

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JOHN P. LINSTROTH,

Petitioner,

vs.

CASE NO.

CAROL A. DORGAN,

Respondent.

_____ /

BRIEF OF PETITIONER ON JURISDICTION
On Appeal from the Fourth District Court of Appeal
CASE NO. 4D07-1493
4D07-3469

LAW OFFICES OF JOSEPH D. FARISH, JR.
LLC
Denco Building
316 Banyan Boulevard
West Palm Beach, Florida 33401
(561) 659-3500
(561) 655-3158
Attorney for Petitioner
farish@bellsouth.net

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PREFACE

This is "Petitioner", JOHN P. LINSTROTH'S, request for discretionary review of a June 11, 2008 decision of the Fourth District of Appeal, confirming by majority opinion, the Trial Court's Final Judgment Denying Former Husband's Amended Petition to Modify or Terminate Alimony and Granting Former Wife's Amended Counter-Petition to Modify Alimony. Petitioner, JOHN P. LINSTROTH, will be referred to as "FH". Respondent, CAROL A. DORGAN, will be referred as "FW". James Stuart, Respondent's paramour, or significant other, will be referred to as "SO".

STATEMENT OF THE CASE AND FACTS

On November 29, 2005, the "FH" filed his Petition seeing to terminate or reduce his alimony obligation based upon the recent enacted Florida Statute 61.14(b)(1)(2)(3). On May 31, 2006, the "FH" filed an Amended Petition to Modify. On July 22, 2006, "FW" filed a Counter-Petition for Modification seeking an increase in alimony alleging that her needs had increased, and "FH's" earnings had increased. "FH" filed his Answer denying said allegations and the cause came on to be heard before the Court on December 2006. After colloquies and argument between the Court and counsel for the parties, on January and February of 2007, the Court entered a Final Judgment denying "FH's" Amended Petition to Modify and Terminate Alimony and granting "FW's" Counter-Petition to increase alimony, and awarding "FW" appellate attorney's fees. An appeal was taken to the Fourth District Court of Appeal, and the 4th DCA entered its decision on June 11, 2008, affirming the Trial Court's Final Judgment, and its Order denying "FH's" Motion for Rehearing on September 3, 2008. The "FH" filed its Notice to Invoke Discretionary Jurisdiction of Supreme Court on the 22nd day of September, 2008.

After the Final Judgment of the parties was entered on July 31, 1992,

the "FW" dissipated her substantial equitable distribution from the marriage, took bankruptcy, and moved into her "SO's" residence in the Village of Tequesta in May of 2002. During the cohabitation with "SO" for the past five years, the "FW" has lived in his home, and the lifestyle of a country club community, using his vehicle, using a cell phone furnished by "SO", and purchasing a vehicle with "SO's" credit. "FW" and her "SO" shared personal and monetary contributions between themselves while at the same time enjoying "FH's" timely payments of permanent alimony. The appearance to the public was that of a marriage relationship without the benefit of a license.

SUMMARY OF ARGUMENT

The majority opinion recognized that the new Florida Statute 61.04 (b)(1) was applicable to the facts in this appeal, but misapplied the clear intent of the legislation. Justice Farmer drafted the Opinion, but was rejected by the remainder of the panel. Said dissenting Opinion supports and is in harmony with the decision of the District Court of Appeal of Florida, Second District dated September 5, 2007, Buxton v. Buxton, 963 So. 2d 550 (Fla. 2d DCA 2007) upon which this Court should find it has conflict jurisdiction Art.V, § (b)(3) of the Florida Constitution and Fla.R. App.P.9.030 (a)(2)(A)(iv).

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SAME QUESTION OF LAW FROM A DECISION FROM THE SECOND DISTRICT COURT OF APPEAL, AND A PRIOR DECISION OF THE FOURTH DISTRICT COURT OF APPEAL.

Standard of Review

This Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal on the same question of law. See: Art. V., §(b)(3), Fla. Const.; Fla.R. App.P. 9.030(a)(2)(A)(iv).

