

IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,
Petitioner,

v.

JOHN R. ZOLD,
Respondent.

Supreme Court Case No. (None yet due to hurricanes)
5th DCA Case No. 5D03-148, 5D03-2117
Trial Court (Orange County) Case No. DR01-1145

PETITIONER'S JURISDICTIONAL BRIEF

NORMAN D. LEVIN, ESQUIRE
NORMAN D. LEVIN, P.A.
165 West Jessup Avenue
Longwood, Florida 32750
(407) 834-9494: Telephone
(407) 260-0069: Facsimile
Florida Bar No. 213322
Counsel for Petitioner

AMY HAMLIN, ESQUIRE
NORMAN D. LEVIN, P.A.
Florida Bar No. 0255830
Co-Counsel for Petitioner

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INTRODUCTION

The Petitioner, SHERRY PALICTE ZOLD, was the Appellee in the District Court of Appeal, Fifth District, and was the Petitioner at the trial level with respect to a "Petition For Dissolution Of Marriage." The Respondent is JOHN F. ZOLD, and was the Appellant in the District Court of Appeal. The Petitioner shall be referred to herein as "Petitioner" or "Wife." The Respondent shall be referred to as "Respondent" or "Husband." References to the Appendix shall be indicated by the abbreviation "App." All emphasis herein is supplied unless otherwise noted.

STATEMENT OF FACTS

The facts upon which Wife believes the Fifth District has announced a rule of law which conflicts with a rule previously announced by another court are set forth in its opinion rendered herein. The following material facts are stated:

Husband, who was sixty-five years of age, and Wife, who was fifty at the time of the trial, have one fifteen year old child. (App. 1). Husband is the chief executive officer of Tri Tech and Wife was a full-time housewife with one year of

college. (App. 1-2). She was employed as a secretary making \$20,000 per year prior to the marriage. (App. 2).

On November 27, 2002, the trial court ordered Husband to pay Wife: \$172,088.50 within sixty days; \$1,797.66 monthly until \$200,000, plus interest @ 7% was paid; \$5,000.00 monthly as permanent alimony; \$520.94 monthly as child support; Premiums on a \$500,000 life insurance policy, the amount of which is unknown; Health and dental insurance; One-half of the child's clothing, schooling, entertainment, and other and uninsured medical expenses. (App. 2). The total for the above sum is more than \$189,406.20.

The only marital asset distributed to Husband, and the only source of income to satisfy the obligations imposed on him by the trial court, was his interest in Tri Tech, the capital stock of which is owned by Husband and one other stockholder. (App. 2).

The source of all Husband's income is from Tri Tech. (App. 3). Tri Tech and its two shareholders have elected to be taxed under Subchapter S of the Internal Revenue Code, which means that all corporate income is "passed through" to the shareholders in accordance with their percentage ownership of the stock of the corporation. (App. 3). "Pass through" income would be reported on the shareholders' individual federal

income tax returns. (App. 3). Although all of the corporate income must be reported and taxed, the individuals do not necessarily receive distributions of cash equal in amount to the income subject to taxation. (App. 3). Only that amount of cash is distributed in excess of what must be retained for corporate purposes. (App. 3).

Tri Tech's other shareholder is an attorney and the tenor of his testimony at trial does not indicate that Husband is free to treat the corporate cash as his piggy bank, nor to accumulate cash rather than distribute it, especially when the federal income tax on it had been previously paid. (App. 4).

SUMMARY OF THE ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN SEVERAL CASES IN DETERMINING WHETHER UNDISTRIBUTED BUSINESS INCOME SHOULD BE INCLUDED IN A PARTY'S INCOME FOR CHILD SUPPORT, ALIMONY AND ATTORNEYS FEES CASES UNDER CHAPTER 61, F.S..

The Fifth District's opinion in this case directly conflicts with rulings of other District Courts on the issue of whether business income is income for alimony and child support cases. The Appellate Court's opinion in the instant case directly conflicts with Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), because the First District specifically held that pass through income is within the

definition of income under Section 61.046, Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), where the Third District held that no error occurs when the retained income of an S-Corporation for the purpose of calculating child support and alimony is included in the calculation of income and Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), where the First District held that a person's income includes amounts from a Subchapter S Corporation shown but not paid out. The instant decision further conflicts with McHugh v. McHugh, 702 So.2d 639 (Fla. 4th DCA 1997) because the facts of this case do not fall within the narrow exception that could be argued from McHugh.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HEREIN DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN SEVERAL CASES IN DETERMINING WHETHER UNDISTRIBUTED BUSINESS INCOME SHOULD BE INCLUDED IN A PARTY'S INCOME FOR CHILD SUPPORT, ALIMONY AND ATTORNEYS FEES CASES UNDER CHAPTER 61, F.S.

The question presented to the trial court and Appellate Court asked what is the Husband's income for the purposes of awards of child support, alimony and attorneys fees.

Husband is President, Chairman of the Board of Directors, General Manager of Tri Tech Electronics, Inc., and majority shareholder.

The Fifth District vacated the portions of the Final Judgment that include the findings of Husband's income and remanded with instructions to, among other things:

Make findings as to the amount of income available to Husband for the purposes of support for Wife, his child and himself without considering any undistributed Subchapter S Income to shareholders unless it can be demonstrated that Tri Tech has delayed distributions of cash for purposes other than corporate requirements. (App. 5-6).

