OA 12-6.83
047

SUPREME COURT

STATE OF FLORIDA

CASE NO. 63,368

FELICIA M. TRONCONI,)

Petitioner,)

vs.)

FRANCIS JOSEPH TRONCONI,)

Respondent.)

_____)

REPLY BRIEF OF PETITIONER

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POINT I

THE DECISION IN THIS CASE, AS WELL AS THE FAILURE TO APPLY THE CORRECT LEGAL THEORY, CONSTITUTES REVERSIBLE ERROR

It is respectfully submitted, that neither the trial court, nor the appellate court correctly applied the law as set forth in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), pertaining to the division of marital property. The trial court was without authority to merely divide the parties' assets without resorting to the vehicles of lump sum alimony or special equity. The appellate court's affirmation of the application of equitable distribution as an independent remedy is tantamount to overruling this Court's holding in Canakaris and thus constitutes error. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973).

Pursuant to Canakaris, the trial and appellate courts were required to find a special equity in favor of the Petitioner as a result of her various mortgage payments and contributions from her separate property. The payments and contributions unquestionably established a special equity in the Respondent's interest in the marital residence, the Great Abaco Island and Lake Placid properties (see Petitioner's Main Brief). Had the courts below properly considered the Petitioner's special equities, the ultimate distribution would have been significantly different.

A "special equity is an entirely distinct vehicle from lump sum alimony awarded to achieve equitable distribution..." Greer v. Greer, 8 FLW 2406 (2nd DCA 1983). A special equity represents a vested property interest and is "...only a return of what is

already yours". Bosch v. U.S., 590 F.2d 165 (5th Cir. 1979); Duncan v. Duncan, 379 So.2d 949 (Fla. 1980). "...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 (5th DCA 1963). "This means that, where the property is held as tenants by the entirety, so that each spouse already has a 50% share, a special equity established by one spouse must be expressed as an interest in addition to that spouse's existing 50% interest". Landay v. Landay, 429 So.2d 1197 at 1200 (Fla. 1983). Thus, the failure to find the special equities constitutes reversible error.

Respondent argues that the distribution herein is tantamount to reciprocal lump sum awards (Respondent's Brief, Page 8). The term special equity should not be used when considering lump sum alimony. Canakaris, at 1197. It is important to first segregate a party's vested property interest in the other spouse's one-half interest before any lump sum award can be granted. Landay, supra. Illustrative of this point is the decision in Greer, where the appellate court found "[the interest awarded] was not shown to have been correctly designated a 'special equity' [thus] obviously impacting upon the trial court's distribution...". Greer at 2407.

> "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 (5th DCA, 1981); Goss v. Goss, 400 So.2d 518 (4th DCA, 1981).

Therefore, because of the interrelationship of the financial aspects of the property distribution, the trial court herein should reconsider all provisions of the final judgment relating to a division of the parties' assets. Weider v. Weider, 402 So.2d 66 (4th DCA, 1981).

Finally, the Respondent suggests that the decision of the appellate court should be affirmed, even if the end result herein was arrived at by the improper application of existing rules of law. To adopt Respondent's position would be contrary to the letter and spirit of Canakaris. The failure to use the "vehicles" set forth in Canakaris, particularly the analysis of the separate property of the parties and existing special equities, would create inconsistent results in similar cases.

> "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.

Therefore, it is clear that reversing this decision would be more than simply returning this case to the trial court for a mere change in nomenclature.

POINT II

EQUITABLE DISTRIBUTION IS CLEARLY NOT A SEPARATE INDEPENDENT VEHICLE TO DIVIDE MARITAL ASSETS

Respondent and the appellate court have misconstrued the holding in Canakaris in an attempt to justify the trial court's final judgment in the case at bar. This court very clearly and explicitly announced that equitable distribution is not an independent remedy, but an end result to be achieved by resort to specific "vehicles". Canakaris at 1201. A careful analysis of

the language of this court in Canakaris and subsequent decisions leaves little doubt that this court had any intention of establishing equitable distribution as an independent remedy. In this regard, Canakaris provides:

> "A judge may award lump sum alimony to ensure equitable distribution...". Canakaris at 1201.
>
> "The trial judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property and an award of exclusive possession of property... These remedies are interrelated... The remedies are part of one overall scheme. It is extremely important that they also be reviewed as a whole, rather than independently." Canakaris at 1201.

