12-6-83

SUPREME COURT

STATE OF FLORIDA

CASE NO. 63,368

FELICIA M. TRONCONI, :

Petitioner, :

vs. :

FRANCIS JOSEPH TRONCONI, :

Respondent. :

_____ :

BRIEF ON BEHALF OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

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I. WHY WAS CANAKARIS NECESSARY?

In Yandell v. Yandell, 39 So.2d 554 (Fla. 1949), this Court approved a utilization of lump sum alimony or "alimony in gross", terming their opinion "a yardstick as a guide to the several Chancellors of this State to be used by them when considering the propriety of a lump sum award of alimony". (At page 556)

Although the Yandell court opined that an award of lump sum alimony would be proper under certain circumstances, the court's acceptance of its usage was tempered:

> We are constrained to the view that ordinarily the better practice is to direct periodic payments of permanent alimony and a lump award should be made only in those instances where some special equities might require it or make it advisable....(At page 556)

Thus, the "guidelines" for an award of lump sum alimony were thereafter devised both from the alimony statutes in affect at the time and the language of the court in Yandell, supra. This resulted in the criteria for such an award being the need of the wife, the ability of the husband to pay and the existence of "special equities". This latter reference to "special equities" would ultimately prove to be an unfortunate usage necessitating this Court's distinction between the term "special equity" and the term "special equities" in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

The "confusion" that developed subsequent to Yandell, supra, was not, however, created solely by the usage of the term "special equities" as much as by the fact that the three criteria

were often weighed disproportionately. Thus, throughout the three decades that followed the rendition of Yandell, supra, the District Courts of Appeal rendered opinions which alternately placed emphasis upon "need" in a purely financial context, "need" in the sense of a generalized necessity for the particular award made as, for example, cash funds or a residence, and the lack of or existence of "special equities" occasionally termed "an equitable contribution to the husband's estate." See e.g., White v. White, 314 So.2d 187 (Fla. 4th DCA 1975), Cannon v. Cannon, 323 So.2d 9 (Fla. 1st DCA 1975), McRee v. McRee, 267 So.2d 21 (Fla. 4th DCA 1972).

The requirement that the recipient of a lump sum alimony award demonstrates either "financial necessity: or "special equities" ultimately led to an inequitable results. A review of the decision in McAllister v. McAllister, 345 So.2d 3521 (Fla. 4th DCA 1977), with an eye towards the clarity of vision created by hindsight, is illustrative. In McAllister, supra, the parties had been married for 26 years. The wife had married the husband while he was a medical student and she was a pharmacist. She worked to assist her husband to finish school and, upon the completion of the husband's education, "almost immediately thereafter bore the first of four children." During the remaining 24 years of marriage, the wife "pursued the outmoded profession of housewife and mother". The husband became a successful physician earning a gross income in excess of $200,000 a year. The parties accumulated assets and income which enabled

the husband to go "elk hunting in Wyoming and dove shooting in Mexico" and to belong to a yacht club and to enjoy many skiing excursions. However, at the conclusion of the marriage, Mrs. McAllister received a final award of but $500 a month rehabilitative alimony for 5 years, $500 a month permanent alimony, and her one-half interest in the former marital residence.

The District Court of Appeal reversed, and directed the trial court to increase the permanent alimony from $500 to $1,000 per month during the first five years encompassed by the trial court's final order. The District Court also required that at the end of the said period the amount of permanent alimony be increased to $1,500 per month. The court noted:

> In so holding, we recognize that this decision does little more than repeat the same award that was made by the trial court, except that the total sum arrived at is permanent, rather than a combination of permanent and rehabilitative. Such a similar result is reached by us in deference to the trier of the fact who was out there on the firing line, which we were not; however we would comment that the award was low. It should also be noted that we have not forgotten the possibility of lump sum alimony being appropriate, but cannot find the trial judge's decision in this regard to be an abusive discretion under the facts and circumstances of this case. (At Page 356)

Thus, in 1977 is was not "error" to fail to award a wife of 26 years a share of the marital assets greater than her record title interest, nor was it an abuse of discretion to fail to award lump sum alimony to a wife in recognition of her contribution to the marriage despite the principles enunciated by

the First District Court of Appeal in Brown v. Brown, 300 So.2d 719 (Fla. 1st DCA 1974). It was neither error nor an abuse of discretion because the trial courts were not permitted to "make a property settlement agreement" for the parties, and the trial courts were not permitted to award lump sum alimony absent the strict requirements of the "ability to pay" and the existence of "special equities".