Argument

The Trial Court's Final Judgment Denying Former Husband's Amended Petition to Modify and Terminate Alimony went on to be considered by a panel from the 4th DCA that consisted of two justices from that Court and a visiting circuit court judge from another district without oral argument. Justice Farmer assumed the task of writing the Opinion to

interpret the new statute. Statute 61.14 (1)(b) codifying cohabitation as a ground for modification or termination of alimony. Justice Farmer's Opinion was rejected by the other two members of the panel relegating his learned Opinion to that of a Dissenting Opinion. In doing so, Justice Farmer considered basically the same factual scenario as opined by the Second Court of Appeal in Buxton v. Buxton, 950 So. 2d 963 (Fla. 2d DCA 2007).

In the Buxton the Second DCA quoted:

"We review the trial court's conclusion concerning whether those facts establish a 'supportive relationship' de novo."

The 4th DCA majority Opinion digressed and entered its Opinion conflicting with that in Buxton in finding the "FW" and her "SO" were not in a supportive relationship as set forth in the Statute. The majority Opinion recognized that it was in conflict:

"Unlike the Second District Court of Appeal in Buxton which determined that the economic impact on the obligee was only part of the analysis in determining if there was a supportive relationship, the trial court in this matter concluded that section 61.14(1)(b) requires a relationship economically equivalent to a marriage. We adopt the reasoning of the trial court."

That statement alone recognized that there is a conflict between these two Opinions. The majority Opinion states:

"The evidence at trial was largely uncontradicted."

Judge Farmer's dissent:

"The evidence at trial was straightforward and almost entirely unrefuted and uncontradicted."

When she and Jim began cohabiting, they held a party for more than 50 guests. She has now been cohabiting with Jim for five years. In an obituary for Jim's mother, one newspaper described her as Jim's 'companion'. She did not take his surname. They do not call each other husband and wife. They have not indicated in any way that they intend to marry.

He has a limousine business. He pays the mortgage on the house, which he owns. She is not on the title or mortgage. She supports their cohabitation by paying Jim \$1,000.00 monthly. They share cooking and household responsibilities and sleep together. Each purchases groceries and household goods for the house which they freely share. Jim provides her with an automobile and membership in a nearby country club. Several years ago Jim also lent her \$5,000. She still owes him \$4,000. They did not pool their personal assets or income. She kept her own bank accounts and property. Jim kept his."

Justice Farmer in his dissent further stated:

"Because this is a statute, we must be guided by its plain text. The statute's essential provision says: '[t]he court may [e.s.] reduce or terminate' It is well established that *may* has multiple meanings. Among MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (CD edition) definitions for *may* are these:

'2a: have permission to (you may go now) ... used nearly interchangeably with *can*

...

5: SHALL, MUST -- *used especially in* deeds, contracts, and *statutes.* ' [e.s.]

The issue turns on which of these senses most nearly fits the Legislature's purpose. The meaning in MERRIAM-WEBSTER'S__ definition 2a suggests itself as a new grant of authority to do something previously unauthorized. This is in keeping with the prior decisions holding that the court lacked 'jurisdiction' (or authority) to terminate alimony when the recipient cohabits rather than marries someone. This meaning is reinforced by the meaning in definition 5. That is to say, the court *must* terminate or reduce alimony upon finding a cohabitation in a supportive relationship."

Prior to the enactment of Florida Statue 61.14(b)(1) on July 1, 2005, our appellate courts faced a moral erosion of our society with the "anything goes" standard of the sexes living and cohabiting together and being resolved by a supportive relationship when the males and females chose to remate to establish cohabitation without the benefit of a license and a formal marriage.

In attempting to maintain a standard of legal responsibilities with marriage, and legitimate children being protected, and at the same time of

coping with the aforesaid social trends our legislature adopted this Amended Statute. The majority Opinion continues to condone this "double dipping" relationship making the enactment of this Statute an absurdity and useless. The majority Opinion, in order to properly evaluate this relationship failed to review the evidence "de novo".

In Buxton, the wife owned the house where she and her paramour shared and dined at restaurants together. They shared the household chores, maintenance and upkeep. He paid rent, the paramour mowed the lawn. The so-called rent was never declared on the recipient's tax return. (The \$1,000.00 per month "FW" was paying to "SO" for her luxury living, "SO" never declared on his tax return). There was no joint bank account in the Buxton case, and also here. When they would go out to the grocery store, each does not pay for only the food he or she will eat, and they do not always share the cost of their travels and meals. The long term committed relationship provided both economic and social support, equivalent to that of a marriage. Here, the "SO" was not fully supporting the "FW", Buxton further stating:

"However nothing in Section 61.14 (1)(b) requires the recipient spouse to be completely dependent on the cohabitant before 'a supportive relationship' an exist."

