FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3855

ROBERT B. FINCH, Former Husband,

Appellant,

v.

TERRI CRIBBS f/k/a Terri C. Finch, Former Wife,

Appellee.

On appeal from the Circuit Court for Duval County.
Lance M. Day, Judge.

November 2, 2022

ON MOTION FOR REHEARING OR CLARIFICATION

TANENBAUM, J.

The former husband moves for rehearing or clarification, but his motion addresses just this court's post-disposition order remanding to the trial court the former wife's motion for appellate attorney's fees. The former husband posits a fair question: Why did we remand with a statutory reference (section 61.16(1), Florida Statutes) to the continuing jurisdiction of a trial court to award temporary appellate fees, even though our affirmance brought the appeal to a close? As the former husband notes, this court on

previous occasions has issued a "*Dresser* order,"[1] which makes a "provisional"[2] grant and sends the motion to the trial court (so still a remand) for a determination on the merits under the same statute we referenced in our order. We deny the request for rehearing but grant the request for clarification so that we can explain.

The parties in this case dissolved their marriage by a consent judgment. In that judgment, the former husband was to pay monthly permanent alimony and make monthly payments to the former wife toward an outstanding loan. Of course, the division of the marital estate and the fair distribution of the parties' assets and liabilities was conclusively determined by the trial court and was not at issue in this case. This appeal instead concerned a subsequent contempt order against the former husband for his failure to make the payments required by the consent judgment. As part of that order, the trial court awarded the former wife all her fees and costs incurred "as a sanction pursuant to Florida Family Law Rule of Procedure [] 12.1380 for [the former husband's] purposeful failure to comply with his financial obligations." We affirmed that order.

After she submitted her answer brief, the former wife submitted a motion for appellate attorney's fees. She does not seek fees as an additional sanction. Instead, she seeks them pursuant to section 61.16, Florida Statutes, claiming that there is a "substantial disparity in the parties' income," that she "has a financial need for an award of her reasonable attorney's fees," and that the former husband "has the superior financial ability to pay those fees." The motion does not explain why the former wife did not seek temporary appellate fees in the trial court to assist in securing counsel, or why she needed this court to weigh in on the issue.

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[1] This refers to *Dresser v. Dresser*, 350 So. 2d 1152 (Fla. 1st DCA 1977).

[2] "Provisional" means temporary, so a temporary grant does not have any formal effect. It does nothing to dispose of the request for relief.

The former husband is correct to mention the first sentence of subsection one of section 61.16, Florida Statutes. It does say: "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 *and appeals*. . . ." § 61.16(1), Fla. Stat. (emphasis supplied). There is no doubt that we have the authority to grant such a request. Since the late nineteenth century , the Florida Supreme Court has claimed for itself, as an appellate court, this authority to award fees to spousal litigants in need of counsel on appeal. *See, e.g.*, *Prine v. Prine*, 18 So. 781, 784–85 (Fla. 1895) (explaining that an appellate court has the authority to grant suit money for an appeal as "essential to the proper and impartial administration of justice in the exercise of our appellate jurisdiction," but denying the request for failure of proof as to the value of counsel's services and the amount of "reasonable suit money"); *Duss v. Duss*, 111 So. 382, 386 (Fla. 1926) (noting that an appellate court, "in proper cases, and upon an adequate showing of necessity and ability to pay," may decree payment of an appellate fee "for services already rendered," but denying the request because it failed to explain why it was not "seasonably made"); *Phifer v. Phifer*, 168 So. 9, 10 (Fla. 1936) (remarking that "[i]t is undoubtedly within the power and jurisdiction of the Supreme Court to order" payment of fees from one former spouse to another to assist on appeal).

