

OA 11-14.84

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED

S'D J. WHITE

AUG 13 1984

CLERK, SUPREME COURT

By *MJ*
Chief Deputy Clerk

MARILYN WALTER,
Petitioner,

vs.

Case No. 64,641

DAVID L. WALTER,
Respondent.

_____ /

DISCRETIONARY PROCEEDINGS TO REVIEW A
DECISION OF THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA, FIFTH DISTRICT

RESPONDENT'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner Wife's Statement of the Case and Facts improperly contains argument. The Respondent Husband accepts the non-argumentative statements regarding the status of the case and the testimony presented at trial with the following corrections and additions.

The Petitioner Wife states that although the parties "... were legally husband and wife for only seven years, they lived together after the divorce almost continually..." [Petitioner's Merits Brief at p. 8] This statement is incorrect. At trial the Petitioner Wife testified that after the divorce in July of 1972, the parties lived together from October of 1972 until the Spring of 1973. [R. 23-24] There is no testimony that the parties lived together at any other time after the divorce. [R. 1-166]

The Petitioner Wife states regarding loans made by the Wife to the Husband that "[s]he was repaid under the Final Judgment less than half of the amounts, with interest, that David truly owed to her." [Petitioner's Merits Brief at p. 11] The trial court ruled that a portion of the loans were unenforceable due to the Wife's failure to demand payment within a reasonable time and due to the applicable statute of limitations. [R. 155-157] The Petitioner Wife did not appeal this ruling.

The Petitioner Wife asserts that she was fired from her job as the manager of Mr. Frogs' Fish 'n Chips Restaurant by the Husband. [Petitioner's Merits Brief at p. 11]. However,

the Husband testified that he did not fire the Wife and indeed that he had purchased this restaurant to provide the Wife with flexible employment. [R. 94] Even the Wife admitted that the Husband did not tell her she was fired. [R. 75]

The Petitioner Wife states as follows:

"Even David conceded, when questioned by his own counsel, that if Marilyn had gone back to the restaurant work with which she is familiar, her wages would be minimal."
[Petitioner's Merits Brief at p. 14 citing R. 100-101]

The Husband's testimony at pages 100-101 of the transcript does not support this statement. Rather, the Husband testified that in the past when the Wife worked at the restaurant as a waitress and cook, she was paid more than the normal wage. [R. 100-101]

The Petitioner Wife fails to discuss her age, health and full employment history. [Petitioner's Merits Brief at pp. 8-16] At the time of the hearing, the Wife was 41 years old [R. 132] and she was in good health. [R. 72; Respondent's Appendix A. 3] The Wife holds a degree from Brevard Community College. [R. 72; Respondent's Appendix A. 4] At the time of the divorce, the Wife was employed as a waitress at a restaurant, Dancing Waters. [R. 24] The Wife's history of employment since the divorce is as follows:

<u>Time</u>	<u>Employer</u>	<u>Position</u>	<u>Income</u>	<u>Record</u>
11/73- 5/74	Robinson's Dept. Store	Waitress	unknown	[R. 72; R.A.*5

<u>Time</u>	<u>Employer</u>	<u>Position</u>	<u>Income</u>	<u>Record</u>
1975	Christy's	Waitress	\$5320.00	[R. 330-331]
1976	Christy's Brevard's Surf	Waitress Waitress	\$5320.00 unknown	[R. 332-333] [R. 72; R.A. 2, 5-6]
1977	Christy's	Waitress	\$5000.00	[334-336]
1978	Christy's ITT North	Waitress Telex Operator	see below \$12,789.49	[R. 337-339] [R. 72, 349- 354; R.A. 6]
1979	Christy's ITT North	Waitress Telex Operator	see below \$19,828.66	[R. 72, 343-345; R.A. 2] [R. 72, 355-359, R.A. 6]
1980	Mr. Frogg's	Manager	\$13,562.44	[R. 343-345, 360-362]
1981	Mr. Frogg's	Manager	\$15,600.00	[R. 72, 346, 348; R.A. 2]

