IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,~~386~~ 368
(4th DCA 81-525)

FELICIA M. TRONCONI,

Petitioner,

v.

FRANCIS JOSEPH TRONCONI,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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CHARTERED
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TABLE OF CONTENTS

	PAGE
Preface	i
Table of Authorities	ii
Points of Appeal	iii
Statement of the Case	1
Argument	2
Conclusion	9
Certificate of Service	10

PREFACE

The parties are designated as they stand before this Court or by their proper names.

Citations to the Fourth District's decision are to the original page numbers.

TABLE OF AUTHORITIES

	PAGE
Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980)	2,6,7,9
Claughton v. Claughton, 393 So.2d 1061 (Fla. 1980)	7,8
Connor v. Connor, 411 So.2d 899, 902 (Fla. 1st DCA 1982)	5,6
Duncan v. Duncan, 379 So.2d 949 (Fla. 1980)	7,8
Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1980)	2,3
Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)	3
Leonard v. Leonard, 414 So.2d 554, 555 (2nd DCA 1982)	5,9
Mirabal v. Mirabel, 416 So.2d 868, 870 (Fla. 3rd DCA 1982)	5,6
Niemann v. Niemann, 312 So.2d 733 (Fla. 1975)	3,4
Powers v. Powers, 409 So.2d 177, 178 (Fla. 2nd DCA 1982)	5,9
Robinson v. Robinson, 403 So.2d 1036 (Fla. 1980)	7,8
Sangas v. Sangas, 407 So.2d 630 (Fla 4th DCA 1981)	2,3,5,7,9
Walton v. Walton, 290 So.2d 110 (Fla. 3rd DCA 1974)	3,4
Williams v. Duggan, 153 So.2d 726, 727 (Fla. 1963)	2

STATEMENT OF THE CASE AND THE FACTS

Petitioner seeks review of a decision of the Court of Appeals, Fourth District, unanimously affirming, en banc, the distribution of assets made in the final judgment dissolving the parties' marriage. For all practical purposes, those assets consisted of three parcels of property held by the parties as tenants by the entireties and purchased during the marriage largely with joint funds.

As summarized by the Fourth District:

> The trial judge found that "neither party had established a special equity in any of the real property," that"physical partition would not be in the best interest of either party" and that his announced disposition of the property would result in an "equitable division of the parties' assets." Pursuant thereto, he awarded a portion of the real estate holdings to the one and the remainded to the other in what the record supports as an approximately equal distribution of the equities involved. (Tronconi,2)

POINTS OF APPEAL

		PAGE
POINT I.	THE LEGAL POSITION RELIED UPON BY PETITIONER DOES NOT CONFLICT EVEN IN THEORY WITH THE DECISION OF THE DISTRICT COURT.	2
POINT II.	THE DISTRICT COURT DECISIONS REIED UPON BY PETITIONER DO NOT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN THIS CASE.	5
POINT III.	THE SUPREME COURT DECISIONS RELIED UPON BY PETITIONER DO NOT CONFLICT WITH THE DECISION IN THIS CASE.	7

Point I

THE LEGAL POSITION RELIED UPON BY PETITIONER DOES NOT CONFLICT EVEN IN THEORY WITH THE DECISION OF THE DISTRICT COURT.

In the present case, this Court's jurisdiction depends on the existence of "express and direct conflict...on the same question of law."Fla.Const.Art.V,S3(b)(3);Rule ,Fla.R.App.Pro. To rise to the status of constitutional conflict, the decisions as opposed tthe reasons or opinions, Gibson v. Maloney, 231 So.2d.823,824 (Fla. 1980) must be "wholly irreconcilable," Williams v. Duggan, 153 So.2d. 726,727 (Fla.1963).

Petitioner has acknowledged both before the Court of Appeals and this Court that:

> Canakaris specifically and unambiguously set forth the law of the State of Florida by granting the trial judge the ability to transfer marital assets between the spouses.(Petitioner's Brief,6&7)

She suggests conflict and therefore this Court's jurisdiction exists soley over the issue of whether such a transfer must be accomplished "by an expanded version of lump sum alimony" as opposed to equitable distribution as relied upon by the majority in the court below. The question is not the end but simply the means to that end.