This claim by the court of equitable authority stemmed from necessity. At the time, once an appeal was taken in a dissolution case, the chancery or equity court lost jurisdiction over the parties and subject matter, and the supreme court (before there were intermediate courts) acquired exclusive jurisdiction. *See State ex rel. Shrader v. Phillips*, 13 So. 920, 921 (Fla. 1893) (observing that "where an appeal and supersedeas [regarding divorce decree] have been effected, the jurisdiction of the appellate court attaches, and its jurisdiction is then exclusive"); *Prine*, 18 So. at 784 (noting that in Florida, once a dissolution case is on appeal, the trial court "was without power or jurisdiction to entertain proceedings for alimony or suit money"); *Horn v. Horn*, 73 So. 2d 905, 906 (Fla. 1954) (explaining that the filing of an appeal "transferred jurisdiction of the parties and of the subject matter to this Court"). Without a

statutory grant of authority, after an appeal is taken in a dissolution proceeding, the trial court was "wholly without power to enter [an] order requiring the payment of counsel fees and costs in connection with the appeal." *Horn*, 73 So. 2d at 906; *see Phillips*, 13 So. at 921 (mentioning with approbation a statement from the Illinois Supreme Court "that, *but for a statutory provision expressly giving the power*, there would be no hesitation in holding that the trial court had no power after the consummation of the appeal to allow the wife solicitor's fees for service in the appellate court" (emphasis supplied)).

Since early days, though, the supreme court has characterized a spouse's right to "the aid of counsel learned in the law and acquainted with her case" as the most important of the rights possessed by that spouse. *Prine*, 18 So. at 784. "Without such aid the court must perform the double and inconsistent functions of court and counsel, or she, with no knowledge of the principles or experience in the practice of the law, must cope with" able opposing counsel. *Id.*[3] The supreme court reasoned at the time that if the trial court loses the authority to consider appellate fees once the appeal is taken and the appellate court does not have the authority to consider a request for those fees as part of an award of suit money, then "no such power is vested in any court, and a great and humane principle of the law would, so far as it relates to cases on appeal, be practically abolished in this state." *Prine*, 18 So. at 784–85. To resolve this tension, the supreme court has said that "[i]f necessity existed for such temporary counsel fees, the proper

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[3] Indeed, the purpose behind section 61.16 is to ensure that both spouses "will have reasonably the same ability to secure competent legal counsel." *Cummings v. Cummings*, 330 So. 2d 134, 136 (Fla. 1976) (citation omitted); *see also Canakaris v. Canakaris*, 382 So. 2d 1197, 1205 (Fla. 1980) (same); *cf. Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 835 (Fla. 1990) (noting that a "significant purpose of this fee-authorizing statute is to assure that one party is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party").

forum, under numerous precedents, is in this Court." *Horn*, 73 So. 2d at 906.

We have no basis for doubt that this authority still exists with us. If a spouse or former spouse has a need for this court to award temporary fees, she can say so in a motion filed pursuant to Florida Rule of Appellate Procedure 9.400(b). Such a motion, however, is not a prevailing-party fee motion; it is a motion seeking our intervention on an interim basis to aid the spouse in acquiring (or keeping) the aid of capable appellate counsel. We cannot think of a reason for why such a motion should just sit quietly on our docket while the appeal progresses to disposition, so assuming that the movant is truly in need, he or she should file the motion early and flag the motion as one requiring the court's immediate consideration. The motion also needs to be more than just a bare-bones, *pro forma* one; it should explain the nature and extent of the need, include evidence of the amount of the reasonable fee charged by or already paid to counsel, and address the parties' respective financial abilities. *Cf. Prine*, 18 So. at 785 (denying fee request because the movant did not furnish "proof of her own necessities for support, as well as the means and ability of the appellant to contribute to such support during the pendency of the case here," and did not offer "any proof as to the value of services of her solicitor in the necessary proceedings here, or as to what would be reasonable suit money in this court"); *Sierra v. Sierra*, 505 So. 2d 432, 434 (Fla. 1987) (holding that an appellate court cannot award appellate fees in a dissolution case without there being proof going to reasonableness and necessity, and directing appellate courts either to remand the matter to the trial court for a determination or "provide a method for receiving evidence by affidavit or otherwise on this issue in the appellate court"). Finally, if the movant is the appellant, he or she "must assume the burden of showing, as a predicate for the granting of the application, that the appeal is taken in good faith and likely to be well founded" because the request "is addressed to the sound discretion of the appellate court." *Troeger v. Troeger*, 172 So. 473, 473 (Fla. 1937); *see also id.* (requiring an applicant, whether the appellant or the appellee, "to demonstrate to the appellate court that . . . [the spouse] is without such means, and must have learned counsel in order to properly present her defense . . . for the proper and impartial administration of justice" (citing *Prine*)).