*R.A.- Respondent's Appendix

The Petitioner Wife states that the Husband's financial affidavit is incomplete and that the Husband agreed. [Petitioner's Merits Brief at p. 15] The Wife's statements are misleading. The real property discussed by the Wife is listed on the Husband's financial affidavit. [R. 55, Petitioner's Appendix A. 3] The 1981 Cadillac Seville is owned by Christy's Pizzeria, paid for by the company and driven by company employees including the husband. [R. 124-126] The 1981 Datsun truck was a recent acquisition inadvertently omitted from the asset and liability columns of the Husband's financial affidavit. [R. 124, Petitioner's Appendix A. 3] The thirty-four foot Carver boat is owned by the Christy Corporation and has proved to be a bad investment. [R. 107-108]

The Petitioner Wife discusses an increase in the deposits to the Husband's personal checking account from 1980 to 1981 and concludes without record citation that the Husband had the sum of \$5,481.54 available monthly. [Petitioner's Merits Brief at p. 16] The Husband explained at trial that the increase in deposits to his personal checking account resulted from reimbursements for business expenses. [R. 136-138] The Husband stated that his financial affidavit correctly reflected his income, i.e. \$548.00 net per week. [R. 136-138; Petitioner's Appendix A. 3]

The Husband testified at trial that the Wife's financial affidavit did not clearly reflect the following:

"Art collection - \$20,000
Lead glass cut crystal set - \$2,160 - \$2,800
Jewelry - more than shown"
[R. 112]

In addition, it should be noted that the oldest child of the parties, James Michael, born June 5, 1967, began living with his father approximately one year prior to the hearing on February 17, 1982. [R. 39, 40]

ISSUES INVOLVED

- I. WHETHER THE DISTRICT COURT OPINION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISIONS OF CONNER AND KUVIN.

- II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL APPLIED AN IMPROPER LEGAL TEST IN REVERSING THE TRIAL COURT'S AWARD OF PERMANENT ALIMONY.

ARGUMENT

I. THE DISTRICT COURT OPINION IN THIS CASE DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OF CONNER AND KUVIN.

A. The Trial Court Judge Erred as a Matter of Law in Awarding the Wife Permanent Alimony and the Fifth District Properly Reversed this Decision.

In Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980), this Court stated as follows:

"In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule, as when he refuses to terminate periodic alimony upon remarriage of the receiving spouse, the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law.

However, where the action of the trial judge is within his judicial discretion, as in the establishment of the amount of alimony or award of child custody, the matter of appellate review is altogether different."

The Canakaris review standards have not been altered by Conner v. Conner, 439 So. 2d 887 (Fla. 1983) and Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983). In essence, the Fifth District Court of Appeal held in the case at bar that the trial court erred in awarding permanent alimony to the Wife

in light of the undisputed facts of this record. The Fifth District stated in its opinion as follows:

"Permanent alimony was awarded to Appellee and that was error because the evidence clearly reveals that Appellee has earned a substantial income in the past and is not incapable of earning her own income now."
[Walter v. Walter, 442 So. 2d 257, 258 (Fla. 5th DCA 1983)]

The case at bar is unique in that it presents an alimony award which was entered almost ten years after the parties' divorce. [Petitioner's Appendix A. 1, A. 6] Thus, an actual picture was presented of the Wife's ability to support herself. This picture was undistorted by factual disputes. The clear and uncontradicted evidence clearly established that the wife had and could support herself. [See supra, p. 4]

During the ten years between the divorce and alimony award, the Wife and children were supported by the Wife's earnings, the Husband's provision of a home and the Husband's voluntary payments of \$200.00 per week. [Petitioner's Merits Brief at pp. 9-10, 12; see supra, p. 4] At the time of the alimony award, the Wife had been unemployed for about six weeks. [Petitioner's Merits Brief at p. 14] However, she was in good health, age 41, and her employment history clearly established her ability to earn. [See supra at p. 4]

Thus, the Fifth District properly held that the trial court's award of permanent alimony under these circumstances was erroneous as a matter of law because the undisputed factual evidence revealed a ten year history of the Wife's ability to earn her own living.

