IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JACK C. VANDERGRIFF,

Petitioner,

vs.

WALLYCE V. VANDERGRIFF,

Respondent.

Case No. 64,514

On Petition for Review from the First District Court of Appeal

DCA Docket No. AQ-277

REPLY BRIEF OF RESPONDENT

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE

The respondent, WALLYCE VANDERGRIFF, filed her original petition for dissolution of marriage on June 1, 1982, in Escambia County, Florida. Subsequent to a final hearing, the trial judge entered a final judgment dated December 13, 1982; that final judgment was appealed timely by the respondent. The First District Court of Appeal, by opinion dated September 19, 1983, reversed the trial court. The petitioner then timely effected his appeal to this tribunal. The transcript of the hearing held on November 3, 1983, will be referenced by the following symbol: T-___; the record on appeal will be referenced by the following symbol: R-___.

STATEMENT OF THE FACTS

The parties were married on June 23, 1951, in Pensacola, Florida. Mrs. Vandergriff bore and raised three daughters, Lisa, age twenty-five, Laka, age twenty-four and Lee, age fifteen, during the marriage; all three children, at the time of the hearing, continued to reside with their mother in the marital home and but for Lisa, who attended and graduated from Florida State University before returning home, have always lived in the home. (T-28) Dottie Bonifay, Mrs. Vandergriff's seventy-four year old mother, at Mr. Vandergriff's request, has lived in the home since 1961. (T-29 and 130)

Mrs. Vandergriff, age fifty-two, suffers from allergies, high blood pressure and a bad back. (T-27) Concerning the blood pressure condition, Wayne S. Willis, M.D., stated:

> "We have had some difficulty managing this patient's hypertension and have had to change her medications several times because of side effects. Her B/P is presently improved but far from normal, although I suspect that the stress she is under right now has had alot to do with this." (R-289)

Mrs. Vandergriff married her husband at age twenty and at age twenty-one in 1952, received a degree in elementary education from Florida State University. At the time of the marriage, Mr. Vandergriff was working at Southern Bell and living with his wife's mother in Pensacola. In 1956, after teaching for four years, Mrs. Vandergriff ceased working in order to start a family; her teaching certification lapsed

long ago. (T-42) Her husband, at length and on numerous occasions, emphasized that his wife ought never work again outside of the home. (T-42)

Mrs. Vandergriff acts as a voluntary director at a small local art gallery and paints although she has never made enough from painting to even pay her own expenses; during 1982, she sold two paintings for a total of $67.00. (T-43 & 96) Mrs. Vandergriff acknowledged during the hearing that she hoped to improve her painting and possibly sell same but she did admit that the best painter at the gallery only averaged about $400.00 per month from sales. (T-70-71)

Since leaving teaching over twenty-six years prior to the final hearing, Mrs. Vandergriff has functioned as a wife, mother and homemaker. She has helped to maintain the marital home doing carpentry, wallpapering, painting, repairing appliances and planting flowers until she injured her back about three years ago; she has developed into an excellent cook; she knits and needlepoints gifts for godmothers and godfathers as well as her husband, his mother and the children. (T-43 & 44) She has helped her husband clean fish and bake for Southern Bell company functions, taught Sunday School and Vacation Church School for eight years; worked as a Brownie and then Girl Scout leader, room mother, teacher's helper, unpaid volunteer teacher and lunchroom helper. (T-45) She sews most of her own clothes.

Mrs. Vandergriff has no health, hospitalization, dental insurance, retirement plan or disability plan apart

from the protection afforded by her husband's employer; she has no outside sources of income. Mr. Vandergriff has always been the family bookkeeper and had complete control over all family funds. (T-48)

During a normal day, Mrs. Vandergriff prepares meals, makes beds, straightens the home, paints, perhaps goes to the art gallery, sews, knits, and two or three times per week may even take a one hour nap. (T-62 & 63)

Concerning her husband's unfortunate excessive drinking, Mrs. Vandergriff testified as follows:

> "Q. Why is your marriage broken beyond repair?
> A. Because my husband was a mean-mouthed drunk who mentally and physically and economically abused me, my children, for thirty-one years and he didn't care whether we had anything or not. All he cared about was himself.
> Q. How often did he drink?
> A. The last year he was at home he didn't draw a sober breath the whole time.
> Q. Let's go before the last year that he was at home, before the explosion that eventually led up to the separation. Did he drink prior to that?
> A. He drank every weekend.
> Q. Did he have a drinking problem?
> A. Yes, Jack always had a drinking problem, it makes him violently ill, he throws up in the bed, he throws up on the floor, he throws up in the bathroom and he still drinks.
> Q. Does he drink to excess? Does he get drunk?
> A. Yes, he gets drunk.
> Q. How is his termanent around you, your mother and his three children when he gets drunk?
> A. He's repulsive, he's foul-mouthed and he's repulsive." (T-97,98)

Mr. Vandergriff complained that his wife had attacked him with a pair of scissors and had pointed a gun at him twenty-six years ago. Mrs. Vandergriff, by explanation, testified that

she did indeed protect herself from being raped by a drunk with a three and one-half inch pair of scissors and did point a unloaded gun at her husband twenty-six years ago. (T-76 & 77) Upon leaving the marital home, Mr. Vandergriff's departing words were, "I hate you, I hate you, I hate you. You think I've been mean, you haven't seen nothing yet". (T-89) Upon cross examination, Mrs. Vandergriff admitted to writing a series of spiteful notes to her husband and a woman she believed to be his paramour but all of those notes were written within two weeks after the parties' separation. (T-95)

Mrs. Vandergriff, on cross examination, admitted that in response to petitioner's counsel's request, she had checked with the school board and determined that seventy-five certified teachers were on a job waiting list. Mrs. Vandergriff cannot type, or even work a cash register.

Lisa Vandergriff, the parties' twenty-five year old daughter, at the time of the hearing was working and earning $117.00 per week; she was saving her money in order that she might return to graduate school at the University of West Florida. (T-101) She stated that she did pay the cable t.v. at the home and on occasions during the last six months had given her mother gas money and had once purchased groceries. Lisa admitted that her father drank heavily every night, that he drinks too much and was an alcoholic; when drinking, her father was rude and employed nasty language. (T-103) She

testified that Mrs. Vandergriff was a good mother and wife upon cross examination.

Laka Vandergriff, age twenty-four, had graduated from the University of West Florida and had just lost her position at the Naval Air Station. While working, she had paid the power and water bills on occasions and had given her mother about $400.00 over the last couple of months. (T-108) She admitted that her father was mean and unthoughtful when he was drunk and had once even tied up her sister Lisa and was going to cut her hair off when he had been drinking. The bouts of drinking definitely outweighed the sober moments. (T-110) Her mother had been a good wife and an excellent mother.

Dottie Bonifay, Mrs. Vandergriff's mother, had paid Lisa's expenses at FSU the last two years of college including, books, tuition, clothes, room and board. (T-53) Mrs. Bonifay paid $40.00 per month for her room, contributed $80.00 every two weeks toward the family's groceries, paid the part time cleaning woman and paid the monthly newspaper expense. (T-58 & 59) She had even loaned Mr. Vandergriff money on several occasions for home siding and replacement of the roof, which money had not been repaid. (T-118) Mrs. Bonifay likewise admitted that Mr. Vandergriff drank heavily and when drunk acted unkindly to his family.

Mr. Vandergriff has been with Southern Bell for a period of thirty-four years and at the time of the hearing, was an associate manager, public services. He admitted that

in 1980 he had on deposit with the Southern Bell Systems Savings Plan the sum of $19,457.00, but that on April 17, 1982, the balance in that plan was only $8,165.00 and he had further incurred a $1,500.00 withdrawal penalty at the time that he made his first and only withdrawal in thirty-four years from the savings plan. (T-5-9) Mr. Vandergriff, presumably in an effort to confuse his financial state, filed three separate financial affidavits during this litigation. (R-161, 288 & 289); Mr. Vandergriff never explained why his expenses as listed on the various financial affidavits continuously increased from one affidavit to the next; as an example, his incidental expenses (laundry and dry cleaning) increased from $125.00 per month to $250.00 per month without explanation. (T-18-19) Mr. Vandergriff in addition to health, hospitalization and dental coverage, provided without cost by his employer, was provided with a substantial Southern Bell pension plan and life insurance with a face value equal to three times his yearly gross pay. (T-20-24) He admitted that his gross pay for 1982 was approximately $35,000.00 and would increase to $37,300.00 in 1983. (T-20) Mr. Vandergriff admitted to getting drunk and even sick from drinking. (T-178) During 1981 and the years before, all marital obligations had been paid by check, but commencing in 1982, he mysteriously decided to place the family upon a cash basis. (T-13)

In addition to drawing the funds from the savings plan, Mr. Vandergriff had borrowed an additional $3,000.00

upon his open line of credit at the credit union on April 22, 1982. (R-7)

As per the final judgment, Mrs. Vandergriff received the use of the martial home until Lee attained her majority (about three years) or until she died or remarried; $300.00 per month rehabilitative alimony for a period of three years and $180.00 per month child support. Mr. Vandergriff was required to pay the Catholic High School tuition payment, perform certain repairs to the home and maintain his daughter (but not his ex-wife) upon the Southern Bell health/hospitalization and dental insurance plan.