So long as "financial need" remained a prerequisite to a lump sum alimony award, the trial courts were precluded from utilizing lump sum alimony as a method of balancing the equities between the parties. The change in this artificial standard brought by this court's decision in Canakaris, supra, is made evident by the decision by the Second District Court of Appeal in MacDonald v. MacDonald, 382 So.2d 50 (Fla. 2nd DCA 1980). In MacDonald, supra, the trial court had awarded the wife the formerly jointly owned marital residence. The District Court noted that the award was understandable as a method of "avoiding the possibility of subsequent disputes over the support of the wife" but nevertheless reversed the award because the record failed to "reflect the positive showing of the necessity for lump sum alimony on the wife's part". (At page 50) However, on rehearing, subsequent to the rendition of the Canakaris opinion, the award was affirmed upon the basis of the existence of a "justification" and the financial ability of the husband to make the payment without substantially endangering his economic status.

The question before this Court at this time is not, we believe, whether to now retreat from the inroads made, but rather how to proceed forward along these paths.

II. THE STRUGGLES OF THE DISTRICT COURTS OF APPEAL

Speaking generally concerning the law in Florida, this Court, in Canakaris, supra, stated as follows:

> A judge may award lump sum alimony to ensure an equitable distribution of property acquired during the marriage, provided the evidence reflects (1) a justification for such lump sum payment and (2) financial ability of the other spouse to make such payment without substantially endangering his or her economic status. (At page 1201)
>
> Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, and vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme. (At page 1202) (Emphasis added)

Speaking specifically about the trial court's ruling which was before the Supreme Court for review, this Court stated as follows:

> This lump sum alimony award was clearly within the trial court's discretion and was justified as part of an equitable distribution of the property of the parties acquired during their marriage. (At page 1204) (Emphasis added)

In Robinson v. Robinson, 403 So.2d 1306 (Fla. 1981), this Court, in summarizing the ruling in Canakaris, supra, stated as follows:

> We held that awarding lump sum alimony to ensure equitable distribution of property acquired during the marriage is within the trial court's discretion so long as there is some justification for the award and the paying spouse is financially able to make the payment 'without substantially endangering his or her economic status.' Id. at 1201. (At page 1306)

Again, citing Canakaris, supra, the Supreme Court in Claughton v. Claughton, 393 So.2d 1061 (Fla. 1981), stated as follows:

> ...remarriage of the wife does not bar consideration of lump sum alimony to the extent it is used to provide the wife with an equitable share of the assets of the parties accumulated during their marriage, as distinguished from her need of support. ...The trial judge in the instant case has jurisdiction to award such lump sum alimony if it is found necessary to 'compensate the wife for her contribution to the marriage' in accordance with the standards set forth in Canakaris v. Canakaris...any award made in this instance should be based upon her equitable share of the assets resulting from her marital contribution rather than her need of support. (At page 1062) (Emphasis added)

This Court, in Canakaris, supra, approved the theory of lump sum property distribution as announced in Brown, supra.

In spite of this clear mandate, there is confusion and uncertainty on the part of trial lawyers and trial judges as to what pleadings are necessary. Canakaris stated that "...these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme. It is extremely important that they also be reviewed by appellate courts as a whole, rather than independently." (At page 1202)

The Supreme Court in Duncan v. Duncan, 379 So.2d 949 (Fla. 1980) overlooked the labels and went to the substance of the court's result and held as follows:

> The division and distribution of material wealth acquired in the course of a marriage and the interconnected needs for the support of a spouse and minor children, together with the parties' respective financial problems, are among the most difficult and sensitive issues facing a trial judge in this type of proceeding. In this case the trial judge entered an equitable and reasonable judgment. Although the erroneous finding of a special equity served as a legal basis for the award of exclusive possession of the Alabama property, the facts warranting the award was clear from the record. We affirm this correct result even though it was reached in part for the wrong legal reason.... (At page 953) (Emphasis added)

The questions which have arisen are the following:

1. Is equitable distribution an independent vehicle that the trial court can use to order the transfer of property from one party to another pursuant to a divorce proceeding, or is equitable distribution the result of the judge using the various remedies of lump sum alimony, vested special equity, child support, permanent periodic alimony, and rehabilitative alimony?

