IN THE SUPREME COURT OF FLORIDA
CASE NO. 05-1283

Third District Court of Appeal Case no. 3D05-05

CAROL WILLIAMS,

Petitioner

vs.

MICHAEL WILLIAMS

Respondent

RESPONDENT'S BRIEF ON JURISDICTION

___

Respectfully submitted,

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STATEMENT OF THE CASE AND FACTS

The appellate opinion affirms in part and reverses in part a final judgment of the trial court in a dissolution of marriage case. The opinion recites that the parties "lived well beyond their means, accumulating significant credit card debt" and they "received financial assistance from their parents" (slip op., p. 2). While the opinion does not specifically cite the husband's income from his work as a store manager, the appellate court was at pains to point out that these parties would not be able to maintain the standard of living that they had experienced during the marriage, citing *DeLuca v. DeLuca*, 722 So. 2d 947 (Fla. 3d DCA 1998) and other cases explaining that two households cost significantly more than one (slip op., pp.

4-5). The marriage lasted approximately fifteen and a half years, and the parties were both thirty-seven years of age at the time of the proceedings. The former wife was currently working thirty-five hours per week for nine months of the year. The former husband testified that the former wife was easily capable of training for a career where she would earn significantly more than the $7.50 per hour that she was making (slip op., p.4). The three children are all school-aged, with the eldest born in 1992

and the youngest born in 2000. (The Court may take judicial notice that public kindergarten starts at age five). Accordingly, although the appellate court found that the former wife does not presently possess employment skills sufficient to support herself fully, it did find that she was capable of rehabilitation, based upon evidence in the record. "We remand, however, for an award of rehabilitative alimony as the former husband conceded that the former wife was entitled to this type of alimony, and the record before us also demonstrates that this type of alimony is appropriate" (slip op., p. 7). The appellate court thus ordered the lower court to award rehabilitative alimony in place of the "bridge-the-gap" award in the final judgment. The appellate court specifically stated that the trial court did not abuse its discretion in declining to award permanent alimony. The former wife, however, still insists that she does not wish to ever support herself, but instead wants permanent alimony.

The trial court awarded all of the equity in the marital home to the wife as lump sum alimony (slip op., p. 3). The former husband therefore lost all of his equity and the wife received the parties' only significant asset. The former wife will receive the lump sum alimony, plus child support for three children (which will have to be revised as it was miscalculated by the lower court), plus rehabilitative alimony to be determined upon remand.

SUMMARY OF THE ARGUMENT

This is a garden-variety dissolution of marriage case, although Petitioner has tried to make it into something momentous. A trial court exercised its discretion to formulate an equitable solution to the common problem of not having enough money to go around in this "grey area" marriage. The appellate court affirmed many aspects of the distribution and support scheme, and reversed some. The court found no abuse of discretion in the denial of permanent alimony, but ordered an award of rehabilitative alimony. No principles of law have been violated, and none are even in question.

Many facts are omitted from the opinion which Petitioner seeks to have reviewed. In the absence of those facts, Petitioner cannot show any "express and direct" conflict with other "grey area" cases. Indeed, most of the cited cases have obvious factual differences from the case at bar. An alimony determination is a complex and multi-dimensional problem. Petitioner's lament that there is no hard and fast rule for these disparate situations is a policy question for the legislature or the Bar, but is certainly not a basis for Supreme Court conflict jurisdiction.

Argument:

FLORIDA LAW IS QUITE CLEAR THAT A TRIAL COURT HAS DISCRETION TO DETERMINE TYPES AND AMOUNTS OF ALIMONY, DEPENDING UPON THE UNIQUE FACTS OF THE CASE, AND THERE IS NO CONFLICT WHERE DIFFERENT COURTS REACH DIFFERENT CONCLUSIONS FROM DIFFERENT FACTUAL SCENARIOS

Petitioner's primary argument seems to be a contention that there should be guidelines for alimony, so that all discretion is removed from the trial judge. Petitioner laments that we do not have "cookie-cutter justice" in Florida, because a trial court has discretion to consider the full picture, using the factors in Fla. Stat. §61.08 and others derived from caselaw, to create a fair scheme of alimony, equitable distribution and child support. Petitioner also complains that we do not have precise upper or lower limits on the "grey area" where there is no presumption for or against permanent alimony. These contentions are proper subjects for a legislative or Bar committee. They are not a basis for jurisdiction in any individual case.