QUESTIONS PRESENTED

I. WHETHER THE INSTANT OPINION OF THE FIRST DISTRICT COURT OF APPEAL, BY DETERMINING THAT AS A MATTER OF LAW A FIFTY-TWO YEAR MARRIAGE IS ENTITLED TO PERMANENT ALIMONY, REGARDLESS OF OTHER EVIDENCE, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT ON THE SAME QUESTION OF LAW, I.E., WHETHER THE TRIAL COURT HAS AUTHORITY TO EXERCISE DISCRETION IN DETERMINING ALIMONY MATTERS?

II. WHETHER THE INSTANT OPINION OF THE FIRST DISTRICT COURT OF APPEAL, BY DETERMINING THAT AS A MATTER OF LAW A FIFTY-TWO YEAR OLD UNEMPLOYED WIFE OF A THIRTY-TWO YEAR MARRIAGE IS ENTITLED TO PERMANENT ALIMONY, REGARDLESS OF OTHER EVIDENCE, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW, I.E., WHETHER THE TRIAL COURT HAS AUTHORITY TO EXERCISE DISCRETION IN DETERMINING ALIMONY MATTERS?

III. WHETHER JUDGE NIMMONS' OPINION THAT THE TRIAL COURT MUST SET FORTH FACTUAL FINDINGS IN SUPPORT OF AN OTHERWISE PROPER RULING EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL?

ARGUMENT

I. BY DETERMINING THAT, AS A MATTER OF LAW, A FIFTY-TWO YEAR OLD UNEMPLOYED WIFE OF A THIRTY-TWO YEAR MARRIAGE IS ENTITLED TO PERMANENT ALIMONY, REGARDLESS OF OTHER EVIDENCE, THE FIRST DISTRICT COURT OF APPEAL DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT ON THE SAME QUESTION OF LAW, THAT IS, WHETHER THE TRIAL COURT HAS THE AUTHORITY TO EXERCISE DISCRETION IN DETERMINIG ALIMONY MATTERS.

II. BY DETERMINING THAT AS A MATTER OF LAW A FIFTY-TWO YEAR OLD UNEMPLOYED WIFE OF A THIRTY-TWO YEAR MARRIAGE IS ENTITLED TO PERMANENT ALIMONY, AND A SPECIFIC AMOUNT THEREOF, REGARDLESS OF OTHER EVIDENCE, THE OPINION HEREIN OF THE FIRST DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW, THAT IS, WHETHER THE TRIAL COURT HAS THE AUTHORITY TO EXERCISE DISCRETION IN DETERMINING ALIMONY MATTERS.

The petitioner misinterprets the decision as rendered by the District Court of Appeal, First District. If the final judgment from the trial court is not supported by competent substantial evidence as such pertains to the issue of permanent as opposed to rehabilitative alimony, it must be reversed. Shaw v. Shaw, 334 So2d (Fla. 1976). In Shaw, the wife was forty-nine years of age with a high school education plus one year of business college; she had attended court reporting school and engaged in sales work; she had sixteen years of experience in secretarial work and an additional three years experience as a legal secretary plus ten or twelve years of legal secretarial experience working intermittently for her husband. An employment expert testified at trial that Mrs. Shaw was employable and she could earn $175.00 per week; the trial court had not reserved jurisdiction upon the issue of rehabilitative alimony, therefore, the District Court of Appeal reversed stating that it was an abuse of judicial

discretion not to reserve jurisdiction upon that issue whereupon this Court reversed stating that the judgment of the trial court was supported by competent substantial evidence.

If a trial judge is erroneous as a matter of law, the appellate court must correct the erroneous application of a known rule of law; if a trial judge fails to terminate periodic alimony upon a spouse's remarriage, this is erroneous as a matter of law. The trial judge's discretionary powers, as in the establishment of the amount of alimony or child support, requires the appellate court to apply the "reasonableness" test to determine whether the trial judge abused his discretion. Canakaris v. Canakaris, 382 So2d 1197, 1202 and 1203 (Fla., 1980).