2. After #1 is answered, what pleadings are necessary? Is it sufficient to plead a request for an equitable distribution of marital property in a petition for dissolution of marriage for a lump sum alimony award, or is it necessary that the pleadings contain a prayer for an award of lump sum alimony before the court can make an equitable distribution of marital assets?

3. If one party requests an award of lump sum alimony and/or equitable distribution, can the court order reciprocal lump sum awards to ensure an equitable distribution of property for both parties?

4. If only one party asks for equitable distribution, can the court order it for both parties?

The First District Court of Appeal

The First District Court of Appeal in Connor v. Connor, 411 So.2d 899 (Fla. 1st DCA 1982), reversed the trial court's award as being inadequate for the wife, and stated as follows: After Canakaris, trial courts now have the discretion to use lump sum alimony to insure an equitable distribution of property acquired during the marriage." This wording would lead us to believe that the First District Court of Appeal believes that equitable distribution is the result and lump sum alimony is the vehicle or tool that the trial court must use to achieve the equitable distribution. This Court reviewed this decision and "...agree[d] with the First District's holding that the property distribution should be considered in light of this Court's opinion (issued after the decision of the trial court) in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980)." Connor v. Connor, 9 F.L.W. 405 (Fla., October, 1983).

The First District has now held that an award of lump sum alimony will be upheld if there has been pled in the petition for dissolution of marriage a claim for temporary and permanent alimony. Lump sum alimony need not necessarily be pled

specifically. McIntosh v. McIntosh, 432 So.2d 176 (Fla. 1st DCA 1983).

The Second District Court of Appeal

The Second District Court of Appeal has made it very clear that equitable distribution is not an independent vehicle for an award of property, but has said property of the parties in the dissolution of marriage proceeding should be disposed of by resort to the concepts of alimony and special equities with due regard given for the contribution of both parties. They have further clearly stated that for a lump sum award, that issue must be framed by the pleadings, and both parties given an opportunity to present evidence specifically directed to that issue. Hu v. Hu, 432 So.2d 1389 (Fla. 2nd DCA 1983); Mayberry v. Mayberry, 8 F.L.W. 2315 (2nd DCA, September 10, 1983); Leonard v. Leonard, 414 So.2d 554 (Fla. 2nd DCA 1982); Powers v. Powers, 409 So.2d 177 (Fla. 2nd DCA 1982).

In both Leonard, supra, and Hu, supra, the Second District pointed out that the trial court had been fair in their division, but because of the lack of appropriate pleadings, the reciprocal lump sum awards had to be reversed. It was noted that equitable distribution is the end rather than the means.

In Leonard, supra, there was an award to the wife of permanent periodic alimony and the husband's one-half interest in the parties' Florida residence as lump sum alimony. The Court awarded the husband the wife's interest in Canadian real estate also as lump sum alimony. The court reversed the award of the

interest in the Canandian property to the husband as lump sum alimony because in his answer and counter-petition there was no allegation upon which an award of alimony could be made. As a consequence, both lump sum alimony awards were reversed.

In Hu, supra, the trial court had awarded three pieces of real property to each spouse. The husband had not filed a pleading requesting an award of lump sum alimony or a special equity, and therefore the appellate court found the trial judge had erred in awarding to the husband the wife's interest in the property. The court stated that since the trial court obviously awarded the properties the way they did to balance the other, all six of the awards were reversed.

In Cyphers v. Cyphers, 373 So.2d 442 (Fla. 2nd DCA 1979), (pre-Canakaris), the husband was complaining about the trial court awarding his interest in an automobile to his wife as lump sum alimony. She had not specifically requested lump sum alimony, but had requested temporary and permanent alimony. The Second District found that her request was a sufficient pleading to support the action of the trial judge in choosing the form of alimony he did.

As we stated, in the Leonard case, the parties owned only two pieces of real estate, both of which were in joint names. In Hu, supra, there were six pieces of real estate, all jointly owned. The wife had requested lump sum alimony, but the husband had not. If the husband refuses to request equitable distribution and/or lump sum alimony in his pleadings, upon

remand, how is the trial court going to make an equitable distribution? Since the trial court cannot equitably distribute the property without the specific pleadings requested by the Second District Court of Appeal, the trial court will be forced to leave the parties as tenants in common upon the divorce. If one of the parties had requested a partition, the court could, of course, order partition, which usually benefits the more affluent party. If only one party asks for a dissolution of marriage, it can be granted even though opposed by the other party who is adversely affected by the result.