The individualized nature of an alimony determination resists the imposition of hard-and-fast rules. Florida law on alimony was recently summarized as follows:

> [F]actors the court may consider are what the paying spouse is capable of earning and whether the requesting spouse is able to contribute to his or her own support; whether the requesting spouse's needs will be met through equitable distribution, and whether as a result of the marriage there was any harm done by the marriage itself to the requesting party's ability to earn enough to support himself....[D]isparity in income is not sufficient to justify a permanent alimony award where the wife is young and her earning capacity has not been impaired....In grey area marriages, defined as marriages which are neither short-term nor long-term, there is no presumption for or against permanent alimony. Some considerations in whether permanent alimony will be awarded include an agreement between the parties for one spouse to stay home with the children and whether the requesting spouse has a mental or physical disability affecting his or her earning potential. Where a marriage is in the grey area and when permanent alimony is justified and awarded, the amount of the award can also be in the grey area. The general rule that the payee spouse should be afforded a lifestyle commensurate to that of the marriage does not necessarily apply.
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> Victoria M. Ho and Jennifer L. Johnson, "Overview of Florida Alimony," 78 *Fla. B. J.* 71 (Oct. 1978).

Petitioner, in desperately attempting to create some conflict to be resolved in this Court, fails to accurately discuss the facts of this or other cases which she cites. Admitting that the case at bar presents no conflict involving a discernible rule of law, she contends that the result in the instant case conflicts with results in other "grey area" cases having substantially the same controlling facts. This factual type of conflict, of course, is the most difficult to ascertain from appellate opinions, because opinions include only the facts which the reviewing court found necessary to explain its appellate decision. Many facts will not appear in published opinions

because they did not seem relevant to the points on appeal, or were not contested. But "missing facts" do not create conflict jurisdiction. When we compare the instant case with the cases cited by Petitioner, there is no "express and direct" conflict appearing within the four corners of the published opinions, and therefore no jurisdiction. This Court does not accept jurisdiction of merely "implied" or "inferential" conflicts. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986); *Dept. of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986).

In the instant case, the trial court does not specify the husband's income, the wife's potential earnings, or the parties' assets; it just states that the income will be insufficient for either party to maintain the lifestyle which, during the marriage, was supported by debt and parental subsidies. One cannot tell from the appellate opinion how much, if any, disparity in income and resources there will be when child support and lump sum alimony are taken into account. Thus, one surely cannot assert, from the four corners of the opinion, that when the mandate is implemented, there would be any inequitable result. Likewise, one cannot find conflict with other cases where such omitted factors were instrumental in the decisions.

The appellate court in our case found no abuse of discretion in the denial of

permanent alimony, and this result apparently means that the court does not expect a significant disparity and/or that the husband really does not have a significant ability to pay. "The wife's argument rests on the faulty premise that the parties had sufficient current income to cover their expenses," *Berges v. Berges*, 871 So. 2d 919 (Fla. 3d DCA 2004) [approving an award of lump-sum alimony where both parties testified that they had borrowed substantial moneys during their separation]. In a "grey area" marriage, the amount of alimony is likewise "grey," and a receiving spouse is not necessarily entitled to be brought up fully to the lifestyle of the marriage. *Pollock v. Pollock*, 722 So. 2d 283, 285 (Fla. 5th DCA 1998) Petitioner characterizes the decision below as a denial of permanent alimony based solely upon the former wife's relative youth and ability to enter the job market, but the opinion does not tell us that those are the only factors considered; indeed, it strongly indicates that they were not. In addition to omitting a discussion of the parties' assets and the husband's income, the appellate court states that the record proves the former wife is capable of rehabilitation and should be awarded rehabilitative alimony. This ruling is totally inconsistent with the finding that Petitioner *wishes* the Court had made, *i.e.*, that she can never become capable of self-support and she therefore needs permanent alimony.

