IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 63,368

FELICIA M. TRONCONI,

Petitioner,

v.

FRANCIS JOSEPH TRONCONI,

Respondent.
_____/

RESPONDENT'S BRIEF

PHILIP MICHAEL CULLEN III
CHARTERED
SUITE 206, 700 S.E. 3RD AVENUE
FORT LAUDERDALE, FLORIDA 33316
(305) 462-0273

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NOS.

OTHER AUTHORITIES

POINTS ON APPEAL

STATEMENT OF THE CASE

Respondent, Francis J. Tronconi, adopts Petitoner's statement of the case as to those matters showing the jurisdiction of this court. Respondent would add the following:

In the court below, Petitioner, as noted in her statement of the case, filed a motion seeking to compel Mr. Tronconi to contribute payments to a second mortgage on the marital residence (R. 209-210). While Appellant reports the General Master's Reports and two court orders issued on that motion, nowhere has Appellant advised this court that on two separate occasions, she failed to convince the General Master to recommend Mr. Tronconi be compelled to contribute to the mortgage payments (R. 220, 222, 237, 240).

STATEMENT OF THE FACTS

In the court below, the trial of this action took an entire day. The testimony ranged from three expert witnesses testifying on behalf of Mr. Tronconi to Appellant's requesting "three dishes, three forks, and three spoons." (T. 180, A.68). The testimony was often conflicting. Appellant herself gave different accounts of certain events. Based on all the testimony, Judge Ferris, having as the opportunity to evaluate the credibility and demeanor of the witnesses, made extensive findings of fact which appear in the Final Judgment. The District Court--en banc upheld those findings unanimously. It is Respondent's position that those finding are supported in all respects by substantial competent evidence and constitute to the facts of this case.

Turning to the record, one finds that the parties were married in 1955. Mr. Tronconi brought into the marriage real property valued between $12,000 to $18,000, an automobile and approximately $700 in cash. (T.46, A.24). Mrs. Tronconi had about $5,500 prior to the marriage (T. 150, A.53). Appellant testified $3,000 of this amount was utilized as a down payment on a lot in Pompano Beach, Florida (T. 151, A. 54). No cancelled check or other evidence of payment was forthcoming. Five hundred

dollars was utilized for moving expenses (T. 150, A. 53). No evidence was presented as to what use the remainder was put.

In 1969, Mrs. Tronconi testified she received a $2,500 inheritance (T. 152, A.55). Mr. Tronconi had no recollection of such occurring (T. 94, A.42). In any event, Mrs. Tronconi testified that the funds were utilized to purchase a 1970 Pontiac Station Wagon, originally titled in her name and later transferred to a jointly owned company. (T. 152, 153, A. 55,57).

Immediately after their marriage, the parties lived in Florida, subsequently moving to Connecticut. Ultimately, Mr. Tronconi's real estate was sold for $18,000 (T. 51, A. 26) The proceeds of that sale were utilized for the acquisition of a residence in Avon, Connecticut. (T. 50, A.25). As of the time of that purchase, whatever funds may have at one time, come from a source separate and apart from the marriage and which could be traced, were invested in either the Avon, Connecticut home or a 1970 Pontiac which was later demolished. (T. 162, A.62) At least prior to their separation, the only other source of funds available to the parties were the salaries each earned.

The parties lived in Connecticut for a number of years with both working. Mr. Tronconi obtained his Master's Degree with a Ford Foundation Grant. Their joint funds paid for Mrs. Tronconi's college degree (T. 52, A. 27). It was during this period of time that the parties acquired two lots on Stella Maris in the Bahamas.

After a number of years, marital difficulties developed. The parties separated in 1972 and agreed to a division of their assets. (T. 109, A. 46). Mr. Tronconi received $18,000 from the Avon property plus the two lots in the Bahamas. Appellant received $25,000 in cash (T. 54, A. 28). In addition, Mrs. Tronconi claimed she received the parties' household furniture (T. 57,A. 29). Mr. Tronconi testified to the exact opposite. (T. 109, A. 46)

Respondent moved to Fort Lauderdale and filed for divorce. This action resulted in a Court Order compelling the compliance with a Property Settlement Agreement of the parties (R. 306-307). No divorce was ever granted and a reconciliation ensued.

Both Mr. and Mrs. Tronconi then settled in Fort Lauderdale. They acquired the marital residence, the Great Abaco property, and the Lake Placid property. The first two were acquired with joint funds. (T. 59, 61, 158, A. 30,31,59). The parties went into the last mentioned purchase as a 'business proposition'. (T. 107, A. 45). Twenty thousand dollars was borrowed from a third party (T. 147, A. 52) and the remainder of an $80,000 purchase price paid from joint funds. (T. 109, A. 46).

During their marriage, both parties worked--occasionally at two jobs (T. 159, A. 60). Both had various separate bank accounts as well as joint accounts. Mr. Tronconi had previously accumulated approximately $10,000 in a pension fund while em-

ployed by the State of Connecticut (T. 91, A. 41). Mrs. Tronconi had a separate pension with the same employer. (T. 175, A. 67) There was no evidence as to her accumulations in it nor if, in fact, she still has an interest. In 1979, Mr. Tronconi withdreew the funds from his pension plan and invested them in gold. The investment was lost (T. 66,67,68,94, A. 32,33,34,42). In June of the same year, he surrendered a life insurance policy, realizing approximately $6,000 (T. 68, A. 34). While it was in effect, the premiums were paid from Mr. Tronconi's separate account, (T. 99, A. 44) the parties joint account (Id.) and for a short period Mrs. Tronconi's (T. 161, A. 61) account which, as she testified, represented joint funds. (Id.,) The money realized was deposited into one of his bank accounts with other funds. While the specific funds could not be traced, (T. 68, 69, A. 34, 35) Mr. Tronconi utilized funds from that account to pay off his own Cadillac in the amount of approximately $6,000 and also paid $3,000 toward the purchase of a Cadillac for his wife, (T. 68,69, A. 34,35).

Marital difficulties ensued and the parties separated in 1979. Mrs. Tronconi remained in the marital residence. Mr. Tronconi ultimately moved to the Lake Placid property paying all the expenses in connection with that property. (T. 59, 61, A. 30, 31). In the interim, Mr. Tronconi's health also deteriorated. He had ulcers and developed certain psychiatric difficulties referred to as an adjustment disorder with work inhibition. In

connection with Mr. Tronconi's problems, the trial judge found that his condition

> had existed in the past and is reasonably likely to continue in the future. As treatment [Mr. Tronconi] requires supportive psychotherapy on a monthly basis.

