Case No.: SC01-586
Lower Tribunal No.: 5D00-793
Discretionary Review from the District Court of Appeal,
Fifth District
Florida Bar No. 026993
Florida Bar No. 0982120
Florida Bar No. 283975

In the Supreme Court of Florida

KAREN F. RYKIEL,

Petitioner,

and

STEPHEN A. RYKIEL,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, **KAREN F. RYKIEL**, was the Appellee in the District Court of Appeal, Fifth District, and was the Wife in the dissolution of marriage proceedings in the trial court. The Respondent, **STEPHEN A. RYKIEL**, was the Appellant in the District Court and the Husband below. The parties shall be referred to herein as "the Husband" and "the Wife." References to the Appendix refer to the Appendix submitted simultaneously herewith and are indicated by the abbreviation, "App." All emphasis are supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

On September 23, 1999, the trial judge in the Circuit Court for Orange County, Florida, in his final judgment of dissolution of marriage provided in paragraph 9 [App. 7] that the permanent alimony awarded the Wife will be "periodic non-taxable alimony [in] the sum of $1,600 per month." The Husband appealed to the District Court of Appeal for the Fifth District of Florida.

Notwithstanding the provisions of I.R.C. § 71[1] which requires that a stream of cash payments by one spouse or former spouse to the other will be taxable/deductible[2] unless, among other requirements,[3] "the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under [I.R.C. § 71] and not allowable as a deduction under I.R.C. § 215,"[4] the Fifth DCA reversed on the ground, *inter alia*, that it was error for the trial judge to make an "award of permanent periodic alimony . . . non-taxable to the receiving party, the former wife." The Fifth DCA reasoned in its original opinion that

> This award cannot stand because there is no legal authority which would permit such a practice. Permanent periodic alimony (*i.e.* support money) is taxable to the recipient under federal income tax law. 26 U.S.C.A. §71. Its taxability cannot be changed by a state court order. State law creates legal interests, but federal law determines how

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[1] The Internal Revenue Code will be referred to herein as "I.R.C." and sometimes as "the Code".

[2] Taxable to the payee spouse and deductible to the payor spouse.

[3] The other requirements of I.R.C. § 71 are that the cash payments be to or on behalf of the payee spouse or former spouse living in separate households (if the status of marriage has changed, i.e. a dissolution of the marriage), the liability for payment ceases upon death of the payee, and the payments are not fixed as to child support.

[4] I.R.C. § 71(b)(1)(B). I.R.C. § 215 allows a deduction to the payor spouse for payments of cash that met the requirements of I.R.C. § 71.

> those interest shall be taxed. The power of Congress to tax is not subject to state control, and in exercising its power Congress may impose its own criteria. (Citations omitted) [App. 15] 25 Fla. L. Weekly D2801 (Fla. 5th DCA, Dec. 8, 2000).

The Wife sought a rehearing because Congress did, in fact, "impose its own criteria" when in I.R.C. § 71 it defined the "divorce or separation instruments" in which the designation of non-taxability may be made as:

> (A) a decree of divorce or separate maintenance or written instrument incident to such a decree,
>
> (B) a written separation agreement, or
>
> (C) a decree (not described in sub-paragraph (A)) requiring a spouse to make payments for such support or maintenance of the other spouse.

Thus, Congress provided in I.R.C. § 71 that not only can the parties make the non-taxable designation in a "B" type of divorce or separation instrument, "a written separation agreement;" but also the trial court may likewise so designate in one of the two "A" alternative types of divorce or separation instruments, either "a decree of divorce or. . . [a] written instrument incident to such a decree."

The Fifth DCA then rejected the Wife's motion for rehearing explaining in a footnote:

> Section 71 was rewritten to clarify when a continuing stream of payments were to be

> characterized as maintenance, and thereby taxable, or a property distribution, which is nontaxable.[5] In fact, 26 C.F.R. § 1.71-1T, A-8, specifically provides that "the *spouses may designate*" that separate maintenance payments are nondeductible by the payor and excludible from the gross income of the payee. The term designate means "to make known directly." *Richardson v. Commissioner of Internal Revenue Service*, 125 F.3d 551, 556 (7th Cir. 1997). A reading of 26 U.S.C. § 71 and 26 C.F.R. § 1.71-1T, as a whole, convinces us that only the parties may agree to this in a written document or on the record before the trial judge, which would be reduced to judgment. [App. 18] 26 Fla. L. Weekly D430 (Fla. 5th DCA, Feb. 9, 2001).

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[5] Although not an issue in these proceedings, the Wife believes the Fifth DCA also misunderstood the 1984 Act which promulgated the current rules dealing with the taxability of alimony. The Code in § 71 makes no distinction of whether the payments are characterized as maintenance or property distribution.