The Third District Court

The Third District Court of Appeal has stated that they feel that Canakaris, supra, has given the trial judge authority to award reciprocal lump sum awards to fashion an equitable distribution of the parties' property or to make a property settlement agreement for them. Roffe v. Roffe, 404 So.2d 1095 (Fla. 3rd DCA 1981); De Cenzo v. De Cenzo, 433 So.2d 1316 (Fla. 3rd DCA 1983); Blum v. Blum, 382 So.2d 52 (Fla. 3rd DCA 1980). De Cenzo, supra, did cite as authority Tronconi v. Tronconi, 425 So.2d 547 (Fla. 4th DCA 1982). It did not cite that portion of the Tronconi opinion, (which will be discussed later), which seems to say that equitable distribution is an independent vehicle for the division of property.

The trial court, in Blum, supra, had awarded to the wife the automobile that she was driving, which had been in the husband's name, but failed to award the husband title to the automobile he

was driving, which was titled in the wife's name. The Third District found that it was entirely unfair and inequitable to decline reciprocally to grant to the husband the wife's car, which he was driving. The appellate court directed that the judgment be revised to provide that the automobile the husband customarily drove be conveyed to him as lump sum alimony. We do not know whether or not the husband had made a request in his pleadings for any form of alimony and/or equitable distribution.

In De Cenzo, supra, the husband had appealed, alleging that the trial court had erred in its division of the marital property. The specific awards were not provided in the opinion. The appellate court did state as follows: "The trial court has the power to fashion, by reciprocal lump sum awards, an equitable distribution of the parties' property." (At page 1319)

In Roffe, supra, the wife appealed alleging error based upon the trial court's award to her of the husband's interest in the marital home, and the award of lump sum alimony of her interest in a formerly rent-producing residence to the husband. The appellate court stated, "...the reciprocal lump sum award represents an appropriate exercise of the trial court's discretion to fashion, by this device, an equitable distribution of the parties' property - in other words, to 'make a property settlement agreement' for them - which we think has been granted by Canakaris v. Canakaris, supra. ..." (At page 1906) In a footnote, we are advised that the appellate court rejected the argument that the husband's pleadings did not support the

granting of that relief. The opinion does not advise us specifically what the pleadings contained.

The cases in this district have held that a request for alimony in a pleading is sufficient for an award of lump sum alimony. Parham v. Parham, 385 So.2d 107 (Fla. 3rd DCA 1980). They have gone further in Mirabal v. Mirabal, 416 So.2d 868 (Fla. 3rd DCA 1982), and held that when both parties neither seek and even specifically waive alimony, the trial court cannot force a property settlement agreement upon them. Specifically, the trial court had ordered reciprocal lump sum alimony awards of real estate balanced by money paid over a period of months. The appellate court held that since alimony had not been requested it could not be forced on a party.

The Fourth District Court

The Fourth District Court of Appeal, in Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA 1981), found as follows: "Our view of Canakaris and Duncan is that these decisions attempted to clarify the law as to lump sum alimony and permanent periodic alimony in Canakaris and special equities and exclusive possession of property in Duncan. These decisions did not create a totally new vehicle for the award and division of property. Trial courts are still bound to exercise their broad discretion to the existing remedies." ..."We conclude that an 'equitable distribution of the property of the parties acquired during their marriage,' as this language was used by the Supreme Court, refers to an end or purpose rather than a vehicle or remedy." (At page 633)

Sangas, supra, was, of course, revisited in Tronconi v. Tronconi, 425 So.2d 547 (Fla. 4th DCA 1982). The majority opinion stated as follows:

> It is true that in Sangas we opined that Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), did not create a totally new vehicle for the division of the property; however, we now think, after further analysis of Canakaris, and its progeny, that although the Supreme Court continues to quote traditional concepts in the vernacular of lump sum alimony, periodic and rehabilitative alimony, we believe it has adopted the doctrine of equitable distribution de facto if not de jure. ...In our view the totality of the language there employed, coupled with the accompanying dissertation of the trial judges' 'broad discretion' obviously permits a trial judge to make a distribution of assets acquired during the marriage in a manner which is just and equitable: Ergo, make an equitable distribution. (At pages 548 and 549)

As to the pleading question, the majority in Tronconi, supra, stated that an equitable distribution need not necessarily be carried out automatically in every case. The party who seeks an equitable distribution should set it forth in the pleadings.

There were three concurring opinions in Tronconi, supra. It is obvious from a reading of the decision that this Court reflects the struggles occurring in all the districts. The court was obviously struggling to bring some order to the terminology.