The trial judge also found

> The mental disorder with which Petitioner is afflicted prevents him from pursuing his normal occupation of teaching high school. Petitioner has been unable to obtain other employment. As present, his only source of income is unemployment compensation. (R. 260, A.15)

In support of that finding, a deposition of Dr. O'Lone, Mr. Tronconi's psychiatrist was presented. Mr. Tronconi testified as to the number of job inquiries he had made in a number of different areas and in several geographic locations. (T. 73, 75, 131, 133, A. 36, 37,50, 51). He was unable to find employment. (T 131, 133, A. 50, 51). No testimony was presented on behalf of Appellee to indicate that jobs were available for someone with Mr. Tronconi's difficulties, nor, if they were, that the salary generated would be anywhere near sufficient to enable him to pay his living expenses. In addition, it appears from the testimony that Mrs. Tronconi made efforts to have her husband discharged from employment on several occasions, through comments made to his employers. (T.44, A. 23).

Subsequent to the separation action, an action was commenced to foreclose the second mortgage on the marital residence alleging that a balloon payment of $12,000 due in June of

1980 was not made. (R. 317-321). A Motion to Dismiss was filed on behalf of Mr. Tronconi asserting that the complaint for foreclosure did not state a cause of action because the mortgage was not in default. As is set forth more fully hereinafter, the complaint in foreclosure was filed eight (8) days prior to the expiration of the fifty (50) day grace period set forth in the mortgage. (R. 317-321). In any event, Mrs. Tronconi proceeded to obtain a satisfaction of the second mortgage. She borrowed approximately $6,000 and utilized $3,200 in her IRA account and an additional $3,400 from her "working funds". (T. 61, A.31). The note which the mortgage secured was produced at trial. It bore no evidence of payment. (R. 609). The foreclosure action was dismissed without prejudice.) (R. 322).

It was in this posture that the case came on for trial. Mrs. Tronconi was earning between $15,000 and $17,000 per year (T. 183, A. 69) Her husband was on unemployent compensation. (T. 75, A. 37) Their only substantial assets were the real property, their automobiles and the furniture in the marital residence.

POINT I

THE RESULT IN THIS CASE IS CORRECT REGARDLESS OF THE LEGAL THEORY

Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) and Duncan v. Duncan, 379 So.2d 494 (Fla. 1980), its companion case, substantially altered the domestic relations law of this State in that those decisions made available a form of relief not previously permissible in divorce actions. e.g., MacDonald v. MacDonald, 382 So.2d 50 (5th DCA 1980) (on rehearing); compare Roffe v. Roffe, 404 So.2d 1095 (3rd DCA 1981) with Meredith v. Meredith, 366 So.2d 425 (Fla. 1978) and Cummings v. Cummings, 330 So.2d 134 (Fla. 1976). To the extent that there is uncertainty at the District Court level in this area of the law, it arises not from whether the law was changed, but over how the change was effected. In other words, did this Court engraft the doctrine of equitable distribution onto the law of Florida as a separate vehicle for relief, or did it redefine lump sum alimony so as to permit an already existing remedy to be utilized to equitably distribute marital assets? These two positions are clearly delineated in the majority opinion of the Court of Appeals, Tronconi v. Tronconi, 425 So.2d 547 (4th DCA 1982), (en banc) and in Judge Beranek's concurring opinion respectively. It was dicta in Judge Beranek's earlier opinion in Sangas v. Sangas, 407 So.2d 630 (4th DCA 1982), setting forth the same

position he espoused in Tronconi that gave rise to the statements made by the Second District in such cases as Hu v. Hu,432So.2d 1389 (2nd DCA 1983), Leonard v. Leonard, 414 So.2d 554 (2nd DCA 1982); and Powers v. Powers, 409 So.2d 171 (2nd DCA 1982) which are the cases on which Petitioner relies to establish conflict. Where the Second District has reached the merits, it has approved reciprocal lump sum alimony. Aylward v. Aylward, 420 So.2d 660 (2nd DCA 1980)

In her brief, Petitioner advances various theoretical considerations to support her argument that Sangas represents the correct interpretation of Canakaris. What her arguments overlook is that, on the facts of this case, the result would be no different were she correct. The decision of the Fourth District and concurring opinions in the case sub judice provide this Court with the advantage of having both interpretations of Canakaris applied to identical facts. The majority would affirm. Judge Beranek, even applying the rationale of Sangas would affirm. Concurring in the result reached by the majority he noted:

> The award here can be sustained as a "justified" award of lump sum alimony". Tronconi,supra,at 550 (Beranek, J. concurring).

The rationale may be different. The result of the specific controversy now before this Court would be exactly the same. See

Tronconi, supra, at 552 (Anstead, J. concurring). As the Court of Appeals, Third District, noted in similar circumstances:

> There is no purpose to be served by returning the case to the trial court for a change in nomenclature. Roffe, supra, at 1097.

POINT II

EQUITABLE DISTRIBUTION IS A SEPARATE VEHICLE FOR RELIEF IN DIVORCE ACTIONS

Any analysis of the law are relative to equitable distribution must begin with an analysis of what this Court held in Canakaris and Duncan. The former involved a long-term marriage. Prior to the property distributions, the wife had a net worth of almost $300,000. The husband's net worth was in excess of $3,000,000. The trial judge awarded the wife, as lump sum alimony, $50,000, plus the husband's interest in the marital residence. The husband appealed, the Court of Appeals reversed and the Supreme Court, quashing the decision of the District Court, held:

> A judge may award lump sum alimony to insure 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 payments without endangering his economic status. Canakaris, supra, at 1201.

Further, in addressing itself to the issue of judicial discretion, the Court stated:

> The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose including the lump sum alimony, permanent and 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. It is extremely important that they also be reviewed by appellate courts as a whole... Id., at 1202 [emphasis added].

The first case to apply the rationale of Canakaris to a situation factually analogous to this case was Duncan, supra, in which the parties owned two motor vehicles, some furniture, a tractor, cash and two parcels of realty. Initially, the Court upheld the award to the wife of one vehicle, the furniture, one half the cash, plus "an additional sum to equalize the automobile distribution" Id., at 951. The husband received the other automobile, the tractor, and the remaining cash. The Court then awarded exclusive use of one parcel of property to the wife and the other to the husband because

> To do otherwise would likely force partition... resulting in significant...expense... and an accomanying decrease in the husband's fiscal ability. Id., at 953.

