IN THE SUPREME COURT
OF FLORIDA

CASE NO. 64,641

MARILYN WALTER,

Petitioner,

v.

DAVID L. WALTER,

Respondent.

CONFLICT CERTIORARI FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

MICHAEL R. WALSH
326 North Fern Creek Avenue
Orlando, Florida 32803
305/896-9431
Attorney for Petitioner

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PRELIMINARY STATEMENT

Petitioner, MARILYN WALTER, was the Appellee in the District Court. Respondent was the Appellant.

This appeal seeks to invoke the discretionary jurisdiction of this Court because the opinion of the District Court of Appeal for the Fifth District in this case expressly and directly conflicts with decisions of other district courts of appeal or of this Court on the same question of law, i.e. an initial award to the wife of permanent rather than rehabilitative alimony.

References in this brief to an appendix will be designated by the letter (A) and if necessary, followed by appropriate page citation.

STATEMENT OF THE CASE AND FACTS

Petitioner and Respondent were married to each other on September 18, 1965. A Final Judgment of Dissolution of Marriage was entered on July 19, 1972 (A-1).

At the time of the Final Judgment, Respondent had been terminated from his employment and the court made the finding that he was unable to pay child support or alimony.

In the Final Judgment, the wife was awarded custody of the three minor children (then 6, 2 and 1) but soon after, the parties began living together and continued to do so until a short time before the modification proceeding was filed by the Petitioner in July, 1981 (A-2 23, 25-26, 38-39, 41-42 and 81-82).

After moving to Brevard County, Respondent told Petitioner that he preferred her not to work but instead to stay home with the children. Beginning in 1974, he paid to her $200.00 per week to take care of herself and the children (A-2 30-36).

In August, 1975, the Petitioner went to work for her former husband because he needed help and instead of receiving a $200.00 per week personal check from him, she received $200.00 per week salary from his business known as Christy's Pizzeria (A-2, 33-34).

Petitioner returned to work for her former husband in June, 1977. She begged Respondent to give her some type of a written agreement setting definite support, but his answer according to her was "no way was he going to be legally obligated to pay me a dime" (A-2, 36-37).

Respondent himself set Petitioner's salary at $300.00 per week (A-2, 36). At the time of the initiation of this modification suit she was the manager of one of his restaurants (A-2, 44-45).

For five years prior to the filing of the modification action, Petitioner and the children had resided in Respondent's home at 2926 Barkway Drive, Cocoa, Florida, and he had paid the monthly mortgage payment, utility bill, pest control bill, taxes and insurance, and maintenance and upkeep (A-2, 28 and 39-41). Although Respondent paid no support, he claimed all three children as income tax dependents (A-2, 39-40 and 121).

In the summer and fall of 1981 a dispute broke out between the parties concerning Petitioner's request to take a vacation with the minor children to the State of Ohio for the purpose of visiting her father who was then dying with cancer. Respondent refused to permit her to go because he claimed that company policy violated such a trip (A-2, 40-48). Petitioner made sure that all of her work was done and left with the minor children for such a trip during Christmas vacation of 1981. When she returned after the New Year, Respondent fired her and kept her back pay-checks (A-2, 48).

Petitioner testified at trial that her net take home pay in working for her former husband was $950.00 per month during 1981. She further testified that she was unemployed and had been out of work for a month and a half. She stated that she was looking for a clerical or secretarial position but knew that she could not earn $1,300.00 per month as she had been earning in her former husband's business. She stated rather that she would probably earn only a gross amount of approximately $800.00 per month.

Respondent owns all of the stock of Christy's Pizzeria, Inc., and Christy's Corporation. He also does business as Action Management and Supply Company. He also owns 60% of the stock in Christy's Pizzeria of Rockledge, Inc. (A-4). As the sole stockholder of the two (2) Christy's Corporations, Respondent draws no compensation but does have sizable loan accounts ($40,612.95) and these corporations have bought for him two (2) cars and an $80,000.00 boat (A-3 and A-4). Further, in 1981, the gross sales of Christy's Pizzeria, Inc., increased from $324,537.00 over the previous year. The increase was also $411,936.00 over the sales in 1979 (A-4).

At the conclusion of the non-jury trial, the trial judge read into the record citations of authority to support his rulings and rendered judgment for the Petitioner (A-2, 155-165).

Petitioner was awarded sole and exclusive occupancy and possession of the Respondent's residence at Barkway Drive until the youngest child, CHRISTOPHER, attained majority, died, married or until Petitioner's remarriage. During the period of such occupancy and possession, as an incident to child support, Respondent was required to pay all of the mortgage payments, taxes and insurance, and repair and maintenance expenses in excess of $200.00.