Judge Beranek disagreed with the majority view and submitted that equitable distribution is the goal which is to be achieved through the avenues of alimony and special equities. Judge Glickstein stated that he was troubled by the concepts of the

labelling. He felt that it would be wiser and more meaningful to have the Supreme Court answer the question as to whether or not equitable distribution is the vehicle to achieve equity and justice or was the goal which was to be achieved by awards of lump sum alimony, reciprocal and otherwise. Judge Anstead found the court "...gripped in a battle of semantics as to whether to label the Supreme Court's adoption of this approach as an entirely new remedy of 'equitable distribution' or simply an approval of the use of the existing remedy of lump sum alimony free of the artificial and inequitable restraints previously placed on its use." (At page 553) He felt that "...Canakaris, simply seems to have endorsed the use of the existing remedy of lump sum alimony based on the standards previously articulated in Brown." (At page 553)

The spirit of Tronconi, supra, is that equitable distribution and lump sum alimony are synonomous and the trial court should not be reversed if they have reached an equitable result. The problem, of course, is whether or not the parties have had sufficient notice of what the other party is going to be seeking, and thus an ability to present a defense or an alternative plan for distribution.

The Fourth District, in Nusbaum v. Nusbaum, 386 So.2d 1294 (Fla. 4th DCA 1980), has specifically held that a prayer for temporary and permanent alimony is sufficient for an award of lump sum alimony.

The Fifth District Court of Appeal

It does not appear that the Fifth District Court of Appeal has specifically addressed the questions cited above. They do cite Canakaris, supra, with approval and specifically quote that portion of Canakaris, supra, which states that the court is to use lump sum alimony to ensure an equitable distribution of property acquired during the marriage. Lynch v. Lynch, 8 F.L.W. 2308 (5th DCA, September 15, 1983); Gorman v. Gorman, 400 So.2d 75 (Fla. 5th DCA 1981); Powell v. Powell, 421 So.2d 575 (Fla. 5th DCA 1982).

A fifth natural question arises as a result of the review of the district courts' stuggle. That is:

5. Are there two types of lump sum alimony?

As to question #5, Canakaris, supra, stated as follows: "Yandell clearly does not limit the use of lump sum alimony to instances of support or vested property interest. A judge may award lump sum alimony to ensure an equitable distribution of property acquired during the marriage, provided the evidence reflects (1) a justification for such lump sum payment and (2) financial ability of the other spouse to make such payment without substantially endangering his or her economic status." (At page 1201). In Claughton, supra, the Supreme Court noted that upon the wife's remarriage, the trial court was barred from any facet of periodic or lump sum alimony which could be predicated on the need to support the wife.

The Fourth District Court of Appeal, in Tronconi, supra, found that there are not two types of lump sum alimony and stated as follows: "There is an important new twist which emerges from Canakaris. One of the two basic criteria traditionally employed to support lump sum awards has been deep sixed and is never once referred to in the opinion in the context of lump sum. 'Ability' to pay remains but 'need' has been excised and instead the word 'justification' substituted." (At page 549) The Fifth District in Lynch, supra, has specifically found that there are two types of lump sum alimony, one relating to support, and the other related to making an equitable division of marital property. Or more specifically as follows: "We thus find Canakaris as confirming the two-fold use of alimony - for support, when a need and a concomitant ability is shown, and as a tool for equitably dividing marital property when justification is shown, as well as the concomitant ability to comply." (At page 2308)

Claughton, supra, stated that lump sum alimony for the remarried wife would be appropriate to provide her with an equitable share of the assets of the parties accumulated during their marriage as distinguished from her need for support. In talking of lump sum alimony to be awarded to this remarried wife, the court never used the word "justification". Is Tronconi, supra, saying that by Canakaris, supra, failing to use the word need in its description of lump sum alimony and in approving both Yandell, supra, and Brown, supra, that justification encompasses both an award to provide for an equitable share of the assets of

the parties accumulated during their marriage, and the need for support. Lynch, supra, has stated that there are two types of alimony, the one for support and the other for the equitable division of marital property. These decisions could be reaching the same result and saying the same thing.

The last question that naturally arises from a review of the cases above is:

#6. When an equitable distribution is invoked, does it take the place of lump sum alimony or any special equity?

