IN THE SUPREME COURT OF FLORIDA

ESIG PERLOW,
Petitioner,

CASE NO. SC02-1317

v.

SHARON H. BERG-PERLOW,
Respondent.
__________________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

RICHARD A. KUPFER, P.A.
5725 Corporate Way, Suite 106
West Palm Beach, FL 33407
(561) 684-8600
Counsel for Petitioner

TABLE OF CONTENTS

Page

Table of Citations ii

Issues Presented:

I. WHETHER THE FOURTH DCA HAS CREATED CONFLICT BY AFFIRMING THE TRIAL COURT'S ORDER DECLINING TO HOLD A HEARING ON ENTITLEMENT TO TEMPORARY ATTORNEY'S FEES UNTIL AFTER TRIAL WAS CONCLUDED?

II. WHETHER THE FOURTH DCA HAS CREATED CONFLICT WITH OTHER DISTRICTS BY FINDING THAT THE TRIAL COURT DID NOT IMPROPERLY DELEGATE ITS DECISION-MAKING FUNCTION TO COUNSEL?

III. WHETHER THE FOURTH DCA CREATED CONFLICT AND ERRED BY FINDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO APPOINT A GUARDIAN AD LITEM FOR ADAM?

Reply Argument

Point I . . . . 1 - 7
Point II . . . . 7 - 12
Point III . . . . 12 - 14

Conclusion 15
Certificate of Service 16
Certificate of Compliance 16

TABLE OF CITATIONS

Cases

Page

Bould v. Touchette,
349 So2d 1181 (Fla. 1977) 9

Harris v. Harris,
753 So2d 774 (Fla. 5th DCA 2000) 14

Other Authorities:

§39.01, Fla. Stat. 12
§61.401, Fla. Stat. . . . . 12 - 13

REPLY ARGUMENT

Point I - Temporary Attorney's Fees and Costs

The Wife has attached as an Appendix to her Answer Brief the transcript of the hearing held before Judge Colton on December 9, 1999, 2½ months before trial, on the Husband's motion for temporary attorney's fees and costs. This will assist the court since this is an important transcript supporting this first issue on appeal and we will cite to the Wife's Appendix (W.App.) hereafter in referring to this transcript.

The Wife argues there was no evidence presented at that December 9, 1999 hearing to substantiate the amount of fees and costs that would be necessary to retain an attorney to continue to represent the Husband throughout trial and no evidence to show the Husband had a "need" for such an award in order to retain an attorney. These arguments are contradicted by the transcript that the Wife has attached to her Answer Brief on the Merits.

The hearing began with Judge Colton stating, before hearing any evidence, that he was under the impression a pro se litigant is not entitled to ask for an interim award of attorney's fees without having first retained an attorney. (W.App. 9-10). At that hearing the Husband's previous attorney, Ken Renick, Esq., who had just recently withdrawn for nonpayment of past fees owed to him (W.App. 10-11), testified under oath that it would take $210,000 to $225,000 to complete this case in a reasonable

fashion. (Id. at 23). Attorney Renick gave a detailed breakdown of what he would expect to have to spend in costs and how much time and money he would expect it to take to finish representing the Husband at his normal rate of $250 per hour. (Id. at 24-26). This included costs to accounting experts for their services in tracing assets, (Id. at 25), as well as the hiring of necessary medical experts. (Id. at 26).

The Husband was also placed under oath at that hearing (Id. at 28) and he testified he has no income (Id. at 32), he has not earned any income in the past several years due to his heart condition and his business having become insolvent (Id. at 33, 59), he has been surviving on loans (over $200,000) from his mother who could not afford to continue loaning him the money to litigate this case (Id. at 34), and he could not afford to sustain this litigation without a temporary award of fees and costs.