According to Petitioner, the genesis of the conflicting position is the decision of Judge Beranek in Sangas v. Sangas, 407 So.2d.630 (Fla. 4thDCA 1981).As is discussed below, these cases are distinguishable on a variety of grounds, and , in toto, exhibit little more that the differences to be expected in any body of jurisprudence which develops on a case by case basis. As

the majority of the court below noted, even Sangas was distinguishable in that it involved

> an inequitable and improper distribution favoring one spouse over the other . (Tronconi, 2)

What is noteworthy for present purposes is that Judge Beranek was a member of the court that decided the instant case. Different grounds" notwithstanding, Judge Beranek concurred in the result reached by the majority because:

> The award here can be sustained as a "justified"award of lump sum alimony. (Tronconi,6, Beranek, J. concurring)

In other words, while the reasons may differ, the decision would be exactly the same under either approach. There is no conflict and therefore no jurisdiction. Jenkins v. State, 385 So.2d. 1356,1359(Fla.1980); Gibson, supra.

In Niemann v. Niemann , 312 So.2d. 733(Fla. 1975), this Court reached the same conclusion when presented with an alleged conflict substantially similar to that petitioner suggests. In Niemann, the petitioner argued that the decision rendered by the Court of Appeals, Fourth District, Niemann v. Niemann, 294 So.2d.415 (Fla.4th DCA 1974), conflicted with that of the Third District in Walton v. Walton, 290 So.2d.110(Fla.3rd,DCA 1974). The Fourth District decision in Niemann held:

> The court's authority to effect a change in title to the property of the parties in a dissolution of marriage is restricted to an award of lump sum alimony, a determination of special equity, a partition of the real property, or a division based on an agreement of the parties. Niemann(4th DCA),supra, at 416.

In Walton, the appellant sought "an equitable division of the property, Walton,supra, at 111. The issue was tried without objec-

tion. On the above facts, the Supreme Court dismissed the petition distinguishing the cases on the grounds that appellant's real complaint, and therefore the basis of the Third District's holding in Walton was:

> Not that the trial court attempted to divide the jointly held property but that he abused his discretion in the manner of the division. Niemann(Supreme Court),supra, at 734.

As was the case in Niemann, Petitioner does not argue that the trial judge cannot divide jointly held property. Petitioner complains only of the manner in which the distribution was made--equitable distribution as opposed to lump sum alimony. Again, there is an absence of conflict.

POINT II

THE DISTRICT COURT DECISIONS RELIED UPON BY PETITIONER DO NOT CONFLICT WITH THE FOURTH DISTRICT'S DECISION IN THIS CASE.

The District Court cases upon which Petitioner relies for conflict are also distinguishable on their facts. The Notice to Invoke Jurisdiction relies upon the decisions of the Second District in Powers v. Powers,409 So.2d 177 (Fla. 2nd DCA 1982) and Leonard v. Leonard,414 So.2d 554(Fla.2nd DCA 1982) to establish conflict. Her jurisdictional brief adds the District Court decisions in Connor v. Connor, 411 So.2d 899(Fla. 1st DCA 1982) and Mirabal v. Miarbal,416 So.2d 868(Fla.3rd DCA 1982) in this case.

Both Powers and Leonard were handed down by the Second District within three months of each other. In the former, that court announced its "agreement with the analysis and holding of Sangas. Powers,supra, at 177, and remanded the case for reconsideration in that light. As previously noted, the decision in Sangas is distinguishable from the case sub judice on its facts, and, in any event, would produce the identical result. Neither Sangas nor Powers, therefore conflict with the present case.

In Leonard, the same court reversed property awards made on the basis of reciprocal lump sum alimony because the husband's

> Answer and Counter-Petition contained neither an allegation upon which an award of alimony could be made nor any prayer for alimony. Id.,at 555.

The award to the wife was then reversed because the court could not determine if the trial judge would have made one award without the other. Id. The foregoing, which constitutes the decision

of the court, does not even reach the issues addressed in the present case.

