IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC02-681

JEANNE E. PAUL, :

Petitioner, :

vs. :

JEAN-CLAUDE PAUL, :

Respondent. :

_____

PETITION FROM THE THIRD DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONER

James C. Blecke
Counsel for Jeanne Paul
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Others

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC02-681

JEANNE E. PAUL, :

Petitioner, :

vs. :

JEAN-CLAUDE PAUL, :

Respondent. :

_____

INTRODUCTION

This brief is filed on behalf of the petitioner, Jeanne Paul ("Wife"). The respondent is Jean-Claude Paul ("Husband").

STATEMENT OF CASE AND FACTS REFERABLE TO THE CONFLICT

There is no transcript of the calendar call and there was no effort to recreate it under Rule 9.200(b)(4). There is no transcript of the final hearing and there was no effort to recreate it under Rule 9.200(b)(4). The only transcript is of the hearing on the motion to set aside the final judgment and for rehearing. The Husband's counsel advised the trial court:

> I appeared at mediation and so did counsel. My client did not appear. But at mediation I provided counsel with all outstanding discovery . . . .
>
> . . . There was a calendar call, and since I expected to resolve this case, apparently I did not appear. [T. 3].
>
> * * *
>
> These are two poor people. The only issue involved is a house. . . .
>
> That's all we are looking for. These are two people who worked hard, have two children who are almost grown; the only thing they are asking for is to share whatever they had left. [T. 5-6].

After hearing argument on the notice issues, the trial court looked to the merits of the final judgment to see if there was any error, mistake or other reason to revisit the merits on rehearing (T. 9-13). Finding none, the motion to set aside the judgment and for rehearing was denied.

Conspicuously absent from the Husband's motion or argument was any proffer or other evidence not already in the record that would in any way influence equitable distribution. The Final Judgment granted Husband everything he requested in his petition. The trial court accepted the Husband's financial affidavit and used it in calculating relative ability to provide child support. The trial court also recognized

his impoverished status, and offset the Husband's admitted responsibility for retroactive child support with his negligible interest in a fully mortgaged burned out home.

STATEMENT OF CASE AND FACTS REFERABLE TO DISSOLUTION

The Husband initiated this dissolution action. The Wife answered and filed a cross-petition for dissolution. The petition and cross-petition for dissolution are near mirror images of each other. Both Husband and Wife sought a dissolution with primary child custody with the Wife, shared parental responsibility, retroactive and prospective child support, and equitable distribution of their assets and liabilities (R. 1-4, 10-12). The Final Judgment fairly and appropriately resolves all these issues.

Section 61.075, Florida Statutes (2000), lists the relevant factors in an equitable distribution of marital assets and liabilities. The first listed and most relevant factor is: "(a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker."

The Final Judgment includes the following findings of fact and conclusions that are presumptively correct and uncontradicted in the record:

> Since the parties separated, Petitioner paid little or no child support to Respondent for the minor children.

> The parties own a home . . . . When the parties separated, Respondent and the minor children continued to reside in said home until November 1999, when the house caught fire and burnt down. There are insurance proceeds pending to rebuild the home and make it habitable again.
>
> The home was originally purchased in 1991 for approximately $50,000.00. The parties refinanced the home in early 1999, prior to the fire and had a mortgage of approximately $51,000.00. The house has little or no value at the present time considering the condition of the house.
>
> * * *
>
> The Petitioner shall pay to the Respondent the sum of $84.69 per week as and for child support . . . . In lieu of awarding any retroactive child support, the Court is awarding Respondent Petitioner's share in the marital home.
>
> * * *
>
> . . . Respondent shall be solely responsible for all payments and expenses associated with said marital home and shall hold Petitioner/Husband harmless as to same.
>
> * * *
>
> Except as otherwise stated in this Final Order, each party shall be solely responsible for any and all debts in his/her individual name.

In his petition, the Husband affirmatively alleged that child support should be retroactive to December, 1997 (R. 4). The Wife was unquestionably entitled to

retroactive child support at least from November 1999, when the marital home burned down. At the rate of $85 per week, three years retroactive child support from December 1997 to January 2001 would approximate $13,500. Retroactive child support from November 1999 would be approximately $5,000. The Husband did not have the resources to pay retroactive child support in any amount.

The marital home purchased for $50,000 was the only "asset" and was subject to a recently refinanced $51,000 mortgage "debt." As of the date of the dissolution, the home was of little or no net equitable value, especially considering its burned out condition. The trial court did not abuse its discretion in awarding to the Wife the Husband's negligible net equity in the marital home in lieu of retroactive child support. The Wife was entitled to retroactive as well as prospective child support because, as of the date of the final hearing, the Husband had "paid little or no child support to Respondent for the minor children."

> A party's contributions to the care and support of minor children is a relevant consideration in the computation of both equitable distribution and alimony. §§ 61.075(1)(a) and 61.08(2)(f), Fla. Stat.