There was no contrary evidence presented. The Wife produced evidence of what the Husband had earned several years in the past but there was no evidence at all to contradict the sworn statements of the Husband and his previous attorney. The Wife's attorney chose not to cross examine the Husband at that hearing (Id. at 34), but he argued that the Husband is not entitled to a temporary fee award unless he presently has an attorney already on retainer. (Id. at 37). The Husband argued the law does not require that for an award of temporary fees and costs (Id. at 35-36), and it was specifically represented to the court that this figure is what it would take for Ken

Renick, Esq. to continue to represent the Husband or for a new attorney to step in and do so. (Id. at 40, 36). A few months before this hearing Ken Renick, Esq. filed a motion (before he withdrew) asking the court to award temporary fees so he could continue to represent the Husband (R.14/2319-2324) which the trial court denied. (R.7/1126-27; 14/2334).

Toward the end of the hearing when the Wife's attorney renewed his argument that no fee could be temporarily awarded before a new attorney had actually been retained, Judge Colton stated, "Didn't I sort of bring that up at the beginning?" (Id. at 41). Judge Colton then denied the Husband's motion "without prejudice to the Husband to seek temporary fees after retaining counsel." (R.9/1525). Judge Colton found the Husband failed to demonstrate any "need" because he had no obligation to pay an attorney. (Id.)

Once Judge Harrison, who presided at trial, was told the reason why Judge Colton denied temporary attorney's fees 2½ months previously, Judge Harrison denied it again for the same reason. (See Initial Brief on Merits at p.4.) It is inaccurate for the Wife to now argue other reasons why the Husband could have been denied temporary attorney's fees. The record is very clear as to why his motions were denied on several occasions.

The Wife argues that no attorney testified under oath what it would take to

represent the Husband throughout trial, but that is not accurate. Ken Renick, Esq. testified to that effect well in advance of trial. Peggy Rowe-Linn, Esq. would have also testified to that if Judge Harrison had been willing to hold an evidentiary hearing. Instead, he asked her a few questions as soon as she walked into the courtroom (not under oath) and after about three minutes of informal discussion he said he was not going any further with it until after the trial was finished. (See Initial Brief on Merits at pp. 4-5.)

An immediate finding of entitlement to attorney's fees plus an actual interim award of reasonable temporary costs for hiring experts would have leveled the playing field. Attorney Renick, 2½ months before trial, gave a detailed breakdown of anticipated litigation related costs and fees. (See W.App. at pp. 24-26.) The Wife's brief implies that the Husband only asked the trial court for temporary attorney's fees and not for litigation costs. That is incorrect. (See W.App. 3; R.8/1397-98.)

The Wife's brief (at p.5, n.3) states generally that the Husband's finances as presented in his brief are not supported by the record. There is no record cite and no further discussion of it in the Wife's brief. The Wife does not point out any part of the record that contradicts the Husband's evidence that he is genuinely in financial need of temporary costs and fees.

The Husband's statement of facts came from the trial court's own "findings"

attached as Exhibit A to the Final Judgment (R.14/2506). The Husband's net worth was determined to be $271,556 of which $250,000 consisted of disputed jewelry that the Wife accuses the Husband of taking. The Wife's brief is silent about this but the record does not independently support her allegations and the Final Judgment does not make any specific finding that the Husband took the jewelry. Although there is no supporting evidence and no specific finding, the $250,000 has been included in Exhibit A to the Final Judgment as the Husband's asset. If we eliminate the disputed jewelry, the Husband has about $20,000 in assets and the Wife has over $3.5 million in assets.

The Wife cannot realistically contend that the Husband failed to demonstrate a "need" for temporary fees and costs. The Wife's brief mentions the Husband's income in 1996 and 1997, but the Husband has not worked since then and the issue here involves his ability to pay fees and costs in the year 2000 when this case went to trial. The Wife now suggests the trial court could award a nominal sum for an initial retainer and then hold a subsequent hearing to assess a reasonable amount of temporary fees. (Wife's brief at pp. 7, 10). We agree, but when this case was before the trial court, the Wife successfully argued that the court was "without authority to order any temporary fees whatsoever" until the Husband had actually retained an attorney. (See W.App. at 41.) The Wife is now completely changing her position. If what she now says was stated as her position before the trial court, we might not be

in this court at this time.

