IN THE SUPREME COURT
OF THE STATE OF FLORIDA

KAREN F. RYKIEL,

Petitioner,

vs. Case No. SC01-586

STEPHEN A. RYKIEL,

Respondent.

DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

The trial record in this case will be referenced as TR: 1-429; the trial transcript as TT:1-161; and the Fifth District's Record on Appeal as RA:1-65.

STATEMENT OF CASE AND FACTS

The Former Wife's Statement of Case and Facts is incomplete. The designation of the alimony by the trial court in this case as non-taxable to the Former Wife was not raised in the pleadings (TR: 1-8); or was this issue mentioned during the trial of this cause. TT: 1-161. Rather, this provision mysteriously appeared in the executed Final Judgment. TR: 258-266; 365-393.

The specific facts of this case regarding the parties' incomes and the awards made are set forth at pp. 6-7 of this Argument. In addition, the parties involved in this action have recently entered into a Mediation Agreement dated November 28, 2001 resolving all pending matters. App. A. It is anticipated that an Amended Final Judgment will be entered shortly. When this judgment is entered, it will be provided to the Court.

SUMMARY OF ARGUMENT

The parties have settled their differences and this matter is now moot as to the parties. However, the Former Husband acknowledges that this Honorable Court may find this issue to be of great public importance, or a question likely to recur so as not to destroy this Court's jurisdiction. However, the Former Husband respectfully questions this Court's jurisdiction, as no question was certified by the Fifth District Court of Appeal, and any conflict is not express and direct.

The Former Husband concedes that the authorities cited by the Petitioner/Wife appear to interpret 26 U.S.C. ss. 71 as providing state courts with the discretion to designate permanent periodic alimony as non-taxable to the recipient spouse. However, this issue was never properly raised below, nor is this a case where such an award would be justified.

ARGUMENT

I. THE DECISION OF THE FIFTH DISTRICT THAT A TRIAL JUDGE CAN NEVER DESIGNATE ALIMONY AS NON-TAXABLE TO THE RECIPIENT SPOUSE WITHOUT AGREEMENT OF THE PARTIES MAY BE IN ERROR.

The authorities cited by Petitioner/Wife appear to interpret 26 U.S.C. ss. 71 as providing state courts with the discretion to designate permanent periodic alimony as non-taxable to the recipient spouse. No further authorities have been found on this subject.

II. THIS CASE HAS BEEN AMICABLY RESOLVED BY THE PARTIES. HOWEVER, THIS HONORABLE COURT MAY FIND THE ISSUE TO BE OF GREAT PUBLIC IMPORTANCE, OR A QUESTION LIKELY TO RECUR SO AS NOT TO DESTROY THIS COURT'S JURISDICTION.

The parties to this action have amicably resolved between them "all pending matters." See App. A. Thus, this matter is moot as it relates to these parties. However, it is acknowledged that:

. . . the mootness doctrine does not destroy [this court's] jurisdiction when the question . . . is of great public importance or is likely to recur.
Enterprise Leasing Co. v. Jones, 789 So. 2d 964, 965 (Fla. 2001).

NEVERTHELESS, THE FORMER HUSBAND RESPECTFULLY QUESTIONS WHETHER JURISDICTION SHOULD BE EXERCISED IN THIS CASE.

No Certified Question of Great Public Importance.

The Fifth District did not certify any question for review. And, as this Court stated in *Allstate Insurance Company v. Langston,* 615 So. 2d 91, 93 at n. 1 (Fla. 1995):

> *This Court does not have jurisdiction to review cases that a party deems to present an issue of great public importance. This Court may only review questions of great public importance that are certified by a district court of appeal.*

No Express and Direct Conflict.

The trial court in *Almodavor v. Almodavor*, 754 So. 2d 861 (Fla. 3d DCA 2000) did not order that alimony payments were excluded from the payee's taxable income, and thus, non-deductible by the

payor. Therefore, the Third District could not have, and did not, issue any ruling on whether a state court could do so. Rather, it made a comment about the matter in dicta, in reliance upon a family law treatise. 754 So. 2d at 862.