Is the type of alimony to be awarded, i.e., permanent versus rehabilitative, a discretionary ruling by the trial court or a "matter of law"? The petitioner suggests that the opinion rendered by the First DCA concluded that under the facts present, the award of permanent alimony was entered as a matter of law and not because the trial judge abused his judicial discretion; this is quite simply not the case. The lower appellate court summarized the facts and circumstances of the case sub judice and determined that the trial court had abused his judicial discretion by his failure to award permanent alimony. Judge Shivers summarized the majority's rationale and legal bases for reversing the rehabilitative award as follows:

> "The parties were married over thirty-two years. Although the wife received a degree in

> elementary education, her teaching certificate long ago lapsed. The wife has stayed home to raise the parties' three daughters and has not been gainfully employed for twenty-six years. Her activities outside the home have included teaching at church school, helping with Southern Bell functions, family/community service as a leader in Brownie and Girl Scouts, a room mother, a teacher's helper, an unpaid volunteer teacher and lunchroom helper.
>
> The husband has been employed thirty-four years with Southern Bell, is now an associate manager earning an annual gross salary of $36,000.00 - $37,000.00 ($3,133.34 per month). The marital home is unencombered. The husband owes $6,500.00 to his credit union. . .
>
> We turn now to the wife's point that she should have been awarded permanent alimony. She should have. A husband who has been married over three decades to a wife whom he has supported, who has raised his three children, and who has no present ability to support herself, but whom he can support, should provide her permanent alimony. See Colucci v. Colucci, 392 So2d 577 (Fla. 3rd DCA, 1980). Permanent alimony is used to provide the needs and necessities of life to a former spouse as they have been established by the marriage of the parties. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) at 1201. The standard of need for the award of alimony after a marriage of some duration is the standard of living enjoyed durings its course. The trial court abused its discretion in awarding rehabilitative instead of permanent alimony and in making an inadequate award of only $300.00 per month. See DeCenzo v. DeCenzo, 1983 FLW 1797 (Fla. 3rd DCA, July 5, 1983). We reverse the rehabilitative alimony award with directions to award an adequate and increased amount of permanent periodic alimony sufficient for the wife's support and in accordance with the husband's ability to pay." (emphasis added).

The majority as noted above, determined that the trial judge had abused his judicial discretion not that he had erroneously applied a known rule of law. As this court stated in Canakaris, at page 1203:

> "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 court's 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 reach from substantially the same facts comport with neither logic nor reasonableness."

In Quick v. Quick, 400 So2d 1297 (Fla. 1st DCA, 1981) the majority affirmed substantial rehabilitative alimony over a eight year span. Although Mrs. Quick, in all probability, would be unable to continue the standard of living enjoyed during the course of the marriage, the majority was of the opinion that this was but one factor to be considered; the marriage was of only sixteen years duration, produced two minor children, the wife was only age thirty-eight with no evident disability and had a bachelor's degree in education and was certified. The dissent would have allowed permanent in lieu of rehabilitative alimony since Mrs. Quick lacked the financial wherewithal to maintain the standard of living enjoyed during the marriage and the husband had the ability to pay permanent, periodic alimony. The dissent further stated:

> "The classification of alimony as rehabilitative rather than permanent presents a question of law, an 'application of the correct legal rule is not a matter of discretion.' Wagner v. Wagner, 383 So2d 987 (Fla. 4th DCA, 1980). Our review on that issue, therefore, is not governed by the reasonableness test of Canakaris v. Canakaris, 382 So2d 1197 (Fla. 1980), referenced by the majority."

The District Court of Appeal, Second District, in Maloy v. Maloy, 431 So2d 743 (Fla. 2nd DCA, 1983) held:

> "There was no evidence that the wife would or could be rehabilitated to a greater financial success within the two year period of the rehabilitative alimony award. . .
>
> There was no evidence that she could develop anew or re-develop a capacity for self-support and achieve some semblance of the life style she enjoyed during the marriage . . .

> Because that is so, we find the trial court applied an incorrect rule of law. Canakaris v. Canakaris, 382 So2d 1197 (Fla. 1980)."

