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FILED
SID J. WHITE
MAY 23 1984
CLERK, SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF FLORIDA
DCA Docket No. AQ-277

JACK C. VANDERGRIFF,

Petitioner,

v.

WALLYCE V. VANDERGRIFF,

Respondent.

Case No. 64,514

On Petition for Review from the First District Court of Appeal

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REPLY BRIEF OF PETITIONER

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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 EXCEEDED THE SCOPE OF APPELLATE REVIEW.

The wife's brief sets forth that the problem confronting this Court is whether the trial court failed to apply a correct rule of law, or whether it abused its judicial discretion. We submit that if the judgment of the trial court is supported by competent evidence, the test should be whether the trial judge abused its discretion. As this Court stated in Shaw v. Shaw, 334 So.2d 13,16 (Fla.1976),

> "The test,... is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' [footnote omitted]; it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court."

Is the trial court's judgment in the instance case supported by competent evidence? As in all Dissolution of Marriage proceedings, the Court heard disputed testimony and had to weigh the evidence to determine the disputed facts. For purposes of this appeal, it should be assumed that the facts favorable to the husband are correct.

The trial judge is bound by law to evaluate credibility of the witnesses before him, and to resolve disputed issues of fact. It is not the function of the appellate court to determine if a party to a Dissolution of Marriage proceeding has been short changed. As this Court stated in Conner v. Conner, 439 So.2d 887 (Fla.1983),

> "[The] determination that a party has been 'short changed' is an issue of fact, and not one of law, and in making that determination on the facts before it on the instance case, the District Court exceeded the scope of appellate review."

It is submitted that the First District Court of Appeal exceeded its authority of appellate review in re-evaluating the testimony of the witnesses and in essence determining their credibility and demeanor.

As this Court stated in Canakaris v. Canakaris, 382 So.2d 1197,1203 (Fla.1980),

> "If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

See also, Kuvin v. Kuvin, 442 So.2d 203,205 (Fla.1983), wherein upholding an award of rehabilitative alimony this Court stated that:

> "After careful review of the record, and mindful of the trial court's superior advantage point, we cannot say that no reasonable person would take the view adopted by the trial court."

In the case at bar, the trial court considered just those

factors which the Legislature has determined should be considered. Florida Statues 61.08(1) states in pertinent that, "in a proceeding for Dissolution of Marriage, the Court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature". Florida Statues 61.08(2) provides as follows:

> "In determining a proper award of alimony or maintenance, the Court shall consider all relevant economic factors, including but not limited to:
>
> a. A standard of living established during the marriage.
> b. The duration of the marriage.
> c. The age and the physical and the emotional condition of 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 equity and justice between the parties."

Based on the facts in the record, the trial court in this case applied the above factors, including each party's contribution to the marital relationship itself. If the Legislature had intended that all thirty-two year marriages result in permanent alimony, it would have said so. The Legislature and this Court have determined that such matters must be

discretionary and based upon a person's potential for rehabilitation, particularly where a wife has been far from a model wife as in this case, and where the trial court in this case reserved jurisdiction to review efforts of the wife at a point in time not too distant in the future.

If it is to be a matter of law that all unemployed housewives of a thirty-two year marriage, regardless of all other evidence, are to be awarded permanent alimony, it is requested that this Court so advise practitioners and judges in the State of Florida. At what point does the law apply? Thirty years? Twenty-five? Twenty? On the other hand, if this Court is to continue the rationale of Canakaris, Conner, and Kuvin, as well as the intent of the Legislature as set forth in the statute, this Court should reverse the decision of the First District Court of Appeal.

CONCLUSION:

This Court should continue expressing the intent of the Legislature, set forth in the above cases, that there cannot be a hard and fast rule for cases of this nature, and should reinstate the judgment of the Trial Court.

Respectfully submitted,

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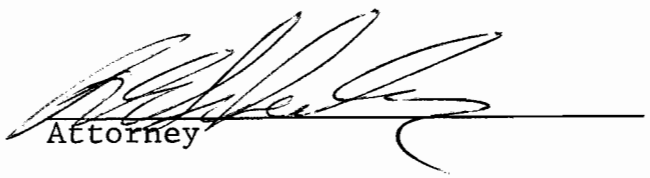
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished to John L. Myrick, Esquire, Kinsey, Myrick & Troxel, P.A., 438 East Government Street, Pensacola, Florida, by hand delivery, on this 22 day

of May, 1984.



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