W00A

FILED
SID J. WHITE
FEB 14 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

RAUL R. SOTOLONGO

Petitioner

vs.

ROBERT M. BRAKE

Respondent

CASE NO. 78,752

3rd DCA Case No. 91-165

BRIEF OF RESPONDENT

Robert M. Brake, Esquire
1830 Ponce de Leon Blvd.
Coral Gables, Florida 33134
(305) 444-1694
Fla Bar No. 008308

TABLE OF CONTENTS

ISSUE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	8

TABLE OF CITATIONS

CASES

Bosem v. Bosem, Fla 1973, 279 So 2d 863	4,5
Faust v. Faust, Fla DCA 1, 1990, 553 So 2d 1275	6,7
Gardnnr v. Edelstein, Fla DCA 1, 1190 561 So 2d 327	7
Levy v. Levy, Fla DCA 3, 1986 483 So 2d 455	3,4,5,8
Standard Guarantee Insurance Co. v. Quanstrom, 1990, Fla, 555 So 2d 828	2
Wintnrbotham v. Winterbotham, DCA 2, 1987, 500 So 2d 723	3,4,5,6,8

TEXTS

3 Fla Jur 2d Appellate Review, Section 277, Page 323	2

ISSUE

The issue stated by Petitioner in his brief is not the issue considered by the Courts below. The issue he does present could be better stated as follows:

> IN A DOMESTIC RELATIONS CASE WHERE A COURT TAXES A FEE FOR THE ATTORNEY OF ONE PARTY AGAINST THE OPPOSING PARTY, MUST FINANCIAL DISPARITY BETWEEN THE PARTIES BE PROVED, AND, IF SO, WHO HAS THE BURDEN OF PROOF?

SUMMARY OF ARGUMENT

Both Courts below considered only tho question of whether an attorney fee taxed by a court against the opposing party in a domestic relations case could exceed the foe amount agreed upon in the contract between lawyer and client.

Petitioner concedes this point in his brief, and admits that the contract amount may be exceeded by the court. He then goes on to argue the question of whether financial disparity between the parties must be proved, and, if so, who should have the burden of proof.

Assuming this Court wishes to consider this point even though it was not decided below, Respondent argues that tho better view is that financial disparity should be a rebuttable presumption in favor of the wife or mother, and that the husband or father should have the burden of proof if he contests the presumption.

ARGUMENT

1. The issue presented to this Court by Petitioner was not addressed by any of the courts below and therefore is not a proper matter for adjudication by this Court (3 Fla Jur 2d Appellate Review, Section 277 at Page 323, and cases cited)

a. The solo point considered by all courts below was whether the award of attorney foes could exceed an hourly rate allegedly agreed upon between the attorney and client.

i. In his report, the Special Master stated that tho case of Standard Guarantee Insurance Co. v. Quanstrom, 1990, Fla, 555 So 2d 828,

> "...denied the Court the ability to increase the fee beyond that fee as agreed to between the Plaintiff and her attorney." (Record Page 11).

ii. The trial court accepted this report (Record Page 18).

iii. Tho Court of Appeal ruled only on this issue.

> "The General Master ruled that the award of attorney fees could not exceed the hourly rate agreed on between Brake and his client Wilma Corwin, the former wife. Based on the rule announced in Levy v. Levy, 483 So 2d 455 (Fla. 3d DCA), review denied 492 So 2d 1333 (Fla 1986) we reverse and remand for further proceedings." (Slip opinion page 2).

b. Petitioner does not contest this ruling.

> "Petitioner doos not argue that a fee arrangement between the

> spouse and attorney in Chapter 61 proceedings shall always be binding. That position would defeat the purpose of Section 61.16 and could result in the denial of access to the courts to the impecunious spouse and thus, denial of due process." (Brief, pp 2-3)

C. The cases alleged to be in conflict, to wit: Levy v. Levy, 1986 (Fla 3d DCA) 483 So 2d 455 and Winterbotham vs. Winterbotham, 1987 (Fla 2d DCA 500 So 2d 723 do not appear to be in conflict on this issue. Whe e they conflict, as is shown below, is on the separate issue of whether or not one of the parties must prove the contract between client and attorney was an otherwise unreasonably low fee arrangement resulting from the inferior financial position of the client.

(i) Tho Winterbotham Court stated that:

> "... if the parties have established a fee that is fixed rather than contingent, an award should not exceed that agreed upon fee unless other factors established by the Code out-weigh that agreement" (500 So 2d at 725.
>
> "There has been no showing in this case that wife was required to fee bargain with her attorney from an inferior financial position which resulted in an otherwise unreasonably low fee arrangement. Where no such inadequate bargaining position resulting in an artificially low contractural arrangement is demonstrated, Rowe should apply and 'the court awarded fee' should not 'exceed the fee arrangement reached by the attorney and his client." 500

So 2d at 724.

This language shows that the Winterbotham court accepts the rule that a court may exceed a contract agreement on awarding a fee. However, it limits the rule to cases where the fee is shown to have been negotiated by the wife from an inferior financial position.

(ii). The Levy court stated the same rationale for taxing attorney foes in excess of an agreement between attorney and client:

> "... in the domestic context (,) since fees are awarded just because one party cannot afford them as well as the other, the liability of the wealthy party cannot be limited to the exposure of the impecunious one." (480 So 2d at 457, col 2)

Thus, both courts appear to recognize this rule, which was announced by the Florida Supreme Court in Bosem v. Bosem, **Fla,** 1973, *279 So* 2d 863 and cited by the Levy court.

d. This is the issue presented in Petitioner's brief:

> "Whether attorney fees...should exceed the agreed upon fees between the attorney (and client) when...there is no finding by the Court below that the ex-wife negotiated her attorney fees from an inferior financial position to that of the ex-husband." (Brief of Petitioner, Page 1 under the heading : "Issue")

It is thus apparent from record that in the case at bar the Court below did not reach the issue now presented in Petitioner's

brief. On the face of their opinions, the courts below reached only the issue of whether a court-awarded attorney fee might exceed a contract rate, and not the subsidiary issues of whether that rate was the result of bargaining from an inferior financial position, and, if so, who has the burden of proof of said issue.