As concerns the present case, two points are noteworthy about Duncan. Initially, the Court awarded one vehicle to each party, utilizing cash to balance their respective interests and awarded the furniture to the wife and the tractor to the husband making no mention of alimony, lump sum or otherwise. This is precisely what Judge Ferris did with the major pieces of real estate in the Final Judgment, using the furniture and the Bahamas property to balance the awards.

The second point to be made regarding Duncan is that it approved reciprocal exclusive use awards.

The parties in Duncan were at opposite ends of the

financial spectrum from Dr. Canakaris and his wife. Neither of the Duncans had sufficient assets to permit substantial awards of periodic alimony. The major assets were two parcels of realty. Awarding exclusive use of one parcel to the wife and the other to the husband avoided what the Court recognized would have been the mutual financial disaster that would befall the parties were partition ordered. Also, Hartley v. Hartley, 399 So.2d 1126 (4th DCA 1981).

Prior to Canakaris, Courts could not transfer marital assets between the spouses except in limited circumstances. The partition statute, which applies to both real and personal property, governed. Against that background, on what basis was the property division in Duncan made? The Court "made a Property Settlement Agreement for the parties" in that it equitably distributed their assets without reliance on-or even mention of-any of the traditional remedies. In other words, equitable distribution is a distinct vehicle for relief. In the case sub judice, the Fourth District did no more than hold that it was not an abuse of the "broad discretion" recognized in Canakaris for a trial judge to apply the remedy approved in Duncan.

Support for the conclusion that equitable distribution is a separate vehicle for relief appears in analyzing the underlying problem Canakaris was intended to resolve. As this Court described the situation, the term special equity was being used to describe both a "vested interest in property" and to "justify an

award of lump sum alimony" Canakaris, supra, at 1200, 1201. Defining the same term in two different ways gave rise to Court decisions that were "not reconcilable". Id. It is unlikely that in an opinion having avowed purpose bringing "some stability to this area of the law" this Court intended to perpetuate the very problem Canakaris was written to avoid.

That result, however, is exactly what Petitioner asks this Court to do. There are, her brief advises "two types of lump sum alimony". It may be awarded to equitably distribute marital assets based on justification and ability and for support presumably under the positive necessity standard. Were that approach followed, the law would once again utilize the same term to define two very different forms of relief with radically different consequences. There would be two sets of standards for awarding "lump sum alimony" and, therefore, two separate standards for appellate review. The tax consequences of a property division are considerably different from an award of traditional lump sum alimony. Lastly, consider the question of enforcement. In Geisinger v. Geisinger, 8 F.L.W. 2134 (4th DCA 9/9/83),the Court of Appeals was uncertain not only as to on which basis lump sum alimony had been awarded, but how that award could be enforced. Specifically, the Court seem to harbor serious doubts as to whether contempt would be available. Id., at 2144. Were such an approach adopted, it would not be long before the decisions of the Appellate Courts are again irreconcilable. The

state's domestic relations law would be right back in the same thicket from which it was freed by Canakaris.

Like "community property" or "comparative negligence", equitable distribution is a legal term of art that is reasonably well defined. See Mason & Sessums, Equitable Distribution: As of What Date is Property Included and Valued, 56 Fla.Bar.J. 281 (March 1982); Elser & Anton, Distribution of Personal Injury Awards Upon Divorce, 56 Fla.Bar.J. 552 (June 1982). It is a term that may produce consistent results even without resorting to lists of "mandatory guidelines" such as those Petitioner suggests. In Canakaris, This Court specifically disaproved of such "inflexible rules." Canakaris, supra,at 1200. As the Fourth District noted in the recent decision of Upstill v. Upstill, 8 F.L.W. 2047 (4th DCA 2/19/83) the difficulties of equitable distribution are not so much uncertainty with the factors to be considered in determining an appropriate property distribution as with proving those contributions and their value. It was the type of detailed proof missing in Upstill on which the judgment in the case sub judice was rendered. It was the same type of factual basis that was adduced before the trial Court in Sangas. Sangas, supra, at 632. Also, Hurtado v. Hurtado, 407 So.2d 627 (4th DCA 1981). It was that detailed proof which allowed the majority of the Fourth District to distinguish Sangas, and the entire panel to affirm regardless of legal theory.

Petitioner's brief makes much of dicta in the District

Court's opinion with respect to the relationship between equitable distribution and the traditional remedies, specifically the special equity and lump sum alimony. With respect to the former, the District Court not only "stressed" its opinion applied only to marital assets, but "specifically did not address" the question of assets acquired by inheritance or gift. Tronconi, supra, at 549, immediately, prior to the comments quoted by Petitioner with respect to lump sum alimony. The op inion says nothing about how many types of lump sum alimony there may be. The issue was simply not before the Court. Beyond that, the dicta in the District Court's opinion are not impermissible law making, but merely a reflection of this Court's own dicta in Canakaris.

While it is not necessary to examine that matter in this case, it is enlightening to follow the rationale of Canakaris to its logical conclusion. In that decision, this Court stressed on several occasions that the traditional remedies were part of one interrelated scheme to be reviewed as a whole. In addition to that holding and its approval of lump sum alimony to effectuate equitable distribution where justification and ability are present, the Court, citing Patterson v. Patterson, 315 So.2d 104 (4th DCA 1975), indicated that permanent periodic alimony could be used for the same purpose. Canakaris, supra, at 1202. In such circumstances, the standard for both types of alimony would be justification as opposed to need. See Lewis v.

Lewis, 383 So.2d 1143,1144 (4th DCA 1980). While not specifically addressed, theoretically, the same consideration should apply with regard to rehabilitative alimony and child support, since the same need and ability standard were previously utilized in all cases. The Courts of at least one other state "equitably distribute" the benefits and burdens of child support. Conway v. Dana, 546 Pa. 536 (1974).

At least prior to this Court's decision in Landay v. Landay, 429 So.2d 1197 (Fla. 1983) published subsequent to the decision in this case, there were suggestions that even the special equity doctrine may have undergone a similar metamorphosis as a result of Canakaris and Duncan. Tommaney v. Tommaney 405 So.2d 454 (2nd DCA 1981). See Frumkes, Florida's Flight to Fairness (Equitable Distribution in Florida: from January 31, Through February 14, 1982) Part I, 56 Fla.Bar J. 351, 352 (April 1982).