The trial court ordered the Husband to continue to provide the residence to the Wife rent-free; ordered the Husband to pay child support for the two children living with the Wife of \$350.00 per month per child; ordered the Husband to secure the child support with life insurance; ordered the Husband to provide hospitalization and medical insurance for the children. [Petitioner's Appendix A. 6]; and, in addition the court ordered the Husband to pay the Wife permanent alimony of \$350.00 per month. [Petitioner's Appendix A. 6]

The Wife contends that the trial judge's award of alimony and child support is only \$190.00 more or 22.5 percent in excess of the support standard which the Husband established for the family in 1974, when the Wife first moved to Brevard County. [Petitioner's Merits Brief at p. 20] This analysis is totally incorrect. It is important to note that the Husband's voluntary payments of \$200.00 per week were made when all three of the parties' children lived with the Wife. The oldest child of the parties, James Michael, born June 5, 1967, began living with his father approximately one year prior to the hearing of February 17, 1982. [R. 39, 40] Thus, without considering the award of alimony, the trial court's award of child support increased the support standard from \$287.00 per child to \$350.00 per child.

To award a healthy 41 year old Wife permanent alimony ten years after divorce is erroneous as a matter of law when the undisputed facts present a ten year history of employment sufficient to provide for the Wife's needs.

B. Assuming Arguendo that the Trial Court's Award of Permanent Rather than Rehabilitative Alimony Should be Reviewed as a Discretionary Decision, the Fifth District Properly Reversed this Decision.

Even assuming arguendo that the trial court's award of permanent alimony is a discretionary decision, it is still subject to review. As this Court stated in Canakaris, supra:

"The discretionary power that is exercised by a trial judge is not, however, without limitation... 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."
[382 So. 2d at p. 1203]

The undisputed factual picture presented in this case reveals a woman who supported herself and children for ten years after divorce through her employment and child support assistance from the Husband. An award of permanent alimony in this case was unreasonable and appropriately reversed by the Fifth District Court of Appeal.

II. THE FIFTH DISTRICT COURT OF APPEAL
DID NOT APPLY AN IMPROPER LEGAL
TEST IN REVERSING THE TRIAL COURT'S
AWARD OF PERMANENT ALIMONY.

The Petitioner Wife interprets the decision of the Fifth District Court of Appeal in the case at bar as limiting the factors to be considered in determining whether permanent alimony should be awarded to the sole factor of the financial capacity and ability of the requesting spouse. She then argues that this decision conflicts with Canakaris, supra, and other decisions which require consideration of the totality of all circumstances.

The Petitioner is incorrect in this analysis. The proper considerations for an award of permanent alimony were set forth in Canakaris as follows:

"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 are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to be 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."
[382 So. 2d at pp. 1201-1202]

In essence, a spouse requesting permanent alimony must first establish a need for the funds, based upon earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course, and the value

of the spouses' estate. If the requesting spouse has no need, the inquiry is ended.

Judge Dauksch, writing for the Fifth District Court of Appeal in the case at bar, expressly states as follows:

"Here the parties are the same age (he was 42, she 41 at the hearing) both in good health and both have the experience and ability to earn a living...

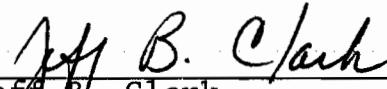
The children are split between the parties and both parties apparently contribute in raising all the children. Neither party has substantial net worth and both have a spotted history of employment--sometimes working and sometimes not. Under all the circumstances it is apparent rehabilitative alimony should be awarded..."
[442 So. 2d at p. 259]

The Fifth District Court of Appeal clearly considered the totality of circumstances in concluding that the award of permanent alimony was erroneous. The Petitioner Wife has failed to present the existence of a conflict between decisions and the Respondent is entitled to the dismissal of this action or the affirmance of the Fifth District's decision.

CONCLUSION

For the reasons stated herein, Respondent, David L. Walter, respectfully requests this Honorable Court to dismiss this action for lack of the requisite conflict between decisions; or alternatively, to affirm the decision of the Fifth District Court of Appeal.

RESPECTFULLY SUBMITTED this 9th day of August, 1984.

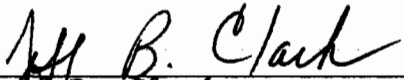


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of August, 1984 to: MICHAEL R. WALSH, Esquire, 326 North Fern Creek Avenue, Orlando, Florida 32803.



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