In ***Nelson v. Commissioner***, T.C. Memo 1998-268 (U.S. Tax Ct. 1998), the court agreed with the taxpayer's argument that "because the payment fit within the definition of alimony for federal income tax purposes, the intended purpose for the payments is of no consequence. It held "the possibility that the payments might have represented a division of marital property. . .makes no difference."

Likewise, in ***Hopkinson v. Commissioner***, T.C. Memo 1999-154 (U.S. Tax Ct. 1999), the taxpayer unsuccessfully argued that she properly excluded the payments in issue from her gross income because they were intended by the parties to be a property settlement and not alimony.

On March 5, 2001, the Petitioner filed her Notice to Invoke Discretionary Jurisdiction to ask this Court to resolve the conflict of the decision of the Fifth DCA with that of the Third DCA in ***Almodovar v. Almodovar,*** 754 So. 2d 861 (Fla. 3d DCA 2000).[6] On September 7, 2001, this Court entered its Order accepting jurisdiction and dispensing with oral argument, directing the Petitioner to file her brief on the merits.

SUMMARY OF ARGUMENT

In ruling that a trial judge in Florida does not have the legal authority to designate in its final judgment that alimony shall be non-taxable to the recipient spouse, the Fifth DCA is in direct conflict with I.R.C. § 71, as amended. The Fifth DCA is also in direct conflict with ***Almodovar v. Almodovar,*** 754 So. 2d 861 (Fla. 3d DCA 2000), in which opinion the court articulated:

> The usual treatment of alimony is to make the alimony taxable to the recipient and deductible by the payor. If the trial court wanted to avoid burdening the former wife with the tax consequences of the alimony payments the court has the discretion to provide that "the payor [former husband] will not deduct the alimony payments so that the payee [former wife] may then exclude the payments from gross income."

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[6] Now also in conflict with the subsequent Third District Court of Appeal's case of ***Rashotsky v. Rashotsky***, 782 So. 2d 542 (Fla. 3d DCA 2001).

The Third DCA reiterated its position on April 18, 2001, in ***Rashotsky v. Rashotsky***, 782 So. 2d 542 (Fla. 3d DCA 2001), notwithstanding the Fifth DCA's decision in ***Rykiel*** which was published previously on December 8, 2000. [App. 14][7]

Although the usual treatment of alimony is to make it taxable to the recipient and deductible to the payor, Congress, in amending § 71 of the Internal Revenue Code in 1984, recognized that either the parties or the court can designate such payments as non-taxable to the recipient and non-deductible to the payor.

ARGUMENT

The decision of the Fifth DCA that a trial judge cannot designate alimony as non-taxable to the recipient spouse without agreement of the parties is erroneous and misconstrued the authority granted by Congress to allow such designation by using the disjunctive in the Internal Revenue Code authorizing such designation in either final decree or in an agreement of the parties.

The Fifth DCA was just flat out wrong when it ruled that a designation by a trial judge for permanent alimony as non-taxable to the receiving party cannot stand "because there is no legal authority which would permit such a practice."

Not only is such holding in direct conflict with that which was articulated by the Third DCA in ***Almodovar v. Almodovar,*** 754

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[7] Publication of the ***Rashotsky*** opinion also post-dated the publication of the ***Rykiel*** opinion on rehearing of February 9, 2001. [App. 17]

So. 2d 861 (Fla. 3d DCA 2000), but it smacks head-on with the provisions of I.R.C. § 71 that control whether or not a stream of cash payments are to be taxable to the recipient spouse (or former spouse) under the provisions of I.R.C. § 71 and, thus, deductible to the payor spouse under the provisions of I.R.C. § 215.

I.R.C. § 71 is abundantly clear. It provides in subsection (a) that gross income includes amounts received as alimony. Sub-subsection (b)(1) of I.R.C. § 71 defines alimony as any payment of cash if such payment is received on or on behalf of a spouse under a divorce or separation instrument, in case of a divorce that the parties maintain separate households, and that there is no liability to make payments after the death of the payee spouse. Payments must not be fixed as to child support.[8] Sub-subsection (b) of I.R.C. § 71 further provides that payments are alimony if "a divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under § 215."[9]

Thus, that which is in I.R.C. § 71 makes it quite clear that Congress intended that either the trial court judge or the

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[8] The latter provision as to fixing as to child support is in I.R.C. § 71(c).