In DeCenzo v. DeCenzo, 433 So2d 1316 (Fla. 3rd DCA, 1983) held as follows:

> "When a trial court awards rehabilitative alimony when permanent alimony is due, the error is harmful and must be reversed. This is so because it places the burden on the wife to come in at the end of the rehabilitative period and to prove significantly changed circumstances before a modification will be allowed. Section 61.14, Florida Statutes (1981); Holland v. Holland, 406 So2d 496 (Fla. 5th DCA, 1981); Foss v. Foss, 392 So2d 606 (Fla. 3rd DCA, 1981); Colucci v. Colucci, 392 So2d 577 (Fla. 3rd DCA, 1981); Garrison v. Garrison, 380 So2d 473 (Fla. 4th DCA, 1980); Smith v. Smith, 378 So2d 11 (Fla. 3rd DCA, 1979), cert. denied, 388 So2d 1118 (Fla. 1980), McClusky v. McClusky, 359 So2d 494 (Fla. 4th DCA, 1978). The classification of alimony as rehabilitative rather than permanent presents a question of law, and the application of the correct legal rule is not a matter of discretion. . .
>
> Our review, therefore, is not restricted to the abuse of discretion of reasonableness standard of Canakaris v. Canakaris, 382 So2d 1197 (Fla. 1980)."

In Wagner v. Wagner, 383 So2d 987 (Fla. 4th DCA, 1980), Mrs. Wagner held a real estate license, had some slight modeling experience and was employed primarily as a teacher earning a salary of $12,000.00 per annum, with every expectation of modest, periodic, incremental increases. The Third DCA determined that no "habilitation" to greater financial success was reasonably to be anticipated and held as follows:

> "Application of the correct legal rule is not a matter of discretion; consequently, characterizing the alimony award as

rehabilitative is erroneous as a matter of law."

In Nichols v. Nichols, 418 So2d 1198 (Fla. 5th DCA, 1982), the court determined that since Mrs. Nichols suffered from various physical disabilities, was fifty years of age, the sixteen year old son continued to reside with her and the marriage had endured twenty-nine years and although she was working at minimum wage as a part-time motel maid, she exhibited no potential or actual capacity for self support and therefore rehabilitative rather than permanent alimony was erroneous. The court relying upon McAllister v. McAllister, 345 So2d 352 (Fla. 4th DCA, 1977), determined that simply because the wife was working was not dispositive. The future standard of living must be compared with the standard of living enjoyed during the course of the marriage; the divorced wife is entitled to live in a manner reasonably commensurate with the marital standard; the trial court must award permanent alimony to the wife providing the requisite ability on the part of the husband exists. The Fifth DCA determined that the trial court's award of rehabilitative rather than permanent alimony was unreasonable and an abuse of discretion. In Holland v. Holland, 406 So2d 496 (Fla. 5th DCA, 1981) Mrs. Holland was only forty-three years old but had a tenth grade education and had not worked during the sixteen marriage; she did care for the parties' eleven year old daughter. The court determined that the evidence did not show a potential or actual capacity for self-support, therefore, the award of rehabilitative versus permanent alimony was erroneous.

In Hair v. Hair, 402 So2d 1201 (Fla. 5th DCA, 1981), the trial court's award of rehabilitative alimony was upheld because Mrs. Hair would receive substantial assets from the marriage, was insulated from joint debts and liabilities, was only thirty-eight years of age and had an associates degree in general studies, was in good health, and a vocational counselor had testified at trial that she had high average intelligence with a potential for learning various skills or trades. Upon those facts, the District Court of Appeal, Fifth District, determined that the record was not devoid of evidence of the potential for self-support, therefore it was not dealing with a clear question of law but with an area wherein the trial judge possesses broad discretionary authority to do equity between the parties. Finally, in Campbell v. Campbell, 432 So2d 666 (Fla. 5th DCA, 1983) the District Court reviewed prior case law and determined that "each case must be examined carefully, to determine whether, as a matter of law, the alimony needs of the wife fall into one category or the other," i.e., rehabilitative or permanent alimony. If the wife's education, skills or training do not show the actual or potential capacity for self-support, then rehabilitative alimony is improper; where those factors clearly demonstrate the wife has the capacity or potential for self-support in a manner similar to that enjoyed by her during the marriage, then rehabilitative, not permanent alimony is the award of choice. The court then determined that Mrs. Campbell, who was only thirty-four years old, a marriage of

ten years duration, producing one daughter, spoke several foreign languages, and had worked during the last five years of the marriage as a clerk/typist, was not devoid of the capacity for self-support and therefore, as a matter of law, would receive rehabilitative alimony, not permanent alimony.