The Final Order granting modification awarded to Petitioner $350.00 per month as permanent periodic alimony and $350.00 per month per child as child support for the two minor children: PATRICK WALTER and CHRISTOPHER WALTER. The oldest child, JAMES WALTER, had been living with the Respondent for more than a year (A-2, 102).

After the Final Order was rendered an Order was entered an Order was entered on Respondent's Motion for Rehearing (A-7).

In an opinion filed on November 10, 1983, the Fifth District in a two to one (2 to 1) decision affirmed all provisions of the Final Order of Modification with the exception of the award of permanent periodic alimony (A-8). As to the award of permanent periodic alimony, the District Court reversed and substituted instead an award of rehabilitative alimony for Petitioner if upon remand the trial court found that it was warranted under the facts and circumstances then existing. This appeal follows.

ARGUMENT

POINT ONE: THE DISTRICT COURT'S DECISION ASSERTING THAT PERMANENT ALIMONY IS AWARDABLE ONLY WHERE THE EVIDENCE ESTABLISHES THAT THE WIFE HAS NO ACTUAL OR POTENTIAL CAPACITY FOR SELF-SUPPORT OR THAT THE RECORD IS DEVOID OF ANY EVIDENCE OF REHABILITATION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND OF THIS COURT ON THE SAME QUESTION OF LAW.

Not only by the decision in this case, but in earlier cases this District has adopted an exclusive standard for an award of periodic alimony, i.e. the financial capacity and ability of the requesting spouse, as the sole factor which is determinative of the nature, kind and duration of periodic alimony initially awarded to a wife by a trial judge, G'Sell v. G'Sell, 390 So. 2d 1196 (Fla. 5th D.C.A., 1980), Hair v. Hair, 402 So. 2d 120 (Fla. 5th D.C.A. 1981), review den. 412 So. 2d 465 (Fla. 1982), Campbell v. Campbell, 432 So. 2d 666 (Fla. 5th D.C.A., 1983) and Thornton v. Thornton, 433 So. 2d 682 (Fla. 5th D.C.A., 1983). These cases

further create conflict with the cases of Burke v. Burke, 401 So. 2d 921 (Fla. 5th D.C.A., 1981) and Hinebaugh v. Hinebaugh, 403 So. 2d 451 (Fla. 5th D.C.A., 1981) and this intra-district conflict is readily apparent since they cannot be distinguished merely because young children were involved or the husband was a professional man.

By holding that there is just one measuring stick with which to judge an award of permanent versus rehabilitative alimony the Fifth District has expressly removed from consideration the remaining criteria approved by this Court in its landmark case of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla., 1980), at 1201 and 1202:

> "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."

Also Kuvin v. Kuvin, _____ So. 2d _____, 8 F.L.W. 483 (Fla. December 8, 1983) at 484.

Not only does this decision erode the mandates of Canakaris but it also impliedly repeals the legislatively approved criteria of F.S. 61.08.

The District Court opinion expressly excludes "permanent alimony" as a reward for being a "good and virtuous wife" but also opts for rehabilititative alimony as a decided preference to permanent alimony in all dissolution of marriage cases; as such, not only are the roles of the husband the wife switched in modification proceedings, F.S. 61.14, but their respective burdens of proof as well.

A showing of complete and permanent dependence by a wife on her husband is but a factor to be considered and is not an essential element which must be proved before there can be an award of permanent alimony. Indeed, if permanent alimony is to be awarded, it should be awarded initially and the yoke of rehabilitative alimony not placed upon the wife so that she must later prove a substantial and material change in circumstances: Garrison v. Garrison, 351 So. 2d 1104 (Fla. 4th D.C.A., 1977) and Garrison v. Garrison, 380 So. 2d 473 (Fla. 4th D.C.A., 1980). Even if as the majority suggests Mrs. Walter could earn $10,000.00 to $15,000.00 per year, it would still be proper for the trial judge based upon her age, station in life, age of the minor children and years of living with her former husband to have an award of permanent periodic alimony sustained, Greer v. Greer, 438 So. 2d 535 (Fla. 2d D.C.A., 1983); such was the point that the trial judge made at the conclusion of the evidence in making an initial award of permanent alimony to her but leaving the "door open" for the husband at a later date, Hurtado v. Hurtado, 407 So. 2d 627 (Fla. 4th D.C.A., 1981. Also the word "permanent" is not synonymous with "forever," Ruhnau v. Ruhnau, 299 So. 2d 61 (Fla. 1st D.C.A., 1977).

As suggested by the same district in O'Neal v. O'Neal, 410 So. 2d 1369 (Fla. 5th D.C.A., 1982):

> "A person is not self-supporting simply because he or she has a job and income. The standard of living must be compared with the standard established during the course of the marriage .... A court must base an award of alimony to a wife upon the ability of her husband to pay that award and her financial need in light of the standard of living she enjoyed during the marriage."