[9] This designation provision is in § 71(b)(1)(B).

parties can make the requisite designation taking cash payments out of the I.R.C. § 71 definition of "alimony", by including the definition of "a divorce or separation instrument." In sub-subsection (b)(2) of I.R.C. § 71 "divorce or separation agreement" is defined as including "a decree of divorce. . . or written instrument incident to such a decree"[10] or "a written separation agreement."[11]

Congress not only used the disjunctive of "or" in listing what is a "divorce or separation instrument" in subparagraph (b)(2)(A)[12] by giving as alternatives for such designation a "decree of divorce or separate maintenance or written instrument incident to such a decree" but also gave two other alternatives: "a written separation agreement"[13] or "a decree (not described in subparagraph (A)) requiring a spouse to make payments for such support or maintenance of the other spouse."[14] Congress did not use the conjunctive "and." There can be little doubt of the meaning of the Code[15] when the connective "or" is used since the word "or" is a connective "used to express a choice or a

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[10] I.R.C. § 71(b)(2)(A).

[11] I.R.C. § 71(b)(2)(B).

[12] I.R.C. § 71(b)(2)(A).

[13] I.R.C. § 71(b)(2)(B).

[14] I.R.C. § 71(b)(2)(C), i.e. an order for temporary support.

[15] I.R.C. § 71.

difference or to connect words or groups of words of equal importance."[16] Blacks' Law Dictionary defines the word "or" as "a disjunctive particle used to express an alternative or to give a choice of one among two or more things."

Such is the view of this Court as expressed, *inter alia*, in ***Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers***, 334 So. 2d 563 (Fla. 1976), holding that where numerous activities are described in a statute all connected with the word "or," "it is the legislative intent that performing any of the enumerated activities" constitutes the described activity - there applicable to funeral directing. This Court approved the district court's holding that "'or' when used in a statute is generally to be construed in the disjunctive."[17]

Likewise, the First DCA recognized the same principal in ***Hu v. Crockett***, 426 So. 2d 1275 (Fla. 1st DCA 1983), wherein it interpreted Section 47.122, Florida Statutes, which states that "venue may be changed, based on three considerations, including: (1) the convenience of the parties, (2) the convenience of the witnesses or (3) in the interest of justice." There the court articulated that "because these three considerations are in the disjunctive, it appears to us that in very special circumstances

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[16] The World Book Dictionary, page 1050.

[17] Citing ***Pompano Horse Club, Inc. v. State***, 111 So. 801 (1927).

venue could be changed based upon any one of the foregoing criteria. . . ." (Emphasis supplied)[18]

When the Fifth DCA in its footnote explained its rationale that only the parties may designate payments as non-deductible in a written document or on the record before the trial court [App. 18], it read into the Code language that is just not there and ignored the fact that the enumerated instruments were connected by "or" thus, in the alternative.

In its holding, the Fifth DCA explained in its footnote on rehearing that its reasoning was based on A-8 of the Temporary Regulation, § 1.71-1T, Temp. Treas. Regs.[19] There, the court notes that A-8 provides how the spouses may designate payments as non-deductible by the payor and excludible from the gross income of the payee. However, the Fifth DCA opinion completely ignores the introductory remarks of the Temporary Regulation that "no inference, however, should be drawn regarding questions not expressly raised and answered." It further ignores the question to which A-8 was addressed: "How may spouses designate

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[18] The holdings of the federal courts are the same. ***E.g. Pacific-Atlantic Trading Company v. United States of America***, 64 F.3d 1292 (9th Cir. 1995), [In construing a statute where subsections are enumerated and separated by the word "or," the court should interpret such subsections written in the disjunctive as setting out separate and distinct alternatives.]

[19] The introductory remarks to the Temporary Regulations from the 1984 Domestic Relations Tax Reform Act which adopted the current alimony rules under § 71 explain that "these temporary regulations are presented in the form of questions and answers."

that payments otherwise qualifying as alimony or separate maintenance payments shall be excludible from the gross income of the payee and non-deductible by the payor?" The Temporary Regulation does not address the question as to how a trial court designates the payments otherwise qualifying as alimony and separate maintenance payments as excludible from gross income. It did not need to. Section 71 was quite clear - it could do so "in a decree of divorce," here, in Florida, a final judgment for dissolution of marriage or a "written incident to such a decree" or "a written separation agreement" or an order for temporary support.[20]

It is interesting to note that the Fifth DCA, in its footnote, recited that "the term designate means 'to make known directly,'" citing ***Richardson v. Commissioner of Internal Revenue Service***, 125 F.3d 551, 556 (7th Cir. 1997). The Fifth DCA continually overlooks footnote 3 of the ***Richardson*** opinion on the same page to which it referred, wherein the 7th Circuit recited:

> Surprisingly, the commissioner has not promulgated any regulations describing what a divorce or separation instrument must say, or what a divorce court must do to

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[20] See ***McKelvey v. McKelvey***, 534 So. 2d 801 (Fla. 3d DCA 1988), which discusses how a court (not the parties) must designate if a stream of payments are to be non-taxable.