The Wife now argues that the Husband has not preserved this issue for appeal because he did not proffer the sworn testimony of Peggy Rowe-Linn. The trial judge just said he was not going any further with this. When the Husband asked if he could speak further on this the court declined and said it would go no further until after trial. (T. 3/339). It is one thing to proffer certain evidence that is being excluded during an evidentiary hearing. It is another thing to say that a pro se party has to proffer an entire evidentiary hearing that the court refuses to hold in order to preserve the issue for appeal. The Wife does not cite any authority to support that argument and it does not make any logical sense. Aside from that, the Husband did proffer the sworn testimony of Ken Renick, Esq. two months before trial. (See W.App.).

The Wife mentions that the Husband was once a member of the California bar and implies he was competent to represent himself (after she previously points out how he forgot to proffer testimony). The Husband did not practice law and has not been a member of any bar association since the mid-1980's. He is certainly not a trial lawyer or any other kind of lawyer, and he did not ask to represent himself pro se. The fact that he lost every issue presented to the trial court and is appealing a judgment that verbally crucifies him is some reflection of his litigation skills.

The Wife suggests a continuance of the trial would have endangered the

emotional health of Adam. Adam's health had nothing to do with the trial court's refusal to grant a continuance. If that was the issue, the trial court could have allowed a continuance but entered an interim custody order to protect Adam. It should be noted also that the Wife has not mentioned the trial court's granting of temporary attorney's fees for the appeal and how the financial evidence differed in order to explain why the Husband's request would be granted at the appellate level but not at the trial level. It should have been granted at both levels, and the failure to do so creates conflict among the district courts in Florida.

Point II - Delegation of Decision-Making Function

It is not denied by the Wife that her trial counsel drafted the 25-page Final Judgment without any specific directions, rulings or findings having been announced by the trial court. It is also not denied that, after being handed the proposed Final Judgment at closing argument, the trial court stated that the court's Final Judgment would be signed, filed and ready to be picked up in Judge Colton's office within two hours. Logistically, that left just enough time for Judge Harrison to read the order and sign it. The circumstances certainly justify a well-founded suspicion that the trial court had already decided to sign the judgment verbatim when the "two hour" announcement was made at the end of closing argument. At that point the order could not yet have been read since it was just given to the court and the court left itself no time to make

any revisions to it or to draft its own order.

The way the Fourth DCA below approached this issue of improper delegation of the judicial function is in direct conflict with the standard of review employed by other district courts. The First District in the Cole Taylor Bank v. Shannon case discussed in the Initial Brief (at p. 34) utilized the standard of whether an appearance of impropriety has so permeated the proceedings as to justify a suspicion of unfairness, or whether the record establishes that the final judgment does not reflect the trial court's independent decision on the issues of a case. The "appearance of impropriety" standard is the correct approach. The appearance of judicial independence is a fundamental bedrock of our legal system and that is exactly the issue implicated in cases like this.

The Fourth DCA below rejected this issue on appeal on the stated grounds that the judgment is supported by competent substantial evidence and because the trial judge participated at trial by occasionally interjecting questions and comments. The Wife's brief continues to rely on those grounds to uphold the Fourth DCA's opinion, but they are irrelevant to the issue and they are at odds with the criteria used in other districts to determine whether there has been an improper delegation of judicial responsibility.

This point on appeal presents a clear basis for exercising conflict jurisdiction.[1] All five district courts have written opinions addressing this issue over the last 15 years but this court has apparently not yet directly addressed it in a written opinion. This case presents an excellent vehicle to address the issue. It is hard to imagine a more clear example of an attorney being given complete authority by the trial court to draft complex fact findings without any prior judicial input or direction, which were then hastily rubber-stamped by the court without giving itself enough time for careful reflection. It would also be hard to find a better example of how such delegated authority leads to the temptation to overreach and exaggerate since the lawyer is an advocate rather than a disinterested fact finder. It would also be hard to find a case where such an order has a more disruptive effect on a family. If there is any one division of the court where this should not be allowed, it is the family division.

