OA 12-6-83

SUPREME COURT

STATE OF FLORIDA

CASE NO. 63,368

FELICIA M. TRONCONI,)

Petitioner,)

vs.)

FRANCIS JOSEPH TRONCONI,)

Respondent.)

_____)

MAIN BRIEF OF PETITIONER

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STATEMENT OF CASE

Petitioner (Wife) was the Respondent/Counter-Petitioner in the Trial Court. Respondent (Husband) was the Petitioner/ Counter-Respondent in the Trial Court. In this brief, the parties will be referred to as Wife (Petitioner) and Husband (Respondent) respectively. Exhibit references refer to the conformed record. The record of exhibits shall be referred to as "R", while the transcript proceedings will be referred to as "T".

The Husband was the original Petitioner in an action for Dissolution of Marriage and Partition in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Case Number: 79-21937, filed on November 29, 1979. (R-188-192). On January 7, 1980, the Wife filed her Answer, Affirmative Defenses and Counterpetition for Dissolution of Marriage and Partition. (R-195-202). On or about June 3, 1980, the Husband filed his Reply to Wife's Answer and Affirmative Defenses to Wife's Counterpetition. (R-204-207). On June 10, 1980, Wife filed a Motion for Temporary Relief seeking to have the Husband contribute to the monthly mortgage payments on the marital residence. (R-209-210). The Court issued its Order of Referral to the General Master. (R-208). On June 6, 1980, the Wife also filed a sworn Motion for Temporary Restraining Order, requesting Husband to be restrained from interfering with Wife's access to the jointly-owned Lake Placid property. (R-211-212). On June 10, 1980, Wife filed her Reply to Husband's Answer and Affirmative Defenses to Wife's Counterpetition (R-213). On June 9, 1980, the General Master issued his Order pursuant to Wife's

Motions for Temporary Relief and Restraining Order. (R-211-212). On July 7, 1980, the General Master filed his Report. (R-220-221) and on July 10, 1980, the Court issued its Order upon the report of the General Master. (R-222). Thereafter, Husband's original counsel filed his Motion to Withdraw. (R-224-225). The Motion to Withdraw was allowed pursuant to the Order of the General Master. (R-227). The Husband then filed his Motion for Leave to Amend his Petition to include a claim for alimony. (R-228-231). On September 9, 1980, the Wife filed her Answer and Affirmative Defenses to Husband's Amended Petition. (R-238-239). The Husband filed his Reply to Wife's Affirmative Defenses. (R-243). The Husband substituted counsel, pursuant to Order dated September 16, 1980. (R-242). The Wife filed a Motion to Amend her Counterpetition adding a court for contribution. (R-244-247). The amendment to Wife's Counterpetition was allowed on January 12, 1981. (R.-253). On January 14, 1981, Husband filed his Answer to Wife's Amended Counterpetition. (R-254). A Final Hearing was held on February 4, 1981. The Trial Court entered its Final Judgment on March 3, 1981. (R-258-263). Notice of Appeal was filed on March 17, 1981. (R-264). On March 18, 1981, Wife filed her Motion to Stay Pending Appeal. (R-265). On April 20, 1981, the Court entered its Order denying Wife's Motion to Stay Pending Appeal. (R-269). On May 12, 1981, Wife filed her Motion for Temporary Restraining Order. (SR 1-2). On May 26, 1981, the trial court entered its Order Denying Wife's Motion for Temporary Restraining Order. (SR-3). On June 10, 1981, Wife filed her Motion to Review the Trial Court's denial of

her Motion for Temporary Restraining Order Pending Appeal. (SR-4). On July 2, 1981, Appellant's Motion for Review Order entered on motion in lower tribunal was denied, and Appellant's July 10, 1981 Motion for Temporary Restraining Order was denied; (App. 13) this appeal was initially argued on January 27, 1982. Thereafter, the District Court of Appeal, pursuant to Florida Rules of Appellate Procedure Rule 9.331(c) on its own motion, ordered a rehearing en banc of this case, and it was argued before the full court on June 24, 1982.

The full court rendered its decision on December 1, 1982 and affirmed the Trial Court's Final Judgment. (App. 1-12).

On February 9, 1983, the Appellate Court denied Appellant's Motion for Rehearing. (App. 14). A Mandate was then filed on February 25, 1983 by the District Court of Appeal of the State of Florida, Fourth District. (App. 15).

Following the Appellate Court's mandate, Appellant filed, on February 28, 1983, its motion to withdraw mandate or, in the alternative, stay the application of mandate pending further review. (App. 16-17). The Appellate Court then granted Appellant's Motion to Withdraw the mandate issued. (App. 18).

On February 28, 1983, Appellant filed its Notice to Invoke Discretionary Jurisdiction. (App. 19). An Order accepting jurisdiction and setting oral argument was issued on July 19, 1983. (App. 20).

STATEMENT OF THE FACTS

The parties were married in 1955 and there were no children born of the marriage. (R-188-192; 195-202). Both the Husband the Wife were sixty years old at the time of the Final Hearing. (T-42, 149). The Husband has a B.A. in Education, a Masters in Business Administration from Columbia University and is qualified to teach on the high school and college level. (T-80). He has business administrative skills, experience in the construction trade (T-79-80), design engineering experience (T-48) and has been employed in the electronics field. (T-80). Throughout most of the marriage, the Husband has been employed as a high school teacher, initially in Avon, Connecticut and later at Cardinal Gibbons High School in Fort Lauderdale, Florida. (T-72-73, 90). At the time of the Final Hearing, the Husband was collecting unemployment, although capable of being gainfully employed. (T-127, 131, 134). The Husband had an earning capacity as a teacher of approximately $16,000.00. (T-130). The Husband's assets included: a $1,500.00 IRA account (T-122); a free and clear 1978 Cadillac Seville, with a minimum fair market value of $5,000.00. (T-129); two lots in Stella Maris, Bahamas, free and clear, worth approximately $4,000.00-$7,000.00, plus his interest in the jointly-owned real and personal property. (R-337-340). The Husband's net worth was approximately in excess of $15,000.00. (T-337-340).

The Wife initially worked as a secretary when the parties lived in Connecticut. (T-87). Thereafter, she obtained her degree in Education and worked as a teacher in Connecticut and

Florida. (T-51-52, 181). The Wife worked two jobs throughout most of the marriage (T-151-152), as well as performed the normal wifely chores of cooking and cleaning. (T-87-88, 90). The Wife came into the marriage with approximately $5,000.00 of her own funds. (T-150, R-404). Subsequently, the Wife inherited $2,500.00 upon the death of her mother (T-94, R-405), which was used to purchase an automobile titled in Husband's name alone. (T-153-154). Approximately $3,500.00 of the Wife's initial $5,000.00 money went toward the purchase of a vacant lot on Southeast 14 Street, Pompano Beach, Florida. (T-82-87). The property was purchased in 1956 for approximately $3,800.00 (T-47, 86) and was jointly owned. (T-86, 151).

At the time of the Final Hearing, Wife was working two teaching jobs and was earning approximately $15,000.00 per year gross salary. (T-183, R-119-620).

The parties first lived together as Husband and Wife in Fort Lauderdale when they moved from Connecticut in 1955. (T-47). They built a house on the vacant lot in Pompano and resided there for approximately three years. (T-48). Thereafter, the parties returned back to live in Lake Congamond, Connecticut for a short period. (T-49). They eventually sold the Pompano property and jointly acquired a house in Avon, Connecticut. (T-50, 100). During this time, both parties were working and jointly contributing to joint bank accounts and living expenses. (T-61).

During the course of the marriage, assets were acquired both in joint names and solely in the name of the Husband. While the Husband was working as a teacher for the State of Connecticut, he

accumulated a pension fund in the amount of $10,000.00. (T-91, 94). The pension fund was accumulated by deductions from Husband's salary. (T-175, R-168). In 1979, shortly before the parties separated, the Husband withdrew the $10,000.00 pension fund, invested it in gold coins and lost the entire amount. (T-66-68, R-333).