Because of the emphasis that the Canakaris Court placed on the end result and blurring of the distinctions between the traditional forms of financial relief available in divorce actions, it would appear that these forms may ulitimately be reduced to little more than descriptions of various facets of financial relief awarded on the basis of justification and ability rather than separate forms of relief having distinct legal requirements and purposes.

In summary, the language and logic of Canakaris and

Duncan compels the conclusion that equitable distribution is a separate vehicle for relief. The holding in Tronconi is a correct application of Canakaris and Duncan. Equitable distribution is a defined remedy whose consistent application requires little more than adequate evidentiary support. To define lump sum alimony in two different ways creates the very problem Canakaris was intended to eliminate. There is scant reason to go backward. See Williamson v. Williamson, 376 So.2d 1016 (Fla. 1979).

POINT III

THE COURTS HAVE JURISDICTION TO ADAPT THE LAW TO CHANGING SOCIAL CONDITIONS AND NEEDS

Petitioner's major objection to the majority's interpretation of Canakaris and simultaneously the major argument advanced in support of her position that equitable distribution, which she concedes is the law, must be accomplished via lump sum alimony is that the Courts lack jurisdiction to effect title to real property absent specific legislative authorization. On that basis, she argues that, once the parties' respective interests are determined, the Court has no alternative but to order "partition and sale".Since this argument rests on the application of the partition statute, it must logically apply to personal property as well. F.S.A. 64.091.

Citing a footnote in Gorman v. Gorman, 400 So.2d 75 (5th DCA 1981) for the proposition she contends

> A lump sum alimony award cannot...be used merely to divide jointly owned property because that must be done with statutory partition proceedings. Id., at 77; n. 4 (Petitioner's brief, 14, 15.)

The import of this argument is clouded by the fact that Petitioner also argues:

> This Court in Canakaris specifically and unambiguously set forth the law in the State of Florida granting to the trial judge the ability to transfer marital assets between the spouses regardless of how title is

> held by an expanded version of lump sum alimony (Petitioner's brief, p. 10,11 also, 13).

Perhaps this matter would have been clarified had Petitioner's brief commented on what would appear to be Duncan's explicit rejection of her argument that the trial Courts had no alternative but to order partition and sale. Further confusing matters with respect to Petitioner's contention that "only the legislature has jurisdiction over title to property" (Petitioner's brief, 20) is her argument resting on Neiman v. Neiman, 294 So.2d 415 (4th DCA 1971) that:

> The Court's authority to effect a change in the title to property of the parties in the dissolution of marriage is restricted to an award of lump sum alimony, the determination of a special equity, a partition of the property, or a division based upon an agreement of the parties. Id., at 416 (Petitioner's brief, 20) [emphasis added].

What this argument overlooks is that the special equity on which Petitioner herself most strongly relies is a Court created vehicle. See Canakaris, supra, at 1200. In the domestic relations area, it is the classic example of this Court's having done exactly what Petitioner contends it lacks jurisdiction to do.

In the same vein, relying on this Court's decision in Condry v. Condry, 92 So.2d 423 (Fla. 1957) and citing Sudholdt v. Sudholdt, 389 So.2d 301 (5th DCA 1980) Petitioner concedes the existence of

> The power of the trial Court to deny partition ...in extreme cases where otherwise manifest injustice, fraud or oppression would result if the remedy

were granted, Id., at 302; (Petitioner's brief, 35) [emphasis added].

In the case sub judice, this standard is met. Manifest injustice would unquestionably result to both parties from the sale of the marital assets at the courthouse door upon which Petitioner insists.

For all practical purposes, the parties' only asssets were the parcels of real property. Mrs. Tronconi, at best, earns about $17,000 per year. At the time of the final hearing, Mr. Tronconi was living on unemployment. His medical problems prohibited him from following his usual career of teaching. His efforts to find other employment were unavailing. Mrs. Tronconi produced no other evidence that jobs for which her sixty year old husband would allegedly be qualified were available to permit Mr. Tronconi to earn anywhere near enough to support himself. The marital assets had an appraised value of roughly $120,000. Subtracting the indebtedness to others ($20,000 for Lake Placid and granting that Appellant can properly claim all the various payments she made in connection with the marital residence, roughly $17,000) one is left with approximately $80,000. By the time one subtracts costs, taxes, attorney's fees and the like, the parties would be unlikely to realize more than $75,000. Making the highly unrealistic assumption that a sheriff's sale would produce anything approximately approaching the fair market value of the property, each party would end up with approximately $37,000. In this day and age, that sum would provide neither party with

sufficient funds to obtain a residence in any way comparable to what each has now. Given their ages, neither party would have the financial security each has now. The foregoing is doubly true in Mr. Tronconi's case. He has all the ordinary expenses of living plus the need to pay for regular psychiatric care. From the figures on his financial affidavit, the expenses for medical care, plus rent, $37,000, plus whatever he can realize from the sale of the Bahamas property, would be exhausted in reasonably short order. Even should Mrs. Tronconi still be working, it is doubtful her salary would be sufficient to support both parties. The criteria of Condry and Sudholdt, to say nothing of the justification of Duncan, are met.

Consider also the situation that would be presented were Petitioner's argument correct. As she herself argues, both the special equity and the remedy made available by Canakaris and Duncan represent judicial innovations effecting title to property. If Petitioner, in fact, contends this Court is without the power to act in that area, the logic of her position is that she so advise the Court and further advise the Court that it should acknowledge that limitation and recede from Canakaris and, in addition, abolish the special equity.

Once having made that determination, Petitioner would also have to concede she is entitled to no relief on the grounds that her special equity claims were denied. Alternatively, should she wish to press the special equity claim, she must

concede the jurisdiction of the Courts to fashion remedies effecting title to real property and abandon her argument that the decision of the majority below was beyond the Court's juridiction.

The jurisdiction of this Court to transfer title to property, aside from specific legislative enactment as seen in Petitioner's examples, in fact, exists first and foremost because, as recognized by Article V, Section 1 of the Florida Constitution, the Courts are the repository of "the judicial power" which includes the authority to adapt the law

> To meet the demands of fairness generated by changing social conditions and needs. Colucci v. Colucci, 392 So.2d 577, 581, n. 6 (3rd DCA 1980).

The opinion of this Court in Hoffman v. Jones, 280 So.2d 431 Fla.1973) not only serves an additional example of the exercise of the judicial power in that it replaced contributory with comparative negligence but, in addition, lists a variety of cases in which that power which, to say the least, has a venerable history at common law has been exercised in this state's jurisprudence. Id., at 435, 436.

