ATTORNEY'S FEES - ENTITLEMENT

CLETCHER v. CLETCHER

So. 3d (Fla. 2d DCA 2022) 47 FLW D2043 (10/7/2022)

THE TRIAL COURT'S ORDER REQUIRING THE HUSBAND TO PAY ATTORNEY'S FEES TO THE WIFE WAS REVERSED BECAUSE THE WIFE HAD A GREATER FINANCIAL ABILITY TO PAY ATTORNEY'S FEES THEN THE HUSBAND.

In the DCA's analysis it cited some of the following well-established law and gives cites to support them:

1. AS A GENERAL RULE, WHEN MARITAL PROPERTY HAS BEEN EQUITABLY DISTRIBUTED AND THE PARTIES' INCOMES HAVE BEEN EQUALIZED THROUGH AN ALIMONY AWARD, THE TRIAL COURT ABUSES ITS DISCRETION BY AWARDING FEES.

2. IF THE EQUITABLE DISTRIBUTION SCHEME PLACES THE PARTIES IN SUBSTANTIALLY THE SAME FINANCIAL POSITIONS WITH EQUAL ABILITIES TO PAY ATTORNEY'S FEES, IT IS AN ABUSE OF DISCRETION TO AWARD ATTORNEY'S FEES TO ONE FORMER SPOUSE.

3. ROSEN FACTORS CANNOT BE APPLIED TO ALLOW AN AWARD OF ATTORNEY'S FEES IN FAVOR OF A SPOUSE WITH THE GREATER FINANCIAL ABILITY TO PAY.

THE DCA THEN FOUND THAT THE ORDER DOES NOT CONTAIN ANY EXPRESS FINDINGS OF BAD FAITH OR FIND THAT THE FEES INCURRED WERE AS A RESULT OF ANY ALLEGED BAD FAITH CONDUCT. THE DCA'S OPINION SUMMARIZES THE LAW ON BAD FAITH AS FOLLOWS:

"B. Bad Faith Conduct There is an additional basis upon which an award of attorney's fees may be imposed. In limited circumstances, "[a] trial court has inherent authority to order an attorney to pay opposing counsel's fees if the attorney acts in bad faith." Finol v. Finol, 912 So. 2d 627, 629 (Fla. 4th DCA 2005) (citing Bitterman v. Bitterman, 714 So. 2d 356 (Fla. 1998)). In doing so, the court must exercise caution. To ensure the proper use of this judicial power, the Florida Supreme Court has demanded that the assessment of fees must be based upon an express finding of bad faith conduct and must be supported

by detailed factual findings describing the specific acts of bad faith conduct 9 that resulted in the unnecessary incurrence of attorneys' fees. Thus, a finding of bad faith conduct must be predicated on a high degree of specificity in the factual findings. In addition, the amount of the award of attorneys' fees must be directly related to the attorneys' fees and costs that the opposing party has incurred as a result of the specific bad faith conduct of the attorney. Moakley v. Smallwood, 826 So. 2d 221, 227 (Fla. 2002); see also Finol, 912 So. 2d at 629 (holding that trial court departed from the essential requirements of the law where it awarded fees without making an express finding of bad faith or making factual findings demonstrating how the attorney's fee award directly relates "to the fees incurred as a result of the alleged bad faith conduct").”

Factually, in this case the Wife’s gross monthly income was $15,083 and the Husband’s was $4,300. The Wife had retirement savings in excess of $778,000 and the Husband had $136,000. The Wife still owed the Husband a retirement transfer of $30,000 for equitable distribution. The court ordered the Husband to pay attorney’s fees to the Wife and found that he had the financial ability to do so by offsetting the fees against the $30,000 that the Wife owed the Husband.

Reversed.

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INTEREST – PREJUDGMENT – EQUITABLE DISTRIBUTION

IARUSSI v. IARUSSI

So. 3d (Fla. 1st DCA 2022) 47 FLW D2079 (10/12/2022)

THE WIFE IS NOT ENTITLED TO PREJUDGMENT INTEREST ON THE EQUITABLE DISTRIBUTION PAYMENT THAT WAS ORDERED BY THE COURT.