Additionally, during the course of the marriage, the Husband accumulated $6,000.00 in cash value in a Prudential Life Insurance Policy. (T-68, 96, 118). The premiums for the said policy were paid from the joint funds of the parties. (T-97-99, 161; R-527-541). In April, 1980, shortly before the $12,000.00 balloon payment was due on the second mortgage on the marital residence, the Husband cancelled the life insurance policy, received $6,000.00 and paid off the loan on his 1978 Cadillac titled in his name. (T-68, 118-121, 143-144, 161; R-352, 527-541). The Husband purchased the said Cadillac with joint funds. (T-124, 161-163; R-542-548).

The parties lived together in Avon, Connecticut until the end of 1972 or beginning of 1973. (T-53). During this time, the parties jointly acquired two lots in Stella Maris, Bahamas, for approximately /$7,000.00. (R-298-304). In 1973, the parties separated and the Husband moved to Florida. (T-109, 156). The parties entered into a Property Settlement Agreement, wherein the Avon, Connecticut property was remortgaged (R-287-291) and the Husband received $18,000.00 in cash, plus the two lots in Stella Maris, Bahamas, work approximately $7,000.00, a station wagon and his tools. (T-53-56, 109-110). The Wife received the proceeds

of the sale of the Avon, Connecticut house, in the approximate amount of $25,000.00, plus its contents. (T-54, 109-110, 157-158; R-409-413). A divorce proceeding was commenced in Broward County and the exchange of property was the subject of a court order, although no final judgment was ever entered. (R-306-307).

The parties reconciled and the Wife moved to Fort Lauderdale in March, 1974. (T-56, 158). When the Wife moved, she transported to Florida, at her own expense, the contents of the Avon, Connecticut house. (T-156-157; R-409-413).

In 1975, the parties acquired in joint names, the marital residence located at 4640 Northeast Third Avenue, Fort Lauderdale, Florida. (T-59). The down payment and first and second mortgage payments up to August of 1979 came from joint funds. (T-61; R-406-408). The marital residence had a purchase money second mortgage in the approximate amount of $12,000.00 that would balloon in June, 1980. (R-609). The parties resided together until August 21, 1979, when Husband voluntarily abandoned the marital residence. (T-113-114. After Husband left, he did not contribute any monies toward the mortgage payments on the marital residence or Great Abaco Island property. (T-116). After separation, Wife made all first and second mortgage payments on marital residence and Great Abaco Island property. (T-147, 159-161; R-414, 456; 471-526; 550-608). The second mortgage went into default, foreclosure proceedings were commenced. The Wife paid the sum of $13,563.79 to satisfy and discharge the second mortgage. (T-167, 171, 173).

Also, the parties, after reconciliation, purchased the Lake Placid Property, as a business proposition. The purchase price was $80,000.00. Wife contributed one-half (1/2) of the $50,000.00 down payment on the Lake Placid property from her own funds. (T-107-108), 163). The parties maintained joint bank accounts representing the contributions of parties' salaries. (T-66; R-406-408). The purchase price for the Great Abaco Island property came from joint funds. (T-158). The joint contributions of the parties went to pay off the remaining debt on the Lake Placid property. (T-109-159).

After the "division of property" by the Trial Court, Wife received approximately $53,000.00 worth of assets, to wit: the marital residence and car, in addition to liabilities incurred to pay off the second mortgage. The Husband realized from the marriage assets valued at a minimum of $89,000.00 (if Lake Placid valued at $62,000.00) or $109,500.00 (if Lake Placid valued at $80,000.00, the purchase price).

ARGUMENT I

THE DISTRICT COURT OF APPEAL COMMITTED ERROR IN AFFIRMING THE TRIAL COURT'S "EQUITABLE DIVISION OF THE PARTIES' ASSETS" AND IN ESTABLISHING THE "DOCTRINE OF EQUITABLE DISTRIBUTION" AS A NEW INDEPENDENT VEHICLE TO DIVIDE THE PARTIES' ASSETS, CONTRARY TO THE MANDATE OF CANAKARIS V. CANAKARIS.

(a) The District Court of Appeal erred in affirming the Petitioner/Wife's conveyance of her interests in the Lake Placid and Great Abaco Island Properties as an equitable division of properties. The majority opinion of the District Court of Appeal affirmed all aspects of the Trial Court's award. The Final Judgment of the Trial Court specifically found that "...neither party has established a special equity in any of the real property" (R-260,¶10); the Trial Court further found that "...partition of the property would not be in the best interests of either party and further that the following represents an equitable division of the party's assets..." (R-260;¶11). The Trial Court required the Wife to convey to Husband her one-half interest (1/2) in the Lake Placid and Great Abaco Island properties. The Court purported to award to the Wife the Husband's "one-half" interest in the marital residence, together with furnishings. In actuality, the Wife did not receive the Husband's 50% interest in the marital residence, because her clear vested special equity represented a portion of Husband's one-half interest and therefore part of what she received was merely a return of her own property. (R-260; ¶4). Landay v. Landay, 429 So.2d 1197 (Fla. 1983). Further, there was no finding that the Husband was entitled to lump-sum alimony based upon justification.

(R-260;¶14). The Trial Court merely attempted an "equitable division of the party's assets" without resort to the various remedies available, to wit: various forms of alimony, special equity or partition. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

The Appellate Court held, after hearing en banc, that

> "in affirming the Trial Judge, we adopt the doctrine of equitable distribution ... When an equitable distribution is invoked it may well take the place of lump-sum alimony or any special equity."

(App. 1).

This holding is clearly contrary to this Court's specific ruling in Canakaris, that "equitable distribution" is an end result to be achieved by use of specific vehicles, rather than an independent vehicle or remedy. Canakaris at 1201. This Appellate Court's decision also directly conflicts with the decisions of the Second District Court of Appeals in the cases of Powers v. Powers, 409 So.2d 177 (Fla. 2d DCA, 1982), Leonard v. Leonard, 414 So.2d 554 (Fla. 2nd DCA, 1982) and Hu v. Hu, 432 So.2d 1389 (Fla. 2nd DCA, 1983), the Third District Court of Appeal in the case of Mirabal v. Mirabal, 416 So.2d 868 (Fla. 3rd DCA, 1982) and the First District Court of Appeal decision in Connor v. Connor, 411 So.2d 899 (Fla. 1st DCA, 1982).

In affirming the Trial Judge's award, based upon an "equitable division of the parties' assets", the District Court misinterpreted, misconstrued and misapplied the ruling in Canakaris, and thus committed error. 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.

> "A judge may award lump-sum alimony to ensure equitable distribution of property acquired during the marriage provided the evidence reflects (1) a justification for lump-sum alimony and (2) financial ability of the other spouse to make such payment without substantially endangering his or economic status..."

Canakaris, at 1201. The Canakaris decision did not create the doctrine of equitable distribution either "de facto or de jure". In one "fell swoop", the Appellate Court herein not only overruled the law set forth in Canakaris, but all Florida law regarding special equity, as it evolved from Carlson v. Carlson, 83 So. 87 (Fla. 1919) through Ball v. Ball, 335 So.2d 5 (Fla. 1976) to the present. The Appellate Court's decision erroneously disregarded the fact that a spouse's vested special equity interest in assets must first be removed from the "kitty" before that "kitty" can be equitably divided between the parties. "...upon dissolution, the owner of the separate property is entitled to a 'Special Equity' representing a return of the 'separate property'. McClung v. McClung, 427 So.2d 350, 352 (Fla. 5th DCA 1983). This attempt by the District Court to overrule Canakaris will "...create chaos and uncertainty in the judicial forum, particularly at the trial level." Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973).