While not necessary to a decision in this case, the extent to which this judicial power extends can be gauged from the circumstances giving rise to the creation of the special equity. That remedy, as noted in Canakaris:

> Was developed to avoid the inequities of the existing statutory provision which de-

> nied alimony to an adulterous wife... Id., at 1200.

Simply stated, the judicial creation of the special equity undid the exact result the legislature appears to have intended. In Hoffman v. Jones, supra, this Court changed the law, the argument that contributory negligence existed by virtue of legislative enactment notwithstanding. Id., at 434, 435.

The rule making power conferred on the Court by Article V, Section 2 of the Florida Constitution provides a second basis for this Court's power to transfer title to realty without specific legislative enactment.

Article V, Section 2(a) provides, in part:

> The Supreme Court shall adopt rules for practice and procedure in all Courts....

Pursuant to that authorization, this Court adopted Rule 1.570(d), Fla.R.Civ.Pro. which provides, in part:

> If a judgment is for a conveyance...of real or personal property, the judgment shall have the effect of a duly executed conveyance....

The portion of the Final Judgment dealing with property transfers in this case specifically made reference to the above-quoted rule.

In summary, this Court has jurisdiction to create remedies transferring title to property without specific legislative authorization, as Petitioner's own examples amply demonstrate. That argument, therefore, does not effect the validity of the majority's position nor the compel the conclusion that Sangas represents the only interpretation of Cankaris consistent with this Court's jurisdiction.

POINT IV

THE FINAL JUDGMENT REPRESENTS AN EQUITABLE DIVISION OF THE MARITAL ASSETS

Petitioner's remaining argument presented in different guises throughout her brief, is that the property division contained in the Final Judgment which represented "an approximately equal division" of the parties assets resulted in the wife's being "shortchanged". This is "an issue of fact and not one of law." Connor v. Connor, 8 F.L.W. 405 (Sup. Ct. 10/14/83). Judge Ferris' findings of fact came before the Fourth District presumed correct because, as this Court noted in Canakaris, only the trial judge "can personally observe the participants and events of trial" Canakaris, supra, at 2102. Those findings come before this Court not only presumed correct but butressed by the approval conferred by the Fourth District's adoption of those findings without dissent.

In attempting to demonstrate that "an approximately equal" division of assets "shortchanged" her, Petitioner does not discuss the presence or absence of substantial evidence to support the trial judge's findings. Petitioner's Main Brief also does not address the more important issue. If her version of the facts is accepted, it is never explained why the result she contends occurred costitues an abuse of the "broad discretionary authority to do equity and justice between the parties"

conferred on the trial judge by Canakaris. An equitable distribution, of course, "need not equalize their financial position", of the parties Id., at 1204. Unless Petitioner demonstrates both, she cannot show error.

(A) THE SPECIAL EQUITY CLAIMS

In the trial court, Petitioner contended she was entitled to a special equity in the Lake Placid property, the Great Abaco property and the marital residence. The Court of Appeals upheld the trial judge's conclusion that the wife had "not demonstrated a special equity" in any of those parcels.

The position she now takes is uncertain first because the logic of her jurisdictional argument is that the special equity--upon which she now relies--should be abolished and second, because her argument does not discuss why the trial judge's rulings constitute an abuse of discretion even if her contentions regarding the facts are sound.

(1) THE LAKE PLACID PROPERTY

The Lake Placid property consists of acreage with a small cottage which was and is Mr. Tronconi's residence. The property was purchased originally as "a business proposition". Of the funds utilized to acquire that property $20,000 was borrowed from a third party (T. 147, A. 50) and the remainder of the $80,000 purchase price was paid from joint funds (T. 109, A. 46).

Petitioner conceding each party was entitled to a one-half interest regardless of the theory, nontheless asserts the trial judge erred in not ordering the property "partitioned and sold" and the parties thereafter exchange equal amounts of money (Petitioner's brief, 26-28). Error, if there be any, is harmless.

The Petitioner's real argument is not so much that the property was not "partitioned", but rather that it was not "sold" which is a remedy she asserts is hers by right under the partition statute. Curiously enough, this is error only with respect to the property received by the husband. Petitioner is perfectly happy with the award to her of the marital residence--without partition--which, under the statute, appears to by the only parcel for which the remedy of sale is even arguably appropriate. Chapter 64, Florida Statute (partition) provides that the trial judge may order property sold where it is not capable of division in kind. F.S.A. 64.071. The Lake Placid property and the Bahamas property are acreage and thus subject to such division. The only parcel which is not capable of being divided in that fashion is the marital residence. In other words, respecting the assets of which complaint is made, Petitioner is not entitled to the remedy she seeks. Where that remedy would be applicable, she makes no complaint. In any event, whatever merit there may have been in her argument would appear to have been eliminated, by this Court's holding in Duncan, if nothing else.

On the subject of Duncan, this Court should also not overlook that if Petitioner's argument is accepted as correct, as is gone into in more detail elsewhere, it would require the sale not only of the real estate of both parties, but of all the household furnishings, automobiles and everything else constituting their joint property. It would visit on both of two elderly people a totally unnecessary financial disaster.

(2) THE MARITAL RESIDENCE AND GREAT ABACO

The claim for a special equity in the marital residence and the Great Abaco property rests on the assertion that, after separation, Mrs. Tronconi made mortgage payments. She claims an additional special equity in the marital residence on the grounds that she procured a satisfaction of a second mortgage. According to her brief, she paid a total of $285 on the Great Abaco property, $2,314.62 toward the first mortgage on the marital residence, $1,000 in monthly payments on the second mortgage and an additional $13,563.79 to satisfy that mortgage, making her total claim $16,878.

The initial difficulty with Appellant's argument is this: If everything she says is true, she is not entitled to $16,878 for post-separation payments but only one half that amount. Dancu v. Alexander, 421 So.2d 819 (4th DCA 1980). Her claim applying the law as stated in very case on which she relies

Petitioner's brief, 24) is thus reduced to $8,439.

Petitioner is not entitled to even that amount for a more important reason. She did not establish that the funds involved came from a source separate and apart from the marriage. Canakaris, supra, at 1202. Of the authorities on which Petitioner relies, Gorman, supra, dealt with post-judgment payments, the correctness of which was not directly before the Court. Id., at 79. The Court's comments with respect to how such payments might be treated on remand rest on the obligations of tenants in common inter se which the parties in that case were at the time the payments would be made. That case is simply inapplicable. Aguiar v. Aguiar, 386 So.2d 280 (4th DCA 1980) is factually similar to this case in that the payments were made at a time when the marital assets were jointly owned. In that case, the District Court found a special equity in favor of the wife where she:

> Made mortgage payments on this home from her own funds. Those funds were from a source totally unconnected with the marriage, Id., at 282 [emphasis added].