Further stating:

"However Section 61.14 (1)(b)(2)(d) specifically requires the trial court to consider the extent to which the parties have supported each other 'in whole or in part.'"

The majority Opinion totally ignored that portion of the Statute *in whole or in part*; specifically digressing to the mixed Opinions prior to the enactment of the new Statute. The Buxton Court further opined:

"Under section 61.14(1)(b)(2), financial support is but one factor to be considered in determining whether a 'supportive relationship' exists."

* * *

"We do not believe that the legislature intended for every roommate or brief live-in relationship to trigger a reduction in alimony. Instead, only those relationships that are equitably equivalent to a remarriage warrant a reduction or termination of alimony. While consideration of financial support is an important part of that analysis, that factor alone does not define whether a 'supportive relationship' exists.

A supportive relationship means exactly what it says, and there is no better source than Webster's dictionary. The synonyms for the word "support" are:

" prop, stay, buttress, maintenance, sustenance, encouragement, comfort, help, uphold encourage, to support pain, distress, and misfortune. "

The Majority Opinion further was in conflict with its own Opinion in Donoff v. Donoff, 940 So. 2d 1271 (Fla. 4th DCA 2006). Justice Farmer in that unanimous Opinion stated:

"The purpose of permanent periodic alimony is not to divide future income to establish financial equality. Instead, it is intended to avoid --where possible -- having a recipient pass from the ease and comfort of always having more than enough to the distress of having only just enough for the essentials of minimum food, shelter and clothing."

Judge Farmer's dissenting Opinion in the instant case:

"The statute says that the court 'may reduce or terminate alimony' when cohabitation is supportive. When the statute was adopted, courts were already terminating alimony upon marriage but reducing alimony upon cohabitation only after newly re-analyzing need and ability. If the new statute were construed to mean that the trial judge has *discretion* merely to reduce supportive alimony upon cohabitation, **the statute would end up serving no purpose and we would be back where we were when it was enacted.** In the matter of terminating alimony, the new statute would not place cohabitation on the same legal footing as marriage. Those who marry would forfeit alimony, but those who cohabit without marriage would not. The marriage penalty and its existing disincentive to marry would continue as though the legislature had done nothing.

The trial court should terminate alimony."

The Trial Court erroneously reinstated the permanent alimony after it had been modified to the amount immediately after the marriage. This is in direct conflict with that of Bridges v. Bridges, 842 So. 2d 93 (Fla. 1st DCA 2003):

"When payee ("FW") is receiving support from an unmarried cohabiting partner, a substantial change in circumstances has been shown, and the burden then shifts to the recipient spouse ("FW") to show that if there is any continued need for alimony.

. . . the burden of proof shifts to the receiving party ("FW") to justify an amount of alimony because the true economic condition is uniquely within her knowledge and may not be available to the payor ("FH").

CONCLUSION

It is respectfully requested that this Court accept jurisdiction to resolve the conflict between the Second and Fourth District Courts of Appeal, of the interpretation of Florida Statute 61.14(1)(b) of a supportive relationship the legislature intended.

Joseph D. Farish, Jr., Florida Bar No.0023740
LAW OFFICE OF JOSEPH D. FARISH, JR. LLC
Denco Building, 316 Banyan Blvd.
West Palm Beach, Florida 33401
(561) 659-3500
(561) 655-3158 (FAX)
Attorney for Petitioner
farish@bellsouth.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of "FH" on Appeal has been furnished Adam S. Gumson, Esquire, 1102 West Indiantown Road, Suite 7, Jupiter, Florida 33458, Attorney for Respondent, by mail, this the day of September, 2008.

Joseph D. Farish, Jr.
Florida Bar No. 0023740

CERTIFICATE OF TYPEFACE COMPLIANCE

The "FH" certifies the Brief of "FH" on Jurisdiction was prepared in Times New Roman 14 pt., in compliance with font requirements set forth in Florida Rules of Appellate Procedure 9.210.

Joseph D. Farish, Jr.
Florida Bar No. 0023740

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LLC
Denco Building
316 Banyan Boulevard
West Palm Beach, Florida 33401
(561) 659-3500
(561) 655-3158
Attorney for Petitioner
farish@bellsouth.net

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