DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2007

TODD A. JAFFY,
Appellant/cross-appellee,

v.

TRACY L. JAFFY,
Appellee/cross-appellant.

Nos. 4D05-3656 & 4D06-2459

October 24, 2007

ON MOTION FOR REHEARING

PER CURIAM.

Appellee/cross-appellant's motion for rehearing is denied.

GUNTHER and FARMER, JJ., concur.
STONE, J., dissents with opinion.

STONE, J., dissenting.

I initially concurred in part with the majority opinion because I accepted the premise that a marriage just short of ten years is a "short term" marriage. On reconsideration, I would now recognize that this marriage is a "gray area" marriage, as found by the trial court, and that, therefore, the trial court correctly recognized that there is no presumption regarding permanent alimony. *See Yitzhari v. Yitzhari*, 906 So. 2d 1250, 1256 (Fla. 3d DCA 2005) ("A nine-year marriage has been held to fall into the 'gray area' in which '[t]here is no presumption for or against permanent alimony.'" (emphasis supplied; citations omitted)); *Adinolfe v. Adinolfe*, 718 So. 2d 369, 370 (Fla. 4th DCA 1998) (nine year marriage "may very well be in the 'gray area'"). In a gray area marriage, "a disparate earning capacity becomes a 'significant factor' in deciding whether permanent . . . support is appropriate." *Nelson v. Nelson*, 721 So. 2d 388, 389 (Fla. 4th DCA 1998); *see also Byers v. Byers*, 910 So. 2d 336, 343-44 (Fla. 4th DCA 2005).

Here, the husband's expert accountant testified that the husband had a gross monthly income of $12,687, or over $150,000 per year. (T 349, 372) Thus, even if the wife worked as a gemologist, with an income comparable to retail sales, as the trial court found the wife capable of doing, it is not likely that she will ever attain a level of self-support reasonably commensurate with a standard of living of $150,000 per year.

Although I agree that the wife's health and youth are factors to consider in weighing permanent alimony, the court also properly considered whether the wife can establish a standard of living reasonably commensurate with the standard set throughout the marriage. *See Ghen v. Ghen*, 575 So. 2d 1342 (Fla. 4th DCA 1991).

I recognize that these parties' standard of living may have been, to some extent, "artificially enhanced" by their parents' contributions. Nevertheless, the trial court could consider the wife's role as a mother and that she will likely never earn a salary which would allow her to live in accordance with the lifestyle the husband's salary afforded them. *See Byers*, 910 So. 2d at 343 (a party is not self-supporting, for purposes of determining whether to award permanent periodic alimony because she has the opportunity to enter the job market, without some evidence of the ability to earn a salary which would allow the party to live in accordance with the lifestyle established during the marriage). Further, where the superior earning power of one spouse is achieved during a period when the other spouse is out of the job market as a result of an agreement that the non-working spouse will care for the children, courts of this state have not hesitated to reverse awards of temporary support in lieu of permanent alimony. *Id.*

I would hold that this record does reflect disparate earning power of the parties such that a trial court could find it a significant factor in determining whether permanent support is appropriate. *See Nelson*; *Byers, supra; see also Zeigler v. Zeigler*, 635 So. 2d 50 (Fla. 1st DCA 1994) (trial court abused its discretion in deciding to amend temporary support in lieu of permanent alimony where there was no evidence in the record that the wife would be able to support herself in a manner reasonably equal to marital standard of living and no evidence of the husband's inability to provide some level of permanent support: wife was 35, parties had 3 minor children, and thirteen-year marriage fell into the "gray area"). I note that in *Harvey v. Harvey*, 596 So. 2d 1251 (Fla. 4th DCA 1992), this court also upheld an award of permanent alimony in a ten-year marriage.

As indicated by my initial dissent, I would also recognize that there is record evidence supporting the trial court's conclusion as to the husband's income. Just two months prior to seeking this dissolution, the husband swore, under oath, to a mortgage application reflecting a higher income than he now claims from his share in three separate businesses (with respect to one of which the books were in "chaos"), and there was testimony that he brought home "cash" in addition to his stated income.

I would further recognize, on reconsideration of the record, that the trial court explicitly did not, and did not have to, accept a conclusion that the wife's parents provided much of the parties' lifestyle. Although the parents' gifts (which included furniture and $100,000 used as a down payment on the parties' home) obviously made it easier for the parties to purchase and furnish their home, the trial court could, and did, find that the parties would have been able to afford a comparable lifestyle without the parents' gifts.

I cannot say, on the facts of this case, that a trial court could not view the totality of this record as supporting permanent alimony in doing equity and justice between the parties.

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Consolidated appeals from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; William J. Berger, Judge; L.T. Case No. 50 2004 DR 008144 FY.

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