

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CHERI LYNNE MELCHIONE,

Appellant,

v.

Case No. 5D20-1188

TIMOTHY TEMPLE,

Appellee.

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Decision filed October 9, 2020

Nonfinal Appeal from the Circuit Court for  
Orange County,  
Julie H. O'Kane, Judge.

Jessica Ann Travis, of Jessica Travis,  
P.A., Orlando, for Appellant.

Hal Roen, of Hal Roen, P.A., Maitland, for  
Appellee.

PER CURIAM.

AFFIRMED.

EVANDER, C.J., and TRAVER, J., concur.  
LAMBERT, J., concurs with opinion.

In this appeal, Appellant raises three arguments for reversal of certain post-final-judgment orders entered by the trial court in a paternity action. I write briefly to address Appellant's third argument that the trial court erred in denying her motion for an award of temporary attorney's fees brought under section 742.045, Florida Statutes (2018).

The trial court denied the motion "without prejudice" because Appellant was not represented by counsel at the time of the hearing, but it provided that Appellant could refile the motion "once she obtains legal representation." In my view, the trial court erred in apparently determining that, as a matter of law, a party must be represented by counsel as a prerequisite to seeking an award of temporary attorney's fees under section 742.045.

A similar issue was raised in *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004). There, the husband in a dissolution of marriage proceeding had moved for temporary attorney's fees under section 61.16, Florida Statutes. *Id.* at 384. At the hearing held on the motion, the husband was unrepresented, testifying that he did not have the financial resources to hire counsel. *Id.* The trial court denied the husband's motion without prejudice to him refiling the motion after obtaining counsel, *id.* at 385, and later entered a final judgment from which the husband unsuccessfully appealed. *Id.* at 386 (citing *Perlow v. Berg-Perlow*, 816 So. 2d 210 (Fla. 4th DCA 2002)). The husband thereafter sought review in the Florida Supreme Court. *Id.* at 383.

Because the Court reversed the final judgment for a new trial on other grounds, it chose not to address the separate issue raised by the husband regarding the denial of his motion for temporary attorney's fees. *Id.* at 390 n.6. However, in his concurring opinion, Justice Lewis specifically discussed whether a party must retain counsel as a

prerequisite to seeking temporary attorney's fees, opining that "[t]he ruling of the trial court requiring [the husband] to first secure counsel prior to awarding fees constituted a legal error, and was not a matter within the court's discretion." *Id.* at 401 (Lewis, J., concurring). Justice Lewis observed that it was clear that the Legislature intended under section 61.16 for a party to be able to obtain a determination as to whether he or she is entitled to fees and costs without first retaining an attorney, *id.*, reasoning that "[a] person who asserts that he or she cannot afford counsel cannot be expected to employ counsel as a condition precedent to be eligible to request funds to pay the necessary fees and costs." *Id.* at 402; *cf. Nichols v. Nichols*, 519 So. 2d 620, 621 (Fla. 1988) (concluding that denying a spouse's motion for temporary attorney's fees solely because the spouse was represented by counsel at the hearing was unacceptable because it "would mean that the requesting spouse as a matter of sheer formality must appear pro se in order to be entitled to temporary attorney fees").

I agree with Justice Lewis's analysis. Although *Perlow* involved a motion for temporary attorney's fees brought under section 61.16 and Appellant's motion here is brought under section 742.045, both statutes contain the following identical language:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings . . . . An application for attorney's fees, suit money, or costs, whether temporary or otherwise, shall not require corroborating expert testimony in order to support an award under this chapter.

§§ 61.16(1), 742.045, Fla. Stat. (2018). Nowhere within section 742.045 is there the requirement that a party must first retain counsel before a trial court determines, at the

very least, entitlement to an award of temporary attorney's fees in a chapter 742 proceeding.

Nevertheless, I concur in affirming the order. Appellant is now being represented by counsel. The trial court's order denying her motion without prejudice allows her to seek again an award of temporary attorney's fees for the present enforcement proceedings below. According to the briefs filed here, Appellant is apparently pursuing an award of temporary attorney's fees in the trial court. As such, there appears to be no present harmful error.

Lastly, I concur in the summary affirmance of the other two orders under review.