IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

HADI LASHKAJANI vs. AMY H. LASHKAJANI

Petitioner, Respondent.

PETITIONER'S INITIAL BRIEF

SUPREME COURT CASE NO.: SC03-1275
SECOND DISTRICT COURT CASE NO.: 2D02-3427
CIRCUIT COURT CASE NO.: GCF-00-0241 (POLK COUNTY)

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PREFACE

In this Initial Brief, Former Husband/Petitioner, HADI LASHKAJANI, will be referred to as "Former Husband." Former Wife/Respondent, AMY LASHKAJANI, will be referred to as "Former Wife." References to the Record on Appeal shall be indicated by the abbreviation "R" followed by the appropriate page number. References to the Appendix shall be indicated by the abbreviation "A" followed by the appropriate page number.

CITATIONS OF AUTHORITY

Cases:

Laws and Statutes:

STATEMENT OF THE CASE AND FACTS

The trial court's order that is the nexus of this case and all its permutations, collateral suits and appeals upholds the validity of the parties' Prenuptial Agreement (R. 98-107). In that order, the trial judge found that Former Wife had a Masters degree in Business Administration and worked as an accountant for a CPA firm where it was her responsibility to audit Former Husband's businesses. (R. 100). After Former Wife began auditing Former Husband's businesses, a social relationship between the two parties began. (R. 100). The social relationship blossomed over a period of many months into engagement and marriage. (R. 100). The concept of a prenuptial agreement had always been a condition to the marriage and was the subject of months of negotiations during which Former Wife was represented by counsel of her own choosing. (R. 101-102). The Prenuptial Agreement was revised on several occasions, with each revision inuring to the benefit of Former Wife (R. 100).

On January 21, 2000, Former Wife filed a petition for dissolution of marriage, temporary and permanent injunction and complaint for money damages against Former Husband. On February 11, 2000, Former Husband filed a response and counter-petition for dissolution of marriage seeking enforcement of the parties' Prenuptial Agreement (R. 328-332).

After a hearing on the Prenuptial Agreement, on August 29, 2000, the trial court entered its order finding the Prenuptial Agreement valid and enforceable (R. 98-107, 243, 534, 538-539). The trial court found that there was no evidence of coercive circumstances, undue influence or overreaching on behalf of Former Husband. (R. 104-105). The trial court further found that the financial disclosure made by Former Husband was full and frank, and that the Prenuptial Agreement is fair and not grossly disproportionate to the detriment of Former Wife. (R. 103, 106). In the final analysis, it was clear to the court that the Former Wife would leave the marriage with assets and support valued in excess of one million dollars. (R. 106). On December 8, 2000, the trial court entered a final judgment of dissolution of marriage, again enforcing the Prenuptial Agreement. (R. 534).

On April 27, 2001, August 9 and 10, 2001, and January 29, 2002, the parties' motions relative to attorneys' fees were heard by the trial court, including (1) Former Wife's motion for attorneys' fees, costs and suit monies, served March 21, 2001, (R. 52-53, 533) and (2) Former Husband's second amended motion for reimbursement and recovery of attorneys' fees and costs pursuant to paragraphs sixteen and eight of the parties' Prenuptial Agreement and other applicable law, served May 10, 2001 (R. 157-159, 533). The fees and

costs sought by both parties were those incurred during the parties' marriage. (R. 242-296, 299-332, 359-499, 500-531).

On June 20, 2002, nunc pro tunc to January 29, 2002, the trial court entered its Order On Temporary Attorneys' Fees And Costs And Final Order On Attorneys' Fees And Costs Through March 7, 2001 (R. 533-558). The trial court granted both parties prejudgment attorney's fees and costs incurred during the challenge to the Prenuptial Agreement. The court also denied Former Husband's request for reimbursement of temporary attorney's fees under paragraph eight of the Prenuptial Agreement, which provides that Former Wife pay her own fees and costs in challenging the agreement, and awarded Former Wife attorney's fees otherwise incurred in the dissolution action to that point. The court based the Former Wife's attorney's fee award on Section 61.16, Florida Statutes (2002) and made the following findings: (1) Former Wife was in need of attorney's fees, costs and suit money; (2) Former Husband's net worth was at least $12,000,000, and Former Husband was twelve times as wealthy as Former Wife; and (3) Former Wife's challenge to the Prenuptial Agreement was not without merit. (R. 533-558). The court based the Former Husband's attorney's fee award on paragraph sixteen of the prenuptial agreement, which provided for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the Prenuptial Agreement.

On July 9, 2002, Former Husband filed his Notice of Appeal of the trial court's Order, challenging the trial court's award of attorney's fees and costs to Former Wife; and on July 22, 2002, Former Wife filed her Notice of Cross Appeal of the trial court's Order, challenging the trial court's award of attorney's fees and costs to Former Husband.