This opinion directly conflicts with prior decisions of other district courts in this state. In Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), the First District specifically held that pass through income is within the definition of income under Section 61.046. In Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), the Third District held that no error occurs when the retained income of an S Corporation is included in the calculation of income for the purpose of calculating child support and alimony. In Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), the First District held that amounts from a Subchapter S Corporation shown but not paid are to be included in a person's income when the corporation paid the taxes on that person's personal tax return.

In Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), the First District addressed the issue of whether undistributed business profits are income. The trial court failed to include dividend and business income, which was included on husband's tax return, as part of husband's income. Husband argued that the court should not include the interest, dividend, and business income as part of his income because he would have a loss if he had actually received that money.

The First District disagreed by stating that "Chapter 61 clearly designates 'income'" and found that the definition in section 61.046 included undistributed business income. Id.

In Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), the First District revisited the income issue in a child support modification case where, again, the trial court did not include undistributed business income in computing the father's income. The Court stated:

We reverse and remand for reconsideration of these issues, as the trial court apparently felt bound to accept Father's undisputed testimony that he received only approximately \$45,000 in salary and distributions from his Subchapter S corporation, although the corporation generated approximately \$100,000, which Father claimed and paid taxes on, on his personal tax return. See Zipperer v.

Zipperer, 567 So.2d 916, 917 (Fla. 1st DCA 1990). Id.

In Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), the Third District faced the income issue in a dissolution proceeding. Husband owned a construction company which he started and developed during the marriage and argued that the trial court erred by imputing him the retained income of his S Corporation for purposes of calculating alimony and child support. The Court rejected husband's argument stating:

Former husband next contends that the trial court erroneously imputed to him the retained income of his construction company, an S- corporation, for alimony and child support purposes. We disagree and find that the record supports the award, and amount of, child and spousal support.
Id.

In the present case, Respondent argued below that the court should not follow these cases but should follow the opinion of the Fourth DCA in McHugh v. McHugh, 702 So.2d 639 (Fla. 3d DCA 1997).

In McHugh, the Fourth District compared its facts to Zipperer, Martinez, and Sohacki. In McHugh, wife sought to have \$247,000 in Schedule K-1 income of the corporation attributed to the husband. The trial court did not include

the Schedule K-1 income because this income was not received by husband but was retained by the corporation for purpose of building the business. **The trial court based its ruling on the fact that the wife did not present any evidence that the husband had access to the K-1 income, and the husband testified that he had no access and no ability to control distributions.** Id. (Emphasis added).

Even if the Court determines that McHugh is a proper statement of law, the facts of this case are the reverse of McHugh and the decision reached by the Fifth District far extends the rule McHugh and is in conflict even with that case.

The McHugh distinction is not appropriate because that case allows a person to accumulate savings and not recognize this income for support purposes. However, for this case the above issue does not need to be addressed because this case did not fall within the narrow exception that could be argued from McHugh, supra.

The District Court relied on the uncontradicted fact that husband as a 10% owner had no access to funds retained in the corporation. No such requirement is included in either of the

statutes.

The construction that the Fifth District placed on the term income in this case added additional requirements not contained in the statutes and is in specific conflict with the above noted decisions of other districts that the funds be available to the payor. One of the additional problems that the case at hand creates is that the District Court did not address who has the burden of proof as to the availability of the funds.

The Fifth District ignores the evidence related to this matter that is solely within the possession of Husband and his compatriots if the Court is suggesting that Wife has this burden. Husband testified at trial that he controlled the distributions and payments from the corporation.

The Court's ruling, if the Wife has the burden, will require the non-owning party in all Subchapter S cases to hire an accountant and perform the equivalent of an audit on the corporate accounts and encourage the owner to store up cash without accountability. The party with lesser assets and no access to resources would have a major financial burden and not on the party with the funds and control.

The trial evidence established the gross receipts minus ordinary and necessary expenses required to produce income provides a showing of significant income. The uncontradicted evidence showed that the corporation increased its cash holdings during the last two years before the dissolution by \$300,000.00. This is not a case, like McHugh, where "the wife did not present any evidence that the Husband had access... and no ability to control distributions." McHugh, supra.

This ruling is a significant opinion because it effects thousands of cases involving small business owners with dissolution, child support, and modification cases with three different rules in different jurisdictions.

It is clear that the decision of the Fifth District Court of Appeals in this case directly and expressly conflicts with the decisions of other district courts of appeal in determining a party's income for child support, alimony and attorneys fees cases.

CONCLUSION

Based upon the foregoing argument and authority, Wife respectfully submits that this Court should exercise its discretionary jurisdiction to review the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by facsimile and U.S. Mail to Charles Willits, Esq., 1407 E. Robinson St., Orlando, FL, 32801, this ____ day of September, 2004.

NORMAN D. LEVIN, ESQUIRE
NORMAN D. LEVIN, P.A.
165 West Jessup Avenue
Longwood, Florida 32750
(407) 834-9494
(407) 260-0069: Facsimile
Florida Bar No. 213322
Counsel for Petitioner

AMY HAMLIN, ESQUIRE
NORMAN D. LEVIN, P.A.
Florida Bar No. 0255830
Co-Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I, AMY HAMLIN, CERTIFY THAT the font used in this Jurisdictional Brief is Courier New (12 point) type.