Days v. Days, 617 So.2d 417, 418 (Fla. 1st DCA 1993).

As is, the house is uninhabitable. The house, whatever its worth, must be rebuilt if it is to survive foreclosure. The Wife is now solely responsible for the

house and for rebuilding the house with whatever insurance proceeds are available for that purpose. She was awarded exclusive possession and control of the house to provide a home for her children. Any value added hereafter will be entirely her own doing.

Half of nothing is nothing. The Husband lost nothing in the trial court's equitable distribution of assets and debts – and gained the very real benefit of forgiveness of liability for past child support.

> No judgment shall be set aside or reversed . . . for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.

Section 59.041, Florida Statutes (2000). The trial court found no reason to set aside the judgment. But for the certified conflict, the Third District should have affirmed.

ISSUE ON APPEAL

WHETHER RULE 1.440 AND DUE PROCESS REQUIRE "ADDITIONAL NOTICE" BEYOND ACTUAL NOTICE OF THE CALENDAR CALL.

SUMMARY OF ARGUMENT

There are three settled and separate principles. First, a judgment entered without notice is void. Second, a default entered as a sanction for disobedience of a court order (such as non-appearance at a court ordered calendar call) may be set aside upon a showing of mistake or excusable neglect. Third, rehearing may be entertained if the court has overlooked or failed to consider relevant fact or law.

The certified conflict goes solely to the first principle, a bright line non-discretionary due process test without equitable overlay. Rule 1.440 requires thirty days notice of trial. The second and third principles are purely equitable, highly discretionary, and fall procedurally under Rules 1.530 and 1.540. The Third District erred in creating a hybrid notice requirement that finds no support in the rules of civil procedure, the case law, or the record in this particular case.

The Fourth District has correctly set out the law of due process notice in two unrelated but complimentary and consistent Watson v. Watson decisions. In Watson v. Watson, 583 So.2d 410 (Fla. 4th DCA 1991), the Fourth District held that a judgment entered without notice is void. In Watson v. Watson, 683 So.2d 534 (Fla. 4th DCA 1996), the Fourth District held:

> We reject the former husband's claim that he was not given adequate notice of the date of the final hearing. The former husband received an order setting calendar call . . . . He failed to appear at the calendar call. Ultimately, the final

> hearing was held on September 16, 1994. . . . We conclude that, in the instant case, the order setting calendar call fulfilled the requirements of [Rule 1.440(c)]. The order *required* the parties to appear at the calendar call. The purpose of the calendar call was for the court to consider possible conflicts and to more specifically advise the parties when the case would actually be heard on the docket . . . . The former husband sought no relief from the trial court concerning his mandatory attendance at the calendar call.

ARGUMENT

As reflected in the Third District opinion, "[Husband] does not dispute, however, that he received notice of the mandatory calendar call, at which the date of the final hearing was set. This notice was properly sent to Mr. Brutus [Husband's counsel]." The Third District also says, "[R]eceipt of the notice of calendar call by Mr. Brutus' office was sufficient to provide notice to Mr. Paul."

This is all the notice to which the Husband was entitled under due process and settled case law. The judgment is not void for lack of notice. Significantly, the Third District did not find the judgment void for lack of notice. In resolving the certified conflict, this Court should approve without reservation Watson v. Watson, 683 So.2d 534 (Fla. 4th DCA 1996) as a correct explanation and application of Rule 1.440(c) and due process notice.

Watson v. Watson does not invite, promote, or otherwise condone "sharp practice." The Third District's abstract concerns about sharp practice or inequitable consequence are already met and well served with existing settled principles. See, e.g., Schneider v. Schneider, 683 So.2d 187 (Fla. 4th DCA 1996) (failure to attend calendar call resulting from excusable neglect warranted relief from default judgment of dissolution). Here in a footnote, the Third District gives another example:

> [A] calendaring error would have provided grounds to set aside the final judgment. [citation omitted]. However, this ground was never asserted to the trial court in the motion. In fact, at the hearing on the motion to set aside, counsel stated that no one appeared at the calendar call because counsel expected the matter to settle.

Trial courts have broad equitable and discretionary power under Rules 1.530 and 1.540 regarding rehearing and relief from judgment. If the Husband here suffered any real detriment from his non-attendance at the final hearing, the trial court could have, would have, and should have reconsidered the merits of the final judgment under either Rule 1.530 or 1.540. But the Husband's motion to set aside the final judgment and for rehearing did not set forth any grounds for relief under Rule 1.530 or 1.540. Even so, the trial court did listen to Husband's counsel on the merits but

heard no valid basis to revisit the final judgment. Thus, unless the judgment is *void*, there is no reason to disturb it.

The Third District opinion is a negative visceral response to perceived professional discourtesy that creates more mischief than it cures. The Third District frames the issue as follows:

> Once we find that the calendar call notice was properly sent to counsel, we must decide whether it was necessary to provide additional notice to Mr. Paul of the date of the final hearing.

