the rendition and entry of the judgment assailed. Lamb v. State, 90 Fla. 844, 107 So. 530 (1926). The writ of error Coram nobis is a remedy known to the common law and was viable in the courts of this State by virtue of Section 2.01, Florida Statutes (1975), which provides:

> The common and statute laws of England which are of a general and not a local nature . . . (with an exception not material herein), down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

While the writ at common law was usually issued by the court of Kings Bench which is comparable in jurisdiction to our circuit court, it has been held that the authority also reposed in other courts of record established from time to time by our Constitution. See Leavitt v. State, 116 Fla. 738, 156 So. 904 (1934). (Emphasis added)

Farrell v. Amica Mut. Ins. Co., 361 So.2d 408 (Fla.1978). As stated in the Initial Brief, attorney fees are in derogation of the common law. The rationale advanced below and by Respondent would serve to engraft upon Rule 1.540, which absorbed and abolished common law remedies, a right to attorney fees in situations which formerly would have allowed for a named common law remedy but for the modern "Rule 1.540" relabeling. The action below was not, as FS 61.16 requires for attorney fees, "... **a proceeding under this chapter**".

Respondent argues from the cases of ***Kass v. Kass***, 560 So.2d 293 (Fla.4th DCA 1990), ***Hornsby v. Newman***, 444 So.2d 90 (Fla.4th DCA 1984), and ***Marino & Goodman, P.A. v. Chapman***, 561 So.2d 1318 (Fla.4th DCA 1990) that the 1.540 proceeding is so intertwined with a dissolution proceeding as to bear the "indicia" of a Chapter 61 proceeding, thereby allowing for attorneys' fees under Chapter 61. ***Hornsby*** and ***Marino*** were paternity cases which did not involve a Rule 1.540 proceeding. Neither did ***Kass***. In the ***Kass*** case not many facts are given incident to the allowance of attorney fees in two lawsuits "companion" to, and one of which was consolidated with, the dissolution action because they involved entities solely owed by the husband. Unlike the situation herein, no judgment had been entered in those cases. The rationale in ***Baumgartner v. Baumgartner***, 693 So.2d 84 (Fla. 4th DCA 1997), and in ***Lewis v. Lewis***, 689 So.2d 1271 (Fla. 1st DCA 1997) is more applicable to this discussion, if at all. ***Baumgartner*** distinguished ***Marino*** and ***Hornsby*** and others which had allowed attorney fees in that the cause of action involved in ***Baumgartner*** under F.S. 741.30, domestic violence injunction, was utilized in situations which do not or cannot result in a divorce proceeding under Chapter 61, and because the statutory domestic violence injunction is not designed or intended to resolve complex family issues determined in divorce, paternity or annulment proceedings. Petitioner points out

that neither is 1.540 designed to resolve such issues. There is a cause of action, once a common law remedy, under Rule 1.540, i.e. for the vacation of a previously entered judgment. That cause of action is utilized in many other areas of the law besides dissolution proceedings. ***Baumgartner*** points out that it is up the legislature to provide for attorneys' fees in a statute. In this case it would be necessary for F.S. 61.16 to provide for such fees in a Rule 1.540 proceeding. It is submitted that, following the rationale of ***Spano v. Spano***, the legislature should not provide for the financing of attacks on final dissolution judgments. Neither is it likely that Court Rule 1.540 would be or should be amended to finance attacks on various and sundry other judgments entered under Florida law. As stated in ***Lewis v. Lewis***:

> We also deny wife's request for attorney's fees because there is no statutory authorization to grant such fees as part of a proceeding brought pursuant to section 741.30, Florida Statutes (Supp.1996).

Insofar as ***Spano v. Spano*** is concerned, Petitioner meant to be understood as saying that the decision was well reasoned insofar as the same concerns the inapplicability of Chapter 61 to Rule 1.540 proceedings; but certain of the dicta in ***Spano*** is speculative in nature with a hint of a tendency toward judicial legislation your Petitioner seeks to avoid.

CONCLUSION

The Petitioner respectfully submits and moves that this Court reverse the decisions below entitling the Former Wife to recover attorney fees incident to the Rule 1.540 motion proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to David A. Maney, Esquire, Post Office Box 172009, Tampa, Florida 33672, this 23 day of February, 2000.

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