The District Court of Appeal cites Robinson v. Robinson, 403 So.2d 1306 (Fla. 1980) and Claughton v. Claughton, 393 So.2d 1061, (Fla. 1980) to support its conclusion that equitable distribution is an independent remedy. Canakaris, Claughton and

Robinson clearly state that a Trial Judge may "ensure equitable distribution of property acquired during a marriage" by awarding lump-sum alimony. Nowhere in any of these opinions does this Honorable Court state that there is discretion to merely equitably distribute property, independent of the concepts of lump-sum alimony (based upon justification) or special equity. In this regard, it is respectfully suggested, that the District Court of Appeal has substantially deviated from the letter and spirit of Canakaris.

In Canakaris, this Court unequivocably pronounced that Florida is committed to the concept of an equitable division of marital assets to achieve equitable distribution. However, it is carefully noted that "equitable distribution is the end rather than the means" Hu v. Hu, 432 So.2d. 1389 (Fla. 2d DCA 1983). "Equitable distribution" is a term of art given to the totality of the process of achieving this equitable division. When the marital assets are divided by use of certain prescribed remedies an equitable distribution will result.

> "Dissolution proceedings present to a trial judge the difficult problem of providing necessary support, and attempting to distribute the assets of the parties equitably. 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 [based on justification], permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property... However, it is extremely important that [these remedies] be reviewed by appellate courts as a whole, rather than independently.

Canakaris v. Canakaris, 387 So.2d 1197 (Fla. 1980), at 1202.

Prior to Canakaris, there was no specific statutory or judicial authority to equitably divide marital assets, particularly, assets not subject to a special equity and titled in the name of one spouse. The true significance of Canakaris is not that it uses the term "equitable distribution", but that it granted to the Trial Judge the ability to transfer marital assets between the spouses, regardless of title, by the vehicle of lump-sum alimony.

The concept of lump-sum alimony now can be liberally employed to accomplish the mandate of Canakaris. The Judge has broad discretion to find "justification" for an award of lump-sum alimony to distribute marital assets, after any special equity is removed, subject to a rule of "reasonableness". Canakaris, 387 So.2d 1197, at 1203. See Rosen v. Rosen, 386 So.2d 1268 (Fla. 3d DCA 1980); Vanderslice v. Vanderslice, 396 So.2d 1185 (Fla. 4th DCA 1981); Costich v. Costich, 383 So.2d 1141 (Fla. 4th DCA 1980).

It is respectfully submitted, that the District Court of Appeal further committed error when it held, "nor do we suggest that equitable distribution must be carried out in every case". Again, Canakaris clearly states that "equitable distribution" is the end result to be accomplished by resort to various remedies. These remedies are a part of one overall scheme. The import of the Canakaris opinion and its companion, Duncan v. Duncan, 379 So.2d 949 (Fla. 1980) was "...to the extent possible,...to bring some stability to this area of the law", Canakaris, at 1200.

It is absolutely essential that each "remedy" be considered independently because there are certain specific criteria to be met as to each one. There is a clear interrelationship between these remedies. Goss v. Goss, 400 So.2d 518 (Fla. 4th DCA 1981) and Weider v. Wieder, 402 So.2d 66 (Fla. 4th DCA 1981).

In the case sub judice, the District Court of Appeal suggests "when an equitable distribution is invoked, it may well take the place of lump-sum alimony or any special equity". (App 1). This holding is clearly error, in that special equity is a vested property right of a spouse, as such, that property or portion thereof is not subject to distribution. Landay v. Landay, 429 So.2d 1197 (Fla. 1983). A property distribution may not disregard or "take the place of" the said vested right. The Trial Judge does not have discretion not to find a special equity if one has been established by the evidence. The failure to find a special equity where one exists is not an abuse of discretion, but constitutes a failure "...to apply the correct legal rule, [and that] action is erroneous as a matter of law". Canakaris at 1202.

> "A lump-sum alimony award cannot, of course, be used merely to divide jointly owned property because that must be done in accordance with statutory partition proceedings. (Citations omitted). Nor can an award of lump-sum alimony be used as a division tool where one party has established a special equity because, if the special equity is for a dollar value arising in the nature of an equitable lien from an ungifted contribution of funds or property from a source outside the marriage relationship, such interest, being a security interest, is enforced by judicial sale as in foreclosure and not by a division of property. If, as in Ball v. Ball, 335 So.2d 5 (Fla. 1976), the special equity interest is an entitlement to legal title from the finding of a resulting trust rather than a gift,

then a title transfer, not a property division, occurs. Gorman, at 77.

The District Court of Appeal further erred when it held that the concept of "'need' has been excised and instead the word 'justification' substituted when considering the doctrine of lump-sum alimony". (App 1). It is respectfully reiterated that there still remains two types of lump-sum alimony. The first type is periodic, permanent alimony which may be awarded in a lump-sum award based upon traditional concepts of need and ability to pay. Canakaris, supra. The second type is an expanded version of lump-sum alimony, based upon justification and financial ability to respond. Canakaris, at 1201; Claughton v. Claughton, supra; Robinson v. Robinson, supra.

In the case at bar, Justices Beranek and Hurley in their concurring opinion in "Judgment only", agreed that the majority opinion misinterpreted the ruling in Canakaris, supra.

> "I submit that equitable distribution is simply a goal or an end -- which is to be achieved through the avenues of alimony and special equities. Canakaris only broadened the definitions of these avenues and also broadened the discretion of the trial judge in achieving the laudable goal of an equitable division or distribution."

Further, Judge Anstead's concurring opinion in the case at bar is instructive on the majority's conclusion:

> "I must agree that in reviewing Canakaris, I find few of the trappings usually associated with the formal adoption of an entirely new doctrine as that doctrine may have been embraced legislatively or judicially in other jurisdictions. Rather, Canakaris simply seems to have endorsed the use of the existing remedy of lump-sum alimony based on the standards previously articulated in Brown. This interpretation of Canakaris is also consistent with the view that the legislature has primary responsibility for determining the relief available upon dissolution".

The "trappings usually associated" with true equitable distribution jurisdictions are specific criteria or standards to be applied to effectuate equitable distribution, as well as a statutory or judicial basis for the same. The Appellate Court herein interprets the Canakaris Court's reference to Florida Statutes 61.08 as meaning that Canakaris really held that "equitable distribution", is an independent remedy. The "alimony statute", (Section 61.08, Florida Statutes) authorizes the Trial Judge to:

> "grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments of payments in lump-sum or both... In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties. (Emphasis supplied).

Section 61.08, is the "Alimony Statute" and, unless modified by the legislature, it cannot be interpreted as authority for the adoption of "equitable distribution" as an independent remedy for dividing marital assets. Further, it is clear from Canakaris, that this Court's reference to 61.08 was to allow the Trial Judge broad discretion to consider other factors beyond those enumerated in the said statute in awarding alimony, including lump-sum alimony.

This Court, in Canakaris referred to 61.08 as authority to allow the Trial Judge to consider those "equities" referred to in Yandell v. Yandell, 39 So.2d 554 (Fla. 1949) and Brown v. Brown, 300 So.2d 719 (Fla. 1st DCA 1971) in granting lump-sum alimony. Thus, lump-sum alimony, as set out in Canakaris is not synonymous

with equitable distribution, as the District Court of Appeal has ruled.

Traditionally, equitable distribution is a comprehensive statutory or judicial scheme designed to alter a common law property system (record title), and allow for an equitable division of marital assets, taking into consideration all factors to do equity between the parties.

> "The function of equitable distribution is to recognize that when the marriage ends, each of the spouses, based on the totality of the contribution made to it, has a stake in and right to a share of the family assets accumulated while it endured, not because that share is needed but because those assets represent the capital profit of what was essentially a partnership entity".