The reference to "equity" above, in the context of the decision as a whole, is a reference to the ultimate purpose to be accomplished by the trial judge i.e., to equitably distribute the marital assets. The trial judge has enumerated "various remedies to accomplish this purpose". Nowhere is the term "equitable distribution" referred to as an independent remedy or vehicle. "These remedies [quoted above] are interrelated". Clearly, the "overall scheme" is equitable distribution. Further, the appellate courts must review the combined use of all or part of the "various remedies" to determine if the trial judge accomplished the purpose of doing "equity" between the parties, to wit: to equitably distribute the marital assets. Therefore, in order for this "system" to work, it is absolutely essential that the trial judge use "these remedies". The use of "these remedies" will enable the appellate court to determine the legal basis for the distribution plan. If "these remedies" are not

used, the appellate court is relegated to pure conjecture as to how the assets were distributed. See Upstill v. Upstill, _____ So.2d _____ (4th DCA 1983), Case No. 82-108.

The language of Canakaris continues:

> "This lump sum award was clearly within the trial court's discretion and was justified as part of an equitable distribution of the property of the parties acquired during the marriage." At 1204.

Again, "lump sum alimony" is a component part of the whole, to wit: equitable distribution. Thus, equitable distribution cannot be both the end result to be accomplished and an independent remedy to accomplish that result.

Moreover, it is important to note the factual circumstances of Canakaris. This court ultimately approved the trial court's use of lump sum alimony, permanent periodic alimony and attorneys' fees as accomplishing an equitable division of the parties' assets. This court merely enabled the principles of Brown v. Brown, 300 So.2d 719 (Fla. 1st DCA, 1971) to be effectuated by this expanded version of lump sum alimony. Simply, this court did not create a new independent remedy, but rather attempted to free the trial judge from the "inflexible rules" of only being able to award lump sum alimony where the trial judge finds "special equities" referred to in Yandell v. Yandell, 39 So.2d 554 (Fla. 1949) [not vested property interest]. Hence, even though Mrs. Canakaris did not demonstrate the traditional "special equities", "equity" demanded that she receive a fair share of the assets. Hence, this court ruled that, if there is "justification", i.e., if equity requires it and there is an ability to respond, a trial judge may award lump sum alimony to

equitably distribute the assets. In so ruling, this court referred to that portion of Florida Statutes §61.08 which allowed the trial court to "...consider any factor necessary to do equity between the parties", as authority for the transfer of marital assets without the necessity of finding "special equities". Canakaris at 1200. Hence, nowhere does Canakaris use the term "equitable distribution" as an independent remedy, nor does the language used even suggest that conslusion.

In Claughton v. Claughton, 393 So.2d 1061, 1063 (Fla. 1980), this court held that:

> "...the trial judge...has jurisdiction to award such lump sum alimony if it is found necessary to 'compensate the wife for her contribution to the marriage' in accordance with the standards set forth in Canakaris..."

The "standards" referred to herein are clearly "justification and ability to respond". Conspicuously absent from the language in Claughton is any reference to "equitable distribution" as an independent vehicle. If the trial court could merely equitably distribute the assets as a remedy unto itself, then why was it necessary for this court to emphasize that the trial judge has "jurisdicton" to award lump sum alimony to "ensure equitable distribution". Canakaris at 1201.

In Robinson v. Robinson, 403 So.2d 1306 (Fla. 1980), this court addressed similar issues to those presented in Canakaris, to wit: the trial court's award of the Husband's interest in the marital residence as lump sum alimony, rehabilitative alimony and attorneys' fees. The District Court of Appeal held the wife was not entitled to the husband's interest in the marital residence as lump sum alimony because she did not demonstrate any "special

equities", citing Yandell v. Yandell, 39 So.2d 554 (Fla. 1979). This court, in Robinson, affirmed its clear holding in Canakaris and stated:

> "We held that awarding lump sum alimony to ensure equitable distribution of property...is within trial court's discretion based upon justification and ability to respond." Robinson at 1306.

Again, conspicuously absent is any reference to equitable distribution as an independent remedy, as opposed to the end result to be achieved. In this sense, the use of lump sum alimony to "ensure equitable distribution" is analogous to providing notice and opportunity to be heard in order to ensure that due process is afforded to a litigant.

In Connor v. Connor, 8 FLW 405 (Fla. October 14, 1983), this court confirmed the First District Court of Appeal's decision that trial courts may use lump sum alimony as the vehicle to accomplish equitable distribution.

It is further suggested that, if this court intended to create the new independent remedy of equitable distribution, it would not have emphasized the significance of special equity as a vested property interest in the property distribution scheme. In this regard, both Canakaris and Duncan provide that "special equity" is a vested interest in property that, once established, is permanent in nature and cannot be modified. See Robinson, supra.

Moreover, this court, in Landay, supra, set forth a formula to express a spouse's special equity interest in the other spouse's 50% interest as a result of a special equity. Hence, this vested property right has not lost its independent signifi-

cance and is still an essential element of any property distribution plan.