Rashotsky v. Rashotsky, 782 So. 2d 542 (Fla. 3d DCA 2001) finds the trial court's non-taxable alimony decision an abuse of discretion because it ". . . *worked a unnecessary hardship on the overall financial position of the couple."* 782 So. 2d at 544. The decision does not expressly hold that a trial judge may, without the consent of the parties, designate an alimony award to be non-taxable. However, that principle is implicit in the decision.

"Express and direct" conflict is required for this Court's review by Article V, Section 3(b)(3) of the Florida Constitution. The Former Husband respectfully questions whether jurisdiction exists for review of this case.

This is particularly true because the taxability of alimony issue was never raised below as an issue in the pleadings, or at trial. Rather, it simply mysteriously appeared in the Final Judgment drafted by the Former Wife's trial counsel. The reference in the Fifth District's decision to this topic is dicta. See *supra* at 2.

IV. ANY DECISION SHOULD MAKE IT CLEAR THAT ANY POWER THE TRIAL COURT JUDGE MAY HAVE TO DESIGNATE ALIMONY AS NON-TAXABLE TO THE RECIPEIENT SPOUSE WAS

IMPROPERLY EXERCISED IN THIS CASE.

The non-taxability of alimony issue was neither raised by the pleadings (TR. 1-8), nor tried by consent (TT: 1-161). Therefore, it was clearly erroneous for the trial court judge to address this issue in the Final Judgment. See e.g. *Williamitis v. Williamitis*, 741 So. 2d 1176 (Fla. 2d DCA 1999); *Hough v. Hough*, 739 So 2d 654 (Fla. 4th DCA 1999); *Milio v. Leinoff & Silvers, P.A.*, 668 So. 2d 1108 (Fla. 3d DCA 1996).

Secondly, the usual treatment of alimony is to make it taxable to the recipient and deductible by the payor. *Almodovar,* 754 So. 2d at 862; *Rashotsky*, 782 So. 2d at 544. In this case there was absolutely no basis to stray from the usual rule.

The parties are of very average means. He is a nursing home administrator and is paid $80,000 per year. His gross monthly wage is $6,666, with a net of $4,566. TT. 79, 106; TR. 178-180. She is employed by Disney World, and earns $990.60 gross per month and $840.60 net. TT. 28; TR. 72-74. She also receives monthly death benefits from the Veteran's Administration as a result of a previous marriage. TT: 33, 35.

The Former Wife was awarded custody of the parties' two minor children, plus occupancy of the marital residence until sold. Until that sale, the Former Husband was ordered to continue to make alimony and child support payments of $3,954.81 or almost 87% of

his net salary. TR: 101, 178-180, 369; TT: 79, 106. In addition, he was also ordered to pay the second mortgage of $372.96, plus life insurance costing at least $82.71, for a grand total of $4,410.58, or 96% of the Former Husband's net income. TR: 369-72. It was quite unlikely that the marital residence would sell in any reasonable time since the first and second mortgages on the marital home exceeded its value by $25,361.77. TR: 77-78, 183-85, 265. Even if the sale took place, the Former Husband was still ordered to pay 69% of his net income for alimony ($1,600.00) and child support ($1,104.61). TR: 101, 178-80, 369-72.

On top of all of these awards, which virtually eliminated the Former Husband's income, the trial court, with no prior warning, designated the alimony as non-taxable to the Former Wife and non-deductible by the Former Husband. At best, this was a gross abuse of discretion.

CONCLUSION

In the event this Honorable Court decides to exercise jurisdiction and determines that the decision of the Fifth District Court of Appeal regarding the tax/alimony issue is erroneous, it is respectfully requested that it be clearly stated that any power the trial court may have to designate alimony as non-taxable to a recipient spouse should never have been exercised in this case.

RESPECTFULLY SUBMITTED this 14th day of December, 2001.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Merits and Appendix thereto have been furnished by U.S. Mail this 14th day of December, 2001 to:

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the Respondent's Brief on Merits has been prepared in compliance with Rule 9.210(a)(2), Fla. R. App. P., using Times New Roman, 14 point font.

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