Most recently in Kuvin v. Kuvin, 442 So2d 203 (Fla. 1983), this court reversed the District Court of Appeal, Third District, Kuvin v. Kuvin, 412 So2d 900 (Fla. 3rd DCA, 1982) which had determined that although Mrs. Kuvin was rehabilitable, she would be allowed to continue as a full time mother, remain at home and forego rehabilitation since her former husband could afford to support her. This court determined that under those circumstances since the wife could rehabilitate herself, then the question of whether to award permanent or rehabilitative alimony was a discretionary decision on the part of the trial judge and under Canakaris would not be disturbed unless that decision failed to satisfy the test of reasonableness. Mrs. Kuvin was a relatively young, able and healthy woman, who had some post secondary education, had demonstrated an ability to hold a job and the marriage had endured only twelve years.

From a distillation of the foregoing decisions, counsel would conclude that the trial judge must (1) consider the primary elements and other criteria relative to permanent alimony awards as established by Canakaris at pages 1201 and 1202 as well as F.S., Section 61.08; (2) apply those factors to a particular case and determine whether the wife is

reasonably a candidate for rehabilitation or not and (3) if she is a candidate for rehabilitative alimony, then award same, if not, award permanent alimony. If the record is devoid of any evidence as to the wife's present capacity for self-support or potential for rehabilitation then permanent alimony is required. Additionally, the wife is not self-supporting because she has an income. Her present or anticipated standard of living must be compared to that enjoyed during coverture. She is entitled to live in a manner reasonably commensurate with the standard established by the husband during the course of a long-term marriage. Nichols v. Nichols, 418 So2d 1198 (Fla. 5th DCA, 1982), McAllister v. McAllister, 345 So2d at 355 (Fla. 4th DCA, 1977), O'Neal v. O'Neal, 410 So2d 1369, 1371 (Fla. 5th DCA, 1982), Lash v. Lash, 307 So2d 241, 243 (Fla. 2nd DCA, 1975), DeCenzo v. DeCenzo, 433 So2d 1316 (Fla. 3rd DCA, 1983), and numerous other cases.

If the trial court awards permanent where rehabilitative is required or vice versa, then depending upon the district, this would constitute either an abuse of judicial discretion or error as a matter of law. Obviously, it would be very helpful if the trial judge sets forth his findings and conclusions with specificity. The District Court of Appeal, First District has not followed Wagner and its progeny, except in the dissenting opinion as set forth above, but have held as in the instant case that should the trial court abuse its discretion in awarding rehabilitative instead

of permanent alimony, that abuse of discretion must be reversed on appeal as it was herein. Counsel would submit that should this court accept the misapplication of a known rule of law test regarding permanent versus rehabilitative alimony as opposed to the application of the "reasonableness" test to determine whether the trial judge abused his discretion as employed by Judge Shivers in the instant case, an identical ruling would result. This court has clearly delineated those factors which must be considered when awarding permanent alimony:

> "Permanent, periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent, periodic alimony or the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course, and the value of the parties' estates." Canakaris, at page 1202.

The purpose of rehabilitative alimony is to restore the abilities of the recepient so that she will regain a useful and constructive role in society as well as be in a position reasonably to continue to maintain the lifestyle which the parties had enjoyed during the marriage, considering the length of the marriage and other appropriate criteria. Lee v. Lee, 309 So2d 26, 28 (Fla. 2nd DCA, 1975). Rehabilitative alimony assumes that the recepient is a

candidate to return to the job market successfully. Colucci v. Colucci, 392 So2d 577, 579 (Fla. 3rd DCA, 1980).

The Vandergriffs were married in 1951, thus the marriage endured for thirty-one years. Mrs. Vandergriff has not worked outside of the home for twenty-six years; during that time, she has functioned as a wife, homemaker and mother. Her teaching certificate lapsed long ago and while her vocational deficits are many her assets are limited. She can paint and hopes in the future to sell her works; the petitioner would have this court believe that Mrs. Vandergriff is Pablo Picasso or Leroy Neiman whereas the only testimony in the record indicates that the best painter at the local gallery where Mrs. Vandergriff does volunteer work, averages only $400.00 per month from the sale of his art work. Mrs. Vandergriff has medically substantiated physical problems, allergies, a bad back and high blood pressure; she is fifty-two years of age and cannot type nor operate a cash register. No employment expert provided testimony that she was employable or a candidate for rehabilitation. The petitioner ignores the fact that it has taken him thirty-four years with Southern Bell to work up to the position of associate manager earning in excess of $37,000.00 per year.