The Fourth District Court of Appeal, in Tronconi, supra, stated: "When an equitable distribution is invoked it may well take the place of lump sum alimony or any special equity. However, any such equitable distribution may be influenced by factors indicating the presence of a special equity or any concomitant award of periodic alimony." (At page 549) Canakaris, supra, on the other hand, stated clearly as follows: "The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme." (At page 1202) While all these remedies must be interrelated, and must be considered part of one overall scheme, nowhere does Canakaris state that

special equity is to be disregarded in equitable distribution. On the same day of Canakaris, and as referred to in Canakaris, Duncan v. Duncan, 379 So.2d 949 (Fla. 1980) completely reviewed special equity and its importance in the division of property at the time of dissolution.

Can it be assumed that there are circumstances where even though a party has a special equity in an asset, the court can award that asset to the other party based upon need or justification?

In Bird v. Bird, 385 So.2d 1090 (Fla. 4th DCA 1980), the trial court found that the wife had a special equity in a taxi business based upon her contributions to that business during the marriage. The court then awarded that business to the husband. The court then found that the wife had a special equity in three pieces of property that were in joint names. They then awarded the husband's interest in the property to the wife as lump sum alimony. The appellate court noted that the finding of special equity in the three pieces of property did not follow the strict rules of a special equity, but that the court had done equity in its award and distribution. The appellate court found: "The award of lump sum alimony was not unreasonable but rather it 'ensure[d] equity and justice between the parties.'" (At page 1092)

Canakaris, supra, stated, "Although the statutory prohibitions underlying the formulation of the special equity doctring no longer exist, this vested interest aspect of the

doctrine remains a viable part of our case law." (At page 1200). "The term 'special equity' ... should be used only when analyzing a vested property interest of a spouse." (At page 1201) (Emphasis added). Duncan, supra, stated "In its true sense, a 'special equity' is a vested interest which a spouse acquires ..." "When the court finds a true 'special equity,' it should indicate that the party has a vested interest in the subject property. The award, once made, is permanent and not subject to modification." (At page 952) Landay v. Landay, 425 So.2d 1197 (Fla. 1983) stated "...the spouse who furnishes some but not all of the consideration for entireties property has, in effect, made a capital investment, which should give the contributing spouse an enhanced interest in the property. Having invested his or her capital in the property, the contributing spouse should be permitted to reap the fruits of such investment, if any." (At page 1199)

III. SUGGESTED SOLUTIONS TO THE ISSUES RAISED

1. Is equitable distribution an independent vehicle that the trial court can use to order the transfer of property from one party to another or is it the result obtained by using the various remedies of lump sum alimony, vested special equity, child support, permanent periodic alimony and rehabilitative alimony? This is largely a matter of semantics so long as: (a) the parties know what pleadings are necessary to request an equitable distribution or division of marital assets; (b) the trial judge has the power to make such equitable division or distribution under proper circumstances and knows what to call it in his final judgment, whether equitable distribution, lump sum alimony based on justification and ability, or whatever; and (c) the trial judge has the power to not only grant fairness in equity to the person requesting equitable distribution, but also to accomplish it through reciprocal lump sum awards when dealing with the problem of dividing property regardless of how it is titled, so long as it marital property.

2. What pleadings should be necessary? As long as the required pleadings are not a trap for the unwary, it is submitted that it does not really matter. Since the granting of an equitable division or distribution of marital assets is a form of lump sum alimony is authorized by statute and case law, it would seem that any pleading which asks for alimony, lump sum alimony, an equitable division of marital assets or equitable distribution should be sufficient to put the other party on notice that

alimony to make such an equitable division or distribution was being requested.

In any event, the most important thing is for this Court to state with clarity what pleadings are required.

3. Are reciprocal awards of property authorized to accomplish an equitable division or distribution of marital assets? This question of necessity must be answered yes. The Second District Court of Appeal, in Leonard, supra, and Hu, supra, reversed reciprocal lump sum awards even though they resulted in a fair and equitable distribution of marital property. How does this make any sense when the result the court seeks is fairness and equity?

It is impossible to give an equitable distribution or division of marital assets to one party without doing equity for the other party. The Second District's approach is no problem when the majority of the marital assets are titled in the name of the party other than the one seeking equitable distribution. It is then simple to take from the one who has and give to the one who does not have in order to equalize or to equitably distribute the asset. On the other hand, in most modern marriages, assets, even when substantial, tend to be more jointly and equitably owned. Unless the Court is going to leave the parties as joint titleholders of all the assets, or invariably require partition, both of which in many cases would leave the parties with an undesirable and undesired result, reciprocal lump sum alimony awards are the only solution to making an equitable distribution.