Thereafter, Former Husband, in light of <u>Belcher v. Belcher</u>, 271 So.2d 7, 13 (Fla.1972), and similar cases, discussed infra, filed his Notice of Voluntary Dismissal, so that the only remaining issue on appeal was the Former Wife's challenge to the award of attorney's fees and costs to the Former Husband.

On June 13, 2003, the Second District Court of Appeal of Florida reversed the trial court's order finding that the obligation to pay spousal support during the term of the marriage cannot be contracted away. Specifically, the district court of appeal stated:

> ***It is well settled in Florida that a spouse's obligation to provide spousal support during the marriage, including the responsibility for attorney's fees and costs, may not be contracted away by a prenuptial agreement. <u>Belcher v. Belcher</u>, 271 So.2d 7, 13***

(Fla.1972); Fernandez v. Fernandez, 710 So.2d 223, 225 (Fla. 2d DCA 1998); Blanton v. Blanton, 654 So.2d 1240, 1240 (Fla. 2d DCA 1995); Lawhon v. Lawhon, 583 So.2d 776, 777 (Fla. 2d DCA 1991). Thus, a provision of a prenuptial agreement purporting to waive the spouse's obligation to pay attorney's fees and costs incurred during the marriage is unenforceable. Id. In determining entitlement to prejudgment attorney's fees, the court may consider the prenuptial agreement, but only in conjunction with the factors articulated in section 61.16 to the extent that the agreement bears on those factors. Belcher, 271 So.2d at 10; Appelbaum v. Appelbaum, 620 So.2d 1293, 1295 (Fla. 4th DCA 1993); Mulhern v. Mulhern, 446 So.2d 1124, 1125 (Fla. 4th DCA 1984).

(A. 3-4).

However, the district court of appeal also recognized that perceptions have changed since Belcher was decided and that a review of existing legal principles may be required. (A. 5) (citing Fernandez, 710 So. 2d at 225). Thus, the court of appeal certified the following question as one of great public importance:

May the parties, by express provision in a prenuptial agreement, contract away a future obligation to pay attorney's fees and costs during the term of the marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial agreement?

(A. 5).

On July 11, 2003, Former Husband filed a notice to invoke the discretionary jurisdiction of this Court seeking an answer to the question certified by the district court of appeal.

SUMMARY OF THE ARGUMENT

Traditionally, Florida courts have upheld the validity of nuptial agreements but have paradoxically voided provisions in those agreements which purport to waive attorney's fees and costs incurred prior to the final judgment of dissolution of marriage. Accordingly, even though the Prenuptial Agreement in the instant case was found to be binding and enforceable, counsel was free to attack its validity and be assured of the right to seek fees and costs for doing so. If a party freely and voluntarily decides to waive all attorney fees in a dissolution of marriage action, however, there is no legitimate reason why he or she should not be held to the bargain made. Florida's current bar on prejudgment attorneys' fees and cost waivers in marital agreements only serves to promote the excessive litigation which the parties originally contracted to avoid. For these reasons, this Court should reverse the lower court's decision, answer the lower court's certified question in the affirmative, and find that parties are free to contract away by express provision in a prenuptial agreement a future obligation to pay attorney's fees and costs during the term of the marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial agreement.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION, ANSWER THE LOWER COURT'S CERTIFIED QUESTION IN THE AFFIRMATIVE, AND FIND THAT PARTIES ARE FREE TO CONTRACT AWAY, BY EXPRESS PROVISION IN A PRENUPTIAL AGREEMENT, A FUTURE OBLIGATION TO PAY ATTORNEY'S FEES AND COSTS DURING THE TERM OF THE MARRIAGE BY PROVIDING FOR PREVAILING PARTY ATTORNEY'S FEES IN ACTIONS SEEKING TO ENFORCE OR PREVENT THE BREACH OF THE PRENUPTIAL AGREEMENT.

In a case where the Prenuptial Agreement was found to be fair and not grossly disproportionate to the detriment of the Former Wife, and where there was no evidence that the Prenuptial Agreement was entered into with fraud, misrepresentation, overreaching, coercion or duress, it is absurd to encourage, as happened in the instant case, a continual battle over the validity of the Prenuptial Agreement with no penalty for losing. Doing so only promotes the excessive litigation which the parties to the Prenuptial Agreement contracted to avoid. Unfortunately, however, the current state of the law on nuptial agreements almost makes it negligent for a marital lawyer to fail to encourage a spouse to contest a nuptial agreement regardless of the merits because there is no penalty for failure.