Gibbons v. Gibbons, 415 A.2d 1174 at 1177 (N.J. 1980).

An award of property as lump-sum alimony under Canakaris, as authorized by 61.08, is still alimony. This special kind of alimony is similar to other types of alimony, such as permanent periodic and lump-sum based upon need and ability to pay. However, lump-sum alimony under Canakaris must be based upon: (1) justification; and (2) financial ability to respond. Canakaris at 1201. Thus, unless both criteria (1) and (2) are met, a spouse is not entitled to this type of lump-sum alimony. This award is discretionary. Hence, neither Florida Statutes 61.08, nor Canakaris, can be considered to imply a comprehensive property distribution scheme, but merely a component part thereof. Painter v. Painter, 320 A.2d 484 (N.J. 1974) Rothman v. Rothman, 320 A.2d 496 (N.J. 1974). See generally, 6 Fam. L. Rep. No. 42 4043, 4050 (BNA. September 2, 1980).

Furthermore, neither Canakaris alone, nor the Canakaris Court's interpretation of Florida Statute 61.08, compels the conclusion that Florida has adopted equitable distribution as an independent remedy. Both Canakaris and Florida Statute 61.08 fail to adequately set forth specific fundamental guidelines that are traditionally found in true equitable distribution jurisdictions. Florida Statutes 61.08 fails to define the terms "marital property"; "separate property". See: Footnote 1. Enumerated factors or guidelines which a Trial Judge must follow provide a check on the court's discretion, allow for consistency and predictability and a means of reviewing the trial court's exercise of its discretion.

In the case at bar, the Appellate Court suggests that they "see no reason why the provisions of subsection (2)(a) through (f) of [61.08] ... should not also be applicable to an equitable distribution..." (App. 1). Again, 61.08 is the "Alimony Statute" and, while those factors set forth in 2(a)-(f) may and should be considered in formulating an equitable distribution, the said list is insufficient. Further, it is inappropriate and contrary to the legislative intent to use the "Alimony Statute" synonymously with equitable distribution.

It is suggested that what the legislature intended by the use of the language "in determining a proper award of alimony, the Court may consider any factor necessary to do equity and justice between the parties" was that the Trial Judge may consider other factors, such as; marital misconduct, economic

fault, fraudulent conveyances in contemplation of divorce, and concealment or dissipation of assets, in awarding alimony.

> "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 our no-fault system was enacted and would be directly contrary to express legislative policy. Therefore, we hold that §61.08(2), Florida Statutes (1975), which permits a trial court to consider "any factor to do equity and justice between the parties", does not permit a court to conduct an inquiry into every aspect of the marital conduct of the parties as a matter of course. Whether such an inquiry is proper will depend upon the circumstances of each case. Today we hold only that where an analysis of the need of one spouse and the ability of the other to pay demonstrates that both parties will suffer economic hardship as a result of any division of available resources the court might make, the court may then consider, as an equitable circumstance under §61.08(2), Florida Statutes (1975), any conduct of either party which may have caused the difficult economic situation in which they stand before the court. (Emphasis supplied.)

Williamson v. Williamson, 367 So.2d 1016, 1019 (Fla. 1979). See also: Mendel v. Mendel, 386 So.2d 627 (Fla. 4th DCA 1980); "Fault in Consideration in Alimony, Spousal Support or Property Division Awards Pursuant to No-Fault Divorce", 86 ALR 3d 1116.

In this regard, reference to the New York Equitable Distribution Statute, one of the most comprehensive in the nation, is instructive.(1) Subsection 5 of the said statute sets forth ten (10) specific factors a Trial Judge must consider, and then make specific factual findings as a basis of a "distributive award". Factor number 10 provides:

> "(10) Any other factor which the court shall expressly find to be just and proper."

This language is directly analogous to the above referred to language of Florida Statute 61.08. New York Legislative history

reveals that this factor was the result of bar committee and legislative compromises over the relevance of "marital misconduct". "Marital fault, which destroyed the marriage relationship, and led to dissipation of family assets, should be the kind [of fault] that is cognizable under Factor (10)". New York Law School Review, Commentary on Equitable Distribution, Foster, Henry H., Vol. XXVI, No. 1, 1981, page 50. Therefore, 61.08 cannot be construed as legislative authority for the creation of the independent remedy of equitable distribution.

Finally, the Appellate Court herein refers to the legislation proposed by the Family Law Section of the Florida Bar as "guidelines which do not appear to be inappropriate" to fashion an equitable distribution of marital assets. (App. 1). It is respectfully submitted, that the Family Law guidelines are insufficient when compared to the more comprehensive equitable distribution statutes.[1] Florida courts must rely upon the vehicle of lump-sum alimony to achieve equitable distribution because only the legislature has jurisdiction over title to property.

> "The court's authority to effect a change in the title to the property of the parties in a dissolution of marriage is restricted to an award of lump-sum alimony, a determination of a special equity, a partition of the property, of a division based upon an agreement of the parties".

Nieman v. Nieman, 294 So.2d 415 at 416 (4th DCA 1971).

Hence, in the case at bar, the Trial Court and Appellate Court erred in disposing of the parties' various property interests and transforming these interests by the use of "equitable distribution" as an independent vehicle for the said

award. The effect of this distribution was clearly prejudicial to the Wife. In the case sub judice, the Court failed to acknowledge the Wife's vested interest in certain properties by virtue of her clear special equities in those properties. Thus, by merely resorting to the remedy of "division of property", the Trial Judge and Appellate Court committed error as a matter of law. The Court, by looking at the "forest", overlooked the Wife's vested interest in significant "trees". The Fourth DCA, in Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA 1981) correctly summarized Canakaris and its progeny:

> "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 through the existing remedies... When the court listed the various remedies it clearly did not intend to create a totally new vehicle named 'equitable distribution' as the Trial Court employed in the instant case. 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".

Sangas v. Sangas, 407 So.2d 630, at 633.

Thus, in the absence of a finding of a special equity in favor of the Husband, the property rights of the respective parties were controlled by Statute, §689.15, Griffin v. Griffin, 276 So.2d 211 (rth DCA 1973); Cribb v. Cribb, 261 So.2d 566 (4th DCA, 1975). Therefore, the Final Judgment requiring the Wife to convey to Husband her one-half (1/2) interest in the Lake Placid property and Great Abaco Island property "...constitutes an abuse of discretion since it is tantamount to the imposition of a

property settlement by the Court". Nieman v. Nieman, supra at 416; Sistrunk v. Sistrunk, 235 So.2d 53 (4th DCA 1970); Harder v. Harder, 264 So.2d 476 (3rd DCA 1972); Jacobs v. Jacobs, 400 So.2d 141 (1st DCA 1981).

Moreover, it is further respectfully submitted that the said award to the Husband cannot be implicitly sustained on the basis of a lump-sum alimony. The Court specifically denied an award of lump-sum alimony to Husband, notwithstanding Husband's prayer for same. (R-188-192; 258-263). An award of lump-sum alimony was not warranted based upon the evidence presented at trial, in that, there was no justification for the award and the Wife was not financially able to make the payment or transfer of property without substantially endangering her economic status. Canakaris, supra; Brown v. Brown, 360 So.2d 719 (1st DCA 1974).

Thus, the Trial Court and Appellate Court failed to apply the correct rule of law and its action is erroneous as a matter of law and should be reversed. Canakaris, 387 So.2d at 1202.

ARGUMENT

II

THE TRIAL COURT ERRED AS A MATTER OF LAW, IN FAILING TO AWARD A SPECIAL EQUITY TO THE WIFE IN THE HUSBAND'S INTEREST IN THE MARITAL RESIDENCE, THE GREAT ABACO ISLAND AND LAKE PLACID PROPERTIES.