The Second District seems to be saying you cannot have reciprocal lump sum awards unless both parties ask for the relief. Leonard, supra, and Hu, supra. This does not conform to any pre-existing standard for the granting of other relief in these cases. The dissolution of the marriage, child support, alimony, attorney's fees, suit money, costs, partition and all other forms of relief can be granted even though the other party strenuously objects to such relief. One party can ask for alimony in one form and end up getting it in another form if the court, under the fact, has competent, substantial evidence to support such an award. Thus, a wife asking for lump sum alimony might, instead, be awarded permanent periodic alimony. Also, a party who is not seeking relief can be granted assets. This occurs in partition when a party desires to leave the property as it is, the court orders partition, and as a result, the party does not receive the property, but rather receives the cash that results from the sale.

Clearly, this Court needs to approve reciprocal lump sum awards as ordered in this case and disapprove the language of Leonard, supra, and Hu, supra, which would seem to prohibit such awards.

4. If only one party asks for equitable distribution, can the court order it for both parties? As indicated above, this question must be answered in the affirmative if equitable distribution is to have significant meaning and the trial judge is to be free to fashion a fair and equitable result when requested to grant such relief.

5. Are there two types of alimony? It does not matter which of the two options the court accepts; (A) that lump sum alimony can be awarded based upon (i) justification and financial ability or (ii) need for support, or (B) lump sum alimony is to be awarded based upon justification and financial ability, to ensure an equitable distribution of the property acquired during the marriage and to provide support for a needy spouse. The important thing is that the trial judge has the ability to divide the property equitably between the parties, and provide for the support needs of both.

6. When an equitable distribution is invoked, does it take the place of lump sum alimony or any special equity? No. It must all be considered as one overall general scheme to do equity. Florida has a clear history of returning to a party property which was owned by them prior to the marriage, or giving them an interest in property because of a contribution of funds, property or services over and beyond the performance of normal marital duties. Once that special equity is determined, because of the respective needs of the parties, and a particular justification, the court, after recognizing that special equity, could award that piece of property to the other spouse. The court could then award other property or other equities to reimburse the party which was found to have the special equity.

Finally, it would be very helpful to the practicing bar to have the questions raised by this case and in our brief answered clearly and concisely. It also would be helpful if the Court

could suggest to trial judges throughout the state some orderly process through which they could go in evaluating the various remedies available to achieve an overall fair and equitable result between the parties. An illustration of what we would suggest as a direction for trial judges would be the following order of consideration:

1. First, determine the nature, extent and value of all assets owned by the parties.

2. Determine what special equities, if any, either party has in such assets by reason of ownership prior to the marriage or contributions to the acquisition or enhancement of such asset from sources unconnected with the marriage in accordance with Canakaris, supra, Landay, supra, and others.

3. Determine which of the "all assets owned by the parties" should not be considered as marital assets , (pursuant to the theories of special equities).

4. Determine what distribution of such marital assets should be made between the parties based upon the principles enunciated by this Court in Canakaris, supra.

5. Next, in light of such property distributions, determine the ability of both parties to contribute to the support of their minor children, if any, and establish a support amount.

6. Determine, in light of the property division and child support awards, the need or a lack thereof for requested support by either party from the other, taking into account their ability, if any, to contribute to their own support from the

assets allocated to them by reason of equitable distribution or their special equities.

7. Make an alimony and support award by additional lump sum alimony or by periodic alimony whether rehabilitative or permanent, as is justified by the facts and the principles previously enunciated by this Court in other cases.

There are many questions related to the equitable distribution and division of marital property which are raised by the decision in the Canakaris case, but which are not necessarily or appropriately answered in this case. One raised by the Fourth District Court of Appeal below, is the promulgation of a laundry list of guidelines as to what is and what is not marital property. It is submitted that such issues should be left to another day and another case even though we agree that such questions cry out for determination. It would be better to promulgate them in a case in which the direct issue is before the court and briefed and approached by both parties.

The questions that this case raises are important, critical issues to the bench and bar. Canakaris, supra, must be given effective meaning, and the promise of Brown, supra, must continue to benefit the economically disadvantaged spouse, so that a new day is indeed dawning in Florida in which both parties, regardless of how the benefits and fruits of the marital partnership are titled will have an equitable share in those benefits. Upon proper pleadings, the trial judge must be able to effectively make a property settlement for the parties and

equitably distribute the assets they have accumulated during their marriage.