Those in Florida who enter prenuptial agreements in an attempt to avoid extensive litigation are hindered by the case of Belcher v. Belcher, 217 So. 2d 7 (Fla. 1972). The court in Belcher considered prenuptial agreements that purported to contract away the husband's future obligation to pay alimony, suit money and attorney's fees during a separation prior to the final dissolution of marriage. The court stated:

> ***However, we now hold further that before and pending dissolution of the marriage a husband's obligation of support while still married continues under the historical principle supported by an unbroken line of cases since shortly after Florida became a state in 1845 which we decline to reverse, as would be necessary in order to accept the husband's contention here that his agreement extends as controlling to the period while his marriage continues. This provision of such an agreement is a factor to be considered but not***

the sole factor, nor conclusive, in a determination of support pendente lite.

***Belcher**, 217 So. 2d at 8.*

*This quote is the only justification for Florida's bar on prejudgment attorneys' fees and cost waivers in marital agreements which Florida courts have routinely upheld because of the state's interest in decreasing the amount of public assistance required by divorced spouses who are unable to support themselves. The **Belcher** court stated: "The State still imposes upon marriage contracts the obligation that the wife shall not become dependent upon welfare or others; it requires that an able husband support a needy wife during coverture." **Belcher**, 217 So. 2d at 10.*

*Florida's law on marital agreements was massively transformed in **Casto v. Casto**, 508 So. 2d 330 (Fla. 1987), when the Florida Supreme Court held that "the fact that one party to the agreement apparently made a bad bargain is not a sufficient ground, by itself, to vacate or modify a settlement agreement," and that "if an agreement that is unreasonable is freely entered into, it is enforceable." **Casto**, 508 So. 2d at 334. Pursuant to **Casto**, the trial court in the instant case upheld the validity of the Prenuptial Agreement because there was full and fair disclosure of the Former Husband's assets, the agreement was freely and voluntarily executed, and because the Former Wife left the marriage with assets in excess of one million dollars. (R. 98-107).*

*Nevertheless, **Casto** was only a superficial victory for those, like the parties in the instant case, who contract to avoid litigation over an otherwise valid nuptial agreement in that **Casto** failed to address **Belcher**'s pronouncement as to the non-waivability of attorney's fees and costs incurred prior to dissolution. As a result, Florida courts still hold that a provision in a prenuptial agreement that waives prejudgment attorney's fees and costs will not be enforced. Accordingly, in the instant case, the Second District Court of Appeals held that: "It is well settled in Florida that a spouse's obligation to provide spousal support during the marriage, including the responsibility for attorney's fees and costs, may not be contracted away by a prenuptial agreement." (A. 3) (citing **Belcher**, 271 So.2d at 13; **Fernandez v. Fernandez**, 710 So.2d 223, 225 (Fla. 2d DCA 1998); **Blanton v. Blanton**, 654 So.2d 1240, 1240 (Fla. 2d DCA 1995); **Lawhon v. Lawhon**, 583 So.2d 776, 777 (Fla. 2d DCA 1991)). More specifically, the district court stated:*

> ***The Former Husband claimed entitlement to attorney's fees under paragraph sixteen of the prenuptial agreement, which provided for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial agreement. Because this provision purported to waive the Former Husband's obligation to pay attorney's fees and costs incurred during the marriage, it is unenforceable. Accordingly, the trial court erred in awarding the Former Husband prejudgment attorney's fees under the prenuptial agreement.***

(A. 4).

Consequently, while parties can contract in advance of or during a marriage to save themselves litigation costs incident to a later divorce, they can not do so for the period pending entry of a final judgment of divorce. Instead, an award of prejudgment attorneys' fees and costs is based on the parties' respective financial positions. See Fla. Stat. §61.16(1) ("The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorneys' 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"). In his article, Nuptial Dentistry, Christopher Chopin explains that "This result returns the determination of the validity of a prenuptial agreement and the entry of a final judgment based thereon to the antiquated tests of whether the agreements' provisions, at least as to prejudgment awards, are reasonable and fair, rather than, as Casto would have it, whether it was fairly entered into...Casto rejects once and for all the idea that a wife must be paternalistically coddled by the state to avoid unduly burdening the welfare rolls. However, that very idea is Belcher's motivation to hold that prejudgment attorneys' fees and costs waivers are unenforceable."[1]

Florida courts are seemingly aware of this contradiction in the law. In Balazs v. Balazs, 817 So. 2d 1004 (Fla. 4th DCA 2002), the Fourth District Court of Appeal reversed the denial of fees under §61.16 and remanded for further proceedings under Appelbaum v. Appelbaum, 620 So.2d 1290 (Fla. 4th DCA 1993). In accordance with Belcher, the Balazs court refused to enforce a fee provision in a nuptial agreement. However, Judge Farmer, concurring specially, commented that:

[1] Christopher Chopin, *Nuptial Dentistry*, THE FLORIDA BAR JOURNAL, Jul/Aug 2003, at 49.