In the case at bar, the Trial Judge specifically found that "... neither party has established a special equity in any real property..." (R-260, ¶10). The Appellate Court affirmed this finding. (App. 1). This ruling was error as a matter of law,

thereby affecting the entire "equitable division of the parties' assets." Canakaris.

(a) Marital Residence and Great Abaco Island Properties. It is respectfully submitted that the Wife, as a matter of law, was entitled to a special equity in the marital residence and the lot in the Great Abaco Island, as a result of mortgage payments made after the separation of the parties and for funds expended to discharge the second mortgage, which was in foreclosure. Aguiar v. Aguiar, 383 So.2d 280 (4th DCA 1980); Dancu v. Alexander, 421 So.2d 819 (4th DCA 1982). The unrebutted evidence was that the Wife made the mortgage payments on both properties from her own funds, from a source unconnected with the marriage during the separation of the parties. (T-159-160, 165, R-415-526, 550-608). The evidence was unrebutted that the Wife made all the first mortgage payments from August, 1979 up to date of dissolution proceedings ($128.59 per month; total $2,314.62); all the second mortgage payments ($100.00 per month; total $1,000.00); all the mortgage payments on the Great Abaco Island property ($15.00 per month; total $285.00) and all other maintenance payments on the marital residence. (T-147, 159-161; R-141, 456; 471-526; 550-608).

The case at bar is directly on point with the case of Aguiar v. Aguiar, 386 So.2d 280 (4th DCA, 1980), where it was held:

> "It is clear from the evidence that after separation of the parties, the Wife made the mortgage payments on this home from her own funds...we can see no reason why the Wife was not entitled to a special equity ... recognizing her payment of the mortgage obligation. We, therefore, conclude the trial court abused its discretion in failing to award a special equity under the circumstances..."

Aguiar, at 282.

In Dancu v. Alexander, the Fourth DCA also held that:

> "The Trial Court erred in not awarding the Husband a special equity giving due consideration to the Husband's...payment after separation of more than his one-half share of the monthly mortgage payments and taxes".

421 So.2d 819 (Fla. 4th DCA 1980).

The Wife should be entitled to a special equity representing periodic mortgage payments made subsequent to separation on both the marital residence and the Great Abaco Island Properties. Landay v. Landay, 400 So.2d 43 (Fla. 1983).

A "special equity" is a vested interest in property which a spouse acquires because of contribution of funds, property or services made over and above the performance of normal marital duties, which vests when the contribution is made. Canakaris, supra; Duncan v. Duncan, 379 So.2d 949 (Fla. 1980).

> "This vested interest is not alimony... The property interest or lien concept of "special equity" is entirely distinct from the determination of parties equities in a lump-sum alimony award. The term 'special equity' should not be used when considering lump-sum alimony; rather, it should be used only when analyzing a vested property interest of a spouse (citations omitted)".

Canakaris at 1201.

Thus, the Wife had a vested property interest in a portion of Husband's one-half (1/2) interest in the marital residence because of the periodic mortgage payments she made with her separate property.

The Wife was also entitled to a special equity in a portion of the Husband's one-half (1/2) interest in the marital residence as a result of paying off and discharging the second mortgage

with her separate funds, in a total amount of $13,563.79. The parties were obligated on a second mortgage on the marital residence in the approximate amount of $12,000.00, which ballooned in June, 1980. (T-112-113; R-470, 481, 609). The parties did not pay the said balloon note when it came due and foreclosure proceedings were commenced. (R-317-321; T-166, 168). The Husband stipulated that he did not pay anything towards the discharge of the second mortgage. (T-166). The source of the funds to pay off the second mortgage came from various loans the Wife obtained to prevent foreclosure. (T-169-172; R-610-614). The Wife obtained a satisfaction of the second mortgage (R-617) and the foreclosure proceedings were voluntarily dismissed. (R-322). The case of Gorman v. Gorman, 400 So.2d 75 (5th DCA 1981) is directly on point with the facts herein:

> "The record on appeal indicated...that the appellee may have been forced, in order to prevent loss of the home by foreclosure, to personally borrow funds which were used to discharge the mortgage on the home. Upon remand in this cause or in any partition action, she will be entitled to assert a 'special equity' in nature of an equitable lien against the husband's interest in the marital home property for any such sums as she may have advanced for the benefit of his interest".

400 So.2d at 79.

Thus, it is respectfully submitted, that the failure to find and award to the Wife a special equity in the marital home requires this cause to be reversed.

> "It follows, therefore, that when a trial judge is found to be in error as to some aspect of his disposition the cause should be remanded with sufficient authority that he may again exercise his broad discretion to modify the related matters within his original plan for division and support as may be necessary in order to do equity and justice between the parties in view of the changes required by the appellate opinion".

Eagan v. Eagan, 392 So.2d 988, 990 (Fla. 5th DCA 1981); Goss v. Goss, 400 So.2d 518 (Fla. 4th DCA 1981); Weider v. Weider, 402 So.2d 66 (Fla. 4th DCA 1981).

As a consequence of the Wife being entitled to a special equity in the marital residence in an approximate amount of $16,878.00 (periodic mortgage payments, plus satisfaction of second mortgage), the award to the Husband is so unequal in his favor as to preclude an "equitable distribution" of the marital assets.

(b) The Lake Placid Property. The Husband was awarded the Wife's one-half (1/2) interest in the Lake Placid property as part of the attempted "equitable division" of assets. (R-258-263). Prior to the parties' acquisition of the said Lake Placid property, the parties lived in a jointly-owned home in Avon, Connecticut. (T-50, 100). The parties lived together in Avon, Connecticut until the end of 1972 or beginning of 1973. (R-198-304). In 1973, the parties separated and the Husband moved to Florida. (T-109, 156). The parties entered into a Property Settlement Agreement, wherein the Avon, Connecticut property was remortgaged (R-287-291) and the Husband received $18,000.00 in cash, plus the two lots in Stella Maris, Bahamas, worth approximately $7,000.00 ($25,000.00 total), a station wagon and his tools. (T-53-56, 109-110). The Wife received the proceeds of the sale of the Avon, Connecticut house, in the approximate amount of $25,000.00, plus its contents. (T-54, 109-110, 157-158; R-409-413). The Husband commenced a divorce proceeding in Broward County and the exchange of property was the subject of a

court order, although no final judgment was ever entered. (R-306-307). Thus, each party received approximately $25,000.00 in cash and property which became their separate properties.

Thereafter, the parties reconciled and the Wife moved to Fort Lauderdale in March of 1974. (T-56, 158). When the Wife moved, she transported to Florida, at her own expense, the contents of the Avon, Connecticut house. (T-156-157; R-409-413). Each maintained separate savings accounts containing the cash respectively received by virtue of the separation agreement. Thereafter, the parties purchased the Lake Placid property held jointly. The Wife contributed one-half (1/2) of the $50,000.00 down payment on the Lake Placid property, in the approximate amount of $25,000.00, from her own separate funds. (T-107-108, 163). The Husband contributed a similar amount towards the down payment from his own funds. The parties purchased this property as a "business proposition". (T-107). The parties maintained joint bank accounts representing the contributions of parties' salaries. (T-66; R-406-408). The joint contributions of the parties went to pay off the remaining debt on the Lake Placid property. (T-109-159). The Trial and Appellate Court erred in failing to find and award to the Wife a special equity in the Lake Placid property in an amount equal to the percentage of the value of her contribution, $25,000.00, as one-half (1/2) of the down payment, because it was her separate property. Landay v. Landay, supra. Thus, each party hereon was entitled to be awarded a special equity representing their respective down payments and were entitled to share equally in the remaining

equity of the property. Evers v. Evers, 374 So.2d 1117 (Fla. 1st DCA 1979). The Trial Court was without authority to transfer and transform the Wife's vested property interest in the said property to be wholly owned by the Husband. There is no authority, statutory or judicial, to defeat the Wife's special equity. Canakaris.