2. Tho real conflict between Levy and Winterbotham (which was not decided by the courts below but which will affect the proceedings in the case at bar upon remand), concerns:

a. Must the trial court make a finding of financial disparity?

b. Who has the burden of going forward with evidence of economic disparity?

c. Who has the burden of providing the greater weight of the evidence on economic disparity? and

d. How much of an economic disparity is necessary to justify a fee higher than the contract terms?

While neither the courts below in the case at bar, nor the courts in the cases cited by the parties in their briefs, deal specifically with these questions, the cited cases indicate two different lines of approach, and thus of potential conflict,

In Levy, the Third District Court of Appeal recognized as a matter of principle that in almost all cases the wife is in an inferior bargaining position (483 So 2d at 457, Column 1). The opinion does not recite the financial disparity between the parties, but assumes it. Apparently, no rebuttal was made in the trial court.

Likewise, in Faust v. Faust, Fla DCA 1, 1990, 553 So 2d 1275, the First District Court of Appeal held that:

> "... The trial court's order that the husband pay the wife's entire contractual liability for appellate attorney fees implies a finding that she is unable to pay any portion of the fee." 553 So 2d at 1278.(emphasis added)

In other words, these courts hold that there is a presumption of disparity between husband and wife, and the burden is upon the husband to prove that the disparity is minimal. This presumption is in accordance with the widely publicized findings that women, particularly those who have custody of their minor children, have an inferior economic position vis a vis their former spouses.

This was true in the seminal case of Bosem v. Bosem, Fla, 1973, 279 So 2d 863, whore this Court reversed the Third District Court of Appeal and reinstated a trial court award of attorney fees approximately twice the amount contracted for by the wife. The District Court opinion stated the wife in that case had a net worth of approximately $30,000, plus personal effects, whereas her husband had a net worth of $2,210,000, with an annual income in excess of $100,000 (Third District Opinion, 269 So 2d at 761).

The other approach was taken in the Winterbotham case, in which the Second District Court of Appeal rejected an award of fees in excess of the contractual amount because:

> "there has been no showing in this case that wife was required to fee bargain with her attorney from an

> inferior financial position which resulted in an otherwise unreasonably low fee arrangement." 500 So 2d at 724 (emphasis added).

See also Gardner v. Edelstein, 1990 DCA 1, 561 So 2d 327.

This is, in effect, a holding that the wife has the burden of coming forward with evidence concerning the financial status of both parties.

Respondent submits that there should be a presumption of disparity in domestic relations cases and that the burden of alleging and proving the lack of disparity of economic status ought to be upon the husband or father.

- In the first place, as mentioned above, it is a well documented fact that in American society most women are in an economically inferior position to that of their husbands, and particuarly their ox-husbands.

- Furthermore, the husband is in a better position to know the financial circumstances of the parties. To gain such knowledge the wife would have tho burden of taking extensive discovery to find out his resources to compare with her own resources.

- Finally, the majority of dissolution cases, and the majority of cases for modification of child support (such as the case at bar) involve allegations and evidence of the financial circumstances of the parties. Under such circumstances the Faust Court is correct in stating that an award of attorney fees carries with it the implication of a finding of disparity of resources, based on such evidence.

(In the c se at b r the x-wife p titioned for an increase in child support because her annual income as a school teacher was in the low five figures, while the ex-husband's income as an architect had increased to multiples of 6 figures. Her attorney fees wore not paid by her prepaid legal insurance program because coverage did not include court proceedings in which she was a plaintiff or petitioner. Record, page 8. She is thus in the same position as the wives in tho cited cases).

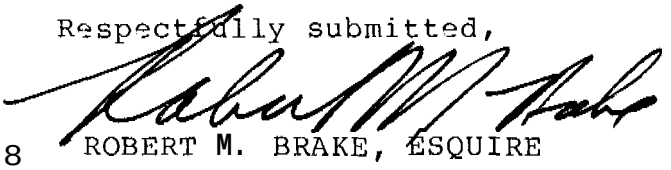
Therefore, an award of attorney fees for the ex-wife in excess of her contract with her lawyer should be allowed absent proof by tho ex-husband of financial parity of the parties.

CONCLUSION

There is no conflict between the Levy and Winterbotham cases on the narrow point decided by the Court below, namely, that a trial court is not bound by a contract between client and attorney in setting an amount of attorney fees to be **taxod** against a spouse or ex-spouse. Even Petitioner admits this.

On the sole point of conflict between Levy and Faust on the one hand, and Winterbotham on the other, namely, proving financial disparity, as a matter of public policy Levy and Faust have the better position. There should be a presumtion in favor of tho wife as to disparity of income between wife and husband, and presumption of such a finding in an Order taxing such a fee. The husband should have the burden of alleging and proving financial parity.

Respectfully submitted,



ROBERT M. BRAKE, ESQUIRE

I hereby certify that a true and correct copy of the above and foregoing was mailed this 13th day of February 1992 to

Micheal Lechtman, Esquire
17001 N.E. 6th Avenue
North Miami, Florida 33162

Jorge Gaviria, Esquire
5901 S.W. 74th Street, Suite 400
Miami, Florida 33134

ROBERT M. BRAKE, ESQUIRE
1830 Ponce de leon Blvd.
Coral Gables, Florida 33134
(305) 444-1694