Without substantial help from her ex-husband, it is inconceivable that Mrs. Vandergriff will be able to even approach the standard of living provided by the husband during this long-term marriage. Under the circumstances of the

instant case, the learned trial judge abused his discretion or if the classification of alimony as rehabilitative versus permanent does present a question of law, the trial judge misapplied applicable legal principles and therefore the judgment was erroneous in that regard. Mrs. Vandergriff clearly has no present ability to support herself and no reasonable prospect that she will be able to do so at any time in the foreseeable future.

Regardless of the applicable legal test, a substantial body of case law has developed as to the circumstances requiring permanent alimony as opposed to an award of only rehabilitative alimony; even the Florida legislature has codified the factors which the court ought to consider in making an alimony award.[1]

In King v. King, 420 So2d 631 (Fla. 4th DCA, 1982), the court reversed the rehabilitative alimony award and awarded permanent alimony holding that the evidence showed that the wife's net income as a teacher was substantially insufficient to meet her reasonable day to day needs; there was a marked differential between their respective incomes;

[1] F.S., Section 61.08 (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 of both parties. (d) The financial resources of each party. (e) Where appplicable, 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 wife's lifestyle would be reduced to a near poverty level whereas the husband would continue to enjoy a normal lifestyle. And further, upon consideration of the age of the parties, the length of the marriage, the wife's limited earning ability and the fact that the wife would be placed on the charity of the world if she should become disabled, the trial court abused its discretion by failing to award permanent alimony.

Other cases similar in practically every respect to this case holding that permanent alimony is required are cited below.[2]

The petitioner suggests that "marital misconduct" on the part of the wife should have been considered by the trial judge as a basis for awarding rehabilitative in lieu of permanent alimony. The trial court in his order should have articulated that misconduct if considered, but in the instant

[2] Garrison v. Garrison, 351 So.2d 1105 (Fla. 4th DCA, 1977) and Garrison v. Garrison, 380 So2d 473 (Fla. 4th DCA, 1980) Mrs. Garrison was employed full time as a real estate broker but earned only a minimal income, the marriage was of thirty-years duration; she had stayed out of the market place at the behest of her husband, had enjoyed a high standard of living during the marriage which standard would be difficult for her to approach from her own efforts; she was not too old to work but was at an age that reasonable employment would be difficult to obtain. Mrs. Garrison ought to have been awarded permanent as opposed to rehabilitative alimony. The reservation of jurisdiction by the trial court upon the issue of alimony does not render the error any less harmful since Mrs. Garrison would have had the burden of exhibiting significantly changed circumstances before the alimony award could be modified. McAllister v. McAllister, 345 So2d 352 (Fla. 4th DCA, 1977). Judge Letts enumerated the factors upon which an alimony award should be predicated: (1) the financial ability of the husband (2) the needs of the wife (3) the standard of living enjoyed by the wife during the marriage (4) the length of the marrige (5) the number of children and the wife's role as mother and homemaker (6) the relative