> "...and in the process of sorting out separate property (to be returned to the separate owner as a special equity) from marital property (which may be subject to an equitable distribution between the parties) the trial court must look to the substance, that it, the source of the funds used to acquire the asset..."

McClung, at 353.

The award of the Wife's interest cannot be supported on the basis of an "equitable division" of the parties' assets or upon the theory of equitable distribution. The Wife's special equity interest constitutes her separate property and not marital property and, thus, it is not available for equitable distribution, nor can it be awarded by lump-sum alimony. See Landay v. Landay, supra. Only that portion beyond the initial respective down payments (approximate total of $4,000.00) of the parties that went to pay off the balance of the purchase price ($30,000.00) may be considered marital property available for distribution. Thus, this property should have been partitioned as the parties requested.

The Trial Court further erred by treating parties inequitably. In this regard, the Trial Court acknowledged that the proceeds of the Separation Agreement remained the separate property of the parties when it confirmed Husband's title to the Stella Maris, Bahamas property. (R-258-263). Thus, the Husband

was able to retain the benefits of the property settlement, to wit: Stella Maris lots worth $7,000.00, plus the down payment on Lake Placid, approximately $20,000.00. However, the Wife did not receive the corresponding benefit. The failure to award special equity to the Wife was error as a matter of law.

Additionally, the award to the Husband of Wife's interest in the Great Abaco Island and Lake Placid properties cannot be supported as lump-sum alimony based upon "justification" to ensure equitable distribution of property, because the Trial Court specifically found that the Husband was not in need of alimony. (R-258-263). Further, the record is totally devoid of any evidence to support the conclusion that the award to the Husband was "justified" and that the Wife had an ability to "respond".

The Court further erred in failing to find and award to the Wife a special equity in the marital residence. This special equity should be carved out of the Husband's one-half interest in the approximate amount of $16,800.00 representing the payment of the mortgages with her separate funds. Thus, the actual value of Husband's remaining equity was approximately $8,700.00. This is, in realty, what the Wife was awarded.

In this regard, it has been held that an award of a special equity constitutes a division of existing property rights and, therefore, is not a taxable event. Bosch v. United States, 590 F.2d 165 (5th Cir. 1979); see also, U.S. v. Davis, 370 U.S. 65 (1962).

However, a division of property pursuant to equitable distribution may be a taxable event. U.S. v. Davis, supra. Thus, it is crucial that a vested interest/special equity not be overlooked because of the said potential tax consequences.

(c) Personal Property:

The court found that the furniture and furnishings located in the marital residence to be valued at $3,500.00 (R-259) and "awarded" these items to the Wife. (R-260). The court erred because the said furnishings were the separate property of the Wife. The Wife was the sole owner of the furnishings. The Court erred in crediting to the Husband any interest in the furnishings awarded to the Wife. The furnishings should have been removed from the distribution plan, as was the Stella Maris properties.

ARGUMENT III

THE WIFE WAS "SHORTCHANGED" AS A RESULT OF THE INEQUITABLE DIVISION OF THE PROPERTY AND THUS THE LOWER COURT ABUSED ITS DISCRETION

The Honorable Court, in affirming the division of the parties' assets, committed error in that the said distribution to the Husband was not "justified". The Canakaris decision firmly establishes the concept that marriage is indeed an economic, as well as social partnership, and each partner "is entitled to a fair share of the fruits of their combined industry..." Neff v. Neff, 386 So.2d 318 (2nd DCA 1980); Brown v. Brown, 300 So.2d 719 (1st DCA 1971).

> "The trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from

prosperity to misfortune, and in viewing the totality of the circumstances should not be 'shortchanged'."

Canakaris, supra at 1204; Brown v. Brown, 300 So.2d 719 (1st DCA 1974).

In the case at bar, the Wife was "shortchanged" because the Final Judgment provided the Husband with the "lion's share" of the marital assets and, as such, that award constituted an unreasonable abuse of discretion. Brown v. Brown, supra; Canakaris v. Canakaris, supra. A judge's discretion is abused when "...judicial action is arbitrary, fanciful or unreasonable." Canakaris v. Canakaris, supra.

ARGUMENT IV

THE COURT ERRED IN FAILING TO CONSIDER THE HUSBAND'S USE OF HIS PENSION FUND AND THE PROCEEDS OF THE LIFE INSURANCE POLICY AS MARITAL ASSETS

(a) The Pension Fund and Life Insurance Proceeds. While the Husband was working as a teacher for the State of Connecticut, he accumulated a pension fund in the amount of $10,000.00. (T-91, 94). The pension fund was accumulated by deductions from Husband's salary. (T-175, R-618). In 1979, shortly before the parties separated, the Husband withdrew the $10,000.00 pension fund, invested it in gold coins and lost the entire amount. (T-66-68, R-333). It is widely recognized that pension benefits are marital property and may be the largest family asset acquired during the marriage, with the possible exception of the marital home. Aylward v. Aylward, 420 So.2d 660 (2nd DCA 1982). Retirement and pension benefits are in reality a form of deferred compensation and hence are considered property and not a "mere expectancy". In re: Marriage of Brown, 544 P.2d 561 (1976).

Equitable Distribution, N.Y. Law School L. Rev. 1 (1981), Footnotes 165, 166. In the case at bar, in the context of the ultimate financial circumstances of the parties, the sum of $10,000.00 was a substantial marital asset. Assuming arguendo the said funds were an "expectancy" (Petitioner does not concede this point), once Husband withdrew these funds, the character of the property was no longer an expectancy but was a marital asset. The Wife derived no benefit from this marital asset. The Wife does not contend that these funds were squandered or that the Husband acted in bad faith in making this investment. The Trial Judge still should have considered the Husband's dissipation of this asset in fashioning the division of property herein. It is clearly inequitable for the Husband to use this asset for his sole benefit and not be required to account for it at the time of dissolution.

The Trial judge was authorized pursuant to Florida. Statute. 61.08 to "consider any factor necessary to do equity and justice between the parties". This type of consideration is necessary to ensure a truly equitable distribution of the marital assets. See: Williamson v. Williamson, 367 So.2d 1016, 1019 (Fla. 1970); Vanderslice v. Vanderslice, 396 So.2d 1185 (Fla. 4th DCA 1981).

Other jurisdictions recognize the wasting or dissipation of marital assets as an important factor in accomplishing an equitable distribution. The New York "Equitable Distribution Statute" provides for the Court to consider:

> "(9) The wasteful dissipation of family assets by either spouse."[2]

Economic fault is a relevant consideration for a division of marital assets and determining amount of support. Arizona, Delaware, District of Columbia, Indiana, Illinois, Minnesota, Montana, New York, Pennsylvania and Wisconsin make dissipation of family assets or economic fault a factor to consider for division of marital assets. See 6 Fam. L. Rep. 4042, 4043, 4050 (BNA, Sept. 2, 1980).

> "When marriage is viewed as a partnership and the product of the partnership is divided equitably upon divorce, it may be claimed that there will be unjust enrichment unless the dissipation of family assets is a factor to be reckoned with in rendering justice as between the parties."

N.Y. L. Rev. Vol. 26. P. 58.

Additionally, this Honorable Court in Canakaris has implicitly recognized the concept of economic fault to be considered by the Trial Judge when it opined:

> "In granting Lump-sum alimony, the trial court should be guided by all relevant circumstances to ensure "equity and justice between the parties."

Canakaris at 1201.

Hence, the trial court erred in failing to consider the dissipation of the pension fund when it divided the assets.