In a similar fashion, the First District's decision in Connor, supra, did not reach the issue addressed in the case this court is now considering. Connor was tried four months prior to this Court's decision in Canakaris and was remanded "for reconsideration of the evidence in light of [That] decision." Connor, supra, at 109.

Mirabel, supra, a decision of the Third District, was also decided on a different issue. That case involved a post dissolution proceeding in which the only relief sought was a determination of the parties' interests in certain parcels of realty. No alimony was sought and, in addition, was specifically waived by both parties. Id., at 869. That notwithstanding, the trial judge awarded alimony. The Third District reiterated its specific approval of reciprocal lump sum alimony but held that rule inapplicable to the specific facts before it in Mirabel, that is where neither party seeks a specific form of relief and in addition, specifically waives the type of relief the court awards. There is simply no conflict.

POINT III

THE SUPREME COURT DECISIONS RELIED UPON BY PETITIONER DO NOT CONFLICT WITH THE DECISION IN THIS CASE.

The last group of cases that petoitioner suggests give rise to conflict are this Court's decisions in Canakaris, Claughton v. Claughton, 393 So.2d 1061(Fla. 1980); and Robinson v. Robinson, 403 So.2d.1306(Fla.1980). The heart of Petitioner's argument is that Judge Beranek's concurring opinion in the case sub judice and opinion in Sangas represent the correct interpretation of Canakaris and related cases. As was discussed more fully at the outset, even if Petitioner's assertion were correct, Sangas is distinguishable on its facts and as demonstrated by Judge Beranek's concurring opinion in this case would, if applied to the facts of this case, produce exactly the same result.

According to Petitioner, Canakaris held:

> A judge may award lump sum alimony to assure equitable distribution....(Petitioner's Brief,7)

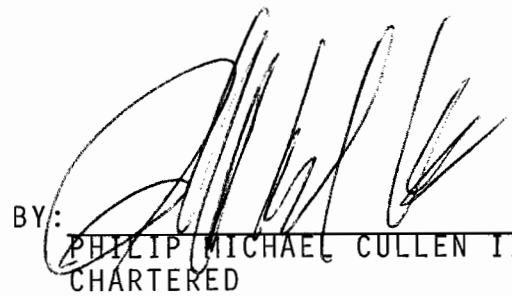
That decision does not use the word"shall" nor otherwise indicate that equitable distribution must be accomplished via that particular remedy. A decision determining equitable distrtibution to be a unique remedy, if anything, simply complements Canakaris. More to the point. it clarifies the law as announced in Canakaris and its companion case, Duncan v. Duncan, 379 So.2d.949 (Fla.1980). Petitioner's brief does not discuss Duncan most probably because this Court approved exactly what the trial judge did in the instant case. In Duncan, the parties owned two motor vehicles,

CONCLUSION

For this Court to have jurisdiction, there must exist two decisions that are mutually exclusive. Except for the fact that Sangas (from which the Fourth District has receded) has taken on a half-life of its own in decisions such as Powers and Leonard, what Petitioner asserts as conflict is a difference of opinion between two panels of the same District Court. Both Powers and Leonard are distinguishable on their facts. If they held what Petitioner asserts,not only do they not conflict but the result would be identical.

In a similar fashion, Canakaris addresses only the issue of alimony stating lump sum alimony may be utilized to accomplish an equitable distribution. It says nothing about, and therefore does not logically exclude equitable distribution as a distinct remedy.

This Court should decline to execise jurisdiction. The reasons advanced by Petitioner, in the conclusion to her brief, which are, at best, peripherally involved in this case, are best resolved either on a case by case basis in the district courts or, if they are as important to the public as petitioner suggests, in the legislature.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Ira Marcus, P.A., Attorney for Appellant, 625 Northeast Third Avenue, Fort Lauderdale, Florida 33304, and Melvyn B. Frumkes, New World Tower, Suite 1607, 100 North Biscayne Boulevard, Miami, Florida, 33312, this 11th day of April, 1983.

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