

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-801
Fifth DCA Case No.: 5D06-1614

JENNIE RUTH BARRETT McMILLAN,

Petitioner,

v.

DONALD W. McMILLAN, II,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The petitioner and the respondent were previously married to each other. The Brevard County Circuit Court dissolved the marriage and awarded attendant relief. The petitioner appealed, arguing that the trial court had erred in its distribution of the marital assets of the parties, in its award of permanent alimony to her, and in its denial of her request for attorneys' fees. The respondent cross-appealed, alleging error in the distribution of the marital assets. App. 1.

The district court found several errors in the asset distribution, and ordered adjustments not pertinent to these proceedings. App. 1 - 2. The district court affirmed the trial court's finding that the petitioner would need approximately \$4,800.00 per month to maintain her lifestyle. App. 2. It found error, however, in the trial court's failure to take into consideration the tax consequences of the permanent alimony award and ordered that on remand the trial court should determine whether the petitioner would be receiving sufficient income from her assets to cover the tax liability, or whether additional alimony would be needed. App. 2 - 3.

With regard to the attorneys' fees, the district court agreed with the respondent that his former wife's equitable distribution was sufficient to allow her to pay the balance of the fees owed her attorneys without compromising her lifestyle. App. 3 - 4. It rejected the petitioner's argument that she should have

been awarded her fees because her former husband's net monthly income at the time of the dissolution was more than five times her net monthly income after alimony. App. 3 - 4.

In its decision, the district court noted two decisions of the Second District Court of Appeal, *Hutto v. Hutto*, 842 So. 2d 994 (Fla. 2d DCA 2003), and *Lowman v. Lowman*, 724 So. 2d 648 (Fla. 2d DCA 1999), which appeared to support a contrary result. App. 3. The district court attempted to distinguish those cases based upon its findings that the assets equitably distributed to the petitioner were more liquid than the assets distributed to the respondent, whose distribution consisted primarily of real property, and that the respondent voluntarily had given his former wife some money during the proceedings to pay a portion of her fees. App. 3. The district court observed, however, that to the extent that the petitioner's investment assets were being used to generate sufficient income to cover her monthly needs, including the tax liability on the alimony, then those assets would not be available to her to pay her fees. App. 4. If such was the case and alimony was not adjusted, then the trial court should reconsider its denial of the fees. App. 4.

The decision was filed February 15, 2008. App. 4. A timely motion for rehearing was filed on February 29, 2008. Rehearing was denied on March 25,

2008, and the petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on April 23, 2008.

SUMMARY OF ARGUMENT

This court has jurisdiction because the decision of the district court expressly and directly conflicts with previous decisions of each of the other four district courts on the same question of law. Those decisions all support the petitioner's argument that where there is an equal division of the marital assets and liabilities but a substantial disparity in the parties' incomes, it is an abuse of discretion to deny an award of attorneys' fees to the financially inferior spouse.

The district court's attempts to distinguish the conflicting decisional law are unconvincing. Neither the petitioner's greater liquidity, nor the fact that she now has the means to pay her fees by virtue of the equitable distribution to her, constitutes sufficient legal justification to deny her request for fees. Since the petitioner's income, including alimony, leaves her just enough to meet her demonstrated needs before payment of her fees, the result of this decision is the unnecessary and inequitable diminution of the petitioner's equitable distribution, while the respondent's assets and income remain intact. All of the district courts, excepting the Fifth District Court, have recognized the inequity of such a result. Accordingly, this court should exercise its discretionary jurisdiction to resolve the

express and direct conflict between the decision below and the decisions of all of the other district courts on this point of law.

ARGUMENT

I. THIS COURT MUST EXERCISE ITS DISCRETIONARY JURISDICTION TO RESOLVE THE CONFLICT BETWEEN THE DECISION OF THE DISTRICT COURT BELOW AND THE DECISIONS OF EVERY OTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

This court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this court or another district court of appeal on the same point of law. Art. V, §3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A) (iv).

The decision construes Section 61.16, Florida Statutes, which provides in pertinent part as follows:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals . . .

§61.16(1), Fla. Stat. (2007). The purpose of the statute is to ensure that the parties will have a similar ability to secure competent legal counsel to represent them in their case. *Nichols v. Nichols*, 519 So. 2d 620 (Fla. 1988). This principle has long been an important part of Florida's family law jurisprudence. *See Rosen v. Rosen*, 696 So. 2d 697, 699 (Fla. 1997) (reaffirming the importance of Section 61.16 in

assuring the parties have similar abilities to secure competent counsel); *Standard Guaranty Insurance Co. V. Quanstrom*, 555 So. 2d 828, 835 (Fla. 1990) (noting significant purpose of statute is to assure that the relative quality of representation is not compromised by one party's inferior financial position).

The primary factors to consider when determining a party's entitlement to a fee award are that party's need and the other party's ability to pay. *Rosen*, 696 So. 2d at 699. The decision below focused primarily on the petitioner's need for such relief, which the district court found to be lacking because she now has assets that she received in equitable distribution. The petitioner now must use those assets to pay her unpaid attorneys' fees notwithstanding the fact that the respondent's net monthly income was five times greater than the petitioner's.

A. THE DISTRICT COURT'S DECISION TO AFFIRM THE DENIAL OF ATTORNEYS' FEES WHERE THERE IS AN EQUAL DISTRIBUTION OF MARITAL ASSETS BUT A SIGNIFICANT DISPARITY IN THE PARTIES' INCOMES EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF EVERY OTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

The decision below expressly and directly conflicts with decisions of each one of the other district courts. Those decisions all hold that a trial court abuses its discretion in denying an award of attorneys' fees where the equitable distribution is generally equal, but there is a significant disparity in the parties' incomes.

In *Flemming v. Flemming*, 742 So. 2d 843 (Fla. 1st DCA 1999), the First District Court reversed the trial court's denial of attorney's fees to the former wife based upon the disparity in the parties' incomes, stating that she "should not be required to use assets obtained from equitable distribution to pay her attorney." *Id.* at 845, citing *Canakarlis v. Canakarlis*, 382 So. 2d 1197 (Fla. 1980).

In *Hutto v. Hutto*, 842 So. 2d 994 (Fla. 2d DCA 2003), the Second District Court reversed a denial of attorney's fees where the equitable distribution between the parties was "generally equal," but the former husband had greater income at the time of the dissolution. *Id.* at 997. The district court relied upon *Lowman v. Lowman*, 724 So. 2d 648 (Fla. 2d DCA 1999), which held that "[w]here there is a substantial disparity between the parties' incomes, it may be an abuse of discretion to grant a partial attorneys' fee award." *Id.* at 650.

In *Murray v. Murray*, 826 So. 2d 1029 (Fla. 3d DCA 2001), the Third District Court reversed a denial of attorneys' fees to a former wife where the former husband's income far exceeded the former wife's earnings "as well as her ability to earn in the future." *Id.* at 1030. The court also found that the trial court's consideration of the assets equitably distributed to her as a basis to deny the motion was inappropriate. *Id.* at 1030.

In *Hough v. Hough*, 739 So. 2d 654 (Fla. 4th DCA 1999), the Fourth District Court of Appeal reversed the denial of the wife's attorneys fees where there was an

equal distribution of the assets, but the husband's income was greater than the wife's, and the husband was found to be in a better position to pay her attorney's fees. "It is apparent from the record that the wife would have to invade her assets in order to pay attorneys' fees, while the husband could pay them from his income. Under these circumstances, the court should have awarded attorney's fees to the wife." *Id*; see *Bagley v. Bagley*, 720 So. 2d 582, 583 - 584 (Fla. 4th DCA 1998) (an attorneys' fee award should be used to prevent the "inequitable diminution" of one party's share of the equitable distribution).

The decision below makes clear that the petitioner will be required to pay her unpaid legal fees from her one-half share of the parties' marital assets.¹ Without any nonmarital assets or income that would allow her to meet her obligations to her attorneys, her equal share of the marital estate will be significantly reduced. Conversely, the respondent's share of the marital estate and his income, which is 400 percent greater than his former wife's, will remain intact.