Additionally, during the course of the marriage, the Husband accumulated $6,000.00 in cash value in a Prudential Life Insurance policy. (T-68, 96, 118). The premiums for the said policy were paid from the joint funds of the Parties. (T-97-99, 161; R-527-541). In April, 1979, shortly before the $12,000.00 balloon payment was due on the second mortgage on the marital residence, the Husband cashed in the life insurance policy, received $6,000.00 and paid off the loan on his 1978 Cadillac

titled in his name. (T-68, 118-121, 143-144, 161; R-352, 527-541). The Husband purchased the said Cadillac with joint Funds. (T-124, 161-163; R-542-548).

Thus, the evidence warranted a finding that the said proceeds of the life insurance policy was a marital asset and the Wife was entitled to one-half (1/2) the value of the $6,000.00. Therefore, the trial court committed error in failing to award and/or credit the same to the Wife. Windham v. Windham, 198 So. 202 (Fla. 1943); Floyd v. Floyd, 383, So.2d 773 (5th DCA 1980); Johnson v. Johnson, 367 So.2d 695 (2nd DCA 1979); LaFleur v. LaFleur, 395 So.2d 613 (5th DCA 1981).

It is respectfully reiterated, that the Husband's conduct of abandoning the Wife and his financial responsibilities, was a relevant consideration of "economic fault" and should have been weighed by the trial judge. Williamson v. Williamson, 367 So.2d 1016 (Fla. 1970).

> "If, as so often happens, the harvest resulting from the mutual efforts winds up in the hands of one partner, the equitable share of the other can be allocated by an award of lump-sum alimony."

Neff v. Neff, 386 So.2d 318 at 319 (2nd DCA 1980); Canakaris v. Canakaris, 392 So.2d 1197 (Fla. 1080).

Thus, the Appellate Court erred in affirming the Trial Court's equitabe division of property wherein the said "division" was clearly not equitable.

ARGUMENT V

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ORDER THE PARTION OF THE LAKE PLACID AND GREAT ABACO ISLAND PROPERTIES

It is submitted that both the Husband, in his petition, and the Wife, in her counterpetition, prayed for the court to partition the entire Lake Placid and Great Abaco Island properties. (R-188-192, 195-207). Additionally, the Wife, at trial, requested the court to partition these properties. (T-177). The Husband, at trial, requested that at least 18 acres of the Lake Placid property be partitioned and sold. (T-78). Upon the entry of the Final Judgment in a dissolution action jointly-owned property automatically becomes owned as tenants in common. F.S.A. §689.15; Griffin v. Griffin, supra. Partition of property held as tenants in common, with certain exceptions, is a matter of right. Condrey v. Condrey, 92 So.2d 423 (Fla. 1957); Sudholt v. Sudholt, 389 So.2d 301 (5th DCA 1980); Hazelwood v. Hazelwood, 345 So.2d 819 (4th DCA 1977); Ranes v. Ranes, 311 So.2d 370 (2nd DCA 1975); F.S.A. §64.011.

The Supreme Court of Florida stated in Condrey v. Condrey,

> "...that the power of the trial court to deny partition should be invoked only in extreme cases, where otherwise manifest injustice, fraud or oppression would result if the remedy were granted." (Emphasis supplied.)

Sudholt v. Sudholt, supra, at 302.

In the case at bar, the Husband failed to demonstrate "manifest injustice", "fraud" or "oppression" in order to overcome his burden to avoid partition. (T-77-78). Specifically, the trial court found only "...that physical partition of the realty would not be in the best interest of the parties..." (R-260). Thus, partition was denied and the Husband was awarded the entire parcels of land based upon "...an equitable division

of the parties' assets". (R-260). As previously argued, the trial court was without authority to make this award to the Husband.

Furthermore, in order to sustain the refusal to grant Wife's prayer for partition, there would require a showing by the Husband of need and an obligation of support by the Wife. Sudholt v. Sudholt, supra. The evidence revealed that the Husband was not in need of support from the Wife. The Husband voluntarily left the marital residence in August, 1979 and has since been able to support himself without assistance from the Wife. (T-75; 127-130). Additionally the Husband is capable of being gainfully employed. (T-74, 75-76, 80, 127, 131-135). It is questionable as to whether the Husband made a diligent effort to find employment since the date he voluntarily chose not to renew his contract of employment with Cardinal Gibbons High School. It is respectfully suggested that the pending divorce had an effect on the Husband's motivation to obtain gainful employment. (T-131-135). It should be further noted that Dr. O'Lone testified at deposition that the Husband was capable of being gainfully employed. (T-654, 670-674).

Additionally, the Court specifically rejected Husband's claim for alimony, support and attorney's fees. (R-258-263). However, the Appellate Court found "that while the Husband was in poor health with ulcers and a mental disorder, he was unable to work then or in the foreseeable future, with unemployment compensation constituting his only source of regular income". This finding was not supported by the evidence. Further, the Trial

Court did not find that the Husband was "unable to work then or in the foreseeable future", it merely indicated that "his adjustment disorder with work inhibition" inhibited his ability to work as a high school teacher. (R-258-263). The Appellate Court overlooked the deposition testimony of Dr. O'Lone which clearly indicates that the Husband was able to be gainfully employed in other types of employment, including being a college teacher. (R-621-677). Furthermore, the Appellate Court overlooked the fact that in order to be eligible for unemployment compensation, one must have the present ability to be employed and one must be actively engaged in seeking employment. Thus, the Husband failed to demonstrate a need and an obligation of support by Wife in order to sustain a denial of Wife's claim to partition the Lake Placid and Great Abaco Island Properties. Sudholt v. Sudholt, 389 So.2d 301 (5th DCA 1981).

Partition and sale were required based upon the evidence, the mutual requests of the parties, and to equitably divide the marital assets. Further, it was error not to grant partition.

ARGUMENT VI

THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES AND COSTS TO THE WIFE.

The trial court has broad discretion pursuant to statutory authority in awarding attorney's fees in a dissolution action. F.S.A. 61.16. The trial court must consider the respective financial resources of both parties in determining an award of attorney's fees. Droubie v. Droubie, 379 So.2d 1331 (2nd DCA 1980). The purpose of allowing attorney's fees in a dissolution action is to ensure both parties will have similar ability to

secure competent legal counsel. Gerber v. Gerber, 392 So.2d 317 (4th DCA 1980); Hill v. Hill, 376 So.2d 472 (4th DCA 1979); Scattergood v. Scattergood, 363 So.2d 601 (4th DCA 1978). In the case sub judice, the Husband's financial position was far superior to that of the Wife's.

> "The Husband has a superior financial ability to secure and pay counsel. It is not necessary that one spouse be completely unable to pay attorney fees in order for the trial court to require the other spouse to pay these fees".

Canakaris, supra at 1205; Kaylor v. Kaylor, 390 So.2d 752 (4th DCA, 1980); Lewis v. Lewis, 383 So.2d 1143 (4th DCA 1980).

Thus, the trial court abused its discretion in failing to award attorney's fees to the Wife and the Wife prays that the Final Judgment be reversed on this issue.

ARGUMENT VII

PROPOSED MANDATORY GUIDELINES AND FACTORS THE FLORIDA COURTS SHOULD BE DIRECTED TO FOLLOW IN AWARDING LUMP-SUM ALIMONY TO ENSURE EQUITABLE DISTRIBUTION OF MARITAL ASSETS.

It is clear that this Honorable Court, in Canakaris, has attempted to achieve an equitable division of marital assets by the use of lump-sum alimony. It is further evident that, in the absence of a specific equitable distribution statute containing comprehensive mandatory guidelines, it is necessary for this Honorable Court to judicially set forth those guidelines so as to bring stability, consistency and predictability to this area of the law.

It is respectfully suggested, that this Honorable Court follow the trend of other jurisdictions in adopting specific

mandatory procedures, definitions and guidelines, so as to provide the parameters of the trial judge's discretion.

> "The discretionary power that is exercised by a trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.

Canakaris at 1203.