In deciding that "additional notice" is required, the Third District leaves unanswered the more important question of when, where, who and how this additional notice is to be given. "Whether the notice should be by telephone, fax, mail, or some combination depends on the circumstances." (Cope, J., concurring). The Third District majority indicates a telephone call from chambers will suffice, when the party fails to show up at the appointed hour. What if the call to counsel is directed to "voice-mail" as happens all too often these days? Will this satisfy the new Third District additional notice requirement? If additional notice is required, then presumably it should be meaningful notice that allows for attendance.

An "additional notice" requirement without uniform guidelines for prospective compliance is a procedural nightmare. If the form of the notice "depends

on the circumstances," then one is left with a retrospective adequacy analysis as the inevitable and unacceptable consequence. A phone call or fax will be found adequate only when counsel and client respond, and will be found inadequate if client or counsel are unavailable. That is why there is a call of the calendar in advance of trial.

Rule 1.440 requires a full thirty days notice of trial, the "due process" notice. This requirement is fulfilled with thirty day notice of a calendar call and corresponding trial period. The calendar call is the time and place where scheduling conflicts are resolved and specific dates and times for trials are set. When litigants have notice of the calendar call, as here, it becomes the individual litigant's singular responsibility to either attend the calendar call or otherwise determine when thereafter their case will be heard.

Professional courtesy and everyday practicality invite communication and coordination among counsel and court personnel. It should be encouraged. But there is no rule of procedure that calls for any "additional notice" either from the court or opposing counsel. This Court has exclusive rule-making authority under Article V, section 2(a), Florida Constitution. If new rules are needed, it is for this Court to make them under established guidelines and procedural safeguards. See, Supreme Court of Florida Manual of Internal Operating Procedures, Section II. F. Rulemaking.

Rule 1.440 addresses notice of trial. Rules 1.530 and 1.540 address rehearing and relief from judgments. These rules and their case law interpretation provide all the protections necessary. The Third District's creation of a new rule of "additional notice" may be well intended, but it is seriously flawed.

The Third District says initially, "as a matter of professional courtesy, most attorneys would have picked up the telephone to inquire from opposing counsel why no one had attended the calendar call. Instead, the attorney for Mrs. Paul sent notices of the final hearing to both Mr. Paul and Mr. Brutus . . . ." Two things are important here. First, any notice from counsel is a matter of professional courtesy, not rule or court order. Second, the attorney for Mrs. Paul *did* extend the professional courtesy of mailing notice to both Mr. Paul and to Mr. Brutus even though he was under no obligation to do so.

That fact that the courtesy notice was not timely received due to clerical error does not diminish the courtesy actually extended — only its practical effect. Mrs. Paul was represented at trial by a dedicated and well intended attorney from the Legal Aid Society of Dade County. Any suggestion of sharp practice is outrageous and way out of line. There is nothing in the hearing transcript or the record to indicate anything other than professionalism by trial counsel.

There is no transcript of the calendar call or the final hearing. If trial counsel had violated any trial court requirement for communication with opposing counsel, there would be some direct reference to it in the record. There is none. The concurring Judge's personal belief about what is required under "local practice" is not supported by the record.[1]

Mr. Paul never attended any proceeding personally. His counsel's participation was intermittent. He was not at the duly noticed calendar call. Both parties requested the same relief in their cross-petitions for dissolution. There was no net "equity" in the burned out home to distribute. Trial counsel believed (erroneously it turns out, due to clerical error) that notice of the final hearing date had been mailed days earlier as a professional courtesy. In sum, there was no reason not to proceed to final judgment of dissolution on the Husband's financial affidavit in his absence and the other evidence submitted at the final hearing. There was Rule 1.440 compliance and no demonstrated basis for Rule 1.530 or 1.540 post-trial relief.

CONCLUSION

---

[1] If court directed additional notice was the recognized local practice it would be conceded as such here, but the local calendar call experiences of undersigned counsel are the converse. Non-attendance at calendar call is usually at one's peril.

This Court should approve Watson v. Watson and reject the Third District engrafting of an additional notice requirement onto existing rules.

James C. Blecke
Counsel for Jeanne Paul
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

By_____
James C. Blecke
Fla. Bar No. 136047

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon Phillip J. Brutus, Esquire, Brutus and Roberson, 645 N.E. 127th Avenue, North Miami, Florida 33161; and Peter Adrian, Esquire, Legal Aid Society of Dade County, 123 N.W. 1st Avenue, Miami, Florida 33128, this 29th day of April, 2002.

James C. Blecke
Counsel for Jeanne Paul
Deutsch & Blumberg, P.A.
New World Tower, Suite 2802
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

By_____
James C. Blecke
Fla. Bar No. 136047

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with font requirements.

By_____
James C. Blecke
Fla. Bar No. 136047