> ***When the issue is properly raised … I think it will be necessary to recede from that part of Appelbaum holding that the §61.16 factors should be considered even when a valid nuptial agreement has waived such fees. If a party freely and voluntarily decides to waive all attorney fees in a dissolution of marriage action, I know of no reason why he or she should not be held to the bargain made. After all, Casto does not shrink from holding parties to their bargains waiving property rights and alimony. The purpose of the attorney fee statute in ch. 61 is to enable a party to contest unresolved issues of property rights and alimony. Hence if one can waive rights to property and alimony, surely one can equally waive rights to attorney fees.***

Balazs, 817 So. 2d at 1005; See also Appelbaum, 620 So. 2d 1290 (involving a valid prenuptial agreement which was held to be controlling except that a waiver of attorneys' fees and costs was deleted and instead fees were determined under the Florida Statutes).

If Florida courts continue to limit Casto in response to its failure to address Belcher, the validity of marital contracts, and the parties' ability to freely contract, will be increasingly whittled away. For example, in Fernandez v. Fernandez, 710 So. 2d 223 (Fla. 2d DCA 1998) the Second District Court of Appeal held that the spouse who had the ability was required to support the more needy spouse until the final judgment of dissolution was entered even in the fact of a nuptial agreement to the contrary. Fernandez, 710 So. 2d at 225 (holding that any waiver of support which takes effect prior to the entry of a final judgment is invalid). Yet the Fernandez court also recognized "that perceptions have changed since Belcher was decided that may require a review of existing legal principles" and certified the question as one of great public importance. Fernandez, 710 So. 2d at 225. In the instant case, because it did not appear that the parties in Fernandez pursued review in the supreme court, the Second District Court of Appeal again certified the question of whether a spouse may contract away his future obligation to pay attorneys' fees prior to dissolution of marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of a prenuptial agreement as one of great public importance. (A. 5).

If a party freely and voluntarily decides to waive all attorney fees in a dissolution of marriage action, there is no reason why he or she should not be held to the bargain made. In the instant case, the Prenuptial Agreement was

found to be fair and not grossly disproportionate to the detriment of the Former Wife. In fact, Former Wife left the marriage with assets in excess of one million dollars. (R. 98-107). Moreover, there was no evidence that the Prenuptial Agreement was not entered into freely and voluntarily. The trial judge found that Former Wife was a well educated woman who was fully aware of the Former Husband's financial condition at the time the agreement was executed; that she knew of the agreement at least two and one half months prior to the wedding; and that she reviewed three drafts of the agreement with her counsel. (R. 98-107). All of Former Wife's challenges to the Prenuptial Agreement have proven to be futile, however, Belcher and its progeny have enabled her to repeatedly attack the Prenuptial Agreement with no penalty for losing. It makes no sense that it has cost the Former Husband hundreds of thousand of dollars in attorneys' fees to obtain a bargain which both parties understood when they entered the Prenuptial Agreement. The risk of excessive litigation over a valid prenuptial agreement ought to be on the losing party.

Casto does not shrink from holding parties to their bargains waiving property rights and alimony, and there is no justification for treating prejudgment attorney's fees and costs any differently. The purpose of the attorney fee statute in Florida Statutes chapter 61 is to enable a party to contest unresolved issues of property rights and alimony. If one can waive rights to property and alimony, surely one can equally waive rights to attorney's fees. Accordingly, this Court should answer the lower Court's certified question in the affirmative and find that parties are free to contract away by express provision in a prenuptial agreement a future obligation to pay attorney's fees and costs during the term of the marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial agreement.

CONCLUSION

Because Casto failed to address Belcher's exception, which was grounded in an antiquated, paternalistic approach to protect women, when Casto attempted to allow the freedom of contract to extend to marital contracts it excluded the litigation period during which the contract would be reviewed. As such, parties to a marital agreement in Florida have never been insulated against exposure for prejudgment attorneys' fees and costs. Thus, in the instant case, even though the trial court found the Prenuptial Agreement to be valid and enforceable, Former Husband has incurred hundreds of thousands of dollars in attorneys' fees to fund Former Wife's attempts to challenge the Agreement.

Based upon these reasons, and the reasons set forth in this Initial Brief, this Court should answer the lower court's certified question in the affirmative and find that parties are free to contract away by express provision in a prenuptial agreement a future obligation to pay attorney's fees and costs during the term of the marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial agreement. Petitioner respectfully requests that this Court reverse and remand the lower court's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U. S. Mail this ____ day of February, 2004, to: Raymond J. Rafool, Esquire, Post Office Box 7286, Winter Haven, Florida 33883 and Carol A. Kartagener, Esquire, Weiss & Handler, P.A., 2255 Glades Road, Suite 218A, Boca Raton, Florida 33431.

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CERTIFICATE OF COMPLIANCE

In accordance with the applicable Rules of Appellate Procedure, Former Husband/Appellee has used 14 point Times New Roman throughout this Brief.

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