IN THE SUPREME COURT OF FLORIDA

FELICIA M. TRONCONI,

Petitioner,

vs.

FRANCIS JOSEPH TRONCONI,

Respondent.
_____/

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

PETITIONER'S BRIEF ON JURISDICTION

IRA MARCUS, P.A.
Attorney for Felicia M. Tronconi
625 Northeast Third Avenue
Fort Lauderdale, FL 33304
Telephone: (305) 525-1511

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PREFACE

The Petitioner, FELICIA M. TRONCONI, was the Respondent/Counter-petitioner in the Trial Court, and the Appellant in the Appeal to the Fourth District Court of Appeals. The Respondent to this Petition was the original Petitioner/Counter-respondent in the dissolution proceedings and the Appellee in the Appellate proceedings. The Petitioner, FELICIA M. TRONCONI, will be referred to as Wife and Respondent, FRANCIS JOSEPH TRONCONI, will be referred to as Husband.

The following symbol will be used for reference: "R" for "Record of Proceedings Sought to be Reviewed." "App." for Appendix.

PRELIMINARY STATEMENT

Petitioner, FELICIA M. TRONCONI, seeks to have reviewed a decision of the District Court of Appeal, Fourth District of Florida, dated and filed on December 1, 1982; Motion for Rehearing was denied on February 9, 1983. (App. 2)

This was an appeal by the Wife from a Final Judgment of Dissolution of Marriage entered by the Circuit Court, in and for the Seventeenth Judicial Circuit, on March 3, 1981. The Final Judgment specially 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 (½) in the Lake Placid and Great Abaco Island properties. The Wife was awarded Husband's "one-half" interest in the marital residence, together with furnishings, notwithstanding Wife's clear special equity in Husband's interest in the martial residence (R-260;¶11). The award to the Husband was not based upon any theory of lump-sum alimony, a determination of special equity, partition or a division of assets based upon an agreement of the parties. The Court specifically found that the Husband was not entitled to any special equity or in need of permanent periodic alimony. It further rejected all claims for relief, including lump-sum alimony (R-260;¶14). The Trial Court merely attempted an "equitable division of the party's assets" without resort to the various remedies available to such as lump-sum alimony; special equity or partition.

The Wife filed her Notice of Appeal on March 17, 1981 (R-264); the appeal was initially argued on January 27, 1982. Thereafter, the District Court of Appeal, pursuant to Florida Appellate Rules of Procedure, Rule 9.331(c), on its own Motion, ordered a rehearing on this case en banc and was argued before the Full Court on June 24, 1982. The Full Court requested the parties to address themselves to three questions, including "1. Has Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) engrafted the doctrine of equitable distribution into the law of this State." (App. 4).

The Full Court rendered its decision on December 1, 1982, and affirmed the Trial Court's Final Judgment. The Appellate Court held 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, rather than an independent vehicle or remedy. This 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. 2nd DCA, 1982) and Leonard v. Leonard, 414 So.2d 554 (Fla. 2nd DCA, 1982). This decision further conflicts with the decision of 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).

I.

THE DECISION IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEALS IN THE CASES OF POWERS V. POWERS, 409 So.2d 177, (Fla. 2nd DCA, 1982) and LEONARD v. LEONARD, 414 So.2d 554, (Fla. 2nd DCA, 1982), WHICH HOLD THAT THE THEORY OF EQUITABLE DISTRIBUTION IS NOT AN INDEPENDENT VEHICLE TO ACCOMPLISH A DIVISION OF MARITAL ASSETS IN A DISSOLUTION OF MARRIAGE PROCEEDINGS AND THE TRIAL COURT IS NOT AUTHORIZED TO MAKE AN "EQUITABLE DIVISION" OF THE PARTIES' PROPERTY ABSENT ONE OF THE LEGALLY RECOGNIZED VEHICLES SUCH AS LUMP-SUM ALIMONY OR SPECIAL EQUITY.

It is respectfully submitted, that this Honorable Court clearly has jurisdiction of this case because the question of law decided by the Fourth District Court of Appeal is in direct conflict with the prior decisions of the Second District Court of Appeal in Powers v. Powers, 409 So.2d 177, (Fla. 2nd DCA, 1982) and Leonard v. Leonard, 414 So.2d 554, (Fla. 2nd DCA, 1982).

In the case sub judice, the Trial Court proceeded to make what it termed as an "equitable division of the party's assets" (App. 5). The Trial Court divided the parties assets without resort to the various vehicles or remedies announced in Canakaris v. Canakaris, supra. The Trial Court employed the concept of an "equitable division of the party's assets" as a total new and independent remedy to divide marital assets.