In our Initial Brief, we pointed out numerous portions of the Final Judgment that made highly pejorative statements and findings that were never uttered by the trial court. In response, the Wife has pointed to two instances during 17 days of trial where the trial judge asked a question or a witness made a comment using language similar to that used in the Final Judgment. The Wife suggests that this demonstrates

---

[1] Of course, once this court has conflict jurisdiction under one point it has jurisdiction to address any other point presented as well. See Bould v. Touchette, 349 So2d 1181 (Fla. 1977).

the Final Judgment does reflect the trial judge's independent thinking. We respectfully submit it does not reflect any such thing. Just because a judge asks a question or a witness makes a comment does not mean the judge would incorporate it into the court's ultimate findings of fact. This Final Judgment was counsel's production, from start to finish.

What is of more interest are all the gratuitous comments in the Final Judgment that the Wife does not attempt to rationalize; such as the court's instruction to the Wife to disparage the Husband to Adam so that Adam will no longer look up to him. Where in the record did that instruction come from? What about the fact that the Husband's 1986 conviction for grand theft, which is highlighted in the Final Judgment, was set aside and charges dismissed which the Final Judgment does not mention? What about the Final Judgment threatening the Husband with incarceration based on the court's "belief" the Husband will attempt to violate the court's "no contact" orders? Where in the record did that come from? What about prohibiting the Husband from knowing anything about Adam's health or education while saddling him with the financial responsibility for both, rather than the multi-millionaire mother? Where did the court tell counsel to include that provision? What about the provision ordering the Husband to produce a certificate of attending a parenting course which the Husband handed to the judge a few hours before the judge signed the final

judgment? None of these are mentioned at all in the Wife's brief. What about the provision of the Final Judgment finding it would be beneficial for Adam to be relocated to another country? Where in the record does that "finding" come from?

The Wife, as expected, argues there is sufficient evidence in the record to support the Final Judgment. That is not the issue here, which is why the Fourth DCA should be quashed. The issue here is not whether there is evidence to support the judgment, but rather whose judgment was it? The standard of review utilized by the Fourth District in this case clearly conflicts with the standard utilized by other district courts in Florida.

The Wife also, as expected, argues that the trial court participated in the trial proceedings prior to Final Judgment. The trial court, over a 17 day trial, participated to the extent it had to at trial, but that does not minimize the error of then delegating to counsel the judicial function of making findings of fact and conclusions of law. The issue here is whether the trial judge truly participated in rendering the final order of the court, not whether the judge occasionally asked questions of a witness to clarify testimony.

The Wife argues (at p. 8) that "it is not per se reversible error to sign a proposed judgment in total." It is <u>not</u> our position that it is per se reversible error to do that, as stated in the Initial Brief (at p. 26). The Wife is responding to an argument

we are not making.

The Wife states that the trial court asked for proposed final judgments after the evidence was closed. (Wife's brief at p. 21). That is incorrect. The trial court never asked for proposed final judgments to be submitted. The Wife submitted one without prompting at the close of the evidence. (See T. 26/3410.) The Husband was not, before then, aware of that procedure and asked for additional time to prepare and submit his own proposed final judgment. (T. 26/3406-07; 27/3500). The Wife disagrees with our statement that the trial court discouraged the Husband from preparing his own proposed final judgment. This court can review the transcript and draw its own conclusion about that. (See T. 26/3406-07; 27/3500.)

Point III - Guardian Ad Litem

The Wife argues that since she did not specifically allege "child abuse" by the Husband, the provisions of Section 39.01are not implicated. It is not necessary to use that precise term in order to trigger the requirements of the statute to appoint a guardian ad litem for the protection of a child's interests. Sections 61.401 and 39.01(2), Fla. Stat., read together, require the appointment of a guardian ad litem when there is an allegation that a parent is willfully endangering a child physically or emotionally. That is "abuse" by definition whether the "A" word is used or not. The Wife's entire case at trial was built around this allegation. Even her brief on the merits

states (at p. 18), "Husband has a sickness that was emotionally harming the child." She now claims the Husband did not "willfully" intend to cause any harm to the child, but there is no question that he is alleged to have "willfully" engaged in acts designed to alienate the child from the mother, which is allegedly causing emotional harm to the child. The statute does not provide that a parent has to specifically intend to harm the child. It only requires that the acts allegedly harming the child are willful acts. We are not talking about a specific intent crime. We are talking about protecting a child.