health of the wife and husband (7) the contribution of the wife to the husband's successful career. The court then determined that Mrs. McAllister satisfied the foregoing criteria and reversed the rehabilitative award and made same permanent. Lash v. Lash, 307 So2d 241 (Fla. 4th DCA, 1975) This was marriage of twenty-six years duration; the parties' daughter was grown, the wife was forty-four years old and the husband was forty-seven; Mr. Lash was employed earning approximately $29,000.00 per year. His wife was unemployed. As the court indicated, it often happens that the wife has given up her career upon marriage in order to manage the home and raise children, whereas the husband has had the opportunity to develop a career, whereas the wife, at the time of the dissolution is less equipped for work than she was when she became married and her employment opportunities at an older age are less than if she were much younger. The award of rehabilitative alimony was reversed and permanent alimony substituted in its place. Colucci v. Colucci, 392 So2d 577 (Fla. 3rd DCA, 1980). This case presented the all too familiar scenario. The marriage had endured for twenty-four years, produced five children, the wife had worked only briefly as a cashier and waitress but did have a high school degree and some college credits and was only forty-two years of age; the husband had pursued his career and earned a good income. The wife had no present ability to support herself and no reasonable prospect that she would be able to do so in the future. The failure to award permanent alimony was harmful and not rendered any less so even though the wife could apply for modification in the future, because the burden would then be upon her to show significantly changed circumstances. Golden v. Golden, 395 So2d 1255 (Fla. 1st DCA, 1981). (A marriage of twenty-three years duration, wife had only a tenth grade education, poor physical condition and as per the husband's wish, had devoted her married life endeavors to home and children.); Schwartz v. Schwartz, 297 So2d 117 (Fla. 3rd DCA, 1974) (A 17 year marriage at the time of the dissolution, the wife was 36 years of age, her schooling was limited, she was ill-equipped by training or experience to support herself but if she later acquired such ability, a modification action was available to the husband); Smith v. Smith, 378 So2d 11 (Fla. 3rd DCA, 1979), cert. denied, 388 So2d 1118 (Fla. 1980) (A 17 year marriage, three minor children, a wife with the stated wish to continue rearing them, with no marketable skills, last employed 14 years earlier, and the husband with the ability to pay, rehabilitative alimony award was improper); McNaughton v. McNaughton, 332 So2d 673 (Fla. 3rd DCA, 1976), cert. denied, 345 So2d 424 (Fla. 1977) (A 43 year-old wife with no income or training and had not worked outside the home since shortly after the marriage, husband's income was $52,000/annum and the husband had maintained a good home and approved of the wife's role, the wife entitled to permanent alimony, not just rehabilitative alimony) and others too numerous to mention.

case, such was not done. Beville v. Beville, 415 So2d 151 (Fla. 4th DCA, 1982)

Regarding marital misconduct, this court held in Williamson v. Williamson, 367 So2d 1016, 1019 (Fla. 1979):

> "Today we hold that only 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 Section 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.

As this court stated in Williamson: "(F)or 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." The record contains not one scintilla of proof tending to show that any conduct by Mrs. Vandergriff contributed to a difficult economic situation; on the other hand, the record contains an abundance of evidence tending to establish Mrs. Vandergriff's contributions to the home, family and Mr. Vandergriff's career. The petitioner would ask this court to weigh every argument between the parties which has occurred over the last thirty-one years but ignore the substantial contributions made by both parties during this course of this marriage.

The petitioner cites McAllister v. McAllister, 345 So2d (Fla 4th DCA, 1977) in support of his marital misconduct

argument. Therein, the appellate court noted that this type of testimony involves a retrogression back to the fault concept and away from no-fault. The court then cited the type of misconduct which a trial court, in its discretion, might consider as set forth in Oliver v. Oliver, 285 So2d 638 (Fla. 4th DCA, 1973) - - Mrs. Oliver was drunk all of the time, repeatedly threatened to kill her husband and made no effort whatever to keep house; the marital misconduct standard established by Williamson, McAllister and other cases is inapplicable to the facts of the instant case.

CONCLUSION

> "According to a recent survey of more than 3,000 California divorces, it was discovered that men improved their standard of living an average of forty-two percent in the first year after the divorce while the living standard for women and children dropped seventy-three percent when income is compared to need." No. 241 A.F.T.L. Journal

The role of mother and homemaker is a risky occupation to say the least if the ruling of the trial court is allowed to stand. Mrs. Vandergriff has no present ability to support herself and no reasonable prospect that she will be able to do so in the future. She is entitled, as a matter of law, to live in a manner reasonably commensurate with the standard established by Mr. Vandergriff during the course of this thirty-one year marriage.

The judgment rendered by the trial court does not meet the reasonableness test as established by Canakaris and therefore was reversed by the District Court of Appeal, First District, since that judgment constituted an abuse of judicial discretion; not only should the alimony have been characterized as permanent but the award, according to all three members of the panel, reduced Mrs. Vandergriff to the level of proverty.

Should this Court determine that permanent versus rehabilitative alimony involves the application of a known rule of law, counsel would submit that since Mrs. Vandergriff has met the standards set forth in Canakaris and F.S., Section 61.08, the failure of the trial court to award permanent alimony constitutes error as a matter of law.

Wherefore, the respondent would respectfully request that this Court affirm the opinion rendered by the District Court of Appeal, First District in its entirety.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David H. Levin, Esquire, and Richard E. Scherling, of Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Seville Tower, 226 South Palafox, Pensacola, Florida, 32501, by delivery, this 4th day of May, 1984.

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