Aside from providing consistency, predictability and fairness to decisions, specific guidelines and required factual findings would provide Appellate Courts with a means of ascertaining how the trial judge arrived at his distribution plan. It is respectfully urged, that the trial judge be required to make specific findings of fact as to each non-discretionary factor which show that he considered all the factors in reaching his decision.[3] Mancuso v. Mancuso, 428 N.E. 2d 339, 1341 (Mass. 1981). The need for these factual findings is illustrated by the recent Fourth District Court of Appeal decision in the case of Upstill v. Upstill, _____ So.2d _____, Case No. 82-108 (4th DCA 1983), where the court stated:

> "We are unable to determine the trial court's basis for achieving equitable distribution vis a vis the award of $24,000 in that there is no explanation in the judgment for the amount of the award or recitation whether consideration was given to the value of the land

acquired directly from and related to the success and operation of the business."

Initially, it is crucial that this Honorable Court set forth specific definitions of "marital property" and "separate property". It is respectfully suggested that, pursuant to the majority of common law jurisdictions that have either adopted equitable distribution by statutes or case law, "Marital property" is defined as follows:

> "all property acquired by either or both spouses during marriage and before execution of a separate agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided by contract."

1980 N.Y. Laws Ch. 281; ILL Rev. Stat. Ch. 40 §503(b) (1980); ME Rev. Stat. Ann §722-A(1); MD Cts. and Jud. Proc. Code Ann §3-6A-01(e) (1980).

"Separate property" will include:

> "all assets acquired by gift or inheritance from someone other than a spouse; the increase in value of separate assets, except if such increase is attributable to the efforts of the other spouse; compensation for personal injuries and property described as such.

Further, this Court should fix a date certain to value the said marital assets. A majority of the equitable distribution jurisdictions use the date of filing of the divorce petition as the date of valuation. 27 N.Y. Law School L. Rev. 1 (1981).

It is respectfully suggested that this Honorable Court adopt the following:

PROPOSED GUIDELINES

> "That in every dissolution proceeding, except where the parties provided for disposition of their property by Agreement, and plead for the Court to equitably distribute their property, the court shall determine the respective rights of the parties in their 'separate'

and 'marital property' and may provide for the disposition of marital property by lump-sum alimony in the Final Judgment.

Further, the Court shall, in writing, set forth as to each factor enumerated below, its specific factual findings which show that all the said factors were weighted and further set forth in detail the reasons for its decision; such may not be waived by the parties or counsel:

A. The Court shall set aside to each spouse his "separate property";

B. "Special Equities" in marital property shall be determined and awarded to the appropriate spouse;

C. "Marital property" may be equitably distributed between the parties by lump-sum alimony, after allocating separate property and special equities.

D. The Trial Judge, in awarding lump-sum alimony under Paragraph (b), shall consider:

1. Respective age, background and earning ability of the parties;

2. Duration of the marriage;

3. What money or property each brought into the marriage;

4. The present income and property of each party at the time of marriage and at time of commencement of the parties;

5. The property acquired by either or both of the parties during the marriage;

6. The current value and income producing capacity of the property;

7. The liquid or non-liquid character of all marital property;

8. The debts and liabilities of the parties to the marriage, including the liabilities relating to the acquisition and maintenance of marital property;

9. The contribution of each spouse to the acquisition enhancement, or improvement of the marital property and the separate property of the other party;

10. The results of any alimony awarded;

11. The present mental and physical health of the parties;

12. The probability of continuing present employment at present earnings and future earning capacities of each spouse;

13. Gifts of one spouse to the other during marriage;

14. Standard of living established during marriage;

15. Contribution to the marriage by each spouse, including contributions and services to the care and education of the children, as a homemaker, and to the career or career opportunities of the other spouse;

16. The contribution, dissipation, wasting or fraudulent conveyances, of each party in the acquisition, preservation, depreciation or appreciation in value of the property;

17. The vocational skills and employability of each of the parties;

18. Pension rights or retirement benefits of each spouse;

19. The probable future financial circumstances of each party;

20. The tax consequences of division of property;

21. Any equitable claim to, or interest in, any marital property by party not having title to said property;

22. Any other factor which the Court shall expressly find to be just and proper."

The above proposed guidelines represent a comprehensive list of essential factors to govern an equitable division of the marital assets. It is respectfully submitted, that if these mandatory guidelines are followed by each Trial Judge, the result will be greater consistency, fairness and predictability of judicial decisions.

CONCLUSION

For the reasons and authorities set forth herein, the Petitioner prays this Honorable Court to reverse the decision of the District Court of Appeal, award the Petitioner her special equities in the various properties, along with a more equitable share of the parties' assets, attorneys' fees, remand to the Trial Court for further proceedings and adopt Petitioner's proposed guidelines suggested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to: Philip Michael Cullen, III, Esquire, Attorney for Respondent, Suite 206, 700 Southeast Third Avenue, Fort Lauderdale, Florida 33316, and Stephen W. Sessums, Chairman-Elect, 100 Madison Street, Tampa, Florida this 6th day of September, 1983.

Ira Marcus

IRA MARCUS

FOOTNOTES

[1] Disposition of property in certain matrimonial actions.

(a) Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition therein in the final judgment.

(b) Separate property shall remain such.

(c) Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

(d) In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) any award of maintenance under subdivision six of this part;

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or

profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(10) any other factor which the court shall expressly find to be just and proper.

(e) In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution or an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

(f) In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter without regard to the form of ownership of such property.

(g) In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its descision and such may not be waived by either party or counsel.

Maintenance.

(a) Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance to meet the reasonable needs of a party to the matrimonial action in such amount as justice requires, having regard for the circumstances of the case and of the respective parties. In determining reasonable needs the court shall decide whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the the other party has sufficient property or income to provide for the reasonable needs of the other. In determining the amounts and duration of maintenance the court shall consider:

(1) the income and property of the respective parties in including marital property distributed pursuant to subdivision five of this part;

(2) the duration of the marriage and the age and health of both parties;

(3) the present and future capacity of the person having need to become self-supporting;

(4) the period of time and training necessary to enable the person having need to become self-supporting;

(5) the presence of children of the marriage in the respective homes of the parties;

(6) the standard of living established during the marriage where practical and relevant;

(7) the tax consequences to each party;

(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party;

(9) the wasteful dissipation of family assets by either spouse; and

(10) any other factor which the court shall expressly find to be just and proper.

(b) In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

2 New York Domestic Relations Law; 5236 (McKinney Supp. 1980).

(a) Arizona Domestic Relations Laws, Chapter §25-318A. provides: "Nothing in this section shall prevent the court from considering excessive or abnormal expenditures, destruction, concealment or disposition of community, joint tenancy or other property held in common."

(b) Uniform Marriage and Divorce Act §307: "The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation in the value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit". See: Massachusetts Domestic Relations Law, Chapter 208 §345 for identical language.

(c) See also: Burtscher v. Burtscher, 563 S.W.2d 566 (Mo. 1970). Neely v. Neely, 563 P.2d 302 (Ariz. 1977); Wireman v. Wireman, 353 N.E.2d 292 (Ind. 1976).

3 Alimony; assignment of estate; determination of amount.

Upon divorce or upon a complaint in any action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband

or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any of each party, (1) shall consider the length of the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income; (2) the court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Amended by St.1974, c. 565; St.1975, c. 400, § 33; St. 1977, c. 467; St.1982, c. 642, §1.

[4] National Conference of Commissions on Uniform State Laws, Uniform Marriage and Divorce Act §307, Alternative A, provides that a court, making a distribution should consider the following factors:

> the duration of the marriage, any prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

[5] Florida Statutes 61.08. Alimony.

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded.

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage;

(b) The duration of the marriage;

(c) The age and the physical and emotional condition fo both parties;

(d) The financial resources of each party;

(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment;

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.