The underlying portion of the above quotation is omitted from Petitioner's rendition of the Court's holding (Petitioner's brief, 23). In Dancu, as well, the contention was that the funds came "from a source unconnected with the marriage". Dancu, supra, at 820.

The evidence before the trial Court was that the

checks making these payments were drawn on Mrs. Tronconi's account. The funds in that account were derived from her salary (T. 159, A. 60) and her husband's salary (T. 66, A. 31). On at least two occasions, Mrs. Tronconi described the funds in that account as "joint" (T. 161, 162, A. 61, 62). Petitioner produced no documents or other evidence whatever to establish that funds in that account at the time various payments were made even came solely from her own salary, let alone from a source separate and apart from the marriage. The frequent assertion in her brief to the contrary, was not supported by the record and are on occasion flatly contradicted by her own testimony.

An additional claim for a special equity in a marital residence is made on the grounds that a satisfaction of the second mortgage was procured. Petitioner has demonstrated no error on this theory first, because the mortgage payment was not in default and second, because she did not, in fact, satisfy the obligation.

In examining this claim, it is important to know exactly what financial arrangements were made to obtain the satisfaction. Mrs. Tronconi claims to have paid $13,563.79 derived from the following persons:

1.	Credit Union Loan	$2,500.00
2.	Personal Loan	3,000.00
3.	Personal Loan	600.00
4.	Visa	775.00
5.	Her IRA Account	3,200.00
	TOTAL	$10,075.00

The remaining $3,488.79 was accumulated "through her own working funds" (T. 168, 169, A.63, 64). In other words, almost $7,000 of the total did not come from sources separate and apart from the marriage but from Mrs. Tronconi's various accounts. In Mrs. Tronconi's words everything "was joint". Even if one assumes that the loans in question were obtained on her separate credit without reference to marital assets, which has nowhere been demonstrated, the amount to which Petitioner would be entitled under Dancu is reduced to $3,344.40. Her total "special equity" claims would accordingly be lowered to $6,943.40.

The additional special equity claim is unsupported for the following reasons. Initially, the note and second mortgage provided for balloon payment of $12,000 on June 20, 1980. The note and mortgage also provided for a fifty (50) day grace period or until August 9, 1980. (R. 609). As appears from the file in the case of William v. Tronconi, of which the trial Court took judicial notice, a foreclosure action was filed on August 1, 1980, eight (8) days before the grace period expired (R.317-321). This matter was brought to the attention of at least Appellant's counsel in a Motion to Dismiss filed on behalf of Mr. Tronconi. There was never a ruling on the Motion to Dismiss. No responsive pleadings were ever filed on behalf of Mrs. Tronconi. Instead she proceeded to obtain a Satisfaction of Mortgage when there was no obligation to do so. Such voluntary payments do not form the basis for special equity.

Appellant is not entitled to a special equity on an even more important ground--she did not, in fact, satisfy the obligation. At trial, there was no evidence that the obligation represented the note was ever satisfied. At trial, Mrs. Tronconi testified that approximately $12,000 to $13,000 was delivered to her attorney (T. 171, A.65). Neither the attorney nor Williams testified. In short, the record establishes that only funds were deposited with Mrs. Tronconi's attorney--not payment to Williams. further, a note offered in evidence bears no notation of payment. (R. 609). The foregoing action was, significantly, dismissed without prejudice. (R. 322). Thus, where there could be some question as to the identity of the holder of the note, there is no question that the obligation represented by the note has not been extinguished. The posture in which the foreclosure was resolved suggests the Mary Carter Agreement may well have found its way into the law of domestic relations.

In that no joint obligation has been satisfied, there is no basis upon which to claim a special equity and no error has been demonstrated. Even if it had, at least half of the money use came from what were joint funds.Petitioner was, of course, awarded the marital residence in the Final Judgment. She thus has received the full benefit of her investment, if any.

(B) THE OTHER "ASSETS"

Petitioner asserts that the trial judge failed to consider the husband's pension fund and the proceeds of a life insurance policy, marital assets and, as a result, the wife was again "shortchanged". The record reveals extensive testimony respecting these matters was considered. At the time of trial, the pension fund did not exist. The money it once contained had been withdrawn, invested in gold and lost. The wife, received one half the proceeds of the life insurance policy. In either event, she has nothing about which to complain.

The legal justification suggested for these claims is the "partnership" concept of marriage set forth in Brown v. Brown, 300 So.2d 719 (1st DCA 1971) and supplemented by Williamson v. Williamson, 367 So.2d 1016 (Fla. 1979) relative to resorting to "fault" considerations in determining financial awards in dissolution actions. It is Respondent's position, first, that Petitioner's contentions are not supported by the facts. Second, there has been no demonstration that the condition precedent to the use of fault considerations at stated in Williamson has been met and, in any event, would be inapplicable when it is conceded Respondent acted in good faith and, additionally, Petitioner received an equal "share" in the particular assets.

In Brown, supra, the Court stated:

> The new concept of the marriage relation implicit in the so called "no fault" divorce law... places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in the event of dissolution. Id, supra, at 725 [citations and original emphasis omitted, emphasis added]

A corollary to this partnership principle appears in Williamson, supra, wherein this Court held that:

> where an analysis of the need of one spouse on the ability of the other to pay demonstate that both parties will suffer economic hardship as a result of any division of available resources the court may consider...any conduct of either party which may have caused the difficult economic situation in which they stand before the court. Id, at 1019 [emphasis added]

In other words, before resort to "fault" considerations is permissible in allocating the assets of the marital partnership, a showing must be made--as a condition precedent--that any division of resources will inflict economic hardship on both parties.

Turning to the assets involved in this case, the most important thing to note about the pension plan, which Petitioner consistently overlooks, is that it does not exist. Funds in the plan were generated while Mr. Tronconi was employed by the state of Connecticut. During this time, Mrs. Tronconi was contributing to her own separate pension plan with the same employer In 1979, Mr. Tronconi withdrew the funds and invested them in gold. The investment was lost. There was no evidence before the

trial Court even suggesting Mr. Tronconi acted in bad faith. Indeed, the wife did not even contend:

> That the funds were squandered or that the husband acted in bad faith in making this investment (Petitioner's brief, 32).