The Respondent suggests that Duncan is authority for his position that this court has created the independent remedy of equitable distribution. Duncan is factually distinguishable from Canakaris and the case at bar. It should be carefully noted that this court, in Duncan, first sought to determine whether either party was entitled to a special equity. Thereafter, the jointly owned property was respectively awarded to each party without reference to the term "lump sum alimony". However, it is clear that because Duncan was decided simultaneously with Canakaris and Canakaris clearly did not create equitable distribution as an independent remedy, the awards in Duncan can only be justified as lump sum alimony to achieve equitable distribution. It should be further emphasized that, because it is both logical and judicially necessary to read Duncan and Canakaris together, it is clear that equitable distribution is not an independent remedy. Hence, in the case at bar, the trial court in effect made a property settlement agreement for the parties, when neither requested it.

> "The traditional concepts of alimony and special equity must be used to distribute marital property. Otherwise, the trial court will be making a property settlement agreement without the consent of the parties. The trial court is not authorized to make such a settlement". Abbe v. Abbe, 8 FLW 2700, 2701 (2nd DCA, November 9, 1983).

POINT III

THE LOWER COURTS ARE BOUND BY THIS COURT'S INTERPRETATION OF LEGISLATIVE ENACTMENTS GOVERNING RELIEF IN DISSOLUTION PROCEEDINGS.

In the case at bar, neither the trial court nor the apellate court had authority to effect a change in the title to parties'

properties by resorting to the "vehicle" of "equitable distribution". The trial court's authority to transfer property in a dissolution proceeding is restricted to certain specific remedies, including lump sum alimony and partition. Neiman v. Neiman, 294 So.2d 415 (Fla. 4th DCA 1971); Canakaris. This court clearly has jurisdiction to adopt measures to give full force and effect to the statutes governing dissolution actions, as well as to fashion remedies to afford just and equitable relief to the litigants. See Canakaris.

In the case at bar, the trial judge erred in failing to grant partition because the parties requested it. (See Petitioner's Main Brief). Florida Statutes §61. et. seq. It is respectfully suggested that the statement in Petitioner's Main Brief that "...only the legislature has jurisdiction over title to property" [page 20] was used to emphasize that the legislature governs the procedure and remedies available in dissolution proceedings and this court, in its equitable jurisdiction, is empowered to interpret the legislative directives to afford litigants the type of relief necessary to do equity.

The Petitioner does not contend this court lacks jurisdiction to effect a change in title, but rather argues that the source of that authority is derivative from the legislature. See: Florida Statutes, 61 et. seq. Petitioner further acknowledges that special equity is indeed a judicially created vehicle. Carlton v. Carlton, 83 So.87 (Fla. 1919). However, the purpose of special equity was judicially created to avoid the harshness of the statutory rule that absolutely prohibited

alimony to an adulterous spouse. It is important to note that only this court can create remedies interpreting legislative enactments and lower appellate courts are bound by these remedies.

Further, Respondent argues that a manifest injustice would result to the parties if the court granted partition. However, Respondent fails to indicate that both the Petitioner in her Petition and the Respondent in his Counterpetition prayed for the court to partition the properties (R. 188-192, 195-207). Upon dissolution, jointly owned property automatically becomes owned as tenants in common. FSA §689.15. Partition of property held as tenants in common is a matter of right. Therefore it was error for the lower court to deny the parties partition.

Petitioner further relies upon her Main Brief to support her claim that the trial court erred in failing to partition the parties' properties.

POINT IV

THE FINAL JUDGMENT DOES NOT REPRESENT AN EQUITABLE DIVISION OF THE MARITAL ASSETS

The Petitioner will rely upon her Main Brief filed herein to respond to Respondent's argument on this point. However, certain points raised by Respondent needs to be clarified.

It is respectfully submitted, that the trial court committed reversible error in failing to award special equities to Petitioner. Petitioner was "justified" in receiving Respondent's one-half interest in the marital residence as lump sum alimony based upon her special equity in a substantial portion of his 50%

interest, and the considerations given to the disparity in the assets the Respondent received.

The Lake Placid property, or at least 18 acres of it, should have been partitioned, sold and the proceeds divided, because both parties requested it. The trial court abused its discretion in denying this request. Respondent testified at trial:

"Q. Do you want the court to divide the rest of the real property [Lake Placid]?

A. Yes." (T-78)

The Petitioner testified:

"Q. Mrs. Tronconi, what is your desire with reference to what should happen with the Lake Placid Property?

A. To sell it. Get my half of it..." (T-177).

Further, the Respondent misleads this court when he argues that the evidence did not support a finding that the Petitioner made mortgage payments unconnected with the marriage and, therefore, is not entitled to a special equity. The Petitioner testified that the funds were unconnected with the marriage (T158-159).