> "designate" the tax treatment to be afforded interspousal payments.[21]

The teaching in ***Richardson*** could not be more clear. ***Richardson*** acknowledges that a divorce court may make the requisite designation, as did the trial court below.

This court, in ***Canakaris v. Canakaris***, 382 So. 2d 1197, 1202 (Fla. 1980), has emphatically taught that "dissolution proceedings present a trial court with the difficult problem of . . . providing necessary support. . ." and that "the Judge possess broad discretionary authority to do equity between the parties." It is inconceivable that the Fifth DCA should limit the right that Congress has given to trial judges in divorce cases the tool to fashion an alimony award by considering the economic impact of the income tax burden that such award will have. There is no reason for a Florida court to abrogate such congressionally given discretion.

Some of the leading authorities in the field agree with the pronouncement of ***Almodovar, supra***. In Marjorie A. O'Connell, *Divorce Taxation* §3501 (Wren Gorham Lamont 1992) it states "The parties or the court may make the election." In their book on divorce taxation, Harold G. Wren, Leon Gabinet and David Clayton Carrad, *Tax Aspects of Marital Dissolution* §6:07 (Callaghan & Company 1987), states that "the courts as well as the parties

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[21] Note the use by the 7th Circuit of the disjunctive "or."

themselves may apparently dictate the designation of the payments as excludible/deductible. . . ."

Many courts from other states so recognize. In ***Lowe v. Lowe***, 622 N.Y.S.2d 26 (App.Div. 1st Dept. 1995) it was held that "It is within the sound discretion of the court, pursuant to I.R.C. § 71(b)(1)(B), to provide in its order that the maintenance payments be neither income to the plaintiff [wife] nor deductible to the defendant [husband]."

An Ohio appellate decision has recognized that the trial court, even over the objection of one of the parties, can designate a stream of payments as "non-taxable spousal support."[3] In ***Roddy v. Roddy***, _____ N.E.2d _____, 1999 WL 22589 (Ohio 4th Dist. 1999) the court said:

> Not all court-ordered alimony and separate maintenance payments, however, fall within the federal statutory definition of "alimony or separate maintenance payment". . . . Pursuant to [I.R.C. § 71(b)(1)(A)] if a court designates a payment as not includible in the payee's gross income pursuant to Section 71 and not deductible from the payor's gross income pursuant to Section 215, then the payment, by definition, is not "alimony or separate maintenance."

A Virginia trial court in ***Hamilton v. Hamilton***, 19 Va.Cir. 241, 1990 WL 751116 (Cir. Ct. of Va. 1990), in answering the question of whether the court may order a party, over his objection, to allocate the tax burden to him held that I.R.C. §

71 contains no prohibition of such court action "and no conflict between state and federal law would be created."

CONCLUSION

To deprive trial judges throughout the State of Florida, as well as to cloud the issue throughout the country, of the right to designate otherwise qualified cash payments to a spouse or former spouse as non-taxable would be contrary to the congressionally sanctioned right for them to do so since 1984.[22] Such designation of non-taxability has been a frequently utilized tool by judges throughout the country to exercise their discretion in crafting an economically beneficial arrangement for both spouses.[23] Accordingly this Court should quash the portion of the opinion of the Fifth DCA, which precludes the trial court on remand to exercise its discretion in determining whether or not to designate in its final judgment that any alimony awarded may be non-taxable to the recipient.

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[22] On July 18, 1984, Pub.L.No. 98-369 became law, in which I.R.C. § 71 emanated and changed the rules as to taxability of alimony that were in effect for the preceding 30 years. Melvyn B. Frumkes, *Effect of TRA 1997 and RARA 1998 on Divorce Taxation*, 16 J. Am. Acad. Matr. Law. 121 (1999).

[23] The issue was not whether or not the trial court should in a discrete set of facts exercise discretion to designate a stream of payments as non-taxable but whether it could do so.

CERTIFICATE OF SERVICE

WE CERTIFY that a copy of the foregoing has been faxed and mailed to counsel for the Respondent, (407 688-1159) Marcia K. Lippincott, P.A., P.O. Box 953693, Lake Mary, Florida 32795-3693 this 25th day of October, 2001.

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STATEMENT OF COMPLIANCE WITH RULE 9.210(a)(2)

WE HEREBY CERTIFY that this Petitioner's Brief on the Merits has been prepared in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, using 12 point Courier New font.

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