That notwithstanding, loss of the investment is equated with "dissipation" of marital assets which in turn constitutes "economic fault", under Williamson, entitling the wife to "an accounting". The record is devoid, oddly enough, of any evidence Petitioner ever offered to "account" for her pension plan as a marital asset.

Petitioner also asserts the trial judge erred in failing to award her one half the cash surrender value of her husband's life insurance policy on the same "economic fault" theory. According to Petitioner "shortly" before the balloon payment on the second mortgage was due, the husband cashed in the policy and used the money to pay off his Cadillac. (Petitioner's brief, p. 33,34). In reality, the second mortgage ballooned in June of 1980 and with the fifty-day grace period and was not due until August of that year. The policy was surrendered not "shortly" before that date, but over a year earlier in June of 1979 (T. 68,118,120, A.34,47,48)

Additionally, the record reveals that after the surrender of the policy the proceeds were deposited into Mr. Tronconi's bank account along with other funds. While the speci-

fic funds could not be traced (T. 68,69, A.34,35), $6,000 from that account was utilized to pay off Mr. Tronconi's Cadillac and an additional $3,000 was used to pay off Mrs. Tronconi's Cadillac (T. 69, 173, A. 35 ,66)--a fact Petitioner first denied (T.161, A. 58) only later to admit (T. 173, A. 66) and which her brief simply ignores. In June of 1979, Petitioner was more than willing to take the benefit of what is now her husband's "economic fault". As the record makes clear, Petitioner received an amount equal to one half the proceeds of the insurance policy.

In any event, aside from the differences in Petitioner's factual recitals and the record, what both arguments overlooks the condition precedent. Petitioner does not even suggest that both parties will suffer economic hardship as the result any division of the parties' resources. With assets valued by the Final Judgment in the $120,000 range and one party still working, it is submitted that the condition cannot be met on the facts of this case.

In addition and far more serious, Petitioner's brief overlooks what this Court in Williamson did not.

> For a trial Court to perform routinely a balancing act with testimony of alleged marital misconduct of the parties would be a step backward to the days of threats and insinuations which plagued our Courts before the no fault system was enacted and would be directly contrary to express legislative policy. Williamson, supra, at 1019.

Were Petitioner's arguments accepted and presuming it

were somehow possible to limit fault considerations solely to economic concerns, every error, every judgmental oversight, every decision with which one spouse disagrees will become "fault" by the time the irretrievably broken marriage ends in divorce. In the case sub judice, a good faith investment that went bad is "economic fault". Petitioner accepted the benefits of the insurance proceeds in 1979 and now cries "economic fault". Unfortunately, other Court decisions suggest Petitioner's argument is only the beginning. In Beville v. Beville, 415 So.2d 151 (4th DCA 1982), minimal support for a wife after a marriage of 35 years was deemed acceptable on the grounds that she was "a life long nag and interolerable companion". Id., at 152. In Pitts v. Pitts, 412 So.2d 404 (3rd DCA 1981), the Court justified a limited support award on the finding that the wife was responsible "for the fact that the parties no longer lived together happily". Id.,at 405, 406, n. 1.

Pitts represents the logical conclusion of Petitioner's argument. If it were a correct statement of the law it would be just as important to prove fault--with or without descriptive adjectives--in connection with a marital break-up as it was before the advent of no fault divorce. Establishing fault, however attenuated, may not entitle one to a dissolution, but it may well determine the financial outcome of the divorce. As this Court recognized in Williamson, were the foregoing the law, Florida would be again be a "fault" state, the express purpose of

the legislature in adopting the no fault divorce law notwithstanding.

In the case sub judice, Petitioner's arguments are not supported by the law or of the facts. Those contentions misapply the partnership concept of marriage. As noted Brown, supra, the parties share equally both in the financial benefits and burdens of the marriage. With respect to the pension fund, it was simply lost. That notwithstanding, the wife claimed she has been "shortchanged" because she was not awarded an amount presumably greater than one half of nothing. She is not seeking a share of the partnership. She is asking that her husband be made a guarantor of the success of any financial undertaking. A position more consistent with partnership law would be to require the wife to indemnify the husband for one half of the loss. She certainly would have claimed one half of the benefit. With respect to the life insurance proceeds, it is one half the Petitioner received. The result reached by the trial judge is what the partnership concept of marriage requires.

(C) THE END RESULT

The ultimate conclusion Petitioner argues the Court should draw from the foregoing is that the trial judge abused his discretion in dividing the assets resulting in the wife's receiving less than her fair share. The basis of her argument is summarized in her Statement of Facts.

> After the "division of property" [T]he wife received approximately $53,000 worth of assets .... the husband realized.... assets valued at $89,000 (if Lake Placid valued at $62,000)... $109,000 (if Lake Placid valued at $80,000), the the purchase price. (Petitioner's brief, 8). [emphasis in original].

The marital residence awarded to the wife was valued at $65,000 in the Final Judgment (R. 258, A.13). The furniture and fixtures she was awarded was valued at $3,500 (R. 258, A.14) Her Cadillac was valued in her financial statement at $3,100, making a total of $71,600. Mrs. Tronconi's liabilities were the first mortgage on the marital residence, the balance of which was $13,753.12, plus $6,875 owed to others in connection with the second mortgage, making a total of $20,628.12. Subtracting liabilities from assets leaves a net worth of $51,000, without including the obligation of the husband to indemnify the wife in connection with the $20,000 joint indebtedness on the Lake Placid property. In short, the wife's assertion that she was short changed, rests on a comparison of a figure close to the wife's

net worth with what is represented as the husband's "gross receipts". The asserted difference in what each of the parties received is further exaggerated by the method by which the assets "realized by the husband" are valued.

Initially, Petitioner's brief suggests the Lake Placid property could be valued at either $62,000 or $80,000. The fact the trial judge found the property to have a fair market value of the lower amount is simply ignored. Attempting to use the $80,000 figure, which is the purchase price, overlooks expert testimony to the effect that what had once been productive agricultural land had reverted "back to a raw state" (T. 24, A. 19). It could not be used for "anything" (T.31,40, A. 21,22) without "extensive ditching and draining" (T. 31, A. 21). As a result, its value decreased. (T. 30, A. 20) The other testimony on the subject was that of Petitioner who admittedly had not seen the land in over a year and a half (T. 184, A. 70) and who based her opinion solely on what the purchase price had been. (Id.) Petitioner's allegations respecting the value of the assets received is thus limited to $89,000.