The Respondent admits that he did not contribute to the payment of the bills after the separation of the parties.

"Q. How long did your checks go into that checking account, Sir?

A. As long as I had a job and I lived with her, except certain times that I put them in my own checking account to pay off some of my particular bills.

Q. Since August, 1979, you have not paid any money towards the monthly payments on the Great Abaco Island property, is that correct?

A. Yes.

Q. Your wife has continually paid that, to your knowledge, is that right?

A. Yes." (T103-104)

With reference to the first and second mortgage payments on the marital residence, again the evidence is unequivocal.

"Q. In August of 1979 you left and to this date you have not contributed one cent to the maintenance of the marital residence?

A. That's right." (T116)

The Petitioner has unequivocally established her right to a special equity by virtue of payment and discharge of the second mortgage. The evidence was unrebutted that the Petitioner paid the entire balance due on the second mortgage, plus costs and attorneys' fees in the amount of $13,563.79 (T167). The Respondent stipulated that he did not contribute to the discharge of the second mortgage (T116). The record is clear that the source of the funds to discharge the second mortgage came from various loans and earnings, unconnected with the marriage (T169-172; R610-614). This evidence was uncontradicted.

Respondent's contention that the balloon second mortgage was not satisfied by the Petitioner is, at best, specious. The Petitioner testified that she paid $13,563.79 to her attorney and received a Satisfaction of Mortgage property executed which was recorded (T167, 171; R615-617). The satisfaction of a mortgage of record signed by owner is prima facie evidence of payment of the mortgage debt, cancellation of mortgage of record and discharge of lien. Biggs v. Smith, 185 So. 106 (Fla. 1910); Windle v. LeBold, 241 So.2d 165 (4th DCA, 1970).

The ultimate division of the parties' assets was not equitable. The following simply demonstrates the final result.

Respondent received the following as a result of this marriage:

IRA Account	$ 1,500.00	
Lake Placid Property	62,857.62	(free and clear)
Stella Maris Lots	7,000.00	
Great Abaco Island	7,000.00	(Respondent's Brief page 41)
Cadillac	5,000.00	
Approximate Total	$83,357.62	

Thus, the Respondent received unencumbered assets worth approximately $83,357.62, less $500.00 due on Abaco Island for a total net of $82,857.62. In addition, the Respondent had the benefit of the use of the $10,000.00 from his pension plan and $6,000.00 from the proceeds of his life insurance policy. Further, Respondent argues that the net value of his assets is reduced by the alleged $20,000.00 indebtedness assumed by Respondent. This indebtedness is payable or not payable at the will of the Respondent. There was no evidence that this $20,000.00 is an enforceable obligation, that there is no date certain when the same must be repaid, or if it is to be repaid at all. Therefore, the $83,357.62 should not be reduced by $20,000.00. Furthermore, Respondent resides on the Lake Placid property without any monthly loan or mortgage obligations.

The Petitioner received the following:

Marital Residence	$65,000.00	(Subject to special equity in portion of Respondent's 50% interest)
Car	3,100.00	
Furniture	3,500.00	
	$71,600.00	

The marital residence is subject to a first mortgage in the amount of $13,753.12. Thus, the net assets are worth $51,427.00.

However, it should be emphasized that the Petitioner paid off the second mortgage of $13,563.91, still has monthly obligations on the first mortgage and is obligated to repay approximately $6,875.00, plus interest for loans obtained to pay off the second mortgage. Thus, the $51,427.00 should be reduced by the $6,875.00 owed, leaving $44,552.00 that Petitioner in fact realized.

The $3,500.00 representing the value of the furniture should not be included in this valuation because this was Petitioner's separate property as a result of an original property settlement agreement between the parties (see Main Brief). Furthermore, Petitioner's car should not be included in this valuation because, "it was gift..." (T173). However, even if the furniture and the car are included ($6,600.00), the total free and clear assets the Petitioner received were $51,152.00 ($44,552.00 + $6,600.00), compared to the total free and clear assets Respondent received of $82,857.62. Hence, Respondent received free and clear assets worth $31,705.62 more than the Petitioner. It is abundantly clear that the Petitioner has been "short-changed".

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioner respectfully requests this Honorable Court to reverse the decisions of the appellate and trial courts, award Petitioner reasonable attorneys' fees and costs and for such other further relief as this court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 26 day of November, 1983 to: Philip Michael Cullen, III, Esquire, Suite 206, 700 Southeast Third Avenue, Fort Lauderdale, Florida 33316; Melvyn B. Frumkes, Esquire, New World Tower, Suite 1607, 100 North Biscayne Boulevard, Miami, Florida 33132; and Stephen W. Sessums, Esquire, 215 Verne, Tampa, Florida 33606.

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