The Wife also argues her allegations were not "verified" as required by Section 61.401. They were "verified" when the Wife and her litany of experts testified under oath at trial and it was then that the Husband requested the appointment of a guardian ad litem. Until then there was no "verified" allegation, as the Wife points out, which is another reason why the Husband's request should not be deemed untimely. That is in addition to the fact that this was "fundamental error" that can be raised at any point in the proceedings, especially when there was no one at trial to raise this on behalf of the child. (See Initial Brief at pp. 35-36.)

The Wife alternatively argues that the failure to appoint a guardian ad litem was harmless, even if it was error, since Dr. Ellinger (Adam's therapist) was looking out for Adam's best interests. No one at trial considered Dr. Ellinger to be a de facto guardian ad litem, including Dr. Ellinger himself who was in favor of having both

parents evaluated. (See R. 14/2418; T. 1348). However, he had no legal standing to insist on it and therefore it never happened. The Wife also argues that Adam is not a "party" to the divorce proceeding but that is irrelevant to the issue of whether it was error not to appoint a guardian ad litem to protect his interests.

The Fourth DCA's opinion in this case directly conflicts with Harris v. Harris, 753 So2d 774 (Fla. 5th DCA 2000) which held it is error not to appoint a guardian ad litem for a child whose mother sought to terminate visitation rights of the "reputed" father. The Wife argues that Harris is distinguishable because it involved a child born out of wedlock whereas Adam was not born out of wedlock. What possible difference does that make? Harris was not a paternity case, as the Wife incorrectly argues. It was a post-judgment proceeding in a divorce case and it is in direct conflict with the Fourth DCA's decision in this case which holds that only a termination of parental rights, not visitation rights, requires appointment of a guardian ad litem.

CONCLUSION

The Husband was wrongfully denied access to counsel and litigation costs to enable him to present a reasonable defense, he was denied a forum in which the court makes its own independent findings of fact rather than delegating that function to one

party's counsel, and Adam was denied a guardian ad litem to protect his own interests. The cumulative result of all of this was the termination of all contact between a closely-bonded father and his only child, as well as the denial to the Husband of any rights in a marital estate of twelve years.

This court should quash the Fourth District's opinion and the Wife should be instructed to return with Adam to this country for a new trial on all issues at which the Husband should be awarded temporary fees and costs and Adam's interests should be protected by a guardian ad litem.

Respectfully submitted,

Richard A. Kupfer, P.A.
5725 Corporate Way
Suite 106
West Palm Beach, FL 33407
(561) 684-8600
Counsel for Petitioner

By: ___________________________________
Richard A. Kupfer
Fla. Bar No. 238600

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished by U.S. Mail this 7th day of August 2003 to: **Joel M. Weissman, Esq.** and **Doreen M. Yaffa, Esq.**, Weissman, Yaffa & Desmond, P.A., 515 N. Flagler Drive, Suite 1100, West Palm Beach, FL 33401, counsel for Respondent.

RICHARD A. KUPFER, P.A.
5725 Corporate Way; Suite 106
West Palm Beach, FL 33407
(561) 684-8600
Counsel for Petitioner

By:________________________________
Richard A. Kupfer
Florida Bar No. 238600

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Petitioner certifies that the size and style of type used in this document is 14 Point Times Roman.

RICHARD A. KUPFER, P.A.
5725 Corporate Way, Suite 106
West Palm Beach, FL 33407
(561) 684-8600
Counsel for Petitioner

By:__________________________________
Richard A. Kupfer
Florida Bar No. 238600