We do not eschew our responsibility to consider such a motion when filed, especially when its urgency is brought to our attention. At the same time, since 1994 at least, there no longer is a need for appellate involvement on this front in most dissolution matters. It was in that year that trial courts acquired the authority in dissolution cases that the supreme court historically had observed was lacking. The Legislature added the following language to section 61.16:

> The trial court shall have *continuing jurisdiction* to make temporary attorney's fees and costs awards reasonably necessary to prosecute or defend an appeal on the same basis and criteria *as though the matter were pending before it at the trial level*. . . . In determining whether to make attorney's fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party's cause is deemed to be frivolous.

§ 61.16(1), Fla. Stat. (emphasis supplied); *see* ch. 94-169, § 1, at 1039, Laws of Fla. (amending § 61.16(1), Fla. Stat.). After this amendment, the trial court clearly has jurisdiction to consider and award appellate attorney's fees while the appeal is pending, and the spouse in need of fees does not have to wait until the conclusion of the appeal to get them. *See* Fla. R. App. P. 9.600(c)(1) (recognizing that the trial court retains jurisdiction in family law matters to award fees "reasonably necessary to prosecute or defend an appeal" and to make "other awards necessary to protect the welfare and rights of any party pending appeal").

In a similar vein, as we already mentioned, a fee award under section 61.16 is not a prevailing-party award; it is an award in equity to aid a spouse in need. Because the trial court now has the independent authority to award appellate fees while the appeal is pending, there is no need for some pre-authorization from the appellate court to award those fees. *See Erskine v. Erskine*, 344 So. 3d 566, 576 (Fla. 1st DCA 2022) ("The trial court did not need authorization from this court before it determined whether the wife needed suit money to help pay for her appellate counsel to assist in the defense of the husband's appeals [pursuant to section 61.16(1), Florida Statutes]."). That means a spouse in need of a

lawyer to assist on appeal does not need to come to us at all to have that need addressed. She, of course, still can make the fee request to us, but she now has the option of making the fee request to the trial court while the appeal is pending. There also is nothing that says she cannot wait until the appeal is over to make the request, and the first sentence in section 61.16(1) is broad enough to allow the trial court to consider such a fee request at the back end of the case, if somehow the need for fees did not arise until that point in the case.

As we noted above, a "provisional" grant of a motion does not really do anything. It is a fiction. With the 1994 amendment to section 61.16—establishing the trial court as an option for a spouse in need of appellate fees—there no longer is much of a role for an appellate court to play regarding those fees. We still are here to handle a request for fees under section 61.16 if there is a need for us to be involved, but filing a motion for fees in this court is not a prerequisite for seeking appellate fees under section 61.16 in the trial court. That means "authorization" from us (presumably through a provisional grant) also is not required for the trial court to consider the fee question. With all this in mind, now that the appeal is over, we do not see from the face of the former wife's motion for fees what it is that we can contribute to the fee determination that the trial court cannot. We do not have any evidence before us regarding need, ability to pay, or the amount of fees being claimed, and the trial court now is in a better position to make the factual determinations necessary to decide the motion.

We recognize that consideration of the former wife's fee request no longer would be pursuant to the 1994 language, as that sentence addresses *temporary* fees. Our reference to the sentence added to section 61.16 in 1994 was done with the intent of reminding the parties that the trial court was available all along to address any urgent need for fees. Admittedly, we also should have referenced the first sentence of section 61.16(1). At this point, "after considering the financial resources of both parties," the trial court will have to consider the former wife's fee request and make a fee determination based in part on the former wife's need to avoid seeing her fee bill diminish the financial position the alimony payments were supposed to put her in. This consideration must be made in the light of the former husband's conduct necessitating

the contempt order in the first place. *Cf. Canakaris*, 382 So. 2d at 1205 (observing that an award of fees could be appropriate "to avoid an inequitable diminution of the fiscal sums granted the wife in these proceedings").

Because we had nothing to add to the consideration of the former wife's request for fees—indeed, there is nothing we could do at this point to get the former wife the fees she ostensibly needs any faster than the trial court could—we simply remanded the motion to the trial court now that the appeal is over.

MOTION GRANTED as to CLARIFICATION; DENIED as to REHEARING.

ROWE, C.J., and RAY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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Rebecca Bowen Creed and Aaron Sprague of Creed & Gowdy, P.A., Jacksonville, for Appellee.