The "grey area" alimony cases cited by Petitioner are all distinguishable on their

facts. In *Zeigler v. Zeigler*, 635 So. 2d 50 (Fla. 1st DCA 1994), there was no evidence regarding the wife's potential for rehabilitation, and there was no issue as to her need and the husband's ability to pay support. The court noted that her relative youth, standing alone, was not a basis for denial of permanent alimony, and ordered the trial court to award permanent alimony. But in the case at bar, the appellate court has found rehabilitative potential, and has actually ordered the lower court to award rehabilitative alimony. Need and ability to pay are not mentioned in the opinion at issue herein, so one certainly cannot conclude that, as in *Zeigler,* there was no question about either. Thus, with these factual differences, it is perfectly understandable why the two cases have different outcomes.

Young v. Young, 677 So. 2d 1301 (Fla. 5th DCA 1996), involves an eightfold income disparity between the spouses, where one party had sacrificed significant career opportunities to allow the other to become a physician. The less wealthy party was already a professional (engineer) but there was no evidence that the engineer's income was capable of ever reaching the affluent lifestyle the couple had enjoyed on an annual gross of roughly half a million. *Ghen v.Ghen*, 575 So. 2d 1342 (Fla. 4th DCA 1991), involves a wife who gave up her own education to put her husband through medical school, and worked in his office to help him get established. There was no finding that she could be rehabilitated to any vocation

where she could earn anything close to the husband's income as a physician. But the Court states that the wife's youth can indeed be a basis for denying permanent alimony "if through rehabilitation the wife can establish a standard of living reasonably commensurate with the standard set throughout the marriage." *Ghen*, 575 So. 2d at 1344. Again, in our case the appellate court has concluded that rehabilitation is possible and has directed that rehabilitation be funded. Thus, *Ghen* and *Young* are distinguishable.

In *Knoff v. Knoff*, 751 So. 2d 167 (Fla. 2d DCA 2000), the wife had given up a promising academic career in favor of her child-care responsibilities, and the parties had specifically agreed that she would stay home with the children. The parties had enjoyed an affluent lifestyle, and there was a "great disparity" in their earning potential. None of these factors are reported in the opinion in the case at bar. Here, the former wife has not sacrificed any career opportunities, there was a debt-ridden lifestyle, and the appellate court has concluded that the former wife has earning potential which can be maximized through rehabilitative alimony.

In *Greene v. Greene*, 895 So. 2d 503 (Fla. 5th DCA 2005), permanent alimony was required where two of the parties' three children had special needs (one was an autistic child with an IQ of 67 who will probably never be self-sufficient, and the other had emotional problems). The wife, primary caretaker of

these children, had a nursing degree but had allowed her license to lapse, and she suffered from health problems which would interfere with her working. Thus, it was not reasonable to expect her to have significant earning potential. By contrast, in the case at bar there were no impediments to the former wife's ability to rehabilitate herself. She and the children, fortunately, are healthy, and the children are school-aged.

In *Burrill v. Burrill*, 701 So. 2d 354 (Fla. 1st DCA 1997), the former wife had nearly completed her degree in social work and it was undisputed that her earning potential after this rehabilitation, $18-20,000 annually, was less than one-third of the former husband's. Some permanent alimony was therefore appropriate. Again, in the case at bar there is no indication from the appellate opinion that the former wife's earning potential after rehabilitation will be significantly lower than the former husband's. Thus, on the face of the two opinions there is no conflict.

Petitioner has made an ingenious attempt to demonstrate an intra-district conflict, but a close review of the opinions themselves does not support the attempt. Within the four corners of the opinions cited as creating conflict, there is no indication of the Third District's following any different pattern than its sister courts. The results are different because the situations are different. Family law is,

after all, a very fact-intensive area of practice.

CONCLUSION

Petitioner has failed to demonstrate an express and direct conflict which would create jurisdiction in this Court; this case was decided in conformity with firmly established Florida law.

CERTIFICATE REGARDING TYPEFACE

The typeface used herein is Times New Roman, proportionately spaced, fourteen point.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of this Brief was mailed on this ___ day of August, 2005, to all parties on the attached mailing list.

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