Subsequent to the filing of the appeal in the present case and prior to the oral argument en banc, the Fourth District Court of Appeal decided the case of Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA, 1982). The language of the Sangas opinion most accurately sets forth how the majority opinion in the case at bar conflicts with this Court's decision in Canakaris and other District Court opinions. The Court opined:

> "...The court [trial court] erred in disposing of the parties various property interests and transforming these interests by use of theory of equitable distribution as an independent vehicle for an award."
>
> "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. Contrary to its decision in Sangas and this Court's decision in Canakaris, the Fourth District Court of Appeal, in the instant case in the majority opinion held:

> "In affirming the trial judge, we adopt the doctrine of equitable distribution and revisit Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA, 1981). In Sangas, we were dealing with what was essentially an inequitable and improper distribution favoring one spouse over the other in a manner not justified by the facts of the case. It is true that in Sangas we opined that Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), did not create a totally new vehicle for the division of property; however, we no think, after further analysis of Canakaris and its progeny, that although the Supreme Court continues to quote traditional concepts in the vernacular of lump sum, periodic and rehabilitative alimony, we believe it has adopted the doctrine of equitable distribution de facto if not de jure...in our view the totality of the language there employed, coupled with the accompanying dissertation on the trial judge's 'broad discretion' obviously permits a trial judge to make a distribution of assets acquired during the marriage in a manner which is just and equitable: ergo, make an equitable distribution."

There is an obvious clear conflict in the Fourth District Court opinion in the case sub judice and cases of other districts.

In Powers v. Powers, 409 So.2d 177 (Fla. 2nd DCA, 1982), the Trial Court awarded Husband's interest in a condominium unit to Wife and Wife's interest in jointly-owned marital residence to Husband, when neither party requested partition, no special equity established in domicile and Wife did not agree to disposition of marital domicile. The Husband argued the award to him of marital residence was justified as as "equitable division" of the parties' assets. The Court held that,

> "Recently, the Fourth District Court of Appeal confronted a similar argument and held that the theory of equitable distribution is not an independent vehicle for an award of property in a dissolution of marriage proceeding. Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA, 1981). We agree with our sister court's analysis and holding in that case; here, the property of the parties should have been disposed of by resort to the concepts of alimony and special equities with due regard given for the contribution of both parties."

Powers v. Powers, supra, at 178.

There is clear conflict with the case of Leonard v. Leonard, 414 So.2d 554 (Fla. 2nd DCA, 1982), on the same point of law. The Wife cross appealed award to Husband of her interest in certain Canadian property.

The Court held:

> "We are thus constrained to point out that in a dissolution proceeding a trial court is not authorized to make an "equitable division" of the parties' property absent one of the vehicles legally recognized in marital disputes such as lump sum alimony or special equity. Powers v. Powers; Sangas v. Sangas, 407 So.2d 630 (Fla. 4th DCA, 1981)"

In Conner v. Conner, 411 So.2d 899 (Fla. 1st DCA, 1982), the First District Court of Appeal recognized that Courts have discretion to use only specific remedies such as "lump sum alimony to insure an equitable distribution of property acquired during the marriage." The Court further acknowledged that equitable distribution is an end result to be achieved by

use of the prescribed, available remedies when it stated,

> "Since the remedies of the trial court are part of one overall scheme and should be reviewed by Appellate Courts as whole, rather than independently..."

Conner v. Conner, supra, at 902.

Clearly, the foregoing cases are in conflict with the present decision and therefore, this Honorable Court has discretionary jurisdiction pursuant to Rule 9.030(2)(a)(iv), Florida Rules of Appellate Procedure.

II.

THE DECISION IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THE SUPREME COURT DECISION OF CANAKARIS v. CANAKARIS, WHICH HOLDS THAT TRIAL COURTS ARE BOUND TO EXERCISE THEIR BROAD DISCRETION THROUGH EXISTING REMEDIES TO ENSURE EQUITABLE DISTRIBUTION OF MARITAL PROPERTY.

It is respectfully urged, that this Honorable Court has jurisdiction to review by certiorari a decision of the District Court of Appeal which created conflict when it misinterpreted a prior decision of this Court. Dade County v. Salter, 194 So.2d 587 (Fla. 1967). It is abundantly clear that the majority opinion of the Fourth District Court of Appeal not only directly conflicts with the opinion of this Court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), by declaring equitable distribution as an independent remedy, but clearly misinterpreted that decision as it pertains to the use of special equity and lump-sum alimony.

Canakaris specifically and unambiguously set forth the law of the State of Florida by granting to the Trial Judge the ability to transfer

marital assets between the spouses regardless of title, 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 her economic status..."

Canakaris v. Canakaris, supra, at 1201. However, it is carefully noted that this Court,

> "...did not intend to create a totally new vehicle named equitable distribution.. an equitable distribution refers to an end or purpose rather than a vehicle or remedy."

Sangas v. Sangas, 407 So.2d 630 (Fla 4th DCA 1981).