The confusion among the district courts of appeal, brought to light in Tronconi, supra, boils down to questions concerning terminology, rather than theory. Is equitable distribution a vehicle, or a means toward achieving a desired result, or is it the end result itself? Are we left with two kinds of lump sum alimony, one based upon need, and the other based upon an attempt to make an equitable division of property? Is special equity to be ignored or considered? If one is to step back and view the direction of the recent district court opinions, a common thread comes to light. All of the courts attempt to do equity between the parties. The problem comes in when a court mislabels its method of arriving at its decision.

There is a danger in labeling equitable distribution as a "vehicle", as stated in Tronconi, supra. An attempt to use equitable distribution as a vehicle to arrive at the end result, may cause a court to ignore important theories such as special equity and possibly facilitate a judicial glossing of facts in the case. If equitable distribution is the vehicle, then what is the result to be obtained? Is it equity, and does equity equal an equitable distribution?

This use of equitable distribution as a vehicle may have caused the Tronconi supra, court to seemingly contradict itself. Early in the opinion, the court revisited Sangas supra, and said that equitable distribution is no longer the end to be achieved,

but is the vehicle the court uses in distributing assets. Tronconi, supra, used the following terms: "...a distribution of assets acquired during the marriage in a manner which is just and equitable; ergo, make an equitable distribution."; "Nor do we suggest that an equitable distribution must be carried out automatically in every case."; "...'equitable' distribution does not require an 'equal' distribution."; "When an equitable distribution is invoked ..."; "...equitable distribution may be influenced by factors indicating the presence of a special equity or any concomitant award of periodic alimony."; and "He or she who seeks an equitable distribution should set it forth in the pleadings." (At page 549) All of these cited quotations from Tronconi, supra, indicate that even though the Tronconi court felt that Sangas, supra, must be revisited and equitable distribution must be a vehicle, they also obviously feel that equitable distribution is the result to be obtained.

Thus, if the semantic cloud is permeated, we find all the courts in agreement on this point. Alimony no longer must be divided into "two forms". By basing an award of alimony upon a finding of justification, one form absorbs the other. A court must consider all relevant factors, both social and economic, to "justify" a lump sum award to ensure an equitable distribution. The use of the word "justification" simply constitutes a broadening of the blanket of reasons upon which a court can base an award of lump sum alimony. "Justification" encompasses the ideas of need, equity, fairness, necessity, contributions to the

marriage and so forth.

CONCLUSION

It is important that this Court clarify the following:

1. What pleadings are necessary in order to raise the issue and give the trial judge the power to effect an equitable distribution?

2. Is the trial judge, in connection with granting an equitable distribution, authorized to make reciprocal lump sum awards in order to accomplish such distribution?

3. Can the trial judge grant equitable distribution upon the request of one party only and make such reciprocal lump sum awards even though a party receiving the benefit of a portion of that award does not seek it?

We submit that the nature of the pleadings is not so important as the clarity of statement by this Court as to what is required. Reciprocal lump sum awards are essential to effective equitable distribution in the vast majority of marriages. The ability of the trial court to grant relief to a party requesting it should not be limited by the fact that the other party did not also request such relief. Thus, reciprocal awards should be allowed even though only one party has requested equitable distribution or lump sum alimony in the manner directed by this Court.

Finally, the issues raised are important to the trial bench and bar and cry out for answer. A direct, positive response will serve to <u>reduce</u> litigation, unnecessary appeal and the reversal of just and equitable awards because somehow the "magic words"

were not used by the trial judge or the attorneys for the litigants.

Respectfully submitted,

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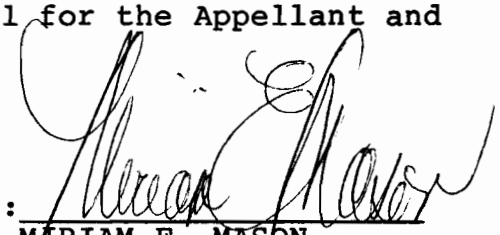
* The Family Law Section of The Florida Bar has submitted this brief on its own behalf as distinguished from The Florida Bar as a whole.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Brief of Amicus Curiae on behalf of the Family Law Section of the Florida Bar has been served by mail upon counsel for the Appellant and Appellee, this 4th day of November, 1983.

BY: 
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