In addressing the petitioner's alimony, the district court makes clear that the petitioner needs to have sufficient income to meet her demonstrated need of \$4,800.00 per month. If she earned only what she needs, then her net income

¹ It must be assumed that the equitable distribution between the parties was equal since there is nothing in the decision to indicate the contrary. See § 61.075 (1), Fla. Stat. (2007) (the court must begin with the premise that the distribution of marital assets and liability should be equal, unless there is a justification for an unequal distribution based on all relevant factors).

would be \$4,800.00 per month minimally. If her former husband earns five times that amount, then his net income would be \$24,000.00 per month. This inequality is evident from the face of the decision, and without any indication of the amount of the fees owed by the petitioner to her attorneys, one is hard pressed to understand how no portion of her fees were assessed against her former husband. The other district courts have held that such a result, without more, is inequitable and contrary to the intent of the fee-assessing statute.

B. THE DISTRICT COURT'S ATTEMPTS TO FACTUALLY DISTINGUISH THE CONFLICTING PREVIOUS DECISIONAL LAW BASED UPON THE PETITIONER'S LIQUIDITY OR HER PRESENT ABILITY TO PAY BASED UPON HER EQUITABLE DISTRIBUTION ARE UNAVAILING.

The district court's attempts to factually distinguish its decision from previous conflicting decisions are unpersuasive. First, to require the petitioner to pay her own fees merely because her assets are more liquid than those of her former husband is contrary to the district court's own prior decisional law. In *Emmel v. Emmel*, 671 So. 2d 282 (Fla. 5th DCA 1996), the Fifth District Court expressly rejected that proposition and stated:

No support is cited for the trial court's notion that a party should be excused from paying a former spouse's attorney's fees when assets are not readily convertible to cash. Such a proposition would undoubtedly lead to abusive pre-litigation strategy.

Id. at 285.

Section 61.16 requires the courts to consider all of the financial resources available to the parties in considering a fee award. §61.16(1), Fla. Stat. (2007). Given the enormous disparity in the parties' post-dissolution incomes, the district court's focus on the alleged lack of liquid assets in the financially superior party's portfolio is misplaced.

The decision below is the latest in a line of cases from the Fifth District Court of Appeal that have held that an award of attorneys' fees pursuant to Section 61.16 is improper "where both parties have ample means to obtain competent counsel, and an equitable distribution of the marital assets has already been affected outside the award of fees." *Morris v. Morris*, 743 So. 2d 81, 82 (Fla. 5th DCA 1999) (citations omitted). The crux of these holdings is that an application for fees should be denied where the requesting party has the "means" to pay for competent representation, regardless of the relative financial impact of that decision on that party or the extent of the other party's greater wealth or income. These decisions are contrary to the statutory requirement that the courts consider the financial resources available to both parties, and contrary to the laudable principles underlying the statute.

Although the petitioner, on remand, may be able to convince the trial court to remedy or ameliorate the apparent inequity, there remains a conflict among the decisions of the district courts on a legal question of significant importance to

Florida's families. Accordingly, this court should take jurisdiction of this case and resolve the express and direct conflict existing between the decision below (and other decisions of the Fifth District Court of Appeal on the same issue) and the decisions of the other district courts.

CONCLUSION

For the foregoing reasons, this court has discretionary jurisdiction to review the decision of the district court below, and the court should exercise its jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail to Michael K. Poe, Esq., Michael K. Poe, P.A., 540 North Harbor City Blvd., Melbourne, FL 32963; Leonard R. Ross, Esq. and Gerard V. Muriello, Esq., Ross & Burden, P.A., 628 North Peninsula Drive, Daytona Beach, FL 32118; and Doreen Inkeles, Esq., Doreen Inkeles, P.A., 7300 West McNab Road, Tamarac, FL 33321; this ____ day of May, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief on Jurisdiction complies with the font requirements of Fla. R. App. P. 9.210(a)(2) and Fla. R. App. P. 9.100(1).

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