Prejudgment interest is not authorized by statute. §61.075(10)(b) allows for interest to be paid when the equitable distribution payment is to be paid over time. It does not authorize prejudgment or retroactive interest. Both parties jointly owed the marital property until final judgment, therefore neither party suffered a deprivation or loss that would allow prejudgment interest.

AND THE SAME CASE RE: ALIMONY – NEED & ABILITY

THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE WIFE’S INVESTMENTS AS A SOURCE OF INCOME FOR HER IN DETERMINING HER NEED FOR ALIMONY.

§61.08(2)(1) provides that when calculating alimony, the court is required to consider all sources of income available to either party, including income available to either party through investments of any asset held by that party. It is well-settled that a court should impute income that could reasonably be earned on a former spouse’s liquid assets. Sherlock v. Sherlock, 199 So. 3d 1039 (Fla. 4th DCA 2016). The court is not entitled to decline a source of income without sufficient reason to do so. See: Fitzgerald v. Fitzgerald, 912 So. 2d 363 (Fla. 2d DCA 2005).

The award of alimony was reversed because the trial court did not impute any investment income to the wife and did not give any reason for not imputing income.

HOWEVER, THE TRIAL COURT MAY REJECT AN EXPERT'S TESTIMONY WHEN IT FINDS THAT THE EXPERT IS NOT CREDIBLE.
The court rejected the Husband's expert's testimony as to the amount of income that the wife could earn on her investments because it found the opinion not credible.

THE CONCURRING OPINION NOTES THAT RETROACTIVE ALIMONY BACK TO THE DATE OF THE PETITION IS NOT UNAUTHORIZED BY STATUTE AND IS NOT A LEGAL FORM OF ALIMONY.

The majority opinion agrees with the concurring opinion through a footnote to the majority opinion but did not address it in the majority opinion because the husband did not appeal the award of retroactive alimony. The concurring opinion notes that the award of retroactive child support is authorized back to 24 months prior to the petition by statute. It notes that Chapter 61 allows for temporary alimony which can be modified during the proceeding, but it does not provide for retroactive alimony. The 4th DCA's opinion in Wright v. Wright, 411 So.2d 1334 (Fla. 4th DCA 1982) approved an award of retroactive alimony indicating that there is no statutory authority for it but neither is there a prohibition. The 5th DCA in Blais v. Blais, 410 So. 2d 1365 (Fla. 5th DCA 1982) held that there is no authority for the award of retroactive alimony. This concurring opinion indicates that no cases since those 2 have addressed the legality of retroactive alimony although noting that the 1st DCA, like other courts, has routinely entertained claims relating to retroactive alimony. The Supreme Court has not addressed the issue.

The durational alimony award and retroactive alimony award is reversed and remanded.
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INJUNCTION

DEVALON v. SUTTON
So. 3d (Fla. 4th DCA 2022) 47 FLW D1589 (7/27/2022)

THE TRIAL COURT ERRED WHEN IT RULED UPON A PETITION FOR INUNCTION WITHOUT CONSIDERING THE POLICE REPORT THAT THE APPELLANT OFFERED IN EVIDENCE BECAUSE THE COURT ERRONEOUSLY BELIEVED THAT IT HAD NOT BEEN FILED.

WHERE APPELLEE NEVER RAISED ANY OBJECTION TO THE COURT CONSIDERING THE POLICE REPORT, THE COURT COULD HAVE ADMITTED IT INTO EVIDENCE BY VIRTUE OF APPELLEE'S FAILURE TO OBJECT. HEARSAY RECEIVED WITHOUT OBJECTION BECOMES PART OF THE EVIDENCE IN THE CASE AND IS USABLE AS PROOF JUST AS ANY OTHER EVIDENCE.

FURTHER, APPELLEE'S STATEMENT IN THE POLICE REPORT WOULD HAVE BEEN ADMISSIBLE EITHER AS A PARTY ADMISSION OR FOR IMPEACHMENT PURPOSES. [§90.803(18)]. THIS INCLUDES PRIOR MATERIAL OMISSIONS.

In this case, appellee's statement to police – which contained no mention of appellant pulling a gun on her – was inconsistent with her testimony at final hearing. Appellee's omission of the detail in her prior statement which did not mention a gun being pulled on her was undeniably material. The trial court's failure to consider the police report was not harmless error. Reversed and remanded.