Except for the inclusion of $62,000, representing the value of the Lake Placid property, Petitioner does not specifically state how the $89,000 figure was reached. Subtracting the value of the Lake Placid parcel leaves $27,000 for which to account. Petitioner additionally lists the following assets as being received by the husband. The first is his Cadillac valued

at $5,000. Subtracting that amount leaves $22,000. Next there is the Great Abaco property valued at $7,000 and Stella Maris lots valued at the same amount for a total of $14,000. With the subtraction, $8,000 remains. The only fashion in which to make up that difference on Petitioner's facts is to subtract $3,000, representing one half the insurance proceeds which the wife, in fact, received and an additional $5,000, representing one half of the pension plan which does not exist.

If one values the pension plan at zero, and does not give the wife credit for the same for the insurance proceeds twice and values the Bahamas property in accordance with the Final Judgment respecting Great Abaco ($4,000) (R. 258, A.14) and the husband's testimony regarding Stella Maris ($4,000) (T.129, A. 49) the "assets realized" by the husband total $75,000--only $3,400 more that the "assets received by the wife.

Consider next what Petitioner's brief overlooked that the trial judge did not--the $20,000 indebtedness to a third party in connection with the acquisition of Lake Placid for which the husband is responsible and the $500 debt in connection with Great Abaco. Subtracting both produce a net worth of $54,500--$3,500 greater than the wife's net worth.

A mathematical "partitioning" of each asset based on what the parties would receive treated as tenants in common also results in a approximatley equal division of assets as the fol-

4. The furniture has a value of $3,500.00. One half of which is $1,750.00 representing Mr. Tronconi's interest which was transferred to his wife restores the balance in her favor to $4,284.63.

Value of furniture $\frac{\$3,500.00}{2}$ = $1,750.00

$2,534,63 Balance in favor of Mr. Tronconi
+1,750.00
$4,284.63 Balance in favor of Mrs. Tronconi

5. Dividing the parties automobiles reduces the balance by $950.00.

Mr. Tronconi's car $\frac{\$5,000.00}{2}$ = $2,500..00

Mrs. Tronconi's car $\frac{\$3,100.00}{2}$ = $1,550.00

Subtracting the difference credits Mr. Tronconi with $950.00 and reduces the balance in favor of his wife to $3,334.63.

6. Even including the Stella Maris property which is Mr. Tronconi's, by virtue of a Court ordered property settlement, leaves a balance in the wife's favor.

Stella Maris $\frac{\$4,000.00}{2}$ = $2,000.00

Subtracting that amount from the previous balance leaves $1,334.63.

Indeed the consistent application of any reasonable system of account leads to the same conclusion--the Final Judg-

lowing calculations demonstrate.

1. Mrs. Tronconi's interest in the Lake Placid property--Mr. Tronconi's present home--was transferred to him and he assumed her one half of the indebtedness. The value of one half the equity is $21,428.81, calculated as follows:

$$\frac{\text{Fair Market Value } \$62,857.62}{2} = \$31,428.81$$

$31,428.81
-10,000.00 (1/2 indebtedness)
$21,428.81 (to Mr. Tronconi)

2. Mr. Tronconi's interest in the Fort Lauderdale property was transferred to Mrs. Tronconi and she assumed his one half indebtedness. The value of a one half interest is $25,713.44, calculated as follows:

$$\frac{\text{Fair Market Value } \$65,000.00}{2} \quad \$32,500.00$$

$32,500.00
- 6,786.50 (1/2 mortgage)
$25,713.44 (to Mrs. Tronconi)

The resulting difference in favor of Mrs. Tronconi is $4,284.63.

3. Transferring Mrs. Tronconi's interest in the Great Abaco property reduces this difference to $2,534.63.

$$\frac{\text{Fair Market Value } \$4,000.00}{2} = \$2,000.00$$

$2,000.00
- 250.00 (1/2 mortgage liability)
$1,750.00 (to Mr. Tronconi)

$4,284.63 Previous balance
-1,750.00
$2,534.63 Balance in favor of Mrs. Tronconi

ment resulted in an "approximately equal division of the equities involved".

Taking matters one step further in assuming arguendo, Petitioner is correct respecting her special equity claims, the amount to which she claims to be entitled and what she received is roughly $8,000, utlizing the formula of Dancu. With the parties' major assets valued at over $120,000 by the Final Judgment and all such valued by Petitioner's brief at between $140,000 and $160,000, a difference even in the amount of Petitioner's claim demonstrates only an uneven distribution which is permissible under Canakaris and not an in equitable one.

The facts of this case provide ample justification for that disparity and could support an even wider discrepancy. At the time of the final hearing, Mrs. Tronconi was living in a furnished home with a small mortgage. She owns a free and clear Cadillac. Most important she was working. Over the next five (5) years, if she retires at age sixty-five (65), her gross income for that period will exceed $85,000. Her husband, who not only worked during the marriage, occasionally at two (2) jobs, did his share of the household chores as well (T. 87,88, A. 39,40) as living on unemployment. He receives no assitance with his medical bills. He receives no support from his wife, whose income is made possible by a degree he helped finance (T. 52, A. 27).

Petitioner has failed to demonstrate an abuse discre-

tion even on her facts. The conclusion becomes even stronger when one considers the findings made by the trial judge and the evidentiary support upon which those findings rest. No error has been demonstrated.

V CONCLUSION

The majority opinion of the Fourth District represents the correct the interpretation of Canakaris and Duncan. Of the two alternatives argued to this Court, the Fourth District's position is the only one that does not recreate the very problem Canakaris was written to eliminate. On the facts of this case, the result would be the same in any event.

PHILIP MICHAEL CULLEN III
CHARTERED
SUITE 206, 700 S.E. 3RD AVENUE
FORT LAUDERDALE, FLORIDA 33316
(305) 462-0273

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Ira Marcus, Esquire, 625 Northeast Third Avenue, Fort Lauderdale, Florida 33302, Melvyn B. Frumkes, Esquire, New World Tower, Suite 1607, 100 North Biscayne Boulevard, Miami, Florida 33132 and Stephen W. Sessums, Esquire, 215 Verne, Tampa, Florida 33606, this 2nd day of November, 1983.

PHILIP MICHAEL CULLEN III
CHARTERED
SUITE 206, 700 S.E. 3RD AVENUE
FORT LAUDERDALE, FLORIDA 33316
(305) 462-0273