The rule of law announced by the Fourth District Court of Appeal in the case sub judice directly conflicts with the holding by this Court in Canakaris,

> "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.

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

Moreover, jurisdiction should be exercised because the concurring opinions in the case at bar further amplify the conflicts between the two cases. The majority opinion in the case at bar misinterprets Canakaris' purpose when they stated,

> "When an equitable distribution is invoked it may well take the place of lump-sum alimony or any special equity."

It is suggested that Canakaris specifically requires the Trial Court to find special equities where they exist because they are vested interests in property. Again, Justices Beranek and Hurley disagreed with the majority opinion and emphasized the majorities' misapplication of the law when they stated:

> "I disagree with the majority view that a trial judge has discretion to employ the "more traditional" concepts (alimony and special equity) to the exclusion of equitable distribution or to use equitable distribution and ignore alimony and special equities. The uncertainty created by this approach will be comfortable for the courts but further cloud an already murky situation of the litigants."

It is respectfully suggested, that the Appellate Court has further misinterpreted Canakaris when it holds, "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. "As considered by the Trial Court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme." Canakaris v. Canakaris, supra, at 1202.

The majority of the Fourth District Court of Appeal in the case at bar further conflicts with Canakaris, as well as misinterprets the Supreme Court decisions of Claughton v. Claughton, 393 So.2d 1061 (Fla. 1980) and Robinson v. Robinson, 403 So.2d 1306 (Fla. 1980) upon which the majority opinion relies to support their conclusion. The majority opinion states

that,

> "The concept of need has been excised and instead the word justification substituted when considering the doctrine of lump-sum alimony"

and

> "...we no longer have to find need to support lump-sum awards."

It is respectfully suggested, this statement of law is clearly erroneous. There are still two types of lump-sum alimony. The first being that type wherein periodic, permanent alimony may be awarded in a lump-sum based upon traditional concepts of need and ability to pay. Canakaris, supra. The second type of lump-sum alimony is the type wherein the Court may utilize this device to transfer marital assets between the spouses regardless of the title based upon justification and ability to respond. Claughton v. Claughton, supra; Robinson v. Robinson, supra.

Thus, it is clear that the majority opinion has substantially deviated from the decision in Canakaris, as well as misinterpreted it. "These two decisions are wholly irreconcilable and this Court has jurisdiction to resolve this conflict." Williams v. Duggan, 153 So.2d 726, 727 (Fla. 1963).

CONCLUSION

The Supreme Court should exercise its discretionary jurisdiction because the majority decision of the Fourth District Court directly conflicts with two decisions of the Second District Court of Appeal and the decision of this Court in Canakaris v. Canakaris and is tantamount to an attempt to overrule a Supreme Court precedent.

There is obvious confusion and disagreement between the concurring

justices of the Fourth District Court of Appeal as to the correctness of the majority opinion. It is clear that the point of law is "one of great public interest", accordingly a concurring opinion suggest the question be certified to this Court.

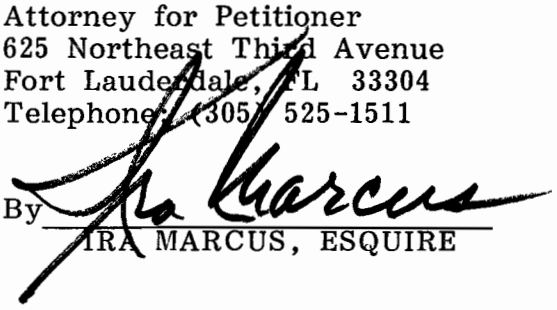
This Court should accept jurisdiction to further clarify the Canakaris decision and to adopt specific guidelines to be followed by Judges in dividing martial assets to achieve equitable distribution.

This Court should accept jurisdiction to clarify the interpretation and application of Florida Statute §61.08, as it applies to achieving equitable distribution.

This Court should accept jurisdiction so it may address the issue of whether the concept of marital fault may be considered in dividing marital assets. Additionally, this Court should review this particular case because it presents factual issues which are common to other dissolution proceedings and if this case were decided on its merits the Wife would prevail and be awarded a more equitable share of the assets, including her special equity.

For the foregoing reasons it is respectfully suggested, that this Court accept jurisdiction of this cause and decide this case upon its merits.

IRA MARCUS, P.A.
Attorney for Petitioner
625 Northeast Third Avenue
Fort Lauderdale, FL 33304
Telephone: (305) 525-1511

By 
IRA MARCUS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on Jurisdiction was furnished by first-class mail to Philip Michael Cullen, III, Esquire, Attorney for Respondent, Suite 206, 700 Southeast Third Avenue, Fort Lauderdale, FL 33316, and to Melvyn B. Frumkes, Esquire, Suite 1607, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132, this tenth day of March, 1983.

IRA MARCUS, ESQUIRE