The rationale of O'Neal has been undercut by the district court in

rendering this decision. What this decision fails to take into account is the "totality of all circumstances" as well-documented in McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th D.C.A., 1977). By applying this "Totality test" other districts have awarded permanent alimony based upon multiple and not singular standards, Colucci v. Colucci, 392 So. 2d 577 (Fla. 3d D.C.A., 1980), DeCenzo v. DeCenzo, 433 So. 2d 1316 (Fla. 3d D.C.A., 1983), Nicolay v. Nicolay, 387 So. 2d 500 (Fla. 2d D.C.A.,1980) and St. Laurent v. St. Laurent, 417 So. 2d 824 (Fla. 2d D.C.A., 1982).

Of further import is the fact that the record in this case does not indicate any evidentiary basis to conclude that the wife would benefit from an award of rehabilitative alimony. An award of rehabilitative alimony is premised on evidence that the receiving spouse has the capacity to develop or acquire in a short or measurable period of time the ability to become self-supporting, Reback v. Reback, 296 So. 2d 541 (Fla. 2d D.C.A., 1974), cert. den. 312 So. 2d 737 (Fla. 1975) (A-2, 159-160).

All of the foregoing was clearly evident to the dissent as Judge Sharp emphatically argued for affirmance in this case.

The Walter opinion cannot be passed off as "non-conflict" and distinguished by differentiating between Fifth District alimony awards in long and short term marriages since a permanent alimony award was reversed in Thornton, which was a long term marriage, and also a rehabilitative award in the short term marriage of Campbell. Further, the facts in this decision cannot be distinguished from the facts in other district court decisions cited under this point of law and thus a credible argument made that any "conflict in precedent is distinguished by the facts in each case." For example, Judge Dauksch's statement that

"Neither party has substantial net worth" finds no support in the Record when one compares the financial affidavits of Mr. and Mrs. Walter. (A-3 and A-5).

Each party is approaching middle age and is pretty well settled into their chosen occupation or vocation. The facts in this case suggest that the Respondent for the past ten years has set the Wife's employment status and more or less created for her and the children their standard of living. The Respondent also set the Wife's salary and position and caused her plight of unemployment at the time of trial by firing her. As suggested in Hurtado, the husband was the one responsible for the wife's "economic hardship", Williamson v. Williamson, 367 So. 2d 1016 (Fla, 1979).

In summary, the reported facts in Walter and the facts "of record" do not justify the conclusions reached by the district court. Stated another way, reapplication of the incorrect rule of law cited by the district court in this case to substantially similar facts as the ones in this case can only lead to a further conflict in the district courts of appeal.

POINT TWO: THE DISTRICT COURT OF APPEAL HAS WRONGFULLY SUBSTITUTED ITS OPINION FOR THAT OF THE TRIAL COURT.

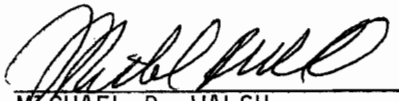
This Court has condemned such conduct, Conner v. Conner, _____ So. 2d _____, 8 F.L.W. 405 (Fla., October 12, 1983) and Kuvin, supra.

If nothing else, this Court should preserve the "Canakaris-type discretion" exercised by the able trial judge in this case and do so by accepting jurisdiction and after being briefed on the merits, reverse the Fifth District decision and reinstate permanent alimony to the Petitioner, MARILYN WALTER, Shaw v. Shaw, 334 So. 2d 13 (Fla., 1976).

CONCLUSION

By enunciating a rule of law which adopts a single criteria to determine whether permanent or rehabilitative alimony should be awarded regardless of the length of the marriage or the presence of other factors clearly acknowledged by our courts and legislature to help govern the discretion of the trial court in making such awards the Fifth District has broken with established stare decisis and has expressly ignored the dictates of Canakaris. The District Court has chosen to re-try the proceeding in the lower court and re-evaluate the discretionary findings and determinations made by the able trial judge. The November 10, 1983 decision creates immediate conflict with other district courts of appeal and this court and if allowed to stand, will create a further conflict.

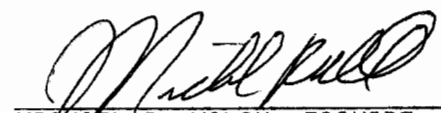
Respectfully submitted,



MICHAEL R. WALSH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was served upon Respondent's counsel, JEFF B. CLARK, ESQUIRE, 126 East Jefferson Street, Orlando, Florida 32801, by hand delivery this 21st day of December, 1983.



MICHAEL R. WALSH, ESQUIRE
326 North Fern Creek Avenue
Orlando, Florida 32803
(305) 896-9431
Attorney for Petitioner